BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NORTHWEST TRAIL ALLIANCE,
Petitioner,

vs.

CITY OF PORTLAND,
Respondent.

LUBA No. 2015-015

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Aaron T. Berne, Lake Oswego, represented petitioner.

Kathryn S. Beaumont, Senior Deputy City Attorney, Portland, represented the respondent.

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

DISMISSED 06/03/2015

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a letter signed by two city commissioners stating that mountain biking is no longer allowed in a city-owned natural area, the River View Natural Area (RVNA).

FACTS

The RVNA is a 146-acre natural area in southwest Portland, bounded by SW Macadam Avenue to the east, SW Palatine Hill Road to the west, River View Cemetery to the north and Lewis and Clark College to the south. The city's Natural Resource Inventory, conducted in 1991 when the area was in private ownership, designates the RVNA as a high-value resource for sensitive and threatened wildlife and habitats. The RVNA includes seven streams that flow through the property to the Willamette River, down steep and ravined topography.

For many years, mountain bikers have used the RVNA for single-track biking, on seven miles of trails developed and maintained by the biking community. In 2011, the city acquired the RVNA from Metro, the regional government, in part with funds contributed by Metro. In return for that contribution, the city granted Metro a conservation easement over the RVNA. The easement prohibits all development, except in support of "permitted uses such as environmental education or nature-based recreation including soft-surface trails, viewing platforms, kiosks and signage." Motion to Dismiss, Exhibit C.

In 2013, the city began work on a natural area management plan for the RVNA. Petitioner is a member of the plan's Project Advisory Committee. Work continues on the plan, with an estimated completion date of September

2015. As described in an April 2015 project update, one of the functions of the planning process is to develop criteria for "allowance and location of mountain biking trails if appropriate[.]" Petitioner's Response 4 (citing an article on the city's website).

On March 2, 2015, the Portland Parks and Recreation (PP&R), and Bureau of Environmental Services (BES) City Commissioners, sent a letter to the RVNA stakeholders, including petitioner. The letter states, in relevant part:

> "In 2013, PP&R began a Natural Area Management Plan process to identify significant ecosystem assets, direct future management priorities, establish research and interpretative activities, and design a trail system compatible with protection of natural resources. During this time period, many recreational uses occurring on site prior to the City's acquisitions were permissible.
>
> "Exercising an abundance of caution and to protect the City's investment in the [RVNA], PP&R and BES will be limiting activities at RVNA from now on to passive nature-based recreational uses—hiking, wildlife viewing, stewardship, education, research etc. Planning for these uses will proceed with the goal of completing the Management Plan in the fall of 2015.
>
> "Mountain biking will no longer be an allowed use at RVNA as of March 16, 2015. The two bureaus will continue to work together with the community to develop a plan for RVNA that meets our common goals of protecting water quality and watershed health, restoring aquatic and terrestrial habitat, and providing recreation access that is compatible with the protection of natural resources.
>
> "The City recognizes the existing and growing need for additional nature-based mountain biking experiences within our City park system. While some natural areas may be able to accommodate mountain biking, other factors must also be considered when evaluating this type of nature based recreational use. We, as Commissioners of PP&R and BES, believe completion of a Citywide Off-Road Cycling Plan is the best course of action for meeting this demand. A comprehensive biking plan will identify

> the most appropriate biking opportunities within our City park system, while protecting the conservation values of our natural areas and the enjoyment and safety of all park users. Towards this end, funding for a Citywide Off-Road Cycling Plan is included in the requested PP&R Fiscal Year 2015-2016 budget. * * *" Motion to Dismiss, Exhibit G.

On the same date, the city posted a "frequently asked questions" document on its website, which includes the following:

> "**What uses at RVNA are no longer allowed?** As of March 16th, mountain biking will no longer be an allowed use at RVNA. Trail building, camping, and fires are also prohibited.
>
> "**Why is mountain biking no longer an allowed use?** In order to protect RVNA's sensitive natural resources, the Commissioners of PP&R and BES have decided to limit uses to passive nature recreation.
>
> "**What measures will be taken to provide for mountain biking opportunities in the City of Portland?** PP&R will develop a Citywide Off-Road Bicycle Master Plan to identify the most appropriate mountain biking opportunities within the City park system. Funding for this planning process will be included in PP&R's proposed FY 2015-2016 budget." Motion to Dismiss, Exhibit F.

