BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WEBER COASTAL BELLS
LIMITED PARTNERS,
NORTHEAST COALITION OF
NEIGHBORHOODS AND COALITION
FOR A LIVABLE FUTURE,
PLAID PANTRIES INC.,
JANTZEN/ANGEL LLC,

Petitioners,

vs.

METRO,
Respondent,

and

TRIMET,
Intervenor-Respondent.

LUBA Nos. 2011-080, 2011-081,
2011-082 and LUBA No. 2011-083

FINAL OPINION
AND ORDER

Appeal from Metro.

Meg E. Kieran, Eugene, filed a petition for review and argued on behalf of petitioner Weber Coastal Bells Limited Partners. With her on the brief was Gartland, Nelson, McCleery, Wade & Walloch, P.C.

Robert C. Shoemaker, Jr., Corbett, filed a petition for review and argued on behalf of petitioners Northeast Coalition of Neighborhoods and Coalition for a Livable Future.

Michael J. Lilly, Beaverton, filed a petition for review and argued on behalf of petitioner Plaid Pantries, Inc.

Seth J. King, Portland, filed a petition for review and argued on behalf of petitioner Jantzen/Angel LLC. With him on the brief were Steven L. Pfeiffer and Perkins Coie LLP.

Richard Benner, Portland, filed a joint response brief and argued on behalf of

respondent. With him on the brief was Mark J. Greenfield.

Mark J. Greenfield, Portland, filed a joint response brief and argued on behalf of intervenor-respondent. With him on the brief was Richard Benner.

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

RYAN, Board Chair, did not participate in the decision.

AFFIRMED IN PART 10/26/2011
REMANDED IN PART

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1996, chapter 12, section 10.

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal an August 11, 2011 Metro Council Land Use Final Order (LUFO) concerning a proposal by TriMet to extend light rail north to Vancouver, Washington and construct two bridges and numerous highway improvements.

MOTION TO INTERVENE

TriMet separately moves to intervene on the side of respondent in each of these consolidated appeals. There is no opposition to the motions, and they are allowed.

INTRODUCTION

This appeal is governed by Oregon Laws 1996, chapter 12 (the 1996 statute). The 1996 statute sets out special procedures and provides for special approval criteria for siting the South North light rail line. Section 4 of the 1996 statute directs the Land Conservation and Development Commission (LCDC) to adopt the criteria that apply when the Metro Council makes decisions on applications for LUFOs under the 1996 statute. LCDC adopted those criteria in 1998.

The initial LUFO was adopted in 1998. The South/North Corridor extends from Clackamas Town Center and Milwaukie north to the Oregon/Washington state line. The initial LUFO has been amended three times before. Under the fourth LUFO amendment, which is the subject of this appeal, light rail would be extended northward from the Expo Center. But instead of the single new bridge for light rail only that was authorized in the initial LUFO, the fourth LUFO amendment authorizes construction of two new multi-modal bridges across the Columbia River as well as a number of highway improvements, and removal of the two existing Interstate-5 (I-5) freeway bridges. The combined light rail, highway, pedestrian bridge project is referred to as the Columbia River Crossing (CRC) Project. The challenged LUFO authorizes construction of the portion of the CRC Project

that would extend northward from the Expo Center and the I-5/N Victory Boulevard intersection to the Oregon/Washington border in the middle of the Columbia River.

The 1996 statute was patterned after a similar statutory expedited approval procedure for the MAX Westside Corridor Project, under which light rail was extended from downtown Portland to downtown Hillsboro and significant highway improvements were made to Highway 26 and Oregon 217. That earlier process led to a LUBA decision and a decision by the Oregon Supreme Court. *Seto v. Tri-Met*, 21 Or LUBA 185, *aff'd Seto v. Tri-County Metro. Transportation Dist.*, 311 Or 456, 814 P2d 1060 (1991). Our decision in this case is also subject to expedited direct review by the Oregon Supreme Court under Section 10 of the 1996 statute.

LUBA's scope of review in an appeal of a LUFO appears at Section 9(12) of the 1996 statute and provides in part:

> "(a) [LUBA] shall remand the land use final order only if it finds that the council:
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> > "(A) Improperly construed the criteria;
> >
> > "(B) Exceeded its statutory or constitutional authority; or
> >
> > "(C) Made a decision in the land use final order on the light rail route, on stations, lots or maintenance facilities, or the highway improvements, including their locations, that was not supported by substantial evidence in the whole record. The existence in the whole record of substantial evidence supporting a different decision on the light rail route, stations, lots or maintenance facilities, or the highway improvements, including their locations, shall not be a ground for remand if there also was substantial evidence in the whole record supporting the land use final order.
>
> "(b) Failure to comply with statutory procedures, including notice requirements, shall not be grounds for invalidating a land use final order.
>
> "(c) [LUBA] shall affirm all portions of the land use final order that it does not remand."

MOTION TO DISMISS LUBA NO. 2011-080

The notices of intent to appeal that initiated these appeals were personally delivered to LUBA on August 25, 2011, and for purposes of this decision the notices of intent to appeal were "filed" with LUBA on that date. Section 9(9) of the 1996 statute requires in part that "[w]ithin 14 days following the filing of the notice of intent to appeal, a petitioner shall personally deliver a petition for review and brief to [LUBA], to the [state court] administrator, to Metro * * * and to Tri-Met * * * if [Tri-Met] has filed a motion to intervene in the review proceeding."[1] Fourteen days after August 25, 2011, on September 8, 2011, petitioner Weber Coastal Bells Limited Partners (Weber) personally delivered a petition for review and brief to LUBA in LUBA No. 2011-080. On September 8, 2011, petitioner Weber also mailed a copy of its petition for review and brief to each of the parties in this appeal. According to Metro and TriMet (respondents), they did not actually receive their mailed copies of the petition for review and brief until one day later, on September 9, 2011. Based on Weber's failure to personally deliver its petition for review and brief to Metro and TriMet within 14 days of August 25, 2011, as required by Section 9(9) of the 1996 statute, respondents moved to dismiss LUBA No. 2011-080 on September 14, 2011. Weber thereafter personally delivered a copy of the petition for review and brief to the State Court Administrator, Metro and Tri-Met on September 16, 2011.[2] In moving to dismiss,

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[1] The complete text of Oregon Laws 1996, chapter 12, section 9(9) is set out below:

> "Within 14 days following the filing of the notice of intent to appeal, a petitioner shall personally deliver a petition for review and brief to [LUBA], to the [state court] administrator, to Metro at the office of Metro's executive officer and to Tri-Met, the Department of Transportation or an affected local government if it has filed a motion to intervene in the review proceeding. The petition for review and brief shall set out in detail each assignment of error and shall identify those portions of the record in which the petitioner raised in the land use final order hearing the issues as to which error is assigned. The petition for review and brief shall comply with the specifications for opening briefs set forth in the rules of appellate procedure."

