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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

TRI-COUNTY METROPOLITAN)
TRANSPORTATION DISTRICT,)
)
Petitioner,)
)
vs.)
)
CITY OF BEAVERTON,)
)
Respondent,)
)
and)
)
HENRY KANE,)
)
Intervenor-Respondent.)

LUBA Nos. 94-002 and 94-003

FINAL OPINION
AND ORDER

Appeal from City of Beaverton.

Gregory S. Hathaway, Portland, filed the petition for review and reply brief. With him on the briefs was Davis Wright Tremaine. Gregory S. Hathaway and Mark J. Greenfield argued on behalf of petitioner.

Pamela J. Beery, Portland, and Ted W. Baird, Assistant City Attorney, Beaverton, filed a response brief. With them on the brief was O'Donnell, Ramis, Crew & Corrigan. Pamela J. Beery argued on behalf of respondent.

Henry Kane, Beaverton, filed a response brief and argued on his own behalf.

SHERTON, Referee; KELLINGTON, Chief Referee; HOLSTUN, Referee, participated in the decision.

AFFIRMED (LUBA No. 94-002) 09/21/94
REMANDED (LUBA No. 94-003)

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISIONS**

3 Petitioner Tri-County Metropolitan Transportation
4 District (Tri-Met) appeals two city council orders granting
5 design review approval, with conditions, for two segments of
6 Tri-Met's Westside Corridor Project (Project).

7 **MOTION TO INTERVENE**

8 Henry Kane moves to intervene on the side of respondent
9 in this appeal proceeding. There is no objection to the
10 motion, and it is allowed.

11 **MOTIONS TO SUBMIT EXHIBITS**

12 On July 11, 1994, intervenor-respondent (intervenor)
13 filed a motion to submit as exhibits several site
14 development permits for the project, issued by the city on
15 May 3, 1994, and two documents entitled "Site Development
16 Permit Conditions of Approval," dated April 28 and May 2,
17 1994, signed by city and Tri-Met staff members. On
18 August 30, 1994, intervenor filed a motion to submit as
19 exhibits two pages from Tri-Met's July, 1994 Project Report,
20 and a letter from Tri-Met's Project Director, dated
21 August 15, 1994.

22 Tri-Met objects to these motions, on the grounds that
23 the proposed exhibits are not part of the local record.

24 LUBA's review is limited to the local record.
25 ORS 197.830(13)(a). We note that all of the offered
26 exhibits postdate the challenged decisions and are not

1 included in the local record. Intervenor provides no other
2 basis on which LUBA might consider these documents, and we
3 are aware of none.

4 The motions to submit exhibits are denied.

5 **MOTIONS TO SUBMIT SUPPLEMENTAL CITATIONS**

6 On July 11, 1994, intervenor filed a motion to submit
7 supplemental citations in support of his brief. Oral
8 argument in this appeal was held on July 13, 1994. On
9 July 14, 1994, intervenor filed a motion to submit
10 supplemental citations in support of his oral argument. The
11 items in question include citations to, and quotes from,
12 appellate court opinions, statutes and other legal
13 authority.

14 Tri-Met objects to both motions on the ground that
15 LUBA's rules do not provide for submitting such supplemental
16 citations of authority. Tri-Met also argues the motion to
17 submit citations in support of intervenor's oral argument
18 should be denied because the material offered includes
19 argument, as well as citations and quotes.

20 LUBA's rules do not provide for the submission of
21 supplemental citations of authority. Intervenor offers no
22 reason why the citations in question could not have been
23 included in his response brief. Intervenor does contend he
24 could not include the citations in his oral argument because
25 he was given only 10 minutes to argue. LUBA's rules provide
26 that respondents shall be given a total of 30 minutes for

1 oral argument. OAR 661-10-040(3). Prior to the start of
2 oral argument in this appeal, the city and intervenor agreed
3 the city would have 20 minutes for argument and intervenor
4 would have 10 minutes. Intervenor cannot rely on this
5 agreed-upon time limitation as a basis for filing
6 supplemental citations.

7 The motions to submit supplemental citations of
8 authority are denied.

9 **SUPPLEMENTAL CITATIONS TO RECORD**

10 During the July 13, 1994 oral argument, the Board
11 specifically asked Tri-Met to provide it with citations to
12 the record to support Tri-Met's assertion that no funds are
13 available for certain improvements required by the decisions
14 challenged in this appeal. On July 15, 1994, Tri-Met
15 submitted a letter listing the pages in the record where
16 testimony asserting that position appears.

17 On July 16, 1994, intervenor filed a document entitled
18 "Answering Brief of Intervenor-Respondent to Petitioner's
19 July 15, 1994 Citations to Record" (answering brief). In
20 the answering brief, intervenor contends most of the record
21 pages cited in Tri-Met's letter do not constitute evidence
22 supporting Tri-Met's claim that funds are unavailable, and
23 provides argument regarding the relevancy of each of the
24 record pages cited by Tri-Met.

25 Because the record citations in Tri-Met's letter were
26 submitted in response to a specific request by the Board,

1 they will be accepted and considered. Intervenor did not
2 have an opportunity to rebut these citations to the record
3 during oral argument. Accordingly, to the extent
4 intervenor's answering brief rebuts Tri-Met's record
5 citations, it will also be accepted and considered.

6 **MOTION TO REMAND**

7 On July 16, 1994, intervenor filed a motion that the
8 Board remand the challenged decisions to the city, for the
9 city to conduct an evidentiary hearing on an issue raised by
10 Tri-Met in this appeal -- the claim that Tri-Met lacks funds
11 to provide the improvements required by the challenged
12 decisions. Intervenor argues the record is insufficient
13 with regard to this key issue.

14 Both Tri-Met and the city oppose intervenor's motion to
15 remand. Tri-Met argues the motion should be denied because
16 (1) the Board's review must be based on the record before
17 it; (2) the Board lacks authority to remand a decision for
18 the purpose of holding local evidentiary hearings; and
19 (3) the motion improperly attempts to submit additional
20 argument to the Board.

