

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 HOME BUILDERS ASSOCIATION OF  
5 LANE COUNTY and HOME BUILDERS  
6 CONSTRUCTION COMPANY,  
7 *Petitioners,*

8  
9 vs.

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11 CITY OF SPRINGFIELD,  
12 CITY OF EUGENE and LANE COUNTY,  
13 *Respondents,*

14  
15 and

16  
17 METROPOLITAN WASTEWATER  
18 MANAGEMENT COMMISSION,  
19 *Intervenor-Respondent.*

20  
21 LUBA Nos. 2004-090, 2004-105 and 2004-114

22  
23 FINAL OPINION  
24 AND ORDER

25  
26 Appeal from City of Springfield, City of Eugene and Lane County.

27  
28 Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioner. With him  
29 on the brief was the Law Office of Bill Kloos, PC.

30  
31 Meg E. Kieran, Springfield, filed a joint response brief and argued on behalf of respondent  
32 City of Springfield. With her on the brief was Harold, Leahy and Kieran.

33  
34 Emily N. Jerome, Eugene, filed a joint response brief and argued on behalf of respondent  
35 City of Eugene. With her on the brief were Jerome Lidz and Harrang Long Gary Rudnick, PC.

36  
37 Stephen L. Vorhes, Assistant County Counsel, Eugene, filed a joint response brief and  
38 argued on behalf of respondent Lane County.

39  
40 G. David Jewett, Springfield, filed a joint response brief and argued on behalf of intervenor-  
41 respondent. With him on the brief was Thorp Purdy Jewett Urness Wilkinson, P.C.

42  
43 HOLSTUN, Board Member; DAVIES, Board Chair; BASSHAM, Board Member,

1 participated in the decision.

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DISMISSED

09/02/2005

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

**NATURE OF THE DECISION**

On May 6, 2004, the Metropolitan Wastewater Management Commission (MWMC) adopted the MWMC Facilities Plan for the Eugene-Springfield Wastewater Treatment Facilities. In this opinion we refer to that plan as the MWMC Facilities Plan.<sup>1</sup> In three separate resolutions, the cities of Eugene and Springfield and Lane County subsequently adopted that plan. Petitioners challenge those resolutions in this consolidated appeal.

**MOTION TO FILE REPLY BRIEF**

Petitioners move for permission to file a reply brief to respond to new matters raised in respondents' brief. The motion is granted.

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<sup>1</sup> A list and explanation of the more important acronyms and abbreviated document titles that we use in this opinion is set out below in alphabetical order to provide a single point of reference to assist in keeping up with them.

**Metro Plan.** The Eugene Springfield Metropolitan Area General Plan (Metro Plan), along with numerous refinement plans, is the comprehensive plan for the cities of Eugene and Springfield and the urban area of Lane County. Citations in this opinion to the Metro Plan are to the Metro Plan as amended through 2002. The Metro Plan defines refinement plan, as follows:

“Refinement plan: A detailed examination of the service needs and land use issues of a specific area, topic, or public facility. Refinement plans of the Metro Plan can include specific neighborhood plans, special area plans, or functional plans (such as TransPlan) that address a specific metro Plan element or sub-element on a city-wide or regional basis.” Metro Plan V-5.

**MWMC.** The Metropolitan Wastewater Management Commission. An entity that was created by an intergovernmental agreement between the cities of Eugene and Springfield and Lane County, to manage and operate a regional wastewater collection and treatment system.

**MWMC Facilities Plan.** The Metropolitan Wastewater Management Commission Facilities Plan for the Eugene-Springfield Regional Wastewater Treatment Facilities, which was adopted in 2004. The city and county decisions adopting the MWMC Facilities Plan are the subject of this appeal.

**PFSP.** The Eugene-Springfield Public Facilities and Services Plan (PFSP) is a Metro Plan refinement plan that was adopted to comply with the requirements of Statewide Planning Goal 11 (Public Facilities and Services). City and county decisions adopting amendments to the PFSP and Metro Plan, which are related to the MWMC Facilities Plan, are the subject of a different LUBA appeal, LUBA Nos. 2004-118, 2004-122, 2004-126, 2004-127 and 2004-142.

1    **INTRODUCTION**

2           Before attempting to untangle the party’s arguments, it may be useful to note what appears  
3 to be the real dispute between the parties. The cities have decided to make substantial  
4 improvements to the regional wastewater treatment system that serves the Eugene-Springfield urban  
5 area. Those improvements will cost approximately 144 million dollars. Some of that cost will be  
6 paid by system development charges (SDCs) that petitioners oppose.<sup>2</sup> Based on petitioners’  
7 statements at oral argument, it appears that petitioners oppose improvement projects that are  
8 proposed in the MWMC Facilities Plan that will expand treatment capacity at the regional  
9 wastewater treatment facility and prefer different improvement projects that would reduce the  
10 amount of effluent that must be treated by reducing collection system inflow and infiltration.  
11 Apparently the wastewater treatment facility improvements proposed in the MWMC Facilities Plan  
12 will require collection of more money through SDCs than the improvements that petitioners favor.  
13 Petitioners also object to the methodology used by the city to assess and collect SDCs.

14           With this general understanding of the underlying dispute, we next turn to the three related  
15 legal proceedings, two LUBA appeals and one writ of review proceeding in Lane County Circuit  
16 Court, in which some or all of the parties in this appeal are involved. Respondents attempt to  
17 separate and draw clear lines between these three separate proceedings and the legal issues that are  
18 presented in those proceedings. Petitioners lump the decisions at issue in the two LUBA appeals  
19 together and contend that the decisions at issue in both of those LUBA appeals are land use  
20 decisions and were a necessary precondition for the decision that is before the circuit court in the  
21 writ of review proceeding.

22           In this consolidated LUBA appeal, which we refer to as “the MWMC Facilities Plan  
23 appeal,” petitioners challenge respondents’ adoption of the MWMC Facilities Plan. In the other  
24 LUBA appeal, petitioners challenge the amendments to The Eugene-Springfield Public Facilities and

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<sup>2</sup> See n 5.

