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

FRIENDS OF EUGENE and ROB HANDY,
Petitioners,

vs.

LANE COUNCIL OF GOVERNMENTS
and METROPOLITAN POLICY COMMITTEE,
Respondents,

and

OREGON DEPARTMENT
OF TRANSPORTATION,
Intervenor-Respondent.

LUBA No. 2004-223

FINAL OPINION
AND ORDER

Appeal from Lane Council of Governments.

Jannett Wilson, Eugene, filed the petition for review and argued on behalf of petitioners.

Kathryn P. Brotherton, Eugene, filed a joint brief and argued on behalf of respondent. With her on the brief were Glenn Klein and Harrang Long Gary Rudnick PC.

Kathryn A. Lincoln, Assistant Attorney General, Salem, filed a joint brief and argued on behalf of intervenor-respondent.

DAVIES, Board Chair; BASSHAM, Board Member, participated in the decision. HOLSTUN, Board Member, did not participate in the decision.

DISMISSED

07/27/2005

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

1 Opinion by Davies.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the Metropolitan Planning Organization's (MPO) adoption of
4 Resolution 2004-06, adopting an update to the Central Lane Regional Transportation Plan.

5 **MOTION TO STRIKE**

6 Respondent Lane Council of Governments (LCOG) and Intervenor-Respondent
7 Oregon Department of Transportation (ODOT) move to strike Appendix "A" to the petition
8 for review.¹ Appendix "A" includes (1) a printout of the LCOG home page showing
9 organizational definitions and functions, (2) two pages of a printout from the LCOG website
10 describing TransPlan and including a table of contents for the 2001 TransPlan and 2002
11 TransPlan, as amended, and (3) a printout from the LCOG website of the LCOG Charter.
12 Respondents move to strike Appendix "A" because it includes documents that are not
13 included in the record of this appeal.

14 Petitioners claim that LUBA may take official notice of the challenged documents.
15 We disagree. The documents are not ordinances or enactments of which we may take official
16 notice under Oregon Evidence Code 202. They also argue that LUBA may consider the
17 extra-record evidence because it is included to assist LUBA in determining jurisdiction. The
18 material, while cited in their petition for review in support of their argument that LUBA has
19 jurisdiction, has no apparent bearing on our jurisdiction. Accordingly, respondents' motion
20 to strike Appendix "A" is granted.

21 Respondents also move to strike footnote three of the petition for review. That
22 footnote, respondents assert contains unsupported "suspicions" regarding the decision
23 maker's motivations for adopting the challenged decision. Parties often include extraneous
24 argument regarding the issues on appeal. To the extent footnote three is irrelevant to the

¹ Respondent and intervenor-respondent filed a joint brief. We refer to them collectively in this opinion as respondents.

1 issues in this appeal, LUBA will not consider it. Respondents' motion to strike footnote
2 three is denied.

3 FACTS

4 We take the summary of material facts in large part from respondents' brief:

5 "Federal law required urbanized areas with a population of 50,000 or greater
6 to have a Metropolitan Planning Organization (MPO) to develop
7 transportation plans and programs for the area. The Lane Council of
8 Governments (LCOG) is the designated MPO for the Eugene-Springfield
9 metropolitan area. The LCOG Board delegated responsibility for MPO policy
10 functions to the Metropolitan Policy Committee (MPC), a committee of
11 officials from the cities of Eugene, Springfield and Coburg, Lane County, the
12 Lane Transit District (LTD) and the Oregon Department of Transportation
13 (ODOT).

14 "In 1990, the U.S. government passed the Federal Clean Air Act Amendments
15 and in 1991 passed the Intermodal Surface Transportation Efficiency Act
16 (ISTEA). These new federal laws required MPOs to engage in additional
17 transportation planning to meet federal requirements. * * *

18 "In 1992 the Oregon Transportation Commission adopted the Oregon
19 Highway Plan and in 1995 the Land Conservation and Development
20 Commission (LCDC) adopted the Transportation Planning Rule (TPR), OAR
21 660-012 *et seq.*, to implement Goal 12 of the statewide planning goals. Both
22 of these state actions required additional transportation planning and
23 coordination by local jurisdictions to meet state planning requirements,
24 different than the planning and coordination actions already required by
25 federal law." Brief of Respondents and Intervenor-Respondent 2-3.
26 (footnotes and citations omitted).

