

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 WILLAMETTE OAKS, LLC,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF EUGENE,
10 *Respondent.*

11
12 LUBA No. 2001-127

13 ORDER ON MOTION TO DISMISS

14 **INTRODUCTION**

15 Petitioner owns property that lies within the Willamette River Greenway. The city has
16 constructed the East Bank Trail Bicycle/Pedestrian Path (East Bank Trail) over a portion of
17 petitioner’s property. This appeal concerns a July 9, 2001 city resolution that initiated eminent
18 domain proceedings to acquire petitioner’s property. The city contends the July 9, 2001 resolution
19 is not a land use decision subject to LUBA review. We first summarize the relevant statutes,
20 statewide planning goal, and comprehensive plan provisions before turning to the parties’ arguments
21 concerning that question.

22 **A. Willamette River Greenway Planning Statute, Statewide Planning Goal 15**
23 **(Willamette River Greenway) and the City’s Comprehensive Plan**

24 **1. ORS Chapter 390**

25 ORS 390.318(1) mandates a cooperative Willamette River Greenway planning effort by the
26 state and units of local government that front the Willamette River. ORS 390.330 to 390.360
27 authorizes local governments to acquire various interests in land within the Willamette River
28 Greenway. ORS 390.318(2) includes the following mandate for the plans required by ORS
29 390.318(1):

30 “The plan prepared pursuant to subsection (1) of this section, shall depict, through
31 the use of descriptions, maps, charts and other explanatory materials:

1 “* * * * *

2 “c. The lands and interests in lands acquired or to be acquired by units of local
3 government under ORS 390.330 to 390.360.”

4 **2. Goal 15 (Willamette River Greenway)**

5 Goal 15 elaborates on the cooperative state/local planning effort that is required for lands
6 within the Willamette River Greenway. The “Inventories and Data” section of Goal 15 requires that
7 a number of items “shall be inventoried.” The fifteenth of those items is set out below:

8 “Acquisition areas which include the identification of areas suitable for protection or
9 preservation through public acquisition of lands or an interest in land. Such
10 acquisition areas shall include the following:

- 11 a. Areas which may suitably be protected by scenic easements;
- 12 b. Scenic and recreational land for exclusive use of the public;
- 13 c. Sites for the preservation and restoration of historic places;
- 14 d. Public access corridor;
- 15 e. Public parks;
- 16 f. Ecologically fragile areas; and
- 17 g. Other areas which are desirable for public acquisition may also be identified
18 if the reasons for public acquisition for the Greenway are also identified.

19 Section E of Goal 15 addresses “Comprehensive Plans of Cities and Counties” and specifically
20 directs:

21 “**Acquisition Areas.** Each comprehensive plan shall designate areas identified for
22 possible public acquisition and the conditions under which such acquisition may
23 occur as set forth in the approved [O]DOT Willamette Greenway Plan and any
24 other area which the city or county intends to acquire.”

25 **3. City Comprehensive Plans**

26 The Eugene-Springfield Metropolitan Area General Plan (Metro Plan) acknowledges the
27 above noted Goal 15 requirement that the city must “indicate areas of potential acquisition along the

1 Greenway.”¹ Metro Plan III-D-1. According to the city, the Eugene-Springfield Metropolitan
2 Area Transportation Plan (TransPlan) and the Willakenzie Area Plan (WAP) refinement plan both
3 show the East Bank Trail from Beltline Road to the Greenway (Valley River) Bridge and both
4 depict the East Bank Trail crossing petitioner’s property. In addition, the city adopted Resolution
5 No. 2592 in 1976 which states, in part, “[f]urther public acquisition is contemplated in * * * [t]he
6 gravel pond area on Goodpasture Island[.]” Petition for Review Appendix 17. The parties
7 apparently dispute whether the TransPlan, the WAP and the above-noted resolution are sufficient to
8 comply with the statutory, Goal 15 and Metro Plan requirements that proposed property acquisition
9 within the Willamette River Greenway be specified in the city’s comprehensive plan. As we explain
10 below, we do not attempt to resolve that dispute in this order.

