BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HOME BUILDERS ASSOCIATION
OF LANE COUNTY and HOME BUILDERS
CONSTRUCTION COMPANY,
Petitioners,

vs.

CITY OF EUGENE,
Respondent.

LUBA No. 2006-099

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Bill Kloos, Eugene, represented petitioners.

Emily N. Jerome, Eugene, represented respondent.

HOLSTUN, Board Chair; BASSHAM, Board Member; RYAN, Board Member, participated in the decision.

DISMISSED 08/15/2007

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

Opinion by Holstun.

INTRODUCTION

A. Facts

The City of Eugene Parks Recreation and Open Space Comprehensive Plan was the subject of an earlier LUBA appeal. *Home Builders Assoc. v. City of Eugene*, 52 Or LUBA 341 (2006) (*Home Builders I*). In this opinion we will refer to that plan as the PROS Plan. As part of the same planning effort that led to adoption of the PROS Plan, the city separately adopted the City of Eugene Parks Recreation and Open Space (PROS) Project and Priority Plan. This appeal concerns that separately adopted plan, and in this opinion we refer to that plan as the PROS Project and Priority Plan. Our decision in *Home Builders I* set out the facts that are necessary to understand the larger planning context for the PROS Plan and the PROS Project and Priority Plan:

> "The City of Eugene, the City of Springfield and Lane County have jointly adopted a comprehensive plan for the Eugene/Springfield urban area. That comprehensive plan is made up of many different plan documents. However, a single plan document, the Eugene-Springfield Metropolitan Area General Plan (Metro Plan), is the framework plan around which those jurisdictions' multi-volume comprehensive plan is built. The controlling Metro Plan document includes seven different chapters. One of those chapters is the 'Specific Elements' chapter. There are specific elements in that chapter addressing Housing, Environmental Resources, Transportation, and a number of other planning areas of concern. The relevant Metro Plan element for purposes of this appeal is the [Metro Plan] Parks and Recreation Facilities Element. It operates at the highest or most general level as the cities' and county's comprehensive plan for parks and recreation in the Eugene/Springfield urban area.
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> "The Introduction chapter of the Metro Plan explains the relationship of the hierarchically superior Metro Plan document to the many other planning documents that combine to make up the regional comprehensive plan:
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> > "'Where the [*Metro*] *Plan* is the basic guiding land use policy document, it is not the only such document. As indicated in the Purpose section above, the [*Metro*] *Plan* is a framework plan, and it is important that it be supplemented by more detailed refinement plans, programs, and policies. Due to budget limits and other responsibilities, all such plans,

> programs, and policies cannot be pursued simultaneously. * * *
>
> "'Refinements to the [*Metro*] *Plan* can include: 1) city-wide comprehensive policy documents, such as the 1984 Eugene Community Goals and Policies; 2) functional plans and policies addressing single subjects throughout the area, such as water, sewer, or transportation plans; and 3) neighborhood plans or special area studies that address those issues that are unique to a specific geographical area. In all cases, the [*Metro*] *Plan* is the guiding document, and refinement plans and policies must be consistent with the [*Metro*] *Plan*. Should inconsistencies occur, the [*Metro*] *Plan* is the prevailing policy document. The process for reviewing and adopting refinement plans is outlined in Chapter IV.' Metro Plan I-5.

"In 1989, the city adopted the City of Eugene Parks and Recreation Plan (1989 Plan) as a Metro Plan refinement plan. On February 13, 2006, the city council adopted an ordinance that repealed the 1989 Plan. That ordinance also amended City of Eugene Code (EC) 9.8010 to delete the 1989 Plan from the EC's 'List of Adopted Plans' and repealed EC 9.9550, which listed a number of "Eugene Parks and Recreation Policies.

"On February 13, 2006, the city also adopted a resolution in which it adopted the [PROS Plan] to replace the 1989 Plan that it repealed by ordinance on the same day. Preparation and adoption of the PROS Plan was a multi-year planning effort with an extensive public outreach component. There were two events during that planning process that [bear] directly on petitioners' arguments in this appeal.

"The first event concerned tables that prioritized proposed park, open space and recreation facility actions and tables that set out the estimated costs of the proposed facilities. Those tables were included in the November 2004 draft PROS Plan. However, these specific project and priority tables were removed from the November 2004 draft of the PROS Plan, before the planning commission considered the plan. These tables were placed in a separate document entitled PROS Project[] and Priorit[y] Plan, which was later adopted by a separate resolution that was signed and became final on May 22, 2006. Petitioners filed a separate LUBA appeal to challenge that resolution (LUBA No. 2006-099). LUBA No. 2006-099 was not consolidated with LUBA Nos. 2006-023 and 2006-024 for LUBA review. Record objections are pending in LUBA No. 2006-099, and petitioners' appeal of the resolution that adopted the PROS Project[] and Priorit[y] Plan will be decided separately from this decision.

