

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

JOSEPH SCHAEFER, CITY OF AURORA,
CITY OF WILSONVILLE, 1000 FRIENDS OF OREGON,
and FRIENDS OF FRENCH PRAIRIE,
Petitioners,

and

CLACKAMAS COUNTY,
Intervenor-Petitioner,

v.

OREGON STATE AVIATION BOARD and
OREGON DEPARTMENT OF AVIATION,
Respondents,

and

AURORA AIRPORT IMPROVEMENT ASSOCIATION,
BRUCE BENNETT, WILSON CONSTRUCTION COMPANY INC.,
TED MILLAR, TLM HOLDINGS, LLC, ANTHONY ALAN HELBLING,
and WILSONVILLE CHAMBER OF COMMERCE,
Intervenor-Respondents.

LUBA Nos. 2019-123/127/129/130

**PETITIONER CITY OF WILSONVILLE'S
PETITION FOR REVIEW**

September 21, 2020

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1 **I. STANDING**

2 Petitioner City of Wilsonville (“Wilsonville”) has standing to appeal the
3 below land use decision (“Decision”), pursuant to ORS 197.830(2)(b).

4 Wilsonville filed Notice of Intent to Appeal with the Land Use Board of
5 Appeals (“LUBA”) on November 21, 2019, within 21 days of the Decision.
6 Wilsonville provided written and oral testimony in the proceeding held on
7 September 24, 2019 before Respondent Oregon Department of Aviation
8 (“ODA”), and again at the proceeding on October 31, 2019 before Respondent
9 Oregon State Aviation Board (“OAB”) (collectively, “Respondents”), where the
10 Decision was rendered. Clackamas County timely provided testimony, timely
11 submitted its LUBA appeal, and joins Wilsonville’s Petition.

12 **II. STATEMENT OF THE CASE**

13 **A. Nature of the Challenged Decision and Relief Sought**

14 Wilsonville appeals the October 31, 2019 “confirmation” of the alleged
15 October 27, 2011 adoption of the Master Plan (“The Board finds that it adopted
16 the Aurora State Airport Master Plan on October 27, 2011.”); and the adoption of
17 Findings of Compatibility and Compliance (“Findings”) by OAB, in support of
18 the alleged 2011/2012 Aurora State Airport Master Plan.¹ (App 1-12.) Findings
19 are required to be made at the time of adoption of the Master Plan, not in a
20 separate hearing more than eight years later. OAR 738-130-0055(6).
21 Wilsonville also appeals the alleged October 27, 2011 decision, affirmed by the
22 Board on December 5, 2019 (App 13-14).

23 The Board’s 2019 adoption stated they had either adopted the Master Plan
24

25 ¹ For ease of reference, but with the continuing assertion that no 2011 or 2012
26 Master Plan was ever adopted, the alleged 2011/2012 Master Plan is hereinafter
referred to as the “Master Plan.”

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1 on October 27, 2011 or, in the alternative, by their December 5, 2019 decision
2 they affirmed whatever was adopted on the October 27, 2011 audio. (App 13-
3 14.)

4 The Decision comes down to a key question: Did OAB adopt a valid
5 Master Plan, with Findings, either in 2011 or 2012? The answer is NO. The
6 answer is determined not only by what is in the record, but also by what is not in
7 the record. The Findings adopted on December 5, 2019 are based on an
8 October 27, 2011 Master Plan that was never adopted.² The Findings are
9 therefore void. For the reasons described below, the Decision should be reversed
10 or, alternatively, remanded.

11 **B. Summary of the Arguments**

12 In September and October 2019, Respondents illegally sought to adopt
13 Findings for a Master Plan Respondents allegedly adopted in 2011. Respondents
14 adopted Findings in 2019, only after Petitioners raised questions as to whether a
15 Master Plan had ever been submitted to OAB for adoption. (App 48.) In April
16 2019, Respondent stated that the Master Plan had not been adopted (App 50-51),
17 but suddenly reversed course in August 2019 to claim the Master Plan was
18 adopted, after all, on October 27, 2011, and then “finalized” in December 2012.
19 (App 52.) There is no evidence of any Master Plan properly noticed public
20 hearing or adoption in the Record for that date.

21 On August 21, 2019, the same day that Respondents reversed course to
22 claim the Master Plan had been adopted, Respondents provided written notice
23 that OAB would be considering adoption of Findings and adoption of the Master
24 Plan. (App 39-40, 52.) When Wilsonville brought to ODA’s attention that ODA
25 had just claimed the Master Plan was already adopted (App 45), Respondents

26 ² An October 27, 2011 Master Plan was never produced for the Record.

1 reversed themselves again and issued a new public notice, stating they were only
2 adopting Findings, not the Master Plan. *Compare* App 43-44 (original agenda
3 for October 27, 2011 OAB meeting) *to* App 46-47 (revised agenda for
4 October 27, 2011 OAB meeting).

5 There is no evidence that the Master Plan was ever adopted by OAB
6 pursuant to a properly noticed public hearing, either in 2011 or 2012. The last
7 public meeting (not public hearing) on the topic occurred on October 27, 2011, but
8 did not include a public hearing, consideration of a final Master Plan, nor were
9 any Findings presented. (*See* App 17-18 (October 27, 2011 OAB agenda),
10 App 34-38 (October 27, 2011 OAB meeting minutes), App 19-33 (October 27,
11 2011 OAB meeting transcript), and App 16 (news release for October 27, 2011
12 OAB meeting).) State law requires the Findings to be adopted contemporaneously
13 with the Master Plan, not eight years later. *See* OAR 738-130-0055; OAR 731-
14 015-0065.

15 The Master Plan is different from any drafts generated on or before
16 October 27, 2011, the date it was alleged to have been adopted. How the Master
17 Plan, as it is now presented, came to be is a mystery, since there is no evidence of
18 any discussion of a 2012 version at any public hearing. The closest evidence in
19 the Record is instruction by ODA's consultant that a final version of the Master
20 Plan would still need to be adopted after the October 27, 2011 meeting and after
21 approval by the Federal Aviation Administration ("FAA") (emphasis added).
22 (App 15, 26-28.)

23 ODA wrongly submitted proposed Findings without a Master Plan, as
24 required under OAR 738-130-0055(5)³, on October 25, 2019. ODA also wrongly
25

26 ³ *See also* OAR 731-015-0065(5), which states the Oregon Department of
Transportation's ("ODOT") coordination procedures for adopting final facility

1 submitted proposed Findings on October 25, 2019, without coordinating with
2 Wilsonville or Clackamas County, as affected agencies under OAR 738-130-
3 0015(1)⁴, to determine whether the Comprehensive Plans were compatible with
4 the Master Plan. OAR 738-130-0055(6).

5 OAB wrongly adopted the Findings without adopting a Master Plan, as
6 required under OAR 738-130-0055(6)⁵, and without Findings with the affected
7 Comprehensive Plans, as required under OAR 738-130-0055(6)⁶.

8 Finally, OAB wrongly adopted Findings that excluded Statewide Land
9 Use Planning Goals (“Statewide Goals”) 2, 5, 6, 7, or 13, and failed to
10 adequately address Statewide Goals 1, 3, 11, 12, or 14. (App 5-7, 65-76.)

11 **C. Summary of Material Facts**

12 **1. Aurora Airport Master Plans**

13 The first Aurora Master Plan was adopted in 1976. (Rec. 3020-87.) That
14 Master Plan was updated in 1988. (Rec. 2617-2897.) Another update was
15 completed in 2000. (Rec. 5216-5679.) Beginning in 2009, Respondents
16 undertook another master planning process for the Aurora Airport (“Airport”).
17 (See, e.g., Rec. 4293.) To support the master planning process, Respondents
18 established a Planning Advisory Committee (“PAC”) to work through the
19 development of a new master plan. See Rec. 4293-4455 (PAC meeting minutes
20 from 2009 through 2011). As the draft Master Plan began to form, ODA brought

21
22
23 plans rule that Respondents relied on in their Findings, even though ODA is not
part of ODOT.

24 ⁴ See also OAR 731-015-0015(2).

25 ⁵ See also OAR 731-015-0065(6).

26 ⁶ See also OAR 731-015-0065(6).

1 chapters of the Master Plan before OAB to be discussed and voted on.
2 (Rec. 6015-6433.)

3 One such meeting occurred on October 27, 2011. (App 16-38.) The
4 agenda for that meeting included the following action item: “Aurora Master Plan
5 Final Chapters.” (App 17.) The agenda did not include consideration of a draft
6 master plan in its entirety, and the agenda item did not include a public hearing.
7 The minutes from that meeting state only the final chapter of the Master Plan
8 was approved:

9 **“ACTION ITEM – The Oregon Aviation Board**
10 **Approves the Aurora Master Plan Final Chapter.”**
11 (App 35 (emphasis in original).)

