12/15/20 PM 1:29 LUBA

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3
4 JOSEPH SCHAEFER, CITY OF AURORA,
5 CITY OF WILSONVILLE,
6 1000 FRIENDS OF OREGON and
7 FRIENDS OF FRENCH PRAIRIE,
8 *Petitioners*,
9
10 and
11
12 CLACKAMAS COUNTY,
13 *Intervenor-Petitioner*,
14
15 vs.
16
17 OREGON AVIATION BOARD and
18 OREGON DEPARTMENT OF AVIATION,
19 *Respondents*,
20
21 and
22
23 AURORA AIRPORT IMPROVEMENT
24 ASSOCIATION, BRUCE BENNETT,
25 WILSON CONSTRUCTION COMPANY, INC.,
26 TED MILLAR, TLM HOLDINGS, LLC,
27 ANTHONY ALAN HELBLING and
28 WILSONVILLE CHAMBER OF COMMERCE,
29 *Intervenors-Respondents*.
30
31 LUBA Nos. 2019-123/127/129/130
32
33 FINAL OPINION
34 AND ORDER
35
36 Appeal from Oregon Aviation Board and Oregon Department of Aviation.
37

1 Andrew Mulkey, Portland, filed a petition for review and a reply brief and
2 argued on behalf of petitioners 1000 Friends of Oregon and Friends of French
3 Prairie.
4
5 Joseph Schaefer, Aurora, and Sara Kendrick, Silverdale, WA, filed a joint
6 petition for review and reply briefs. Joseph Schaefer argued on behalf of himself.
7 Sara Kendrick argued on behalf of petitioner City of Aurora.
8
9 Barbara A. Jacobson, City Attorney, Wilsonville, and Stephen L. Madkour
10 and Nathan K. Boderman, Clackamas County Counsels, Oregon City, filed a joint
11 petition for review and a reply brief. Barbara A. Jacobson argued on behalf of
12 petitioner City of Wilsonville. Nathan K. Boderman argued on behalf of
13 intervenor-petitioner Clackamas County.
14
15 Lucinda Jackson, Senior Assistant Attorney General, Salem, filed a
16 response brief and argued on behalf of respondents.
17
18 Wendie L. Kellington, Lake Oswego, filed a response brief and argued on
19 behalf of intervenors-respondents Aurora Airport Improvement Association,
20 Bruce Bennett, Wilson Construction Company, Inc., Ted Millar, TLM Holdings,
21 LLC, and Anthony Alan Helbling.
22
23 Eric S. Postma, Lake Oswego, filed a response brief on behalf of
24 intervenor-respondent Wilsonville Chamber of Commerce.
25
26 Scott A. Norris, Assistant County Counsel, Salem, filed an Amicus Brief
27 on behalf of Marion County.
28
29 RYAN, Board Member; RUDD, Board Chair; ZAMUDIO, Board
30 Member, participated in the decision.
31
32 DISMISSED 12/16/2020
33
34 You are entitled to judicial review of this Order. Judicial review is
35 governed by the provisions of ORS 197.850.

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal an October 31, 2019 decision of the Oregon Aviation Board (Aviation Board) adopting findings in support of a 2012 update to the Aurora State Airport Master Plan.

MOTIONS TO TAKE OFFICIAL NOTICE

LUBA has authority to take official notice of judicially cognizable law, as set out in Oregon Evidence Code (OEC) 202. OEC 202(7) provides that judicially cognizable law includes "[a]n ordinance, comprehensive plan or enactment of any county or incorporated city in this state." On September 21, 2020 petitioners Joseph Schaefer and City of Aurora (together, Schaefer) moved for LUBA to take official notice of the minutes of an August 5, 2020 Marion County Board of Commissioners' meeting (Minutes).

Respondents Aviation Board and Oregon Department of Aviation (ODA), and intervenors-respondents Aurora Airport Improvement Association *et al* (AAIA) (together, respondents) object, arguing that Schaefer's motion should be denied because Schafer asks LUBA to consider the Minutes for their evidentiary value. Respondents also move to strike the portions of Schaefer's Joint Petition for Review (Joint Petition) that cite to and rely on the Minutes.

We agree with respondents that Schaefer impermissibly requests that LUBA take official notice of the Minutes in order to bolster the evidentiary support for their arguments that are included in the Joint Petition. As we have

held on a number of occasions, LUBA review is generally limited to the evidentiary record that is compiled before the local government, and LUBA's authority to take official notice of official enactments does not extend to taking official notice of adjudicative extra-record evidence to resolve evidentiary disputes. *Lund v. City of Mosier*, 57 Or LUBA 527, 529 (2008); *Friends of Deschutes County v. Deschutes County*, 49 Or LUBA 100, 103 (2005); *Blatt v. City of Portland*, 21 Or LUBA 337, 342, *aff'd*, 109 Or App 259, 819 P2d 309 (1991). The motion to take official notice of the Minutes is denied. In addition, LUBA will disregard arguments in the Joint Petition that cite to or rely on the Minutes.

On October 23, 2020, after the Joint Petition was filed, Schaefer filed an "Amended Joint Motion to Take Judicial Notice" (Amended Motion) of an October 2020 Marion County Board of Commissioners' ordinance (Ordinance) that approved an exception to Statewide Planning Goal 3 (Agricultural Lands) and Goal 14 (Urbanization) for property located in proximity to the Airport. Schaefer's Amended Motion does not state the purpose for which Schaefer seeks to have LUBA consider the Ordinance.

Respondents object, arguing that Schaefer seeks to have LUBA consider the Ordinance to establish adjudicative facts not included in the record. Given that Schaefer's Amended Motion does not explain the purpose for which Schaefer seeks to have LUBA consider the Ordinance, the Amended Motion is also denied.

