

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 ARLINGTON HEIGHTS
4 NEIGHBORHOOD ASSOCIATION,
5 *Petitioner,*

6 vs.

7
8
9
10 CITY OF PORTLAND,
11 *Respondent.*

12 LUBA No. 2003-151

13
14
15 FINAL OPINION
16 AND ORDER

17
18 Appeal from City of Portland.

19
20 John R. Brooke, Portland, represented petitioner.

21
22 Kathryn S. Beaumont, Senior Deputy City Attorney, Portland, represented
23 respondent.

24
25 BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,
26 participated in the decision.

27
28 DISMISSED

11/04/2003

29
30 You are entitled to judicial review of this Order. Judicial review is governed by the
31 provisions of ORS 197.850.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

NATURE OF DECISION

Petitioner appeals a development permit issued on June 23, 2003, that allows the placement of covers and support structures on water reservoirs located in Washington Park.

DECISION

A. Background

The reservoirs at issue in this appeal were constructed in 1894 to provide drinking water to the city’s west side. In 2002, the city council concluded that, for public safety reasons, the city’s drinking water reservoirs should be placed in underground storage tanks. However, until construction of the underground facilities is completed, the city plans to install temporary covers over the reservoirs to protect the integrity of the water supply.

In anticipation of the installation of those temporary covers, the Portland Water Bureau submitted a use determination request in March 2003 to the city Bureau of Development Services (BDS). The use determination request inquired whether the proposed temporary covers would result in a development action that requires land use review under the city code. On March 6, 2003, BDS issued its use determination, concluding that no land use review is required. This conclusion is based on the finding that the reservoirs themselves are allowed conditional uses within the Open Space zone, and that covering the reservoirs is a modification that falls within the category of activities associated with the existing conditional use that are allowed without further land use review. The city council adopted the BDS use determination decision as its own on March 10, 2003. Petitioner received notice of the council’s use determination decision, but did not appeal that decision to LUBA.

After BDS concluded that no land use review was necessary, the Water Bureau proceeded to obtain development permits to construct the temporary covers. Those development permits were reviewed pursuant to the city’s structural codes for non-residential development. According to the city, at least some members of petitioner were aware that

1 those reviews were in progress, and that at least some members of petitioner knew that the
2 development permit at issue in this appeal was issued on June 23, 2003. Petitioner filed a
3 notice of intent to appeal the issuance of the development permit on September 24, 2003.

4 **B. Motion to Dismiss**

5 The city moves to dismiss this appeal, arguing (1) the challenged decision is not a
6 land use decision or limited land use decision; and (2) even if the decision is a land use
7 decision or limited land use decision, petitioner did not file a timely appeal.

8 **1. Land Use Decision**

9 ORS 197.015(10)(a)(A) defines “land use decision” to include:

10 “A final decision or determination made by a local government or special
11 district that concerns the adoption, amendment or application of:

12 “(i) The goals;

13 “(ii) A comprehensive plan provision;

14 “(iii) A land use regulation; or

15 “(iv) A new land use regulation[.]”

16 The city argues that the challenged decision is not a land use decision, because it does
17 not concern, adopt or apply statewide planning goals, comprehensive plan provisions, or land
18 use regulations. According to the city, the challenged decision merely reviews the proposed
19 installation to ensure that grading and environmental standards, which are not part of the
20 city’s zoning or building codes, are met. The city concedes that the decision includes a
21 reference to the city’s zoning code; however, the city contends that the reference shows that
22 installation is in accordance with the March 2003 use determination, and does not itself apply
23 any zoning code provision.

24 In addition, the city argues that the challenged decision does not constitute a
25 “significant impacts” land use decision as described in *Pendleton v. Kerns*, 294 Or 126, 133-
26 134, 653 P2d 992 (1982). The city contends that the cover and supporting structure do not

1 affect the use of the reservoir or the surrounding park. The city concedes that the installation
2 of the cover will change the look of the reservoir, but contends that the change in the scenery
3 is not a “significant impact” on land use.

4 Petitioner responds that the challenged decision is either a statutory land use decision
5 or a significant impacts land use decision. According to petitioner, the March 2003 use
6 determination is only a theoretical answer to a theoretical question. In other words, the
7 question put to the city council was whether a use, as described by the Water Bureau, was
8 allowed within the Open Space zone. Petitioner contends that the use determination did not
9 accurately describe the proposed use or its impacts and, therefore, that March 2003 use
10 determination is not the land use decision that is needed to allow the proposed alterations to
11 the reservoirs. According to petitioner, the use determination did not consider the impact the
12 construction would have on the reservoirs’ status as historic landmarks, nor did it consider
13 the reservoirs’ value as part of the park’s open space attributes. Petitioner also argues that
14 open reservoirs provide a water purification function that is not considered in the city’s
15 decision to cover the reservoirs. Therefore, petitioner contends the appealable land use
16 decision was made when the city issued permits that result in development, and not when the
17 city issued its use determination decision.

