BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WITHAM PARTS AND EQUIPMENT COMPANY, INC., ROGUE REGENCY INC., ROGUE VALLEY CENTER LLC, ROGUE CORNER PROPERTY LLC and SONMAR INN OF MEDFORD, INC.,
Petitioners,

vs.

OREGON DEPARTMENT of TRANSPORTATION,
Respondent.

LUBA Nos. 2001-176, 2001-177 and 2001-178

ORDER

MOTION TO INTERVENE

The notices of intent to appeal in this matter were filed on November 8, 2001. Colvin Oil Company filed a motion to intervene 36 days later, on December 14, 2001. Under ORS 197.830(7)(a), persons who wish to intervene in a LUBA appeal must file a motion requesting permission to intervene within 21 days after the notice of intent to appeal is filed with LUBA. ORS 197.830(7)(c) provides that failure to comply with the deadline established by ORS 197.830(7)(a) "shall result in denial of a motion to intervene." Because the motion to intervene was filed more than 21 days after the notice of intent to appeal was filed with LUBA, the motion to intervene is denied. *Wolverton v. Crook County*, 34 Or LUBA 515, 517 (1998).

MOTION TO DISMISS

A. Introduction

This appeal concerns proposed highway improvements for the Interstate Highway-5/State Highway 62 interchange in the City of Medford (hereafter North Medford Interchange). The Oregon Department of Transportation (ODOT) will build and own the

proposed North Medford Interchange improvements. Federal funds will be used to construct the improvements, so the National Environmental Policy Act (NEPA) applies. ODOT is the lead agency and prepared the required Environmental Assessment (EA). The EA was first released for comment in April 2001. Sometime later, ODOT prepared a Revised Environmental Assessment (REA). On September 20, 2001, an official with the Federal Highway Administration signed a Finding of No Significant Impact (FONSI) for the North Medford Interchange improvements and selected the "Build Alternative." REA 1.[1] Thereafter, on October 5, 2001, ODOT issued a "Decision Statement," which identifies the committees, consultants and local governmental officials that made up the project team for the proposal.[2] Later, on October 18, 2001, ODOT provided copies of the REA to interested parties.[3]

On November 8, 2001, petitioners filed three notices of intent to appeal the REA.[4] On November 21, 2001, ODOT moved to dismiss this appeal. Additional pleadings filed by the parties in this matter are listed below with the dates they were filed:

1. December 10, 2001. Petitioners' Response to Respondent's Motion to Dismiss (Petitioners' December 10, 2001 Response).

2. December 18, 2001. Respondent's Request to File a Reply Motion and Respondent's Reply to Petitioners' Response to Respondent's Motion to Dismiss (ODOT's December 18, 2001 Reply).

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[1]A copy of the REA is attached as Exhibit 1 to ODOT's motion to dismiss.

[2]A copy of the Decision Statement is attached to ODOT's December 18, 2001 reply to petitioners' response to the motion to dismiss.

[3]The first unnumbered page of the REA indicates that the REA was provided to all interested parties. The first paragraph states:

> "This Revised Environmental Assessment and Finding of No Significant Impact are being distributed for your information according to state and federal regulations."

[4]Although the petitioners in each appeal are different, each of the three notices of intent to appeal identify the REA as the decision being appealed and state that the REA became final on October 18, 2001. Amended notices of intent to appeal were filed on November 9, 2001 to identify the persons who were provided notice of the challenged decision. Because the three notices of intent to appeal and amended notices of intent to appeal all challenge the same decision, LUBA consolidated the appeals on November 16, 2001.

3. December 31, 2001. Petitioners' Response to Respondent's Motion to File a Reply (Petitioners' December 31, 2001 Response).

For the reasons explained below, we deny the motion to dismiss.

