

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 TRI-COUNTY METROPOLITAN)
5 TRANSPORTATION DISTRICT,)

6)
7 Petitioner,)

8)
9 vs.)

10) LUBA Nos. 94-002 and 94-003

11 CITY OF BEAVERTON,)

12) FINAL OPINION
13) AND ORDER

14)
15 and)

16)
17 HENRY KANE,)
18)

19 Intervenor-Respondent.)

20
21
22 On remand from the Court of Appeals.

23
24 Gregory S. Hathaway and Mark J. Greenfield, Portland,
25 represented petitioner.

26
27 Mark Pilliod, City Attorney, Beaverton, represented
28 respondent.

29
30 Henry Kane, Beaverton, represented himself.

31
32 HANNA, Referee; LIVINGSTON, Chief Referee; GUSTAFSON,
33 Referee, participated in the decision.

34
35 REVERSED 05/29/96

36
37 You are entitled to judicial review of this Order.
38 Judicial review is governed by the provisions of ORS
39 197.850.

1 Opinion by Hanna.

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).¹

7 **INTRODUCTION**

8 This appeal is before us for the third time.² In the
9 decision leading to LUBA No. 94-002 (No. 94-002), as
10 conditions of design review approval of one segment of the
11 Project, the city required Tri-Met to provide an esplanade
12 and enhanced trackway. In the decision leading to LUBA No.
13 94-003 (No. 94-003), as conditions of design review approval
14 of another segment of the Project, the city required Tri-Met
15 to provide restrooms and drinking fountains.

16 In Tri-Met IV, the court remanded Nos. 94-002 and 94-
17 003 to us, stating, "[w]e again reverse and remand LUBA's

¹ORS 197.850(11) requires that we respond to the Court of Appeal's remand within 30 days. The parties propose a detailed briefing and oral argument schedule and an extension of the statutory deadline. Given the exhaustive briefing and analysis already done in this case, and the underlying emphasis of Oregon Laws, 1991, chapter 3 (Senate Bill 573) to facilitate expeditious resolution of cases involving the Project, we deny the request for additional briefing and argument.

²See Tri-County Metro. Trans. Dist. v. City of Beaverton, 28 Or LUBA 78 (1994) (Tri-Met I) (affirming LUBA No 94-002 and remanding to city LUBA No 94-003), rev'd 132 Or App 253, rev den 320 Or 598 (1995) (Tri-Met II) (reversing and remanding to LUBA, LUBA No 94-002 and LUBA No 94-003); and Tri-County Metro. Trans. Dist. v. City of Beaverton, ___ Or LUBA ___ (LUBA Nos. 94-002 and 94-003, July 31, 1995) (Tri-Met III) (remanding to city, LUBA Nos. 94-002 and 94-003), rev'd 138 Or App 48 (1995) (Tri-Met IV) (reversing and remanding to LUBA, LUBA Nos. 94-002 and 94-003).

1 decisions, and instruct it to perform the reconsideration
2 required by our earlier opinion and this one." The court
3 quoted its opinion in Tri-Met II, stating:

4 "The reasonable and necessary test applies to
5 conditions that are related to or necessitated by
6 the [light rail] project, but the bill does not
7 permit conditions of a kind that are designed to
8 further unrelated land use objectives of local
9 plans and regulations.' 132 Or App at 261." Tri-
10 Met IV at 50.

11 The court continued in Tri-Met IV, stating:

12 "As a threshold proposition, at least, our
13 conclusions and our disposition [in Tri-Met II]
14 therefore called for LUBA to apply the correct
15 legal tests to the established facts in our remand
16 to it. Unless the appeals cannot be resolved by
17 LUBA's completion of that exercise, no further
18 findings or evidentiary development and no remand
19 to the city are necessary.

20 "Moreover, we disagree with LUBA's suggestion that
21 the ultimate questions of reasonableness and
22 necessity are for the city to decide, as distinct
23 from demonstrating. The decision concerning
24 whether the conditions satisfy the statute's
25 requirements turns on questions of law, and it is
26 a decision for LUBA rather than the city to make.
27 Any failure by the city to establish the
28 compliance of its conditions with the statutory
29 test would, as Tri-Met contends, be a basis for
30 LUBA to reverse the city's orders rather than
31 remanding them to the city." (Footnotes omitted,
32 emphasis in original.) Tri-Met IV at 51.