21 As stated above, under ORS 197.830(13)(a), our review
22 is limited to the local record submitted pursuant to
23 OAR 661-10-025. Under ORS 197.830(13)(b) and
24 OAR 661-10-045, this Board itself may conduct evidentiary
25 hearings and rely on evidence accepted therein to resolve
26 disputed allegations concerning certain issues, e.g.

1 standing, requests for stays, unconstitutionality of the
2 challenged decision, procedural irregularities in making the
3 challenged decision. However, intervenor does not ask that
4 LUBA conduct an evidentiary hearing under ORS 197.830(13)(b)
5 or OAR 661-10-045, but rather that LUBA remand the
6 challenged decision so the city can conduct an evidentiary
7 hearing.

8 There is no legal authority for LUBA to remand a
9 challenged decision to a local government for the local
10 government to conduct evidentiary hearings, without
11 resolving the assignments of error raised by a petitioner.
12 To the contrary, ORS 197.835(9)(a) requires LUBA to resolve
13 all issues presented to it when remanding a challenged land
14 use decision or limited land use decision.

15 The motion to remand is denied.

16 **INTRODUCTION**

17 The Project will provide high-capacity Light Rail
18 Transit (LRT) service between downtown Portland and
19 Hillsboro. The Project is expected to cost over \$900
20 million, and will be the largest public works project in
21 Oregon history.

22 **A. Senate Bill 573**

23 The preamble to Senate Bill (SB) 573, enacted by the
24 1991 Oregon Legislature, explains that to obtain federal
25 funding for 75% of the Project's cost, Tri-Met had to sign a
26 Full Funding Agreement (FFA) with the federal Urban Mass

1 Transportation Administration (UMTA) by September 30, 1991.¹
2 Or Laws 1991, ch 3, preamble. SB 573 expresses concern the
3 UMTA might decline to sign an FFA by September 30, 1991, due
4 to the "lack of a final land use decision on the light rail
5 route, the location of associated light rail facilities and
6 the highway improvements to be included in the Project."
7 Id. SB 573 was enacted "to consolidate the land use
8 decisions regarding the light rail route, the location of
9 associated light rail facilities and the highway
10 improvements to be included in the project into a single
11 land use decision and to provide an expedited and exclusive
12 process for appellate review" of that land use decision.
13 Id.

14 To that end, SB 573 provides for adoption of a "final
15 order" by Tri-Met's board of directors, deciding (1) the
16 light rail route for the Project, (2) the location of
17 associated light rail facilities for the Project, and
18 (3) highway improvements to be included in the Project.²
19 Or Laws 1991, ch 3, § 2(9). SB 573 requires the Land
20 Conservation and Development Commission (LCDC) to adopt

¹Thereafter, a contemplated change in federal law was expected to reduce federal participation in Project funding to 50% or less of the Project's cost.

²"Project" is defined as the Westside Corridor Project "as set forth in the [January 1991] Westside Corridor Project Supplemental Draft Environmental Impact Statement" (SDEIS). Or Laws 1991, ch 3, § 2(13). We take official notice of the SDEIS.

1 criteria to be used by Tri-Met in adopting its final order.
2 Or Laws 1991, ch 3, § 4. SB 573 confers exclusive
3 jurisdiction for review of a "final order" on this Board and
4 the Oregon Supreme Court, subject to strict time
5 limitations. Or Laws 1991, ch 3, § 8.

6 However, SB 573 also addresses the subject of
7 subsequent local government decisions necessary to implement
8 a final order. SB 573 provides that all local governments
9 must amend their comprehensive plans and land use
10 regulations "to the extent necessary to make them consistent
11 with a final order." Or Laws 1991, ch 3, § 7(1)(a). Such
12 plan and land use regulation amendments are not reviewable
13 by any court or agency. Or Laws 1991, ch 3, § 7(1)(a).

14 Additionally, under SB 573, local governments are
15 required to "[i]ssue the appropriate permits, licenses and
16 certificates necessary for construction of the project * * *
17 consistent with a final order." Or Laws 1991, ch 3,
18 § 7(1)(b). Such permits, licenses and certificates may be
19 subject to "reasonable and necessary conditions of approval,
20 but may not, either by themselves or cumulatively, prevent
21 the implementation of a final order." Id. Local government
22 decisions concerning such permits, licenses and certificates
23 are "subject [to] administrative and judicial review as
24 provided by law," but "determinations on review shall not
25 prevent the implementation of a final order." Or Laws 1991,
26 ch 3, § 7(4).

1 **B. Land Use Final Order/Final EIS**

2 On March 8, 1991, LCDC adopted an order establishing
3 criteria for adoption of a final order. Tri-Met's board of
4 directors adopted its Land Use Final Order (hereafter LUFO)
5 for the Project on April 12, 1991.³ The LUFO selects the
6 light rail route, the location of associated light rail
7 facilities, and the highway improvements to be included in
8 the Project.

9 The LUFO states that a mitigation plan addressing
10 mitigation of adverse impacts associated with the proposed
11 light rail and highway improvements will be developed as
12 part of the process of preparing the Final Environmental
13 Impact Statement (FEIS). LUFO, p. 18. The LUFO also notes
14 SB 573 directs affected local governments to issue permits
15 necessary for construction of the Project and "authorizes
16 them to impose reasonable and necessary conditions of
17 approval." LUFO, p. 19. The LUFO states that affected
18 local governments, Tri-Met and ODOT signed an
19 intergovernmental agreement ("Westside Transit Corridor
20 Planning Coordination Agreement") "further establishing that
21 local governments may impose 'project design and mitigation
22 specifications' during the local permitting process,
23 consistent with their comprehensive plans and zoning

³The LUFO was appealed, and was affirmed by both LUBA and the Oregon Supreme Court. Seto v. Metro. Transportation Dist., 21 Or LUBA 185, aff'd 311 Or 456, 814 P2d 1060 (1991).