B. State Agency Land Use Decisions

As relevant here, LUBA's jurisdiction includes land use decisions and limited land use decisions. ORS 197.825.[5] Although most appeals at LUBA concern city and county land use decisions, LUBA also has jurisdiction to review state agency land use decisions. *Id*. With certain exceptions and exclusions that do not appear to be relevant in this appeal, an ODOT decision is a land use decision, and therefore reviewable by LUBA, if ODOT is required to apply the statewide planning goals in making its decision. ORS 197.015(10)(a)(B).[6]

The starting point in determining whether ODOT was required to apply the statewide planning goals in preparing the REA is ORS 197.180(1), which provides as follows:

> "[S]tate agencies shall carry out their planning duties, powers and responsibilities and take actions that are authorized by law with respect to programs affecting land use:
>
> "(a) In compliance with [statewide planning] goals * * *; and
>
> "(b) In a manner compatible with:
>
> "(A) Comprehensive plans and land use regulations initially acknowledged under ORS 197.251;
>
> "(B) Amendments to acknowledged comprehensive plans or land use regulations or new land use regulations acknowledged under ORS 197.625; and

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

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

[6]The statutory definition of "land use decision" includes "[a] final decision or determination of a state agency * * * with respect to which the agency is required to apply the [statewide planning] goals[.]" ORS 197.015(10)(a)(B).

"(C) Amendments to acknowledged comprehensive plans or land use regulations or new land use regulations acknowledged through periodic review."

To implement ORS 197.180, LCDC has adopted rules that govern its review of state agency coordination programs. OAR chapter 660, division 30. The purpose of OAR chapter 660, division 30 "is to assure that state agency rules and programs which affect land use comply with the statewide [planning] goals and are compatible with acknowledged city and county comprehensive plans." OAR 660-030-0000. One of the required elements of a state agency coordination program is identification of the agency programs that affect land use and must therefore comply with the statewide planning goals. OAR 660-030-0060(2) and (3).[7]

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[7]OAR 660-030-0060(2) and (3) provide as follows:

"(2) The four required elements of a state agency coordination program listed in ORS 197.180(2)(a) - (d) are as follows:

"(a) Agency rules and summaries of programs affecting land use;

"(b) A program of coordination pursuant to ORS 197.040(2)(e);

"(c) A program for coordination pursuant to ORS 197.090(1)(b); and

"(d) A program for cooperation with and technical assistance to local governments.

"(3) To satisfy the requirement under subsection (2)(a) of this rule, a state agency must complete the following:

"(a) Submit copies of all agency rules and list and briefly describe all agency programs authorized by law. Such description may be satisfied by provision of agency budget narratives or other similar explanatory information;

"(b) Using the definitions in OAR 660-030-0005(2), indicate which of the agency's rules and programs are land use programs;

"(c) For each land use program provide a copy or summary of the applicable enabling statutes or constitutional authority, complete copies of administrative rules and procedures and an analysis of the relationship between the program and land use;

"(d) Identify any agency land use programs subject to the requirements and procedures of the Commission's state permit compliance and compatibility rule, OAR chapter 660, division 31, as described in OAR 660-030-0090(2); and

Although ORS 197.180(1) imposes a dual obligation on state agencies to take actions with regard to programs affecting land use in a manner that (1) complies with the statewide planning goals and (2) is compatible with acknowledged local government comprehensive plans, in practice, state agencies generally achieve compliance with the statewide planning goals by assuring that their actions are compatible with acknowledged comprehensive plans. OAR 660-030-0065.[8]

C. ODOT's State Agency Coordination Program

ODOT's State Agency Coordination Program (SAC Program) has been reviewed and approved by LCDC.[9] ODOT's coordination rule appear at OAR chapter 731, division 15. The stated purpose of ODOT's coordination rule is as follows:

> "The purpose of this division is to establish the procedures used by [ODOT] to implement the provisions of its [SAC] Program which assure that [ODOT] land use programs are carried out in compliance with the statewide planning goals and in a manner compatible with acknowledged comprehensive plans * * *." OAR 731-015-0005.

> "(e) For rules and programs determined not to be agency land use programs, the agency is not required to demonstrate compliance with the statewide planning goals and compatibility with acknowledged comprehensive plans. However, specific actions undertaken in conjunction with such rules or programs may require a local permit or approval."

[8]OAR 660-030-0065(2) provides:

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

This rule appears to implement ORS 197.180(10) which provides:

> "The commission shall adopt rules establishing procedures to assure that state agency permits affecting land use are issued in compliance with the goals and compatible with acknowledged comprehensive plans and land use regulations, as required by subsection (1) of this section. The rules shall prescribe the circumstances in which state agencies may rely upon a determination of compliance or compatibility made by the affected city or county. The rules shall allow a state agency to rely upon a determination of compliance by a city or county without an acknowledged comprehensive plan and land use regulations only if the city or county determination is supported by written findings demonstrating compliance with the goals."