33 Therefore, in this proceeding we are required to
34 determine whether, as a matter of law, the conditions (1)
35 are reasonable and necessary, and (2) individually or
36 cumulatively, prevent implementation of the land use final
37 order (LUF0) adopted pursuant to Senate Bill 573. Senate

1 Bill 573 section 7(1)(b) sets forth the test for the
2 conditions. As relevant here, it requires that cities:

3 "Issue the appropriate permits * * * necessary for
4 the construction of the project * * * consistent
5 with [the LUFO]. Permits * * * may be subject to
6 reasonable and necessary conditions of approval,
7 but may not, either by themselves or cumulatively,
8 prevent the implementation of [the LUFO]."

9 This two-part test requires that we determine first if the
10 conditions are reasonable and necessary, and if they are, if
11 the conditions prevent implementation of the LUFO.

12 Senate Bill 573 does not define the term "reasonable
13 and necessary"; nor does it define either word individually.
14 However, in several instances in Tri-Met II, the court
15 provided guidance in deciding if conditions are reasonable
16 and necessary. The court explained that although the final
17 environmental impact statement (FEIS) or LUFO might require
18 a condition, that requirement alone does not exclude the
19 condition from review under Senate Bill 573, section
20 7(1)(b). The court explained further:

21 "Conceivably, the fact that a condition is
22 directly or indirectly contemplated by the LUFO
23 may be a factor to weigh in deciding whether it is
24 reasonable and necessary. * * * Similarly, if a
25 measure is set forth in the FEIS, that may have a
26 bearing on whether it can be required as a
27 reasonable and necessary condition. However, if
28 the same measure is subject to mandatory deferral
29 in the agreement between Tri-Met and the
30 authoritative federal agency, that, too, is
31 pertinent to whether it is reasonable and
32 necessary for a local government to make the
33 measure a condition of approving a permit, license
34 or certificate under section 7(1)(b)." Tri-Met II

1 at 259-260.

2 In the context of Senate Bill 573 and as evidenced by
3 the court's instruction, a narrow construction of the term
4 "reasonable and necessary" is called for. Tri-Met relies on
5 1000 Friends of Oregon v. LCDC, 83 Or App 278, 282-83, 731
6 P2d 457 (1987) ("necessary" means "cannot be done without"),
7 and argues that the improvements are not "necessary" under
8 section 7(1)(b) if the Project can be completed without
9 them. The city's findings describe the conditions as
10 necessary to comply with its plans.³ However, the findings
11 do not address whether the conditions are reasonable and
12 necessary to the Project, as required by section 7(1)(b).

13 The city argues that Senate Bill 573 contemplates local
14 conditions such as those at issue here. While that may be
15 true, the law and subsequent judicial opinions require that
16 those conditions be reasonable and necessary to the Project.
17 Tri-Met II, 261.

18 We turn to No 94-002 to determine if the city has
19 demonstrated that the conditions requiring enhanced trackway
20 and an esplanade are reasonable and necessary to the
21 Project.⁴ We discussed in Tri-Met I whether the enhanced

³On November 25, 1991, after the adoption of the LUFO and submission of the FEIS, the city amended its comprehensive plan (plan) and adopted a Downtown Development Plan (DDP) (plan and DDP together are referred to as plans) to accommodate the project.

⁴The esplanade condition requires Tri-Met to provide a 15-foot-wide pedestrian sidewalk on each side of the light rail way, including platform furnishings, trees, landscaping, lighting, fencing and other amenities.