BACKGROUND

This appeal involves the Aviation Board's adoption of an amendment to the existing airport master plan for the Aurora Airport (Airport or Aurora Airport). The Airport was established over 70 years ago, in 1943, and served as a base for military training flights. After World War II, the airport was given to the state by the federal government, and it is now owned by the ODA and the Aviation Board. The Airport is located in unincorporated Marion County, approximately 1/4 mile from the City of Aurora, two miles from the City of Wilsonville, and approximately 1/4 mile from the southern boundary of Clackamas County.

Federal, state, and local laws and regulations govern development and uses at the Airport. We briefly describe the laws governing uses and development at the Airport.

A. Airports and Airport Planning

1. Federal Law

Public airports receive federal funds for their development, maintenance and operation. Federal law requires airport master planning for airports that are included in the federal National Plan of Integrated Airport System, as a precursor to obtaining federal funding for airport improvements. The Federal Aviation Administration's (FAA's) Airport Improvement Program funds the planning

process. FAA guidance provides that airport master plans should be consistent with local and state plans while meeting the federal criteria for airport planning.[1]

2. State Law

Pursuant to ORS 835.015, ODA is required to develop "a plan for the development of airports, state airways, airplane industries and aviation generally." This includes adopting master plans for airports owned by the state. ODA adopted an airport master plan for the Aurora Airport in 1976 and, prior to the adoption of the 2012 update, adopted updates in 1988 and 2000.

ORS 197.180(1) requires that state agency programs which affect land use comply with the statewide planning goals and are compatible with acknowledged city and county comprehensive plans. An airport master plan is a "program affecting land use" within the meaning of OAR 660-030-0005(2), and accordingly it is subject to the requirements of ORS 197.180. ODA has adopted a state agency coordination (SAC) program to ensure that its programs affecting land use satisfy the requirements in ORS 197.180, at OAR 738-130-0000 *et seq*. We discuss the statute and rules in detail later in this opinion.

ORS 836.600, enacted in 1995, recognizes "the importance of the network of airports to the economy of the state and the safety and recreation of its citizens," and provides that "the policy of the State of Oregon is to encourage and support the continued operation and vitality of Oregon's airports. Such

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[1] FAA Advisory Circular 150/5070-6B, Airport Master Plans.

1 encouragement and support extends to all commercial and recreational uses and
2 activities described in ORS 836.616(2)." ORS 836.625 provides that "[t]he
3 limitations on uses made of land in exclusive farm use zones described in ORS
4 215.213 and 215.283 do not apply to the provisions of ORS 836.600 to 836.630
5 regarding airport uses."

6 **3. Local Law**

7 The 1976 Aurora Airport Master Plan (1976 Airport Plan) is included in
8 Marion County Comprehensive Plan (MCCP). The county's Rural
9 Transportation System Plan incorporates by reference the 2000 update to the
10 1976 Airport Plan. Record 4078. The Airport is zoned Airport Public (P), and
11 airport and airport-related commercial and industrial uses are conditional uses in
12 the P zone. Marion County Zoning Ordinance (MCZO) 17.171.030(A). The
13 county also applies an Airport Overlay (AO) zone to lands adjacent to the Airport,
14 most of which are zoned Exclusive Farm Use (EFU). MCZO 17.177.010 to .070.
15 The AO zone implements the federal requirement for a Runway Protection Zone
16 set out in 14 CFR Part 77. Record 4074.[2] The AO zone allows all uses allowed
17 in the EFU zone. MCZO 17.177.030.

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[2] OAR 660-013-0030(2) requires consistency between local land use regulations and federal safety zone regulations. MCZO 17.177.010 provides that:

> "The airport overlay zone is intended to minimize potential dangers from, and conflicts with, the use of aircraft at public airports based on the adopted master plans for each airport. It is to be used in conjunction with the underlying zone. If any conflict in regulation

1 **B. 2009 to 2011 Airport Master Plan Update Proceedings**

2 Beginning in November 2009, the Aviation Board through ODA engaged
3 in a public process to update the then-existing master plan for the Aurora
4 Airport.[3] ODA formed a Public Advisory Committee and its first meeting was
5 held in July 2010.[4] Subsequent meetings of the committee were also held in
6 2010 and 2011 through the last meeting in September 2011.

7 One focus of the master plan update proceedings was identifying the
8 location of a lengthened runway. The existing runway at the Airport is 5,004
9 feet long and 100 feet wide. Record 4164. The 1976 Airport Plan and
10 subsequent updates to the 1976 Airport Plan contemplated a 6,000 foot runway.

> or procedure occurs with the underlying zoning districts, the more restrictive provisions shall govern. This section is intended to comply with Federal Aviation Agency Regulation FAR-77 and all other applicable federal and state laws regulating hazards to air navigation."

[3] When the airport master plan update proceedings occurred, ODA had not yet adopted a state agency coordination program. Accordingly because ODA was previously the Aeronautics Division of the Oregon Department of Transportation (ODOT), the state agency coordination program that applied was ODOT's program at OAR 731-015-0005 *et seq*. In 2019, when the Aviation Board adopted the 2019 Findings, the state agency coordination program that applied was ODA's SAC program at OAR 738-130-0005 *et seq*. No party points to any differences between the two SAC programs or assigns any legal significance to any differences.

[4] Petitioners City of Aurora, City of Wilsonville and intervenor-petitioner Clackamas County were members of the Public Advisory Committee. In addition, Marion County was a member of the committee. Record 4023-24.

1 Record 3059 (1976 Airport Plan Airport Layout Plan labeled "Ultimate 6,000"
2 under the location of the Runway.)
3 At one of the final meetings in 2011, the Aviation Board directed the
4 ODA and the Public Advisory Committee to finalize the master plan update to
5 include two scenarios for lengthening the runway.[5] Scenario 2 would lengthen
6 the runway by 800 feet to the north, and would cost approximately $2.5 million
7 more than the other scenario. Record 4200. Scenario 3 would lengthen the
8 runway by 1,000 feet to the south. The paved portion of the southern runway
9 extension would be on property owned by the Airport and zoned P.[6] Record
10 5971.
11 On October 27, 2011, the Aviation Board voted to adopt the update to the
12 existing Airport Master Plan.[7] Record 363. The ODA subsequently submitted

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[5] The third scenario was a "no build" alternative.