[9]A copy of ODOT's SAC Program is attached to petitioners' December 10, 2001 Response.

There does not appear to be any dispute that the North Medford Interchange improvements fall within the ODOT coordination rule definition of "Activities Which Significantly Affect Land Use."[10] ODOT treated the disputed project as a "Class 3 Project."[11]

ODOT's coordination rule sets out the procedure that ODOT follows to ensure that Class 3 Projects comply with the statewide planning goals and are consistent with local comprehensive plans. As relevant, OAR 731-015-0075 provides:

> "(1) The Department shall involve affected cities, counties, metropolitan planning organizations, state and federal agencies, special districts and other interested parties in the development of project plans. The Department shall include planning officials of the affected cities, counties and metropolitan planning organization on the project technical advisory committee.

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[10]OAR 731-015-0035 provides as follows:

> "The following activities undertaken by the Department significantly affect land use:
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> "(1) Enlarging an existing transportation facility to increase the level of transportation service provided, relocating an existing transportation facility, or constructing a new transportation facility.
>
> "(2) Constructing a new accessory facility, enlarging an existing accessory facility, or significantly changing the use of an existing accessory facility.
>
> "(3) Changing the size of land parcels through the sale of property.
>
> "(4) Altering land or structures in a way that significantly affects resources or areas protected by the statewide planning goals or acknowledged comprehensive plans. * * *"

Identical language appears in ODOT's SAC Program. ODOT SAC Program 3-1 through 3-2.

[11]ODOT's SAC Program explains that facility plans begin with a prospectus that, among other things, "classifies the project in accordance with the requirements of the National Environmental Policy Act and federal regulations which implement the Act." ODOT SAC Program 2-5. Class 1 projects "significantly affect the quality of the environment and require draft and final environmental impact statements (EIS)." *Id.* "Class 2 projects include activities that have little or no environmental impact and consequently are categorically excluded from environmental analysis by federal regulations." *Id*. ODOT's SAC Program includes the following description of Class 3 projects:

> "Class 3 projects include actions where the significance of the environmental impact is unclear and is evaluated through the preparation of an [EA]. The purpose of the EA is to establish whether the proposed project will significantly affect the environment. If a potentially significant impact is discovered, the project is reclassified to Class 1 and an EIS is prepared. Otherwise, the assessment results in a [FONSI]." *Id*.

"(2) Goal compliance and plan compatibility shall be analyzed in conjunction with the development of the Draft Environmental Impact Statement or Environmental Assessment. The environmental analysis shall identify and address relevant land use requirements in sufficient detail to support subsequent land use decisions necessary to authorize the project.

"(3) Except as otherwise set forth in section (4) of this rule, [ODOT] shall rely on affected cities and counties to make all plan amendments and zone changes necessary to achieve compliance with the statewide planning goals and compatibility with local comprehensive plans after completion of the Draft Environmental Impact Statement or Environmental Assessment and before completion of the Final Environmental Impact Statement or Revised Environmental Assessment. These shall include the adoption of general and specific plan provisions necessary to address applicable statewide planning goals.

"* * * * *

"(7) The [Oregon Transportation] Commission or its designee shall adopt findings of compatibility with the acknowledged comprehensive plans of affected cities and counties *when it grants design approval for the project*. Notice of the decision shall be mailed out to all interested parties.

"(8) [ODOT] shall obtain all other land use approvals and planning permits prior to construction of the project." (Emphasis added.)

D. ODOT's Motion to Dismiss

ODOT's motion to dismiss assumes that the appealed decision is the Federal Highway Administration's FONSI rather than the REA as a whole. From that assumption, ODOT argues that this appeal should be dismissed because (1) petitioners failed to name the Federal Highway Administration as a party, (2) LUBA does not have jurisdiction to review federal agency decisions and (3) LUBA does not have jurisdiction over the FONSI in this case. However, all parties now agree that the appealed decision is the REA, not the Federal Highway Administration's FONSI which is included in that document. Because ODOT's underlying assumption is erroneous, its motion to dismiss is without merit.

As an initial point, all parties recognize, and we also recognize, that the REA serves in part to comply with NEPA, and the REA and the FONSI are subject to review in federal district court for compliance with NEPA. However, that does not mean the REA does not *also* serve as ODOT's mechanism for compliance with ORS 197.180. Neither does it mean that the REA could not also qualify as a land use decision subject to review by LUBA.