Petitioner appealed the March 2, 2015 letter to LUBA.

JURISDICTION

The city moves to dismiss this appeal, arguing that the March 2, 2015 letter is not a "land use decision" subject to LUBA's jurisdiction.

As relevant here, LUBA's jurisdiction is limited to review of "land use decisions" as defined at ORS 197.015(10)(a), *i.e.*, a final decision or determination made by a local government that concerns the adoption, amendment or application of the statewide planning goals, a comprehensive

plan provision, a land use regulation or a new land use regulation.[1] The city argues that the March 2, 2015 letter is not a land use decision under that definition for two reasons: (1) it does not concern the adoption, amendment or application of any goal, comprehensive plan provision or land use regulation, and (2) it is not a "final" decision regarding whether mountain biking is allowed in the RVNA.

Petitioner responds that the March 2, 2015 letter concerns the application or amendment of city comprehensive plan policies that implement Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) and 8 (Recreation). According to petitioner, the RVNA is Site 117 of the Southwest Hills Resource Protection Plan, which is part of the city's Goal 5 inventory of significant natural areas. Petitioner argues that the March 2, 2015 letter justified the prohibition of mountain biking in the RVNA in order to protect the RVNA's water qualify and natural resources, which petitioner contends constitutes an application of the city's comprehensive plan policies related to water quality and natural resource protection. For the same reason, petitioner argues that that prohibition of mountain biking also constitutes an

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[1] ORS 197.015(10)(a)(A) defines "land use decision" to include:

> "A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
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> "(i) The goals;
>
> "(ii) A comprehensive plan provision;
>
> "(iii) A land use regulation; or
>
> "(iv) A new land use regulation[.]"

application or violation of city comprehensive plan policies implementing Goal 8, Recreation. Further, because the March 2, 2015 letter describes the prohibition on mountain biking as a "new policy," petitioner argues, the March 2, 2015 also constitutes the "amendment" of the city's comprehensive planning documents related to natural resource protection and recreational uses.

On finality, petitioner argues that the March 2, 2015 letter is a final decision because it purports to permanently close existing trails that were previously open to mountain bikes, and permanently exclude mountain biking from consideration as a potential use within the RVNA in the current land use management planning process.

Finally, petitioner argues that even if the March 2, 2015 letter is not a "land use decision" as defined at ORS 197.015(10)(a), the letter nonetheless falls within LUBA's jurisdiction under the "significant impacts" test articulated in *City of Pendleton v. Kerns*, 294 Or 126, 134, 653 P2d 992 (1982) and *Billington v. Polk County*, 299 Or 471, 480, 703 P2d 232 (1985).[2]

A. ORS 197.015(10)(a)(A) Land Use Decision

As defined by ORS 197.015(10)(a), a land use decision must be "final" decision. As noted, the city argues that the March 2, 2015 letter is not a final decision regarding whether mountain biking is allowed in the RVNA, because that issue is one of the issues discussed in the current RVNA management plan process, and also an issue potentially on the table if the city proceeds with the citywide off-road bicycle master planning process alluded to in the March 2, 2015 letter and mentioned in the frequently asked questions document. We

[2] The significant impacts test was first recognized in *Peterson v. Klamath Falls*, 279 Or 249, 253-54, 566 P2d 1193 (1977).

understand the city to argue that in this context the March 2, 2015 letter should be viewed as an interim or interlocutory determination regarding mountain biking in the RVNA, not a final decision.