1 ordinances." Id. The LUFO also provides the City of
2 Beaverton may impose "approval conditions * * * during
3 conditional use or design review for transit stations,
4 park-and-ride lots and the placement of tracks." Id. The
5 LUFO recognizes that mitigation measures for visual impacts
6 and design options for the downtown Beaverton LRT facilities
7 "will be considered in the FEIS, and selected during the
8 Final Design and local permitting processes." LUFO,
9 pp. 84-85.

10 Tri-Met submitted the FEIS to UMTA, and it was approved
11 on August 28, 1991. The FEIS states a visual mitigation
12 plan has been prepared for the preferred alternative, and
13 "Tri-Met and ODOT are committed to implementation of the
14 measures detailed in this plan, as summarized in
15 Table 5.4-3." FEIS, p. 5-93. The visual mitigation plan
16 incorporates "[l]andscaping and pedestrian amenities * * *
17 to mitigate visually sensitive areas" in central and west
18 Beaverton. Id. For the "Center Plaza" area, the visual
19 mitigation measures listed in Table 5.4-3 include "[s]treet
20 trees and other landscaping along pedestrian and bicycle
21 paths; paved trackway between Beaverton Transit Center and
22 S.W. Watson Avenue (Civic Center) stations."⁴ FEIS,
23 p. 5-29. The FEIS also states that "Tri-Met and ODOT will

⁴In Tri-Met's design review application and other Tri-Met documents, the proposed S.W. Watson Avenue/Civic Center LRT station is referred to as the Beaverton Central LRT station. We hereafter refer to this station as the Beaverton Central LRT station.

1 continue to coordinate with local jurisdictions during final
2 design, and these design features will be subject to review
3 and approval by local design review boards." Id.

4 **C. Beaverton Downtown Development Plan**

5 In November, 1991, the city adopted the Downtown
6 Development Plan (DDP) as part of its acknowledged
7 comprehensive plan.⁵ Several governmental units, including
8 Tri-Met, participated in development of the city's DDP.
9 Record 211. Among the objectives of the DDP are locating
10 the LRT stations "to promote development of a compact,
11 pedestrian oriented commercial core" and "integrat[ing] the
12 core area LRT stations into pedestrian serving retail
13 streets and plazas." Record 216.

14 The Town Esplanade subarea established by the DDP
15 encompasses the area adjacent to the proposed LRT alignment,
16 extending from the proposed Beaverton Central LRT station
17 east to the existing Transit Center. Record 231. The DDP's
18 policies for the Town Esplanade are intended "to provide a
19 desirable focus for a pedestrian oriented retail trade."
20 Id. The Town Esplanade subarea includes concept drawings of
21 sections of the proposed esplanade. Record 232-33.

22 **D. Full Funding Agreement**

23 In late 1991, Tri-Met learned that the U.S. Congress

⁵The city's adoption of the DDP as a postacknowledgment comprehensive plan amendment was not appealed to this Board and, therefore, the DDP is considered acknowledged. ORS 197.625(1).

1 had authorized only \$515 million for the Project, rather
2 than the expected \$565 million. Further, UMTA would not
3 enter into an FFA until it was demonstrated that the Project
4 could be completed using the \$515 million in federal funds
5 (and the \$172 million 25% "local match" funds). A group
6 comprised of representatives from the eight units of
7 government involved in development of the Project, known as
8 the Project Management Group (PMG), was convened. The city
9 planning director was a member of the PMG. Record 206. The
10 mission of the PMG was to find \$50 million worth of Project
11 items that could be either deleted or deferred to the
12 future.

13 On April 8, 1992, Tri-Met representatives also
14 discussed Project financing and the need to eliminate or
15 defer \$50 million of Project improvements with the Westside
16 Corridor Project Steering Group. The city's mayor was a
17 member of the Steering Group. Among the items on the list
18 of possible deferrals or deletions were:

19 "Defer a bike path between Beaverton Transit
20 Center and Hocken Station^[6] until redevelopment of
21 the area occurs.

22 "Similarly defer Beaverton track design
23 enhancement." Record 209.

24 On May 6, 1992, the PMG approved a list of 24

⁶It appears that the LRT station referred to as Hocken Station here is referred to in more recent documents as Tektronix Station. In any case, the LRT station referred to is located west of the proposed Beaverton Central LRT Station.

1 recommended deferrals, totaling \$37 million.⁷
2 Record 203-04. On September 29, 1992, Tri-Met and UMTA
3 signed the FFA. The FFA states the federal government and
4 Tri-Met "have agreed to certain deferrals and deletions that
5 reduce the total Project cost."⁸ Record 76. The FFA also
6 provides that if there are unforeseen cost savings, or
7 additional appropriations for the project from the U.S.
8 Congress, the FFA may be amended to restore the deferred
9 project elements listed in Attachment 9. Record 199. As
10 relevant here, Attachment 9 includes:

11 **"Beaverton Bike Path (Partial).** Defer
12 construction of bike/ped. path between the Transit
13 Center and Hocken Station.

14 **"Beaverton Trackway Enhancement.** Delay track
15 enhancement in area of Civic Center until
16 surrounding area develops." Record 201.

17 **E. Design Review Applications**

18 On July 28, 1993, Tri-Met applied to the city for
19 design review approval to construct a segment of the Project
20 from S.W. 117th Avenue to S.W. Hall Boulevard (hereafter
21 117th to Hall segment), approximately 2200 feet in length.
22 Record 285, 300. The proposal included construction of an
23 open tie and ballast railbed and installation of track,

⁷As far as we can tell, the record does not include the list of recommended deferrals approved by the PMG.

⁸There is no indication in the record, however, and the parties do not contend, that the FEIS or LUFO was ever amended or supplemented to reflect the deferrals agreed to by Tri-Met and UMTA in the FFA.

1 support poles, various retaining walls and an overhead
2 wiring system. Record 301. The proposal also included
3 construction of a new LRT station at the existing Transit
4 Center, including certain landscaping, utilities and
5 pedestrian access improvements.