11 **B. The Appealed Resolution**

12 The city adopted Ordinance 20024 on September 18, 1995. Ordinance 20024 authorized
13 acquisition of property between “the Greenway Bicycle Bridge north to the Delta Highway/Green
14 Acres Road intersection for construction and maintenance of the East Bank Trail * * *.” Petition
15 for Review Appendix 1. The decision that is the subject of this appeal is Resolution 4684.
16 Resolution 4684 was adopted by the city on July 9, 2001. As the resolution explains, it was
17 adopted to authorize acquisition of property that was mistakenly omitted from the appendix to
18 Ordinance 20024 that identified the property to be acquired for the East Bank Trail. The omitted
19 property included petitioner’s property. Subsequent to the adoption of Resolution 4684, the city
20 acquired a part of the property that Resolution 4684 authorized the city to acquire, including part of
21 petitioner’s property. Construction of the East Bank Trail has been completed.²

¹ The Metro Plan and a number of plans that were adopted as refinements of the Metro Plan make up the City of Springfield and City of Eugene’s comprehensive plan.

²The East Bank Trail is part of a larger trail system that includes the North Bank Trail, West Bank Trail and South Bank Trail. On January 13, 2003 that trail system was renamed the Ruth Bascom Riverbank Trail System.

1 **MOTION TO DISMISS**

2 As relevant here, LUBA’s jurisdiction is limited to land use decisions. ORS 197.825(1).
3 The city moves to dismiss this appeal. The city asserts three bases for its motion to dismiss. First,
4 the city argues that Resolution 4684 is not a “final” decision of any kind. For that reason alone, the
5 city argues Resolution 4684 does not qualify as a “land use decision,” as ORS 197.015(10)(a)
6 defines that term, even if the resolution might qualify as a land use decision if it were a final decision.³
7 Second, the city argues that the challenged decision is not a land use decision because the city did
8 not and was not required to apply its comprehensive plan when it adopted Resolution 20024.
9 Finally, the city argues this appeal is moot.

10 **A. Mootness**

11 The city did not acquire all of the property that Resolution 4684 authorized the city to
12 acquire. Resolution 4684 authorizes the city to acquire that remaining part of petitioner’s property
13 that the city has not already acquired. Accordingly, this appeal is not moot.

14 **B. Finality**

15 Citing *No Tram to OHSU v. City of Portland*, 40 Or LUBA 411 (2001), *Dickert v. City*
16 *of Wilsonville*, 35 Or LUBA 52 (1998), and *Cole v. Lane Transit District*, 33 Or LUBA 201
17 (1997), the city argues that its decision to initiate a process that might ultimately lead to
18 condemnation of petitioner’s property is not a land use decision because it is not a “final decision,”
19 as ORS 197.015(10)(a) requires. *No Tram to OHSU* concerned a city resolution that directed

³ Land use decisions, as defined by ORS 197.015(10)(a), must be “final” decisions. *Hemstreet v. Seaside Improvement Comm.*, 16 Or LUBA 748, 752, *aff’d* 93 Or App 73, 761 P2d 533 (1988); *CBH Company v. City of Tualatin*, 16 Or LUBA 399, 405 n 7 (1988). ORS 197.015(10)(a) defines “land use decision,” in relevant part, to include:

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

“* * * * *

“(ii) A comprehensive plan provision[.]”

1 planning staff to prepare a planning document. *Dickert v. City of Wilsonville* concerned a city
2 request to the Metropolitan Service District that it take action to amend the regional urban growth
3 boundary. In both of those cases, the land use status quo would not change without a subsequent
4 land use decision that, presumably, would be a final reviewable decision. The city does not suggest
5 that a deed from the owners of the properties identified in Resolution 4684 would be a land use
6 decision. Neither does the city suggest that a circuit court judgment entered pursuant to ORS
7 35.325, which would be effective to convey the properties identified in Resolution 4684 to the city if
8 the owners were not willing to sell their property to the city, would constitute a land use decision.
9 We do not believe such a deed or circuit court judgment would constitute a land use decision
10 subject to LUBA review. If the challenged resolution otherwise falls within the statutory definition of
11 “land use decision,” it does not escape that classification simply because deeds or a circuit court
12 judgment pursuant to ORS 35.325 are needed to actually convey title to the city.

13 *E & R Farm Partnership v. City of Woodburn*, 39 Or LUBA 251 (2000), which the city
14 also cites in support of its finality argument, does not support the city either. There were two *E & R*
15 *Farm Partnership v. City of Woodburn* appeals. In the first appeal, which petitioner does not
16 cite, we dismissed an appeal of a city decision that authorized appraisals that would be necessary
17 for the city to later condemn certain property for an expansion of the city’s waste water treatment
18 facilities located outside city limits. *E & R Farm Partnership v. City of Woodburn*, 37 Or LUBA
19 702 (2000). That first appeal was dismissed based on the city’s representation it would later adopt
20 land use findings, and presumably a land use decision, at the time it made a final decision to acquire
21 or condemn the disputed property. Based on that representation, we concluded the challenged
22 decision to authorize appraisals was not the city’s final decision. 37 Or LUBA at 704-05.