If the current RVNA management plan process, scheduled for completion in September 2015, were a land use planning process that would result in a land use decision, that is, a final decision regarding what uses will be allowed within the RVNA, we might agree with the city that the March 2, 2015 should be viewed only as an interim or interlocutory determination, pending a final resolution in that management plan process. However, in a reply pleading, the city takes the position that the current natural area management plan process is not a land use planning process that will result in a land use decision (although such a process exists in the city's toolbag pursuant to Portland City Code (PCC) 33.430.310 *et seq.*), but rather merely an internal agency process to develop management guidelines for the RVNA. Seen in that context, we do not believe it accurate to view the March 2, 2015 letter as an interim or interlocutory determination regarding mountain biking in the RVNA, pending a final resolution of that issue in the adoption of a natural area management plan.

The city also argues that a final decision regarding mountain biking in the RVNA will be made in adoption of a citywide off-road bicycle master plan. PP&R has requested funding for such a master plan, but the prospects and timing of developing the master plan are currently uncertain. Because the adoption and the content of such a master plan is speculative at this point, we disagree with the city that the March 2, 2015 letter should be viewed as an interim or interlocutory decision regarding mountain biking in the RVNA,

pending a final decision on that issue in a future master plan process, if it occurs.

For the foregoing reasons, the city has not established that the March 2, 2015 letter is not a "final" decision. However, we agree with the city the March 2, 2015 letter does not appear to concern the application or amendment of any statewide planning goal, comprehensive plan provision or land use regulation, and for that reason does not constitute a "land use decision" as defined at ORS 197.015(10)(a)(A).

Petitioner bears the ultimate burden of demonstrating that the challenged decision is a land use decision. *Billington*, 299 Or at 475. On this point, petitioner argues that the city's stated intent in limiting recreational uses in the RNVA to passive uses is to preserve natural resource and water quality values, and the March 2, 2015 letter therefore must concern the application of comprehensive plan policies concerning natural resource and water quality. However, the March 2, 2015 letter does not mention or apply any comprehensive plan policies, and petitioner does not identify any comprehensive plan policies that were applied or that should have been applied. *Jaqua v. City of Springfield*, 46 Or LUBA 566, 574 (2004). The city's comprehensive plan may include policies that would apply to a decision to restrict or prohibit mountain biking in the RVNA, but if so, petitioner has not identified them.

Petitioner also argues that the March 2, 2015 letter constitutes a *de facto* amendment of the city's comprehensive plan policies that implement Goal 8, and for that reason falls within the ORS 197.015(10)(a)(A) definition of "land use decision." However, again, petitioner does not identify any comprehensive plan policies implementing Goal 8 that were "amended" by the March 2, 2015

letter, or explain how a letter could possibly amend the city's comprehensive plan. Absent a more developed argument, petitioner has not demonstrated that the March 2, 2015 letter constitutes a "land use decision" as defined at ORS 197.015(10)(a)(A).

B. Significant Impacts Land Use Decision

Finally, petitioner argues that even if the March 2, 2015 letter does not qualify as an ORS 197.015(10)(a)(A) land use decision, the letter nonetheless is subject to LUBA's jurisdiction under the significant impacts test.

We have held that the "significant impact" test is met only if the decision creates an "actual, qualitatively or quantitatively significant impact on present or future land uses." *Carlson v. City of Dunes City*, 28 Or LUBA 411, 414 (1994); *Keating v. Heceta Water District*, 24 Or LUBA 175, 181-82 (1992). Petitioner argues that the RVNA trails represent over 50 percent of the single-track trails legally open to mountain bikes in the City of Portland, and that the March 2, 2015 letter, in prohibiting mountain biking in the RVNA, significantly affected the status quo of mountain biking access within the entire city. For purposes of this opinion, we assume without deciding that petitioner is correct that closing 50 percent of city trails formerly open to mountain biking constitutes a "significant" impact on present and future land uses.

In reply, the city notes that the March 2, 2015 letter was issued by two city commissioners who are, as relevant here, tasked with managing city-owned natural areas. The city argues that management of public property such as parks or natural areas commonly involves operational decisions concerning public access, hours of operation, and the terms under which the public can enter and use city-owned property, for reasons that have little or nothing to do with land use planning and zoning laws. In this capacity, the city argues, it is

acting as much like a private property owner making decisions affecting the use of its land. According to the city, while such local government operational or property management decisions might have indirect impacts on the use of public property, such decisions should not be viewed as land use decisions subject to LUBA's exclusive review under the significant impacts test.

