

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CITIZENS AGAINST IRRESPONSIBLE
5 GROWTH, BAKER ROCK CRUSHING CO.
6 and FISHER FARMS LLC,
7 *Petitioners,*

8
9 vs.

10
11 METRO,
12 *Respondent.*

13
14 LUBA No. 2000-141

15
16 FINAL OPINION
17 AND ORDER

18
19 Appeal from Metro.

20
21 Lawrence R. Derr, Portland, filed the petition for review and argued on behalf of
22 petitioners. With him on the brief was Josselson, Potter & Roberts.

23
24 Kenneth D. Helm, Portland, filed the response brief and argued on behalf of
25 respondent. With him on the brief was Daniel B. Cooper.

26
27 HOLSTUN, Board Member; BRIGGS, Board Chair; BASSHAM, Board Member,
28 participated in the decision.

29
30 AFFIRMED

10/08/2001

31
32 You are entitled to judicial review of this Order. Judicial review is governed by the
33 provisions of ORS 197.850.
34

35

NATURE OF THE DECISION

Metro adopted a Regional Transportation Plan (RTP) in 1989 and updated that plan in 1992. The ordinance that is challenged in this appeal adopts the Metro 2000 Regional Transportation Plan (2000 RTP), which replaces the existing RTP.

FACTS

Some explanation of the structure and historical development of the Metro Regional Framework Plan (RFP) and the 2000 RTP, is necessary before turning to petitioners' assignments of error. Metro's brief sets out a succinct description of that structure and historical development.

"Voters in Multnomah, Clackamas and Washington Counties created the Metropolitan Service District (Metro) in 1978 to manage certain activities whose effects transcend city and county boundaries. Fourteen years later, voters in the district approved a home rule charter for Metro (November 7, 1992). The charter made regional planning Metro's primary function and directed Metro to adopt a [RFP] addressing prescribed matters, including regional transportation.

"To guide its own planning, Metro adopted Regional Growth Goals and Objectives ('RUGGOs') in 1991. Metro made substantial amendments to the RUGGOs in 1995, most significantly to incorporate the 2040 Growth Concept.

"ORS Chapter 268 is Metro's organic legislation; it authorized the charter election. Among other things, Chapter 268 requires Metro's charter-required RFP to consolidate Metro's goals, policies and requirements into the plan. ORS 268.380(2). The statute also clarifies the relationship between the RFP and city and county comprehensive plans. It gives Metro authority to require local governments to change their plans to be consistent with the RFP, but [Metro requires such changes] through 'functional plans' that address designated subjects of regional concern, such as transportation. ORS 268.390(2) and (4).

"Metro adopted its RFP on December 11, 1997, based upon the 2040 Growth Concept and the RUGGOs. As the RFP states in its Introduction:

"While a new document, the [RFP] incorporates goals, objectives and policies in existing Metro legislation, including

1 the [RUGGOs], the 2040 Growth Concept, * * * and the
2 [RTP].” Respondent’s Brief 2-3.

3 Chapter 2 of the 1997 RFP is entitled “Transportation” and explains that it “presents
4 the overall policy framework for specific transportation goals, objectives and actions
5 contained in the [RTP].” RFP 60. The challenged decision replaces Chapter 2 of the 1997
6 RFP with the Introduction and Chapter 1 of the 2000 RTP.¹ The 2000 RTP also discusses
7 three alternative sets of transportation projects and programs: (1) a Fiscally Constrained
8 System, (2) a Priority System, and (3) a Preferred System. The challenged decision selects
9 the Priority System, which petitioners contend violates two 2000 RTP policies, which are
10 also part of the RFP, and the Transportation Planning Rule (TPR).

11 **SCOPE OF REVIEW**

12 The challenged decision is clearly a “land use decision,” as ORS 197.015(10) defines
13 that term. Therefore, under ORS 197.825(1), we have jurisdiction to review the challenged
14 decision.² However, ORS 197.825(2) specifies a number of limitations on LUBA’s
15 exclusive jurisdiction to review land use decisions. In particular, ORS 197.825(2)(c)
16 provides that LUBA’s scope of review does not include “matters over which * * * the Land
17 Conservation and Development Commission [(LCDC)] has review authority under ORS
18 197.251[.]” Because the 2000 RTP is a matter over which LCDC has “review authority
19 under ORS 197.251,” to determine compliance with Statewide Planning Goal 12
20 (Transportation), Metro argues that we do not have jurisdiction to review petitioners’
21 arguments under the second assignment of error concerning compliance with the TPR, which
22 LCDC adopted to implement Goal 12. *See Commercial Real Estate Economic Coalition v.*

¹The remainder of the 2000 RTP is adopted as an appendix to the RFP.