[2] Metro's and Tri-Met's motion to dismiss was served on all parties by mail on September 14, 2011. Petitioner Weber personally delivered a second copy of its petition for review and brief to Metro and Tri-Met on September 16, 2011.

respondents rely in part on Section 9(9) of the 1996 statute and in part on OAR 661-010-0030(1).[3]

Weber responds that because its petition for review and brief was personally delivered to LUBA on September 8, 2011 it was timely *filed*. Weber contends that OAR 661-010-0030(1) provides no basis for dismissing its appeal based on a lack of timely *service* on the parties in this appeal. Citing OAR 661-010-0005, Weber contends that because its petition for review was mailed to all other parties on September 8, 2011 and was actually received by respondents on September 9, 2011, respondents suffered no prejudice to their substantial rights from Weber's failure to personally deliver the petition for review and brief to respondents until after September 8, 2011, and respondents' motion to dismiss should therefore be denied.[4]

Although it is not entirely clear under the 1996 statute, as it applies to the conduct of appeals of LUFOs at LUBA, we understand Section 9(1) of the 1996 statute to leave in place any of LUBA's rules of procedure that are not inconsistent with the 1996 Act.[5] LUBA's rules distinguish between the deadline for *filing* a petition for review *with LUBA* and the deadline for *serving* a petition for review *on the parties* in an appeal. OAR 661-010-0030(1) specifies dismissal as the consequence where the petition for review is not timely filed with LUBA; OAR 661-010-0075(2)(b) simply requires that all documents filed at LUBA be contemporaneously served on all parties, without specifying a consequence for late service.

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[3] OAR 661-010-0030(1) provides in part that failure to timely file a petition for review "shall result in dismissal of the appeal and forfeiture of the filing fee and deposit for costs to the governing body."

[4] OAR 661-010-0005 provides in part that "[t]echnical violations [of LUBA's rules of procedure] not affecting the substantial rights of parties shall not interfere with the review of a land use decision or limited land use decision."

[5] Oregon Laws 1996, chapter 12, section 9(1) provides:

> "Notwithstanding ORS 183.482, 183.484, 197.825 or any other law or regulation, exclusive jurisdiction for review of a land use final order relating to the project or project extension is conferred on the Land Use Board of Appeals and the court as *provided by sections 1 to 13 of this Act*." (Emphasis added.)

Under LUBA's rules, Weber's late *service* of the petition for review on the parties in an appeal would only justify dismissing the appeal if it resulted in prejudice to another party's substantial rights. *Allen v. Grant County*, 39 Or LUBA 735 (2000). We agree with Weber that respondents have not shown that they suffered any prejudice due to Weber's late service of the petition for review and brief on respondents. If this appeal were a typical LUBA appeal, and not subject to the 1996 statute, respondents' motion to dismiss LUBA No. 2011-080 would be denied.

Unlike LUBA's rules of procedure, and unlike Section 10 of the 1996 statute which governs petitions to the Oregon Supreme Court for review of LUBA decisions regarding LUFOs,[6] Section 9(9) of the 1996 statute does not distinguish between filing a petition for review and brief and service of a petition for review and brief in an appeal of a LUFO. *See* n 1. Section 9(9) unambiguously requires that the petition for review and brief be personally delivered to LUBA, the state court administrator, Metro and any intervening parties not later than 14 days after the notice of intent to appeal was filed. The Section 9(9) requirement that a petition for review must be personally delivered to LUBA, the State Court Administrator, Metro and Tri-Met applies in place of LUBA's rules, which would allow a petition for review to be filed with LUBA by first class mail and allow service of copies of the petition for review on the parties by first class mail.

The more difficult question is whether Weber's failure to comply with Section 9(9) in this case requires that LUBA dismiss Weber's appeal. Section 9(9) of 1996 statute does not specify that dismissal of an appeal is the required consequence for failure to timely

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[6] Section 10(1) of the 1996 statute provides in relevant part:

> "Any party appearing before the Land Use Board of Appeals under section 9 of this Act and objecting to the board's final opinion may petition the court for review of the final opinion as provided for in this section. The petition shall be filed with the administrator and served on the board and all parties within 14 days following the board's issuance of its final opinion in the manner provided for filing and service in the rules of appellate procedure. * * *"

personally deliver the petition for review and brief before the statutory 14-day deadline.[7] Nevertheless, if the question were presented, we likely would conclude that a failure to personally deliver the petition for review and brief *to LUBA* within the statutory 14-day deadline would require dismissal of the appeal. While the 1996 statute does not expressly say that failure to comply with the deadline for personally delivering the petition for review to LUBA requires dismissal, LUBA has always required strict compliance with that deadline, and dismissed appeals where petitioners fail to comply with that deadline. *Terrace Lakes Homeowners Assoc. v. City of Salem*, 29 Or LUBA 532, 535, *aff'd* 138 Or App 188, 906 P2d 871 (1995); *Hutmacher v. Marion County*, 15 Or LUBA 514, 515 (1987). We think it is highly unlikely that in enacting the 1996 statute the legislature intended to impose a less severe consequence when petitions for review are not timely filed with LUBA in appeals of LUFOs.

However, even though Section 9(9) does not draw a distinction between *filing* a petition for review with LUBA and *serving* copies of the petition for review on the State Court Administrator, Metro and intervenors, Weber's error in the manner of delivery of the petition for review and brief to the State Court Administrator, Metro and TriMet seems to us to be an error that is different in kind. We recognize that Section 9 of the 1996 statute was adopted to expedite appellate review of LUFOs and that any failure to comply with statutory deadlines is arguably inconsistent with that purpose. Viewed in that context even a relatively short delay in serving the petition for review and brief might provide a basis for dismissal. However, in this case that error resulted in only a one-day delay in Metro and TriMet actually receiving Weber's petition for review and brief. There are a total of four petitions

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[7] In contrast, ORS 197.850(3)(b) provides that timely service of a petition for review is a jurisdictional requirement for a petitioner seeking review of a LUBA decision at the Court of Appeals.

> "Filing of the petition, as set forth in paragraph (a) of this subsection, and service of a petition on all persons identified in the petition as adverse parties of record in the board proceeding is jurisdictional and may not be waived or extended".

for review, and the other three were personally delivered on time. The one-day delay in Metro and TriMet receiving Weber's petition for review did not prevent Metro or TriMet from immediately beginning to prepare its consolidated response brief as to the three petitions for review that were timely filed. And the one-day delay in respondents' receipt of Weber's petition for review and brief did not alter the scheduled oral argument or delay our final opinion. Therefore, while it is a close question, absent a clearer indication that dismissal is required here, we conclude that the 1996 statute does not mandate dismissal of Weber's appeal in the circumstances presented in this appeal.

Respondents' motion to dismiss LUBA No. 2011-080 is denied.

MOTION TO TAKE EVIDENCE

Pursuant to OAR 661-010-0045(1), Metro requests that LUBA consider evidence that is not included in the record it transmitted in this appeal, for purposes of resolving petitioner Northeast Coalition of Neighborhoods and Coalition for a Livable Future's (Coalitions') fourth assignment of error. No party objects to the motion, and it is allowed.

