BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PETER SETO and HENRY KANE,	)	
	)	
Petitioners,	)	
	)	LUBA No. 91-045
vs.	)	
	)	FINAL OPINION
TRI-COUNTY METROPOLITAN	)	AND RECOMMENDATION
TRANSPORTATION DISTRICT OF	)	TO THE SUPREME COURT
OREGON, a municipal corporation,	)	
	)	
Respondent.	)	

Appeal from Tri-County Metropolitan Transportation District.

Henry Kane, Beaverton, filed the petition for review and argued on behalf of petitioners.

Mark J. Greenfield, Edward J. Sullivan and Christopher P. Thomas, Portland, filed the response brief, and Mark J. Greenfield argued on behalf of respondent. With them on the brief was Preston Thorgrimson Shidler Gates & Ellis.

HOLSTUN, Referee; Kellington, Chief Referee; Sherton, Referee, participated in the decision.

RECOMMENDATION TO AFFIRM 05/21/91

This final opinion and recommendation is subject to judicial review pursuant to Oregon Laws 1991, chapter 3, section 9.

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a final order of the Tri-County Metropolitan Transportation District (Tri-Met) Board concerning a light rail route and alignment, related facilities and highway improvements between downtown Portland and Southwest 185th Avenue in Hillsboro (hereafter the Project). Tri-Met's final order selects:

> "(1) The light rail route for the * * * Project * * *, including but not limited to the identification of the appropriate alignment in certain areas;
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> "(2) The location of associated light rail facilities for the Project, including but not limited to light rail station and park and ride lot locations; and
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> "(3) The highway improvements associated with the Project." Record Item 34 page 1.[1]

INTRODUCTION

Oregon Laws 1991, chapter 3 (SB 573)(the 1991 Act) was adopted to consolidate land use decisions related to the Project and expedite appellate review of Tri-Met's land use

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[1]The record submitted in this proceeding consists of 5 boxes of documents and a number of oversized maps. Record Item 34 includes the decision challenged in this proceeding as well as findings of fact and conclusions of law adopted in support of the challenged decision.

decision concerning the Project.[2] Oregon Laws 1991, chapter 3, section 1(1) provides as follows:

> "The Legislative Assembly finds that a failure to obtain maximum federal funding at a 75 percent level for the * * * Project will seriously impair the viability of the transportation system planned for the Portland metropolitan area, the ability of the area to implement a significant portion of its air-quality and energy efficiency strategies and the ability of Multnomah and Washington Counties and the Cities of Beaverton, Hillsboro and Portland to implement significant parts of their comprehensive plans. The Legislative Assembly further finds that in order to obtain maximum federal funding for the Westside Corridor Project at a 75 percent funding level, it is necessary:
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> "(a) To consolidate the land use decisions regarding the light rail route, the location of associated light rail facilities and the highway improvements to be included in the Westside Corridor Project into a single land use decision;
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> "(b) To expedite the process for any appellate review of the single land use decision; and
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> "(c) To establish an exclusive process for appellate review of the single land use decision."

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[2]The total estimated cost of the Project is $900 million. In order to secure federal funding for 75 percent of the Project, Tri-Met must sign a full funding agreement with the Federal Urban Mass Transportation Administration by September 30, 1991. After September 30, 1991, changes in federal law may reduce federal funding availability for the Project from 75 percent to 50 percent or less.

We first briefly discuss the significant requirements of the 1991 Act governing Tri-Met's final order and LUBA's review of that final order, before turning to the questions presented in this appeal.

Section three of the 1991 Act provides that the procedures and requirements provided for in the 1991 Act are "the only land use procedures and requirements" governing Tri-Met's final order on the "light rail route," "associated light rail facilities" and "highway improvements."[3]

Section four requires the Land Conservation and Development Commission (LCDC) to "establish criteria to be used by [Tri-Met] in making decisions in a final order on light rail alignments, station and lot locations and highway improvements." Section four also establishes procedures for LCDC to follow in adopting such criteria. Section five establishes an exclusive expedited appellate review

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[3]As discussed later in this opinion, Tri-Met Board actions on the Project are required to comply both with the requirements of the 1991 Act and the requirements of the National Environmental Policy Act of 1969 (NEPA). The challenged decision was adopted to comply with the 1991 Act only. Separate decisions yet to be adopted will be necessary to comply with NEPA requirements, and the 1991 Act recognizes that compliance with NEPA requirements may necessitate additional modifications to the Project in the future. Record Item 34, Exhibit A, pp. 1-2.

procedure for review of LCDC's criteria by the Oregon Supreme Court.[4]

Section six requires that Tri-Met apply the LCDC criteria "in making decisions in a final order on light rail alignments, station and lot locations and highway improvements." Section six also specifies procedures for Tri-Met to follow in adopting its final order.

Section seven provides that all affected municipal corporations must issue appropriate permits for the Project. Such permits may be subject to reasonable conditions of approval. However, any such conditions of approval may not, "by themselves or cumulatively, prevent the implementation of [Tri-Met's] final order." Section seven further requires that all affected municipal corporations must "[a]mend their * * * plans * * * and land use regulations to the extent necessary to make them consistent with [Tri-Met's] final order" and that such amendments "shall not be reviewable by any court or agency."

Section eight establishes an expedited procedure for review of Tri-Met's final order by LUBA.[5] LUBA's final

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[4]On March 8, 1991, LCDC adopted nine criteria together with an explanation of how the criteria reflect relevant Statewide Planning Goals and comprehensive plan policies. LCDC's decision adopting the criteria was not appealed.

opinion is required to be issued within 15 days following oral argument and is to be in the form of a recommendation to the Oregon Supreme Court. LUBA's scope of review is as follows:

> "(a) [LUBA] shall recommend remand of the final order only if it finds that the district:
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> "(A) Improperly construed the [LCDC] criteria;
>
> "(B) Exceeded its statutory or constitutional authority; or
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> "(C) Made a decision in the final order on the light rail alignments, on station or lot locations or on highway improvements that was not supported by substantial evidence in the whole record. The existence in the whole record of substantial evidence supporting a different decision on the light rail alignments, on station or lot locations or on highway improvements shall not be a ground for remand if there also was substantial evidence in the whole record supporting the final order.
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> "(b) Failure to comply with statutory procedures, including notice requirements, shall not be grounds for invalidating a final order.

