

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

NO MORE FREEWAYS and CHRISTOPHER SMITH,
Petitioners,

vs.

OREGON DEPARTMENT OF TRANSPORTATION
and OREGON TRANSPORTATION COMMISSION,
Respondents.

LUBA No. 2021-046

FINAL OPINION
AND ORDER

Appeal from Oregon Department of Transportation and Oregon
Transportation Commission.

Sean T. Malone and Mike Sargetakis represented petitioners.

Stacy C. Posegate represented respondents.

RYAN, Board Member; ZAMUDIO, Board Chair, participated in the
decision.

RUDD, Board Member, did not participate in the decision.

DISMISSED 12/06/2021

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

NATURE OF THE DECISION

Petitioners appeal a decision by the director of the Oregon Department of Transportation adopting “findings of compatibility” of the “I-5 Rose Quarter Improvement Project” with the City of Portland’s comprehensive plan.

BACKGROUND

Between 2010 and 2012, the Oregon Department of Transportation (ODOT) and the City of Portland (the city) engaged in a joint planning process to improve I-5 between I-84 and I-405. Through that process, ODOT and the city developed the “I-5 Broadway/Weidler Interchange Improvements Facility Plan” (Facility Plan).¹ Notice of Intent to Appeal Ex A, at 1; Motion to Dismiss 5-6. The Facility Plan includes recommended elements and proposed improvements for the Broadway/Weidler interchange on I-5 (Interchange Improvement Project). In 2012, the Oregon Transportation Commission (OTC) adopted the Facility Plan. Notice of Intent to Appeal Ex A, at 2; Motion to Dismiss 6.

Also in 2012, the city adopted by resolution the “N/NE Quadrant Plan” (Quadrant Plan) with the goal of achieving “integrated land use, urban design, and transportation strategies, policies and plans for the N/NE Quadrant and the I-5 Broadway/Weidler interchange that balance, complement, enhance, protect, respect, revitalize, support, and sustain economic, environmental, and social

¹ OAR 731-015-0015(10) defines “facility plan” to mean “a plan for a transportation facility such as a highway corridor plan and an airport master plan.”

1 interests.” Quadrant Plan 14. The Quadrant Plan includes the Facility Plan as
2 Appendix C.

3 In 2018, the city adopted the 2035 Comprehensive Plan (2035 Plan), an
4 update to the city’s then-existing comprehensive plan, and it adopted the 2035
5 Transportation System Plan (2035 TSP) as a component of the 2035 Plan.² The
6 Quadrant Plan is a background document to the 2035 Plan. The 2035 TSP
7 includes the Interchange Improvement Project in its Major Projects List as
8 Projects 20119, 20120, and 20121. 2035 TSP App A, at 3.³

9 In February 2019, ODOT and the Federal Highway Administration
10 (FHWA) issued an Environmental Assessment (EA) for the Interchange
11 Improvement Project. Thereafter, in October 2020, ODOT and the FHWA issued
12 a Revised Environmental Assessment (REA) that serves as final design approval
13 for the Interchange Improvement Project. According to the challenged decision,

² The 2035 Plan was acknowledged in 2020. *Multnomah Neighborhood Association v. Land Conservation and Development Department*, 302 Or App 186, 456 P3d 695 (2020) (affirming a Land Conservation and Development Commission order concluding that the 2035 Plan complies with the statewide planning goals).

³ Project 20119 is to “[c]onduct planning, preliminary engineering and environmental work to improve safety and operations on I-5, connection between I-84 and I-5, and access to the Lloyd District and Rose Quarter.” Project 20120 is to “[a]cquire right-of-way to improve safety and operations on I-5, connection between I-84 and I-5, and access to the Lloyd District and Rose Quarter.” Project 20121 is to “[c]onstruct improvements to enhance safety and operations on I-5, connection between I-84 and I-5, and access to the Lloyd District and Rose Quarter. Project includes a pedestrian/bicycle bridge across I-5 at Clackamas St.” 2035 TSP App A, at 3.