1 trackway and an esplanade were required by the FEIS and
2 LUFO, and concluded that the "FEIS includes, as mitigation
3 measures to which Tri-Met is committed, the trackway
4 enhancement and esplanade that are the subjects of the
5 disputed conditions." Tri-Met I at 29. We concluded
6 further that the fact that these improvements were included
7 on the list of improvements that could be deferred did not
8 affect our conclusion that such improvements were required
9 by the FEIS.⁵ However, as the court instructed in Tri-Met
10 II, although the improvements may be required by the FEIS,
11 they are nonetheless subject to review under section 7(1)(b)
12 to determine if they are reasonable and necessary.

13 The city did not adopt findings demonstrating that the
14 trackway enhancement and esplanade conditions are reasonable
15 and necessary, and consequently, comply with the
16 requirements of section 7(1)(b). Thus, the question we must
17 answer is whether, as a matter of law, improvements that are
18 required by the FEIS, but deferred under another agreement
19 with the federal government until a later unspecified time,
20 are reasonable and necessary to the Project. We conclude
21 that the city has not demonstrated that the improvements are
22 reasonable and necessary to the Project. The Project can be

The enhanced trackway condition requires Tri-Met to construct the railbed with a finished concrete surface instead of open ballast rock and railroad ties. Record 132-33 and 294-95.

⁵In Tri-Met I at 29, we discuss a list of improvements that federal state and local officials agreed could be deferred pending later funding.

1 completed and operate without them. Accordingly, we find
2 that the improvements are not reasonable and necessary to
3 the Project as required by section 7(1)(b).

4 We turn next to No 94-003 to determine if the city has
5 demonstrated that the conditions requiring Tri-Met to
6 provide restrooms and drinking fountains meet the reasonable
7 and necessary test. In Tri-Met III we observed "the
8 challenged order on the [No 94-003] segment included no
9 findings demonstrating the conditions requiring restrooms
10 and drinking fountains complied with the requirements of
11 section 7(1)(b) * * *." Additionally, there is no
12 indication that restrooms and drinking fountains are
13 required by the FEIS. Nor is there any indication that the
14 FEIS identified a Project impact that should be mitigated by
15 restrooms and drinking fountains. There was, however,
16 testimony that there are financial and maintenance
17 difficulties in providing restrooms, and that few light rail
18 facilities provide them. Record 57-58.

19 We conclude that the city has not demonstrated that the
20 improvements are reasonable and necessary to the Project.
21 The Project can be completed and operate without them.
22 Accordingly, we find that the improvements are not
23 reasonable and necessary to the Project as required by
24 section 7(1)(b).

25 Generally, LUBA will reverse a decision only if it

1 cannot be rectified on remand.⁶ However, in Tri-Met II the
2 court instructed that LUBA's reading of Senate Bill 573 is
3 premised on the understanding that it is "a land use
4 'business as usual' provision, when its whole purpose is the
5 opposite. * * * [The usual land use] process is superseded
6 for purposes of this project." Tri-Met II 261. In Tri-Met
7 IV at 52, the court added that "[a] remand to the city could
8 prolong the process indefinitely, notwithstanding the
9 statutory call for expedition, which both the Supreme Court
10 and we have emphasized that the legislature meant

⁶OAR 661-10-071 sets forth LUBA's authority to reverse or remand decisions and states:

- "(1) The Board shall reverse a land use decision when:
 - "(a) The governing body exceeded its jurisdiction;
 - "(b) The decision is unconstitutional; or
 - "(c) The decision violates a provision of applicable law and is prohibited as a matter of law.

- "(2) The Board shall remand a land use decision for further proceedings when:
 - "(a) The findings are insufficient to support the decision, except as provided in ORS 197.835(9)(b);
 - "(b) The decision is not supported by substantial evidence in the whole record;
 - "(c) The decision is flawed by procedural errors that prejudice the substantial rights of the petitioner(s); or
 - "(d) The decision improperly construes the applicable law."

1 literally."⁷

2 In accordance with the court's instruction, we find
3 that because the amenities required by the decision leading
4 to No. 94-002 and No. 94-003 are not reasonable and
5 necessary to the Project as a matter of law, the city cannot
6 impose them.

7 The city's decision is reversed.

⁷The reference to the Supreme Court is apparently to its opinion in a related case, Seto v. Tri-County Metro. Transportation Dist., 311 Or 456 (1991).