1 Services Plan (PFSP) and The Eugene Springfield Metropolitan Area General Plan (Metro Plan)  
2 that were adopted by respondents to make those comprehensive planning documents consistent  
3 with the MWMC Facilities Plan. In the Lane County Circuit Court writ of review proceeding,  
4 petitioners challenge the city’s decisions to adopt a systems development charge methodology to  
5 fund some of the projects that are identified in the MWMC Facilities Plan, in part, through systems  
6 development charges. We first briefly describe each of those proceedings and the decisions that are  
7 at issue in those proceedings before turning to the parties’ arguments in this appeal.

8 **A. The MWMC Facilities Plan Appeal**

9 Respondents provide a useful description of the MWMC and the decision making that led  
10 to adoption of the MWMC Facilities Plan, which we set out below:

11 “The MWMC is an intergovernmental entity created in 1977 by an  
12 intergovernmental agreement among Springfield, Eugene and Lane County.<sup>3</sup>  
13 MWMC owns and operates the Eugene-Springfield regional wastewater treatment  
14 facility designed to serve those areas within the urban growth boundary. At the time  
15 of its inception, MWMC’s facilities planning document was the ‘208 Plan.’ The  
16 208 Plan established the original projections, requirements and projects needed to  
17 serve the Eugene-Springfield community through 2005. The MWMC Facilities  
18 Plan is driven by: the conditions contained in MWMC’s NPDES wastewater  
19 discharge permit; DEQ’s May 2002 reissuance of the NPDES permit and new  
20 regulations or changes in regulatory policy that affect overall treatment capacity  
21 rating, treatment strategy, or effluent requirements; current constraints; future  
22 capacity and performance requirements; new treatment technologies; and existing  
23 operational issues.

24 “Following the opening of MWMC’s Water Pollution Control Facility (WPCF) in  
25 1984, and prior to 1997, no comprehensive evaluation of the wastewater treatment  
26 facility was performed. Beginning in the mid-1990s, MWMC initiated several  
27 studies and projects to develop a master plan. In early 2003, MWMC began a  
28 planning process intended to produce a long range facility planning document and  
29 project list and a methodology for financing the projects. The MWMC Facilities  
30 Plan, which is the result of that study and analysis, is intended to identify facility

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<sup>3</sup> According to the MWMC Facilities Plan, the MWMC is made up of seven commissioners. The City of Eugene appoints three commissioners, the City of Springfield appoints two commissioners, and Lane County appoints two commissioners. One commissioner from each jurisdiction is an elected official; the rest are lay representatives. Record 38-39.

1 enhancements and expansions that are needed to serve the community’s regional  
2 wastewater needs through 2025. The planning criteria include regulatory  
3 requirements, existing MWMC policies, adopted citizen advisory committee  
4 recommendations and direct Commission guidance. MWMC adopted the  
5 MWMC Facilities Plan and 20-year project list (the ‘MWMC Facilities Plan’) on  
6 May 6, 2004. \* \* \*” Respondents’ Brief 5-6 (record citations omitted).

7 After the MWMC adopted the MWMC Facilities Plan on May 6, 2004, the cities and  
8 county each separately adopted that plan.<sup>4</sup> The Executive Summary for the MWMC Facilities Plan  
9 includes the following:

10 “This Facilities Plan, prepared for the [MWMC] is the result of a comprehensive  
11 evaluation of the regional wastewater treatment facilities serving the Eugene-  
12 Springfield metropolitan area [Eugene-Springfield Water Pollution Control Facility  
13 (WPCF), major pump stations and interceptors, the Biosolids Management Facility  
14 (BMF), and Biocycle Farm, and the Seasonal Industrial Waste Facility (SIWF)]. \*  
15 \* \*

16 “Both Eugene and Springfield have separate sewer systems that come together into  
17 a regional system of pipes. Over 800 miles of sewer pipes and 47 pump stations  
18 transport wastewater to the WPCF. Most of the conveyance pipelines of 24 inches  
19 in diameter or greater and associated pumping facilities necessary to convey the  
20 region’s wastewater to the regional facility were included in the facilities’ original  
21 construction by regional and local resources.

22 “This newly adopted MWMC Facilities Plan is intended to identify facility  
23 enhancements and expansions that are needed to serve the community’s wastewater  
24 needs through 2025.” MWMC Facilities Plan ES-1.

## 25 **B. The Writ of Review Proceeding**

26 After respondents adopted their resolutions that endorse and adopt the MWMC Facilities  
27 Plan, the cities of Eugene and Springfield each adopted additional resolutions. In those resolutions,  
28 the cities adopted the SDC methodology that was recommended in the MWMC Facilities Plan.<sup>5</sup>

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<sup>4</sup> Public hearings and work sessions on the MWMC Facilities Plan began in November 2003. The final MWMC public hearing was held on April 22, 2004 and the MWMC adopted the MWMC Facilities Plan on May 6, 2004. The cities and county subsequently adopted the MWMC Facilities Plan on May 17, 2004 (Springfield), June 23, 2004 (Lane County) and June 28, 2004 (Eugene).

<sup>5</sup> ORS 223.299(4)(a) provides the following definition of SDC:

1 The SDCs that are to be collected by applying that methodology will finance a portion of some of  
2 the improvements listed in the MWMC Facilities Plan. Record 307-08. In the writ of review  
3 proceeding, petitioners challenged the SDC methodology. Petitioners in the writ of review  
4 proceeding also argued that the cities' SDC resolutions were improper, because at the time those  
5 resolutions were adopted, the facilities that were to be funded in part with SDCs had not yet been  
6 included in the PFSP and Metro Plan. The circuit court rejected all of petitioners' arguments and  
7 affirmed the city's resolutions. The parties informed LUBA at oral argument that the circuit court's  
8 decision has been appealed to the Court of Appeals.