23 In the second appeal, the city moved to dismiss an appeal of a subsequent city decision to
24 acquire the property through condemnation without first seeking land use approval from the county
25 and without adopting any land use findings. Although we questioned why the city represented in the
26 first appeal that that the city would adopt land use findings at the time it made a final decision to

1 acquire or condemn the property, we nevertheless granted the city’s motion to dismiss the second
2 appeal. *E & R Farm Partnership*, 39 Or LUBA at 254-55 (2000). That second appeal was not
3 dismissed because the city’s decision to condemn the disputed property was not a final city
4 decision. Rather, the second appeal was dismissed because petitioner failed to demonstrate “that
5 the city either applied or was legally required to apply any land use standards when it made a final
6 decision to condemn [the] property.” 39 Or LUBA at 254. Neither of the *E & R Farm*
7 *Partnership* cases supports the city’s argument that the challenged resolution is not the city’s *final*
8 decision regarding acquisition of petitioner’s property.

9 In summary, we conclude that the disputed resolution is the city’s “final” decision to acquire
10 property, as that term is used in ORS 197.015(10)(a). After that resolution was adopted, no other
11 actions concerning the acquisition remained to be taken besides executing and recording a deed to
12 the property or entering a judgment pursuant to ORS 35.325, and neither a deed nor a circuit court
13 judgment pursuant to ORS 35.325 is a final city decision to acquire petitioner’s property. The only
14 remaining question is whether the city applied or was legally required to apply a city comprehensive
15 plan or land use regulation when it adopted Resolution 4684. If so, Resolution 4684 is a land use
16 decision subject to LUBA’s review.

17 **C. Application of the Comprehensive Plan**

18 Resolution 4684 does not expressly apply the Metro Plan, TransPlan, WAP or any other
19 city plan or land use regulation. However, petitioner contends that the city should have done so.
20 The Metro Plan, TransPlan and WAP are all component parts of the city’s comprehensive plan. If
21 petitioner is correct that the city should have applied those plans when it adopted Resolution 4684,
22 the city’s decision is a land use decision subject to our review unless some other exception to the
23 statutory definition of “land use decision” applies.⁴

⁴ ORS 197.015(10)(b), (c), (d) and (e) exempt a number of decision that might otherwise qualify as land use decisions under the definition set out at ORS 197.015(10)(a). For example, ORS 197.015(10)(b) exempts a local government decision “[w]hich is made under land use standards which do not require interpretation or the exercise of policy or legal judgment.”

1 There can be no doubt that the relevant statutes, Goal 15 and the city’s comprehensive plan
2 itself require that the city adopt a plan for acquiring property within the Willamette Greenway, as
3 part of its comprehensive plan. Moreover, the city argues that its plan does identify petitioner’s
4 property for acquisition.

5 “Contrary to Petitioner’s assertion that the City’s comprehensive plan does not
6 identify Petitioner’s property for acquisition, the East Bank Trail, including its path
7 across Petitioner’s property, is specifically identified in both the text and the maps of
8 the City’s comprehensive plan. * * * Project #225a * * * is described in the text
9 of TransPlan as the ‘East Bank Trail from Beltline Road to the Greenway (Valley
10 River) Bridge.’ The TransPlan Bicycle map specifically depicts the East Bank Trail
11 going across Petitioner’s property.

12 “The East Bank Trail is also both discussed and depicted in the [WAP], a
13 refinement to the City’s comprehensive plan. The WAP specifically identifies the
14 construction of a public pedestrian and bicycle access along the river as a use within
15 the Willamette Greenway that is consistent with Goal 15. * * * The path of the East
16 Bank Trail is shown going over Petitioner’s property.” Respondent’s Motion to
17 Dismiss Petitioner’s Appeal 7-8 (citations and footnotes omitted).

18 Notwithstanding that a decision to acquire property under such a scheme would seem
19 clearly to call for the city to apply its acquisition plan, thus rendering the decision to acquire property
20 a land use decision, the city argues:

21 “The city anticipates that Petitioner will assert that, because the East Bank Trail is
22 identified in the City’s comprehensive plan, taking steps to acquire the property
23 needed for the construction of the East Bank Trail is an ‘application’ of the City’s
24 comprehensive plan. Petitioner is, again, incorrect.

