

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 FRIENDS OF EUGENE and ROB HANDY,
5 *Petitioners,*

6
7 vs.

8
9 LANE COUNCIL OF GOVERNMENTS
10 and METROPOLITAN POLICY COMMITTEE,
11 *Respondents,*

12
13 and

14
15 OREGON DEPARTMENT
16 OF TRANSPORTATION,
17 *Intervenor-Respondent.*

18
19 LUBA No. 2004-223

20
21 FINAL OPINION
22 AND ORDER

23
24 Appeal from Lane Council of Governments.

25
26 Jannett Wilson, Eugene, filed the petition for review and argued on behalf of petitioners.

27
28 Kathryn P. Brotherton, Eugene, filed a joint brief and argued on behalf of respondent. With
29 her on the brief were Glenn Klein and Harrang Long Gary Rudnick PC.

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31 Kathryn A. Lincoln, Assistant Attorney General, Salem, filed a joint brief and argued on
32 behalf of intervenor-respondent.

33
34 DAVIES, Board Chair; BASSHAM, Board Member, participated in the decision.
35 HOLSTUN, Board Member, did not participate in the decision.

36
37 DISMISSED

07/27/2005

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

NATURE OF THE DECISION

Petitioners appeal the Metropolitan Planning Organization’s (MPO) adoption of Resolution 2004-06, adopting an update to the Central Lane Regional Transportation Plan.

MOTION TO STRIKE

Respondent Lane Council of Governments (LCOG) and Intervenor-Respondent Oregon Department of Transportation (ODOT) move to strike Appendix “A” to the petition for review.¹ Appendix “A” includes (1) a printout of the LCOG home page showing organizational definitions and functions, (2) two pages of a printout from the LCOG website describing TransPlan and including a table of contents for the 2001 TransPlan and 2002 TransPlan, as amended, and (3) a printout from the LCOG website of the LCOG Charter. Respondents move to strike Appendix “A” because it includes documents that are not included in the record of this appeal.

Petitioners claim that LUBA may take official notice of the challenged documents. We disagree. The documents are not ordinances or enactments of which we may take official notice under Oregon Evidence Code 202. They also argue that LUBA may consider the extra-record evidence because it is included to assist LUBA in determining jurisdiction. The material, while cited in their petition for review in support of their argument that LUBA has jurisdiction, has no apparent bearing on our jurisdiction. Accordingly, respondents’ motion to strike Appendix “A” is granted.

Respondents also move to strike footnote three of the petition for review. That footnote, respondents assert contains unsupported “suspicions” regarding the decision maker’s motivations for adopting the challenged decision. Parties often include extraneous argument regarding the issues on appeal. To the extent footnote three is irrelevant to the issues in this appeal, LUBA will not consider it. Respondents’ motion to strike footnote three is denied.

¹ Respondent and intervenor-respondent filed a joint brief. We refer to them collectively in this opinion as respondents.

1 **FACTS**

2 We take the summary of material facts in large part from respondents’ brief:

3 “Federal law required urbanized areas with a population of 50,000 or greater to
4 have a Metropolitan Planning Organization (MPO) to develop transportation plans
5 and programs for the area. The Lane Council of Governments (LCOG) is the
6 designated MPO for the Eugene-Springfield metropolitan area. The LCOG Board
7 delegated responsibility for MPO policy functions to the Metropolitan Policy
8 Committee (MPC), a committee of officials from the cities of Eugene, Springfield
9 and Coburg, Lane County, the Lane Transit District (LTD) and the Oregon
10 Department of Transportation (ODOT).

11 “In 1990, the U.S. government passed the Federal Clean Air Act Amendments and
12 in 1991 passed the Intermodal Surface Transportation Efficiency Act (ISTEA).
13 These new federal laws required MPOs to engage in additional transportation
14 planning to meet federal requirements. * * *

15 “In 1992 the Oregon Transportation Commission adopted the Oregon Highway
16 Plan and in 1995 the Land Conservation and Development Commission (LCDC)
17 adopted the Transportation Planning Rule (TPR), OAR 660-012 *et seq.*, to
18 implement Goal 12 of the statewide planning goals. Both of these state actions
19 required additional transportation planning and coordination by local jurisdictions to
20 meet state planning requirements, different than the planning and coordination
21 actions already required by federal law.” Brief of Respondents and Intervenor-
22 Respondent 2-3. (footnotes and citations omitted).