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[5]Measured from the date of Tri-Met's' final order, the notice of intent to appeal must be filed with LUBA within seven days, the record must be filed within eight days, the petition for review is due within ten days, the response brief is due within 17 days and oral argument must be held within 24 days.

> "[LUBA] shall recommend affirmance of all portions of the final order for which it does not recommend remand." Or Laws 1991, ch 3, § 8(12).

For the reasons set forth below, LUBA recommends that Tri-Met's final order be affirmed by the Supreme Court.

STANDING

The 1991 Act establishes the requirements a person must satisfy to petition LUBA for review of Tri-Met's final order. Or Laws 1991, ch 3, § 8(3). Respondent contends petitioner Kane does not satisfy the requirement of Oregon Laws 1991, chapter 3, section 8(3)(c) that a person must be "affected by residing or owning property within sight or sound of the project, or * * * adversely affected economically in excess of $10,000 in value."[6]

An affidavit regarding petitioner Kane's standing is attached to the notice of intent to appeal.[7] According to petitioner Kane's affidavit, his law office is located approximately seven blocks from the proposed light rail

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[6]Respondent does not challenge petitioner Seto's standing. Neither does respondent contend that petitioner Kane failed to appear below or deliver his notice of intent to appeal as required by Oregon Laws 1991, chapter 3, section 8(3)(a) and (b).

[7]Oregon Laws 1991, chapter 3, section 8(5)(a) requires that a notice of intent to appeal must "[c]ontain an affidavit stating the facts which support the petitioner's standing * * *."

alignment in the City of Beaverton. The City of Beaverton presently experiences problems with traffic congestion. Petitioner Kane alleges that the failure of Tri-Met's final order to provide for grade-separated intersections where the adopted light rail alignment crosses several busy streets in the City of Beaverton will cause severe traffic congestion during peak traffic hours. Petitioner Kane alleges this congestion will be particularly severe during construction, and his clients will have great difficulty reaching his law office. Petitioner alleges his law practice will suffer lost income in excess of $10,000 if the light rail line is constructed as proposed.[8]

Petitioner Kane also alleges his residence is located near the intersection of S.W. Lombard and S.W. Denny Road in Beaverton. Petitioner contends S.W. Denny Road is a busy street; and, as a result of the traffic congestion that will be caused by the at-grade light rail street intersections,

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[8]In support of this allegation, petitioner cites two examples of businesses which he contends were severely economically injured by construction of major transportation facilities and ultimately went out of business. One of the businesses was located next to the existing light rail line in Portland, and one was located next to the freeway at Jantzen Beach. Petitioner also cites his experience as an attorney in proving economic damages in support of his contentions concerning expected economic damages to his law practice.

it will become even busier because traffic will seek shortcuts to avoid congestion. Petitioner Kane alleges his neighborhood will be significantly impacted by such additional traffic and, based on his own knowledge of property values and condemnation law, his house will be reduced in value in excess of $10,000. Petitioner further alleges he could produce an expert economist to show his residence would be damaged in excess of $10,000.

Respondent's brief in this appeal was filed on April 29, 1991, one week after the petition for review was filed and ten days after the above described affidavit was filed with the notice of intent to appeal. In its brief, and in a separate Motion to Dismiss and Strike also filed on April 29, 1991, respondent argues petitioner Kane's affidavit fails to demonstrate his law practice will suffer injury in excess of $10,000. Respondent does not dispute that the City of Beaverton currently experiences traffic congestion, the at-grade intersections may cause traffic to back up or traffic congestion may be exacerbated during construction.[9] However, respondent contends petitioner Kane's allegation

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[9]Respondent does dispute the magnitude of the traffic congestion impacts and cites to portions of the record which show, with one possible exception, that Level of Service D (LOS D), an acceptable level of service, is expected to be maintained at each of the at-grade intersections identified by petitioner Kane.

that his law practice will suffer injury in excess of $10,000 is purely speculation and without factual support in the affidavit or the record of these proceedings.[10]

We agree with respondent that petitioner Kane's allegation that his law practice will suffer in excess of $10,000 in damages is somewhat speculative and is not clearly related to the agreed upon facts or the evidence in the record concerning expected traffic congestion.[11] Further, petitioner Kane's affidavit is not corroborated by an affidavit of an economist or other qualified expert. However, the allegations in petitioner Kane's affidavit are the only testimony specifically estimating the likely economic injury to his law practice.[12] Although the question is close, in the absence of an opposing affidavit,

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[10]Respondent points out the failed businesses petitioner Kane mentions in his affidavit were adjacent to light rail and freeway facilities, unlike petitioner Kane's law office, which is seven blocks away.

[11]We note the 1991 Act specifies no particular time frame for measuring damages, and the parties do not argue any particular time frame was intended.

[12]Although respondent disputes the injury in excess of $10,000 estimated by petitioner Kane, respondent neither identifies expert testimony to the contrary in the record nor attaches an affidavit refuting petitioner Kane's allegations.

we believe petitioner Kane's allegations concerning expected economic impacts of the Project on his own law practice are adequate to demonstrate compliance with the standing requirement of Oregon Laws 1991, chapter 3, section 8(3). See Searcy v. Bend Garage Company, 286 Or 11, 17, 592 P2d 558 (1979); Osborn v. Hay, 284 Or 133, 144, 585 P2d 674 (1978); Lewis v. Worldwide Imports, Inc., 238 Or 580, 584, 395 P2d 922 (1964).