12 Respondents’ lead consultant informed OAB, at conclusion of the October 27,
13 2011 meeting, that a Master Plan would next be sent to the FAA for comment,
14 and then brought back before OAB for a final vote. The transcript reads:

15 *Raines:* “Yes. And what we will do too is we’ll get the
16 answers from the FAA and then finalize the plan, bring
17 the plan back here for your final approval and then start
18 the process with the county. And we talked a little bit
19 about that at the last meeting in terms of going through
20 their approval process, which is a fairly lengthy process,
21 so.” (App 27.)

22 Unfortunately, a Master Plan was never brought back to OAB for final
23 approval, or any approval. Instead, the Director of ODA, after initially stating a
24 Master Plan was never adopted (App 50), reversed course and alleged that a
25 Master Plan was “revised to incorporate changes suggested by the FAA and the
26 ALP” and “was printed in final form December 2012.” (App 52.) She sidesteps
the word “adoption,” and gave no indication that any public process was
undertaken.

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1 **2. Findings of Compatibility and Compliance**

2 Respondents’ drafting and approval of the Findings lack required statutory
3 process. Pursuant to ORS 197.180, state agencies are required to:

4 “carry out their planning duties, powers and
5 responsibilities and take actions that are authorized by
6 law with respect to programs affecting land use:

7 (a) In compliance with the [statewide land use
8 planning] goals, rules implementing the goals and
9 rules implementing this section; and

10 (b) In a manner compatible with acknowledged
11 comprehensive plans and land use regulations.”
12 ORS 197.180(1).

13 ODOT developed a State Agency Coordination Program (“SAC Program”) to
14 comply with ORS 197.180. *See* OAR 731-015-0005. ODOT’s SAC Program is
15 codified in OAR 731-015-0005 through 731-015-0135. ODA was initially a
16 division within ODOT, subject to ODOT’s SAC Program. ODA subsequently
17 developed its own SAC Program. ODA’s SAC Program is codified in OAR 738-
18 130-0005 through 738-130-0125.

19 Both SAC Programs required ODA to “involve DLCD and affected
20 metropolitan planning organizations, cities, counties, state and federal agencies,
21 special districts and other interested parties in the development or amendment of
22 a facility plan.” OAR 738-130-0055(1). ODA is also required to:

23 “provide a draft of the proposed facility plan to planning
24 representatives of all affected cities, counties and
25 metropolitan planning organization and shall request that
26 they identify any specific plan requirements which apply,
any general plan requirements which apply and whether
the draft facility plan is compatible with the
acknowledged comprehensive plan.” OAR 738-130-
0055(2) (emphasis added).

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1
2 If DLCD, or any affected entities, identify a conflict with the Statewide Goals or
3 the acknowledged comprehensive plans, ODA “shall meet with the local
4 government planning representatives to discuss ways to resolve the conflicts.”

5 OAR 738-130-0055(3). Additionally, ODA is required to:

6 “write draft findings of compatibility with acknowledged
7 comprehensive plans of affected cities and counties,
8 findings of compliance with any statewide planning
9 goals..., and findings of compliance with all provisions
10 of other statewide planning goals that can be clearly
11 defined if the comprehensive plan of an affected city or
12 county contains no conditions specifically applicable or
any general provisions, purposes or objectives that would
be substantially affected by the facility plan.” OAR 738-
130-0055(4).

13 After drafting findings, ODA “shall present to the Aviation Board the draft
14 plan, findings of compatibility with the acknowledged comprehensive plans of
15 affecting cities and counties and findings of compliance with applicable
16 statewide planning goals.” OAR 738-130-0055(5). OAB will then “adopt
17 findings of compatibility with the acknowledged comprehensive plans of
18 affected cities and counties and findings of compliance with applicable statewide
19 planning goals when it adopts the final facility plan.” OAR 738-130-0055(6).

20 At no time prior to or after the October 27, 2011 OAB meeting did ODA
21 send a draft Master Plan for review for compatibility with Wilsonville’s or
22 Clackamas County’s Comprehensive Plans, nor did ODA draft Findings. ODA
23 did not provide or adopt any Findings at the October 27, 2011 meeting, when the
24 Master Plan was allegedly adopted. (*See Record generally.*)

25 It was not until August 21, 2019, that Respondents published a public
26 hearing notice for a meeting on September 24, 2019 for public input concerning

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1 the “compatibility of the Federal Aviation Administration approved 2012 Aurora
2 State Airport Master Plan Update with applicable land use plans and statewide
3 planning goals.” (App 40.) The notice also stated, “The Department will prepare
4 findings of compatibility and present the Master Plan and these findings to the
5 Oregon Aviation Board on October 31, 2019, for adoption.” *Id.*

6 When ODA published the OAB meeting agenda for its October 30-31,
7 2019 meeting, the agenda read: “Adopt the Aurora Master Plan, Airport Layout,
8 Findings of Compatibility, and Findings of Compliance.” (App 44.) After ODA
9 received a letter from Wilsonville’s City Attorney questioning the agenda item’s
10 inclusion of adoption of the Aurora Master Plan (App 45), ODA quickly revised
11 and republished the agenda to read as follows: “Adopt Findings of Compatibility
12 and Compliance in Support of ODA’s State Agency Coordination Program for
13 Aurora State Airport Master Plan Update.” (App 47.) In other words, the
14 original agenda contemplated adoption of the Master Plan; the revised agenda
15 was written as if the Master Plan was already adopted, as ODA had insisted was
16 the case. (App 43-44, 46-47.)

17 The proposed Findings, sent to Wilsonville less than one (1) week prior to
18 the OAB Sunriver meeting, included no findings regarding compliance with
19 Statewide Goals 2, 5, 6, 7, or 13. (App 1-7.) The proposed Findings did not
20 include findings regarding compatibility with Wilsonville’s, Aurora’s, or
21 Clackamas County’s Comprehensive Plans, and Respondents claimed no need to.
22 *Id.* ODA made Findings with Marion County’s Comprehensive Plan, but those
23 Findings consisted of a conclusory statement that Marion County passed a
24 resolution in 2013 stating support for the Master Plan. Therefore, ODA found
25 the Master Plan “compatible” with Marion County’s Comprehensive Plan.
26 (App 3.)

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1 **D. Statement of Board’s Jurisdiction**

2 LUBA has jurisdiction to review a land use decision by a state agency.
 3 ORS 197.825(1). This matter involves a final land use decision where
 4 Respondents were required to apply Statewide Goals. ORS 197.015(10)(a)(B).
 5 While Respondents allege that a land use decision was made in accordance with
 6 state requirements, the Record does not support this claim. Pursuant to the
 7 applicable SAC Program, Respondents were required to draft and adopt Findings
 8 with affected cities’ and counties’ comprehensive plans and compliance with the
 9 Statewide Goals. *See* OAR 738-130-0055; OAR 731-015-0065. By adopting
 10 Findings, Respondents made a final, appealable decision regarding the
 11 applicability of the Statewide Goals to the Master Plan.

12 **III. ASSIGNMENTS OF ERRORS**

13 **A. First Assignment of Error: Respondents Adopted Findings for a**
 14 **Master Plan Never Adopted, in Contravention of Goal 2 and**
 15 **Their Own Land Use Regulations, Attempting to Affirm Eight**
 16 **Years Later**

17 **1. Statement of Preservation**

18 Wilsonville raised and preserved this issue in its written public testimony.
 19 (Rec. 339-41; App 60-65.)

20 **2. Standard of Review**

21 LUBA must reverse or remand a land use decision if LUBA finds a state
 22 agency made a decision that violated the Statewide Goals, is not in compliance
 23 with applicable land use regulations, or violates a provision of applicable law and
 24 is prohibited as a matter of law. ORS 197.835(9)(b); ORS 197.835(8); and
 25 OAR 661-010-0071(1)(c).
 26

1 **3. Argument**

2 **a. The 2011/2012 Master Plan Was Never Adopted**

3 In 2019, Respondents drafted and adopted Findings for a Master Plan that
4 was never adopted in accordance with state law requirements. OAR 738-130-
5 0055⁷ requires ODA to draft Findings to present to OAB, along with the draft
6 Master Plan. OAR 738-130-0055(4)-(5). That same provision requires OAB to
7 adopt Findings “when it adopts the final facility plan.” OAR 738-130-0055(6).
8 All evidence in the Record demonstrates the Master Plan was never adopted by
9 OAB. Thus, Findings could not be properly before OAB for consideration.
10 Respondents knew that their procedures in 2009-2012 for adoption of the Master
11 Plan were fatally flawed, as evidenced by their actions and responses to
12 questions raised by Friends of French Prairie in early 2019 regarding the status of
13 the Master Plan. (App 41-42, 50-51.) Respondents failed to follow their SAC
14 Program, which specifically exists to ensure compliance with the Statewide
15 Goals. *See* ORS 197.180; *see also* OAR 738-130-0055, OAR 731-015-0065.

