IN THE SUPREME COURT OF THE STATE OF OREGON

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

Petitioners,
Respondents on Review,

and

CLACKAMAS COUNTY,

Intervenor-Petitioner below,

v.

OREGON 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**,

Respondents,
Petitioners on Review.

Land Use Board of Appeals
2019123, 2019127, 2019129, 2019130

Oregon Court of Appeals
Case No. A175219

Oregon Supreme Court
Case No. S068906

EXPEDITED PROCEEDING UNDER ORS 197.850, ORS 197.855

September 2021

SECOND CORRECTED PETITION FOR REVIEW OF RESPONDENTS AND PETITIONERS ON REVIEW AURORA AIRPORT IMPROVEMENT ASSOCIATION, BRUCE BENNETT, WILSON CONSTRUCTION COMPANY, INC., TED MILLAR, TLM HOLDINGS, LLC, ANTHONY ALAN HELBLING AND WILSONVILLE CHAMBER OF COMMERCE

Petition for Review of the Decision of the Oregon Court of Appeals on Appeal from Land Use Board of Appeals 2019123, 2019127, 2019129, 1029130

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RESPONDENTS AND PETITIONERS ON REVIEW INTEND TO FILE A BRIEF ON THE MERITS IF REVIEW IS ALLOWED

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PETITION FOR REVIEW

This case arises out of a proposal that the Aurora State Airport (the "Airport" or "Aurora Airport"), a public use airport located in rural Marion County, amend its 2011 Aurora Airport Master Plan ("MP") and, pursuant to that amendment, extend the Airport's only runway southward by roughly 1000 feet, to a total of 6000 feet. The Oregon Aviation Board (OAB), operates the Airport and has jurisdiction over alterations to public use airports like the runway extension, which was first approved in the 1976 Airport MP, and re-approved in 2011 as part of the plan's update. (The principal difference was that, due to FAA safety regulations, the 2011 extension went to the south, rather than the north.[1]) In 2019, OAB adopted findings that the 2011 MP update, including the runway extension, complied with all state land use goals.

No one appealed the 2011 MP update, which OAB had approved through a process spanning more than two years. However, several participants invited to the 2011 process did appeal OAB's later, 2019 decision to the Land Use Board of Appeals (LUBA). Those objectors asserted that OAB's finding that the extension complied with the land use goals constituted a "land use decision" that could only occur—if at all—after exceptions to certain land use goals had been approved.

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[1] A copy of LUBA's opinion is attached at App-1.

Responding parties at LUBA (now "Petitioners on Review") countered, and LUBA agreed, that (1) the goals did not apply because the planned extension was to be constructed entirely within the existing land already zoned for the Airport; (2) the state goals at issue did not apply to the extension because of an administrative rule, OAR 660-012-0065(3)(n); and (3) no goal-related inquiry was required, because the extension was a long-standing component of Marion County's acknowledged Comprehensive Plan ("MCCP") and therefore exempt under ORS 197.180(1)(a) and (b) and OAR 660-030-0065(2).

LUBA has jurisdiction only over "land use decisions." ORS 197.825. State agency decisions are "land use decisions" only if the agency is "required to apply the [statewide planning] goals" to those decisions. ORS 197.015(10)(a)(B). Accordingly, LUBA's determination that those goals did not apply to the runway extension meant that LUBA had no jurisdiction in the matter. LUBA therefore dismissed the appeal. LUBA Op at 33.

Objectors sought judicial review in the Court of Appeals, which held that approving the runway extension in OAB's 2019 findings <u>was</u> a "land use decision." The case was remanded to LUBA. *Schaefer v. Oregon Aviation Board, et al.*, 312 Or App 316, 346, ___ P3d ___ (2021) ("*Schaefer I*").[2] Petitioners on

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[2] Copies of *Schaefer I* and of its successor opinion, *Schaefer II*, are attached

Review, who had been "Respondents" below, petitioned for reconsideration. The court, with one minute adjustment, adhered to its former view. *Schaefer v. Oregon Aviation Board, et al.*, ___ Or App ___, ___ P3d ___ (August 4, 2021) ("*Schaefer II*"). Petitioners on Review respectfully request that this Court grant review of and reverse those decisions.

