

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

3
4 FRIENDS OF FRENCH PRAIRIE
5 and BENJAMIN D. WILLIAMS,
6 *Petitioners,*

7
8 vs.

9
10 OREGON DEPARTMENT OF AVIATION
11 and OREGON AVIATION BOARD,
12 *Respondents.*

13
14 LUBA No. 2019-083

15
16 FINAL OPINION
17 AND ORDER

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19 Appeal from Oregon Department of Aviation and Oregon Aviation Board.

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21 Jeffrey L. Kleinman, Portland, represented petitioners.

22
23 Lucinda D. Jackson, Senior Assistant Attorney General, represented
24 respondents.

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

28
29 DISMISSED 12/10/2019

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

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2 **NATURE OF THE DECISION**

3 Petitioners appeal an August 2019 letter from the Director of the Oregon
4 Department of Aviation (ODA).

5 **PENDING MOTIONS**

6 Several parties moved to intervene in the appeal on the side of respondents,
7 and a different party moved to intervene in the appeal on the side of petitioners.
8 A motion to appear as *amicus* together with an *amicus* brief was also filed. An
9 objection to one of the motions to intervene and to the motion to appear as *amicus*
10 was then filed.

11 Because we conclude that the challenged decision is not a “land use
12 decision” as defined in ORS 197.015(10)(a)(B), we need not address the pending
13 motions to intervene and motion to appear as *amicus*, and we do not consider any
14 pleadings other than the pleadings filed by petitioners and respondents.

15 **BACKGROUND**

16 ODA is a state agency. ORS 197.180(1) requires state agencies to “carry
17 out their planning duties, powers and responsibilities and take actions that are
18 authorized by law with respect to programs affecting land use” “[i]n a manner
19 compatible with acknowledged comprehensive plans and land use regulations.”¹

¹ OAR 738-130-0055(1) requires the ODA to:

“involve DLCD and affected metropolitan planning organizations,
cities, counties, state and federal agencies, special districts and other

1 Beginning in 2010, ODA engaged in a process to update the existing Aurora
2 Airport Master Plan.²

3 In January 2019, petitioners’ counsel wrote a letter to the interim director
4 and the incoming director of ODA that asked five questions, including in
5 pertinent part whether the “Aurora Airport Master Plan” (Master Plan) had been
6 submitted to the Oregon Aviation Board (Board) for adoption by that Board; and
7 if the answer was yes, when the Board adopted the master plan for the airport. In
8 April 2019, the director of ODA (Stansbury) responded to petitioners’ counsel’s
9 letter with a letter, and answered the five questions (April Stansbury letter). In
10 particular, the April Stansbury letter concluded that “[t]he last Aurora Airport
11 Master Plan was completed in December 2012 but it has not been submitted to
12 the [Oregon Aviation] Board for adoption.” Record 3. The April Stansbury letter
13 also concluded that adoption of the 2012 update to the Master Plan is “on hold”
14 until the Department of Land Conservation and Development approved ODA’s
15 State Agency Coordination program. *Id.*

interested parties in the development or amendment of a facility plan. This involvement may take the form of mailings, meetings or other means that the Department determines are appropriate for the circumstances. The Department shall hold at least one public meeting on the plan prior to adoption.”

OAR 738-130-0015(9) defines “Facility Plan” as “a plan for a transportation facility such as an airport master plan.”

² The culmination of that process is in dispute, but resolving that dispute is not necessary in order to resolve the issues presented in this appeal.

1 In August 2019, Stansbury sent a second letter to petitioners’ counsel
2 (August Stansbury letter). The August Stansbury letter stated that ODA had, after
3 “a review of our historical file on the 2012 Aurora State Master Plan Update,”
4 “found some discrepancies in the information * * * previously provided [to
5 petitioners’ counsel]” in the April Stansbury letter. Record 1. As relevant here,
6 the August Stansbury letter took the position that “[o]n October 27, 2011, the
7 OAB [Oregon Aviation Board] approved the Master Plan for submittal to the
8 Federal Aviation Administration.” *Id.* Petitioners subsequently appealed the
9 August Stansbury letter to LUBA.

10 JURISDICTION

11 On October 4, 2019, respondents moved to dismiss the appeal on the basis
12 that the August Stansbury letter is not a “land use decision” as that term is defined
13 in ORS 197.015(10)(a)(B). Respondents then transmitted the record, and
14 subsequently transmitted an amendment to the record. Petitioners then filed a
15 response to respondents’ motion to dismiss. For the reasons set forth below, we
16 agree with respondents that the August Stansbury letter is not a land use decision
17 over which we have jurisdiction.

18 ORS 197.015(10)(a)(B) provides that a “[l]and use decision” includes “[a]
19 final decision or determination of a state agency other than the commission with
20 respect to which the agency is required to apply the goals.” Petitioners contend
21 that the August Stansbury letter is “[t]he first appealable, final decision” made by
22 ODA because according to petitioners, ODA did not adopt the Aurora Airport

1 Master Plan in 2011. Petitioners' Memorandum in Opposition to Motions to
2 Dismiss 9. In other words, we understand petitioners to argue that the August
3 Stansbury letter is a land use decision because the letter itself is incorrect in
4 stating as a fact that the Board adopted the master plan in 2011.

5 In support, petitioners cite *Love v. Klamath County*, 54 Or LUBA 747
6 (2007) and *Kent v. City of Portland*, 38 Or LUBA 942 (2000). In *Love*, we
7 concluded that a letter from the county's counsel that took the position that a
8 motorcycle track was a permitted use of property zoned R-5 was a "land use
9 decision" because the letter was a "final decision" that "concern[ed] the
10 application * * * of a land use regulation," a provision of the county's
11 development code. 54 Or LUBA at 748-50. In *Kent*, we held that a zoning
12 confirmation letter from the city's planning department that concluded that a
13 proposed soccer practice area within a city park was not subject to the city's
14 conditional use review procedure was a "final decision" that indisputably applied
15 a land use regulation, the city's development code. 38 Or LUBA at 946-47.
16 Those cases do not assist petitioners, because in each of those cases the local
17 government made a "final decision" that applied the local government's adopted
18 land use regulations with the resultant effect of authorizing a use of property.

19 Here, the August Stansbury letter is not a "final decision or determination
20 of a state agency[.]" ORS 197.015(10)(a)(B). Rather, we agree with respondents
21 that the August Stansbury letter "merely convey[s] facts about events that have
22 already occurred," which respondents maintain were state agency decisions that

1 “were made in 2011 and 2012.” Respondents’ Motion to Dismiss 2. While we
2 express no opinion about the accuracy or inaccuracy of ODA’s statement, we
3 agree with respondents that the August Stansbury letter is not a final
4 determination or decision of any kind by the ODA. We also agree with
5 respondents that petitioners have not established that the August Stansbury letter
6 is a decision “with respect to which the agency [was] required to apply the goals.”
7 ORS 197.015(10)(a)(B).

8 The appeal is dismissed.