9 **C. The PFSP Appeal**

10 Finally, the PFSP and Metro Plan amendments that are the subject of a separate  
11 consolidated LUBA appeal were initiated by the City of Springfield on February 4, 2004. After  
12 public hearings before the cities' and county's planning commissions and governing bodies, the  
13 disputed amendments were adopted on July 19, 2004 (Springfield), July 31, 2004 (Eugene) and  
14 August 25, 2004 (Lane County).<sup>6</sup> The PFSP and Metro Plan amendments were adopted to  
15 comply with Goal 11 (Public Facilities and Services) and the Goal 11 administrative rule, OAR  
16 chapter 660, division 11. Respondents describe the Goal 11 role that is played by the PFSP and  
17 Metro Plan as follows:

18 "Urban facilities and services within the urban growth boundary are provided by the  
19 City of Eugene, the City of Springfield, Lane County, Eugene Water and Electric  
20 Board (EWEB), the Springfield Utility Board (SUB), [MWMC], electric  
21 cooperatives and special service districts. The Metro Plan distinguishes between its

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“‘[SDC]’ means a reimbursement fee, an improvement fee or a combination thereof assessed or collected at the time of increased usage of a capital improvement or issuance of a development permit, building permit or connection to the capital improvement. ‘[SDC]’ includes that portion of a sewer or water system connection charge that is greater than the amount necessary to reimburse the local government for its average cost of inspecting and installing connections with water and sewer facilities.”

<sup>6</sup> The February 2004 to August 25, 2004 public hearing and adoption time period for the PFSP and Metro Plan amendments overlapped the November 2003 to June 28, 2004 public hearing and adoption time period for the MWMC Facilities Plan. *See* n 4. The adoption process for the PFSP and Metro Plan amendments was completed approximately two months after the adoption process for the MWMC Facilities Plan was completed.

1 PFSP and the service provider planning documents; it states; ‘Local facility master  
2 plans and refinement plans provide more specific project information [than the  
3 PFSP].’ In distinguishing the PFSP from service provider plans, the Metro Plan  
4 describes the purposes of the PFSP as to provide general guidance direction.  
5 Service provider plans are intended to be a guide for ‘detailed planning and project  
6 implementation.’” Respondents’ Brief 9.

7 If we understand respondents correctly, they contend that the cities’ and county’s Goal 11 public  
8 facility plan, the PFSP, has been adopted as a Metro Plan refinement plan. The MWMC Facilities  
9 Plan, like the detailed facility planning of other regional service providers, are generally consistent  
10 with that Goal 11 public facility plan. However, neither the MWMC Facilities Plan nor any of those  
11 other detailed facility plans are part of the cities’ and county’s Goal 11 public facility plan unless the  
12 cities and county amend the PFSP to incorporate those plans, in whole or in part.

#### 13 **D. The Issues**

14 The issue presented in the MWMC Facilities Plan appeal is whether respondents’ collective  
15 decision to adopt that plan is a land use decision.<sup>7</sup> We resolve that issue in this appeal. The issue  
16 presented in the writ of review proceeding concerns the legal sufficiency of the SDC methodology  
17 that the cities adopted following adoption of the MWMC Facilities Plan. The Lane County Circuit  
18 Court has rejected petitioners’ challenge to the SDC methodology, and the circuit court’s judgment  
19 has been appealed to the Court of Appeals. The remaining issue concerns the legal sufficiency of  
20 the PFSP and Metro Plan amendments. We address that issue in a separate opinion issued this  
21 date in the PFSP appeal.

#### 22 **JURISDICTION**

23 LUBA has exclusive jurisdiction to review land use decisions. ORS 197.825(1). As  
24 defined by ORS 197.015(10)(a)(A), a land use decision includes:

25 “A final decision or determination made by a local government or special district  
26 that concerns the adoption, amendment or application of:

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<sup>7</sup> Respondents concede that they did not adopt the MWMC Facilities Plan as a land use decision and did not apply Goal 11 or the Goal 11 administrative rule in adopting the MWMC Facilities Plan.



- 1           “(i)     The goals;
- 2           “(ii)    A comprehensive plan provision;
- 3           “(iii)   A land use regulation; or
- 4           “(iv)    A new land use regulation[.]”

5   The parties dispute whether the cities’ and county’s decisions to adopt the MWMC Facilities Plan  
6   are land use decisions.

7           The jurisdictional question presented in this appeal is relatively straightforward. Are three  
8   city and county decisions that collectively adopt the MWMC Facilities Plan (a plan that appears to  
9   include all the elements that are required by the Goal 11 rule and is the kind of facilities plan that is  
10   envisioned by the Goal 11 rule) land use decisions that must be adopted following land use decision  
11   making procedures and in accordance with Goal 11 and its implementing rule?<sup>8</sup> Petitioners contend  
12   that they are.

13           “The 2004 MWMC Facilities Plan is a land use decision for any number of reasons:  
14   the Plan involved Goal 11 because it meets the definition of a ‘public facilities Plan’  
15   [within] the meaning of the Goal 11 Rule; approval of the Plan applied policies from  
16   the Metro Plan and the PFSP (2001); the Plan is the only planning document that  
17   establishes a need for the new wastewater facilities approved in the Plan; and the  
18   Plan effectively amends the PFSP. The Board need only find that the adoption of  
19   the 2004 MWMC Facilities Plan was a land use decision for one of these reasons  
20   to remand the decision.” Petition for Review 10.

21           Respondents, on the other hand, contend the MWMC Facilities Plan has nothing to do with  
22   land use. According to respondents, it was adopted to comply with the ORS 223.309 requirement  
23   that respondents adopt a “public facilities plan \* \* \* that includes a list of \* \* \* capital  
24   improvements” before adopting a system development charge methodology to collect system  
25   development charges to pay the cost of such improvements.<sup>9</sup> According to respondents, ORS

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<sup>8</sup> OAR 660-011-0010(1) sets out the required elements of a Goal 11 public facility plan. See n 18. Petitioners point to various parts of the MWMC Facilities Plan that appear to supply what OAR 660-011-0010(1) requires of a Goal 11 public facility plan. Petition for Review 16-17.