HISTORICAL AND PROCEDURAL FACTS

Petitioners on Review accept the Court of Appeals' statement of the *procedural* facts. However, Petitioners on Review can only accept the court's statement of allegedly *historical* facts with a reservation: On occasion, the court seems to have accepted as "fact" allegations from the opponents of the Airport, when LUBA had held that it was not persuaded by such allegations.

LEGAL QUESTIONS PRESENTED

1. Did the Court of Appeals err in overruling LUBA's holding that, as a matter of fact, neither the runway extension nor its ancillary taxiways would extend outside the Airport's present zoning?

2. Did the court err in holding that LUBA was not entitled to rely upon the acknowledged Marion County Comprehensive Plan to demonstrate that the runway extension complied with the state goals?

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at App-36 and App-77, respectively.

3. Did the Court of Appeals err in construing the term, “permit service,” in OAR 660-012-0065(3)(n), to refer to “better” service to the airplanes presently using the Airport? Did the court err in not construing the rule’s term, “larger class,” as being limited only to an airplane’s tail height and wingspan?

PROPOSED RULES OF LAW

1. The court erred. The evidence showed that the extension was already planned under the Airport’s MP, and the extension and related features were neither intended nor approved to extend outside the airport boundary. The Court of Appeals was forbidden under ORS 197.850(8) to decide the facts otherwise.

2. The court erred. The OAB was entitled to rely upon the MCCP to demonstrate that the extension complied with the state goals.

3. The court erred. The phrase, "permit service," refers to airport improvements that permit new service to the airport, not to airplanes already using the airport. The phrase, “larger class of airplanes,” refers only to airplanes that are “larger by tail height and wingspan.”

IMPORTANCE OF QUESTIONS PRESENTED

Including Aurora, there are seventy-three public use airports in Oregon. This case involves a plan by Aurora to extend its runway to a length first planned for in 1976 and consistently featured in plan updates approved thereafter. Public

use airports must construct “expansions and alterations” to respond to technological advancements in aviation if they are to maintain their role as safe and effective places for aircraft to use. Long-range planning for such “expansions and alterations” is absolutely necessary: most improvements to the majority of such airports are financed primarily with federal funds, which often do not become available until long after the planning process is completed.

Experientially, airport modifications commonly engender opposition. Recognizing this truism, OAR 660-030-0065(2)[3] specifies that improvements in public use airports do not have to be scrutinized under the land use goals, so long as the improvements do not violate the acknowledged Comprehensive Land Use Plan of the jurisdiction in which the airport is located. (Here, Marion County.) And, under OAR 660-012-0065(3)(n),[4] even if airport improvements are not in the relevant comprehensive plan, airport "expansions and alterations" are not subject to particular goals so long as they do not "permit service to a larger class of airplane."

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

> Except as provided in [a subsection not relevant here], a state agency shall comply with the statewide goals *by assuring that its land use program is compatible with the applicable acknowledged comprehensive plan(s)* as provided in OAR 660-030-0070.

(Emphasis supplied.)

[4] OAR 660-012-0065(3)(n) is discussed further, *post*.

The reason for those rules is straightforward: the often time- and safety-sensitive considerations that motivate airport improvements require that, when funding is available, there not be years of delay or uncertainty of ultimate approval that accompany land-use-goal-based challenges before the funding can be used.

Or so it was until now. The Court of Appeals has swept away those rules, which helped airports keep up with aviation advances. Unless this Court overturns those decisions, Oregon public use airports face stagnation, unable to make safety and efficiency improvements for virtually all general aviation.

ERRORS BY COURT OF APPEALS IN REVIEWING LUBA'S DECISION

First Error: LUBA decided as a fact that no part of the Aurora Airport runway extension and its ancillary additions is outside the existing boundary of the Airport. The Court of Appeals erred in substituting its judgment for LUBA's.