For the reasons explained above, we believe petitioner Kane satisfies the requirements of Oregon Laws 1991, chapter 3, section 8(3) to have standing to file a petition for review in this matter.[13]

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[13]In view of our conclusion that petitioner Kane has standing in this matter based on his allegations concerning expected economic injury to his law practice, we do not consider the parties' similar disputes concerning the adequacy of the allegations concerning impacts on petitioner Kane's residence. We note, however, respondent did not challenge petitioner Kane's allegations concerning economic injury to his residence in its response brief or motion to dismiss and strike filed April 29, 1991. On May 2, 1991, four days before oral argument in this appeal, respondent filed a Supplemental Memorandum in Support of Motion to Dismiss in which, for the first time, respondent challenged petitioner Kane's allegations concerning economic injury to his residence. In an ordinary appeal, this Board would likely overlook respondent's delay in raising an issue concerning petitioner's allegations of standing and would consider those

FIRST ASSIGNMENT OF ERROR

> "SB 573 is unconstitutional because it deprives the cities of Portland, Beaverton and Hillsboro, and Multnomah and Washington Counties of their 'Home Rule' rights under the Oregon Constitution to decide matters of 'local concern' -- land use decisions pertaining to the Westside Corridor Project."

A. Respondent's Objections Concerning the First Assignment of Error and Motion to Strike Portions of Petitioners' Reply Brief

Petitioners include in their argument following the first assignment of error, but do not state in the assignment of error itself, allegations that the 1991 Act violates rights to equal protection of the laws and equal privileges and immunities guaranteed under the United States and Oregon Constitutions. US Const, 14th Amend; Or Const, Art I, § 20.

Respondent argues petitioners' equal protection and equal privileges and immunities allegations are unrelated to petitioners' claim in the first assignment of error that the 1991 Act violates state constitutional home rule provisions. Respondent contends, because the equal protection and equal

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issues if necessary. See Hilliard v. Lane County, 51 Or App 587, 595, 626 P2d 905 (1981); Kellogg Lake Friends v. City of Milwaukie, 16 Or LUBA 1093, 1095 (1988). However, as explained earlier in this opinion, this appeal is not a typical LUBA appeal, and we are uncertain such latitude would be warranted or justifiable under the expedited review procedures set forth in the 1991 Act.

privileges and immunities claims were not set forth under separate assignments of error as required by Oregon Rules of Appellate Procedure (ORAP) 5.45(4) and Oregon Laws 1991, chapter 3, section 8(9), those claims should not be considered by LUBA.[14] Respondent also moves to strike portions of petitioners' reply brief in which petitioners offer additional argument in support of their first assignment of error which, respondent argues, goes far beyond responding to any new issues raised in the respondent's brief.

We believe it is appropriate to consider all of petitioners' constitutional claims. To the extent petitioners committed a technical error by not stating their constitutional claims in separate assignments of error, neither our review nor respondent's ability to respond to those arguments has been prejudiced. See Clausen v. Carstens, 83 Or App 112, 114 n 3, 730 P2d 604 (1986); SAIF v. Webber, 66 Or App 463, 466 n 1, 674 P2d 74, rev den 296 Or 638 (1984); Golden 'B' Products v. Clark Equip., 60 Or App 39, 42 n 1, 652 P2d 832 (1982).

Petitioners' additional argument in the reply brief in support of their first assignment of error generally

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[14]Oregon Laws 1991, chapter 3, section 8(9) requires that the petition for review and brief must "comply with the specifications for opening briefs set forth in the rules of appellate procedure."

elaborates upon arguments fairly presented in the petition for review. Respondent received a copy of the reply brief four days before oral argument and, therefore, had an opportunity to respond to the reply brief at oral argument. In view of the very short period of time allowed under the 1991 Act for petitioner to prepare and file the petition for review, we believe it is appropriate that LUBA consider the arguments advanced by petitioners in the reply brief in support of the first assignment of error.

B. Petitioners' Home Rule Arguments

The Cities of Portland, Beaverton and Hillsboro and Washington and Multnomah Counties have exercised their home rule powers under the Oregon Constitution, and each has adopted a charter. Or Const Art XI, § 2 (cities); Or Const Art VI, § 10 (counties). From the arguments presented in the petition for review and the reply brief, we understand petitioners to contend that by effectively removing certain land use decision making concerning the Project from these three cities and two counties, and giving that decision making authority to Tri-Met, the affected cities' and counties' constitutionally protected right to home rule is violated and the 1991 Act is therefore unconstitutional.[15]

Petitioners simply state that, by virtue of the 1991 Act, the affected cities and counties no longer have the

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[15]Tri-Met is a special district created pursuant to ORS chapter 267.

same degree of planning authority over the Project that other cities and counties would enjoy, were similar transportation facilities proposed elsewhere in the state. Citing ORS 197.005, petitioners contend the act improperly preempts "matters of local concern under the Oregon Constitution."[16] Petition for Review 21. Petitioners also suggest in their reply brief that such preemption of local planning prerogatives would be constitutionally permissible under home rule guarantees, provided it were done on a statewide basis.

Oregon's land use planning and regulatory system has repeatedly been upheld against home rule challenges. 1000 Friends of Oregon v. Washington County, 80 Or App 34, 36, 720 P2d 1316 (1986); City of Pendleton v. Kerns, 56 Or App 812, 826, 643 P2d 658 (1982); Tillamook County v. LCDC, 56 Or App 459, 461, 642 P2d 691, rev den 293 Or 373 (1982). As

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[16]ORS 197.005 is a statement of legislative findings regarding the need for a statewide planning program and provides in relevant part:

"* * * * *

"(3) Except as otherwise provided in subsection (4) of this section, cities and counties should remain as the agencies to consider, promote and manage the local aspects of land conservation and development for the best interest of the people within their jurisdictions.

"(4) The promotion of coordinated statewide land conservation and development requires the creation of a state-wide planning agency to prescribe planning goals and objectives to be applied by state agencies, cities, counties and special districts throughout the state."

respondent correctly notes, land use planning in this state is the product of a comprehensive statutory enabling scheme. Comprehensive planning statutes both authorize and require local governments to adopt and implement comprehensive plans and land use regulations. Local government exercise of land use planning powers is heavily regulated by the state.[17] In a number of instances, the legislature has specifically limited local government land use regulatory authority over certain matters.[18]

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[17]For example, ORS 197.175 requires cities and counties to adopt comprehensive plans and land use regulations. Those plans and land use regulations must comply with the statewide planning goals and other administrative rules adopted by the Land Conservation and Development Commission. ORS 197.835. ORS 227.160 to 227.185 and 215.402 to 215.431 authorize cities and counties to adopt procedures for conduct of certain land use proceedings, and ORS 197.763 imposes detailed statutory requirements concerning the conduct of quasi-judicial land use proceedings. ORS 215.203 to 215.337 establish a number of specific requirements that counties must apply in their exclusive farm use zones.