INTRODUCTION

The statement of facts in petitioner Plaid Pantries' petition for review includes an adequate introduction to the parties' assignments of error and is set out below:

> "In 1996 Governor Kitzhaber called a special session of the legislature for the purpose of passing a collection of bills related to a proposed South North Light Rail Line. The 1996 statute was passed in the special session and it authorized an expedited process for review of the South North Light Rail project (the 'Project').
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> "An approval under the 1996 statute is called a Land Use Final Order (a 'LUFO'). The effect of a LUFO is a) to require affected local governments to amend the[ir] land use plans to [be] consistent with the LUFO; and b) require affected local governments to issue development approvals for the Project, subject only to limited conditions. The 1996 statute also creates a highly accelerated and limited appeals process for the LUFO.
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> "The 1996 statute directed the Land Conservation and Development Commission to establish criteria (the 1996 LCDC criteria) for the land use approvals necessary for the Project and gave Respondent Metro the authority

to approve the project upon application from Intervenor TriMet, based upon the 1996 LCDC criteria.

"The LCDC voted to approve the criteria in 1996, and * * * the order formalizing the LCDC LUFO criteria was signed in 1998. Subsequently, various portions of the light rail line have been approved with a LUFO and some have been constructed.

"TriMet's application for this LUFO seeks approval for an extension of the light rail line from its current location [at the Oregon Exposition Center] to the Oregon-Washington border, a point midway across the Columbia River. The northern endpoint of the Project is outside Portland's Urban Growth Boundary and extend[s] to the State of Oregon boundary. Portland's Urban Growth Boundary follows the north shore of Hayden Island at the point where the project crosses the Columbia River.

"The project for which TriMet seeks the LUFO approval includes both the light rail line itself; two double deck bridge spans across the Columbia River for use of motor vehicles on Interstate-5 Highway, pedestrians, and bicyclists; and multiple freeway interchanges and modifications to Interstate-5. TriMet elected to bundle the highway and highway bridge improvements into the light rail project in order to induce Clark County voters to accept the light rail crossing." Plaid Pantry Petition for Review 9-10. (Record and statutory citations omitted.)

FIRST ASSIGNMENT OF ERROR (COALITIONS, JANZEN, PLAID PANTRIES)

The portion of the CRC Project that lies south of the north shore of Hayden Island along the Columbia River is inside the Portland metropolitan urban growth boundary (UGB). But the portion that lies north of the north shore of Hayden Island, extending to the border between Oregon and Washington in the middle of the Columbia River, lies outside the UGB.

As defined by Section 1 of the 1996 statute, the "Project" is to be located within the UGB.[8] Section 1 of the 1996 statute includes a nearly identical worded definition of "Project

[8] The "Project" is defined as:

"[T]he portion of the South North MAX Light Rail Project *within the Portland metropolitan area urban growth boundary*, including each segment thereof as set forth in the Phase I South North Corridor Project Locally Preferred Alternative Report as may be amended from time to time or as may be modified in a Final Statement or the Full Funding Grant Agreement. The project includes the light rail route, stations, lots and maintenance facilities, and any highway improvements to be included in the project." Or Laws 1996. ch 12, sec 1(18) (emphasis added).

extension," and that definition similarly provides that a Project extension is to be located inside the UGB. Petitioners contend that the LUFO improperly approves a Project that lies partially outside the UGB, and that Metro lacks authority under the 1996 statute to approve such a Project under the expedited process authorized by the 1996 statute. Petitioners contend that the 1996 statute's text unambiguously requires that the Project be sited inside the UGB and that the legislative history also shows that there was no legislative intent to authorize a Project that would extend outside the Portland UGB. Petitioners argue Metro exceeded its statutory authority in relying on the 1996 statute to approve a Project that is located, in part, outside the UGB.

Respondents argue that, without regard to the disputed LUFO, the Metro Regional Transportation Plan approves new multi-modal bridges across the Columbia River that extend outside the UGB to the state line with the State of Washington, as does the City of Portland's Transportation System Plan. Respondents argue that even if it was improper to include the portion of the Project that lies outside the UGB within the scope of the approval granted by the LUFO, the only legal effect of that impropriety is that that portion of the Project outside the UGB does not receive the benefit of not having to address and comply with other land use laws that might otherwise apply if the project were being approved without the benefit of the 1996 statute. In particular, the parts of the Project outside the UGB would not be protected by Section 8 of the 1996 statute, which limits local governments' authority to impose conditions of approval on the Project.

We do not agree that we can treat TriMet's and Metro's approval of a Project that is partially outside the UGB as harmless error. The special procedures and approval standards created by the 1996 statute only apply to Projects that are located within the Portland UGB. While that limitation appears in definitions, rather than in the substantive parts of the 1996 statute, we agree with petitioners that Metro's approval of a Project that is not located entirely within the UGB exceeds the authority Metro was granted by the 1996 statute.

Coalitions', Jantzen's and Plaid Pantries' first assignments of error are sustained.[9]

SECOND ASSIGNMENT OF ERROR (COALITIONS, PLAID PANTRIES, JANTZEN); FOURTH ASSIGNMENT OF ERROR (WEBER)

As previously noted, the Project authorized by the LUFO will extend light rail north from its current terminus at the Expo Center across a new multi-modal bridge to Hayden Island where a new light rail station will be constructed west of the site authorized in the original 1998 LUFO. From that station, light rail would be extended north across the lower deck of a new multi-modal double deck bridge.

In addition to those light rail improvements, the Project will remove the two existing I-5 freeway bridges that connect Hayden Island with Vancouver. In their place the Project will construct two new double deck bridges. The westerly new bridge, in addition to carrying light rail on the bottom deck, will carry freeway traffic on the top deck. The easterly new bridge will devote the top deck to freeway traffic and the bottom deck to bicycle and pedestrian traffic. The Project also includes a number of other highway improvements, including: two new freeway interchanges and widening of the freeway in both northbound and southbound directions. In addition, a number of existing roadways are to be realigned, widened or modified and two new connections between existing roads will be constructed. According to petitioner Coalitions, the total cost for highway improvements is approximately 75 percent of the total Project cost. Although petitioners Weber, Coalitions, Plaid Pantries and Jantzen couch their arguments under these assignments of error in slightly different terms, they all contend Metro exceeded its statutory authority by relying on a statute that was adopted to authorize a light rail project to authorize what they characterize as primarily a highway project.

[9] The parties disagree regarding the legal consequence of sustaining these assignments of error. We discuss that question at the end of this opinion.

The most direct answer to petitioners' second assignments of error is that even if the 1996 statute does not authorize approval of a South North Light Rail Project that is primarily a highway project, in determining whether the South North Light Rail Project is primarily a highway project, the correct focus is on the entire South North Light Rail Project, not the CRC Project portion of the South North Light Rail Project in isolation. Viewed in that way, the South North Light Rail Project is not primarily a highway project. In any event, for the reasons explained below, the 1996 statute simply does not limit the highway improvements that may be included in the Project in the way petitioners argue.

As defined by Section 1(18) of the 1996 statute, the Project includes "the light rail route, stations, lots and maintenance facilities, and *any highway improvements* to be included in the project." *See* n 8. The only express limitation on "any highway improvements" that may be included in the Project is set out in Section 1(12) of the 1996 statute, which provides as follows:

> "'Highway improvements' means the highway improvements, *if any*, to be included in the project or project extension. The highway improvements shall be selected from among the highway improvements, *if any*, described in a Draft Statement or Final Statement for the project or project extension." (Emphasis added.)