1 in 2019, a “Land Use Technical Report” was prepared for the REA that analyzed
2 the Interchange Improvement Project for compatibility with the 2035 Plan.⁴
3 Notice of Intent to Appeal Ex A, at 3.

4 In April 2021, the director of ODOT adopted findings, as required by OAR
5 731-015-0075(7), concluding that the Interchange Improvement Project is
6 compatible with the 2035 Plan (the Findings). We discuss OAR 731-015-0075(7)
7 in more detail below.

8 This appeal followed.

9 **JURISDICTION**

10 As relevant here, LUBA’s jurisdiction includes review of “land use
11 decision[s].” ORS 197.825(1).⁵ Here, because the decision-maker is a state
12 agency, the challenged findings are a land use decision reviewable by LUBA only
13 if ODOT was “required to apply the [statewide planning] goals” in adopting
14 them. ORS 197.015(10)(a)(B).⁶ As the party seeking review by LUBA,

⁴ Neither party has provided us with a copy of the REA or any technical reports prepared in support thereof.

⁵ ORS 197.825(1) provides, as relevant, “[LUBA] 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.)

⁶ LUBA’s scope of review for state agency decisions is also limited. ORS 197.835(9)(b) provides that LUBA is authorized to reverse or remand a state agency decision if the decision “violated the goals.”

1 petitioners have the burden of establishing that LUBA has jurisdiction. *Billington*
2 *v. Polk County*, 299 Or 471, 475, 703 P2d 232 (1985).

3 **A. ORS 197.180 and OAR chapter 660, division 30**

4 ORS 197.180(1) requires state agency programs that affect land use to
5 comply with the statewide planning goals and be compatible with acknowledged
6 city and county comprehensive plans. The Land Conservation and Development
7 Commission (LCDC) rules that implement ORS 197.180(1) provide, as relevant
8 here, that (1) state agencies must adopt programs governing how they will fulfill
9 their obligations to ensure goal and plan compliance (State Agency Coordination
10 Programs or SAC Programs) and (2) agencies can establish goal compliance by
11 establishing compatibility with the “applicable acknowledged comprehensive
12 plan(s).” OAR 660-030-0065(1), (2).⁷ In turn, OAR 660-030-0065(3) sets out the
13 circumstances in which state agencies may *not* rely on compatibility with the

⁷ OAR 660-030-0065(1) and (2) provide:

“(1) A state agency shall adopt as part of its coordination program under OAR 660-030-0060 appropriate rules and procedures as required under this rule to assure that the agency’s land use programs comply with the statewide planning goals.

“(2) Except as provided in section (3) of this rule, a state agency shall comply with the statewide goals by assuring that its land use program is compatible with the applicable acknowledged comprehensive plan(s) as provided in OAR 660-030-0070.”

- 1 applicable acknowledged comprehensive plans to comply with the goals.⁸
- 2 ODOT's SAC Program is found at OAR chapter 731, division 15.

⁸ 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
- “(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 [LCDC] 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

1 Initially, we reject petitioners' argument that ORS 197.180(1) requires
2 ODOT to establish that the Interchange Improvement Project is compatible with
3 both the goals and the 2035 Plan. In *1000 Friends of Oregon v. LCDC*
4 (*Forestry/Trans.*), 111 Or App 491, 492, 826 P2d 1023, *rev den*, 313 Or 299
5 (1992), the Court of Appeals held that LCDC was authorized to (1) adopt rules
6 that allow a demonstration of compatibility with an acknowledged
7 comprehensive plan, as required in ORS 197.180(1)(b), to also satisfy the
8 obligation in ORS 197.180(1)(a) that a state agency take actions "[i]n compliance
9 with the goals," and (2) define by rule the circumstances in which local plan
10 compatibility is insufficient to demonstrate goal compliance. *See also Byrd v.*
11 *Stringer*, 295 Or 311, 318-19, 666 P2d 1332 (1983) ("[O]nce acknowledgment
12 has been achieved, land use decisions must be measured not against the goals but
13 against the acknowledged plan and implementing ordinances."). Accordingly,
14 OAR 660-030-0065(2) and (3) are the legitimate implementation of the statutory
15 obligation of state agencies to "carry out their planning * * * responsibilities and
16 take actions" in compliance with the goals.