[18]See, e.g., ORS 527.722 (Forest Practices Act); ORS 469.400(5) (energy facility siting); Or Laws 1985, ch 679, § 5(3)(b) (solid waste disposal facility siting); ORS ch 196 (Columbia River Gorge Commission); Or Laws 1989, ch 789; Or Laws 1987, ch 321 (corrections facilities); Or Laws 1987,

Prior to the Oregon Supreme Court's decision in LaGrande/Astoria v. PERB, 281 Or 137, 576 P2d 1204 (1978), the balancing test applied to determine whether state legislation improperly impinged upon powers reserved to cities under constitutional home rule provisions was "whether the state's interest or that of the city [was] paramount." State ex rel Heinig v. Milwaukie et al, 231 Or 473, 481, 373 P2d 680 (1962). The Oregon Supreme Court recently explained:

> "This balancing test remained in effect until the most recent reinterpretation of Oregon home rule in LaGrande/Astoria v. PERB, * * * where this court held:
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> > "'When a statute is addressed to a concern of the state with the structure and procedures of local agencies, the statute impinges on the powers reserved by the amendments to the citizens of local communities. Such a state concern must be justified by a need to safeguard the interests of persons or entities affected by the procedures of local governments.
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> > "'Conversely, a general law addressed primarily to substantive social, economic, or other regulatory objectives of the state prevails over contrary policies preferred by some local governments if it is clearly intended to do so, unless the law is shown to be irreconcilable with the local community's freedom to choose its own

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ch 356 (superconducting super collider); ORS 197.405 (areas of critical concern).

> political form. In that case, such a state law must yield in those particulars necessary to preserve that freedom of local organization.'
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> "Id. at 156. (Footnote omitted.) Thus, the form and structure of local governments is protected from most state interference, but the state may with greater freedom interfere with local municipalities' substantive laws." Mid-County Future Alternatives v. City of Portland, 310 Or 152, 160-161 ___ P2d ___ (1990) cert den ___ US ___ (December 3, 1990).

The 1991 Act was adopted to facilitate decision making to assure funding for a mass transportation system which would be a significant addition to and part of the regional transportation system for the Portland metropolitan area. That regional transportation system serves a large number of cities and counties and a significant percentage of the state's population. Indeed, the state's general interest in metropolitan mass transit systems is demonstrated by the enabling legislation for mass transit districts.[19] ORS 267.010 to 267.390. We believe the 1991 Act is a "general law addressed primarily to substantive social, economic, or

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[19]The Project is a "mass transit system" as that term is defined at ORS 267.010(3). Included among Tri-Met's powers under ORS chapter 267 is authority to "[c]ontract with the United States or with any county, city, state, or public body * * * for the construction, acquisition, purchase, lease, preservation, improvement, operation or maintenance of any mass transit system." ORS 267.200(3).

other regulatory objectives of the state" as that concept was used by the Oregon Supreme Court in LaGrande/Astoria v. PERB, although it may directly and immediately impact only three cities and two counties.[20]

Petitioners have not shown the 1991 Act is irreconcilable with an affected local government's "freedom to choose its own political form." LaGrande/Astoria v. PERB, supra, 281 Or at 156. Although the 1991 Act denies the affected local governments certain decision making authority they would otherwise be free to exercise over the Project, we fail to see how the 1991 Act's reallocation of that decision making authority to Tri-Met amounts to an infringement of the affected cities' and counties' freedom to choose their political form. See City of Roseburg v. Roseburg City Firefighters, 292 Or 266, 274-281, 639 P2d 90 (1981).

For a number of reasons we disagree with petitioners' suggestion that ORS 197.005 establishes that the city and county decision making powers preempted by the 1991 Act are "matters of local concern under the Oregon Constitution;" we briefly discuss two of them. First, ORS 197.005 is a legislative finding expressed in statute; it does not and

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[20]Petitioners do not specifically contend the 1991 Act violates the constitutional prohibition against special or local laws. Or Const Art IV, § 23.

could not establish a constitutional allocation of land use decision making power to cities and counties. Second, ORS 197.005 clearly does not express a statutory division of land use decision making between the legislature and local governments or between different local governments. It is simply a legislative finding that cities and counties should retain the ability to adopt rules, regulations and decisions concerning local aspects of land conservation and development and LCDC should take certain actions to address statewide interests.

Nothing in the home rule constitutional provisions cited by petitioners prohibits the legislature from adopting substantive legislation in an area where local governments are also permitted to legislate.[21] City of Roseburg v.

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[21]After describing the futility of defining predominant state or local interest by the "subject matter" of legislation, the Oregon Supreme Court in LaGrande/Astoria v. PERB, 281 Or at 154-155, explained:

> "The geographic boundaries of local entities are not much more determinative in excluding state concerns. * * * [C]ity police officers and firemen are sometimes assigned duties beyond their cities, but this is hardly needed to demonstrate a state concern. Large complexes of state buildings and state personnel such as college campuses, and indeed the state Capitol, executive offices, and this court, depend on the quality of police and fire protection within city limits, and thousands of persons who frequent city streets and business districts every day are not city residents. The state relies on local governments for many functions deemed important to the state within local boundaries, most recently land use controls. The modern addition of home rule for counties would create additional complexities in employing a geographic criterion for allocating mutually exclusive constitutional authority."

Roseburg City Firefighters, supra, 292 Or at 274. We conclude the legislature's decision to reallocate responsibility for planning and land use regulatory standards and procedures for the Project in the manner provided by the 1991 Act does not violate constitutional home rule provisions.

C. Equal Protection/Equal Privileges and Immunities

Petitioners allege that the denial of land use decision making authority to the citizens of three cities and two counties violates the right of citizens in those cities and counties to equal protection and equal privileges and immunities under the Fourteenth Amendment to the United States Constitution and Article I, section 20, of the Oregon Constitution.