<sup>9</sup> ORS 223.309 provides:

1 223.314 expressly provides that “establishment \* \* \* of a \* \* \* plan or list adopted pursuant to  
2 ORS 223.309 \* \* \* is not a land use decision.”<sup>10</sup> Because the MWMC Facilities Plan was  
3 adopted to comply with ORS 223.309, and ORS 223.314 provides that establishment of such a  
4 plan is not a land use decision, respondents contend that LUBA does not have jurisdiction to review  
5 the MWMC Facilities Plan.

6 **A. Issue Preclusion**

7 Respondents argue:

8 “Under the facts of this case, the issue of whether the MWMC Facilities Plan is a  
9 plan pursuant to ORS 223.309 and therefore subject to the exemption of ORS  
10 223.314 or a land use plan subject to the provisions of ORS Chapter 197 was  
11 raised, briefed on its merits, and litigated in the writ of review proceeding in Lane  
12 County Circuit Court. \* \* \*” Respondents’ Brief 13 (footnote omitted).

13 Respondents contend that petitioners are precluded from relitigating that issue in this LUBA appeal.  
14 For the reasons explained below, we do not agree with respondents’ formulation of the  
15 jurisdictional issue in this appeal. Respondents assume that the MWMC Facilities Plan must either  
16 be one of the types of plans mentioned in the ORS 223.309 or a Goal 11 public facilities plan.  
17 Stated differently, we understand respondents implicitly to contend that the MWMC Facilities Plan  
18 could not be both an ORS 223.309 plan that LUBA lacks jurisdiction to review and a *de facto*

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“(1) Prior to the establishment of a system development charge by ordinance or resolution, a local government shall prepare a capital improvement plan, *public facilities plan*, master plan or comparable plan that includes a list of the capital improvements that may be funded with improvement fee revenues and the estimated cost and timing for each improvement.

“(2) A local government that has prepared a plan and the list described in subsection (1) of this section may modify such plan and list at any time.” (Emphasis added.)

<sup>10</sup> ORS 223.314 provides:

“The establishment, modification or implementation of a system development charge, or a plan or list adopted pursuant to ORS 223.309, or any modification of a plan or list, is not a land use decision pursuant to ORS chapters 195 and 197.”

1 Goal 11 public facility plan that LUBA does have jurisdiction to review for compliance with  
2 statewide planning requirements that have nothing to do with SDCs.

3 In *Drews v. EBI Companies*, 310 Or 134, 139-40, 795 P2d 531 (1990), the Oregon  
4 Supreme Court explained the requirements for issue preclusion:

5 “The issue preclusion branch of preclusion by former adjudication, formerly called  
6 collateral estoppel, precludes future litigation on a subject issue only if the issue was  
7 ‘actually litigated and determined’ in a setting where ‘its determination was essential  
8 to’ the final decision reached. *North Clackamas School Dist. v. White*, 305 Or  
9 48, 53, 750 P2d 485, *modified* 305 Or 468, 752 P2d 1210 (1988); Restatement  
10 (Second) of Judgments § 17(3) (1982); *see also id.* at § 27. This court has  
11 previously explained issue preclusion as follows:

12 “‘If a claim is litigated to final judgment, the decision on a particular  
13 issue or determinative fact is conclusive in a later or different action  
14 between the same parties if the determination was essential to the  
15 judgment.’ *North Clackamas School Dist. v. White*, *supra*, 305  
16 Or at 53.

17 “Issue preclusion applies to an issue of either fact or law. Restatement (Second) of  
18 Judgments § 27 (‘[w]hen an issue of fact or law is actually litigated and determined  
19 by a valid and final judgment, and the determination is essential to the judgment, the  
20 determination is conclusive’). \* \* \*”

21 We set out below the text from the circuit court’s judgment that the parties rely on in asserting their  
22 respective position regarding whether the issue of LUBA’s jurisdiction in these appeals has already  
23 been decided by the circuit court:

24 “Petitioners explain that the SDC Methodology must be based on projects  
25 contained in the 309 plan and list, pursuant to ORS 223.309. This list must come  
26 from the city’s comprehensive plan, which is a planning document that draws its  
27 projects from the city’s PFSP. While the SDC statute specifically states that an  
28 SDC methodology is not a land use decision (thereby disallowing jurisdiction by  
29 LUBA), Petitioners assert that the comprehensive plan and the PFSP are both land  
30 use documents. Because the projects included in the SDC methodology are  
31 dependent upon projects from the 309 plan and list, and this list comes from the  
32 PFSP, Petitioners believe there is a ‘link’ between the land use statutes and the  
33 SDC statute. On this basis, Petitioners argue that the projects identified in the 309  
34 plan and list were improperly adopted before these projects were formally amended  
35 to the PFSP.

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“\* \* \* \* \*

“This Court agrees with Intervenor’s understanding of the operative statute. The statute simply requires that a facilities plan (in generic terms) be created prior to the adoption of an SDC. The purpose of this plan is to contain the list of projects to be funded by the SDC, and thereby give the public notice of the purpose of the charge. The statute clearly does not require that these projects be included in a land use plan prior to their inclusion in the 309 plan and list, and there is no reason to do so. *Even if the Petitioners were correct, they have not been harmed in any way—they were given notice of the projects in the 309 Plan and List through the 2004 MWMC Facilities Plan, and they had the opportunity to challenge them in that context.*” Respondents’ Brief App 11 (Emphasis added.).