23 The MPO and local jurisdictions prepared a single document to address both state and federal
24 requirements. In 2001, the city councils of Eugene and Springfield, the Lane Transit District Board
25 and the Lane County Board of Commissioners adopted TransPlan to serve as the state-mandated
26 Transportation System Plan (TSP), and the MPO adopted the same document to serve as the
27 federally-mandated Regional Transportation Plan (RTP).²

28 “Following the adoption of *TransPlan*, in 2003 the 2000 federal census data was
29 released. The census data triggered two significant planning actions. First, the

² TransPlan provides, in pertinent part:

“Because *TransPlan* serves as **both** the federally required Regional Transportation Plan for the Eugene-Springfield area and as the Transportation Functional Plan for the *Eugene-Springfield Metropolitan Area General Plan (Metro Plan)*, two planning horizons are referred to in the document: 2015 and 2021. * * *” TransPlan 5-6 (emphasis added).

1 Federal Highway Administration (FHWA) and the Federal Transit Administration
2 (FTA) determined that the City of Coburg and additional urbanized land in Lane
3 County needed to be included into the MPO urbanized area to meet the federal
4 Transportation Equity Act for the 21st Century (TEA-21) (adopted in 1998)
5 transportation planning requirements. Second, with the natural population growth
6 and the inclusion of the City of Coburg into the MPO urbanized planning area, the
7 MPO exceeded 200,000 people. MPOs that exceed a population of 200,000 are
8 designated as Transportation Management Areas (TMA) and are subject to
9 additional federal planning requirements. TMAs must be re-certified for air quality
10 conformance **triennially**, maintain an RTP with a planning horizon of 20 years and
11 have updated fiscally constrained forecasts for revenue and costs. The failure to re-
12 certify within three years can result in the withholding of all federal funds and halt all
13 work on activities on federally-funded and/or regionally significant projects.

14 “Consequently, in August, 2003, the FHWA and FTA issued a Transportation
15 Planning Certification Review Report for the Central Lane Metropolitan Area
16 (which included the cities of Eugene, Springfield and Coburg and portions of Lane
17 County). The certification required that the Central Lane MPO make corrective
18 actions to the RTP by December 13, 2004. The MPO developed a work plan to
19 update the RTP to address each of the federal corrective actions. The update was
20 limited to the federally-mandated corrective actions, identified by staff as only minor
21 amendments, with the next (major) updates planned for 2005 and 2007.

22 “In developing its strategy to address the federal RTP updating requirements, the
23 MPO noted and considered that the Eugene-Springfield TSP (embodied in the
24 2001 *TransPlan*) was not due for an update until its next periodic review and that
25 the City of Coburg’s TSP is scheduled for an update in mid-2005. As such, the
26 MPO decided to separate the federally-mandated long range plan, the Regional
27 Transportation Plan (RTP), from the state mandated transportation system plan
28 (TSP) and to just address the pressing federal requirements. The newly updated
29 federally-mandated plan would be called the Central Lane Regional Transportation
30 Plan (RTP). Its purpose is to meet the ‘required update to the federal elements
31 embodied in the 2001 *TransPlan*.’ The document previously known as
32 ‘*TransPlan*’ would continue to meet the state TSP requirements set forth in the
33 TPR. Upon the MPO’s adoption of the federally-mandated RTP update, the
34 Eugene-Springfield metro area would have two separate transportation planning
35 documents – one meeting federal requirements and the other meeting the state TPR
36 requirements.” *Id.* at 6-7 (footnotes and citations omitted; emphasis in original).³

³ The RTP provides, in relevant part:

“Historically, *TransPlan* (the former name for the RTP) has served as both the federally required Regional Transportation Plan for the Eugene-Springfield area and as the Transportation Functional Plan (or Transportation System Plan –TSP) for the Eugene-

1 On December 9, 2004, the MPC adopted Resolution 2004-06, adopting the update to the
2 Central Lane Regional Transportation Plan. This appeal followed.

3 JURISDICTION

4 LUBA has exclusive jurisdiction to review land use decisions. ORS 197.825. ORS
5 197.015(10)(a) defines “land use decision” to include:

6 “(A) A final decision or determination made by a local government or special
7 district that concerns the adoption, amendment or application of:

8 “(i) The goals;

9 “(ii) A comprehensive plan provision;

10 “(iii) A land use regulation; or

11 “(iv) A new land use regulation[.]”