"The second key event during preparation and adoption of the PROS Plan concerns planning staff's original proposal to adopt the PROS Plan as a Metro

Plan refinement plan. The city ultimately decided that it would not adopt the PROS Plan as a Metro Plan refinement plan:

> "'* * * While the PROS Comprehensive Plan will take the place of the 1989 Eugene Parks and Recreation Plan, it will not be a refinement to the Metro Plan. Instead, the PROS Comprehensive Plan will be a stand-alone plan serving as an aspirational and guiding document for the City as it conducts long-range planning for parks, recreation and open space.'" *Home Builders I*, 52 Or LUBA at 343-46 (footnotes and record citations omitted).

B. The PROS Plan and *Home Builders I*

In *Home Builders I*, there were eleven assignments of error. We sustained the second and third assignments. In sustaining those assignments of error we concluded that because the PROS Plan was not adopted as a Metro refinement plan and was a purely aspirational document, it was insufficient to constitute the additional parks and recreation facilities planning that is required under the Metro Plan. Our remand to the city under those assignments of error left it to the city to determine whether to adopt the entire PROS Plan as a Metro refinement plan or, provided it can do so consistently with the Metro Plan, to adopt only parts of the PROS Plan as a Metro refinement plan:

> "[W]e agree with petitioners that a PROS Plan that is a purely aspirational document, which is binding on no one, is not sufficient to comply with Metro Plan Parks and Recreation Facilities Element Policy H.2 and related provisions in the Metro Plan Parks and Recreation Facilities Element. We also agree with petitioners that at least some parts of the PROS Plan must be adopted as a Metro Plan refinement plan. However, that begs the answer to a much a more difficult question. If the city is determined to adopt a document that is *in part* the bare minimum refinement plan that Metro Plan Parks and Recreation Facilities Element Policy H.2 and related provisions require and *in part* a nonbinding or aspirational document, what part must be adopted as a Metro Plan refinement plan? That question is for the city to answer in the first instance on remand. The answer to that question turns in large part on the meaning of the Metro Plan Parks and Recreation Element language that we set out and discuss above. The answer to that question may also depend in part on statut[ory], statewide planning goal and administrative rule requirements that petitioners cite in their remaining assignments of error." *Home Builders I*, 52 Or LUBA at 357.

In petitioners' eighth assignment of error in *Home Builders I*, they argued that the following authorities require that the tables that prioritize proposed park, open space and recreation facilities and the estimated costs of those facilities, which now appear in the PROS Projects and Priority Plan, must be included in the PROS Plan as a Metro refinement plan: (1) the ORS 197.015(6) definition of "comprehensive plan," (2) Statewide Planning Goal 8 (Recreational Needs), (3) Goal 2 (Land Use Planning) and (4) OAR 660-034-0040(1)[1]. We rejected that argument and denied the eighth assignment of error. *Home Builders I*, 52 Or LUBA 362-67. However, we specifically did not resolve petitioners' argument that the Metro Plan itself requires that such detailed parks, recreation and open space planning be adopted as part of a Metro refinement plan:

> "The issue of whether the Metro Plan Parks, Recreation and Open Space Facilities Element requires the kind of detailed parks, recreation and open space facility planning that is now included in the PROS Projects and Priorities Plan, or something like it, presents a closer question. The tables that prioritize proposed park, open space and recreation facility actions and tables that set out the estimated costs of the proposed facilities are now included in the PROS Projects and Priorities Plan, which was later adopted by a separate resolution and is before us in a separate appeal in LUBA No. 2006-099. *Because the issue of whether the planning detail that now resides in the PROS Projects and Priorities Plan must be adopted as a Metro Plan refinement plan is likely to be before us in LUBA No. 2006-099 and because the city may be required to address that issue in determining what parts of the PROS Plan must be adopted as a refinement plan, we do not attempt to resolve that issue in this appeal*." *Home Builders I*, 52 Or LUBA at 367 (emphasis added).