The decisions that were before the circuit court in the writ of review proceeding were the city decisions that adopted an SDC methodology. The resolutions by which the cities and county adopted or endorsed the MWMC Facilities Plan were not before the circuit court. The above-quoted language in the circuit court’s decision was responding to arguments that petitioners advanced about alleged links between the facility list in the MWMC Facilities plan and the Metro Plan and PFSP and alleged impropriety in the timing of the decisions that adopted the MWMC Facilities Plan and the decisions that adopted the Metro Plan and PFSP amendments. However, the only issue that was actually litigated and essential to the circuit court’s decision was whether the adopted MWMC Facility Plan satisfied the ORS 223.309 requirement that the cities first adopt one of the types of plans listed in ORS 223.309 before enacting an SDC ordinance. Whether that MWMC Facility Plan had been *properly* adopted was not before the circuit court, and neither was the issue of whether the decisions that adopted the MWMC Facility Plan might also be land use decisions if the MWMC Facility Plan was adopted in part to comply with Goal 11. The last sentence from the circuit court’s judgment quoted above suggests that the court believed that any contention that the decisions adopting the MWMC Facility Plan improperly predated the Metro Plan and PFSP amendments or were improper for other land use planning-related reasons could be raised in an appropriate appeal of the MWMC Facility Plan. Whatever the circuit court meant by that sentence, this appeal is such an appeal, and the circuit court did not render a final judgment

1 concerning whether LUBA has jurisdiction over this appeal. We reject respondents’ issue  
2 preclusion argument.<sup>11</sup>

3 **B. The Text and Context of ORS 223.309, 223.314**

4 We next turn to respondents’ understanding of the language in ORS 223.314 that provides  
5 that “a plan or list adopted pursuant to ORS 223.309 \* \* \* is not a land use decision.” *See* n 10.  
6 If ORS 223.309 and 223.314 are interpreted literally and in isolation, respondents’ position that the  
7 decisions adopting the MWMC Facilities Plan are not land use decisions and are not reviewable by  
8 LUBA is certainly possible. While the MWMC Facilities Plan may be a more comprehensive  
9 planning document than is necessary to meet the minimum requirements of ORS 223.309, there  
10 does not appear to be any question that it is sufficient to constitute a “public facilities plan \* \* \* or  
11 comparable plan,” within the meaning of ORS 223.309. *See* n 9. Petitioners do not argue  
12 otherwise.

13 However, as petitioners correctly argue, in attempting to understand the legislature’s intent  
14 in adopting ORS 223.309 and 223.314, both the text and context of those statutes must be  
15 considered. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611-12, 859 P2d 1143  
16 (1993). The statutory context includes ORS 197.712(2)(e), which provides:

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

24 In adopting a public facilities plan under ORS 197.712(2)(e), a city or county will  
25 necessarily apply Goal 11 and the Goal 11 rule and that decision will therefore fall within the ORS  
26 197.015(10)(a)(A) definition of land use decision. Therefore, a post acknowledgment plan

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<sup>11</sup> Petitioners offer other reasons why issue preclusion should not apply in this case. We need not and do not consider those other reasons.

1 amendment decision under ORS 197.610 to 197.625 to adopt such a public facilities plan is, at  
2 least in part, a land use decision that is reviewable by LUBA.

3 The legislature did not elaborate on what it meant when it stated in ORS 197.712(2)(e) that  
4 public facility plan “timing and financing provisions” are not “land use decisions.” However, even  
5 before ORS 197.712(2)(e) was adopted, there was an exception from the broad statutory  
6 definition of land use decision for decisions that the appellate courts viewed as fiscal decisions. *See*  
7 *State Housing Council v. City of Lake Oswego*, 48 Or App 525, 617 P2d 655 (1980), *rev dis*  
8 291 Or 878, 635 P2d 647 (1981) (city ordinance imposing a general systems development charge  
9 on all new construction throughout the city was not a land use decision within LUBA’s jurisdiction);  
10 *Westside Neighborhood Quality Project, Inc. v. School District 4J*, 58 Or App 154, 647 P2d  
11 962 (1982) (a school district’s decision to close school not a land use decision reviewable by  
12 LUBA). We believe ORS 197.712(2)(e) was simply carrying that exception forward with regard  
13 to any timing and financing provisions that are included in a Goal 11 public facility plan. While it  
14 certainly creates a potential for jurisdictional confusion, ORS 197.712(2)(e) makes it possible for a  
15 city or county decision that adopts a public facility plan to be both a land use decision and a  
16 decision that is not a land use decision. Such a decision is not a land use decision and may not be  
17 appealed to LUBA for review of the “timing and financing provisions.” But such a decision is a land  
18 use decision and may be appealed to LUBA for review of all other aspects of the public facility  
19 plan, if the public facility plan was adopted to comply with ORS 197.712(2)(e) and Goal 11.<sup>12</sup>  
20 LCDC’s Goal 11 rule includes similar language that makes it clear that the timing and financing  
21 provisions of a Goal 11 public facility plan are not to be considered land use decisions.<sup>13</sup> With

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<sup>12</sup> In the case of a facilities plan that includes timing and financing provisions, but was also adopted to comply with Goal 11 and other land use planning requirements, it would be more accurate to say that such a decision is a land use decision, but LUBA’s scope of review would not include timing and financing provisions.

<sup>13</sup> The following sections of the Goal 11 rule reflect the dual character of Goal 11 public facility plans.

1 regard to such timing and financing provisions in a public facility plan, review at LUBA is not  
2 available. But with regard to other parts of a public facility plan that are not exempt, review at  
3 LUBA is available.

4 Admittedly, the limited scope of the exemption provided by ORS 223.314 could have been  
5 stated more clearly than it was. However, with ORS 197.712(2)(e) and Goal 11 rule as context,  
6 respondents' broad reading of ORS 223.309 and 223.314 is untenable. ORS 197.712(2)(e) and  
7 the Goal 11 rule simply extend the long-standing exception for "fiscal" decisions, to public facility  
8 timing and financing decisions. ORS 223.314 similarly extends that fiscal exception to the planning  
9 and public facility listing that is a prerequisite to adopting an SDC methodology. The broader  
10 reading of ORS 223.314 advocated by respondents would not only extend the fiscal exception to  
11 SDCs, it would allow the plans required by ORS 223.309 to be used to avoid statewide planning  
12 requirements and LUBA review altogether. Although respondents do not make the argument, there  
13 is no reason why respondents' construction of ORS 223.309 and 223.314 would not allow  
14 avoidance of the ORS 197.175 obligation cities and counties have to carry out planning  
15 responsibilities in accordance with the statewide planning goals, so long as those planning  
16 responsibilities were exercised in a document that included a list of projects to be funded by SDCs.  
17 Because that interpretation of ORS 223.309 and 223.314 is not compelled by the text and is  
18 inconsistent with contextual statutes and administrative rules, we reject the interpretation.