[6] A longer runway also requires an expanded Runway Protection Zone.

[7] Although petitioners dispute that the Aviation Board adopted the entire airport master plan update at the meeting, the minutes demonstrate that the Aviation Board voted to adopt the entire master plan update, and not just the last chapters, as petitioners argue, and to submit the different proposed airport layout plans to the FAA for approval of one:

> "Chair: Okay, I will entertain a motion to approve the master plan submitted and fire it off to the FAA.
>
> "* * * *

1 the update to the FAA for FAA approval of one of the two included Airport
2 Layout Plans. In October 2012 the FAA approved one of the alternative Airport
3 Layout Plans (2012 Airport Plan).[8]

4 As we discuss later in this opinion, OAR 660-030-0065(3) requires a
5 state agency to adopt findings demonstrating compliance with the goals if one
6 or more of the circumstances set out in that rule applies. OAR 738-130-0055(6),
7 a provision of ODA's SAC program, requires the agency to "adopt findings of
8 compatibility with the acknowledged comprehensive plans of affected cities and
9 counties and findings of compliance with applicable statewide planning goals
10 when it adopts the final facility plan." The Aviation Board did not adopt
11 findings explaining its decision, as required by OAR 738-130-0055(6), until it
12 adopted the challenged decision.

13 **C. 2019 Proceedings**

14 In 2019, the Aviation Board provided notice that it would consider
15 adopting findings in support of the 2012 Airport Plan. The Aviation Board held
16 a meeting on September 24, 2019, and a second meeting on October 31, 2019. At
17 the conclusion of the October 31, 2019 meeting, the Aviation Board voted to

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"Opposed? Excellent. Good work by the staff. Major milestone passed." Record 363.

[8] In 2013, the Marion County Board of Commissioners adopted Resolution 13R-13, which stated that the commissioners "acknowledge[d] and support[ed]" the 2012 Airport Plan. Record 436.

1 adopt findings in support of the decision to adopt the 2012 Airport Plan (2019
2 Findings). These appeals followed the Aviation Board's adoption of the 2019
3 Findings.

4 **JURISDICTION**

5 As relevant here, LUBA's jurisdiction includes review of "land use
6 decision[s]." ORS 197.825.[9] Although most appeals at LUBA concern city and
7 county land use decisions, LUBA also has jurisdiction to review some state
8 agency land use decisions. *Id.*

9 **A. ORS 197.015(10)(a)(B)**

10 An Aviation Board decision is a land use decision, and therefore
11 reviewable by LUBA, if the Aviation Board is "required to apply the [statewide
12 planning] goals" in making its decision. ORS 197.015(10)(a)(B).[10] In their
13 response briefs, respondents and intervenor-respondent Wilsonville Chamber of
14 Commerce (Chamber) move to dismiss the appeal. Among other bases,
15 respondents assert that the Aviation Board was not required to apply any

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[9] ORS 197.825(1) provides, as relevant:

> "[T]he Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district or a *state agency* in the manner provided in ORS 197.830 to 197.845." (Emphasis added.)

[10] ORS 197.835(9)(b) provides that LUBA is authorized to reverse or remand a state agency decision when "the state agency made a decision that violated the goals."

1 statewide planning goals in adopting the 2019 Findings, and thus the challenged
2 decision is not a "land use decision" as defined in ORS 197.015(10)(a)(B).
3 First, respondents rely on the Land Conservation and Development
4 Commission's (LCDC's) rule that implements ORS 197.180(1), at OAR 660-
5 030-0065(2), and argue that the rule allowed the Aviation Board to establish
6 compliance with the goals by establishing compatibility with the MCCP.
7 Accordingly, respondents argue, the Aviation Board was not "required to apply
8 the goals" within the meaning of ORS 197.015(10)(a)(B). We discuss OAR 660-
9 030-0065 in detail below. Second, respondents argue that even if the Aviation
10 Board was required to apply the goals, any proposed improvements that may be
11 located on EFU-zoned land, of which respondents maintain there are none except
12 an Instrument Landing System Localizer (Localizer), comply as a matter of law
13 with Goals 3, 4, 11, and 14, pursuant to OAR 660-012-0065(3)(n).[11]
14 Petitioners 1000 Friends and Friends of French Prairie (together, 1000
15 Friends) and Schaefer (together, petitioners) argue that ORS 197.180(1) requires
16 a separate and independent determination of goal compliance, and does not allow
17 the Aviation Board to rely on compatibility with the MCCP to establish
18 compliance with the goals. Petitioners also argue that the 2012 Airport Plan is

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[11] OAR 660-012-0065(3)(n) provides that "[t]he following transportation improvements are consistent with Goals 3, 4, 11, and 14 subject to the requirements of this rule: * * * (n) Expansions or alterations of public use airports that do not permit service to a larger class of airplanes."

1 not compatible with the MCCP, and that therefore the Aviation Board was
2 required to apply the goals pursuant to OAR 660-030-0065(3)(b). In a variation
3 of that argument, petitioners also argue that OAR 660-030-0065(3)(b) required
4 the Aviation Board to assure compatibility with the comprehensive plans of the
5 cities of Aurora and Wilsonville, and Clackamas County. Petitioners next argue
6 that OAR 660-012-0065(3)(n) does not establish compliance of the 2012 Airport
7 Plan with Goals 3, 11 and 14 as a matter of law, and that Goals 2, 6, 9, 12 and 13
8 apply. Finally, petitioners argue that LUBA has jurisdiction over the 2019
9 Findings because it is a significant impacts land use decision. We address each
10 argument in turn.