A principal theme in this case is the question whether the appellate court understood the scope of its review authority respecting LUBA's decisions, as required by ORS 197.850(8)[5]. The answer is "no."

As noted, the 2011 MP authorized the long-anticipated lengthening of the Airport runway. A principal objection to that lengthening was a claim that certain

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[5] ORS 197.080(8) provides that, on judicial review of a LUBA decision, "* * *The court shall not substitute its judgment for that of the board as to any issue of fact."

documentation included in the MP graphically indicated that other, ancillary paving adjacent to the runway expansion would also be constructed, and that the additional construction would encroach on certain land zoned EFU.[6]

The position of ODA and OAB has always been that there never has been an intention to encroach on EFU land in the way that the Airport's opponents assert. However, the 2019 proceedings accepted evidence respecting precisely what the 2011 MP contemplated. At the conclusion of the proceeding, OAB and ODA adhered to their earlier opinion. LUBA, on review, accepted OAB's assertion of "no conflict" between the MP and land use, but also assessed the evidence on each side. In so doing, LUBA placed the obligation to show that the land use goals were implicated squarely on the objectors.

LUBA found that protestor's documentation, when weighed against other testimony in the record, was not persuasive: the entire MP was, to some degree, theoretical, speculative, and not the result of any official and binding survey; the stopway and taxiway shown in the documentation were projections only, with no survey support or other conclusive statement that either would be built or that,

[6] The Airport property is zoned "Airport Public," or "P." No part of the present Airport extends outside of that zone. However, Marion County does imposed an "airport overlay" that is intended to minimize potential dangers from the use of aircraft at public airports. (LUBA Op at 7 n4)

even if it were, could not be built without encroaching on an EFU zone. LUBA Op at 23-4. Put most plainly: it was the objectors who had the burden of persuasion, and they failed to satisfy it.[7]

On review, the Court of Appeals disagreed, but its reasoning was seriously flawed.

A primary feature of the court's opinion is its open hostility toward OAB and LUBA relying on any testimony at the 2019 hearing. *Schaefer I*, at 330, 331. The Court simply shut off that avenue of information when it announced: "The improvements that the ALP[[8]] depicts extend off the airport property and onto EFU land." *Id*. at 331. That was, of course, a finding of fact directly contrary to findings made by OAB and LUBA, and was inappropriate. *See* ORS 197.850(8)

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[7] LUBA was equally unpersuaded by objectors' argument that the proposed location of a navigation aid (a "Localizer") on EFU land made the Board's action a "land use decision." No one was certain that there would even be a use for a Localizer at the Airport; GPS technology had overtaken the need for it. (LUBA Op at 24.) To its credit, the Court of Appeals did not deign to discuss the matter.

[8] The "ALP" is a document that is submitted to the FAA with respect to a request for approval of an MP. The ALP purports to show graphically what the MP contemplates, but it is not (and does not claim to be) a surveyed plat of the changes that <u>will</u> be made. It is simply an approximation of future plans intended to help the FAA approve those plans. (Testimony of airport design expert Aron Faegre before OAB, Rec 7-8; 586; 588-89; OAB Decision Rec 162; 164; Supp Rec 4935-36.)

("The court may not substitute its judgment for that of the board as to any issue of fact.") Having found that fact, however, the court speedily moved on to conclude that the MP was a land use decision. *Schaefer I*, 312 Or App at 327-30.

The court's presumption in finding its own preferred version of the facts fundamentally altered Petitioners on Review's rights, to their great disadvantage. The evidence before OAB (and then LUBA) permitted the OAB (and then LUBA) to discount the ALP and, instead, find that there was no present indication that there would be any encroachment on an EFU zone. The court was not at liberty to re-evaluate the evidence and find otherwise. The court erred in overruling LUBA on this ground.

Second Error: LUBA decided that the runway extension was consistent with the Marion County Comprehensive Plan (MCCP), and that the extension therefore was exempt from demonstrating compliance with the goals under OAR 660-030-0065(2). The Court of Appeals erred in reversing that decision.