²ORS 197.825(1) provides:

“Except as provided in ORS 197.320 and [ORS 197.825(2) and (3)], the Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision or limited land use decision * * * in the manner provided in ORS 197.830 to 197.845.”

1 Metro, 37 Or LUBA 171, 190 (1999) (LUBA’s scope of review does not include review of a
2 Metro functional plan for compliance with Goal 5 (Open Spaces, Scenic and Historic Areas,
3 and Natural Resources) where the functional plan is part of the Metro RFP and the RFP has
4 been submitted for acknowledgment review by LCDC under ORS 197.251).

5 We first address the parties’ arguments concerning our authority to consider the
6 issues that petitioners present under the second assignment of error. Because we believe a
7 similar question is raised concerning our scope of review to consider petitioners’ first
8 assignment of error, we then consider that question on our own motion. *Adams v. City of*
9 *Ashland*, 33 Or LUBA 552, 554 (1997); *Interlachen, Inc. v. City of Fairview*, 25 Or LUBA
10 618, 621 (1993); *CBH Company v. City of Tualatin*, 16 Or LUBA 399, 405 n 6 (1988).

11 **SECOND ASSIGNMENT OF ERROR**

12 The 2000 RTP was adopted in part to meet Metro’s obligations under the TPR to
13 adopt a Regional Transportation System Plan. The 2000 RTP, as part of the RFP, has been
14 submitted to LCDC for acknowledgment that it complies with the statewide planning goals.
15 ORS 197.251; ORS 197.274(1)(a). LCDC reviewed the 2000 RTP for compliance with the
16 statewide planning goals, including Goal 12 and its implementing administrative rule, the
17 TPR. On July 9, 2001, LCDC issued a Compliance Acknowledgment Continuance Order in
18 which it identified certain amendments to the 2000 RTP that Metro must adopt to comply
19 with Goal 12 and the TPR. Respondent’s Brief App B-2.

20 Petitioners respond that LUBA may consider their TPR arguments under this
21 assignment of error because the TPR was *also* adopted to implement ORS 197.712(2)(e).³

³The TPR states that the purposes of the rule include implementing Goal 12 and ORS 197.712(2)(e). OAR 660-012-0000. As relevant ORS 197.712(2) provides:

“By the adoption of new goals or rules, or the application, interpretation or amendment of existing goals or rules, the Land Conservation and Development Commission shall implement all of the following:

“* * * * *

1 Petitioners contend that because the TPR was adopted to implement both statutory and
2 statewide planning goal requirements, LUBA’s jurisdiction to consider the matters presented
3 in the second assignment of error is not affected by ORS 197.825(2)(c).

4 We might agree with petitioners if ORS 197.712(2)(e) imposed obligations that in
5 some way go beyond or are different from those imposed by Goal 12 and the other statewide
6 planning goals, and the TPR was adopted to implement such additional obligations.
7 However, petitioners make no argument that the TPR does so. Petitioners identify no TPR
8 obligations that are required by ORS 197.712(2)(e) that go beyond or are in some other way
9 different from the requirements imposed by Goal 12 or other statewide planning goals.
10 Neither do petitioners argue that the TPR violations that they allege under the second
11 assignment of error are beyond LCDC’s jurisdiction in its acknowledgment review under
12 ORS 197.251. LCDC has already reviewed the 2000 RTP for compliance with the statewide
13 planning goals and the TPR, and issued a final decision. In these circumstances, we believe
14 LUBA duplication of that review of the 2000 RTP for compliance with the TPR in this
15 appeal is expressly prohibited by ORS 197.825(2)(c).

16 We do not consider petitioners’ second assignment of error further.

17 **FIRST ASSIGNMENT OF ERROR**

18 As amended by the 2000 RTP, RFP Policies 3.0 (Urban Form) and 13.0 (Regional
19 Motor Vehicle System) provide in relevant part:

20 **“Policy 3.0. Urban Form**

21 “Facilitate implementation of the 2040 Growth Concept with specific
22 strategies that address mobility and accessibility needs and use transportation
23 investments to leverage the 2040 Growth Concept.”