In a very similar circumstance, LUBA concluded that it had jurisdiction to review an ODOT REA for a highway project in the City of Eugene. *Eugeneans for a Livable Future v. Dep't of Transportation*, 12 Or LUBA 142 (1984). That case lends some support to petitioners' position that we have jurisdiction in this matter. However, *Eugeneans for a Livable Future* is of limited assistance here, because it predated ODOT's current SAC Program, and there was no dispute in that case that ODOT had adopted a decision with regard to the highway project that was the subject of that appeal. Our decision in *Eugeneans for a Livable Future* turned on our independent factual conclusion that the proposed highway project would have significant impacts on land use. 12 Or LUBA at 146-47.

Although as a factual matter we believe the North Medford Interchange improvements also would have significant impacts on land use, the relevant legal question here is whether ODOT's SAC Program and coordination rule make the REA a land use decision. As explained earlier, under ODOT's approved SAC Program and its coordination rule, this Class 3 Project will "significantly affect land use." Moreover, under ODOT's state agency coordination program and coordination rule, ODOT is required to ensure that this Class 3 Project is consistent with the city's comprehensive plan and complies with the statewide planning goals. ODOT makes its decision that Class 3 Projects are consistent with the relevant comprehensive plan and comply with the statewide planning goals "when it grants design approval for the project." OAR 731-015-0075(7). In ODOT's December 18, 2001 Reply, ODOT argued that its design approval decision became final on October 5, 2001, when ODOT issued its Decision Statement. At oral argument, ODOT withdrew its

December 18, 2001 Reply and conceded that its design approval decision was made in the REA. No party disputes that the REA became final on October 18, 2001, when the REA was distributed to interested parties.

OAR 731-015-0075(7) expressly requires that ODOT adopt "findings of compatibility with the acknowledged comprehensive plans of affected cities and counties when it grants design approval for the project." With ODOT's concession that it granted design approval for the North Medford Interchange improvements in the REA, it necessarily follows that the REA is a land use decision under ODOT's SAC Program and coordination rule. As we have already noted, it may be that ODOT is relying on the project's consistency with the city's comprehensive plan to satisfy its statutory obligation to ensure that the proposal complies with the statewide planning goals.[12] During the January 3, 2002 conference call in this matter, ODOT argued that the City of Medford has already adopted land use decisions that ODOT is entitled to rely on in satisfying its obligations under ORS 197.180 and LCDC and ODOT implementing rules.[13] ODOT may well be correct in this argument, but that does not mean that the REA is not a land use decision, within the meaning of ORS 197.015(10)(a)(B). *See* n 6. Whatever legal theory ODOT may have for establishing that the North Medford Interchange is consistent with the city's comprehensive plan and complies with the statewide planning goals, its SAC Program and coordination rule require that Class 3 Projects comply with the statewide planning goals and be compatible with relevant comprehensive plans. We conclude that we have jurisdiction to consider the merits

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[12]The REA includes the following finding:

> "The Build Alternative is consistent with the Medford Comprehensive Plan and Transportation System Plan, and the interchange improvements are encompassed within the City's roadway classification system. The Build Alternative has been determined to be consistent with the Regional Transportation Plan (RTP)." REA 10.

[13]Because no record has been filed in this appeal, no such city decisions are presently before us.

of whatever assignments of error petitioners may direct at that legal theory in this appeal of ODOT's design approval decision.

ODOT's motion to dismiss is denied.

DEADLINE FOR FILING THE RECORD

Pursuant to the parties' stipulation, we issued an order on December 4, 2001, that provided the record in this matter would be due on "January 18, 200[2] or 10 days after LUBA rules on Respondent's Motion to Dismiss." However, at oral argument on the motion, ODOT indicated that the record in this matter is voluminous. In order to allow ODOT the opportunity to identify any documents that it believes are necessary for our review and to allow petitioners a reasonable opportunity to consider any proposals ODOT may wish to make to shorten the record, ODOT shall have 21 days from the date of this order to prepare and file the record. If additional time is required for the parties to reach agreement on a shortened record in this appeal, any party may request a further extension of the deadline for filing the record.

Dated this 17th day of January, 2002.

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Michael A. Holstun
Board Member