18 The March 2003 use determination decision is clearly a land use decision appealable
19 to LUBA.¹ See *Buckman Community Assoc. v. City of Portland*, 36 Or LUBA 630 (1999),

¹ ORS 227.160(2) provides, in relevant part:

“‘Permit’ means discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation. ‘Permit’ does not include:

“* * * * *

“(b) A decision which determines the appropriate zoning classification for a particular use by applying criteria or performance standards defining the uses permitted within the zone, and the determination applies only to land within an urban growth boundary[.]”

1 *aff'd* 168 Or App 243, 5 P3d 1203 (2000) (use determination classifying residential treatment
2 facilities as a household use permitted outright in the city's R-2.5 zone); and *North Portland*
3 *Citizens v. City of Portland*, 32 Or LUBA 70, 73 (1996), *aff'd* 145 Or App 548, 930 P2d 902,
4 *rev den* 325 Or 247 (1997) (use determination classifying a parole and probation office as an
5 office use permitted outright in city's General Commercial zone). The March 2003 notice of
6 the city's use determination decision specifically identified LUBA as the body authorized to
7 review the city's decision. If petitioner had appealed the city's March 2003 use determination
8 decision, it could have advanced the same argument that it advances in this appeal: that the
9 installation of the covers exceeds what may be permitted as a modification to a utility use in
10 an Open Space zone. Petitioner did not appeal that decision, and may not collaterally attack
11 that decision by appealing the city's issuance of the June 23, 2003 development permit. More
12 importantly, petitioner does not identify anything authorized by the June 23, 2003
13 development permit that is different from or goes beyond that contemplated by the March
14 2003 use determination decision. In other words, the June 23, 2003 decision does not
15 constitute an implicit use determination, or a use determination of any kind.

16 We now turn to petitioner's response that the June 23, 2003 development permit is a
17 land use decision because the development permit relies on the March 2003 use
18 determination decision rather than independently considering whether the activities that will
19 occur under the development permit are allowed within the Open Space zone. Mere reference
20 to a prior land use decision does not make the document that contains the reference a land
21 use decision. *See Billington v. Polk County*, 299 Or 471, 475, 653 P2d 996 (1985) (decision
22 that "merely touches on" aspects of comprehensive plan not a land use decision); *Kent v. City*
23 *of Portland*, 38 Or LUBA 942, 946-947 (2000) (letter from city commissioner to petitioners,
24 which refers to a prior decision that applied land use standards but does not itself apply or
25 consider land use regulations, is not a land use decision that may be appealed to LUBA.) The
26 June 23, 2003 development permit did not itself apply any land use regulations, nor was the

1 application of any land use regulations necessary to issue such a permit. Accordingly, the
2 June 23, 2003 decision is not a land use decision.

3 **2. “Significant Impacts” Land Use Decision**

4 We also agree with the city that the challenged decision is not a significant impacts
5 land use decision. A significant impacts land use decision is one where the challenged
6 decision

7 “effects a significant change in the land use *status quo* of the area and is not
8 simply [a] *de minimus* improvement project * * *.” *City of Pendleton v.*
9 *Kerns*, 294 Or at 135 (italics in original).

10 An initial problem with petitioner’s argument is that the impacts it relies on are
11 consistent with the March 10, 2003 use determination. Those impacts might provide a basis
12 for arguing the March 10, 2003 statutory land use decision is also a significant impacts test
13 land use decision, but they would not make the June 23, 2003 a second land use decision,
14 separate from the March 10, 2003 decision.

15 That problem aside, the evidence is that the proposed construction will (1) repair
16 piping to reduce leakage; (2) install substructure to accommodate the reservoir covers; (3)
17 install the reservoir covers themselves; (4) temporarily remove fencing to allow for the
18 construction; and (5) require some minor grading and construction-related site restoration
19 around the reservoirs. None of those activities will result in a significant change in the
20 existing land use status quo in Washington Park. Nor will the construction cause a significant
21 impact on the reservoirs’ historic structures or scenic attributes. *See Miller v. City of Dayton*,
22 22 Or LUBA 661, 666 (1992) (expansion of basketball court that may affect historic
23 landscape, including historic fir trees, is not a significant impact decision even though the
24 park had “reached the saturation point for displacement of green open space”). To the extent
25 some change will occur as a result of the city’s decision to issue the development permit, that
26 change is temporary.

1 **C. Conclusion**

2 Because the June 23, 2003 development permit is not a land use decision or a
3 significant impacts land use decision, we do not have jurisdiction to review the city's
4 determination that the proposed construction satisfies the city's development standards. ORS
5 197.825(1). Petitioner has not filed a motion to transfer the challenged decision to circuit
6 court; therefore this appeal is dismissed.² OAR 661-010-0075(11)(a).

² Because we dismiss this appeal because the challenged decision is not a land use decision, we need not and do not address the city's untimely filing argument or petitioner's motion to stay.