“(e) A city or county shall develop and adopt a public facility plan for areas within an urban growth boundary containing a population greater than 2,500 persons. The public facility plan shall include rough cost estimates for public projects needed to provide sewer, water and transportation for the land uses contemplated in the comprehensive plan and land use regulations. Project timing and financing provisions of public facility plans shall not be considered land use decisions.”

1 **“Policy 13.0. Regional Motor Vehicle System**

2 “Provide a regional motor vehicle system of arterials and collectors that
3 connect the central city, regional centers, industrial areas and intermodal
4 facilities, and other regional destinations, and provide mobility within and
5 through the region.

6 “* * * * *

7 “e. Objective: Maintain an acceptable level of service on the regional
8 motor vehicle system during peak and off-peak periods of demand, as
9 defined in Table 1.2.”

10 Under their first assignment of error petitioners argue that the Priority System of
11 transportation projects and improvements that is selected by the challenged decision will not
12 achieve RFP Policy 3.0 and Policy 13.0 and therefore violates RFP Policy 7.3, which
13 requires that functional plans must be consistent with the RFP.⁴ Petitioners also argue that
14 Metro erred by failing to adopt *findings* that demonstrate that the Priority System is
15 consistent with Policy 3.0 and Policy 13.0 (Objective e). Petitioners contend that such
16 findings are required by RFP Policy 7.5.⁵

⁴As relevant, RFP Policy 7.3 provides:

*“The policies included in [RFP] Policies in Chapters 1-6 of this Plan are regional goals and objectives consistent with ORS 268.380(1). Many of these policies were previously adopted and acknowledged as the [RUGGOs]. * * * All functional plans adopted by the Metro Council shall be consistent with these goals and objectives. * * *”* RFP 162 (emphases added).

ORS 268.380(1)(a) directs that Metro “[a]dopt land-use planning goals and objectives for the district consistent with [the statewide planning goals].” Although there is some room for confusion, we agree with petitioners that the requirement in the third of the above-quoted sentences of RFP Policy 7.3 for consistency with “these goals and objectives” requires consistency with the RFP Policies. This is because the first sentence of RFP Policy 7.3 explains that RFP Policies “are regional goals and objectives,” within the meaning of ORS 268.380(1).

⁵As relevant, RFP Policy 7.5 provides:

“The Metro Council shall hold a public hearing on [a] proposed [functional] plan and afterwards shall:

- “● adopt the proposed functional plan; or
- “● refer the proposed functional plan to MPAC * * *; or

1 **A. Consistency of the 2000 RTP Priority System with RFP Policy 3.0 and**
2 **Policy 13.0 (Objective e)**

3 Both petitioners and Metro assume that the issue of whether the Priority System that
4 is adopted by the RTP is consistent with Policy 3.0 and Policy 13.0 (Objective e) is one that
5 is within our scope of review. However, as we have already explained, if that issue is a
6 matter that is within LCDC review jurisdiction under ORS 197.251, it is not an issue that we
7 may consider in this appeal.

8 While RFP 7.3 requires that the 2000 RTP (as a functional plan) must be consistent
9 with the RFP, Goal 2 (Land Use Planning) also imposes such a consistency requirement.⁶

-
- “● amend and adopt the proposed functional plan; or
 - “● reject the proposed functional plan.

“The proposed functional plan shall be adopted by ordinance and shall include *findings of consistency with these goals and objectives.*” RFP 164 (emphasis added).

As was the case for RFP 7.3, we understand the reference in RFP 7.5 to “these goals and objectives” to be a reference to the RFP Policies which are “regional goals and objectives,” within the meaning of ORS 268.380(1).

⁶As relevant, Goal 2, Part I provides:

“City, county, state and federal agency and special district plans * * * related to land use shall be consistent with * * * regional plans adopted under ORS Chapter 268.

“All land use plans shall include identification of issues and problems, inventories and other factual information for each applicable statewide planning goal, evaluation of alternative courses of action and ultimate policy choices, taking into consideration social, economic, energy and environmental needs. * * * The plans shall be the basis for specific implementation measures. These measures shall be consistent with and adequate to carry out the plans. * * *

“* * * * *

“**Implementation Measures** -- are the means used to carry out the plan. These are of two general types: (1) management implementation measures such as ordinances, regulations or project plans, and (2) site or area specific implementation measures such as permits and grants for construction, construction of public facilities or provision of services.