27 The MPO and local jurisdictions prepared a single document to address both state and federal
28 requirements. In 2001, the city councils of Eugene and Springfield, the Lane Transit District
29 Board and the Lane County Board of Commissioners adopted TransPlan to serve as the state-
30 mandated Transportation System Plan (TSP), and the MPO adopted the same document to
31 serve as the federally-mandated Regional Transportation Plan (RTP).²

² TransPlan provides, in pertinent part:

"Because *TransPlan* serves as *both* the federally required Regional Transportation Plan for the Eugene-Springfield area and as the Transportation Functional Plan for the *Eugene-*

1 “Following the adoption of *TransPlan*, in 2003 the 2000 federal census data
2 was released. The census data triggered two significant planning actions.
3 First, the Federal Highway Administration (FHWA) and the Federal Transit
4 Administration (FTA) determined that the City of Coburg and additional
5 urbanized land in Lane County needed to be included into the MPO urbanized
6 area to meet the federal Transportation Equity Act for the 21st Century (TEA-
7 21) (adopted in 1998) transportation planning requirements. Second, with the
8 natural population growth and the inclusion of the City of Coburg into the
9 MPO urbanized planning area, the MPO exceeded 200,000 people. MPOs
10 that exceed a population of 200,000 are designated as Transportation
11 Management Areas (TMA) and are subject to additional federal planning
12 requirements. TMAs must be re-certified for air quality conformance
13 **triennially**, maintain an RTP with a planning horizon of 20 years and have
14 updated fiscally constrained forecasts for revenue and costs. The failure to re-
15 certify within three years can result in the withholding of all federal funds and
16 halt all work on activities on federally-funded and/or regionally significant
17 projects.

18 “Consequently, in August, 2003, the FHWA and FTA issued a Transportation
19 Planning Certification Review Report for the Central Lane Metropolitan Area
20 (which included the cities of Eugene, Springfield and Coburg and portions of
21 Lane County). The certification required that the Central Lane MPO make
22 corrective actions to the RTP by December 13, 2004. The MPO developed a
23 work plan to update the RTP to address each of the federal corrective actions.
24 The update was limited to the federally-mandated corrective actions, identified
25 by staff as only minor amendments, with the next (major) updates planned for
26 2005 and 2007.

27 “In developing its strategy to address the federal RTP updating requirements,
28 the MPO noted and considered that the Eugene-Springfield TSP (embodied in
29 the 2001 *TransPlan*) was not due for an update until its next periodic review
30 and that the City of Coburg’s TSP is scheduled for an update in mid-2005. As
31 such, the MPO decided to separate the federally-mandated long range plan, the
32 Regional Transportation Plan (RTP), from the state mandated transportation
33 system plan (TSP) and to just address the pressing federal requirements. The
34 newly updated federally-mandated plan would be called the Central Lane
35 Regional Transportation Plan (RTP). Its purpose is to meet the ‘required
36 update to the federal elements embodied in the 2001 *TransPlan*.’ The
37 document previously known as ‘*TransPlan*’ would continue to meet the state
38 TSP requirements set forth in the TPR. Upon the MPO’s adoption of the
39 federally-mandated RTP update, the Eugene-Springfield metro area would
40 have two separate transportation planning documents – one meeting federal

Springfield Metropolitan Area General Plan (Metro Plan), two planning horizons are referred to in the document: 2015 and 2021. * * *” *TransPlan* 5-6 (emphasis added).

1 requirements and the other meeting the state TPR requirements.” *Id.* at 6-7
 2 (footnotes and citations omitted; emphasis in original).³

3 On December 9, 2004, the MPC adopted Resolution 2004-06, adopting the update to
 4 the Central Lane Regional Transportation Plan. This appeal followed.

5 JURISDICTION

6 LUBA has exclusive jurisdiction to review land use decisions. ORS 197.825. ORS
 7 197.015(10)(a) defines “land use decision” to include:

8 “(A) A final decision or determination made by a local government or
 9 special district that concerns the adoption, amendment or application
 10 of:

11 “(i) The goals;

12 “(ii) A comprehensive plan provision;

13 “(iii) A land use regulation; or

14 “(iv) A new land use regulation[.]”