11 At the outset, we note that these appeals present a unique circumstance,
12 but one that is similar to the one that was presented in *Jaqua v. City of Springfield*,
13 46 Or LUBA 566 (2004). In *Jaqua*, we were required to resolve the merits of the
14 petitioners' argument that the city was required to but did not apply several
15 provisions of the city's comprehensive plan in order to resolve the jurisdictional
16 question. We explained:

17 "It is awkward at least that, in order to resolve that question and the
18 jurisdictional issue in the present case, we must also effectively
19 determine the merits of petitioners' assignment of error, which
20 argues that GRP policies 13.0 and 13.3 apply to prohibit the city
21 from approving 'development' prior to master plan approval.
22 However, given the statutory definition of 'land use decision' and
23 the nature of petitioners' assignment of error, that awkwardness is
24 inescapable. *See Southwood Homeowners v. City Council of*
25 *Philomath*, 106 Or App 21, 806 P2d 162 (1991) (LUBA must decide
26 the merits of whether a challenged subdivision is consistent with

1 applicable land use standards in order to rule on a motion to dismiss,
2 under *former* ORS 197.015(10)(a)(B), which excluded from
3 LUBA's jurisdiction approval or denial of a subdivision that is
4 consistent with land use standards)." 46 Or LUBA at 574-75 n 5.

5 Here, in order to resolve the jurisdictional question of whether the Aviation Board
6 was "required to apply the [] goals," and thus whether the challenged decision is
7 a land use decision as defined in ORS 197.015(10)(a)(B), we must resolve the
8 merits of petitioners' arguments that because the 2012 Airport Plan is not
9 compatible with the MCCP, the Aviation Board was required and failed to apply
10 the goals.

11 **B. The Aviation Board was not required to apply the statewide**
12 **planning goals**

13 **1. ORS 197.180(1) does not require a separate goal**
14 **compliance determination**

15 ORS 197.180(1) requires that state agency programs which affect land use
16 comply with the statewide planning goals and are compatible with acknowledged
17 city and county comprehensive plans. Petitioners argue that ORS 197.180(1)
18 requires separate and independent goal compliance findings. As explained below,
19 LCDC has adopted rules that implement ORS 197.180(1)(a) and (b). Those rules
20 provide that a state agency can establish goal compliance by establishing
21 compatibility with the "applicable acknowledged comprehensive plans."[12]

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[12] In 1986, prior to adopting amendments to OAR 660 Division 30, the director of the Department of Land Conservation and Development (DLCD) sought and received an opinion from the Oregon Attorney General that concluded that, in the Attorney General's opinion, LCDC could interpret ORS 197.180 to allow state

1 Schaefer relies on our order in *Witham Parts v. ODOT*, 41 Or LUBA 588
2 (2002), to argue that a separate goal compliance determination is required.
3 Petitioners and Intervenor-Petitioner's Joint Response to the Motions to Dismiss
4 (Joint Response) 9. *Witham Parts* was an appeal of an ODOT revised
5 environmental assessment that approved the final design of a facility plan for an
6 interchange. In *Witham Parts*, we concluded that LUBA had jurisdiction over the
7 appeal, by rejecting several serial motions to dismiss presented by ODOT that
8 each relied on different legal theories for why LUBA lacked jurisdiction. *Id.* at
9 597-99. Our order in *Witham Parts* is less than clear, but appears to have denied
10 ODOT's motions to dismiss because LUBA concluded that any argument that
11 ODOT presented that OAR 660-030-0065(2) divested LUBA of jurisdiction over
12 the appeal because ODOT was not required to apply the goals was not sufficiently
13 developed for LUBA to conclude that it applied. *Id* at 598-99. Our order in
14 *Witham Parts* did not conclusively affirm or reject ODOT's apparent premise
15 that LUBA lacked jurisdiction over an appeal of an ODOT facility plan where
16 ODOT took the position that it established compliance with the goals by
17 establishing compatibility with the applicable comprehensive plan.[13]

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agencies satisfy their goal compliance obligations by acting consistently with the acknowledged comprehensive plan. 45 Op Atty Gen 98, 109 (1986).

[13] In our final opinion and order affirming ODOT's decision, we noted that OAR 660-030-0065(2) provides that state agencies may demonstrate compliance with the goals by establishing compatibility with the comprehensive plan.

In *1000 Friends of Oregon v. LCDC*, 111 Or App 491, 492, 826 P2d 1023 (1992), the Court of Appeals held that LCDC was authorized to adopt rules that allow a demonstration of compatibility with an acknowledged comprehensive plan, as required in ORS 197.180(1)(a), to also satisfy the obligation in ORS 197.180(1)(a) to take actions "in compliance with the * * * goals," and was authorized to define by rule the circumstances in which local plan compatibility is insufficient to demonstrate goal compatibility. Accordingly, LCDC's rules at OAR 660-030-0065(2) and (3) are the legitimate implementation of the statutory obligation of state agencies to "carry out their planning * * * responsibilities and take actions" in compliance with the goals.

A local government's comprehensive plan is acknowledged when it complies with the goals. ORS 197.015(1) (definition of "Acknowledgement"). After acknowledgement, a local government is relieved of the responsibility of making land use decisions in compliance with the goals, and it must make land use decisions in compliance with the acknowledged comprehensive plan. Similarly, where an acknowledged comprehensive plan addresses matters relevant to the state agency's program, it would make little sense to require a state agency to demonstrate compliance with the plan *and* with the goals. Requiring a separate determination of compliance with both the comprehensive plan and the

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Witham Parts v. ODOT, 42 Or LUBA 435, 440 (2002), *aff'd*, 185 Or App 408, 61 P3d 281 (2002).

1 goals would create an uncoordinated regulatory scheme that could apply different
2 standards to identical issues.