12 Petitioners allege that the challenged decision concerns the application of the statewide
13 planning goals, comprehensive plan, or land use ordinance because (1) it “integrates and
14 coordinates two local transportation system plans – “TransPlan”” and the Coburg TSP, (2) it
15 “contains transportation policies and expected actions” demonstrating compliance with the
16 transportation planning rule, and (3) “almost all of the ‘objectives’ and ‘policies’ of the plan are
17 based on various statewide land use goals, local comprehensive plan provisions, and/or local land
18 use ordinances.” Petition for Review 4.

19 Respondents argue that the RTP was adopted for the sole purpose of demonstrating
20 compliance with the federal regulations, and that it is therefore not a land use decision:

21 “Resolution 2004-06 is explicit that the adoption of the RTP update was done to
22 comply with federal requirements. Specifically, Resolution 2004-06 states that the
23 MPO is adopting the RTP update in order to comply with federal regulations that

Springfield Metro Plan. As a result of the 2000 census, the geographic boundary of the MPO
(and the RTP) expanded beyond the Eugene-Springfield metropolitan area, leading to the need
for two separate documents to apply to two different geographic areas.

“The Metropolitan [Policy] Committee (MPC) will adopt the RTP as the federal Regional
Transportation Plan. * * * .” Record 10.

1 require the MPO to adopt a long-range regional plan consistent with guidelines set
2 forth by the Federal Highway Administration and the Federal Transit
3 Administration. Further, the resolution states that ‘the primary purposes of the
4 update are to adjust the jurisdictional area of the plan to include the City of Coburg
5 and other parts of the urbanized area recognized by the 2000 census, adjust the
6 planning horizon out to 2025 and to update financial forecasts for revenue and
7 costs.’ Brief of Respondents and Intervenor-Respondent 9 (citations omitted).

8 The purpose or intent of a challenged decision, however, is not determinative of whether or not it is
9 a land use decision. While the purpose or intent may be instructive regarding the relevant inquiry, it
10 is not dispositive. The relevant inquiry is whether the challenged decision “concerns” the adoption,
11 amendment or application of the goals, comprehensive plan provisions or land use regulations. A
12 local government decision “concerns” the application of a statewide planning goal, comprehensive
13 plan provision or land use regulation if the decision maker (1) was required by law to apply the
14 goals, its plan or land use regulations as approval standards, but did not, or (2) in fact applied the
15 goals, plan provisions or land use regulations. *Jaqua v. City of Springfield*, 46 Or LUBA 566,
16 574, *rev’d on other grounds* 193 Or App 573, 91 P3d 817 (2004). We turn, then, to that
17 determination and address petitioners’ alleged bases for jurisdiction, outlined above.

18 Petitioners’ first basis is factually incorrect, as respondents explain: the RTP in fact does not
19 integrate TransPlan and the Coburg TSP. TransPlan remains its own independent document, and
20 the Coburg TSP, adopted in 1999, is currently scheduled for an update. Petitioners’ second and
21 third alleged bases for jurisdiction outlined above present a closer question. Petitioners argue that
22 the RTP policies cite and purport to demonstrate compliance with the TPR, and that the challenged
23 decision is therefore a land use decision.⁴ Petitioners are correct that the RTP contains numerous

⁴ The RTP provides:

“In compliance with provisions in TEA 21 and the TPR, the RTP contains transportation policies and expected actions and is financially constrained to revenues reasonably expected to be available.” Record 11.

1 citations to the TPR and to comprehensive plan provisions that appear to apply or implement those
2 cited provisions.⁵

3 Respondents argue, however, that

4 “a simple statement that the plan contains provisions that comply with the TPR does
5 not establish that the MPO *applied* the statewide planning goals to its adoption of
6 the 2004 RTP; stating that a plan *complies* with the TPR is not the same as
7 *applying* the TPR.

8 “* * * * *

9 “While the 2004 RTP does include citations to various statewide land use goals,
10 those citations are simply a carry-over from the 2001 RTP, *i.e.*, *TransPlan* (the
11 document that served as both the federally-mandated RTP and the state-mandated
12 TSP). The record contains an edited (*i.e.*, red-lined) version of *TransPlan*

⁵ For instance, the RTP provides:

“TSI Pedestrian Policy #1: Pedestrian Environment

“Provide for a pedestrian environment that is well integrated with adjacent land uses and is designed to enhance the safety, comfort, and convenience of walking.