Finally, in their tenth assignment of error in *Home Builders I*, petitioners argued that the PROS Plan was inadequate, because it did not consider how lands that would be needed to satisfy the parks, recreation and open space anticipated in the PROS Plan might affect the supply of land that the city has set aside to meet its housing needs under Statewide Planning Goal 10 (Housing) and Metro Plan policies and objectives that implement Goal 10. Given our remand for the city to consider what parts of the PROS Plan must be adopted as a Metro

[1] The principle focus of OAR Chapter 660, Chapter 34 is park master plans.

refinement plan, we declined to consider the parties' arguments under the tenth assignment of error.[2]

LUBA's decision in *Home Builders I* remanding the PROS Plan was issued on August 9, 2006. LUBA's decision in *Home Builders I* was not appealed to the Court of Appeals. Approximately one year later, the PROS Plan has not been amended or replaced in response to that remand. Before turning to the jurisdictional question that is presented in this appeal, it may be useful to identify what appear to be the three fundamental disputes that petitioners have with the city. Those three disputes underlie the larger jurisdictional dispute in this appeal.

Petitioners' first dispute with the city concerns the nature and extent of planning that the city must do to comply with the Metro Plan's requirement for a refinement plan for parks and recreation facilities. Petitioners in *Home Builders I* argued that the detailed tables showing specific projects, priorities and expenses that were once located in the PROS Plan and are now located only in the PROS Project and Priority Plan must be adopted as a Metro refinement plan. The city took essentially the opposite position—that the detailed listing of projects, priorities and expenses need not be included in the PROS Plan and that the PROS Plan could be adopted as a free-standing advisory plan rather than as a Metro Plan refinement plan. As explained above, LUBA has not yet decided the first dispute. Based on our decision in *Home Builders I*, the city's planning obligation for parks and recreation facilities under the Metro Plan is unfinished. But until the city takes up the PROS Plan on

[2] However, in declining to decide the tenth assignment of error in *Home Builders I*, we stated "it seems unlikely to us that the city will be able to justify a Metro Plan Parks, Recreation and Open Space Facilities Element refinement plan that fails to include any mandatory standards that govern how the city will go about selecting and improving individual park sites in the future." *Home Builders I*, 52 Or LUBA at 370. In *Home Builders I*, the city suggested that in adopting a Metro refinement plan to address parks, recreation and open space needs the city need not consider the effect that meeting those parks, recreation and open space needs might have on its inventory of land that is needed to meet housing demand, even though lands in the city's residential land inventory would also be available to serve at least some parks, recreation and open space needs. The city contended that it could simply wait and see and react in the future to add more residential land if necessary. We expressed skepticism that such a "wait and see" approach could be successfully defended under applicable law. *Id.*

remand and adopts the required refinement plan, the nature and extent of the refinement plan for parks and recreation facilities that is required under the Metro Plan will not be known.

Petitioners' second dispute with the city concerns timing. Petitioners believe the city must first take up the PROS Plan on remand and adopt the necessary Metro refinement plan, *before* it can proceed under ORS 223.297 to 223.314 to adopt the PROS Project and Priority Plan and take the other steps required under those statutes to collect systems development charges to fund and construct the facilities identified in the PROS Project and Priority Plan.

Petitioners' final dispute with the city grows out of the first two disputes. Because the PROS Plan was remanded by LUBA in *Home Builders I*, and because the city has not taken up the PROS Plan following LUBA's remand, petitioners contend the PROS Project and Priority Plan is a *de facto* Metro refinement plan that is subject to LUBA review and legally defective.

MOTIONS TO CONSIDER EXTRA-RECORD EVIDENCE

As we explain in more detail below, the city moves to dismiss this appeal, arguing that LUBA lacks jurisdiction over the city resolution that adopted the PROS Project and Priority Plan. Petitioners filed two motions, asking that LUBA consider certain extra-record evidence in determining whether it has jurisdiction in this matter. We have considered that extra-record evidence, for the limited purpose of determining whether we have jurisdiction.

In opposing petitioners' motions to consider extra-record evidence, the city argues that LUBA lacks authority to consider extra-record evidence to determine the jurisdictional question that the city has raised. The city points out, correctly, that ORS 197.835 limits LUBA's scope of review. ORS 197.835(2)(a) provides that in reviewing a decision LUBA is "confined to the record," except in the circumstances set out in ORS 197.835(2)(b).[3] The

[3] ORS 197.835(2) provides:

"(a) *Review of a decision* under ORS 197.830 to 197.845 *shall be confined to the record.*

limitation set out in ORS 197.835(2)(a) (LUBA review is confined to the record) and the exceptions to that limited scope of review apply to LUBA "[r]eview of a decision." The city apparently assumes that the statutory limit on LUBA's "[r]eview of a decision" also applies when LUBA is asked to decide whether it has jurisdiction to "[r]eview a decision."