6 On August 11, 1993, Tri-Met applied to the city for
7 design review approval to construct a segment of the Project
8 from S.W. Hall Boulevard to S.W. Hocken Avenue (hereafter
9 Hall to Hocken segment), approximately 2500 feet in length.
10 Record 125, 139. This proposal also included construction
11 of an open tie and ballast railbed and installation of
12 track, support poles, various retaining walls and an
13 overhead wiring system. Record 140. Additionally, the
14 proposal for the Hall to Hocken segment included
15 construction of the new Beaverton Central LRT station. Id.

16 On November 19, 1993, after public hearings, the Board
17 of Design Review (BDR) issued orders granting design review
18 approval for the two Project segments, subject to certain
19 conditions. Tri-Met appealed the BDR decisions to the city
20 council, challenging certain conditions imposed by the BDR.
21 As relevant here, the challenged conditions required a
22 pedestrian esplanade and enhanced trackway treatment between
23 the Transit Center and Beaverton Central LRT stations, and
24 restrooms and drinking fountains in the Transit Center LRT

1 station.⁹

2 On December 13, 1993, after an additional public
3 hearing, the city council adopted the challenged orders
4 denying Tri-Met's appeals. The city council decision
5 approving the 117th to Hall segment imposes the following
6 condition:

7 "[Tri-Met] shall construct the pedestrian pathway
8 improvement referred to as the 'Esplanade' and as
9 described in this report. The improvement shall
10 meet the minimum standards and intent of the
11 Beaverton Comprehensive Plan. [Tri-Met] shall
12 submit a detailed plan of the proposed Esplanade
13 improvement that will include, at a minimum; the
14 location and design of: LRT trackway, bridges,
15 retaining and sound walls, platforms, shelters,
16 furnishings, fencing, lighting, trees and other
17 landscaping. The Plan shall also include an
18 enhanced trackway treatment, as described in the
19 staff report. The Plan shall be submitted for
20 Facilities Review [by city staff] and shall be
21 approved by the [BDR] prior to issuance of Site
22 Development Permits."¹⁰ Record 264-65.

⁹Tri-Met challenged additional conditions imposed on the 117th to Hall segment as well, and its appeal to the city council was granted with regard to some of these conditions and denied with regard to others. However, these other conditions are not at issue in this appeal.

¹⁰The staff reports referred to in the quoted conditions describe the required esplanade and enhanced trackway treatment as follows:

"* * * In it's [sic] basic form, the Esplanade would be built to city standards in order to construct a 15 foot wide pedestrian sidewalk on each side of the trackway. The Esplanade would be constructed to abut the trackway at the same elevation in order to provide a seamless physical connection between the Esplanade, the low-floor [LRT] vehicles, station platforms and intersecting sidewalks. Tri-Met's improvement requirement would include placement of street trees, lighting, fencing, and the retaining or sound walls necessary to provide the minimum amenities at this time. The 15 foot width can

1 The city council decision approving the Hall to Hocken
2 segment imposes an almost identically worded condition.
3 Record 112-13.

4 Other conditions incorporated by reference into the
5 challenged decisions indicate the esplanade and enhanced
6 trackway referred to above are required to extend from the
7 Transit Center to S.W. Hall Boulevard (in the 117th to Hall
8 segment), and from S.W. Hall Boulevard to the east property
9 line of the Westgate Theater parcel (in the Hall to Hocken
10 segment). Record 114, 269. The decisions state that
11 "dimensional concept drawings of the esplanade treatment"
12 are found in DDP Figures 11, 12 and 13. Record 9.

13 With regard to the Transit Center LRT station, the
14 decision approving the 117th to Hall segment requires
15 Tri-Met to provide:

16 * * * Toilet facilities appropriate to the scale
17 of ridership to be provided at the Transit Center.

include [Tri-Met's passenger shelters,] platform furnishings,
trees, landscaping, lighting, fencing and other elements of
[Tri-Met's] proposed improvements to platform and station areas
[provided that bike and pedestrian movement is not hindered].

* * * * *

"[The enhanced trackway treatment] entails replacing the 'open
tie & ballast' railbed with a more appropriate urban and
pedestrian improvement in recognition of the special character
of the Esplanade sub-area.

"The recommended enhancement would instead consist of a
finished concrete surface in place of open ballast rock and
ties, and would employ the use of a material such as paver
block, brick or cobblestone as a functional defining edge with
the Esplanade. * * *" Record 132-33, 294-95.

1 "* * * Drinking fountains in quantity appropriate
2 to the scale of ridership to be provided at the
3 Transit Center." Record 265.

4 Findings, incorporated by reference into the decision,
5 interpret these conditions as follows:

6 "[The city] will interpret [these conditions] to
7 mean that, at a minimum, one (1) permanent
8 bathroom and drinking fountain * * * shall be
9 provided by the time of initial Light Rail
10 operation." Record 256-57.

11 **PRELIMINARY ISSUES**

12 **A. LUBA's Jurisdiction**

13 Intervenor contends this Board lacks jurisdiction to
14 review the challenged decisions, and moves to dismiss these
15 consolidated appeals, because (1) the decisions fall within
16 the exceptions to the definition of "land use decision"
17 established by ORS 197.015(10)(b)(A) and (D);¹¹ (2) under
18 ORS 197.712(2)(e), the decisions are not "land use
19 decisions" because they involve "[p]roject timing and
20 financing provisions of public facility plans;" and

¹¹ORS 197.015(10)(b) provides that "land use decision" does not include a local government decision:

"(A) Which is made under land use standards which do not require interpretation or the exercise of policy or legal judgment;

* * * * *

"(D) Which determines final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility which is otherwise authorized by and consistent with the comprehensive plan and land use regulations[.]"

1 (3) petitioner failed to exhaust "all remedies available by
2 right" below, as required by ORS 197.825(2)(a).

3 The city and Tri-Met agree this Board has jurisdiction
4 to review the challenged decisions. However, the city
5 contends the challenged decisions are "limited land use
6 decisions," as defined by ORS 197.015(12), because the
7 Project segments at issue are within an urban growth
8 boundary and the challenged decisions grant design review
9 approval for a use permitted outright.¹² Tri-Met, on the
10 other hand, contends the challenged decisions are "land use
11 decisions," as defined by ORS 197.015(10)(a),¹³ and do not

¹²ORS 197.015(12) provides, in relevant part:

"'Limited land use decision' is a final decision or
determination made by a local government pertaining to a site
within an urban growth boundary which concerns:

"* * * * *

"(b) The approval or denial of an application based on
discretionary standards designed to regulate the physical
characteristics of a use permitted outright, including
but not limited to site review and design review."