There is no dispute that the disputed highway improvements are included in the Draft Environmental Impact Statement for the Project.

Respondents argue that petitioners are asking that LUBA read the 1996 statute to impose a limitation on the scope of highway improvements that may be included in the Project that is simply not included in the statute. Respondents argue:

> "In its brief, Petitioner Plaid Pantries argues that major interstate bridge and interchange construction is '*unrelated* to the light rail improvement in the project.' (Pet. at 22, emphasis added). Similarly, Petitioner Jantzen argues that these I-5 improvements do not *support* or *provide access to* light rail or are not *required* by or *ancillary to* light rail, and Petitioner [Coalitions] asserts that the highway improvements are not *properly connected* to the siting of the South/North light rail line.

> "These assertions are legally meaningless and factually incorrect. First, neither [the 1996 statute] nor the adopted LCDC review criteria require that the highway improvements be 'related' or 'ancillary' to, 'required by', 'support' or 'provide access to' the light rail improvements. Neither do they require that the highway improvements be 'accessory' 'connected' to light rail improvements. The only requirement in [the 1996 statute] is that they be 'selected from among the highway improvements, if any, described in a Draft Statement or Final Statement for the project or project extension.' * * * Had it wanted to, the 1996 Legislative Assembly could easily have limited the highway improvements to just those that are 'related', 'ancillary' or 'accessory' to, 'required by', or 'support' light rail facilities. But the legislature did not choose to insert such modifiers to the Act. Instead, it authorized any highway improvements, provided they are linked with rail facilities in a Draft or Final Statement.
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> "Petitioners urge LUBA to interpret [the 1996 statute] as though these modifying, limiting words are present, implied or intended. But it is not the role of a reviewing body 'to insert [into a statute] what has been omitted, or to omit what has been inserted.' ORS 174.010. Rather, it is the reviewing body's duty to give meaning to every word in a statute. * * * Notwithstanding petitioners' overtures, LUBA should not assume that the 1996 Legislative Assembly inserted the word 'any' unintentionally or intended 'any' to be meaningless surplus. *State v. Stamper*, 197 Or App 413, 417, 106 P3d 172, *rev den* 339 Or 230 (2005)." Respondents' Brief 23-24 (italics and underlining in original).

We agree with respondents. The text of the 1996 statute simply provides no basis for limiting the highway improvements that may be included in the Project in the way petitioners argue. Petitioners contend that the words "if any" in Section 1(12) should be read to connote a legislative intent that any highway improvements be *de minimis* and directly related to or necessitated by light rail improvements. We do not believe such a connotation can be read into that word choice.

Neither the legislative history of the 1996 statute nor the 1991 statue that authorized the Westside Corridor Project provide any basis for interpreting the 1996 statute to preclude the highway improvements that are included in the Project. Isolated references to light rail by individual legislators during the proceedings that led to the 1996 statute certainly provide no basis for finding such a limitation. And, as respondents point out, the 1991 statute that was adopted to expedite approval of the Westside Corridor Project also authorized highway

improvements, and the Westside Corridor Project in fact included substantial improvements to Highways 26 and 217 that were not related to the Westside light rail extension in any direct way. If anything, that statutory and legislative history suggest the legislature was well aware that the Project would include highway improvements when it adopted the 1996 statute to authorize "any highway improvements" that might be included in the Draft or Final Environmental Impact Statements.

As noted earlier, the 1996 statute directs LCDC to adopt the criteria that Metro used to approve the South North Light Rail Project. One of the criteria LCDC adopted, Criterion 3, states in part "[p]rovide for associated highway improvements, including their location * * *."[10] Assuming that language in LCDC Criterion 3 is appropriately read as limiting the highway improvements that may be included in the Project to those that are "associated," we agree with respondents that the CRC highway improvements are "associated" with the light rail component.[11] The council found that the Project is a multi-modal project that is designed to solve an interstate transportation need. As originally approved in 1998, light rail was to be extended to Vancouver, Washington via a light rail bridge over the Columbia River. A ballot measure for the local funding needed from Washington for that extension was rejected by Washington voters. In the LUFO that is before us in this appeal, Metro found that the highway component is necessary to obtain support for the necessary local funding from Washington for the light rail component:

> "* * * The Council finds that the Project reflects negotiation and compromise among governmental bodies and that for all practical purposes, the light rail component could not have gone forward without the highway component and

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[10] We set out LCDC Criterion 3 in its entirety later in this opinion.

[11] *Webster's Third New Int'l Dictionary* (1981) 132 defines "associate" in part as follows:

> "1a : to join often in a loose relationship as a partner, fellow worker, colleague, friend, companion, or ally * * * 3 : to join (things) together or connect (one thing) with another[.]"

> the highway component could not have gone forward without the light rail component. * * *." Record 28-29.

We agree with respondents that the Council's findings and the undisputed fact that the highway improvements are include in the Project's Draft Environmental Impact Statement is sufficient to establish that those improvements are "associated" with the light rail component of the Project, within the meaning of LCDC Criterion 3.

Finally petitioners Coalitions and Jantzen advance two additional arguments under these assignments of error. Article IV, Section 20 of the Oregon Constitution provides in part that "Every Act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title." We understand petitioners Coalitions to argue that because the title of the 1996 statute is "[r]elating to procedures for the siting of the South North light rail line * * *," authorizing substantial highway improvements under the 1996 statute would violate Article IV, Section 20.

Under Section 9(4) a petitioner may not raise an issue to LUBA in an appeal of a LUFO unless that petitioner raised the issue before Metro.[12] Respondents contend petitioners did not raise this issue, and petitioners have not identified where the issue was raised. We agree with respondents that this issue was not preserved for review. We also agree with respondents that in any event Article IV, Section 20 limits enactments of legislation, like the 1996 statute. The decision that is before us in this appeal is Metro's interpretation and application of the 1996 statute, not the decision to enact that legislation. Article IV, Section 20 of the Oregon Constitution provides no basis for reversal or remand of the LUFO that is before us in this appeal.

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[12] Section 9(4) of the 1996 statute provides:

> "A person's failure to raise an issue at the land use final order hearing, in person or in writing, or failure to provide sufficient specificity to afford the council an opportunity to respond to the issue raised, shall preclude that person from petitioning for review based on that issue."

At oral argument, petitioner Jantzen argued that Chapter 2 of the Project Draft Environmental Impact Statement, which appears at Record 10061-10116, distinguishes between highway improvements, interchange improvements, and local street improvements. Although not entirely clear, we understand Jantzen to argue that some of the highway improvements that are authorized by the LUFO are actually interchange and local street improvements, which Metro cannot approve under the 1996 statute since the statute only authorizes highway improvements. That argument does not appear in Jantzen's petition for review and was presented for the first time at oral argument. We therefore do not consider the argument further. *See* OAR 661-010-0040(1) ("The Board shall not consider issues raised for the first time at oral argument"); *DLCD v. Douglas County*, 28 Or LUBA 242, 252 (1994) (declining to consider argument that was presented for the first time at oral argument).

The second assignments of error of petitioners Coalitions, Plaid Pantries and Jantzen are denied. Petitioner Weber's fourth assignment of error is denied.