When LUBA's jurisdiction to review a decision is challenged, a threshold question must be answered *before* LUBA can proceed to exercise its limited scope of review under ORS 197.835(2) to "[r]eview * * * a decision." That threshold question is whether LUBA has jurisdiction to conduct that statutorily limited review of the challenged decision. Simply stated, LUBA is not limited to the local government record in making that threshold decision, because making that threshold decision does not entail "[r]eview of the decision," within the meaning of ORS 197.835(2)(a). *Vanspeybroeck v. Tillamook County*, 51 Or LUBA 546, 548 (2006); *Hemstreet v. Seaside Improvement Comm.*, 16 Or LUBA 630, 631-33 (1988).

The city also objects that LUBA should not review one of the proffered items of extra-record evidence, because it is a confidential communication from the city's attorney to the city council. We agree with petitioners that because a member of the city council provided a copy of the city attorney's communication to one of the petitioners' employees, any privilege that might have initially attached to the communication was waived. The city also argues that the proffered evidence has no relevance to the jurisdictional question in this appeal. We generally agree with the city on that point, but some references to petitioners' extra-record evidence are necessary to acknowledge and reject some of petitioners' jurisdictional arguments.

> "(b) In the case of disputed allegations of standing, unconstitutionality of the decision, ex parte contacts, actions described in subsection (10)(a)(B) of this section or other procedural irregularities not shown in the record that, if proved, would warrant reversal or remand, the board may take evidence and make findings of fact on those allegations. The board shall be bound by any finding of fact of the local government, special district or state agency for which there is substantial evidence in the whole record." (Emphases added).

JURISDICTION

A. Decisions to Adopt ORS 223.309(1) Plans are not Land Use Decisions

Whether the city's decision to adopt the PROS Project and Priority Plan is a land use decision that is subject to LUBA's jurisdiction turns on the scope and meaning of the exception to LUBA's jurisdiction that was created when the legislature adopted ORS 223.309(1) and 223.314. Those statutes concern system development charges (SDCs).[4] The jurisdictional question also turns on whether the city adopted the PROS Project Priority Plan to comply with both ORS 223.309(1) and with state and local land use laws.

LUBA generally has exclusive jurisdiction to review "land use decisions." ORS 197.825(1). ORS 197.015(11)(a) defines the term "land use decision" very broadly.[5] The

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[4] ORS 223.299(4) sets out the following definition:

> "(a) 'System development charge' 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. 'System development charge' 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.
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> "(b) 'System development charge' does not include any fees assessed or collected as part of a local improvement district or a charge in lieu of a local improvement district assessment, or the cost of complying with requirements or conditions imposed upon a land use decision, expedited land division or limited land use decision."

[5] As defined by ORS 197.015(11)(a), a land use decision includes:

> "(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
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> "(i) The goals;
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> "(ii) A comprehensive plan provision;
>
> "(iii) A land use regulation; or
>
> "(iv) A new land use regulation;
>
> "(B) A final decision or determination of a state agency other than the commission with respect to which the agency is required to apply the goals; or

legislature has adopted "a uniform framework for the imposition of system development charges * * *." ORS 223.297. A required step in imposing SDCs is adoption of a plan that lists the capital improvements that are to be funded in whole or in part with system development charges. ORS 223.309(1).[6] The city refers to such plans as "309" plans, which is a reference to the section of ORS chapter 223 that authorizes and requires such plans. As required by ORS 223.309(1), the PROS Project and Priority Plan lists the parks, recreation and open space capital improvements that the city intends to fund with SDCs, and includes estimates of cost and timing. Resolution No. 4863 expressly states that the PROS Project and Priority Plan was adopted in accordance with the "requirements set forth at * * * ORS 223.309." Record 56. While the PROS Project and Priority Plan lists some non-capital program costs that are not required by ORS 223.309, the PROS Project and Priority Plan clearly was adopted as a "309" plan. We do not understand petitioners to dispute that the PROS Project and Priority Plan was adopted as a "309" plan.

Because the city is obligated by statute to plan for "recreational facilities" in its comprehensive plan, and because the Metro Plan requires the city to adopt additional refinement planning for parks and recreation facilities, the city's decision to adopt the PROS Project and Priority Plan could easily constitute a land use decision that is subject to appeal to and review by LUBA.[7] But ORS 223.314 expressly provides that a decision to adopt a

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"(C) A decision of a county planning commission made under ORS 433.763[.]"

[6] ORS 223.309(1) provides:

> "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 the local government intends to fund, in whole or in part, with revenues from an improvement fee and the estimated cost, timing and percentage of costs eligible to be funded with revenues from the improvement fee for each improvement."