15 Petitioners allege that the challenged decision concerns the application of the
 16 statewide planning goals, comprehensive plan, or land use ordinance because (1) it
 17 “integrates and coordinates two local transportation system plans – ‘TransPlan’” and the
 18 Coburg TSP, (2) it “contains transportation policies and expected actions” demonstrating
 19 compliance with the transportation planning rule, and (3) “almost all of the ‘objectives’ and

³ The RTP provides, in relevant part:

“Historically, *TransPlan* (the former name for the RTP) has served as both the federally required Regional Transportation Plan for the Eugene-Springfield area and as the Transportation Functional Plan (or Transportation System Plan –TSP) for the Eugene-Springfield Metro Plan. As a result of the 2000 census, the geographic boundary of the MPO (and the RTP) expanded beyond the Eugene-Springfield metropolitan area, leading to the need for two separate documents to apply to two different geographic areas.

“The Metropolitan [Policy] Committee (MPC) will adopt the RTP as the federal Regional Transportation Plan. * * *.” Record 10.

1 'policies' of the plan are based on various statewide land use goals, local comprehensive plan
2 provisions, and/or local land use ordinances." Petition for Review 4.

3 Respondents argue that the RTP was adopted for the sole purpose of demonstrating
4 compliance with the federal regulations, and that it is therefore not a land use decision:

5 "Resolution 2004-06 is explicit that the adoption of the RTP update was done
6 to comply with federal requirements. Specifically, Resolution 2004-06 states
7 that the MPO is adopting the RTP update in order to comply with federal
8 regulations that require the MPO to adopt a long-range regional plan
9 consistent with guidelines set forth by the Federal Highway Administration
10 and the Federal Transit Administration. Further, the resolution states that 'the
11 primary purposes of the update are to adjust the jurisdictional area of the plan
12 to include the City of Coburg and other parts of the urbanized area recognized
13 by the 2000 census, adjust the planning horizon out to 2025 and to update
14 financial forecasts for revenue and costs." Brief of Respondents and
15 Intervenor-Respondent 9 (citations omitted).

16 The purpose or intent of a challenged decision, however, is not determinative of whether or
17 not it is a land use decision. While the purpose or intent may be instructive regarding the
18 relevant inquiry, it is not dispositive. The relevant inquiry is whether the challenged decision
19 "concerns" the adoption, amendment or application of the goals, comprehensive plan
20 provisions or land use regulations. A local government decision "concerns" the application
21 of a statewide planning goal, comprehensive plan provision or land use regulation if the
22 decision maker (1) was required by law to apply the goals, its plan or land use regulations as
23 approval standards, but did not, or (2) in fact applied the goals, plan provisions or land use
24 regulations. *Jaqua v. City of Springfield*, 46 Or LUBA 566, 574, *rev'd on other grounds* 193
25 Or App 573, 91 P3d 817 (2004). We turn, then, to that determination and address
26 petitioners' alleged bases for jurisdiction, outlined above.

27 Petitioners' first basis is factually incorrect, as respondents explain: the RTP in fact
28 does not integrate TransPlan and the Coburg TSP. TransPlan remains its own independent
29 document, and the Coburg TSP, adopted in 1999, is currently scheduled for an update.
30 Petitioners' second and third alleged bases for jurisdiction outlined above present a closer

1 question. Petitioners argue that the RTP policies cite and purport to demonstrate compliance
2 with the TPR, and that the challenged decision is therefore a land use decision.⁴ Petitioners
3 are correct that the RTP contains numerous citations to the TPR and to comprehensive plan
4 provisions that appear to apply or implement those cited provisions.⁵

5 Respondents argue, however, that

6 “a simple statement that the plan contains provisions that comply with the
7 TPR does not establish that the MPO *applied* the statewide planning goals to

⁴ The RTP provides:

“In compliance with provisions in TEA 21 and the TPR, the RTP contains transportation policies and expected actions and is financially constrained to revenues reasonably expected to be available.” Record 11.

⁵ For instance, the RTP provides:

“TSI Pedestrian Policy #1: Pedestrian Environment

“Provide for a pedestrian environment that is well integrated with adjacent land uses and is designed to enhance the safety, comfort, and convenience of walking.

“Policy Definition/Intent: This policy supports the provision of pedestrian connections between adjacent land uses, improved pedestrian access to transit stops and stations, safe and convenient pedestrian street crossing, and pedestrian amenities, including lighting. In more developed areas, such as downtowns, pedestrian design features improve the accessibility of destinations.