LUBA's dismissal of this case because the state agency was not required to apply the goals should have been sustained by the Court of Appeals on at least two clear grounds: ORS 197.180(1)(a) and (b) and OAR 660-030-0065(2), which provide that a state agency may rely upon an applicable acknowledged comprehensive plan to demonstrate goal compliance, and ORS 197.850(8), which requires a court not to substitute its judgment for that of LUBA on issues of fact. It

is vital that this Court correct the lower court's misunderstanding of both sets of standards.

This case involves an improvement to a public use airport. By way of context, ORS 836.625 provides:

> The limitations on uses made of land in exclusive farm use zones do not apply to the provisions of ORS 836.600 to 836.630 regarding airport uses.

(Emphasis supplied.) ORS 836.608(1) states that the continued "operation and vitality" of public use airports is "a matter of state concern." ORS 836.600 supplies the context for that concern:

> In recognition of the importance of the network of airports to the economy of the state and the safety and recreation of its citizens, the policy of the State of Oregon is to encourage and support the continued operation and vitality of Oregon's airports. Such encouragement and support extends to all commercial and recreational uses and activities described in * * * [a separate statute that describes virtually every kind of commercial activity carried out at the Aurora Airport].

Finally, the sweep of the legislative choice to protect and foster airports is stated in ORS 836.630(3): "The provisions of [two related statutes] and any rules established hereunder *shall be liberally construed to further the policy established in ORS 836.600*." (Emphasis supplied.)[9] In sum, the legislature has directed that

[9] *See also* OAR 660-012-0000(1), a key part of the "Oregon Transportation Planning Rule" ("TPR"), which has among its purposes: "to provide and encourage a safe, convenient and economic transportation system"; "[to f]acilitate the safe,

airport success be encouraged and promoted, not squeezed with uncharitable resistance.

OAR 660-030-0065(2), an administrative rule promulgated by LCDC that deals with state agencies' obligations with respect to statewide planning goals, specifies that state agencies "shall comply with the statewide goals by assuring that [the agency's] land use program is compatible with the applicable acknowledged comprehensive plan(s) ***."[10] The rule has a statutory provenance. *See* ORS 197.180(1)(b) (state agency may establish goal compliance by establishing compatibility with "applicable acknowledged comprehensive plans)." *See also 1000 Friends of Oregon v. LCDC,* 111 Or App 491, 492, 826 P2d 1023 (1992) (LCDC authorized to adopt rules determining that compliance with a local acknowledged plan demonstrates state goal compliance.)

By its terms, the rule should apply to the present case: The Court of Appeals has never questioned that the MCCP was the applicable "acknowledged

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efficient and economic flow of freight and other goods and services within regions and throughout the state through a variety of modes including road, *air*, rail and marine transportation"; and "[to p]rovide for the construction and implementation of transportation facilities, improvements and services necessary to support acknowledged comprehensive plans." OAR 660-012-0000(1)(d) and (f), respectively. (Emphasis supplied.)

[10] ORS 197.015(1) specifies that "acknowledgement" means that a plan or land use regulation complies with all state goals.

comprehensive plan," as that phrase is used in the rule. LUBA for its part recognized that the runway extension complied with the MCCP, so that the OAB did not need to directly apply the goals. *See, generally,* LUBA Op at 14-16)

Moreover, permitting state agencies to validate actions under the land use goals by demonstrating compliance with relevant acknowledged comprehensive plans, where there is a statute authorizing that approach, makes sense. It is that authority that LUBA relied on in ruling in favor of OAB in this case. *Id.* The Court of Appeals offered no analytical explanation why compatibility with the MCCP would not achieve the state's land use goals. Instead, the court opined that (1) OAB's reliance depended in part on evidence from 2019 as to how the MP would be carried out, when LUBA (and OAB) were only permitted to consider what the 2011 MP update said, *Schaefer I*, 312 Or App at 326, (2) only the Oregon Department of Aviation (ODA) is permitted to rely upon the county's acknowledged plan to establish goal compliance, while OAB (ODA's governing body) is not, *id.* at 326 and, in any event, (3) OAB did not rely upon the county plan. *Id*. at 316-17.