[7] The definition of "comprehensive plan" at ORS 197.015(6) is very broad, and provides that a comprehensive plan must interrelate "all functional and natural systems and activities relating to the use of lands, including but not limited to * * * recreational facilities * * *." Statewide Planning Goal 8 (Recreation) imposes recreation planning obligations. As we have already explained, the Metro Plan expresses goals and

"309" plan is not a land use decision.[8] The apparent intent of ORS 223.314 was to exempt decisions to adopt "309" plans from the obligation to apply statewide planning goals and the possibility of a LUBA appeal. If the ORS 223.314 exemption is applied literally and broadly, it has the potential to exempt a large number of decisions that would otherwise be subject to the statewide planning goals and clearly be within LUBA's jurisdiction. The question that we must answer is whether ORS 223.314 applies here to make the city decision to adopt the PROS Project and Priority Plan something other than a land use decision, and therefore outside LUBA's jurisdiction.

B. The City of Springfield Decisions

As the parties recognize we have considered the scope of ORS 223.314 in a case that has both some differences and some similarities when compared to this case. In *Home Builders Assoc. v. City of Springfield*, 50 Or LUBA 109 (2005), *aff'd* 204 Or App 270, 129 P3d 713, *rev den* 341 Or 80 (2006), petitioners appealed a City of Springfield decision that adopted the Metropolitan Wastewater Management Commission Facilities Plan for the Eugene-Springfield Wastewater Treatment Facilities (MWMC Facilities Plan). For ease of reference, we will refer to that decision as *Home Builders (MWMC Facilities)*. In *Home Builders Assoc. v. City of Springfield*, 50 Or LUBA 134 (2005), petitioners separately appealed a related city decision that adopted amendments to the Metro Plan and the Eugene-Springfield Public Facilities and Services Plan (PFSP), which is a Metro Plan refinement

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policies regarding parks, recreation and open space and requires the city to conduct additional parks and recreation facility refinement planning. If the city applied or should have applied statewide planning goals, comprehensive plan or land use regulation standards for parks and recreation planning, the resolution adopting the PROS Project and Priority Plan is a "land use decision," as ORS 197.015(11)(a) defines that term, unless some other authority provides otherwise." *See* n 5.

[8] 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."

plan for sewer facilities. For ease of reference, we will refer to that decision as *Home Builders (PFSP).*

The PFSP was amended in part to comply with ORS 197.712(2)(e) and OAR chapter 660, division 11, which require public facilities plans for "sewer, water and transportation" and specifically provide that certain aspects of those public facility plans are not land use decisions.[9] However, the PFSP is a Metro refinement plan and therefore part of the city's comprehensive plan. The city conceded in *Home Builders (PFSP)* that its decision to adopt amendments to the PFSP and Metro plan was, in part, a land use decision. But the City of Springfield moved to dismiss in *Home Builders (MWMC Facilities),* arguing that unlike the PFSP the MWMC Facilities Plan was a "309" plan and therefore not subject to LUBA's jurisdiction. In granting the city's motion to dismiss, we ultimately concluded that the relevant statutes, including ORS 223.309 and 223.314, authorized the city to bifurcate its effort to establish the regulatory framework necessary to levy and collect SDCs (the MWMC Facilities Plan) from its effort to amend the PFSP, which had not been amended since 2001 (the 2001 PFSP), to authorize construction of those facilities. As we explained in *Home Builders (MWMC Facilities),* those bifurcated efforts worked in concert to allow the city to determine how it would fund sewer facilities with SDCs and to take the necessary prerequisite steps to levy and collect SDCs (without regard to land use laws) at the same time it amended the Metro Plan and PFSP so that those facilities could be constructed consistently with the relevant land use laws. We set out our reasoning from *Home Builders (MWMC Facilities)* below:

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[9] ORS 197.712(2)(e) provides:

> "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.*" (Emphasis added.)

"* * * The 2001 PFSP does not recommend the sewer system improvements that the MWMC Facilities Plan calls for. The question then becomes whether the cities and counties can separately adopt the MWMC Facilities Plan as a plan to comply with ORS 223.309 and state and federal environmental regulations, independent of their land use planning responsibilities under ORS chapter 197, and defer to a contemporaneous Metro Plan and PFSP amendment process the task of incorporating the parts of the MWMC Facilities Plan into the Metro Plan and PFSP that represent a change in the 2001 PFSP.