“Reference: Based on the TPR 660-12-045.” Record 51

Another policy provides:

“TSI Other Modes Policy #1: Eugene Airport

“Support public investment in the Eugene Airport as a regional facility and provide land use controls that limit incompatible development within the airport environs. Continue to use the *Eugene Airport Master Plan* as a guide for improvements of facilities and services at the airport.

“Policy Definition/Intent: The Eugene Airport/Mahlon Sweet Field is the major airport that provides commercial passenger, cargo, mail, and general aviation services to the metropolitan area. This airport also provides major services to Lane County residents outside of the metropolitan area. * * *

“Reference: Based on the TPR 660-12-045(2)(c); *Metro Plan 1987 Transportation Element Policies 8-17.*” Record 53-4.

1 its adoption of the 2004 RTP; stating that a plan *complies* with the TPR is not
2 the same as *applying* the TPR.

3 “* * * * *

4 “While the 2004 RTP does include citations to various statewide land use
5 goals, those citations are simply a carry-over from the 2001 RTP, *i.e.*,
6 *TransPlan* (the document that served as both the federally-mandated RTP and
7 the state-mandated TSP). The record contains an edited (*i.e.*, red-lined)
8 version of *TransPlan* (created by MPO staff to show the changes that were
9 being made to *TransPlan* to make the federally-mandated RTP a separate
10 document from [the] state-mandated TSP). The red-lined version of
11 *TransPlan* clearly demonstrates that the statewide planning goal citations
12 existed in the 2001 *TransPlan* (to meet state planning requirements) and were
13 simply carried over into the 2004 RTP update. Petitioners fail to demonstrate
14 how carrying over these citations from the previous federally recognized and
15 state acknowledged transportation plan (*i.e.*, *TransPlan*) amount to the MPO
16 *applying* statewide planning goals to the RTP update.” Brief of Respondents
17 and Intervenor-Respondent 13-14 (citations omitted; emphasis in original).

18 As far as we can tell, respondents are correct that *TransPlan* was used as a template,
19 and the MPC simply pasted many of the provisions of *TransPlan* into the new RTP. The RTP
20 was not adopted by the jurisdictions that would have been required to adopt it if it were to
21 serve as the local TSP, demonstrating compliance with the TPR. The purpose and intent of
22 the decision maker was to bifurcate the local TSP documents from the federally mandated
23 RTP. It seems clear that the decision maker used the *TransPlan* format and carried over some
24 of the policies in *TransPlan* as a result of the short timeline required for adoption of the RTP.
25 However, the references to the TPR and local comprehensive plan provisions are merely
26 words on a page.

27 While provisions of the TPR and local comprehensive plan are cited in the RTP,
28 petitioners have not demonstrated that the MPC was required to apply, or that it in fact
29 applied, the goals, a comprehensive plan provision or land use regulation in adopting a
30 federally mandated transportation plan. *See Jaqua v. City of Springfield*, 46 Or LUBA at
31 574; *see also Price v. Clatsop County*, 25 Or LUBA 341, 347-48 (1993) (the burden is on
32 petitioner to establish that the challenged decision is a land use decision and where petitioner

1 fails to identify any comprehensive plan provision as applicable to, or argue that any plan
2 provision is an approval standard for, the challenged decision, LUBA does not have
3 jurisdiction)). In our view, mere references to statewide planning goals, comprehensive plan
4 provisions or land use regulations in a transportation planning document that is intended to
5 demonstrate compliance with federal law is not an application of those goals, plan provisions
6 or land use regulations for purposes of ORS 197.015(10).

7 Accordingly, the challenged decision is not a land use decision, and LUBA lacks
8 jurisdiction to review it.⁶

9 The challenged decision is dismissed.

⁶ Respondents include a footnote addressing the significant impact test, arguing that petitioners failed to allege the significant impact test. Brief of Respondent and Intervenor-Respondent 15. *See Price*, 25 Or LUBA 341, 348 (where petitioner does not argue that a challenged decision is a land use decision under the significant impact test, and it is not obvious that it is, petitioner fails to establish jurisdiction). Petitioners in this case do not allege that the challenged decision satisfies the significant impact test, and they therefore have failed to establish that LUBA has jurisdiction over the challenged decision.