Petitioners' equal protection and equal privileges and immunities arguments are without merit. To establish such constitutional violations it is not sufficient to identify some class of persons who are accorded different treatment under the law. Laws may, and often do, affect different groups or classes of persons differently. Different treatment under the law does not necessarily amount to a violation of equal protection or equal privileges and immunities under the law. Wagner v. Marion County, 15 Or LUBA 260, 272 (1987). Petitioners have not explained why the different treatment accorded the citizens of three cities and two counties under the 1991 Act amounts to a

violation of their constitutional rights to equal protection and equal privileges and immunities. We fail to see how the 1991 Act violates federal and state constitutional guarantees to equal protection of the laws and equal privileges and immunities.

LUBA recommends that the first assignment of error be denied.

SECOND ASSIGNMENT OF ERROR

> "Tri-Met has exceeded its statutory authority and therefore the final order is void because Tri-Met through its Board of Directors did not first hold a public hearing on the Supplemental Draft Environmental Impact Statement."

Under this assignment of error petitioners contend Tri-Met failed to comply with certain federal requirements for public hearings on the Supplemental Draft Environmental Impact Statement [SDEIS]. Petitioners rely on recitals included in the 1991 Act to support their argument that Tri-Met's alleged failure to follow federal requirements for public hearings on the SDEIS require that the challenged decision be remanded.[22]

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[22]The language petitioners rely upon is as follows:

> "Whereas aside from determinations to be made under federal law, the land use related issues remaining to be resolved in order to obtain a full funding agreement are a choice among above ground and tunnel rail alignments through the Sunset Canyon in the City of Portland and extending into unincorporated Multnomah and Washington Counties, a choice among rail alignments in the City of Beaverton and extending into unincorporated Washington County, the location of light

Even if the errors petitioners identify did occur, petitioners cite nothing in the 1991 Act which would cause such a failure to have any bearing on the final order challenged in this decision. The final order challenged in this appeal is governed exclusively by state law, as set forth in the 1991 Act. Or Laws 1991, ch 3, § 3(1). The recitals petitioners rely upon do not make compliance with federal SDEIS public hearing requirements an applicable requirement for the final order challenged in this proceeding. As the 1991 Act makes clear, a clear division is intended between the decisions required under NEPA and the land use decision adopted by the final order challenged in this proceeding under state law. Whatever effect the failures petitioners allege may have on the validity of

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rail transit stations and park-and-ride lots and the highway improvements to be included in the project. Under federal law, these matters cannot be decided until after the Urban Mass Transportation Administration [UMTA] has released the [SDEIS] and a public hearing on the [SDEIS] has been held. Upon release by [UMTA], the [SDEIS] must be circulated for 45 days, during which [Tri-Met] will hold the public hearing on the document and receive written comments. Following the hearing and public comment period, [Tri-Met] must adopt for federal purposes a Preferred Alternative Report, determining whether or not to build the project and, if to build, determining the light rail route, the location of associated light rail facilities and the highway improvements to be included in the project * * *[.]"

decisions required under federal law, they have no effect on the validity of the final order challenged in this appeal.[23]

LUBA recommends that the second assignment of error be denied.

THIRD ASSIGNMENT OF ERROR

> "The final order must be remanded because Tri-Met did not give petitioners and others adequate opportunity to present their views on complex and unresolved legal and factual issues."

Under this assignment of error, petitioners contend Tri-Met's final order must be remanded because Tri-Met improperly limited persons wishing to present oral testimony during the April 12, 1991 public hearing in this matter to three minutes of oral testimony. In addition to certain federal law requirements, petitioners contend Tri-Met's refusal to allow more than three minutes of oral testimony violates LCDC Criteria Nos. 1 and 2. See n 4, supra.

For the reasons already explained under the second assignment of error, the federal requirements cited by petitioners are inapplicable. Neither does LCDC Criterion No. 1 have any bearing on petitioners' arguments under this assignment of error. LCDC Criterion No. 2 provides as follows:

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[23]Respondent also contends that all federal requirements concerning public hearings on the SDEIS were met. Because those requirements are inapplicable to the challenged decision, we do not reach the issue.

> "Hold at least one public hearing to provide an opportunity for the public to submit testimony on the light rail alignments, light rail station, and park-and-ride lot locations and the highway improvements."

Under Oregon Laws 1991, chapter 3, section 6(8), Tri-Met is required to "allow for the submission of oral and written testimony at the hearing, subject to such hearings procedures as the [Tri-Met Board] may deem necessary in order to reach an expedited decision." Under this provision of the 1991 Act, Tri-Met was clearly authorized to impose time limits on oral testimony. Petitioners make no claim that the limits imposed on oral argument were unnecessary "to reach an expedited decision."

Respondent also points out that interested persons were allowed to submit written testimony prior to and during the April 12, 1991 public hearing.[24] In fact, petitioners submitted lengthy written testimony. Record Item 30, Test. Nos. 56, 135. In addition, oral testimony was allowed at earlier Citizen Advisory Committee meetings, at the SDEIS hearing and during open houses held in connection with the

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[24]Petitioners complain in their reply brief that the record does not show their written testimony was actually read by the Tri-Met Board. We are not aware of any legal requirement that the record demonstrate local government decision makers read all the written testimony submitted to them.

SDEIS. Transcripts of those proceedings are included in the record of this proceeding and apparently were available to the Tri-Met Board. We fail to see how the procedure followed by Tri-Met violated LCDC Criterion No. 2.

LUBA recommends that the third assignment of error be denied.

FOURTH ASSIGNMENT OF ERROR

> "The Final Order must be remanded because Tri-Met did not apply Criterion No. 3 with respect to the severe adverse economic and other effects of not providing grade separations for Westside light rail in Beaverton and westerly to S.W. 185th."