"While the Goal 11 rule does not explicitly authorize such bifurcated decision making when adopting amendments to an existing Goal 11 public facilities plan, neither does it explicitly prohibit such an approach. We do not believe the cities' and county's decision to pursue *separate, contemporaneous decision making processes*--one to adopt the MWMC Facilities Plan to comply with ORS 223.309 and state and federal environmental regulations and another to adopt amendments to the Metro Plan and PFSP to comply with the cities' and county's statewide planning obligations--affects the ultimate substantive legal obligations the cities and county have under the Goal 11 rule to adopt a Goal 11 public facilities plan that complies with the rule. However, with that caveat, there is simply no support in the language of the Goal 11 rule for petitioners' position that the cities' and county's decision to adopt the Metro Plan and PFSP amendments must predate their separate decision to adopt the MWMC Facilities Plan, so that the facilities that are recommended in the MWMC Facilities Plan to satisfy ORS 223.309 and state and federal environmental regulations have already been included in the Metro Plan and PFSP. * * * Although we tend to agree with petitioners that on the surface it seems more logical to combine those planning processes or adopt the Metro Plan and PFSP amendments first, neither Goal 11 nor the Goal 11 rule require that the Metro Plan and PFSP be amended first.

"* * * * *

"* * * Where public facilities are proposed for reasons that have little or nothing to do with the statewide planning goals, it may later prove difficult or impossible to incorporate those facilities into a public facilities plan that complies with Goal 11 and any other relevant land use planning requirement. Once again, that may be a practical reason to do the Goal 11 public facility planning first. However, nothing cited by petitioners mandates that a Goal 11 public facilities plan must be adopted before a public facility plan that is adopted for the limited purpose of complying with ORS 223.309 or to comply with federal or state environmental regulations can be adopted.

"We understand the cities and county to concede that the Metro Plan and PFSP must be amended to make them consistent with the MWMC Facilities Plan before the facilities recommended in that plan can be built. We also do not understand the cities and county to dispute that the Metro Plan and PFSP

> amendments must be consistent with the requirements of the Goal 11 rule, notwithstanding that the MWMC Facilities Plan was adopted first to allow the cities to proceed with adoption of an SDC methodology and to comply with state and federal environmental regulations. With those understandings, we agree with the cities and county that the decisions to adopt the MWMC Facilities Plan are not land use decisions. We recently held that separate transportation plans could be adopted to meet federal mandates and statewide planning goal requirements. *Friends of Eugene v. Lane Council of Governments*, 49 Or LUBA 672 (2005). Similarly there is no reason why the cities and county could not adopt the MWMC Facilities Plan to meet state and federal environmental mandates without first adopting a land use decision to make the recommended facilities part of the city's Goal 11 public facility plan. And, ORS 223.309 and 223.314 expressly provide that a public facilities list and supporting public facility plan can be adopted, without adopting a land use decision, so long as they are adopted for the limited purpose of establishing SDCs. *Neither of those actions relieves the cities and county from any obligations they may have to include the facilities recommended by the MWMC Facilities Plan in their Goal 11 public facility plan, before those facilities can actually be constructed. However, the cities' and county's land use decisions regarding those facilities were adopted when the cities and county separately approved the Metro Plan and PFSP amendments that are before LUBA in the PFSP appeals.* The question of the adequacy of the PFSP amendments to comply with Goal 11 and the Goal 11 rule is properly presented in that appeal. The cities and county's decisions to adopt the MWMC Facilities plan were therefore not land use decisions, and we do not have jurisdiction to review those decisions in this appeal." 50 Or LUBA at 130-33 (emphases added).

Our reasoning above was based, in part, on language in Goal 11 (Public Facilities), ORS 197.712(2)(e) and OAR chapter 660, division 11, and that Goal, statutory and rule language apparently does not apply here. However, we believe ORS 223.309(1) and 223.314, by (1) authorizing facility plans for the limited purpose of levying and collecting SDCs and (2) making those plans something other than land use decisions, authorize the bifurcated process that we describe above.

C. Separate "309" Plans and Land Use Plans

Under our decision in *Home Builders (MWMC Facilities)*, if a local government wishes to adopt a "309" plan separately from any plan that it adopts to comply with state and local land use laws, it may do so. State land use laws do not prohibit such bifurcation, and ORS 223.309(1) and 223.314 effectively authorize such bifurcation. Provided the local

government adopts such separate planning documents for separate purposes, the decision to adopt a plan for the limited purpose of complying with ORS 223.309(1) is not a land use decision and such a decision is not reviewable by LUBA. Where a local government selects such a bifurcated approach, the plan that the local government separately adopts to comply with state and local land use requirements is a land use decision, if it falls within the statutory definition of land use decision, as it almost certainly will. *See* n 5. As we explain in our decision in *Home Builders (MWMC Facilities)*, a local government decision to adopt those plans separately and on different time schedules may present practical problems if a "309" plan is adopted and implemented before any required land use planning is completed. However, a local government is not required by state land use laws to adopt the plan that is adopted to comply with state land use laws first.[10]