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“Land Use Decisions’: In accordance with ORS 197.712(2)(e), project timing and financing provisions of public facility plans shall not be considered land use decisions as specified under ORS 197.015(10).” OAR 660-011-0005(8).

“Anticipated timing provisions for public facilities are not considered land use decisions as specified in ORS 197.712(2)(e), and, therefore, cannot be the basis of appeal under ORS 197.610(1) and (2) or 197.835(4).” OAR 660-011-0025(3).

“Anticipated financing provisions are not considered land use decisions as specified in ORS 197.712(2)(e) and, therefore, cannot be the basis of appeal under ORS 197.610(1) and (2) or 197.835(4).” OAR 660-011-0035(2).

1           Finally, if the limited scope of the exemption from land use decision making that is provided  
2 by ORS 223.314 is not clear from the text of ORS 223.309 and 223.314 and contextual laws, it is  
3 appropriate to resort to legislative history. *PGE v. Bureau of Labor and Industries*, 317 Or at  
4 611-12. We have reviewed the legislative history of ORS 223.314.<sup>14</sup> That legislative history  
5 includes debate over the merits of funding public facilities with SDCs and debate about how those  
6 SDCs should be calculated and levied but only cursory references to the exemption from land use  
7 decision making that is now codified at ORS 223.314. That legislative history is far more consistent  
8 with the more limited construction that we apply to ORS 223.314 than the much broader  
9 construction that respondents would apply. Specifically, there is nothing in that legislative history  
10 that suggests the legislature intended to shield or divert anything other than the public facilities list  
11 and the calculation and imposition of SDCs from LUBA review. The reference in ORS 223.314 to  
12 “a plan \* \* \* adopted pursuant to ORS 223.309” is simply to make it clear that a public facility plan  
13 or other plan that is prepared for the limited purpose of supplying the public facility list that is  
14 required by ORS 223.309 is not reviewable as a land use decision. However, there is nothing in  
15 that legislative history that suggests the legislature intended to shield public facility plans that were  
16 also adopted to comply with the statewide planning goals from LUBA review, simply because they  
17 may also include an ORS 223.309 public facility project list.

18           While we reject respondents’ argument that a decision to adopt a facility plan to comply  
19 with both ORS 223.309 and to comply with ORS chapter 197 and statewide planning goal  
20 requirements could not be appealed to LUBA, the question remains whether the MWMC Facilities  
21 Plan in this case was adopted for both purposes. We understand the cities and county to argue it  
22 was not. We understand the cities and county to argue that the MWMC Facilities Plan was  
23 adopted in part to comply with Oregon Department of Environmental Quality environmental  
24 requirements and in part to provide the public facilities list that is required by ORS 223.309.

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<sup>14</sup> ORS 223.314 was adopted in 1989 and amended in 2001 and 2003. Or Laws 1989, ch 449, sec 9; Or Laws 2001, ch 662, sec 6; Or Laws 2003, ch 765, sec 9.



1 However, the cities and the county also acknowledge that land use decision making is necessary to  
2 carry out the improvements that are recommended by the MWMC Facilities Plan:

3 “Practically speaking, however, facilities projects must be built in compliance with  
4 land use regulations and plans and must receive local land use approvals prior to  
5 construction. The local governments’ adoption of amendments to the Metro Plan  
6 and PFSP that are the subject of appeal \* \* \* in LUBA Nos. 2004-118, 122, 126,  
7 127 and 142, are intended to allow the proposed regional wastewater facilities and  
8 projects recommended in the MWMC Facilities Plan to be constructed in  
9 compliance with land use plans and regulations when the projects are constructed or  
10 reconstructed.” Respondents’ Brief 11.

11 While respondents stop short of coming out and saying it, in resisting petitioners’ contention that the  
12 decisions adopting the MWMC Facilities Plan are *de facto* land use decisions, we understand  
13 respondents to contend that any obligations they have under Goal 11 and the Goal 11 rule for public  
14 facilities planning with regard to the facilities that are recommended in the MWMC Facilities Plan  
15 have been addressed in the separate decisions that are before LUBA in the PFSP appeals and were  
16 not part of the decision making that led to the decisions challenged in these appeals.<sup>15</sup> We turn to  
17 the Goal 11 rule to determine whether such a bifurcated process is permissible under Goal 11.

18 **C. The Goal 11 Rule Public Facilities Plan**

19 The Land Conservation and Development Commission’s (LCDC’s) Goal 11 rule describes  
20 a land use planning structure that recognizes that city and county public facility planning is carried out  
21 in a world that includes other actors, public and private, and federal and state laws that exist  
22 independently of the statewide planning program. OAR 661-011-0005(1) provides the following  
23 definition:

24 “Public Facilities Plan’: A public facility plan is a support document or documents  
25 to a comprehensive plan. The facility plan describes the water, sewer and  
26 transportation facilities which are to support the land uses designated in the  
27 appropriate acknowledged comprehensive plans within an urban growth boundary

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<sup>15</sup> If the cities and county were relying on their decisions to adopt the MWMC Facilities Plan in any way to satisfy their Goal 11 public facilities planning obligations, then those decisions would be land use decisions and subject to review by LUBA to determine whether the MWMC Facilities Plan is sufficient to satisfy those obligations under Goal 11 and the Goal 11 rule.