We agree with the city that petitioner has not demonstrated that it is appropriate for LUBA to review the March 2, 2015 letter under the judicially-created significant impacts test. In its capacity as a custodian and manager of public lands, a local government commonly makes decisions that have the effect of restricting public access and the use of that land. For example, a city parks bureau may decide to close trails within a public park to dog-walkers, in order to avoid conflict with other users, to prevent harm to wildlife, or for many other reasons that have little or nothing to do with land use planning or regulation, and which may not be governed by any standards at all. In our view, such operational or property management decisions to restrict public access or public use of public property should not be subject to LUBA's review under the significant impacts test, even if such decisions can be said to significantly limit public use of the park.

We emphasize that by definition a significant impacts land use decision does not concern the application of any statewide planning goal, land use administrative rule, comprehensive plan provision or land use regulation. (If it did, it would instead qualify as a statutory land use decision). In the very rare cases when the significant impacts test is deemed met, LUBA's review is typically conducted under statutes or other laws, such as road vacation statutes, that provide standards for the decision, and that have some direct bearing on the use of land. *Billington*, for example, involved a road vacation decision

under the then-applicable statutes, which included standards requiring the county to consider the impacts on access for nearby property owners, and whether the vacation is in the "public interest." *See also Mekkers v. Yamhill County*, 38 Or LUBA 928, 931 (2000) (road vacation that would set "the stage for further development that will alter the character of the surrounding land uses"); *Harding v. Clackamas County*, 16 Or LUBA 224, 228 (1987), *aff'd* 89 Or App 385, 750 P2d 167 (1988) (vacation of road that would alter traffic pattern of nearby properties).

In our view, LUBA should exercise review jurisdiction over a decision under the significant impacts test only if the petitioner identifies the non-land-use standards that the petitioner believes apply to the decision and would govern LUBA's review. Further, we believe that those identified non-land-use standards must have *some* bearing or relationship to the use of land. To return to the example above, a decision to close park trails to dog-walkers, if the only identified standard or issue on appeal is the alleged violation of a statute concerned with companion animal rights then the circuit court is a far better venue for review of that kind of decision than is a specialized land use decision review body like LUBA.

In the present case, petitioner identifies no statutes or other standards or laws that applied to the March 2, 2015 letter or that petitioner believes would govern LUBA's review of the March 2, 2015 letter. The closest petitioner comes is to argue that the city committed procedural error by issuing the March 2, 2015 letter without providing petitioner notice and an opportunity to participate in the decision. However, petitioner identifies no statutes or other laws that would apply to require the city to provide petitioner notice and an

opportunity to participate in the process to issue the March 2, 2015 letter, and we are aware of none.

Petitioner does broadly and vaguely assert that the process under which the March 2, 2015 letter was issued "implicates constitutional due process issues, Statewide Planning Goal 1 [Citizen Involvement], and numerous statutory and local code provisions." Response 10. However, such undeveloped assertions fall far short of establishing that the federal Due Process Clause, Goal 1, or unspecified statutes and local code provisions would apply to allow LUBA meaningful review of the March 2, 2015 letter.

As explained, we believe that to successfully establish LUBA's jurisdiction under the significant impacts test, the petitioner must identify the statutes or other applicable laws that will provide the standards under which LUBA will conduct its review, and show that such standards have some relationship to land use. In the present case, petitioner has not made that demonstration.

For the foregoing reasons, petitioner has not established that the March 2, 2015 decision is either a statutory or significant impacts land use decision, or other decision subject to LUBA's limited jurisdiction.

Petitioner has not requested that this appeal be transferred to circuit court, pursuant to ORS 34.102 and OAR 661-010-0075(11). Accordingly, this appeal must be dismissed.

The appeal is dismissed.