The fact that the different planning documents that are adopted to comply with state and local land use planning standards and ORS 223.309(1) may overlap or include some of the same subject matter creates the possibility of confusion, as it has in this case. But where the substance of a "309" plan overlaps or duplicates the substance of a plan that is adopted to comply with state or local land use laws that overlap or repetition does not alter the nature of the separate plans. The "309" plan remains a "309" plan; the decision to adopt that "309" plan is not a land use decision and it is reviewable for compliance with applicable law by the state circuit courts. The land use plan remains a land use plan; the decision to adopt the land use plan is a land use decision and is reviewable by LUBA. As we pointed out in *Home Builders (MWMC Facilities)*, if a local government adopts its "309" plan first and proceeds to collect SDCs to fund those facilities before the facilities are authorized or approvable under relevant state and local land use laws, it may turn out later that those facilities cannot be constructed under state or local land use laws. Local governments must recognize this

[10] Petitioners suggest that the Metro Plan requires that land use planning precede "309" planning, but nothing cited by petitioners imposes such a "plan first" requirement.

practical danger in pursuing separate "fiscal" and "land use planning" decision making, but state land use laws simply do not mandate that the city complete any required additional land use planning *before* it begins taking the steps necessary under ORS chapter 223 to levy and collect SDCs.

As we note in the emphasized language in the fourth paragraph from *Home Builders (MWMC Facilities)* quoted above, the city's decision to proceed with the SDC part of its sewerage system planning before the needed Metro Plan and PFSP amendments were in place did not affect the city's obligation to ensure any needed Metro Plan and PFSP amendments were in place before the facilities identified in the "309" plan could actually be constructed. We believe the same rule applies here. The city elected to fulfill its land use planning obligations under the Metro Plan by adopting the PROS Plan. The city elected to satisfy its obligations under ORS 223.309(1) by adopting the PROS Project and Priority Plan. Because the city has elected to separate its parks, recreation and open space planning into a land use planning component and a separate fiscal component, under ORS 223.314, LUBA does not have jurisdiction to review the separately adopted PROS Project and Priority Plan, which is the fiscal component.

D. Petitioners' Motion to Consider Extra-Record Evidence of the City's Actions After it Adopted the PROS Plan and the PROS Project and Priority Plan

In their motion to consider extra-record evidence, petitioners ask that we consider certain evidence that can be read to suggest that the city no longer believes it must amend its PROS Plan in response to our decision in *Home Builders I,* before proceeding to construct the facilities identified in the PROS Project and Priority Plan.[11] Other evidence can be read

[11] In an October 26, 2006 memorandum the city attorney advised the city council that it had the following options in responding to LUBA's remand in *Home Builders I*:

> "The City has a number of options for addressing the issues identified by LUBA. Because the remand is based solely on the Metro Plan, the City has broad discretion as to its response. We believe that the options include: 1) City adoption of a portion of the PROS * * * Plan as a

to suggest that the city is in fact now relying on the PROS Project and Priority Plan to fulfill the city's land use planning obligations under the Metro Plan, even though the city did not adopt the PROS Project and Priority Plan for that purpose.[12]

Given our decision in *Home Builders I*, which as we have noted was not appealed, it is difficult to believe that the city would now take the position that it has no obligation under the existing Metro Plan to adopt a Metro Plan refinement plan for parks and recreation facilities. Similarly, it is difficult to believe the city would take the position that the PROS Project and Priorities Plan can be relied on to fulfill the city's land use planning obligations

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> refinement plan with policies that must be addressed by the City, the development community and/or others; 2) City adoption of a different parks plan with policies that must be addressed by the City, the development community and/or others; 3) City initiation of a Metro Plan amendment to remove the requirement for a local parks and recreation plan; or 4) no action for the foreseeable future. The Metro Plan does not impose any deadline for adopting a parks and recreation plan. Consequently, the City need not act on remand within any particular time frame." (Footnotes omitted).

[12] Petitioners first point to a 139-page Systems Development Charge Methodologies document, which is dated November 17, 2006, and argue:

> "The document is explicit that the city is looking to the [PROS Project and Priority] Plan now under appeal as the definitive statement for planning for parks – what the planning period is, the population level to be served, the types of parks facilities that are needed, the level of service to be provided, and the specific park projects that should be developed. With this land use planning information in hand, the methodology document then states how parks SDCs will be calculated and collected. In short, this methodology document relies on the [PROS Project and Priority] Plan to be what the Metro Plan says the city must have – a refinement plan for parks. * * *" Petitioners' Second Motion to Take Evidence not in the Record Relating to Jurisdiction 5-6.