 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 **B. ODOT's State Agency Coordination Program**

2 As mentioned, ODOT's SAC Program is found at OAR chapter 731,
3 division 15. Petitioners do not dispute that the Interchange Improvement Project
4 is a "Class 3 Project" and, accordingly, OAR 731-015-0075 applies.⁹ OAR 731-
5 015-0075 provides the coordination procedures for adopting plans for Class 3
6 projects. With regard to establishing goal compliance, OAR 731-015-0075(2)
7 and (3) provide:

8 “(2) Goal compliance and plan compatibility shall be analyzed in
9 conjunction with the development of the Draft Environmental
10 Impact Statement or [EA]. The environmental analysis shall
11 identify and address relevant land use requirements in
12 sufficient detail to support subsequent land use decisions
13 necessary to authorize the project.

14 “(3) Except as otherwise set forth in section (4) of this rule,
15 [ODOT] shall rely on affected cities and counties to make all
16 plan amendments and zone changes necessary to achieve
17 compliance with the statewide planning goals and
18 compatibility with local comprehensive plans after
19 completion of the Draft Environmental Impact Statement or
20 [EA] and before completion of the Final Environmental
21 Impact Statement or [REA]. These shall include the adoption
22 of general and specific plan provisions necessary to address
23 applicable statewide planning goals.”¹⁰

⁹ OAR 731-015-0015(6) defines "Class 3 Projects" as "projects meeting federal criteria for Class 3 Projects under [the National Environmental Policy Act (NEPA)] and federal agency regulations which carry out NEPA requirements."

¹⁰ As noted, in 2018, the city adopted the 2035 Plan, which includes the Quadrant Plan and the Facility Plan as background documents. As also noted, the EA for the Interchange Improvement Project was completed in February 2019, and the REA was completed in October 2020.

- 1 OAR 731-015-0075(7) provides, “[OTC] or its designee shall adopt findings of
2 compatibility with the acknowledged comprehensive plans of affected cities and

OAR 731-015-0075(4) and (5) provide:

- “(4) [ODOT] may complete a Final Environmental Impact Statement or [REA] before the affected cities and counties make necessary plan amendments and zone changes in the following case:
- “(a) The Final Environmental Impact Statement or [REA] identifies that the project be constructed in phases; and
- “(b) [ODOT] finds:
- “(A) There is an immediate need to construct one or more phases of the project. Immediate need may include, but is not limited to, the facility to be improved or replaced currently exceeds or is expected to exceed within five years the level of service identified in the Oregon Highway Plan; and
- “(B) The project phase to be constructed meets a transportation need independent of the overall project, is consistent with the purpose and need of the overall project as identified in the FEIS, and will benefit the surrounding transportation system even if no further phases of the project are granted land use approval.
- “(5) If a Final Environmental Impact Statement or [REA] is completed pursuant to section (4) of this rule, all necessary plan amendments and zone changes associated with the particular phase of the project to be constructed shall be made by the city or county prior to constructing that phase of the project.”

1 counties *when it grants design approval for the project*. Notice of the decision
2 shall be mailed out to all interested parties.” (Emphasis added.)

3 As noted, in October 2020, ODOT and the FHWA issued an REA that
4 serves as final design approval for the Interchange Improvement Project.
5 Thereafter, in April 2021, the director of ODOT adopted the Findings to comply
6 with OAR 731-015-0075(7), determining that the Interchange Improvement
7 Project is compatible with the 2035 Plan.

8 Respondents argue that OAR 660-030-0065(2) and OAR 731-015-0075(2)
9 and (3) allow ODOT to establish compliance with the goals by establishing
10 compatibility with the 2035 Plan. Respondents argue that, because ODOT was
11 not required to apply the goals, LUBA lacks jurisdiction over the appeal.