Petitioners contend Tri-Met failed to properly apply LCDC Criterion No. 3, which provides as follows:

> "Identify adverse economic, social and traffic impacts on affected residential, commercial, and industrial neighborhoods, and consider mitigation measures to reduce those impacts which could be imposed as conditions of approval during the [NEPA] process or by affected local governments during the permitting process.
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> "A. Provide for highway improvements that facilitate efficient traffic flow, balancing the need to improve the highway system with the need to protect affected residential, commercial, and industrial neighborhoods and, in the City of Portland, the need to protect the scenic qualities of the Sunset Canyon.
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> "B. Provide for a light rail alignment, light rail stations, and park-and-ride lot, balancing the need to protect affected residential, commercial, and industrial neighborhoods with the need for proximity and connections to present or planned residential, employment and recreational

> areas that are capable of enhancing transit ridership. Park-and-ride lots shall not be located within the central business district of the City of Beaverton or within the boundaries established by the Downtown Parking and Circulation Policy of the City of Portland."

Many of petitioners' arguments under the fourth assignment of error and the remaining assignments of error appear to be based on a misunderstanding of what LCDC Criterion No. 3 requires of Tri-Met. We briefly discuss the legal standard imposed on Tri-Met by LCDC Criterion No. 3 before turning to the parties' arguments.

A. Legal Standard Imposed by LCDC Criterion No. 3

Subparagraph A of the criterion specifies considerations Tri-Met is to balance in providing for highway improvements. Subparagraph B specifies considerations Tri-Met is to balance in providing for "a light rail alignment, light rail stations, and park-and-ride lots," and prohibits park-and-ride lots in two locations. The first sentence of the criterion simply requires that Tri-Met identify specified types of adverse impacts and consider mitigation measures which could be imposed later in the NEPA or local permitting process. Therefore, although adverse effects must be identified in Tri-Met's decision, there is no requirement that such adverse effects be avoided, eliminated or even reduced to any specific degree. Tri-Met is only required to consider mitigation measures to

reduce impacts.[25] Those mitigation measures need not be imposed as part of the challenged final order. They need only be mitigation measures that could be imposed "during the [NEPA] process or by affected local governments during the permitting process." LCDC Criterion No. 3.

B. Failure to Provide Grade-Separated Intersections

Petitioners contend the challenged final order violates LCDC Criterion No. 3 because it fails to identify adverse impacts that will result from Tri-Met's decision not to provide grade-separated intersections where light rail crosses major north-south arterials in the City of Beaverton.[26] In addition, citing Oregon Natural Resources Council v. Marsh, 832 F2d 1489 (9th Cir 1985), petitioners contend Tri-Met failed to provide a detailed analysis of mitigation measures and improperly deferred adoption of mitigation measures.

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[25]Although LCDC provided no definition of the term, we assume a mitigation measure is something that will reduce identified adverse effects or make them less adverse in some way.

[26]Petitioners cite to petitioner Kane's testimony below, where he identified a number of streets in Beaverton that are now congested. Petitioner Kane argued failure to provide grade-separated intersections will make the existing unacceptable situation even worse.

Taking petitioners' last point first, respondent correctly points out Oregon Natural Resources Council v. Marsh concerned federal NEPA requirements. As noted previously, those requirements apply to preparation of the Final Environmental Impact Statement and are not applicable to the final order challenged in this appeal. Tri-Met's findings that mitigation measures will be further evaluated and adopted in the Final Environmental Impact Statement and local permitting processes are proper. Provided Tri-Met considered such mitigation measures as part of its decision in this matter, LCDC Criterion No. 3 specifically provides that such measures may be imposed at these later stages.

In support of its decision, Tri-Met adopted by reference a technical memorandum which addresses local traffic impacts. Record Item 34, Exhibit A, p. 21. That technical memorandum explains as follows:

> "The quality of traffic operations on roadway facilities is described in terms of level of service, a measure of operational conditions and their perception by motorists. Level-of-service (LOS) ratings range from 'A' to 'F'; LOS A represents the best operation and LOS F the poorest operation. Within the Portland metropolitan region, the peak-hour level-of-service goal is '...the maximum service volume at level-of-service D. Deficiencies are deemed to exist at level-of-service E (exceeding the D-E boundary).' The policy does make allowances for accepting a lower level of service on a facility if policy, impact, or cost constraints dictate.
>
> "Attainment of the regional level-of-service goal would result in moderate peak-hour congestion levels without significant breakdowns in flow on

> any roadway facilities. For the purposes of this document, facilities which do not meet the regional goal of LOS D operation within the PM peak hour are considered to have impacts." (Emphasis in original.) Record Item 4(b - #20 M) p. III-2. (Hereafter cited as Technical Memorandum #20 M.)

Tri-Met also adopted the following findings:

> "Neighborhood traffic impacts that result in [LOS] E or F are regarded as adverse impacts. * * * Where LOS E or F conditions will result from LRT improvements, mitigation options are identified." Record Item 34, Exhibit A, pp. 87, 113. (Hereafter cited as Findings.)

We understand respondent to argue that the above findings establish LOS A through LOS D as acceptable and not causing adverse impacts within the meaning of LCDC Criterion No. 3. On the other hand, the findings explain LOS E or worse does cause adverse impacts, requiring identification and consideration of mitigation measures under LCDC Criterion No. 3. Petitioners do not challenge these findings or their evidentiary support in either the petition for review or the reply brief. Neither do petitioners challenge the findings adopted by Tri-Met addressing the at-grade intersections petitioner Kane alleges Tri-Met failed to adequately consider under LCDC Criterion No. 3. We discuss those findings briefly below.

1. S.W. Lombard and S.W. Hall Boulevard

Tri-Met's findings explain that the expected LOS from the at-grade crossings of S.W. Lombard and S.W. Hall Boulevards is LOS A. In addition, the findings explain

those streets would experience LOS D where they cross Canyon Road. Respondent contends these findings explain why Tri-Met found there will be no adverse impacts resulting from these at-grade crossings.

2. S.W Cedar Hills Boulevard

Respondent cites findings which explain that the at-grade crossing with S.W. Ceder Hills Boulevard will experience LOS A unless a proposed East-West Arterial is constructed, in which case the at-grade crossing with S.W. Cedar Hills Boulevard could experience LOS F. The findings identify and discuss two options for mitigating traffic congestion at S.W. Cedar Hills Boulevard crossing.