THIRD ASSIGNMENT OF ERROR (PLAID PANTRIES)

Petitioner contends that the purpose of the 1996 statute was to enable TriMet to secure federal funding that was anticipated to be available in a then pending federal transportation act. Section 2(1) of the 1996 statute provides:

> "The Legislative Assembly finds that a failure to obtain maximum federal funding for the South North MAX Light Rail Project in the upcoming federal transportation authorization act will seriously impair the viability of the transportation system planned for the Portland metropolitan area, the ability of the area to implement a significant portion of its air quality and energy efficiency strategies and the ability of affected local governments to implement significant parts of their comprehensive plans. The Legislative Assembly further finds that to maximize the state's and metropolitan area's ability to obtain the highest available level of federal funding for the South North MAX Light Rail Project and to assure the timely and cost-effective construction of the project, it is necessary [to enact an expedited approval process].

Petitioner contends the 1996 statute was adopted to provide a one-time special process to meet funding deadlines for anticipated federal funding in 1996. Petitioner argues TriMet and Metro are misusing the 1996 statute 15 years later when there is no anticipated federal funding for the project and are acting beyond the authority granted by the 1996 statute.

Respondents answer that the purpose of the 1996 statute was to ensure a viable transportation system, implement air quality and energy efficiency strategies and implement local government comprehensive plans. According to respondents, those purposes have not yet been fully achieved since the South North Light Rail Project remains incomplete. Respondents also point out that the 1996 statute specifically includes authority to include project extensions and amend a LUFO after it has been initially adopted. The 1996 statute also includes no sunset provision, and respondents contend it remains a viable statute until the Project is completed.

We agree with respondents.

Plaid Pantries' third assignment of error is denied.

FOURTH AND FIFTH ASSIGNMENTS OF ERROR (PLAID PANTRIES)

LCDC Criterion 3 requires, in part:

> "Identify adverse economic, social and traffic impacts on affected residential, commercial and industrial neighborhoods and mixed use centers. Identify measures to reduce those impacts which could be imposed as conditions of approval during the NEPA process, or, if reasonable and necessary, by affected local governments during the local permitting process."

Petitioner contends that it presented evidence to Metro that the Project financing plan is in shambles and, due to funding uncertainties, the Project will be delayed indefinitely. Petitioner also contends that funding uncertainties make it likely that the Project will have to be constructed in phases. Petitioner contends "delay required by these financial problems would also have inevitable effects on the project's economic, social and traffic impacts." Plaid Pantries' Petition for Review 31. Petitioner contends that Metro wrongly concluded

that it was not required to consider the economic, social and traffic impacts that would be caused by delays that might result from a lack of federal funding and the Project construction phasing that might be required due to funding uncertainties, and in doing so misconstrued LCDC Criterion 3.[13]

As Metro points out in its decision, LCDC's criteria do not expressly require that TriMet produce a funding plan for LUFO approval of the Project or require that TriMet establish that funding is available for the project. Neither do those criteria expressly require that TriMet produce a phasing plan to set out how the Project could be constructed in phases in the event a lack of project funding necessitates construction in phases.

For purposes of applying LCDC Criterion 3, the LUFO assumes a four-year construction period. Under Plaid Pantries' interpretation of LCDC Criterion 3, unless TriMet can establish that it is reasonable to assume funding will be available to construct the Project in a single phase that is four years long, Metro must require a phasing plan that will allow Metro to analyze how constructing the Project over a longer period of time in phases would alter the economic, social and traffic impacts that are anticipated to result if the Project could be built in a single phase in four years. While we do not agree with Metro that requiring TriMet to produce a phasing plan would be impermissible under LCDC Criterion 3, neither do we agree with Plaid Pantries that the LCDC Criterion 3 obligation to consider economic, social and traffic impacts requires Metro to go to such lengths, simply because the availability of funding is not certain and it is possible that due to a lack of funding the Project will not be constructed in a single four-year phase as assumed.

Plaid Pantries' fourth and fifth assignments of error are denied.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR (WEBER); THIRD AND

[13] Petitioner argued to Metro that constructing the Project in phases will "lead to partially constructed portions of the project having reduced utility and much higher than projected temporary economic, social and traffic impacts." Record 513.

FOURTH ASSIGNMENTS OF ERROR (JANTZEN)

These assignments of error all concern LCDC Criterion 3. The text of LCDC Criterion 3 was set out in part earlier in this opinion and is set out in full below:

> "Identify adverse economic, social and traffic impacts on affected residential, commercial and industrial neighborhoods and mixed-use centers. Identify measures to reduce those impacts which could be imposed as conditions of approval during the NEPA process or, if reasonable and necessary, by affected local governments during the local permitting process.
>
> "A. Provide for a light rail route and light rail stations, park-and-ride lots and vehicle maintenance facilities, including their locations, balancing (1) the need for light rail proximity and service to present or planned residential, employment and recreational areas that are capable of enhancing transit ridership; (2) the likely contribution of light rail proximity and service to the development of an efficient and compact urban form; and (3) the need to protect affected neighborhoods from the identified adverse impacts.
>
> "B. Provide for associated highway improvements, including their locations, balancing (1) the need to improve the highway system with (2) the need to protect affected neighborhoods from the identified adverse impacts.

A. Weber's First Assignment of Error

Weber's first assignment of error purports to assign error based on the requirements in paragraph A of LCDC Criterion 3. Under that paragraph, Metro is directed to provide facilities for light rail transportation balancing (1) the need for light rail proximity to areas capable of enhancing transit ridership, (2) the likely contribution of light rail to developing an efficient and compact urban form, and (3) the need to protect neighborhoods from adverse impacts. We separately identify below the issues that we have been able to distill from Weber's first assignment of error.

1. Failure to Justify Need to Relocate the Light Rail Alignment Further West

Weber first contends that Metro failed to establish that amending the 1998 LUFO to move the light rail alignment further west and construct the proposed highway improvements

"will serve to provide needed light rail service to the area, and that relocation will enhance transit ridership, and, finally, that the relocation will contribute to a compact urban form." Weber Petition for Review 7. Weber also appears to argue that the need to relocate the light rail alignment is caused by the proposed freeway bridges and freeway and other highway improvements, not any need for light rail, and as such Metro failed to adequately address and misconstrued paragraph A of LCDC Criterion 3. Weber Petition for Review 7-9.

The letter that constitutes Weber's only appearance before Metro appears at Record 883-88. These issues were not raised with "sufficient specificity to afford the council an opportunity to respond to the issue[s]" and for that reason the issues were waived under Section 9(4) of the 1996 statute. *See* n 12. And, even if these issues had not been waived, they are not sufficiently developed for review.

2. Reliance on the Concept Plan Scenario

We understand Weber also to argue under its first assignment of error, that Metro relied on what it refers to as the "Concept Plan Scenario" that "forms the basis of the City of Portland's adopted refinement plan, *The Hayden Island Plan* (August 2009)." Weber Petition for Review 9. Petitioner contends the Concept Plan Scenario assumes a significant alteration in the mix of uses on Hayden Island, and that projected alteration is no longer realistic in view of the recession that began in 2008, with the result that Metro should have relied on a different scenario, the "2030 Baseline Scenario." *Id*. at 10. We understand Weber to argue that Metro's findings regarding paragraph A of LCDC Criterion 3 are not supported by substantial evidence, because they rely on the Concept Plan Scenario.