12 As noted, in order to establish our jurisdiction, petitioners must establish
13 that the challenged decision is a land use decision because ODOT was “required
14 to apply the goals.” ORS 197.015(10)(a)(B). As also noted, pursuant to OAR
15 660-030-0065(2), state agencies are allowed to establish compliance with the
16 goals by establishing compatibility with the applicable acknowledged
17 comprehensive plans unless one of the circumstances set out in OAR 660-030-
18 0065(3) applies. Thus, in order to establish that we have jurisdiction over the
19 appeal, petitioners must establish that one of the circumstances listed in OAR
20 660-030-0065(3) applies and that, therefore, OAR 660-030-0065(2) does not

1 apply and does not allow ODOT to establish goal compliance by demonstrating
2 compatibility with the 2035 Plan.¹¹

3 Petitioners put forth a number of arguments for why the Findings are
4 incorrect in concluding that the Interchange Improvement Project is compatible
5 with the 2035 Plan, and they argue that, for those reasons, ODOT was required
6 to apply the goals in adopting the Findings.¹² First, petitioners attach to their
7 response to the motion to dismiss excerpts from the Facility Plan which, as noted,
8 is a background document to the 2035 Plan. Petitioners point to Table 3 of the
9 Facility Plan, which is a list of “I-5 Broadway/Weidler Interchange
10 Recommended Concept Facility Plan Elements.” The list identifies as one
11 recommended element “Construct Mainline Freeway Safety Enhancements” and
12 lists as freeway safety enhancements “[e]xtend auxiliary lanes in both directions”
13 and “[a]dd full-width shoulders in both directions.” Response to Motion to
14 Dismiss Ex A, at 13.

¹¹ Petitioners do not cite OAR 660-030-0065(3), but we assume that they rely on OAR 660-030-0065(3)(b) to support their argument.

¹² At the outset, we note a threshold problem with petitioners’ arguments. The majority of petitioners’ arguments rely on documents and actions related to the Interchange Improvement Project that post-date the Findings but that are, according to petitioners, under consideration by OTC or various subcommittees of OTC. Petitioners argue that those post-decision documents and actions demonstrate that the Interchange Improvement Project is not compatible with the 2035 Plan. It is difficult to understand, and petitioners do not address, how post-decision documents and actions could trigger LUBA’s jurisdiction over a state agency decision if the decision was not subject to LUBA’s jurisdiction when it became final.

1 Petitioners first argue that the term “full-width shoulders” is not further
2 defined, that the REA evaluated shoulders that are between three and 12 feet, and
3 that 12-foot shoulders are “overbuilt.” Response to Motion to Dismiss 12.
4 Petitioners then rely on documents attached to their response to the motion to
5 dismiss, some of which appear to post-date the Findings, and argue that 12-foot
6 shoulders are now under consideration as transit lanes. Petitioners argue that, for
7 those reasons, the Interchange Improvement Project is incompatible with the
8 Facility Plan and, by extension, the 2035 Plan.

9 Similarly, petitioners argue that changes that post-date the REA and the
10 Findings and that contemplate placing structures on lids over I-5 are under
11 discussion, and they argue that the 2035 Plan does not contemplate lids that
12 support structures. Finally, petitioners argue that the Findings are “premature”
13 because changes to the final design of the Interchange Improvement Project are
14 under consideration. *Id.* at 13-14.

15 We reject petitioners’ arguments. OAR 660-030-0005(5) provides:

16 “‘Compatibility with Comprehensive Plans’ as used in ORS
17 197.180 means that a state agency has taken actions pursuant to
18 OAR 660-030-0070, including following procedures in its
19 coordination program where certified, and there are no remaining
20 land use conflicts between the adoption, amendment or
21 implementation of the agency’s land use program and an
22 acknowledged comprehensive plan.”¹³

¹³ In general, OAR 660-035-0070 requires state agencies to adopt rules and procedures for resolving land use disputes with local governments, and it

1 Petitioners' arguments do not establish that the Interchange Improvement Project
2 or the Findings are incompatible with the 2035 Plan. Petitioners' arguments do
3 not establish that there are any land use conflicts between the adoption,
4 amendment, or implementation of the Interchange Improvement Project and the
5 2035 Plan. First, the portions of the Facility Plan on which petitioners rely include
6 *recommendations* for auxiliary lanes and full-width shoulders; they do not
7 require either. In addition, petitioners' arguments do not establish that any
8 particular width, or use, of shoulders is contemplated or proposed in the Facility
9 Plan, and they do not establish that 12-foot shoulders that are used for transit are
10 incompatible with the Facility Plan. Finally, the Facility Plan includes as a
11 recommended element lids over I-5, but it does not specifically address or
12 prohibit placing structures on top of those lids.