16 To be valid, passage of the Master Plan must be completed in accordance
17 with ORS 197.180, which requires state agencies to carry out their duties and
18 take action consistent with statewide planning goals and compatible with
19 acknowledged comprehensive plans and land use regulations. The actions by
20 Respondents in 2011, 2012, and 2019 prove that the Master Plan was never
21 adopted and that Respondents knew they failed to follow the proper procedures
22 required by law.

23

24

25

26 ⁷ *See also* OAR 731-015-0065.

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1 **b. 2011 Meetings**

2 **i. September 15, 2011 PAC Meeting**

3 At the September 15, 2011 PAC meeting, prior to the October 27, 2011
4 OAB meeting, the PAC was advised that the Master Plan would be adopted after
5 the FAA reviewed the draft Master Plan. Meeting notes provide:

6 “Rainse explained that there will be an opportunity for
7 public comments on the two chapters [of the Master
8 Plan] until Sept. 30th. Comments may be submitted via
comment forms at meeting or to staff or online.

9 The final draft will be prepared and submitted to the
10 ODA Board and the FAA. It will also be available on the
11 website for review. Notification will be sent to the PAC
12 [Public Advisory Committee] when available on the web.
13 Typically it takes 90 days for the FAA to review and
14 approve an Airport Layout Plan. From there, the ODA
15 will pursue adoption of the Master Plan as part of the
Marion County Comprehensive Plan.” (App 15
(emphasis added).)

16 As of October 4, 2019, Marion County reported that it had taken no action to
17 adopt the 2012 Master Plan as part of its Comprehensive Plan. *See* Rec. 2295.
18 In fact, the only evidence is a resolution by Marion County from 2013 that it
19 acknowledged and supported the Master Plan. Rec. 435-36. That process does
20 not equate to adopting the Master Plan as part of its Comprehensive Plan.

21 The process for adopting the Master Plan, explained at both the
22 September 15, 2011 PAC meeting and the October 27, 2011 OAB meeting, was
23 to send a draft to the FAA for comment, further revise the Master Plan, and then
24 vote on a final version. As explained in subsection c. below, ODA did send a
25 draft to the FAA for comment, further revised the Master Plan, but failed to bring
26 a final version before OAB and to the public.

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1 **ii. October 27, 2011 OAB Meeting**

2 One month following the September 15 PAC meeting, the October 27,
3 2011 meeting agenda, minutes, and tape-recorded meeting transcript show OAB
4 never adopted a final version of the Master Plan. (App 13-14, 19-33, 34-38.)
5 As was indicated at the September PAC meeting, OAB only approved the final
6 chapters of the Master Plan for submission to the FAA for initial review, without
7 a public hearing and without an opportunity for the public to provide testimony.

8 Respondents have not produced written notice of a public hearing to be
9 held on October 27, 2011, when Respondents allege the Master Plan was
10 adopted. The only document Respondents produced is a “News Release” for an
11 OAB meeting to be held on October 27, 2011, which did not mention anything
12 specific to be considered by OAB at the meeting. (App 16.) That news release
13 did not meet statutory requirements for public hearing notice. *See*
14 ORS 192.640(1). By comparison, when the Findings were to be considered by
15 OAB at the October 30-31, 2019 meeting, ODA emailed and published a public
16 hearing notice on August 21, 2019. The notice given was short but technically
17 complied with ORS 192.640(1). (App 40.)

18 Unlike the agenda for the October 31, 2019 meeting, which expressly
19 included a public hearing to consider the Findings (App 40), the October 27,
20 2011 meeting agenda and news release did not state a public hearing would be
21 held. (App 16, 40.) The meeting minutes and transcript did not state a public
22 hearing was held. (App 19-38.) The agenda only included: “Aurora Master
23 Plan Final Chapters.” (App 17.) In the transcript, the OAB Chair did not declare
24 a public hearing open or closed, did not read instructions for providing public
25 testimony, and did not recite how testimony was necessary to create standing in
26 an appeal. No public testimony was called for by the Chair and no public

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1 testimony was taken. (App 19-33.)

2 The approved written minutes of the October 27, 2011 Board meeting
3 state: “ACTION ITEM – The Oregon Aviation Board Approves the Aurora
4 Master Plan Final Chapter.” The minutes make no mention of adoption of the
5 final full Master Plan. The minutes further prove that a Master Plan, in final,
6 complete form, was not before OAB for consideration, nor considered in a public
7 hearing at that October 27, 2011 meeting. (App 35; Rec. 413.)

8 The October 27, 2011 Board meeting makes no mention of a public
9 hearing to consider and adopt the full Master Plan. During OAB’s discussion,
10 Respondents’ consultant, Raines Anderson, stated:

11 “Yes. And what we will do too is we’ll get the answers
12 from the FAA and then finalize the plan, bring the plan
13 back here for your final approval and then start the
14 process with the county. And we talked a little bit about
15 that at the last meeting in terms of going through their
approval process, which is a fairly lengthy process, so.”
(App 27 (emphasis added).)

16 Toward the end of the meeting, then-Chair Mark Gardiner stated, “Okay, I will
17 entertain a motion to approve the master plan submitted and fire it off to the
18 FAA.” (App 33.) A motion, simply stating “so moved” was made, seconded,
19 and passed. *Id.* It is solely on this motion that Respondents claim that the
20 Master Plan was adopted in its entirety. In fact, the vote was only to send the
21 final chapters to the FAA for review prior to any final adoption. (App 27-33.) In
22 the context of all the documents from the October 27, 2011 OAB meeting – the
23 news release, the agenda, the adopted minutes, and the tape-recorded discussions
24 by OAB – it is clear that the motion and vote was to approve the last chapter of
25 the draft master plan and to forward a draft plan to the FAA for review. The next
26 anticipated steps were to incorporate any FAA comments, to revise the Master

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1 Plan, and then to go through all the required legal processes for a final approval
 2 of the Master Plan. (App 15, 27.) As discussed more fully below, Respondents
 3 did, in fact, revise the Master Plan after October 27, 2011 based on feedback
 4 from the FAA, but failed to hold a public hearing or vote for final approval of the
 5 revised draft Master Plan.

6 **c. 2012 Revisions to Alleged Adopted 2011 Master Plan**

7 The Master Plan could not have been adopted on October 27, 2011
 8 because it was modified after that date (without a public hearing or vote by
 9 OAB), following communication exchanges between the FAA and ODA.

10 Respondents contend that the Master Plan adopted on October 27, 2011,
 11 included two alternatives for a runway extension. Respondents claim:

12 “After adoption, Respondents submitted the master plan
 13 to the FAA for funding approval of the projects in the
 14 Capital Improvement Plan (CIP) and approval of the
 15 Airport Layout Plan (ALP). Record at 4192. The FAA
 16 reviewed and approved the secondary alternative (a 1000
 17 foot extension of the runway to the south) for funding.”⁸
*Response to Joint Record Objection Filed by Petitioner
 City of Wilsonville and Intervenor-Petitioner Clackamas
 County, 2:5-9.*

18
 19 Throughout the Record, Respondents attempt to portray the 2012 Master Plan as
 20 the same as the 2011 Master Plan, except for the selection of one alternative
 21 runway extension over another. In fact, the FAA actually rejected funding the
 22 southern extension because the airport already owned property for the northern
 23 extension, as reflected in the FAA’s response letter of November 18, 2011.
 24 (Rec. 4202.) This revision is a significant change that required opportunity for
 25

26 ⁸ Respondents do not include a Record citation for their contention FAA
 approved the southern runway extension for funding.

1 public testimony.

2 In light of the FAA's disapproval letter, Respondents drafted a new
3 Appendix to Chapter 5: Additional Runway Length Scenarios. (Rec. 4192.)
4 Although the Appendix is dated January 11, 2011, that date is obviously a typo.
5 In the first paragraph of the Appendix, it explains that the draft ALP "was
6 submitted to the [FAA] for review and comment in November 2011." *Id.*
7 (emphasis added). By using the past tense, it is clear that the Appendix was
8 written after November 2011. In addition, the Appendix includes the
9 November 18, 2011 FAA disapproval letter. (Rec. 4202.) Finally, the
10 recommendation in the Appendix was written after the FAA's disapproval letter
11 and justification for the recommendation explains why it disagrees with the
12 FAA's direction, as evidenced by the following:

13 "Although the FAA has directed ODA to consider
14 extending the runway north on land already owned by the
15 State, this supplemental information clearly shows that
16 an extension on State-owned land does not alleviate the
17 existing and forecasted constrained operations at the
18 Airport." (Rec. 4201.)

19 It is clear that the 2012 edited Master Plan is not simply choosing one
20 alternative runway extension over another. In fact, Chapter 6, entitled "Airport
21 Layout Plan," must have been written, or significantly redrafted, after the
22 October 27, 2011 OAB meeting because it describes in detail an Airport Layout
23 Plan that is dated March 2012. *See* Rec. 4208-22. The Chapter explains each
24 sheet of the Airport Layout Plan. *See, e.g.,* Rec. 4209 (describing the Cover
25 Sheet and Sheets 1 and 2 of the ALP). The Cover Sheet for the ALP is dated
26 March 2012. (Rec. 4213.)