“Policy Definition/Intent: This policy supports the provision of pedestrian connections between adjacent land uses, improved pedestrian access to transit stops and stations, safe and convenient pedestrian street crossing, and pedestrian amenities, including lighting. In more developed areas, such as downtowns, pedestrian design features improve the accessibility of destinations.

“Reference: Based on the TPR 660-12-045.” Record 51

Another policy provides:

“TSI Other Modes Policy #1: Eugene Airport

“Support public investment in the Eugene Airport as a regional facility and provide land use controls that limit incompatible development within the airport environs. Continue to use the *Eugene Airport Master Plan* as a guide for improvements of facilities and services at the airport.

“Policy Definition/Intent: The Eugene Airport/Mahlon Sweet Field is the major airport that provides commercial passenger, cargo, mail, and general aviation services to the metropolitan area. This airport also provides major services to Lane County residents outside of the metropolitan area. * * *

“Reference: Based on the TPR 660-12-045(2)(c); *Metro Plan* 1987 Transportation Element Policies 8-17.” Record 53-4.

1 (created by MPO staff to show the changes that were being made to *TransPlan* to
2 make the federally-mandated RTP a separate document from [the] state-mandated
3 TSP). The red-lined version of *TransPlan* clearly demonstrates that the statewide
4 planning goal citations existed in the 2001 *TransPlan* (to meet state planning
5 requirements) and were simply carried over into the 2004 RTP update. Petitioners
6 fail to demonstrate how carrying over these citations from the previous federally
7 recognized and state acknowledged transportation plan (*i.e.*, *TransPlan*) amount to
8 the MPO *applying* statewide planning goals to the RTP update.” Brief of
9 Respondents and Intervenor-Respondent 13-14 (citations omitted; emphasis in
10 original).

11 As far as we can tell, respondents are correct that *TransPlan* was used as a template, and
12 the MPC simply pasted many of the provisions of *TransPlan* into the new RTP. The RTP was not
13 adopted by the jurisdictions that would have been required to adopt it if it were to serve as the local
14 TSP, demonstrating compliance with the TPR. The purpose and intent of the decision maker was
15 to bifurcate the local TSP documents from the federally mandated RTP. It seems clear that the
16 decision maker used the *TransPlan* format and carried over some of the policies in *TransPlan* as a
17 result of the short timeline required for adoption of the RTP. However, the references to the TPR
18 and local comprehensive plan provisions are merely words on a page.

19 While provisions of the TPR and local comprehensive plan are cited in the RTP, petitioners
20 have not demonstrated that the MPC was required to apply, or that it in fact applied, the goals, a
21 comprehensive plan provision or land use regulation in adopting a federally mandated transportation
22 plan. *See Jaqua v. City of Springfield*, 46 Or LUBA at 574; *see also Price v. Clatsop County*,
23 25 Or LUBA 341, 347-48 (1993) (the burden is on petitioner to establish that the challenged
24 decision is a land use decision and where petitioner fails to identify any comprehensive plan
25 provision as applicable to, or argue that any plan provision is an approval standard for, the
26 challenged decision, LUBA does not have jurisdiction)). In our view, mere references to statewide
27 planning goals, comprehensive plan provisions or land use regulations in a transportation planning
28 document that is intended to demonstrate compliance with federal law is not an application of those
29 goals, plan provisions or land use regulations for purposes of ORS 197.015(10).

1 Accordingly, the challenged decision is not a land use decision, and LUBA lacks jurisdiction
2 to review it.⁶

3 The challenged decision is dismissed.

⁶ Respondents include a footnote addressing the significant impact test, arguing that petitioners failed to allege the significant impact test. Brief of Respondent and Intervenor-Respondent 15. *See Price*, 25 Or LUBA 341, 348 (where petitioner does not argue that a challenged decision is a land use decision under the significant impact test, and it is not obvious that it is, petitioner fails to establish jurisdiction). Petitioners in this case do not allege that the challenged decision satisfies the significant impact test, and they therefore have failed to establish that LUBA has jurisdiction over the challenged decision.