25 “If the act of purchasing property identified in the City’s comprehensive plan is
26 considered a land use decision subject to LUBA’s review, LUBA’s jurisdiction to
27 review local government property purchases would be boundless and
28 unmanageable. This fact is proven by the following example: A city’s
29 comprehensive has properties designated as Goal 5 resources. When such a
30 property is purchased by a conservation group or public agency for preservation
31 purposes, LUBA does not have jurisdiction over the acquisition. Similarly, the
32 City’s adoption of the Resolution to institute negotiations and potentially a
33 condemnation action to purchase Petitioner’s property for the East Bank Trail is not
34 a land use decision simply because the location of the trail is depicted in the City’s
35 comprehensive plan.” Respondent’s Motion to Dismiss Petitioner’s Appeal 8-9.

1 The city’s premise that LUBA would not have jurisdiction to review a private conservation
2 group’s property purchase decisions is correct, because land use decisions are by definition
3 decisions of local governments. The city’s premise that LUBA would not have jurisdiction to
4 review a decision by a public agency to purchase a Goal 5 resource site may also be correct, since
5 we are aware of no statute or other legal requirement that a plan for acquiring such resource sites
6 must be included in a comprehensive plan. However, the city’s conclusion that Resolution 4684 is
7 not a land use decision, based on those two premises, does not logically follow from either premise.
8 First, the city of Eugene is a local government, which makes the first premise irrelevant. Second, as
9 we have already explained, ORS 390.318, Goal 15 and the city’s own comprehensive plan
10 mandate that a plan for acquisition of properties within the Willamette River Greenway be included
11 in the city’s comprehensive plan. This renders the second premise equally unavailing. Indeed, we
12 understand the city to argue that the TransPlan and the WAP include such an acquisition plan.
13 Therefore, the city was required to act consistently with that acquisition plan when it adopted
14 Resolution 4684, whether it expressly applied that acquisition plan or not. Because Resolution
15 4684 “concerns the * * * application of” “[a] comprehensive plan,” it satisfies the statutory
16 definition of “land use decision” and is a decision subject to our review unless some other exception
17 to the statutory definition applies. The city identifies no such exception.⁵ Accordingly, we deny the
18 city’s motion to dismiss.

19 **CONCLUSION**

20 While we deny the city’s motion to dismiss, we emphasize that we express no position on
21 the merits of petitioner’s two assignments of error. In its first assignment of error, petitioner argues
22 the city was obligated under the City of Eugene Code to provide it with notice and a hearing before

⁵ For example, the city does not argue that petitioner’s property is so clearly identified as a property to be acquired for the East Bank Trail that Resolution 4684 qualifies for the exception provided by ORS 197.015(10)(b)(A) for decisions that are “made under land use standards which do not require interpretation or the exercise of policy or legal judgment.” *See* n 4.

1 adopting Resolution 4684. In its second assignment of error, petitioner argues that Resolution 4684
2 must be remanded because it lacks findings addressing the comprehensive plan.

3 We also note that petitioner, and to a lesser extent the city, seem to confuse or commingle
4 two separate questions. The first question is whether the city's Willamette Greenway property
5 acquisition plan complies with the mandates in Goal 15 and the statute that Goal 15 was adopted to
6 implement. The second question is whether Resolution 4684 is consistent with whatever acquisition
7 plan the city actually adopted and LCDC acknowledged, *without regard to whether the city's*
8 *plan should have been acknowledged to comply with the mandate in Goal 15 for a property*
9 *acquisition plan.* Any consideration of the first question by LUBA in this appeal is likely
10 foreclosed, because we understand the TransPlan and the WAP have been acknowledged under
11 ORS 197.251, 197.625(1) or OAR 660-025-0160(8) as complying with Goal 15. *See Dundas v.*
12 *Lincoln County*, 43 Or LUBA 407, 416 (2002) (acknowledgment of county Goal 5 mineral and
13 aggregate program renders question of the adequacy of that program to comply with Goal 5 and the
14 Goal 5 rule irrelevant). Although neither of petitioner's assignments of error directly raises the
15 second question, it appears to be the ultimate legal question in this matter.

16 The city's response brief shall be due 21 days from the date of this order. The Board's final
17 opinion and order shall be due 56 days from the date of this order.

18 Dated this 22nd day of March, 2004.

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25 _____
26 Michael A. Holstun
Board Member