Only after the development of the March 2012 ALP did the FAA approve

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1 the ALP. The FAA wrote to ODA on October 19, 2012:

2 “The Aurora State Airport Layout Plan (ALP) dated
3 March, 2012 and submitted by WH Pacific, Inc., is
4 hereby approved.” (Rec. 4258 (emphasis added).)

5 The FAA did not approve the ALP that OAB allegedly adopted on October 27,
6 2011. It approved an ALP created after October 27, 2011. Even with that
7 approval, the FAA did not agree to “participate in the cost of any development
8 proposed.” (Rec. 4258.) In addition, the Master Plan increased the anticipated
9 purchase of land zoned Exclusive Farm Use (“EFU”) from 44.5 acres to 55.13
10 acres of prime agricultural land. *See* (Rec. 1666.) All these records prove that
11 whatever OAB voted for on October 27, 2011 was not the 2012 Master Plan.
12 The Record also reflects that the Master Plan differs in many respects (not just
13 the FAA’s approval of one of two alternative runway extensions) from what was
14 before the Board on October 27, 2011.

15 Importantly, it is impossible for Petitioner, or any citizen, to know the
16 extent of the differences between the 2011 Master Plan OAB claims to have
17 adopted on October 27, 2011 (Rec. 5995-96) and the 2012 Master Plan, which
18 was never separately voted on or adopted by OAB, because the October 27, 2011
19 Master Plan is not included in the Record, despite numerous requests and denials
20 to produce it. Petitioner therefore restates its denied request that the critical
21 October 27, 2011 version of the Master Plan and Airport Layout Plan be
22 included in the Record, and respectfully preserves that objection.

23 **d. 2019 ODA Letters and Agenda**

24 It is clear from ODA’s letters, notices, and revised agendas in 2019 that
25 ODA realized its errors in its master planning process in 2011-2012. ODA
26 Director Betty Stansbury was asked, through a public records request, whether

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1 the Aurora Master Plan had been adopted and, if so, when. (App 48.) In her first
2 response letter, dated April 24, 2019, Director Stansbury wrote: “No. The last
3 Aurora Master Plan was completed in December 2012 but it has not been
4 submitted to the board for adoption.” (App 50-51 (emphasis added).) She went
5 on to write:

6 “The board adopted ODA’s State Agency Coordination
7 (SAC) program in 2017.^{9]} This has been sent to the
8 Department of Land Conservation and Development for
9 review and certification by the Land Conservation and
10 Development Commission. Adoption of the 2012 Aurora
State Master Plan is on hold until this process is
complete.” *Id.* (emphasis added).

11 Four months later, Director Stansbury suddenly changed course, claiming
12 the Master Plan actually was adopted at the October 27, 2011 meeting but was
13 subsequently revised and “printed in final form” in December 2012 (App 52),
14 attempting to side-step when or how the revised version was presented at a
15 public hearing, and when and where a final public vote on the Master Plan was
16 held. As explained below, Director Stansbury’s letter was sent the same day
17 ODA sent out a notice regarding a public process for adopting Findings. These
18 documents, and their related timing, demonstrate that ODA recognized that its
19 2011-2012 errors had come to light, but what to do about it remained the
20 question. (App 40, 44, 47, 52.)

21 When ODA published the August 21, 2019 notice of its OAB meeting on
22 October 31, 2019, the notice read: “The Aviation Board is scheduled to hold a

23 _____
24 ⁹ ODA’s SAC Program (OAR 738-130-0005 through 738-130-0125) in the
25 Record (Rec. 2344-78) lists a date of March 7, 2017. The effective date of the
26 OARs is stated on Westlaw as July 28, 2015. As of October 8, 2019, the
Department of Land Conservation and Development did not list ODA’s SAC
Program as an approved program. *See* Rec. 1180-81. Regardless, ODA’s SAC
Program was not in effect in 2011/2012 when Respondents allege the Master
Plan was adopted and “finalized.”

1 public hearing and consider adoption of the Master Plan at the October 31, 2019
2 Oregon Aviation Board meeting....” (App 40 (emphasis added).) Further
3 confirming that ODA knew its master planning process in 2011-2012 was
4 flawed, the original ODA agenda for the October 31, 2019 meeting read:

5 “Adopt the Aurora Master Plan, Airport Layout, Findings
6 of Compatibility, and Findings of Compliance.”
7 (App 44.)

8 After reading the above agenda item, Wilsonville’s City Attorney sent a
9 letter to Director Stansbury, noting the irony of the agenda item, given her claim
10 the Master Plan was already adopted, and making a public records request for the
11 listed Findings. (App 45.) Immediately thereafter, the agenda was revised to
12 remove any reference to adoption of the Master Plan, to read only: “Adopt
13 Findings of Compatibility and Compliance in Support of ODA’s State Agency
14 Coordination Program for Aurora State Airport Master Plan Update.” (App 47.)

15 OAR 661-010-0010(3) provides that “a decision becomes final when it is
16 reduced to writing and bears the necessary signatures of the decision makers....”
17 To date, Wilsonville has received no evidence of a final written decision by OAB
18 to adopt a Master Plan, which means that the “adopted” Findings cannot be
19 based on a never adopted Master Plan. Additionally, the Findings were not
20 considered with a draft Master Plan but, rather, were illegally written,
21 considered, and adopted approximately eight years later. *See Horning v.*
22 *Washington County*, 51 Or LUBA 303, 312 (2006).

23 By attempting to adopt Findings without a valid Master Plan, Respondents
24 did not comply with their own land use regulations, OAR 738-130-0055, or
25 Statewide Goal 2. *See* ORS 197.835(8), (9)(b). Respondents cite no statutory
26 authority by which Findings can be legally adopted for a never adopted Master
Plan eight years after the fact.

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1 **e. 2019 ODA Adoption or Affirmation of Master Plan**

2 If the Board, on December 5, 2019, “affirms the adoption of the Master
3 Plan as indicated in the audio recording of the Board’s October 27, 2011 meeting”
4 then they are back to exactly where they started: the Board adopting the final
5 chapter, with direction to the FAA for review and approval, and then to follow
6 actual formal adoption procedures once the FAA returns comments. (App 13.)

7 **B. Second Assignment of Error: Respondents Failed to Make**
8 **Findings of Compatibility and Compliance Contemporaneous**
9 **With Consideration of the Master Plan**

10 **1. Statement of Preservation**

11 Wilsonville raised and adequately preserved this issue in its testimony
12 regarding the proposed Findings. (App 63-64.)

13 **2. Standard of Review**

14 The same as provided in the First Assignment of Error.

15 **3. Argument**

16 Respondents’ process for adopting a Master Plan for the Airport is
17 outlined in its SAC Program. Oregon state agencies’ SAC Programs were
18 adopted to ensure state agencies comply with land use planning goals and
19 statutes, as required under Goal 2. Respondents violated Goal 1 and Goal 2 by
20 failing to adhere to the land use planning process dictated in the SAC Program.

21 Respondents’ SAC Program requires adoption of “findings of
22 compatibility with the acknowledged comprehensive plans of affected cities and
23 counties and findings of compliance with applicable statewide planning goals
24 when it adopts the final facility plan.” OAR 738-130-0055(6) (emphasis added).

25 In this case, OAB attempted to adopt Findings not “when” but years after it
26 alleges the Master Plan was adopted. Respondents knew this to be the case,

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1 which is likely why their first agenda read: “Adopt the Aurora Master Plan,
2 Airport Layout, Findings of Compatibility, and Findings of Compliance.”
3 (App 44.) When ODA realized it could not, on the one hand, claim the Master
4 Plan was legally adopted in 2011 and then list it to be adopted in 2019, the
5 agenda was revised to read only: “Adopt Findings of Compatibility and
6 Compliance in Support of ODA’s State Agency Coordination Program for
7 Aurora State Airport Master Plan Update.” (App 47.) Although Respondents’
8 “public process” to adopt Findings was an attempt to correct an illegal process, it
9 only served to further circumvent Respondents’ own SAC Program
10 requirements.

11 The reason for adopting Findings at the time the Master Plan is adopted is
12 two-fold: (1) to ensure the master plan complies with the Statewide Goals and is
13 compatible with local comprehensive plans; and (2) Findings relate to site
14 conditions as they exist at the time.

15 In this case, the Findings are considering a Master Plan more than eight
16 years old, adopted without citizen input, and inconsistent with the current Airport
17 conditions. Respondents have created a bifurcated land use planning process
18 that, by law, is required to take place at the same time.