3. S.W. Murray Boulevard

Although petitioners contend the selected alignment approves an at-grade crossing with S.W. Murray, the selected alignment will cross under S.W. Murray Boulevard. Technical Memorandum #20 M, p. V-83. In addition, Tri-Met found the impacts of the S.W Murray Boulevard Station and Park-and-Ride station would not result in a LOS constituting adverse impacts. Technical Memorandum #20 M, p. V-86.

4. S.W. 158th and S.W. 170th Avenues

The Project alignment west of S.W. Murray Boulevard was established by a prior decision and, therefore, is not reviewable in this appeal. Or Laws 1991, ch 3, § 3(2). In addition, respondent identifies findings that the LOS at both crossings would not result in adverse impacts.

C. Conclusion

Tri-Met adopted findings which explain the method it used to identify adverse impacts of the proposed at-grade crossings. Tri-Met also adopted findings explaining why, applying that method, the at-grade crossings in Beaverton will result in a LOS that does not cause adverse impacts. For the one intersection where adverse impacts may occur, Tri-Met identifies and discusses mitigation options. In view of petitioners' failure to specifically challenge any of these findings, we believe they are adequate to demonstrate compliance with LCDC Criterion No. 3. City of Salem v. Families for Responsible Govt, 64 Or App 238, 241-242, 668 P2d 395 (1983).

LUBA recommends that the fourth assignment of error be denied.

FIFTH ASSIGNMENT OF ERROR

> "The final order must be remanded because Tri-Met did not adopt measures to mitigate the severe adverse effects of light rail trains on manufacturing processes of Tektronix, Inc."

As explained earlier in this opinion, Tri-Met is not obligated under LCDC Criterion No. 3 to adopt mitigation measures as part of the final order challenged in this appeal. To the extent the argument under the fifth assignment of error goes further and alleges Tri-Met failed to identify adverse impacts and consider mitigation measures, respondent cites findings which both identify

adverse impacts and identify possible mitigation measures. Respondent's Brief 38. Petitioners do not challenge either the adequacy of or evidentiary support for the findings addressing possible adverse effects on Tektronix and discussing possible mitigation measures.

LUBA recommends that the fifth assignment of error be denied.

SIXTH ASSIGNMENT OF ERROR

> "The Final Order must be remanded because Tri-Met did not adopt measures to mitigate the severe adverse geological conditions affecting the proposed long tunnel and tunnel portals."

LCDC Criterion No. 5 provides as follows:

> "Identify landslide areas, areas of severe erosion potential, areas subject to earthquake damage, and lands within the 100-year floodplain. Demonstrate that adverse impacts to persons or property can be reduced or mitigated through design or construction techniques which could be imposed as conditions of approval during the NEPA process or by local governments during the permitting process."

Like LCDC Criterion No. 3, LCDC Criterion No. 5 does not require that Tri-Met adopt mitigation measures as part of the challenged final order. To the extent petitioners' challenge can be read to allege Tri-Met failed to identify adverse impacts that may be associated with the types of hazards identified in the criterion, petitioners offer no argument in support of that position and state, erroneously, that no mitigation options were identified by Tri-Met.

The findings adopted by Tri-Met appear to address the concerns that are required to be addressed under LCDC Criterion No. 5. Findings 64-69. Potential adverse impacts are identified. The findings discuss possible design solutions to mitigate those impacts or avoid them. Petitioners' undeveloped claim that Tri-Met's decision is inadequate to demonstrate compliance with LCDC Criterion No. 5 provides no basis for remand. See City of Salem v. Families for Responsible Govt, supra.

LUBA recommends that the sixth assignment of error be denied.

SEVENTH ASSIGNMENT OF ERROR

> "The Final Order must be remanded because Tri-Met did not adopt measures to mitigate damage to the environment caused by Westside Corridor light rail and highway construction along Highway 26 (Sunset Highway) and Highway 217."

As noted above, Tri-Met's failure to adopt mitigation measures as part of its final order provides no basis for remand. In their argument under this assignment of error, petitioners contend Tri-Met's decision violates LCDC Criterion No. 3 because it fails to adequately address environmental and traffic impacts that will be associated with construction of the light rail and highway improvements along Highway 26 and Highway 217.

Respondent cites findings which identify and discuss adverse impacts of the Project along Highways 26 and 217. Respondent's Brief 40. The findings also identify and

discuss possible mitigation measures. Petitioners offer no argument explaining why the findings identified by respondent fail to identify and consider possible mitigation measure, as LCDC Criterion No. 3 requires.

LUBA recommends that the seventh assignment of error be denied.

EIGHTH ASSIGNMENT OF ERROR

> "The Final Order must be remanded because Tri-Met did not comply with LCDC criteria with respect to the Westside Corridor Project as the project adversely affects Brookdale, the Golf Creek Apartments complex, the Pointer Property, Cornell Farms, S.W. 76th and adjacent neighborhoods along the Highway 26 segment between Sylvan and the Highway 26-Highway 217 junction."

In the petition for review, following the above quoted assignment of error, petitioners set forth narrative designated as "Argument."[27] Petition for Review 35-41.

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[27]Under Oregon Laws 1991, chapter 3, section 8(10), petitions for review are required to comply with the specifications for opening briefs set forth in the Oregon Rules of Appellate Procedure. ORAP 5.45 provides in pertinent part:

> "(1) Assignments of error are required in all opening briefs of appellants * * *.
>
> "* * * * *
>
> "(4) Each assignment of error shall be clearly and concisely stated under a separate and appropriate heading, [and] must be specific * * *.
>
> "* * * * *

However, pages 35 through 38 of the petition for review simply set forth, verbatim, portions of pages one through seven of the notice of intent to appeal.[28] The quoted portions of the notice of intent to appeal raise many issues and are more accurately characterized as "assignments of error" than as "argument." As required by Oregon Laws 1991, chapter 3, section 8(10), petitioners next cite portions of the record which petitioners contend demonstrate these issues were raised during the April 12, 1991 public hearing. Petition for Review 39. Finally, the petition for review provides two pages of argument. Petition for Review 40-41.