¹³As relevant here, ORS 197.015(10)(a)(A) provides that "land use
decision" includes:

"A final decision or determination made by a local government
* * * that concerns the adoption, amendment or application of:

"(i) The goals;

"(ii) A comprehensive plan provision;

"(iii) A land use regulation; or

"(iv) A new land use regulation[.]"

1 fall within the exceptions established by
2 ORS 197.015(10)(b)(A) and (D) or ORS 197.712(2)(e).

3 This Board has exclusive jurisdiction to review local
4 government "land use decisions" and "limited land use
5 decisions." ORS 197.825(1). The challenged decisions
6 concern the application of comprehensive plan and land use
7 regulation provisions and, therefore, are "land use
8 decisions" under ORS 197.015(10)(a) unless they fall within
9 a statutory exception to that definition. We agree with
10 Tri-Met that land use standards applicable to the subject
11 decisions require interpretation and the exercise of policy
12 and legal judgment. Thus, the decisions do not come within
13 the exception of ORS 197.015(10)(b)(A). Next, the decisions
14 do not approve final engineering design or construction of
15 the disputed LRT facility and, therefore, are not within the
16 exception of ORS 197.015(10)(b)(D). Finally, the decisions
17 do not adopt or amend a city or county public facility plan
18 and, therefore, are not excepted from being considered land
19 use decisions under ORS 197.712(2)(e).

20 Based on the above, we conclude the challenged
21 decisions are either "land use decisions" or "limited land
22 use decisions."¹⁴ In either case, this Board has
23 jurisdiction to review them, provided that Tri-Met exhausted
24 all remedies available by right below, as required by

¹⁴Under ORS 197.015(10)(b)(C), "limited land use decisions," as defined by ORS 197.015(12), are excluded from the category of "land use decisions."

1 ORS 197.825(2)(a).

2 The purpose of the exhaustion requirement is to assure
3 that the challenged decision is reviewed by the highest
4 level local decision making body the local code makes
5 available, before an appeal to this Board is pursued. Moody
6 v. Deschutes County, 22 Or LUBA 567, 569 (1992); McConnell
7 v. City of West Linn, 17 Or LUBA 502 (1989). Where the
8 challenged decision is made by the highest level local
9 decision maker possible and petitioner appeared before that
10 decision maker, as is the case here, the exhaustion
11 requirement of ORS 197.825(2)(a) is met.

12 Intervenor's motion to dismiss is denied.

13 **B. LUBA's Scope of Review**

14 As explained above, the city contends the challenged
15 decisions are limited land use decisions. The city argues
16 that this Board's scope of review of limited land use
17 decisions under ORS 197.828 is more narrow than its scope of
18 review of land use decisions under ORS 197.835. The city
19 further argues the errors alleged in Tri-Met's assignments
20 of error constitute improper construction of the applicable
21 law, in this case SB 573. According to the city, improperly
22 construing the applicable law may provide a basis for this
23 Board to reverse or remand a land use decision pursuant to
24 ORS 197.835(7)(a)(D), but does not provide a basis for
25 reversal or remand of a limited land use decision under
26 ORS 197.828.

1 As explained in more detail infra, Tri-Met's
2 assignments of error contend the conditions imposed by the
3 city requiring an esplanade, enhanced trackway, restrooms
4 and drinking fountains violate Section 7(1)(b) of SB 573.
5 Section 7(1)(b) requires the city to approve permits,
6 licenses and certificates for the Project consistent with
7 the LUFO. Section 7(1)(b) also limits the city's authority
8 to impose conditions on such permits, licenses and
9 certificates, providing that any conditions imposed must be
10 "reasonable and necessary" and cannot, "either by themselves
11 or cumulatively, prevent the implementation of [the LUFO]."

12 ORS 197.828(2)(c)(A) authorizes this Board to reverse
13 or remand a limited land use decision if it is "[o]utside
14 the scope of authority of the decision maker."
15 ORS 197.835(7)(a)(D) authorizes us to reverse or remand a
16 land use decision if a local government "[i]mproperly
17 construed the applicable law." Although these two
18 provisions would not necessarily provide an identical scope
19 of review in all cases, in this case, Tri-Met's arguments
20 can be characterized as contending the disputed conditions
21 imposed by the city either exceed its authority under, or
22 improperly construe, Section 7(1)(b) of SB 573.
23 Consequently, Tri-Met's assignments of error, if sustained,
24 would provide a basis for reversal or remand of the
25 challenged decisions, regardless of whether they are land
26 use decisions or limited land use decisions. We therefore

1 do not determine whether the challenged decisions are
2 properly characterized as land use decisions or limited land
3 use decisions.¹⁵

4 **C. Waiver**

5 The city and intervenor contend Tri-Met is precluded
6 from contending before LUBA that the disputed conditions
7 violate Section 7(1)(b) of SB 573, because Tri-Met failed to
8 raise this issue with sufficient specificity during the
9 city's proceedings. The city argues that although Tri-Met
10 representatives did argue that Tri-Met cannot afford to pay
11 for the developments required by the disputed conditions,
12 they never identified SB 573 as the source of limitations on
13 the city's authority to impose such conditions or contended
14 that the conditions violate SB 573.

15 Under ORS 197.830(10) and 197.835(2), our review of
16 both land use decisions and limited land use decisions is
17 limited to issues which were raised below, unless (1) the
18 local government did not satisfy the procedural requirements
19 of ORS 197.763 or ORS 197.195, whichever is applicable; or
20 (2) the land use decision or limited land use decision
21 adopted differs significantly from what was described in the
22 local government's notice. Barrick v. City of Salem, ____

¹⁵The city also argues that our scope of review of evidentiary challenges to land use decisions and limited land use decisions is different under ORS 197.835(7)(a)(C) and 197.828(2)(a), respectively. Because we do not reach Tri-Met's evidentiary challenges in resolving its assignments of error, infra, we do not consider this issue.