19 This Board has rejected action by a government to make findings after a
20 final decision. *West Side Rural Fire Protection District v. City of Hood River*, 43
21 Or LUBA 612 (2002). In that case, the City attempted to supplement the record
22 to support its decision by including findings after the City’s final decision to
23 annex certain property had already been made. *Id.* at 612. This Board explained
24 the City’s error in attempting to adopt findings after the final decision:

25 “[W]here a local government wishes to adopt findings to
26 support a legislative land use decision, they must be
adopted prior to or at the same time the legislative land

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1 use decision is adopted and becomes final for purposes of
 2 appeal. Because the disputed findings post-date the
 3 appealed decision they are not part of the appealed
 4 decision and are not properly included in the record in
 this appeal.” *Id.* at 616.

5 Important Note: Unlike local governments’ freedom to decide whether to
 6 adopt findings in a legislative land use decision, ODA is required to present a
 7 draft master plan, along with Findings, to OAB, and OAB is required to adopt
 8 Findings “when it adopts the final facility plan.” OAR 738-130-0055(5), (6)
 9 (emphasis added).

10 The legal remedy to correct this “situation” is to restart the master
 11 planning process and to consider, at a properly noticed public hearing, a draft
 12 Master Plan, along with Proposed Findings, as required by Respondents’ SAC
 13 Program and land use law.

14 LUBA should reverse or remand to require Respondents to undertake the
 15 proper SAC Program process, hold a public hearing and, based on the public
 16 hearing, adopt Findings at the time it adopts a new, legally compliant, Master
 17 Plan.

18 **C. Third Assignment of Error: Findings Did Not Consider**
 19 **Wilsonville or Clackamas County Comprehensive Plans**

20 **1. Statement of Preservation**

21 Wilsonville raised and adequately preserved this issue in its written public
 22 testimony regarding the proposed Findings. (App 13.)

23 **2. Standard of Review**

24 The same as provided in the First and Second Assignments of Error.

25 **3. Argument**

26 The Adopted Findings erroneously and repeatedly claim that Respondents

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1 need only consider compatibility with Marion County’s Comprehensive Plan.
2 (App 3-5, App 13.) The Record, however, reflects the Master Plan was never
3 adopted as part of Marion County’s Comprehensive Plan (Rec. 435-36). For this
4 and many other reasons, set forth below, Respondents Findings are wrong, not
5 supported by substantial evidence, and misconstrue applicable law.

6 OAR 738-130-0055 requires coordination with “affected cities” to ensure
7 compliance with local comprehensive plans. OAR 738-130-0055(2) provides
8 that ODA “shall provide a draft of the proposed facility plan to planning
9 representatives of all affected cities, counties and metropolitan planning
10 organization” and then have the affected jurisdictions identify whether the draft
11 plan is compatible with the acknowledged comprehensive plan. If the affected
12 jurisdiction identifies a conflict between the draft plan and the comprehensive
13 plan, ODA “shall meet with the local government planning representatives to
14 discuss ways to resolve the conflicts.” OAR 738-130-0055(3).

15 After meeting with local government planning representatives, ODA must
16 “evaluate and write draft findings of compatibility with acknowledged
17 comprehensive plans of affected cities and counties,” among other findings.
18 OAR 738-130-0055(4). Those findings are presented to OAB along with the
19 draft plan (OAR 738-130-0055(5)), and OAB “shall adopt findings of
20 compatibility with the acknowledged comprehensive plans of affected cities and
21 counties and findings of compliance with applicable statewide planning goals
22 when it adopts the final facility plan.” OAR 738-130-0055(6). ODA did not
23 follow any of these steps, and OAB did not adopt Findings with respect to
24 Wilsonville’s or Clackamas County’s Plans.

25 When interpreting administrative rules, courts “follow the ordinary rules
26 of construction that apply to the interpretation of statutes that is to say, we

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1 examine the language of the rule, giving effect to the intent of the enacting
2 body.” *County of Morrow v. Dept. of Fish and Wildlife*, 178 Or App 329, 334-35
3 (2001). Courts frequently consult dictionary definitions of terms not otherwise
4 defined to determine the term’s “ordinary meaning.” *Comcast Corp. v. Dept. of*
5 *Revenue*, 356 Or 282, 295-96 (2014).

6 “Affected cities and counties” is defined as those “directly impacted by” a
7 Master Plan. OAR 738-130-0015(1). “Directly” is defined as “in a
8 straightforward manner,” “in a straight line or course,” and “immediately.”
9 Black’s Law Dictionary 527 (9th Ed. 2009). “Impact” is defined as “to have a
10 direct effect or impact on.” Merriam Webster’s Collegiate Dictionary 622 (11th
11 Ed. 2012).

12 OAR 738-130-0055(2) requires that ODA “shall provide a draft of the
13 proposed facility plan to planning representatives of all affected cities, counties
14 and metropolitan planning organization” to review for compatibility with their
15 comprehensive plans. By using the terms “all” and “and” when describing
16 “affected cities, counties and metropolitan planning organization,” the rule
17 requires a broad application of the requirement and further contemplates that
18 multiple jurisdictions will be “affected” by a facility plan.

19 Wilsonville and Clackamas County are an “affected” city and county, as
20 defined by OAR 738-130-0015(1), which required ODA to coordinate with
21 Wilsonville and Clackamas County to adopt Findings between the Master Plan
22 and their respective Plans. OAR 738-130-0015 defines an “affected city or
23 county” as “a city or county that has comprehensive planning authority over a
24 site or area which is directly impacted by a proposed Board or Department
25
26

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1 action.”¹⁰ OAR 738-130-0015(1) (emphasis added). This definition does not
2 limit ODA’s coordination responsibilities to only those jurisdictions where a site
3 is physically located, but rather requires coordination with all local jurisdictions
4 “directly impacted by” the Master Plan.

5 The first Aurora Master Plan, adopted in 1976, considered Wilsonville as
6 part of its “Area Planning – Land Use.” (Rec. 3037.) Throughout the 1976
7 Master Plan, it considered Wilsonville part of the master planning process.
8 When it evaluated existing land uses, it included Wilsonville land uses. *See*
9 Rec. 3038.

10 The 1988 update to the Aurora Master Plan analyzed Wilsonville’s land
11 use compatibility with the Aurora Master Plan. Under “Land Use Plans and
12 Policies,” the 1988 Aurora Master Plan explained:

13 “An important factor in the question of future land use
14 compatibility around the Aurora State Airport is the
15 number of jurisdictions involved in establishing
16 compatibility guidelines or making local land use
17 decisions. Three state agencies, two counties, and two
cities all have direct roles in the matter.” (Rec. 2786
(emphasis added).)

18 The three state agencies were the Oregon Aeronautics Division (then part of
19 ODOT), the Department of Environmental Quality, and the Department of Land
20 Conservation and Development. (Rec. 2786-89.) The two counties were Marion
21 County and Clackamas County. (Rec. 2789-91.) The two cities were
22 Wilsonville and Aurora. (Rec. 2791-92.)

23 Since 2009, as noted in Wilsonville Mayor Knapp’s September 24, 2019
24 letter, ODA has used a “Gerrymandered” map of the Airport to exclude
25

26 ¹⁰ OAR 731-015-0015(3) uses the same definition if the ODOT SAC Program is applicable.

1 Clackamas County and Wilsonville (plus other agencies) as necessary parties for
2 discussion and planning the Master Plan. (App 53-56.) Such efforts do not
3 defeat Oregon law.

4 There is nothing in applicable law that provides ODA need only
5 coordinate with the jurisdiction where the facility is physically located, without
6 regard to geographical impact. ODA must coordinate with all counties and cities
7 directly impacted by its action, as it has done in the past when adopting updates
8 to the Master Plan. (Rec. 2791-92; 2789-91.) ODA never provided the draft
9 facility plan for Wilsonville or Clackamas County to review, in violation of the
10 requirement in OAR 738-130-0055.¹¹

11 The Master Plan will directly impact Wilsonville's/Clackamas County's
12 Charbonneau residents, the most densely populated development in closest
13 proximity to the Airport. Charbonneau residents will experience additional
14 noise, air quality degradation, increased traffic, and other negative environmental
15 impacts. (Rec. 2280, 2309-11, 3589-90, 3709, 3763.) As identified in prior
16 Aurora Master Plans, Wilsonville is an "affected" city and Clackamas County is
17 an "affected" county, with which ODA was required to coordinate under
18 OAR 738-130-0055(2).

19 Had ODA coordinated with Wilsonville and Clackamas County, as
20 required by OAR 738-130-0055, each could have explained how the Master Plan
21 was not compatible with several of their respective Comprehensive Plan Goals
22 ("Plan Goals"), as noted in Wilsonville's testimony to OAB. *See* App 74-76.

23 This Board does not have to determine whether the Master Plan is
24 compatible with the Wilsonville and Clackamas County Plans; rather, the Board
25 should remand to require Respondents to undertake this analysis. *See Krueger v.*

26 _____
¹¹ *See also* OAR 731-015-0065.

1 *Josephine County*, 17 Or LUBA 418, 424-26 (1989).