Respondent argues we should decline to review the eighth assignment of error because it does not comply with ORAP 5.45 and Oregon Laws 1991, chapter 3, section 8(10). However, respondent also provides a detailed response to the issues identified on pages 35-38 in the petition for review. We do not believe it is appropriate to refuse to review petitioners' allegations on pages 35 through 38. We

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> "(6) A separate argument shall follow each assignment of error except that if several assignments of error present essentially the same legal question, the argument in support of them shall be combined so far as practicable.
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> "* * * * *."

[28]Oregon Laws 1991, chapter 3, section 8(5)(b) requires that a notice of intent to appeal "[s]tate with particularity the grounds upon which the petitioner assigns error."

therefore briefly discuss the issues petitioners raise before considering the arguments petitioners develop under this assignment of error on pages 40 through 41 of the petition for review.

The issues petitioners identify on pages 35 through 38 of the petition for review can be placed into one or more of five general categories. First petitioners argue that certain inapplicable approval standards are violated.[29] Second, petitioners reassert their argument that Tri-Met failed to adopt mitigation measures.[30] Third, petitioners argue that certain commercial establishments and residences will be adversely affected and Tri-Met failed to identify or consider adverse impacts, engage in the balancing required by the LCDC Criteria or discuss mitigation measures.[31] Fourth, petitioners cite a number of aspects of the Project which they believe will have adverse impacts, but do not

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[29]For example, petitioners contend that the "1983 Community Plan for Cedar Hills" is violated. Petition for Review 35.

[30]We explain under the fourth assignment of error that Tri-Met is not required by the LCDC Criteria to adopt mitigation measures.

[31]In each case, in response, respondent cites findings considering adverse effects, balancing various considerations and discussing mitigation measures and notes the identified findings are not specifically challenged by petitioners.

explain why such adverse impacts justify remand of the final order.[32] Fifth, petitioners argue there were various problems with the local proceedings but do not explain why those problems provide a basis for remand.[33] We conclude the issues identified by petitioners on pages 35 through 38 of the petition for review provide no basis for remand.

Petitioners present additional arguments on pages 40 through 41 of the petition for review. First, petitioners contend Tri-Met staff improperly submitted a supplemental staff report shortly before the April 12, 1991 meeting. Record Item 34, pp. 1-12.

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[32]For example, petitioners contend construction of a transit station near the entrance to the Golf Creek Apartments is not consistent with providing emergency services to the area that will lose its present access to Highway 26. As we have explained above, the LCDC Criteria specifically envision that there may be adverse impacts from the Project. Consequently, the existence of adverse impacts, in and of itself, provides no basis for remand.

[33]For example, petitioners contend maps showing the selected option were not consistent throughout the proceedings, causing confusion and misleading local decision makers. Petitioners also argue there was no opportunity to question certain government officials about notes taken at certain meetings. Petition for Review 37-38.

Respondent points out Oregon Laws 1991, chapter 3, section 6(2) specifically allows such amendments to the staff report up to the time of the public hearing. Respondent also argues the staff report revisions were not substantial and petitioner had an opportunity to present written testimony at the hearing, after the amended staff report was made available. There was no error.

Petitioners next argue Record Item 34 Exhibit C was not available before the April 12, 1991 public hearing in this matter.

Respondent explains that Record Item 34 Exhibit C is an amendment to the proposed findings, and was adopted as part of the findings by Tri-Met to justify its decision. The amended findings were adopted to respond to evidence submitted at the April 12, 1991 hearing and were not required by Oregon Laws 1991, chapter 3, section 6(6) to be prepared before the public hearing. We agree with respondent.

Finally, on page 40 of the petition for review, petitioners explain their central dispute under this assignment of error is that termination of the present access to Highway 26 at S.W. 76th Avenue will have a variety of adverse impacts on nearby residential and commercial properties by virtue of the loss of access to Highway 26 and the need to purchase additional property to provide alternative access. However, the LCDC Criteria cited by

petitioners do not prohibit adverse impacts. Neither do those criteria require that Tri-Met design the Project in a way that will avoid the adverse impacts to which petitioners object. Although the LCDC Criteria require that Tri-Met identify adverse impacts and consider mitigation measures, they do not require that Tri-Met resolve adverse impacts in the same way petitioners would or to petitioners' satisfaction. Petitioners disagreement with the way in which Tri-Met suggests in its findings it will mitigate adverse impacts provides no basis for remand.

LUBA recommends that the eighth assignment of error be denied.

MOTIONS

A number of motions remain pending before the Board in this matter. Our rulings on those motions are as follows.

A. Respondent's May 6, 1991 Motion to Strike

Respondent moves to strike portions of page 15 of petitioners' reply brief.

The motion is denied.[34]

B. Petitioners' May 6, 1991 Official Notice Request

Petitioners request that LUBA take official notice of certain pleadings in Intermark Golf Course v. State of

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[34]We denied the remainder of respondent's May 6, 1991 motion to strike in our discussion of the first assignment of error.

Oregon, a circuit court proceeding now pending in the Washington County Circuit Court. ORS 40.090.

With exceptions not applicable to the offered documents, LUBA's review is limited to the record below. We conclude the offered documents are not appropriate documents for official notice by LUBA.

The motion is denied.[35]

C. Petitioners' May 9, 1991 Motion to Respond to New Authority

Petitioners submitted and move for permission to file a written response to authorities cited by respondent at oral argument.

The motion is allowed.

D. Petitioners' May 10, 1991 Motion Requesting Official Notice

Petitioners request that the Board take official notice of "Northwest Hills Natural Areas Protection Plan."

The motion is allowed.[36]

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[35]Even if we were to take official notice of the documents, they would not affect our recommendation to the Supreme Court in this matter.

[36]LUBA may take official notice of local law. However, as explained in the body of this opinion, we conclude that the applicable law is as set forth in the 1991 Act. Therefore, although we take official notice of the Northwest Hills Natural Areas Protection Plan as requested, that document can provide no basis for reversal or remand of the challenged decision.

RECOMMENDATION

LUBA recommends that the Supreme Court affirm Tri-Met's final order.