1 Or LUBA ____ (LUBA No. 94-013, June 24, 1994), slip op 8-11;
2 Dorgan v. City of Albany, ____ Or LUBA ____ (LUBA No. 93-183,
3 March 24, 1994), slip op 7-8.

4 ORS 197.763(3)(b) requires a local government's notice
5 of evidentiary hearing on an application for a land use
6 decision to list the applicable approval criteria in its
7 comprehensive plan and land use regulations.
8 ORS 197.195(3)(c)(C) requires a local government's notice of
9 a proposed limited land use decision to list the applicable
10 criteria. At oral argument, the city conceded its notices
11 of the hearings held on Tri-Met's design review applications
12 did not list the applicable approval criteria. Therefore,
13 regardless of whether the challenged decision is a land use
14 decision or a limited land use decision, the city's notice
15 failed to list the applicable criteria, as required by the
16 applicable statute. Consequently, Tri-Met may raise issues
17 before this Board, irrespective of whether those issues were
18 raised in the proceedings below.

19 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

20 Tri-Met contends the city's imposition of conditions
21 requiring construction of an esplanade, enhanced trackway,
22 restrooms and drinking fountains violates Section 7(1)(b) of
23 SB 573.¹⁶ According to Tri-Met, the authority to impose

¹⁶As relevant here, Section 7(1)(b) states that cities shall:

"Issue the appropriate permits * * * necessary for the
construction of the project * * * consistent with [the LUF0].

1 conditions granted by Section 7(1)(b) is very limited and,
2 therefore, the city has the burden of demonstrating that any
3 conditions of approval imposed are authorized by
4 Section 7(1)(b). Tri-Met argues the city failed to adopt
5 findings demonstrating the esplanade, enhanced trackway,
6 restroom and drinking fountain conditions are "reasonable
7 and necessary," as required by Section 7(1)(b). Tri-Met
8 further argues the city failed to adopt findings
9 demonstrating that these conditions, individually and
10 cumulatively, will not prevent the implementation of the
11 LUFO. Finally, Tri-Met argues that even if the city's
12 findings are adequate, its determination of compliance with
13 Section 7(1)(b) is not supported by substantial evidence in
14 the whole record.

15 The city first contends Section 7(1)(b) is
16 inapplicable, because the challenged decisions do not
17 approve permits, licenses or certificates. As mentioned
18 above, the city contends the challenged decisions are
19 "limited land use decisions," and argues that the relevant
20 statutory definition of "permit" specifically excludes
21 limited land use decisions. ORS 227.160(2)(a). The city
22 also argues the decisions do not approve licenses or
23 certificates.

24 The city also contends the second sentence of

Permits * * * may be subject to reasonable and necessary conditions of approval, but may not, either by themselves or cumulatively, prevent the implementation of [the LUFO]."

1 Section 7(1)(b), requiring that conditions imposed be
2 reasonable and necessary, and not prevent implementation of
3 the LUFO, is inapplicable to conditions which are required
4 by or part of the LUFO. The city further contends the
5 disputed conditions are required by or part of the LUFO,
6 because the LUFO incorporates the visual mitigation measures
7 included in the FEIS, and the FEIS includes the items
8 required by the disputed conditions.

9 The city next argues that even if the limitations
10 created by the second sentence of Section 7(1)(b) are
11 applicable to the disputed conditions, the degree to which
12 SB 573 supplants the usual statewide land use decision
13 making process is intended to be quite limited. According
14 to the city, unless specifically altered by SB 573, normal
15 principles governing our review of land use decisions apply.
16 The city argues that with regard to the subject design
17 review applications, as with any quasi-judicial land use
18 applications, the burden of proof of compliance with
19 applicable standards rests on the applicant. The city
20 further argues this Board has repeatedly found that there is
21 no general requirement that a local government adopt
22 findings justifying the imposition of conditions of approval
23 or that the record prove the need for such conditions.
24 Cummins v. Washington County, 22 Or LUBA 129, 132-33 (1991);
25 Vestibular Disorders Consult. v. City of Portland, 19
26 Or LUBA 94 (1990).

1 SB 573 was signed into law, with an emergency clause,
2 on February 22, 1991. At that time, ORS 227.160(2) (1989)
3 defined "permit" as the "discretionary approval of a
4 proposed development of land under ORS 227.215 or city
5 legislation or regulation." Oregon Laws 1991, chapter 817,
6 which created the category "limited land use decision" and
7 amended the statutory definition of "permit" to exclude
8 limited land use decisions (and certain other types of
9 decisions) was not enacted until August 5, 1991.¹⁷ We
10 believe the term "permits," as used in Section 7 of SB 573,
11 is intended to refer to all decisions that were defined as
12 "permits" when SB 573 was enacted. The challenged decisions
13 clearly satisfy the ORS 227.160(2) (1989) definition of
14 "permit" and, therefore, are subject to Section 7(1)(b).

15 The first sentence of Section 7(1)(b) requires the city
16 to approve permits for construction of the Project
17 consistent with the LUFO. The second sentence of
18 Section 7(1)(b) limits a local government's authority to
19 impose conditions on such permits to conditions which are
20 reasonable and necessary and will not prevent the
21 implementation of the LUFO. Section 7(1)(b) does not
22 expressly address situations where what is proposed in a
23 permit application is inconsistent with the LUFO. In such

¹⁷At the time SB 573 was enacted, the amendment to the definition of "permit" in ORS 227.160(2) to exclude limited land use decisions had not been proposed.

1 situations, imposition of an appropriate condition is
2 necessary for consistency with the LUFO, the local
3 government is required to impose such a condition in
4 approving the permit application, and the limitations in the
5 second sentence of Section 7(1)(b) do not apply. Therefore,
6 we agree with the city that if the disputed conditions are
7 required by the LUFO, they may be imposed irrespective of
8 the limitations expressed in the second sentence of
9 Section 7(1)(b).