2 **D. Fourth Assignment of Error: Respondents' Adopted Findings**
3 **and Master Plan Do Not Comply with Statewide Land Use**
4 **Planning Goals**

5 **1. Statement of Preservation**

6 Wilsonville raised and adequately preserved this issue in its written public
7 testimony regarding the proposed Findings. (Rec. 337-38; App 65-74.)

8 **2. Standard of Review**

9 LUBA must reverse or remand a land use decision if LUBA finds that a
10 state agency made a decision that violated the Statewide Goals.
11 ORS 197.835(9)(b).

12 **3. Argument**

13 Respondents again erroneously argue that because they alleged, but did not
14 prove, compliance with Marion County's Comprehensive Plan, they
15 automatically demonstrated compliance with Statewide Goals. (App 5.) Despite
16 that assertion, Respondents do propose and adopt certain deficient Findings with
17 respect to Goals that fail in two key respects: (1) Respondents ignored
18 applicable Statewide Goals – Goals 2, 5, 6, 7, and 13; and (2) Respondents failed
19 to adequately address Statewide Goals 1, 3, 11, 12, and 14.

20 **a. Respondents Erred in Failing to Make Findings Regarding**
21 **Statewide Goals 2, 5, 6, 7, and 13**

22 Respondents committed reversible error by failing to make Findings
23 regarding Statewide Goals 2, 5, 6, 7, and 13. This Board has held that when
24 particular concerns are raised about the applicability of certain Statewide Goals,
25 the decision-maker must address those concerns in its findings. *See Shadybrook*
26 *Environmental Protection Association v. Washington County*, 4 Or LUBA 236

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1 (1981). In other words, the decision-maker must make findings why a Statewide
2 Goal is either met or inapplicable, particularly when the decision-maker receives
3 testimony that identifies Statewide Goal compliance issues. *See Krueger*, 17 Or
4 LUBA at 424-25.

5 Wilsonville raised all of these Goals in its testimony (App 5-6, App 65-
6 76), but Respondents failed to make Findings as to whether the Master Plan
7 either meets Statewide Goals 2, 5, 6, 7, and 13 or why they are inapplicable.

8 **i. Statewide Goal 2 – Land Use Planning**

9 Statewide Goal 2 seeks “to establish a land use planning process and
10 policy framework as a basis for all decision and actions related to use of land and
11 to assure an adequate factual base for such decisions and actions.”

12 Statewide Goal 2 requires consistency between all land use plans and
13 decisions with adopted comprehensive plans. OAR 660-015-0000(2). It further
14 requires that plans identify issues, problems, inventories, and other information
15 for each applicable Statewide Goal, among other information. *Id.* The proposed
16 Findings do not mention Statewide Goal 2. It is likely that the proposed Findings
17 did not discuss Statewide Goal 2 because Respondents earlier indicated they did
18 not consider the adoption of Findings a land use decision. (Rec. 154 (10:50).)

19 Statewide Goal 2 is integral to Respondents’ adoption of a Master Plan
20 because it establishes the requirement for facility master plans to be consistent
21 with local comprehensive plans and other Statewide Goals. State agencies
22 demonstrate consistency with local comprehensive plans and Statewide Goals
23 through adoption of Findings. However, as discussed in this Section and
24 Section II.C. above, Respondents failed to demonstrate the Master Plan is
25 compatible with Wilsonville’s or Clackamas County’s Comprehensive Plans or
26 that it complies with the Statewide Goals, particularly 2, 5, 6, 7, or 13, which

WILSONVILLE’S PETITION FOR REVIEW

1 were not analyzed or discussed by Respondents.

2 The Master Plan on which the Findings are based was not the subject of the
3 meeting on October 27, 2011. The Master Plan does not comply with either
4 ODOT or ODA SAC Programs. Respondents did not simultaneously adopt
5 Findings, which are necessary to prove the “adequate factual base” for adoption.
6 *See Restore Oregon v. City of Portland*, 301 Or App 769, 778 (2020) (citing *1000*
7 *Friends of Oregon v. LCDC*, 244 Or App 239, 268 n. 11 (2011)); *see also*,
8 OAR 731-015-0065(6), OAR 738-130-0055(6).

9 Respondents violated Statewide Goal 2 by not making Findings regarding
10 this Goal, by failing to make Findings with affected Comprehensive Plans, by
11 failing to make sufficient Findings, or any, with several other Statewide Goals,
12 and by failing to timely adopt Findings. (App 67-68.)

13 **ii. Statewide Goal 5 – Natural Resources, Scenic and Historic**
14 **Areas, and Open Spaces**

15 Statewide Goal 5 seeks to protect natural resources and conserve scenic,
16 historic, and open space areas. OAR 660-015-0000(5). Respondents do not
17 address Statewide Goal 5, including protection of prime agricultural land
18 surrounding the Airport. *See* App 69; Rec. 564-65. The Master Plan does not
19 provide any inventory, study, or review of natural resources or scenic, historic, or
20 open space areas. Given the historical significance of the area and the abundant
21 natural resources surrounding the Airport (*id.*), the Master Plan must address how
22 it will protect against the degradation of these important resources, in the wake of
23 proposed expansion. The Findings must demonstrate the Master Plan
24 appropriately addresses Statewide Goal 5, but instead ignores Goal 5.

25 **iii. Statewide Goal 6 – Air, Water, and Land Resource Quality**

26 Statewide Goal 6 strives “to maintain and improve the quality of the air,

1 water and land resources of the state.” Statewide Goal 6 aims to protect air,
2 water, and land from discharges that would harm their quality. Respondents
3 make no Findings to address Statewide Goal 6, and the Master Plan fails to
4 (1) offer any mitigation proposals for the reduced air quality that will result from
5 the presence of larger jets that have a more significant carbon footprint;
6 (2) include an Environmental Impact Statement to explain the extent of the
7 pollution that may threaten the land, water, and air; or (3) address any of the
8 issues raised by Wilsonville residents at the Wilsonville Town Hall meeting and
9 in Portland State University’s *Aurora State Airport Assessment Report* regarding
10 jet residue, jet fumes, or traffic. (App 69; Rec. 3349-3415, 3294-3349.)

11 **iv. Statewide Goal 7 – Areas Subject to Natural Disasters and**
12 **Hazards**

13 Statewide Goal 7 seeks to ensure that adopted plans include policies and
14 implementing measures to protect people and property from natural hazards. The
15 Airport faces a serious risk of significant damage from seismic liquefaction in the
16 event of an earthquake. *See* App 70; Rec. 567-70, 3464-73. The Oregon
17 Department of Geology and Mineral Industries’ maps show that the Airport is
18 located in an area subject to major potential damage and liquefaction in a
19 projected 9.0 Cascadia Subduction Zone earthquake. (Rec. 3464-73.) The
20 Master Plan does not include any policies or implementing measures, or even
21 propose a study of the potential impacts to the Airport or surrounding facilities
22 from seismic activity, in order to protect the Airport property and people should
23 a significant earthquake occur.

24 To the contrary, Respondents tout the Airport as a crucial facility in the
25 event of an earthquake. *See* Rec. 2417. Despite Respondents’ identification of
26 the Airport as a crucial facility, the Airport is listed at the lowest level of Tier 3

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1 airports in the Oregon Resiliency Plan. (Rec. 2417, 3466.)

2 Respondents failed to comply with Statewide Goal 7 by not providing for
3 any planning, policies, or proposed studies to address the impact of earthquakes
4 on the Airport and its surrounding facilities. (App 70, Ex. 17 (Rec 567-69).)

5 **v. Statewide Goal 13 – Energy Conservation**

6 Statewide Goal 13 requires land use planning address methods and
7 implementation measures that will achieve “maximum efficiency in energy
8 utilization.” *See* OAR 660-015-0000(13). One way to do so, as suggested by the
9 Goal 13 guidelines, is to “minimize the depletion of non-renewable sources of
10 energy.” *Id.* The Master Plan seeks to expand the Airport to accommodate
11 larger jets that utilize more non-renewable energy than the aircraft the Airport
12 currently serves. Respondents fail to make any Findings about how the Master
13 Plan addresses Statewide Goal 13, particularly given that some mitigation should
14 be planned to address the higher non-renewable fuel consumption that will be
15 utilized by the larger jets that the planned expanded runway is proposed to
16 accommodate. (App 72-73.)

17 **b. Respondents Failed to Make Adequate Findings Based on**
18 **Substantial Evidence for Statewide Goals 1, 3, 11, 12, and 14**

19 Respondents committed reversible error by failing to make Findings
20 supported by substantial evidence regarding Statewide Goals 1, 3, 11, 12, and 14.
21 Before a plan by a state agency may be adopted, it must be supported by an
22 adequate factual basis, as required by Statewide Goal 2, which is also considered
23 to mean “substantial evidence.”

24 “An ‘adequate factual base’ for a legislative land use
25 decision ‘is synonymous with the requirement that a
26 decision be supported by substantial evidence.’” *Restore*
Oregon, 301 Or App at 778 (citing *1000 Friends of*
Oregon, 244 Or App at 268 n. 11).