13 We also reject petitioners' argument that the Findings are "premature."
14 That argument does not establish that the Interchange Improvement Project is
15 incompatible with the 2035 Plan. Even if the final design of the project has
16 undergone changes or revisions since the Findings were adopted, that does not
17 mean that the project was incompatible with the 2035 Plan when the challenged
18 decision was made.

provides a number of different ways in which state agencies can achieve
compatibility with acknowledged comprehensive plans.

1 **C. Petitioners’ challenges to the adequacy of the Findings do not**
2 **establish that ODOT was required to apply the goals.**

3 Petitioners next argue that the Findings are inadequate because they fail to
4 address a number of 2035 Plan policies and statewide planning goals.¹⁴ With
5 regard to the 2035 Plan policies that petitioners allege the Findings should have
6 addressed, even if we agreed with petitioners, that argument would not establish
7 that LUBA has jurisdiction over the appeal because it does not establish that
8 ODOT was “required to apply the Goals.” ORS 197.015(10)(a)(B).¹⁵ With regard
9 to the statewide planning goals that petitioners argue the Findings were required
10 to address, we quote again OAR 731-015-0075(7): “[OTC] or its designee shall
11 *adopt findings of compatibility with the acknowledged comprehensive plans of*
12 *affected cities and counties* when it grants design approval for the project. Notice
13 of the decision shall be mailed out to all interested parties.” (Emphasis added.)
14 OAR 731-015-0075(7) requires only that OTC or its designee (*i.e.*, the director
15 of ODOT) adopt findings that the Interchange Improvement Project is compatible
16 with the 2035 Plan. That is because OAR 660-030-0065(2) allows state agencies
17 to establish goal compliance by establishing compatibility with the applicable

¹⁴ Petitioners cite 2035 Plan Policies 1.4, 2.1, 2.7, 2.10, 2.11, 3.2, 3.3, 3.8, 3.11, 3.12, 5.2, 5.4, 5.6, 6.4, and 6.14, and Statewide Planning Goals 6 (Air, Water and Land Resources Quality), 10 (Housing), 12 (Transportation), and 14 (Urbanization). Response to Motion to Dismiss 21-23, 27-28.

¹⁵ In addition, LUBA’s scope of review for state agency decisions authorizes us to reverse or remand a state agency decision if the decision “violated the goals.” ORS 197.835(9)(b). Petitioners cite no specific statute that allows us to reverse or remand a state agency decision where the findings are inadequate.

1 acknowledged comprehensive plans. The challenged decision does not require
2 ODOT to adopt goal compliance findings unless one of the circumstances in
3 OAR 660-030-0065(3) applies. Petitioners do not develop any argument
4 regarding OAR 660-030-0065(3), and they do not otherwise explain why the
5 Interchange Improvement Project is incompatible with the provisions of the 2035
6 Plan that implement the goals that petitioners cite. *See* n 14. Accordingly,
7 petitioners' argument that the Findings are inadequate does not establish that
8 ODOT was required to apply the goals.

9 **CONCLUSION**

10 LUBA's scope of review for state agency decisions is limited to decisions
11 in which the state agency was "required to apply the goals." ORS
12 197.015(10)(a)(B). For the reasons set forth above, petitioners have not
13 established that ODOT was required to apply the goals in adopting the Findings.
14 Accordingly, the challenged decision is not a land use decision, and we lack
15 jurisdiction over the appeal.

16 The appeal is dismissed.¹⁶

¹⁶ Petitioners have not moved to transfer their appeal to circuit court pursuant to OAR 661-010-0075(11).