10 However, if the disputed conditions are not required by
11 the LUFO, then their imposition is subject to the
12 limitations stated in the second sentence of
13 Section 7(1)(b). Because the second sentence of
14 Section 7(1)(b) imposes limitations on the city's authority
15 to adopt conditions of approval, we agree with Tri-Met that
16 the city has the burden of demonstrating that any conditions
17 which are not required by the LUFO comply with these
18 limitations.

19 With these principles in mind, we consider the parties'
20 specific arguments concerning the city's imposition of
21 conditions requiring (1) an esplanade and trackway
22 enhancement from the Transit Center LRT station to the east
23 property line of the Westgate Theater parcel; and
24 (2) restrooms and drinking fountains at the Transit Center
25 LRT station.

1 **A. Enhanced Trackway and Esplanade**

2 The city contends the enhanced trackway and esplanade
3 are required by the LUFO because the LUFO prospectively
4 incorporates mitigation measures to be identified through
5 the FEIS approval process. The city argues the enhanced
6 trackway and esplanade required by the challenged decisions
7 are identified as committed mitigation measures in the FEIS.
8 The city notes the Tri-Met project engineer testified at the
9 city council hearing that the FEIS includes the enhanced
10 trackway and esplanade. Transcript 90. The city further
11 argues it never agreed to defer these improvements and, in
12 any case, the FEIS was never amended to delete these
13 mitigation measures.

14 Tri-Met contends the LUFO is a final determination only
15 with regard to (1) the LRT route, (2) the location of
16 associated light rail facilities; and (3) the highway
17 improvements to be included in the Project. Or Laws 1991,
18 ch 3, § 2(9). Tri-Met argues the LUFO does not require the
19 mitigation measures identified in the FEIS and, even if it
20 did, the FEIS does not specifically identify the enhanced
21 trackway and esplanade required by the challenged decisions.
22 Finally, Tri-Met argues that even if the esplanade and
23 enhanced trackway would otherwise be required, the city
24 agreed that these improvements be deferred, and that
25 agreement was relied on by Tri-Met and UMTA in signing the
26 FFA.

1 The LUFO includes a section entitled "Overview of
2 Process for Selecting Mitigation Measures," which provides:

3 "[Applicable criteria require Tri-Met] to identify
4 certain adverse impacts * * * which would result
5 as a consequence of its decision, and to identify
6 'mitigation measures' to reduce those impacts
7 which could be imposed as conditions of approval
8 during the NEPA process or by local governments
9 during the permitting process. * * *

10 "Tri-Met's land use decision on the light rail
11 alignment, the location of stations and
12 park-and-ride lots, and the highway improvements
13 is not the final step in the process * * *
14 Subsequent to [Tri-Met's] action, a [FEIS] will be
15 prepared and submitted to [UMTA]. A mitigation
16 plan will be developed as part of that process.
17 That mitigation plan will address mitigation of
18 adverse impacts associated with light rail and
19 highway improvements. Through adoption of this
20 [mitigation] plan, many impacts can be addressed.
21 Following federal approval of the FEIS, the Final
22 Design phase will begin. During Final Design,
23 Tri-Met will obtain all necessary federal * * *,
24 state * * * and local permits.

25 "The siting of light rail and highway improvements
26 also will be subject to local permitting
27 processes, during which affected local governments
28 may impose reasonable and necessary conditions of
29 approval to reduce adverse impacts caused by the
30 Project. * * * Section 7(1)(b) of Senate
31 Bill 573 expressly directs local governments and
32 agencies to issue appropriate permits,
33 certificates and licenses necessary to
34 construction of the Project and authorizes them to
35 impose reasonable and necessary conditions of
36 approval." (Emphases added.) LUFO, pp. 18-19.

37 While not without doubt, we think it is reasonably
38 apparent from the above quote that the development and
39 adoption of a mitigation plan through the FEIS process is
40 envisioned by the LUFO. Thus, the mitigation measures

1 required by the FEIS for compliance with the National
2 Environmental Policy Act (NEPA) are also required by the
3 LUFO. The LUFO goes on to recognize that additional
4 reasonable and necessary conditions to further reduce the
5 adverse impacts of the project may be imposed by local
6 governments during the local permitting process, subject to
7 the limitations of the second sentence of Section 7(1)(b).

8 The next question is whether the enhanced trackway and
9 esplanade are identified and required in the FEIS. The
10 "Summary of Committed Mitigation" in the FEIS includes the
11 following with regard to "Visual and Aesthetic Resources":

12 "A visual mitigation plan has been prepared for
13 the Locally Preferred Alternative * * *. Tri-Met
14 and ODOT are committed to implementation of the
15 measures detailed in this plan, as summarized in
16 Table 5.4-3.

17 "* * * Landscaping and pedestrian amenities are
18 incorporated in the project to mitigate visually
19 sensitive areas in * * * Central Beaverton and
20 West Beaverton.

21 "Specific design treatments will be applied to
22 various segments of the LRT alignment, as
23 summarized in Table 5.4-3.

24 "Tri-Met and ODOT will continue to coordinate with
25 local jurisdictions during final design, and these
26 design features will be subject to review and
27 approval by local design review boards."
28 (Emphases added.) FEIS, p. 5-93.

29 For the "Center Plaza" area, which includes the disputed
30 Project segments, the visual mitigation measures listed in
31 Table 5.4-3 include "[s]treet trees and other landscaping
32 along pedestrian and bicycle paths; paved trackway between

1 Beaverton Transit Center and [Beaverton Central] stations."
2 FEIS, p. 5-29. In addition, the FEIS includes the following
3 response to a comment by the city:

4 "The LRT trackway will be enhanced from the
5 Beaverton Transit Center to the [Beaverton Central
6 station]. * * * In addition, a cohesive design
7 treatment including items such as street lights,
8 landscaping and light standards will be applied to
9 this area. * * *"18 FEIS, p. 8-24.