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1 As this Board explained, in *Heiller v. Josephine County*, findings to support a
2 decision must:

3 “(1) identify the relevant approval standards, (2) set out
4 the facts which are believed and relied upon, and
5 (3) explain how those facts lead to the decision on
6 compliance with the approval standards.” *Heiller v.
Josephine County*, 23 Or LUBA 551, 556 (1992).

7 The Court of Appeals has established “there must be enough in the way of
8 findings or accessible material in the record of the legislative act to show that
9 applicable criteria were applied and that required considerations were indeed
10 considered.” *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16
11 n. 6 (2002). For appellate review of the decision, the decision-maker must have
12 “a clear statement of what, specifically, the decision-making body believes, after
13 hearing and considering all the evidence, to be the relevant and important facts
14 upon which its decision is based. Conclusions are not sufficient.” *South of
15 Sunnyside Neighborhood League v. Board of Com’rs of Clackamas County*, 280
16 Or 3, 21 (1977). Respondents failed to submit substantial evidence of the Master
17 Plan’s compliance with Statewide Goals 1, 3, 11, 12, and 14.

18 **i. Statewide Goal 1 – Citizen Involvement**

19 Statewide Goal 1 aims to meaningfully engage citizens in the land use
20 planning process. Governments should create a “citizen involvement program”
21 that incorporates the following components: citizen involvement,
22 communication, citizen influence, technical information, feedback mechanisms,
23 and financial support. This Goal has been blatantly disregarded. The first
24 example of Respondents’ disregard for Statewide Goal 1 was when Respondents
25 disbanded the PAC that provided input on drafts of the Master Plan, which had
26 its last meeting on September 15, 2011. Respondents allege that at the very next

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1 OAB meeting, on October 27, 2011, the Master Plan was adopted, even though
2 there is no evidence that there was any public hearing, notice of a public hearing,
3 or notice that the Master Plan was being considered for adoption. (App 17-38.)
4 The alleged adoption of the Master Plan without a public hearing violates
5 Statewide Goal 1. (App 65-67.)

6 Other examples of Respondents' failure to engage in citizen involvement
7 in the master planning process include Respondents' failure to notify the PAC or
8 other interested parties that the Master Plan was allegedly adopted after that
9 October 27, 2011 OAB meeting. *See* OAR 738-130-0055(1)¹² and OAR 738-
10 130-0055(7)¹³. More recently, ODA failed to provide its proposed Findings until
11 after business hours on Friday, October 25, 2019, less than one (1) calendar week
12 and just three (3) business days prior to its hearing on the matter (*see* App 60),
13 making it difficult for interested parties to respond to the proposed Findings in a
14 meaningful and productive way.

15 Finally, out of frustration over the lack of public involvement, and the
16 inability to determine whether a Master Plan had even been adopted, Wilsonville
17 elected to hold the Town Hall public meeting ODA failed to have, in order to
18 receive citizen input for or against the Master Plan. 144 people signed the sign-
19 in sheet and more than 54 offered testimony. The transcript of that Special
20 Council Meeting was submitted to ODA for inclusion in the Record. (App 75,
21 excerpts; Rec. 3349-3415.)

22 There is no evidence in the Record that Respondents held any public
23 hearing for adoption of the Master Plan or, thereafter, to amend the Master Plan
24

25 ¹² *See also* OAR 731-015-0065(1).

26 ¹³ *See also* OAR 731-015-0065(7).

1 to incorporate significant FAA and other changes. Even ODA’s own Executive
2 Director was so confused by the record, or lack thereof, that she wrote that the
3 Master Plan had not been adopted. (App 50-51 (emphasis added).)

4 At the Town Hall meeting, former Oregon Supreme Court Justice William
5 Riggs testified: “[t]he thing that stands out more than anything else ... is that
6 really the state has put the cart before the horse. They’ve gone out trying to seek
7 or approve the process for seeking \$37,000,000 before going through the
8 necessary mandated citizen involvement that Goal 1 requires.” (App 59; *see also*
9 58.) It is hard to imagine more egregious violations of Goal 1. This Board
10 should reverse the Master Plan adoption and order a committee for citizen
11 involvement (CCI) to be formed to complete this master planning process, in a
12 public, transparent process, as is required by Goal 1. “The CCI shall assist the
13 government in the development of the program that promotes and enhances
14 citizen involvement in all the components.” Guideline 1 to Statewide Goal 1
15 (OAR 660-015-0000(1)).

16 **ii. Statewide Goal 3 – Agricultural Lands**

17 Goal 3 must be closely scrutinized, given the Master Plan’s proposed major
18 expansion of the Airport runway onto prime EFU-zoned land. Understanding the
19 value in preserving farmland, Statewide Goal 3’s planning guideline states:
20 “Urban growth should be separated from agricultural lands by buffer or
21 transitional areas of open space.” The expansion of the Airport proposed in the
22 Master Plan will lead to an urbanized industrial and commercial conversion of
23 farmland and a major expansion of what was contemplated to be a small, rural
24 airport when it was cited in a rural EFU-zoned area and given precise definitive
25 boundaries through the public process. The impact of the Master Plan on the EFU
26 lands and Goal 1 is already evident in the approved application by Intervenor-

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1 Respondent TLM Holdings, LLC for zone change from its current EFU zoning to
2 Public and a conditional use permit for commercial/industrial development of its
3 property directly adjacent to the Airport. (App 68; Rec. 2238-53, 2914-62.)

4 The French Prairie area, where the Airport is located, is “foundation
5 farmland,” classified as Oregon’s highest-quality agricultural soils, with Class II
6 soils (Rec. 564-65), which Statewide Goal 12 provides should not have
7 transportation facilities built upon them (see discussion below). Wilsonville
8 resident, local historian, and City Councilor, Charlotte Lehan, testified:
9 “Willamette Valley farmland accounts for less than 3% of the state’s total area.
10 It is the finest farmland in Oregon ... soils deposited by multiple Missoula Flood
11 events over 10,000 years ago.” (App 57.) The Master Plan does not adequately
12 address how it will preserve this high-quality EFU land or how it will mitigate
13 impacts to the farmlands from hazardous materials pollution, noise pollution, jet
14 fumes, jet residue, wastewater runoff, or other adverse environmental impact to
15 EFU land, not to mention the sacrifice of prime farmland for a planned large jet
16 runway.

17 The Master Plan fails to analyze potential impacts to the cluster of
18 agricultural businesses that include not only farms, but also multi-field farm
19 operations, and area businesses that supply farms with labor, seed, implements,
20 and related products. Making farming more difficult through unmitigated
21 development harms not only the impacted farms, but also those businesses
22 dependent on farmers’ ability to succeed and operate. The conversion will take
23 away prime farmlands and operations from the food production supply chain that
24 is critical to and impacts all Oregon citizens.

25 The Findings fail to address how the government sanctioning of
26 urbanizing EFU lands around the Airport will mitigate for more real estate

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1 speculation and increasing the cost to own or rent farmland near the Airport.
2 When real estate developers see the State allowing development in an
3 “undeveloped” agricultural area, with lower-cost EFU land and no need to pay
4 for urban services, the State incentivizes real estate speculators to buy “cheap”
5 farmland and thereby de facto increase the cost of farmland for farmers. TLM’s
6 current effort to develop EFU land adjacent to the Airport as commercial and
7 industrial is direct evidence of this trend. (Rec. 2238-53, 2914-62.)

8 The Master Plan seeks to take prime agricultural lands out of production,
9 in contravention of Statewide Goal 3. Respondents have not provided substantial
10 evidence that the Master Plan complies with Statewide Goal 3.

11 **iii. Statewide Goal 11 – Public Facilities and Services**

12 Statewide Goal 11 provides that urban and rural development must be
13 “guided and supported by types and levels of urban and rural public facilities and
14 services appropriate for, but limited to, the needs and requirements of the urban,
15 urbanizable, and rural areas to be served.” OAR 660-015-0000(11). Plans for
16 public facilities, such as a state airport, “should be coordinated with plans for
17 designation of urban boundaries, urbanizable land, rural uses, and for the
18 transition of rural land to urban uses.” *Id.*

19 The Airport is surrounded by EFU-zoned land. Based on EFU zoning, this
20 area is intended to be preserved for farm use. This land is not urban or
21 urbanizable. Yet, the Master Plan seeks to expand the Airport and its uses
22 without consideration of the necessary urban infrastructure needed for increased
23 urbanized uses.