Petitioners next point to a city staff report that was prepared for an October 25, 2006 City Council work session in which city staff state:

> "The council's adoption of the PROS Project and Priority Plan provides policy-level direction on intended parks system projects and levels of service which are key factors in the proposed modifications of the parks SDC." Petitioners' Second Motion to Take Evidence not in the Record Relating to Jurisdiction, Appendix 142.

Finally, petitioners cite to a parks bond measure (Measure 20-110), a summary of that measure and a resolution calling for an election on Measure 20-110 and argue:

> "Each of the parks projects listed in the resolution and summarized in the Measure summary statement can be found in the Parks [Project and Priority] Plan, Table 1, which lists proposed projects. They are not found in any other city planning document." Petitioners' Second Motion to Take Evidence not in the Record Relating to Jurisdiction 8.

under the Metro Plan. Finally, it is difficult to believe the city would take the position that it can proceed to construct all the projects identified in the PROS Project and Priority list without (1) revisiting the PROS Plan, (2) adopting a Metro Plan refinement plan of some sort for parks and recreation facilities or (3) amending the Metro Plan to eliminate any requirement that the city adopt a Metro Plan parks and recreation facilities refinement plan. The cited extra-record evidence does not clearly take any of these positions, although the city's position regarding its legal obligations for parks and recreation facilities planning under the Metro Plan may have evolved somewhat from when the city adopted the PROS Plan to replace the repealed 1989 City of Eugene Parks and Recreation Plan Metro refinement plan and separately adopted the PROS Project and Priority Plan as a fiscal plan under ORS 223.309(1).

The city's decision to adopt the PROS Plan to supply the additional land use planning that is required for parks, recreation and open space under the Metro Plan, and to separately adopt the PROS Project and Priority Plan as a fiscal document, was made when those documents were adopted in 2006. Having made that choice, the city may not rely on the PROS Project and Priority Plan to fulfill the remaining land use planning obligations that we found it has under the Metro Plan in *Home Builders I*.[13] Stated differently, if the city currently has authority under its land use laws to construct any of the projects listed in the PROS Project and Priority Plan, without first adopting a Metro refinement plan for parks and recreation facilities, it is not because of anything in the PROS Project and Priority Plan, which was not adopted as a Metro Plan refinement plan. Rather, such construction would be possible only if the city can establish that such projects can be constructed consistently with

[13] If the city had adopted the PROS Project and Priority Plan to satisfy both ORS 223.309(1) and the city's land use planning obligations under the Metro Plan, the city could rely on the PROS Project and Priority Plan to satisfy its parks and recreation planning obligations under the Metro Plan. But if that were the case, LUBA would have jurisdiction to consider petitioners' appeal of the PROS Project and Priority Plan for the limited purpose of considering petitioners' arguments that the PROS Project and Priority Plan is not adequate to comply with the Metro Plan or other relevant land use standards.

the Metro Plan *before* the unfinished parks and recreation facilities planning that we referenced in *Home Builders I* is completed. If the city now wishes the PROS Project and Priority Plan to serve as both a fiscal plan under ORS 223.309(1) and a land use plan under applicable statewide and local planning law, there is no reason why the PROS Project and Priority Plan could not be adopted to serve both purposes. But the city will first have to adopt the PROS Project and Priority Plan as both a fiscal plan and a land use plan. The PROS Project and Priority Plan clearly was not adopted to serve both purposes when Resolution No. 4863 was adopted on May 22, 2006.

With the above caveats, we agree with the city that its decision to proceed with implementation of its fiscal plan—the PROS Project and Priority Plan—does not convert that fiscal plan into a *de facto* Metro refinement plan or any other kind of land use plan. Resolution No.4863 was not a land use decision on May 22, 2006, when the city adopted that resolution, and it has not been converted into a land use decision by the statements city officials and employees have made since Resolution No. 4863 was adopted. Even if those statements may erroneously describe the current legal status of the city's land use planning for parks, recreation and open space planning under the Metro Plan and any other applicable land use planning laws, those erroneous statement do not convert the PROS Project and Priority Plan into something it was not adopted to be.

This appeal is dismissed. [14]

[14] Under OAR 661-010-0075(11), once a jurisdictional issue is raised at LUBA, all parties have ten days to file a motion requesting that LUBA transfer the appeal to circuit court in the event that LUBA determines that it does not have jurisdiction over the appeal. No party filed a motion to transfer pursuant to OAR 661-010-0075(11).