10 The above language from the FEIS, together with the
11 testimony by a Tri-Met representative in the record and
12 Tri-Met's position argued in this appeal proceeding that the
13 enhanced trackway and esplanade cannot be required by the
14 challenged decisions because the city agreed to their
15 deferral when the FFA was signed,¹⁹ establish the FEIS
16 includes, as mitigation measures to which Tri-Met is
17 committed, the trackway enhancement and esplanade that are
18 the subjects of the disputed conditions.

19 The FFA, including its deferral list, is an agreement
20 between Tri-Met and UMTA. Although city representatives
21 participated on advisory committees that recommended the
22 improvements to be placed on the deferral list, it has not
23 been shown that those representatives had the authority to

¹⁸Here and elsewhere in the FEIS, the reader is referred to a document entitled "Visual Quality and Aesthetic Supplementary Impact Analysis and Mitigation Report." Unfortunately, as far as we know, this document is not included in the local record.

¹⁹If the trackway enhancement and esplanade were not required by the FEIS, there would be no need to include them on the FFA's deferral list.

1 bind the city, or that the city approved or endorsed the
2 FFA. Consequently, we agree with the city that placement of
3 the trackway enhancement and esplanade on the FFA deferral
4 list does not affect the conclusion that these improvements
5 are still required by the FEIS and, therefore, the LUFO as
6 well.

7 Because the LUFO, through the FEIS, requires the
8 enhanced trackway and esplanade, the city did not violate
9 Section 7(1)(b) of SB 573 by imposing conditions requiring
10 construction of these improvements.

11 This subassignment of error is denied. Because the
12 assignments of error include no other challenge to the
13 decision granting design review approval for the Hall to
14 Hocken segment (the subject of LUBA No. 94-002), that
15 decision must be affirmed. Tri-Met's remaining
16 subassignment of error concerns only the decision approving
17 the 117th to Hall segment (the subject of LUBA No. 94-003),
18 and is addressed below.

19 **B. Restrooms and Drinking Fountains**

20 Tri-Met contends the disputed conditions requiring
21 restrooms and drinking fountains at the Transit Center LRT
22 station are not supported by findings addressing the
23 limitations established by Section 7(1)(b) of SB 573.
24 Tri-Met also contends the record lacks substantial evidence
25 supporting the imposition of these conditions.

26 The parties cite nothing in the LUFO or FEIS

1 identifying restrooms or drinking fountains at the Transit
2 Center LRT station as a committed mitigation measure. We
3 therefore agree with Tri-Met that pursuant to
4 Section 7(1)(b), the city is required to demonstrate that
5 the disputed conditions requiring such restrooms and
6 drinking fountains (1) are reasonable and necessary, and
7 (2) do not, individually or cumulatively, prevent
8 implementation of the LUFO.

9 The only findings included in the city council order
10 granting design review approval for the 117th to Hall
11 segment concerning the disputed restroom and drinking
12 fountain conditions are portions of a staff report
13 incorporated by reference that address two of the design
14 review "purposes and objectives" set out in Beaverton
15 Development Code 133. Record 10, 256-57. The decision
16 fails to include findings demonstrating the disputed
17 restroom and drinking fountain conditions comply with the
18 limitations established by the second sentence of
19 Section 7(1)(b) of SB 573.

20 Consequently, this subassignment of error is sustained.
21 This requires that we remand the city decision granting
22 design review approval for the 117th to Hall segment.²⁰

²⁰SB 573, Section 7(4) provides that "determinations on review [of permits for construction of the Project] shall not prevent the implementation of [the LUFO]." Tri-Met argues that this Board's failure to reverse the city's decision with respect to the disputed conditions would violate Section 7(4). Tri-Met does not explain, however, why a remand for further city proceedings with regard to the imposition of the disputed

1 One additional point merits comment. Tri-Met argues
2 that restrooms and drinking fountains are not "necessary,"
3 as that term is used in Section 7(1)(b), if the Project can
4 be completed without them. 1000 Friends of Oregon v. LCDC,
5 83 Or App 278, 282-83, 731 P2d 457 (1987) ("necessary" means
6 "cannot be done without"). The city argues that Tri-Met's
7 interpretation improperly adds the term "to the project" to
8 the word necessary. The city contends that, as used in
9 Section 7(1)(b), a "necessary" condition is a condition
10 required for the Project to meet applicable criteria of the
11 city's plan and code.²¹ The city points out that
12 Section 1(3) of SB 573 states the legislature "reaffirms its
13 commitment to the provisions of ORS 197.010 and to the
14 partnership between the local government and the state in
15 carrying out [its] provisions." One of these provisions is
16 that coordinated comprehensive plans "shall be prepared to
17 assure that all public actions are consistent and
18 coordinated with the policies expressed through the
19 comprehensive plans." ORS 197.010(1)(d).

20 The final provision of Section 7(1)(b) states that a
21 condition may not be imposed if it would prevent

restroom and drinking fountain conditions would itself prevent implementation of the LUFO. Additionally, as explained in the text, if the city decision adopted after remand retains the disputed restroom and drinking fountain conditions, the city will have to demonstrate that those conditions will not prevent implementation of the LUFO.

²¹The city also argues that in the context of Section 7(1)(b), a "reasonable" condition is one that results from a reasonable interpretation of the city's plan and code criteria.

1 implementation of the LUFO and, therefore, implementation of
2 the Project. If Tri-Met's interpretation of "necessary" as
3 meaning essential to completion of the Project were correct,
4 there would be no need to include in the statute a
5 prohibition against conditions which would prevent
6 completion of the Project. We believe the city's
7 interpretation of the term "necessary" in Section 7(1)(b) is
8 correct. Under this interpretation of Section 7(1)(b), even
9 if a condition is "reasonable and necessary" to satisfying
10 applicable city plan and code provisions, it could not be
11 imposed if by itself, or together with other conditions, it
12 would prevent implementation of the Project.

13 The first and second assignments of error are
14 sustained, in part.

15 The city decision challenged in LUBA No. 94-002 is
16 affirmed. The city decision challenged in LUBA No. 94-003
17 is remanded.