Weber's difference of opinion about whether the Concept Plan Scenario can be relied on as substantial evidence to address paragraph A of LCDC Criterion 3 is not sufficiently developed to establish that Metro's decision is not supported by substantial evidence.

Weber's first assignment of error is denied.

B. Weber's Second Assignment of Error

Weber's second assignment of error purports to assign error based on the requirements in paragraph B of LCDC Criterion 3. Under that paragraph, in providing associated highway improvements, Metro is required to balance (1) the need to improve the highway system with (2) the need to protect affected neighborhoods from the identified adverse impacts. Weber's arguments under this assignment of error are not clear. Weber appears to argue that the highway improvements associated with the CRC Project are too extensive and then argues:

> "In light of [the 1996 statute] frame work, the Findings regarding the Columbia River Crossing Project * * * serve only to expand the statutory definitions of 'Project;' 'Project Extension;' and 'associated highway improvements.' Metro's expansion of these definitions results in altering the purpose of [the 1996 statute] beyond recognition. As a result, the Findings are irrelevant and fail to satisfy Metro's requirement that its decision must be based on substantial evidence that the LCDC Criteria had been met." Weber Petition for Review 12.

We are not sure how to interpret Weber's argument. To the extent it is arguing that the highway improvements are beyond the scope of what is approvable under the 1996 statute, that is not really an argument about LCDC Criterion 3, and we have already rejected that argument elsewhere in this opinion. Weber's argument under this assignment of error appears to start off as an argument that Metro misconstrued LCDC Criterion 3 or exceeded its statutory authority. But Weber's argument appears to devolve into a substantial argument that we do not understand, and for that reason we reject Weber's substantial evidence argument.

Weber's second assignment of error is denied.

C. Weber's Third Assignment of Error

Under its third assignment of error, Weber argues that the mitigation measures identified by Metro are "conclusory." Weber also argues that, as proposed mitigation under LCDC Criterion 3, Metro may not rely on compensation when impacted businesses are

displaced and TriMet's and the Oregon Department of Transportation's (ODOT's) advisory services programs to assist business relocations. Weber contends that Metro's conclusory identification of mitigation measures and reliance on compensation and advisory service programs for dislocated businesses represents a misconstruction of LCDC Criterion 3 and results in a decision that is not supported by substantial evidence.

With regard to Weber's contention that the mitigation measures are conclusory, that contention is not sufficiently developed to allow review. We reject Weber's contention that compensation at fair market value when properties are taken and relocation assistance to displaced businesses cannot be relied upon as proposed mitigation under LCDC Criterion 3. Finally, Weber contends that Metro may not rely on ODOT and TriMet relocation assistance as mitigation because there is no substantial evidence that such assistance is effective. Respondents argue, and we agree, that LCDC Criterion 3 does not obligate Metro to establish that all its suggested mitigation measures will be effective.

Weber's third assignment of error is denied.

D. Jantzen's Third and Fourth Assignments of Error

As approved by the LUFO, a concrete median will be constructed in the middle of North Jantzen Drive. That will result in Jantzen's restaurant losing its current full access to North Jantzen Drive and receiving in its place right-in/right-out access to North Jantzen Drive. The LUFO findings acknowledge that this change in access will have adverse access and circulation impacts on Jantzen, with economic consequences. Jantzen contends Metro's findings regarding mitigation for these adverse impacts under LCDC Criterion 3 are inadequate for three reasons and represent a misconstruction of LCDC Criterion 3 and result in a decision that is not supported by substantial evidence. We address those three reasons separately below, before turning to Jantzen's substantial evidence challenge.

1. Impacts are not Speculative and There Will be Construction Related Impacts

Jantzen argues that Metro's findings regarding adverse impacts under LCDC Criterion 3 inadequately address the adverse impacts Jantzen will suffer when its current full access is restricted by the median improvements. Jantzen submitted evidence below that it will suffer a revenue reduction of 50-60 percent, and it will begin to suffer those adverse impacts during construction of I-5 improvements even before the median is installed in North Jantzen Drive. Jantzen argues Metro inadequately responded to this evidence and further that, in repeatedly using the word "could" in referring to the adverse impacts that will be generated by the Project and its construction, Metro wrongly suggests the impacts are speculative.

The LUFO findings acknowledge that there will be 39 displacements on Hayden Island, although Jantzen's restaurant is not one of those displacements. The findings explain that displacements are inevitable with a project such as the CRC Project. The findings address adverse impacts associated with construction and identify possible mitigation measures. Record 123-27. The council also found that "during the preliminary and final engineering processes, engineering staff will try to minimize impacts associated with traffic pattern changes and access management measures to the extent practicable through design refinements." Record 67. With regard to Jantzen specifically, the LUFO includes findings that acknowledge Jantzen will suffer adverse impacts and point out that there will be continued consideration of these impacts during development of the Interchange Area Management Plan that will be developed as part of final design of the Project. The LUFO explains that if impacts to Janzen are found to be greater than currently anticipated, Jantzen will be considered displaced and it will receive compensation and relocation assistance. *Id*.

Respondents contend that these findings correctly apply LCDC Criterion 3. Respondents point out that the criterion only requires that Metro identify adverse impacts on "neighborhoods" and "mixed use centers," not individual properties. And LCDC Criterion 3

only requires Metro to identify mitigation measures that "could be imposed as conditions of approval" during the NEPA or local permitting process. *See Seto v. Tri-County Metro. Transportation Dist.*, 311 Or at 467-68 (addressing a nearly identically worded criterion applicable to the Westside Light Rail Project). Respondents contend that the LUFO adequately performed these functions. We agree with respondents.

2. Mitigation Findings are Generalized and do not Assess Qualitative Economic Impacts on Jantzen

Jantzen contends the LUFO findings are generalized and do not "assess the quantitative economic impacts on the Restaurant." Jantzen Petition for Review 21.

LCDC Criterion 3 does not require that Metro specifically address "quantitative economic impacts" on individual properties. Jantzen argues that because Jantzen introduced evidence of the quantitative economic impacts the Project would have on Jantzen, Metro should be required to respond specifically to that evidence. We reject the argument.

3. Interchange Area Management Plan is not Meaningful Mitigation

Jantzen contends the LUFO is deficient, because it relies to a large extent on the Interchange Area Management Plan (IAMP) that will be developed during final design to provide mitigation. According to Jantzen, "any future IAMPs will simply fall in line with the LUFO, which as explained above, does not include adequate mitigation measures." Jantzen Petition for Review 22.

The LUFO does identify possible mitigation measures. Record 123-27. Respondents contend that it is not Metro's function under LCDC Criterion 3 to decide which mitigation measures should be selected to minimize adverse impacts on Jantzen. Under LCDC Criterion 3, selection of mitigation measures occurs during the NEPA process and local permitting process. We agree with respondents.

4. Substantial Evidence

Finally, Jantzen makes a substantial evidence challenge to the LUFO's findings concerning LCDC Criterion 3. Petitioner contends the LUFO is not supported by substantial evidence, because Metro did not specifically respond to the evidence Jantzen submitted. Otherwise, Jantzen's substantial evidence challenge appears to be derivative of, and entirely dependent on, the findings challenges we have already rejected above.