“**Plans** -- as used here encompass all plans which guide land-use decisions, including both comprehensive and single-purpose plans of cities, counties, state and federal agencies and special districts.”

1 Goal 2 requires that “[c]ity, county, state and federal agency and special district plans and
2 actions related to land use” must be consistent with “regional plans adopted under ORS
3 Chapter 268.” Goal 2 also requires that “plans shall be the basis for specific implementation
4 measures [and t]hese measures shall be consistent with and adequate to carry out the plans.”
5 The 2000 RTP is adopted as part of the RFP and as a measure to implement the RFP. The
6 RFP is clearly a regional plan “adopted under ORS Chapter 268,” and the 2000 RTP must be
7 consistent with the RFP.⁷ See *D.S. Parklane Development, Inc. v. Metro*, 165 Or App 1, 22,
8 994 P2d 1205 (2000) (Metro land use actions must be “consistent with and based upon the
9 applicable plan and ‘related implementation measures’”); *Residents of Rosemont v. Metro*, 38
10 Or LUBA 199, 207-08 (2000), *rev’d on other grounds* 173 Or App 321, 21 P3d 1108 (2001)
11 (same).

12 If, as petitioners allege, the Priority System that is adopted by the 2000 RTP is
13 inadequate to carry out and therefore inconsistent with RFP Policy 3.0 and Policy 13.0
14 (Objective e) set out above, we see no reason why that inconsistency violates RPF Policy 7.3
15 in any way that is different from the way it would violate Goal 2. Accordingly, the
16 consistency issues that petitioners raise under the first assignment of error are “matters over
17 which [LCDC] has review authority under ORS 197.251.” Under ORS 197.825(2)(c), our
18 scope of review does not include such matters.⁸

⁷Although ORS 197.015(16) specifically provides that the RFP is not itself a comprehensive plan, the RFP is clearly a regional plan “adopted under ORS Chapter 268” and a “plan” as that term is used in Goal 2. As a result of the integrated, cumulative nature of the RFP, which incorporates the 2000 RTP, the 2000 RTP is a “plan,” a regional plan “adopted under ORS Chapter 268” and an “implementing measure,” as Goal 2 defines those terms.

⁸Petitioners apparently appeared before LCDC in opposition to Metro’s acknowledgment request. We do not know whether petitioners raised their concerns that the 2000 RTP is inconsistent with the cited RFP Policy and Objective during the proceedings before LCDC. However, whether petitioners actually raised those consistency concerns before LCDC has no bearing on whether such concerns are “matters over which [LCDC] has review authority under ORS 197.251.”

1 **B. The RFP Requirement for Findings that the 2000 RTP is Consistent with**
2 **the RFP**

3 As noted earlier, RFP 7.5 requires that Metro adopt findings that demonstrate that the
4 2000 RTP is consistent with the RFP “goals and objectives,” which we have already
5 concluded include RFP Policies. Metro adopted no findings that are specifically directed at
6 RFP Policies or the Objectives that are included within some of those policies. However, we
7 have already concluded that Goal 2 imposes a substantive legal requirement that the 2000
8 RTP be consistent with the RFP Policies. We have also concluded that LCDC has
9 jurisdiction to review the 2000 RTP for compliance with that consistency requirement. The
10 findings that are required by RFP Policy 7.5 are simply a *means* by which Metro may
11 demonstrate that it satisfies the RFP/2000 RTP consistency requirement that is imposed by
12 Goal 2 and RFP Policy 7.3. Therefore, the RFP Policy 7.5 requirement for findings of
13 consistency is either properly viewed as included within LCDC’s acknowledgment review of
14 the 2000 RTP or rendered legally irrelevant by LCDC’s obligation in its acknowledgment
15 review to ensure that the RFP and 2000 RTP are consistent, as required by Goal 2.
16 Petitioners’ findings arguments under the first assignment of error are either outside our
17 scope of review or provide no independent basis for reversal or remand.

18 We do not consider petitioners’ first assignment of error further.

19 Because the petition for review presents no bases for reversal or remand that are
20 within our scope of review, Metro’s decision is affirmed.