24 Respondents’ Finding for Statewide Goal 11 demonstrates total lack of
25 understanding of the Goal: “The proposed projects in the Master Plan and ALP ...
26 will not have a direct impact on the airport. The airport has electricity, water,

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1 septic and telephone.” This statement is both incorrect and misconstrues the Goal.
 2 As a result, the Master Plan is not guided by the types and levels of rural public
 3 facilities and services that exist around the Airport. There is no public
 4 infrastructure to accommodate increased commercial uses from larger jets. There
 5 is no policy or implementation measure to accommodate a transition from the
 6 urban uses of the Airport to the surrounding EFU-zoned land. As Wilsonville and
 7 other Petitioners have noted, and as the Master Plan also states, there is a serious
 8 concern of the Airport’s current ability to meet water, sewer, and fire protection
 9 needs. *See, e.g.,* Rec. 41, 51, and 54-55; 142; 4073; App 69-71.

10 The City of Wilsonville agrees with Petitioner City of Aurora’s thorough
 11 analysis of the dangerously lacking public sewer, water, waste, and fire protection
 12 services resources needed for any further Airport expansion (Rec. 3184-85), as
 13 well as the potential negative impact on the City of Aurora’s own water supply,
 14 which must be considered (Rec. 3184-86, 4151).

15 **iv. Statewide Goal 12 - Transportation**

16 Statewide Goal 12 seeks to create efficient and safe transportation systems
 17 throughout Oregon. When planning a transportation facility, “[n]o major
 18 transportation facility should be planned or developed outside urban boundaries on
 19 Class I and II agricultural land, as defined by the U.S. Soil Conservation Service
 20 unless no feasible alternative exists.” *See* OAR 660-015-0000(12). Planning for a
 21 transportation facility should also consider population densities and peak hour
 22 travel patterns. *Id.* The Master Plan seeks to expand the Airport to allow for
 23 larger jets¹⁴, and related uses on Class II agricultural land¹⁵, without consideration

24 _____
 25 ¹⁴ OAR 660-012-0065(3)(n) states that certain airport transportation
 26 improvements are consistent with Statewide Planning Goals 3, 4, 11, and 14 if
 the expansions or alterations do not permit service to a larger class of airplanes.
 A major purpose of ODA’s master planning process appears to be to expand
 operations by extending the runway, adding a taxiway, and increasing the class,

1 of the traffic impacts on the rural street infrastructure surrounding the Airport, nor
2 on the already heavily congested Boone Bridge bottleneck on Interstate 5.

3 The Findings note that the implementation of the Master Plan will require
4 Keil Road to be dead-ended, eliminating access to Highway 551, without any
5 justification how this closure is in compliance with Goal 12. Additionally, rather
6 than proving compliance with Statewide Goal 12, the Findings “punt” the
7 discussion of the transportation and farming impacts to a later alleged process, to
8 occur once Respondents undertake expansion of the Airport runway. When the
9 runway expansion project is undertaken, the expansion will already be an
10 approved project, thus eliminating the ability for interested parties and affected
11 jurisdictions to raise issues concerning traffic that may justify precluding or
12 reducing an expansion – another attempt to subvert the opportunity for public
13 comment and land use approval.

14 In other words, Respondents argue that they do not need to consider traffic
15 impacts now, but will claim that because the project is already approved in a
16 Master Plan it can move forward regardless of traffic impacts. Ultimately, this
17 will lead to Respondents never having to prove that the Master Plan transportation
18 impacts comply with Goal 12.

19 The Findings do not provide substantial evidence that the Master Plan
20 complies with Statewide Goal 12. In addition to the above, the Findings do not
21 address: (1) the impacts to local street infrastructure surrounding the Airport,
22 especially considering nearby roads are generally older, unimproved farm-to-

23
24 size, and weight of aircraft regularly using the Airport without constrained
25 operations.

26 ¹⁵ See *Identification and Assessment of the Long-Term Commercial Viability of
Metro Region Agricultural Lands*, ODA, p. 32 (January 2007); see also
Rec. 564-65.

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1 market roads that lack shoulders and sidewalks; (2) the lack of alternative
2 transportation options, meaning that additional trips cannot be offset by other
3 transportation options; (3) the failing intersection – Arndt Road at Airport Road –
4 surrounding the Airport, or the high number of vehicle crashes already occurring
5 at nearby intersections (as noted in the Marion County Transportation Systems
6 Plan (App 6, 41-42, 71)); (4) impacts to Interstate 5 at the Boone Bridge; and
7 (5) the “Substantive Issues,” including traffic, identified in Portland State
8 University’s *Aurora State Airport Assessment Report* (Rec. 3225-56).

9 **v. Statewide Goal 14 - Urbanization**

10 Respondents claim that Statewide Goal 14 does not apply because the
11 Airport is allowed under Marion County’s Comprehensive Plan, even though the
12 Master Plan was never adopted as part of Marion County’s Comprehensive Plan.
13 (Rec. 435-36.) Respondents claim all improvements are within Marion County’s
14 P Zone, with one exception. That one exception involves a runway expansion that
15 will take prime EFU land. The Findings erroneously state that such a use is
16 allowed under ORS 215.283(1)(c).

17 ORS 215.283(1)(c) states that only certain uses may be established in any
18 area zoned for exclusive farm use, including utility facilities necessary for public
19 service. Such a utility facility can be established through ORS 215.275, which
20 requires, as part of establishing a utility facility, the governing body of the county
21 “shall impose clear and objective conditions on an application for utility facility
22 siting ... to mitigate and minimize the impacts of the proposed facility, if any, on
23 surrounding lands devoted to farm use in order to prevent a significant change in
24 accepted farm practices or a significant increase in the cost of farm practices on
25 the surrounding farmlands.”

26 There is no evidence in the Findings that Marion County allows utility

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1 facilities in its EFU-zoned land. Moreover, there is no evidence that Marion
2 County, or ODA if so designated, prepared clear and objective conditions to
3 mitigate and minimize the expansion of the Airport and adjacent uses.

4 **IV. CONCLUSION**

5 Wilsonville does not dispute the importance of Airport operations that
6 benefit the community and public, in particular the helicopter operations used for
7 farming and emergency related operations.

8 Wilsonville does, however, object to corporate business interests
9 commandeering cheap farmland to accommodate large corporate jets, taking over
10 and depleting important public resources in the process, without due process.

11 The Master Plan process was, at best, to coin Shakespeare, “A Comedy of
12 Errors;” an inept violation of public record and land use laws. At worst, it was a
13 deliberate attempt to subvert public process and Oregon land use law for the
14 benefit of a select few wealthy corporate interests.

15 The City of Wilsonville respectfully requests that this Board find:

- 16 1) Respondents failed to legally adopt a Master Plan upon which
17 Findings of Compatibility and Compliance can be adopted, and cannot
18 affirm something never adopted in 2019;
- 19 2) Findings of Compatibility and Compliance must be adopted at the
20 time of adoption of the Master Plan, not eight years later;
- 21 3) Respondents failed to provide Findings of Compatibility and
22 Compliance consistent with the affected jurisdictions’ Comprehensive
23 Plans, as required by their SAC Program;
- 24 4) Respondents did not comply with their State Agency Coordination
25 Program, which exists to ensure compliance with the Statewide Goals
26

1 and compatibility with local comprehensive plans when adopting
2 facility plans;

3 5) Respondents failed to provide Findings of Compatibility and
4 Compliance consistent with Statewide Goals 2, 5, 6, 7, and 13, as
5 required by their SAC Program; and

6 6) Respondents did not prove, by substantial evidence, compliance with
7 Statewide Goals 1, 3, 11, 12, or 14.

8 The City of Wilsonville further requests that the Board reverse or remand this
9 matter for development of an inclusive master planning process for the Aurora
10 Airport, consistent with Statewide Planning Goals, all applicable Oregon land
11 use laws, and public hearing and public record requirements.


12 DATED: September 21, 2020.

13

14

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17

Clackamas County joins in the Petition submitted by City of Wilsonville.

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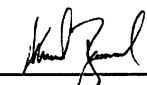
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WILSONVILLE'S PETITION FOR REVIEW

**CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH
AND TYPE SIZE REQUIREMENTS**

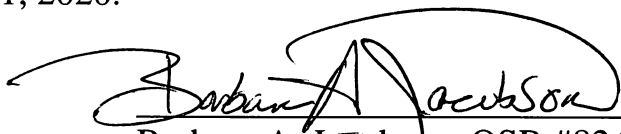
Brief Length

I certify that (1) this brief complies with the word-count limitation in OAR 661-010-0030(2); and (2) the word count of this brief is 10,997 words.

Type Size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and the footnotes, as required by OAR 661-010-0030(2).

DATED: September 21, 2020.


Barbara A. Jacobson, OSB #824630
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on September 21, 2020, I filed the original of this **PETITION FOR REVIEW**, together with four copies, with the Land Use Board of Appeals, 775 Summer Street NE, Suite 330, Salem, OR 97301-1283, by first-class mail, postage prepaid.

On the same date, I served a true and correct copy of the foregoing **PETITION FOR REVIEW** by mailing to each party by first-class mail, postage prepaid, a true copy thereof, addressed to said party at his/her last known address, as follows:

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WILSONVILLE'S PETITION FOR REVIEW