3 **2. OAR 660-030-0065(2) applies**

4 LCDC has adopted rules at OAR chapter 660, division 30 to implement
5 ORS 197.180, to assure that state agency programs and actions affecting land use
6 comply with the goals. OAR 660-030-0000. As provided in OAR 660-030-
7 0065(2), state agencies generally achieve compliance with the statewide planning
8 goals by assuring that their actions are compatible with acknowledged
9 comprehensive plans:

10 "Except as provided in [OAR 660-030-0065(3)], a state agency shall
11 comply with the statewide planning goals by assuring that its land
12 use program is compatible with the applicable acknowledged
13 comprehensive plan(s) as provided in OAR 660-030-0070."

14 OAR 660-030-0065(3) sets out the circumstances in which a state agency
15 must adopt findings demonstrating compliance with the goals.[14] As relevant here,

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[14] OAR 660-030-0065(3) provides:

"A state agency shall adopt findings demonstrating compliance with the statewide goals for an agency land use program or action if one or more of the following situations exists:

"(a) An agency's program or action specifically relates to or occurs in an area that is not subject to an acknowledged comprehensive plan; or

"(b) An agency takes an action that is not compatible with an acknowledged comprehensive plan after exhausting efforts to be compatible as described in OAR 660-030-0070; or

1 one of those circumstances is when the agency's proposed land use program is

2 not compatible with the acknowledged plan. OAR 660-030-0065(3)(b); *see* n 14.

3 OAR 660-030-0070 sets out procedures that a state agency must include

4 in its SAC program that assure that a land use programs are compatible with

5 applicable acknowledged comprehensive plans, in the event of a dispute between

6 the state agency and the local government. ODA's SAC program at OAR 738-

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> "(c) An acknowledged plan pursuant to OAR 660-030-0070(2)(c) does not contain either:
>
> > "(A) Requirements or conditions specifically applicable to the agency's land use program or action thereunder; or
> >
> > "(B) General provisions, purposes, or objectives which would be substantially affected by the agency's action.
>
> "(d) A statewide goal or interpretive rule adopted by the Commission under OAR chapter 660 establishes a compliance requirement directly applicable to the state agency or its land use program; or
>
> "(e) An acknowledged comprehensive plan permits a use or activity contained in or relating to the agency's land use program contingent upon case-by-case goal findings by the agency; or
>
> "(f) The agency's land use program or action is expressly exempt by reason of applicable statute, constitutional provision or appellate court decision from compatibility with acknowledged comprehensive plans; or
>
> "(g) The agency carries out, in accordance with OAR 660-030-0085, specified goal compliance requirements on behalf of certain applicable local governments."

1 130-0055 includes coordination procedures for adopting final master plans. The
2 coordination procedures require ODA to involve "affected cities and counties"
3 and hold at least one public meeting prior to adoption of the plan (OAR 738-
4 0130-0055(1)); provide a draft of the plan to representatives of the affected cities
5 and counties (OAR 738-0130-0055(2)); and meet with local government
6 planning representatives to discuss ways to resolve any identified statewide goal
7 or comprehensive plan conflicts (OAR 738-0130-0055(3)). ODA's SAC program
8 defines "affected city or county" to mean "a city or county that has
9 comprehensive planning authority over a site or area which is directly impacted
10 by a proposed Board or Department action." OAR 738-130-0005(15); OAR 731-
11 015-0005(2). *See* n 3. The procedures also require ODA to "adopt findings of
12 compatibility with the acknowledged comprehensive plans of affected cities and
13 counties and findings of compliance with *applicable* statewide planning goals
14 when it adopts the final facility plan." OAR 738-130-0055(6) (emphasis added).
15 In the 2019 Findings, the Aviation Board concluded that the 2012 Airport
16 Plan is compatible with the MCCP, and that it was not required to find that the
17 plan is compatible with the goals, or with the comprehensive plans of
18 jurisdictions that do not have comprehensive planning authority over the Airport.
19 Record 4934-35. The Aviation Board also adopted alternative, precautionary
20 findings that the 2012 Airport Plan complies with the goals. Record 4935-37.

3. OAR 660-030-0065(3)(b) does not apply

One basis that triggers a state agency's obligation to adopt separate findings determining compliance with the goals is when "[a]n agency takes an action that is not compatible with an acknowledged comprehensive plan after exhausting efforts to be compatible as described in OAR 660-030-0070[.]" OAR 660-030-0065(3)(b). Schaefer argues that the 2012 Airport Plan is not compatible with several MCCP policies, goals, and purposes cited in their petition for review. Those policies include MCCP Agricultural Lands Policies 1, 2 and 3; Rural Development Policies 1, 3, and 4; Rural Services Policies 1 through 4; Special District Policies 6, 7, and 8; Urban Land Use Goals a, b, and c; Urban Growth Policies 1, 2, 3 and 6; Growth Management Framework Purposes 1, 2, 3 and 5; and Growth Management Framework Goals 1, 6 and 7. Joint Petition 46-47, 51; Joint Response 10-12.

a. Agricultural Lands Policies

Schaefer first argues that the 2012 Airport Plan is incompatible with the MCCP's agricultural lands policies because, Schaefer argues, the 2012 Airport Plan depicts future airport development on 16.54 acres land zoned EFU, and that future development is not a use that is allowed in the EFU zone. Joint Petition 51; Schaefer and City of Aurora Joint Reply Brief 3 (citing Record 4181). Schaefer points to a version of one of the proposed airport layout plans in the record that depicts a 16.54-acre area currently zoned EFU (referred to as the church camp), adjacent to the existing P zone, as "suitable for airport-related