Under Section (9)(12)(a)(C) of the 1996 act, LUBA is authorized to remand a LUFO that is not supported by substantial evidence. However Section 9(12)(a)(C) provides in part:

> "The existence in the whole record of substantial evidence supporting a different decision on the light rail route, stations, lots or maintenance facilities, or the highway improvements, including their locations, shall not be a ground for remand if there also was substantial evidence in the whole record supporting the land use final order."

As we have already explained, Metro was not required under LCDC Criterion 3 to respond specifically to evidence submitted by individual property owners. And Metro's failure to respond specifically to Jantzen's evidence does not render its decision unsupported by substantial evidence. Jantzen does not present a sustainable substantial evidence challenge.

Weber's first, second and third assignments of error and Janzen's third and fourth assignments of error are denied.

THIRD ASSIGNMENT OF ERROR (COALITIONS)

Petitioners Coalitions include a general substantial evidence challenge. When making evidentiary challenges at LUBA, petitioners generally identify one or more relevant approval criteria and then argue that the findings directed at those criteria are not supported by substantial evidence. In their third assignment of error petitioners Coalitions do not adopt that approach. Instead petitioners simply contend that three kinds of evidence are unreliable, inadequate or missing—evidence of: (1) traffic projections, (2) environmental impacts and (3) need for highway improvements. In doing so, petitioners suggest that the LUFO must be supported by substantial evidence that the Project is "needed."

Petitioners contend that an Oregon Treasurers Office Report and a Report by Impresa Consulting show that the traffic projections that are relied on in the Draft Environmental Impact Statement are too high. Petitioners also contend that ODOT consultants have called into question the reliability of the models that were used to project toll revenues. Petitioners also contend that because the design of the Project is only 10 to 20 percent complete, the Draft Environmental Impact Statement inadequately assesses the Project's environmental impacts leaving the LUFO unsupported by substantial evidence. Petitioners contend the LUFO should await completion of the Final Environmental Impact Statement.

Respondents first answer that the LCDC Criteria do not require that Metro establish in the LUFO that the Project is needed. We agree. With regard to petitioners challenge to the environmental impact, traffic projection and tolling evidence, respondents offer the following response:

> "Respondent's findings are based upon the 'Transit Technical Report', the 'Traffic Technical Report', the Regional Transportation Plan (adopted June 10, 2010 * * *) and Section 3.1 of the Draft Environmental Impact Statement. Rec 79 to 89.
>
> "[Coalitions] assert[] that traffic projections are incorrect and contradicted by other evidence. Petitioners point to a report of the Oregon Treasurer's Office and a 'white paper' done for the Oregon Department of Transportation for support for its assertion. But the report and paper do not state that traffic and tolling revenue projections are incorrect. Instead, they say the projections and modeling are adequate for this stage of the planning and development process and recommend that inputs and modeling approaches be updated for later stages of planning, prior to final decisions on financing (expected at the end of 2013). * * *
>
> "After hearing testimony from petitioners, other critics, staff and modeling experts, the Council concluded:
>
> > "'The Council heard testimony questioning the adequacy of the models used to forecast toll traffic and revenues. Modeling experts acknowledge that there is a level of modeling analysis required at the environmental impact sta[g]e, and a more rigorous analysis required at the point of financial commitments, in several years. By that time, Metro's modeling will be upgraded and input data regarding traffic,

> growth forecasts, gas prices, transit coverage, interest rates and other conditions will be updated to be as current as possible to the timing of financial commitments.'

> "The studies upon which the Council relied to identify traffic effects of the project and measures to mitigate them, viewed in the light of the whole record, provide substantial evidence for the Council's analysis and findings." Respondents' Brief 69-70.

We agree with respondents' reply to petitioners' substantial evidence challenge regarding the environmental impact, traffic projection and tolling evidence. With regard to petitioners challenge that the record does not include substantial evidence that the bridge highway improvements are necessary to extend light rail north from the Expo center, petitioner identifies no legal requirement for such evidence and we have determined elsewhere in this opinion that the 1996 statute authorizes the Project to include highway projects without imposing any such requirement. Because the LCDC criteria do not require that the LUFO establish that the Project's highway improvements are needed to extend light rail north, it follows that petitioners' challenge that there is no substantial evidence of such a need provides no basis for remand.

Coalitions' third assignment of error is denied.

SIXTH AND SEVENTH ASSIGNMENTS OF ERROR (PLAID PANTRIES)

Although Metro allowed the parties before it a limited opportunity for rebuttal, Metro allowed the applicant and staff to present additional evidence at the end of the proceedings before Metro and did not allow Plaid Pantries' request for an opportunity to rebut that additional evidence. Neither did the Metro Councilors disclose any *ex parte* contacts that they may have had, or allow parties an opportunity to rebut any such *ex parte* contacts. Plaid Pantries argues that those failures on Metro's part violated its right to due process under the Due Process Clause of Fourteenth Amendments to the United States Constitution.

Respondents offer two responses. First, it contends that the LUFO was issued under the procedures set out in the 1996 statute, and Section 3 of the 1996 statute expressly

provides they are the only procedures that apply.[14] It is undisputed that the 1996 statute does not require an opportunity for rebuttal and does not require disclosure of *ex parte* contacts or a right to rebut those contacts. Of course if Plaid Pantries has a due process right to present rebuttal evidence and to disclosure and rebuttal of *ex parte* contacts under the Due Process Clause of the federal constitution, Plaid Pantries would retain those rights, notwithstanding the legislature's failure to provide for such rights expressly in the 1996 statute. We turn to respondents' second response.

All parties agree that any rights Plaid Pantries may have to rebut evidence or insist that any *ex parte* contacts be disclosed with an opportunity for rebuttal only exists if the LUFO that is before us in this appeal is correctly viewed as a *quasi-judicial* rather than a *legislative* decision. *Fasano v. Washington County Commission*, 264 Or 574, 580-81, 507 P2d 23 (1973). Respondents contend the challenged decision is correctly viewed as legislative, Plaid Pantries contends it is correctly viewed as quasi-judicial.[15] The parties also agree that the required analysis for determining whether a decision is quasi-judicial or legislative is the three-part inquiry set out in *Strawberry Hills 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 602-03, 601 P2d 769 (1979). Those three inquiries were described in *Hood River Valley v. Board of Cty. Commissioners*, 193 Or App 485, 495, 91 P3d 748 (2004) as follows:

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[14] Section 3 of the 1996 statute provides:

> "Notwithstanding any other provision of law, the procedures and requirements provided for in sections 1 to 13 of this Act shall be the only land use procedures and requirements to which [LUFO] decisions shall be subject[.]"

[15] The Oregon Supreme Court has explained that the holding in *Fasano* rests on comprehensive land use statutes rather than the Due Process Clause. *1000 Friends of Oregon v. Wasco Co. Court*, 304 Or 76, 80-81, 742 P2d 39 (1987). No party questions petitioner's legal theory that the procedural rights required by *Fasano* in quasi-judicial land use proceedings are required by the Due Process Clause of the United States Constitution. Whether the basis for the *Fasano* procedural rights is constitutional or statutory could affect our resolution of this assignment of error. However, because we ultimately conclude the challenged LUFO is a legislative decision rather than a quasi-judicial decision, and the *Fasano* procedural rights only apply to quasi-judicial decisions, we do not consider the issue further.