1 containing a population greater than 2,500. Certain elements of the public facility  
2 plan also shall be adopted as part of the comprehensive plan, as specified in OAR  
3 660-11-045.”<sup>16</sup>

4 OAR 660-11-045(3) recognizes that more than one entity may be responsible for delivering public  
5 services. In this case, the entity responsible for regional wastewater collection and treatment is the  
6 MWMC.

7 OAR 660-011-0020 describes the general structure of a public facility plan.<sup>17</sup> OAR 660-  
8 011-0020(1) requires that cities and counties prepare an inventory and assessment of public facility  
9 systems. However, it is significant that OAR 660-011-0020(1) provides that any existing

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<sup>16</sup> The elements of a Goal 11 public facility plan that a local government must adopt as part of its comprehensive plan are identified at OAR 660-011-0045(1):

“The governing body of the city or county responsible for development of the public facility plan shall adopt the plan as a supporting document to the jurisdiction’s comprehensive plan and shall also adopt as part of the comprehensive plan:

- “(a) The list of public facility project titles, excluding (if the jurisdiction so chooses) the descriptions or specifications of those projects;
- “(b) A map or written description of the public facility projects, locations or service areas as specified in sections (2) and (3) of this rule; and
- “(c) The policy(ies) or urban growth management agreement designating the provider of each public facility system. If there is more than one provider with the authority to provide the system within the area covered by the public facility plan, then the provider of each project shall be designated.”

<sup>17</sup> OAR 660-011-0020 provides:

- “(1) The public facility plan shall include an inventory of significant public facility systems. *Where the acknowledged comprehensive plan, background document or one or more of the plans or programs listed in OAR 660-011-0010(3) contains such an inventory, that inventory may be incorporated by reference.* The inventory shall include:
  - “(a) Mapped location of the facility or service area;
  - “(b) Facility capacity or size; and
  - “(c) General assessment of condition of the facility (e.g., very good, good, fair, poor, very poor).

“\* \* \* \* \*” (Emphasis added.)

1 inventories and assessments may simply be incorporated by reference. A related section of the rule,  
2 which is cross-referenced by OAR 660-011-0020(1), is OAR 660-011-0010.

3 OAR 660-011-0010(1) provides a list of the elements that must be included in a Goal 11  
4 public facilities plan. However, in preparing a Goal 11 public facilities plan that includes all of those  
5 elements, OAR 660-011-0010(3) expressly provides that LCDC did not intend to dictate that a  
6 local government’s Goal 11 public facility plan must completely occupy the field of public facility  
7 planning or cause unnecessary duplication where the necessary planning has been done by others.  
8 Where public facility planning already exists, and that existing public facility planning “meets all or  
9 some of the requirements of [OAR chapter 660, division 11],” those existing plan, or parts of them,  
10 may simply be incorporated into a local government’s Goal 11 public facility plan.<sup>18</sup>

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<sup>18</sup> As relevant, OAR 660-011-010 provides:

- “(1) The public facility plan shall contain the following items:
  - “(a) An inventory and general assessment of the condition of all the significant public facility systems which support the land uses designated in the acknowledged comprehensive plan;
  - “(b) A list of the significant public facility projects which are to support the land uses designated in the acknowledged comprehensive plan. Public facility project descriptions or specifications of these projects as necessary;
  - “(c) Rough cost estimates of each public facility project;
  - “(d) A map or written description of each public facility project’s general location or service area;
  - “(e) Policy statement(s) or urban growth management agreement identifying the provider of each public facility system. If there is more than one provider with the authority to provide the system within the area covered by the public facility plan, then the provider of each project shall be designated;
  - “(f) An estimate of when each facility project will be needed; and
  - “(g) A discussion of the provider’s existing funding mechanisms and the ability of these and possible new mechanisms to fund the development of each public facility project or system.

“\* \* \* \* \*

1 From the above rules, it is clear that if the MWMC Facilities Plan had been an existing,  
2 previously adopted plan on the date the cities and county first took action to comply with the Goal  
3 11 Rule, the cities and county could have simply adopted the MWMC Facilities Plan, or the parts  
4 of that plan that comply with and are required by the Goal 11 rule, as the cities' and county's Goal  
5 11 public facility plan for wastewater collection and treatment. But the cities and counties already  
6 have adopted a Goal 11 public facilities plan. That Goal 11 public facilities plan is located in the  
7 Metro Plan and the PFSP. Petitioners refer to that plan as the 2001 PFSP. The 2001 PFSP does  
8 not recommend the sewer system improvements that the MWMC Facilities Plan calls for. The  
9 question then becomes whether the cities and counties can separately adopt the MWMC Facilities  
10 Plan as a plan to comply with ORS 223.309 and state and federal environmental regulations,  
11 independent of their land use planning responsibilities under ORS chapter 197, and defer to a  
12 contemporaneous Metro Plan and PFSP amendment process the task of incorporating the parts of  
13 the MWMC Facilities Plan into the Metro Plan and PFSP that represent a change in the 2001  
14 PFSP.

15 While the Goal 11 rule does not explicitly authorize such bifurcated decision making when  
16 adopting amendments to an existing Goal 11 public facilities plan, neither does it explicitly prohibit  
17 such an approach. We do not believe the cities' and county's decision to pursue separate,  
18 contemporaneous decision making processes—one to adopt the MWMC Facilities Plan to comply  
19 with ORS 223.309 and state and federal environmental regulations and another to adopt  
20 amendments to the Metro Plan and PFSP to comply with the cities and county's statewide planning

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“(3) It is not the purpose of this division to cause duplication of or to supplant existing applicable facility plans and programs. Where all or part of an acknowledged comprehensive plan, facility master plan either of the local jurisdiction or appropriate special district, capital improvement program, regional functional plan, similar plan or any combination of such plans meets all or some of the requirements of this division, those plans, or programs may be incorporated by reference into the public facility plan required by this division. Only those referenced portions of such documents shall be considered to be a part of the public facility plan and shall be subject to the administrative procedures of this division and ORS Chapter 197.”