1 development." Joint Petition 16 (citing Record 4157). Schaefer additionally
2 argues that the 2012 Airport Plan contemplates acquisition by ODA of 55.13
3 acres of land south of the extended runway, and argues that the acquisition is for
4 future airport development.
5 Second, petitioners argue that the 2012 Airport Plan identifies some airport
6 improvements that may be located on EFU-zoned land. According to Schaefer,
7 those are a paved taxiway that parallels the extended southern runway, a paved
8 stopway at the end of the extended runway that Schaefer argues extends beyond
9 existing Keil Road, and the Localizer. Schaefer also argues that closing and dead-
10 ending Keil Road, a local road that currently connects Airport Road and Highway
11 551 just south of the existing airport boundary requires the Aviation Board to
12 seek an exception to Goal 3, triggering application of Goal 3.
13 Respondents respond that the 2012 Airport Plan is compatible with the
14 applicable provisions of the MCCP. Respondents first note that Marion County,
15 the jurisdiction with planning authority over the Airport, raised no issues with
16 compatibility with the MCCP during the 2009-11 proceedings or during the 2019
17 proceedings. With respect to the 16.54 acres that Schaefer argues the 2012
18 Airport Plan identifies as "suitable for airport-related development," respondents
19 point to a statement in the 2012 Airport Plan at Record 4191 that "although
20 previous discussions identified the adjacent church camp property as a potential
21 location to meet this forecasted need, through the public involvement process, it
22 was determined that it would not be identified on the Airport Layout Plan as

future airport-related development." With respect to the 55.13 acres to be acquired by ODA to the south of the runway, respondents explain that the acreage is necessary to secure the Runway Protection Zone mandated by the FAA and will remain zoned EFU with an AO overlay. AAIA Response Brief 144-145.

Respondents dispute that any improvements except the Localizer are shown on the FAA-approved Airport Layout Plan to be located on land outside the P zone. ODA responds that the Airport Layout Plan is not a design-level document or a site plan, and that it is therefore not possible to definitively determine from the Airport Layout Plan whether those possible improvements will be located in the P zone. AAIA takes the more definitive position that the parallel taxiway and the stopway would be located in the P zone, and that the Localizer, if constructed, is an allowed use in the EFU zone as a utility facility necessary for public service under ORS 215.283(1)(c). For the paved stopway at the end of the extended runway, respondents explain that the stopway will terminate at half-way point of Keil Road, which the county has confirmed is the boundary between the P zone and the EFU-zoned property to the south of Keil Road. For the Localizer, respondents explain that since the 2012 Airport Plan was approved by the FAA, the need for the localizer has become obsolete and that ODA could choose to rely on a Global Positioning System without the need for the Localizer at all. AAIA Response Brief 61 n 21 (citing Record 4055). Nonetheless, respondents respond, if the parallel taxiway is determined to be necessary to locate outside the P zone, ODA could determine that it is not

1 necessary to be constructed in order for the extended runway to still operate
2 safely. Record 588, 4987; AAIA Response Brief 130. Finally, respondents
3 respond that the dead-ending of Keil Road, a local road, complies with Goal 3 as
4 a matter of law pursuant to OAR 660-012-0065(3)(n) because that action is
5 related to the expansion or alteration of an existing airport. *See Lentz v. Lane*
6 *County*, 38 Or LUBA 669, 675-76 (2000) (realignment of a roadway to facilitate
7 expansion or alteration of a public use airport falls within ambit of OAR 660-
8 012-0065(3)(n)).

9 We agree with respondents that petitioners have not established that the
10 2012 Airport Plan is incompatible with the Agricultural Lands Policies of the
11 MCCP. First, although a draft of the various proposed alternatives for the Airport
12 Layout Plan at Supplemental Record 4185 depicted a 16.54-acre area as
13 "Proposed Future Development," the FAA-approved plan included in the 2012
14 Airport Plan at Record 5693 does not show any future airport related
15 development areas. Second, the proposed acquisition of 55.13 acres for the FAA-
16 mandated Runway Protection Zone is not incompatible with the MCCP because
17 the land will remain zoned EFU, with an AO overlay, and the AO zone allows all
18 uses allowed in the EFU zone. MCZO 17.177.030. Third, given respondents'
19 responses and the evidence in the record, it is not clear to us that the taxiway and
20 the stopway are proposed to be located outside the P zone, and Schaefer does not
21 point to anything in the record that conclusively resolves the question. Rather,
22 Schaefer relies on a map that the city of Aurora introduced into the record that

derives from, but also differs from, the Airport Layout Plan included in the record at 4214. Joint Petition 16 (citing Record 29). The altered map of Record 4214 includes what the city of Aurora apparently believes are improvements proposed outside the P zone boundary. Record 29.

In addition, we think respondents' explanation that ODA could choose to not construct the taxiway or install the Localizer if they had to be located on EFU land, and that the stopway will be located in the P zone, undercuts petitioners' speculation that the improvements will be located in the EFU zone. Stated differently, petitioners' speculation that those improvements may be located outside the P zone is, at this point, just speculation, and not enough to demonstrate that the 2012 Airport Plan is incompatible with the MCCP. Accordingly, Schaefer has not established that the 2012 Airport Plan is incompatible with Agricultural Lands Policies 1, 2 and 3.

b. Other MCCP Policies, Goals and Purposes

For the Rural Development, Rural Services, Special District, Urban Land Use Goals, Urban Growth Policies, and Growth Management Framework Purposes and Goals, cited at Joint Petition 45-47, Schaefer's arguments rest on an unstated but presumed premise that expansion of the Airport, and perhaps the Airport itself, is an urban use of rural land, and that therefore, the MCCP policies that apply to urban level development and services apply. Respondents respond that in 2005, the legislature expressly identified the Aurora Airport as a "rural airport" with a "though the fence program" with specific protections for operation

1 and expansion. ORS 836.640(4), ORS 836.642(2). Record 2926 (Airport's
2 participation in through the fence program available only to rural airports).
3 Absent any developed argument from Schaefer regarding why the statutes
4 identifying the Airport as a "rural airport" eligible for the "through the fence"
5 program participation defeat Schaefer's premise that the Airport is urban
6 development on rural land, we agree with respondents that the 2012 Airport Plan
7 is compatible with the Rural Development, Rural Services, Special District,
8 Urban Land Use Goals and Policies, and Growth Management Framework.