That last ground is factually untrue: OAB made specific findings that the 2011 MP update was compatible with the county plan as required by OAR 731-015-0065(4). Supp Rec-4935; 4937. The other two points seem analytically silly:

Why would not the OAB, which is ODA's governing body, be entitled to know what ODA knew? And, as to the inability of OAB to rely on 2019 evidence, what legal principle declares that a state agency is not entitled to obtain and make use of information about the consequences of an action it is taking? The two rulings are a form of "gotcha"—designed to defeat an agency's reasonable actions with unjustified hyper-technicality that points to no statute or rule that requires that particular outcome. This is a far cry from the "liberal construction" direction that the legislature enacted in ORS 836.600 concerning the success of Oregon aviation.

For some reason, the relentless theme of the Court of Appeals is that every single part of LUBA's opinion in the case is wrong, and the court stretches far to try to justify its approach. Good sense should be able to distinguish between a critique, on the one hand, and overt hostility, on the other. This case is an example of the latter.

Third Error: The Court of Appeals erred in construing OAR 660-012-0065(3)(n) to mean that the rule's determination that certain airport improvements are deemed to comply with state land use goals did not extend to circumstances in which an airport improvement "permits service" to airplanes already using the airport, or to a "larger class of airplane" that includes faster or heavier airplanes than those presently using the airport.

This Court should accept review to correct a highly flawed reading of a key LCDC rule, OAR 660-012-0065(3)(n), which provides:

> (3) The following transportation improvements are consistent with Goals 3, 4, 11, and 14[, subject to requirements not relevant here]:

* * * *

(n) Expansions or alterations of public use airports that do not permit service to a larger class of airplanes * * *.

LUBA found that rule to be dispositive, and dismissed the case. (LUBA Op at 27.) The Court of Appeals' contrary view is wrong as a matter of logic, misuses the FAA's aircraft classification systems, misreads the regulatory context, and is at odds with the public policy reflected in the rule. The court's mistaken construction of subsection (n) will lead to the perverse result of delaying (if not defeating) safety and efficiency improvements at Oregon's airports, a result surely not intended by the drafters of the LCDC rule.

Without the benefit of useful contemporaneous materials to shed light on the meaning of subsection (n), LUBA employed the most plausible meaning of the word "larger" to mean *size*, and borrowed from the FAA Airport Reference Code (the "ARC") to identify "classes" of airplanes.[11] While the FAA has adopted several ways to differentiate among types and operations of aircraft in a variety of circumstances, the ARC, as LUBA determined, is the most appropriate fit for OAR 660-012-0065(3)(n). One part of the ARC , represented by a Roman numeral, I through VI, is a function of tail height and wingspan. The other part, represented

[11] *See* Advisory Circular 15-5300-13A (June 28, 2012) – Airport Design (Table 1-2) (also reflected in Airplane Design Group). Attached at App-80.

by a letter, A through D, is derived from an aircraft's landing approach speed. LUBA logically discarded approach speed as not being a function of size, and therefore not relevant to whether an improvement would accommodate "larger" aircraft. (A vehicle flying faster is not described as a "larger" vehicle; a person running faster is not described as a "larger" person.) That sensible conclusion left tail height and wingspan as the relevant criteria.

The court correctly noted that FAA uses a variety of systems to classify or categorize aircraft, but then pondered why LUBA chose the tail height and wingspan measure rather than aircraft *weight*. In its puzzlement, the court devoted a great deal of attention to FAA Advisory Circular 150/5000-17 (June 20, 2017) – Critical Aircraft and Regular Use Determination, and FAA Advisory Circular 150-5325-4B (July 1, 2005) – Runway Length Requirements for Airport Design, which was concerned with aircraft *weight*. But, if weight were a relevant factor when LCDC adopted OAR 660-012-0065(3)(n), it could have simply used the word "heavier."