1 obligations—affects the ultimate substantive legal obligations the cities and county have under the  
2 Goal 11 rule to adopt a Goal 11 public facilities plan that complies with the rule. However, with  
3 that caveat, there is simply no support in the language of the Goal 11 rule for petitioners’ position  
4 that the cities’ and county’s decision to adopt the Metro Plan and PFSP amendments must *predate*  
5 their separate decision to adopt the MWMC Facilities Plan, so that the facilities that are  
6 recommended in the MWMC Facilities Plan to satisfy ORS 223.309 and state and federal  
7 environmental regulations have already been included in the Metro Plan and PFSP. To the  
8 contrary, OAR 660-011-0015(2) recognizes that cities and counties may be called upon to  
9 “coordinate” their Goal 11 public facilities plan with the planning of others.<sup>19</sup> That duty to  
10 “coordinate” does not necessarily mean that cities and counties must include public facilities in their  
11 Goal 11 public facility plan that have been included in other plans that were prepared outside the  
12 Goal 11 public facility planning process and for other purposes. However, the duty to coordinate  
13 does mean that those public facilities “must be considered and accommodated as much as possible”  
14 in a city’s or county’s Goal 11 public facility plan.<sup>20</sup> Although we tend to agree with petitioners that  
15 on the surface it seems more logical to combine those planning processes or adopt the Metro Plan  
16 and PFSP amendments first, neither Goal 11 nor the Goal 11 rule require that the Metro Plan and  
17 PFSP be amended first.<sup>21</sup>

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<sup>19</sup> OAR 660-011-0015(2) provides:

“The jurisdiction responsible for the preparation of the public facility plan shall provide for the coordination of such preparation with the city, county, special districts and, as necessary, state and federal agencies and private providers of public facilities. \* \* \*”

<sup>20</sup> As relevant, ORS 197.015(5) provides:

“A plan is ‘coordinated’ when the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible.”

<sup>21</sup> Proceeding in the order petitioners suggest also eliminates any potential problems that might be presented if the cities collect or expend SDCs for facilities that are ultimately not included in Goal 11 public facilities plan. Because the MWMC Facilities Plan and the Metro Plan and PFSP amendments were adopted within two months of each other, there does not appear to be much potential for that problem in this case.

1 The only language in the Goal 11 rule that lends any support to petitioners' position that an  
2 ORS 223.309 public facilities plan must also be a Goal 11 public facilities plan, or at least must be  
3 preceded by a Goal 11 public facilities plan that forms the basis for the ORS 223.309 public  
4 facilities list, appears in OAR 660-011-0000. OAR 660-011-0000 states, in part, that the purpose  
5 of a Goal 11 public facilities plan

6 "is to help assure that urban development in \* \* \* urban growth boundaries is  
7 guided and supported by the types and levels of urban facilities and services  
8 appropriate for the needs and requirements of the urban areas to be serviced and  
9 that those facilities and services are provided in a timely, orderly and efficient  
10 arrangement, as required by Goal 11."

11 However, the guiding and supporting role that Goal 11 public facility planning is to perform does not  
12 necessarily preclude a decision to incorporate into a Goal 11 public facility plan public facility  
13 projects that have already been recommended by others primarily for fiscal or environmental  
14 reasons that may have little or nothing to do with the statewide planning goals. Where public  
15 facilities are proposed for reasons that have little or nothing to do with the statewide planning goals,  
16 it may later prove difficult or impossible to incorporate those facilities into a public facilities plan that  
17 complies with Goal 11 and any other relevant land use planning requirement. Once again, that may  
18 be a practical reason to do the Goal 11 public facility planning first. However, nothing cited by  
19 petitioners mandates that a Goal 11 public facilities plan must be adopted *before* a public facility  
20 plan that is adopted for the limited purpose of complying with ORS 223.309 or to comply with  
21 federal or state environmental regulations can be adopted.

22 We understand the cities and county to concede that the Metro Plan and PFSP must be  
23 amended to make them consistent with the MWMC Facilities Plan before the facilities  
24 recommended in that plan can be built. We also do not understand the cities and county to dispute  
25 that the Metro Plan and PFSP amendments must be consistent with the requirements of the Goal 11  
26 rule, notwithstanding that the MWMC Facilities Plan was adopted first to allow the cities to  
27 proceed with adoption of an SDC methodology and to comply with state and federal environmental  
28 regulations. With those understandings, we agree with the cities and county that the decisions to

1 adopt the MWMC Facilities Plan are not land use decisions. We recently held that separate  
2 transportation plans could be adopted to meet federal mandates and statewide planning goal  
3 requirements. *Friends of Eugene v. Lane Council of Governments*, \_\_\_ Or LUBA \_\_\_ (LUBA  
4 No. 2004-223, July 27, 2005). Similarly there is no reason why the cities and county could not  
5 adopt the MWMC Facilities Plan to meet state and federal environmental mandates without first  
6 adopting a land use decision to make the recommended facilities part of the city's Goal 11 public  
7 facility plan. And, ORS 223.309 and 223.314 expressly provide that a public facilities list and  
8 supporting public facility plan can be adopted, without adopting a land use decision, so long as they  
9 are adopted for the limited purpose of establishing SDCs. Neither of those actions relieves the  
10 cities and county from any obligations they may have to include the facilities recommended by the  
11 MWMC Facilities Plan in their Goal 11 public facility plan, before those facilities can actually be  
12 constructed. However, the cities' and county's land use decisions regarding those facilities were  
13 adopted when the cities and county separately approved the Metro Plan and PFSP amendments  
14 that are before LUBA in the PFSP appeals. The question of the adequacy of the PFSP  
15 amendments to comply with Goal 11 and the Goal 11 rule is properly presented in that appeal. The  
16 cities and county's decisions to adopt the MWMC Facilities plan were therefore not land use  
17 decisions, and we do not have jurisdiction to review those decisions in this appeal.

18 This consolidated appeal is dismissed.