9 **c. The 2012 Airport Plan is not incompatible with the**
10 **1976 Airport Plan**

11 Schaefer also argues that the 2012 Airport Plan is not compatible with the
12 1976 Airport Plan incorporated into the MCCP because the 1976 Airport Plan
13 depicts a runway extension to the north, and the 2012 Airport Plan shows the
14 runway extended to the south. However, we do not think that the 1976 Airport
15 Plan's depiction of a runway extension to the north necessarily means that a later
16 update to the master plan that locates a runway extension to the south creates an
17 inconsistency between the 2012 Airport Plan and the MCCP. The 2012 Airport
18 Plan is an update to the 1976 Airport Plan, and it is not required to be identical to
19 the 1976 Airport Plan in order to be consistent with it.

20 **4. OAR 660-012-0065(3)(n) applies**

21 OAR 660-012-0065(3)(n) provides that "[t]he following transportation
22 improvements are consistent with Goals 3, 4, 11, and 14 subject to the

1 requirements of this rule: * * * (n) Expansions or alterations of public use airports
2 that do not permit service to a larger class of airplanes." Respondents additionally
3 respond that the Aviation Board was not required to apply Goals 3, 11 and 14
4 because the proposed improvements contemplated in the 2012 Airport Plan
5 comply with Goals 3, 11, and 14 as a matter of law pursuant to OAR 660-012-
6 0065(3)(n), because those improvements, even if located on EFU-zoned land, do
7 not permit service to a larger class of airplanes.[15] Schaefer argues that the
8 expansion of the airport permits service to a larger class of airplanes and thus
9 does not fall within the exemption in the rule. According to Schaefer, changing
10 the airport from Airport Reference Code (ARC) B-II to ARC C-II means that the
11 airport will serve a "larger class of airplanes."

12 Respondents respond that the transportation improvements identified in
13 the 2012 Airport Plan do not permit service to a "larger class of airplanes."
14 Respondents first note that the ARC for the Airport already changed from ARC
15 B-II to ARC C-II without extending the runway by 1,000 feet. Respondents next
16 explain that "an ARC consists of a letter and a Roman numeral. The letter is the
17 Aircraft Approach Category, determined by aircraft approach speed. The Roman
18 numeral is the Airplane Design Group, determined by wingspan or tail height,
19 whichever is more demanding." AAIA Response Brief 80 (quoting Record

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[15] Respondents dispute that the improvements, except the Localizer, would be located on EFU zoned land.

1 4054). Thus, respondents explain, the change from ARC B to ARC C is related
2 to the speed of an aircraft on approach to landing, and not to the size of the
3 aircraft. The Airplane Design Group remained II, even after the change of the
4 Aircraft Approach Category from B to C.

5 We agree with respondents that for the reasons explained in the response
6 briefs, the improvements contemplated by the 2012 Airport Plan do not permit
7 service to a larger class of airplanes.[16] OAR 660-012-0065(3)(n) establishes as a
8 matter of law that the improvements comply with Goals 3, 11, and 14 and
9 accordingly, the Aviation Board was not required to apply those goals.

10 **5. The Aviation Board was not required to apply Goals 2, 6,**
11 **9, 12 and 13**

12 Schaefer argues that the Aviation Board was required and failed to
13 establish that the 2012 Airport Plan complies with Statewide Planning Goals 2
14 (Land Use Planning), 6 (Air, Water, and Land Resources Quality), 9 (Economic
15 Development), 12 (Transportation Planning), and 13 (Energy). However,
16 Schaefer does not develop any argument explaining why the 2012 Airport Plan
17 is not compatible with the MCCP sections that address and implement those
18 goals. Absent any developed argument regarding why the Aviation Board was

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[16] The administrative rule history of LCDC's adoption of OAR 660-012-0065(3)(n) does not illuminate the meaning of the phrase "larger class of airplanes."

1 required to separately establish compliance with those goals pursuant to OAR
2 660-030-0065(3)(b), Schaefer's arguments do not establish that it was.

3 **6. Only Marion County is an "Affected City or County"**

4 OAR 738-130-0005(15) and OAR 731-015-0005(2) define "affected city
5 or county" as "a city or county that has comprehensive planning authority over a
6 site or area which is directly impacted by a proposed Board or Department
7 action."[17] Schaefer additionally argues that the 2012 Airport Plan is not
8 compatible with the comprehensive plan of the City of Aurora (Aurora), which
9 Schaefer argues is an "applicable comprehensive plan()" as that phrase is used in
10 OAR 660-030-0065(2). That is so, according to Schaefer, due to the extension of
11 the county's AO zone into the city, and the existence of an Intergovernmental
12 Agreement (IGA) between Marion County and Aurora regarding airport planning
13 coordination. Joint Petition 62. Petitioner City of Wilsonville and intervenor-
14 petitioner Clackamas County (together, Wilsonville) argue that the Aviation
15 Board was required to consult with those jurisdictions. However, we do not
16 understand Wilsonville or Clackamas County to take the position that the
17 Aviation Board was required to find that the 2012 Airport Plan is compatible with
18 the comprehensive plans of those jurisdictions.

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[17] As noted above, the parties agree that either ODA's program or ODOT's SAC program apply to the Aviation Board's decision, and the definition of "affected city or county" in OAR 738-0130-0015(1) is identical to the definition in ODOT's SAC program at OAR 731-015-0005(2).