LUBA's choice was correct: use of the tail height and wingspan categories fits neatly into the regulatory text. The larger the tail and the wider the wingspan of airplanes, the longer and wider a runway is likely to need to be. Thus, concerns about land use planning with physically larger aircraft are accommodated by

limiting OAR 660-012-0065(3)(n) to aircraft in the current (*i.e.,* same) class of airplanes presently using the airport.

Unfortunately, the Court of Appeals took a different, less logical analytical path. The court conducted an elaborate analysis of the word "larger," an effort that disregarded LUBA's common-sense construction that would further the text, purpose, policy and context of the rule: The court compared the phrase "larger class of airplanes" with another phrase, "class of larger airplanes," and decided that the use of the former phrase means that LCDC "indicated an intention to refer to a larger – that is, *a more inclusive* – class of airplanes, rather than merely referring to larger airplanes." *Schaefer I,* 213 Or App at 341 (emphasis added). Of course, had this been LCDC's true intent, the word to use for inclusivity would be "broader," or "additional," rather than "larger."

Based on the foregoing analysis, the court decided that the "more inclusive" class that LCDC ostensibly intended means "a *class* that includes airplanes with a greater variety of approach speeds, a greater variety of MTOWs, *or* a greater variety of wingspans or tail heights." *Id.* (emphasis added). But even ignoring the point that approach speed does not relate to size, there is no support for even abstractly concluding that this combination, by including "a greater variety" for each measurement, constitutes "a" class. (This "class" that the court conjured

would certainly be broader, but the Court of Appeals never explains why LCDC would have intended that result.)

The Court of Appeals perceived "no reason that LCDC would focus its rule exclusively on the physical dimensions of the wings or tails of airplanes that serve the airport." *Id.* But of course there is a reason. Wingspan and tail height are aspects of airplane *size*. Airplane approach speed is not. MTOW is related to weight and, yes, for some purposes FAA groups airplanes by weight as well as by wingspan or tail height. *Id.* But, as explained above, the LCDC rule uses the word "larger," not "heavier."

The court stated that its "textual understanding is consistent with the rule's context." *Id*. As just demonstrated, however, that textual understanding is wrong. And this misunderstanding infects its consideration of the rule's context.

The court then proceeds on an extended exegesis of the word "permit," from which it purports to find that the Airport runway is now "B-II" but will become a "C-II" with the 1,000-foot extension. This is inexcusably wrong. The court itself quotes the 2011 MP: "The *current and* forecast ARC is C-II." (Emphasis added.) *Schaefer I*, 312 Or App at 342 (emphasis added). The court ignores this quoted text: the Airport runway was *already* appropriate for C-II airplanes before the 2011 MP; the runway extension will not create or alter that classification.

In any event, an airport moving from B-II to C-II (even if that had not yet happened) would reflect only an increase in aircraft approach speed: it would make no change in the tail height and wingspan *size* class of airplanes presently using the Airport. Thus, as LUBA held, the runway extension will not permit service to a larger class of airplanes, whether "permit" means "to make possible" or "to authorize." That ship has sailed: the airport is already a C-II airplane airport. In fact, there is no dispute that C-II class airplanes operate at Aurora Airport and are authorized to do so, even if weather or temperature impose certain constraints. Proposed improvements in the MP might conform the runway to particular C-II design standards, but they would not result in "permitting" a larger class (III) of airplane.

All of this is vital to the public and the aviation industry: If the court's excruciatingly limiting rewrite of OAR 660-012-0065(3)(n) is not overturned, safety and efficiency improvements at Aurora and other public use airports will require goal exceptions, a process that at best is protracted and at worst imposes insurmountable barriers.

The fact is that a C-II airplane that is subject to constraints on passenger or cargo capacity with a 5,004 foot runway will be able to operate with fewer or no constraints if the runway is extended 1,000 feet. But the mere ability to operate *the*

same make and model of airplane at modestly higher temperatures, and/or with greater payloads or more passengers will—under the Court of Appeals reading—magically constitute service to a "larger class of airplanes." The court's interpretation effectively makes OAR 660-012-0065(3)(n) a dead letter, unavailable to public use airports. That is a disaster for aviation in Oregon. This Court's intervention is urgently needed.