> "First, does 'the process, once begun, [call] for reaching a decision,' with that decision being confined by preexisting criteria rather than a wide discretionary choice of action or inaction? Second, to what extent is the decision maker 'bound to apply preexisting criteria to concrete facts'. Third, to what extent is the decision 'directed at a closely circumscribed factual situation or a relatively small number of persons'?" (Citations to *Strawberry Hill* omitted.)

The *Strawberry Hill* factors are difficult to apply to distinguish between legislative and quasi-judicial decisions in the land use context, since almost all land use decisions that are initiated by an application require that the decision making body reach a decision. And since land use is heavily regulated at the state, regional and local level, in almost all cases a land use decision maker is bound to apply some sort of "preexisting criteria to concrete facts." That leaves the third inquiry, which the Court of Appeals has said is less important than the other inquiries. *Kozak v. City of Bend*, 231 Or App 163, 180, 217 P3d 1118 (2009); *State ex rel City of Powers v. Coos County Airport*, 201 Or App 222, 241, 119 P3d 225 (2005); *1000 Friends of Oregon v. Wasco Co. Court*, 80 Or App 532, 536, 723 P2d 1034 (1986), *rev'd on other grounds*, 304 Or 76, 742 P2d 39 (1987).

Turning first to the third *Strawberry Hill* inquiry, respondents contend it strongly supports a conclusion that the LUFO is legislative:

> "[T]his decision is the fourth phase or segment of the initial South North MAX Light Rail Project approved in 1998. It is part of a very large public works project costing billions of dollars and affecting thousands of people and thousands of properties. The project itself was the subject of state legislation * * *. Just the segment authorized by this LUFO will cost billions of dollars and affect thousands of people and cores of properties in the project area. It is identified in the Regional Transportation Plan as a project of regional and state significance. * * * This positions the decision in the legislative category. * * *" Respondents' Brief 62-63.

We agree with respondents.

The first *Strawberry Hill* inquiry supports Plaid Pantries, because Section 7(6) of the 1996 statute requires that the Metro Council take action on an application for a LUFO. Although the LCDC Criteria nominally are "preexisting criteria," we believe the second

Strawberry Hill inquiry supports a conclusion that the challenged LUFO is a legislative decision. As the Court of Appeals explained in *Hood River Valley*, 193 Or App at 495, the *Strawberry Hill* inquiries are more an analytical aid than a test.

> "Those three general criteria do not, however, describe a bright-line test. As we noted in *Estate of Gold v. City of Portland*, 87 Or App 45, 51, 740 P2d 812, *rev den*, 304 Or 405 (1987), *Strawberry Hill 4 Wheelers* 'contemplates a balancing of the various factors which militate for or against a quasi-judicial characterization and does not create [an] 'all or nothing' test[.]' (Citation omitted.) In particular, we noted that the criteria are applied in light of the reasons for their existence—*viz.*, 'the assurance of correct factual decisions' and 'the assurance of 'fair attention to individuals particularly affected.' *Estate of Gold*, 87 Or App at 51, (quoting *Strawberry Hill 4 Wheelers*, 287 Or at 604)."

The 1996 statute and the LCDC Criteria identify possible light rail connections but only direct that Metro "consider" those connections.[16] The 1996 statute and LCDC Criteria otherwise leave Metro with almost complete discretion to determine what the South North Light Rail Project will look like and where it will be sited. That does not suggest that the legislature was concerned that Metro's decision be factually correct. LCDC Criterion 3 does require that Metro "[i]dentify adverse economic, social and traffic impacts" and possible measures to mitigate those impacts. But Metro is directed to identify adverse impacts on affected neighborhoods rather than the individual properties that will be affected.[17] Therefore, while the LCDC criteria nominally require Metro to apply "preexisting criteria to concrete facts" those criteria in fact are more in the nature of a delegation of legislative authority to site a light rail facility in the location and with the features and facilities that

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[16] For example, LCDC Criterion #10 provides:

> "Consider a light rail route connecting Portland's central city with the City of Milwaukie's downtown via inner southeast Portland neighborhoods and, in the City of Milwaukie, the McLoughlin Boulevard corridor, and further connecting the central city with north and inner northeast Portland neighborhoods via the Interstate 5/Interstate Avenue corridor."

[17] Other LCDC Criteria require that Metro identify other kinds of adverse impacts, but only require Metro to identify mitigation that could be imposed rather than requiring Metro to reduce those adverse impacts to any specified degree.

Metro believes are appropriate, following a process to identify and possibly mitigate adverse impacts on affected neighborhoods, rather than affected individuals. Viewing the *Strawberry Hill* inquiries as a whole, in our view, the decision making called for under the LCDC criteria is more accurately characterized as legislative than quasi-judicial.

Plaid Pantries' sixth and seventh assignments of error are denied.

FOURTH ASSIGNMENT OF ERROR (COALITIONS)

Petitioners Coalitions argue that Metro violated their right to due process under the United States Constitution by relying on a number of CRC technical reports that are listed at Record 47-48, because those technical reports were not available to the public.

Respondents answer that Coalitions offer no evidence that the technical reports were not available and that in fact the technical reports were available to the public. Respondents contend the July 14, 2011 notice of the August 11, 2011 public hearing in this matter stated that the reports were available beginning on July 14, 2011 at Metro and on its website. Attached to Metro's Motion to Take Evidence, which we allowed earlier in this opinion, is an affidavit in which a Metro Records and Information Analyst states that the CRC technical reports were made part of the record in this matter on July 14, 2011, and were available to the public on that date.

Coalitions' fourth assignment of error is denied.

DISPOSITION

We sustain Coalitions', Jantzen's and Plaid Pantries' first assignment of error, because we conclude the 1996 statute does not authorize Metro to approve the part of the Project that is located outside the UGB. Under Section 9(12)(c) of the 1996 statute, "[LUBA] shall affirm all portions of the [LUFO] that it does not remand." The portion of the LUFO that approves the portion of the Project that is located outside the UGB is remanded. The portions of the LUFO that approve the part of the Project that is located inside the UGB are affirmed.

Plaid Pantries argues the Project is meaningless without the portion of the proposed bridges outside the UGB. Plaid Pantries goes on to argue:

> "The remand should at the very least require removal of the 'Columbia River Crossing' component from the approval, and cannot affirm the remainder, because the remainder of the approval (especially the ramps and other infrastructure improvements leading to the bridge) are meaningless without the bridge." Plaid Pantries Petition for Review 22.

We do not agree that LUBA can determine at this point that affirming the portion of the LUFO that approves the portion of the Project that is located within the UGB is meaningless. Metro would appear to have a number of options in responding to our remand. Section 9(12)(c) is clear, and we conclude it requires that LUBA affirm the portion of the LUFO that approves the portion of the Project located within the UGB. We reject Plaid Pantries' argument to the contrary.

The LUFO is affirmed in part and remanded in part.