1 Respondents respond, and we agree, that the adopted SAC definition of
2 "affected city or county" at OAR 738-130-0005(15) and OAR 731-015-0005(2)
3 means that the Aviation Board was not required to establish compatibility with
4 the acknowledged plans of Aurora, Wilsonville and Clackamas County. First,
5 petitioners do not explain why the Aviation Board was not entitled to apply the
6 definition in its adopted SAC program. Second, while Aurora notes that the
7 county's AO zone extends into the city, Aurora does not point to anything in the
8 county's or the city's comprehensive plan that gives the city *planning authority*
9 over the Airport by virtue of the AO zone's extension into the city. The Airport
10 and any airport-related improvements are not located in the AO zone. The
11 existence of an Intergovernmental Agreement between the city and the county
12 gives the city a remedy for breach of that agreement. As respondents point out,
13 the Intergovernmental Agreement requires the Aviation Board and ODA to
14 provide the city of Aurora with notice and the opportunity to comment on
15 amendments to the Airport Master Plan. Record 1089. As noted, the city of
16 Aurora was a member of the Public Advisory Committee, and participated in the
17 proceedings that led to the adoption of the 2012 Airport Plan.
18 More importantly, in the petition for review, Schaefer does not argue that
19 the 2012 Airport Plan is inconsistent with any provision of the city's
20 comprehensive plan. Finally, as respondents point out, as a practical matter, it
21 would put ODA in an exceedingly difficult position if it was required to establish
22 compatibility with the comprehensive plans of the other jurisdictions in addition

to Marion County, because it is at least possible that the comprehensive plans of those other jurisdictions may not be compatible with each other.

C. The 2019 Findings are not a significant impacts land use decision

In the alternative, Schaefer argues that the 2019 Findings are subject to LUBA's jurisdiction under the "significant impacts" test articulated in *Peterson v. City of Klamath Falls*, 279 Or 249, 566 P2d 1193 (1977), *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 992 (1982), and *Billington v. Polk County*, 299 Or 471, 703 P2d 232 (1985). Under the significant impacts test, a decision that does not qualify as a "land use decision" as defined at ORS 197.015(10)(a) can, at least theoretically, be subject to LUBA's review, if the decision creates an "actual, qualitatively or quantitatively significant impact on present or future land uses."

The significant impacts test was first articulated prior to the creation of LUBA and adoption of ORS 197.015(10)(a) in 1979, and as a practical matter has been superseded by ORS 197.015(10)(a). One of the problems with the significant impacts test is that by its nature it operates only where no statewide planning goal, comprehensive plan provision, or land use regulation applies to the challenged decision. Such a decision may be subject only to laws or standards that have little to do with land use. For that reason, we have held that a petitioner who invokes the significant impacts test must identify the non-land use standards that the petitioner believes apply to the decision and that would be the subject of

1 LUBA's review. *Northwest Trail Alliance v. City of Portland*, __ Or LUBA __
2 (LUBA No. 2015-015, June 3, 2015), slip op 11. Further, the petitioner must
3 demonstrate that the identified non-land use standards have some bearing on or
4 relationship to the use of land. *Id.*

5 Schaefer argues that the non-land use standards at issue are FAA standards
6 that require a Runway Protection Zone and limit land uses allowed in the Runway
7 Protection Zone. Joint Response 24-25.[18] However, there are two problems with
8 that argument. First, the Runway Protection Zone is implemented by the county's
9 AO zone, which *is* a land use standard, and which prohibits uses that are
10 incompatible with the Airport. Second, the 2019 Findings do nothing to change
11 the use of the Airport or cause any impact, significant or otherwise, on present or
12 future land use of the Airport or surrounding properties. The 2012 Airport Plan
13 does not approve or authorize any development, and the 2019 Findings do not
14 change the status quo. The new land that will serve as the Runway Protection
15 Zone for the extended runway will remain zoned EFU, and there will not be a
16 change in the status quo of that land.

17 Schaefer additionally cites OAR 738-130-0035(1) through (4), which
18 describe "activities * * * that significantly affect land use" for purposes of the
19 agency's SAC program at OAR 738-130-0075, and argues that *ipso facto* the

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[18] Schaefer asks that we take official notice of FAA Circular AC 150/5300-13A. Joint Response 24. We do so.

1 decision qualifies as a significant impacts land use decision.[19] However, the SAC
2 program's identification of certain "activities that significantly affect land use"
3 for purposes of the coordination rules at OAR 738-130-0075 does not relate to or
4 answer the jurisdictional question presented here, which is whether LUBA has
5 jurisdiction over the 2019 Findings because the decision creates "actual,
6 qualitatively or quantitatively significant impact on present or future land uses"
7 under the "significant impacts" test articulated in *Peterson*. Therefore, it is not
8 relevant in determining whether the decision is a significant impacts decision.
9 For the reasons explained above, we conclude that it is not.

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[19] OAR 738-130-0035(1) through (4) provide:

> "The following activities undertaken by the Department significantly affect land use:
>
> "(1) Adopting Airport Master Plans which significantly affect the objectives of the Transportation Goal (Goal 12).
>
> "(2) Enlarging an existing transportation facility to increase the level of transportation service provided, relocating an existing transportation facility, or constructing a new transportation facility.
>
> "(3) Constructing a new Airport Operations Area (AOA), enlarging an existing AOA, or significantly changing the use of an existing AOA.
>
> "(4) Changing the size of land parcels through the purchase or sale of property. * * *"

1 **CONCLUSION**

2 Under ORS 197.015(10)(a)(B), LUBA has jurisdiction over the 2019
3 Findings if the Aviation Board was "required to apply the goals." Under OAR
4 660-030-0065(2), the Aviation Board is allowed to establish compliance with the
5 goals by establishing compatibility with the applicable provisions of the MCCP.
6 The Aviation Board is required to demonstrate compliance with the goals only
7 under the circumstances set out in OAR 660-030-0065(3). We conclude above
8 that the 2012 Airport Plan is compatible with the MCCP and that, therefore, the
9 Aviation Board was not required to separately demonstrate compliance with the
10 goals. We also conclude above that the 2019 Findings are not a significant
11 impacts land use decision.

12 Accordingly, because the Aviation Board was not required to apply the
13 goals in adopting the 2019 Findings, the challenged decision is not a land use
14 decision as defined in ORS 197.015(10)(a)(B), and we lack jurisdiction over the
15 decision.[20]

16 The appeals are dismissed.

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[20] Because we conclude the challenged decision is not a land use decision, we need not and do not address respondents' alternative bases for dismissal.