FACTORS AFFECTING REVIEWABILITY

ORAP 9.07 contains this Court's non-exclusive list of factors that are relevant to whether to grant review. Petitioners on Review submit that the following factors, numbered as they appear in that Rule, support reviewability:

(1) Whether the case presents a significant issue of law.

The case implicates an issue of law vital to Oregon's aviation industry. Factor **(b)** (the interpretation of both a statute and a rule), factor **(d)** (the legality of an important governmental action by OAB in its management of the Aurora Airport), and factor **(f)** (the jurisdiction of both LUBA and its reviewing court, the Court of Appeals, when the two bodies disagree whether the present case involves a "land use decision," are implicated.

(3) Whether many people are affected by the decision in the case.

The decision of the court hamstrings reasonable efforts by public use airports to make safety and efficiency improvements and to accommodate changes in aviation technology.

Aurora Airport is one of 55 Oregon airports included in the FAA's National Plan of Integrated Airport Systems (NPIAS) and as such "supports flying throughout the Nation and the world."[12] The court's decision then also threatens Oregon's public use airports' ability to viably participate in the NPIAS system, to the detriment of the national airspace system.

(4) Whether the legal issue is an issue of state law.

The legal issues presented are both substantive—the right of ODA and OAB to operate public airports in responsible ways to protect and serve the aviation industry and the public; and procedural—the right of OAB to make factual findings without a reviewing court substituting its judgment respecting those facts.

(5) Whether the issue is one of first impression for the Supreme Court.

This case is one of first impression for this Court.

(7) Whether the legal issue is properly preserved, and whether the case is free from factual disputes or procedural obstacles that might prevent the Supreme Court from reaching the legal issue.

[12]https://www.faa.gov/airports/planning_capacity/npias/current/media/NPIAS-2021-2025-Narrative.pdf at 11.

There are no procedural or factual disputes that will prevent this Court from reaching the issues presented by this case.

(8) Whether the record does, in fact, present the desired issue.

The issues are properly presented.

(11) Whether the Court of Appeals published a written opinion.

As noted, it published two.

(14) Whether the Court of Appeals decision appears to be wrong.

The decision is wrong and has serious consequences: **(a)** The error results in a serious misapplication of at least three different statutory and administrative rule principles, all of which support the concept that expansions and alterations of all of Oregon's 73 public use airports are deemed to comply with certain goals and do not require goal "exceptions." **(b)** The error cannot be corrected by another branch of government. The legislature has already created a legal framework for airports and has delegated rulemaking to LCDC.

(15) Whether the issues are well presented in the briefs.

The issues are clear now, and will be stark in the briefing for this Court.

(16) Whether an *amicus curiae* has appeared, or is available to advise the court.

The Oregon Department of Aviation, a party to these proceedings, has advised Petitioners on Review that it, too, intends to petition this Court for review

of the Court of Appeals' decisions. Moreover, several interested organizations are presently considering *amicus* participation in support of this Petition for Review, and are likely to file a further *amicus* brief if review is allowed.

CONCLUSION

The Court of Appeals is not merely wrong in this case—it is wrong in its impact on a vital aspect of Oregon's transportation system (the aviation industry). The result, if allowed to stand, will cripple the legitimate efforts of Oregon airports to provide up-to-date facilities for the classes of airplanes that they serve, with a concomitant danger to the flying public. Moreover, the decision has created a quagmire respecting the role of the appellate courts in judicial review of LUBA decisions. Either problem would merit review. When taken together, their call for it is powerful indeed.

For the reasons stated in this Petition, Petitioners on Review pray that this Court will allow review in the two *Schaefer* decisions and schedule the cases for briefing and argument.

DATED this 29th day of September, 2021.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS UNDER ORAP 5.05(2)(d)

I certify that: (1) this brief complies with the word-count limitation in ORAP 9.05(3)(a); and (2) the word-count of this brief as described in ORAP 5.05(1)(b) is 4,982. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(3)(b)(ii).

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