BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROBIN JAQUA and JOHN JAQUA,
Petitioners,

vs.

CITY OF SPRINGFIELD,
Respondent,

and

PEACEHEALTH,
Intervenor-Respondent.

LUBA Nos. 2003-145, 2003-146 and 2003-147

FINAL OPINION
AND ORDER

Appeal from City of Springfield.

Allen L. Johnson, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Johnson and Sherton, P.C.

Meg E. Kieran, Springfield, file the response brief and argued on behalf of respondent. With her on the brief was Harold Leahy and Kieran.

Steven P. Hultberg, Portland, filed the response brief and argued on behalf of the intervenor-respondent. With him on the brief was Steven L. Pfeiffer and Perkins Coie, LLP.

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

TRANSFERRED (LUBA No. 2003-145) 03/04/2004
REMANDED (LUBA Nos. 2003-146 and 2003-147) 03/04/2004

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

In these consolidated appeals, petitioners appeal (1) a city council decision authorizing amendments to an annexation agreement, (2)a city Public Works Department approval of a land and drainage alteration permit (LDAP), and (3) a city Development Services Department approval of a floodplain overlay development permit (floodplain permit).

FACTS

Intervenor-respondent (intervenor) owns property next to the McKenzie River in the Gateway area of the City of Springfield. Intervenor wishes to construct a hospital and related development on that site. As a condition of annexing the subject property into the city, intervenor entered into two annexation agreements with the city, both of which provide in relevant part that "no part of the Property may be developed prior to City approval of a Master Plan[.]" Record 17, 31 (LUBA No. 2003-145).

On April 21, 2003, the city adopted Ordinances 6050 and 6051. Ordinance 6051 amends the Metro Area General Plan Diagram. Ordinance 6051 amends the city's Gateway Refinement Plan (GRP) diagram and text. These plan amendments are necessary to allow intervenor's desired development of the property. As relevant here, Ordinance 6051 amended GRP Residential Element Policy 13.0 and GRP Residential Implementation Action 13.3 to require approval of a master plan prior to urban development of the area that includes intervenor's property.[1] Ordinances

[1] As amended by Ordinance 6051, GRP Residential Element Policy 13.0 provides:

> "A Master Plan shall be approved under a Type IV review process for areas larger than 5 acres within the 'McKenzie-Gateway MDR site' on the Refinement Plan diagram; subsequent to annexation and prior to annexation and urban development of any portion of the Master Plan area."

As amended, GRP Residential Element Implementation Action 13.3 provides:

> "All development within the McKenzie-Gateway MDR Site shall be consistent with an approved Master Plan."

6050 and 6051 were appealed to LUBA in a separate consolidated appeal. Subsequently, LUBA issued an opinion that remanded Ordinances 6050 and 6051 to the city for reasons that have nothing to do with the cited GRP policies and actions. *Jaqua v. City of Springfield*, ___ Or LUBA ___ (LUBA Nos. 2003-072, 2003-073, 2003-077, 2003-078, January 5, 2004), *appeal pending* (*Jaqua I*).

Following adoption of Ordinances 6050 and 6051, intervenor applied for a master development plan necessary to site the proposed hospital under those ordinances, but the city has not yet approved that master plan. However, on July 14, 2003, intervenor filed an application for an LDAP seeking authorization to excavate 74,300 cubic yards of soil from the proposed hospital basement and to place about 56,500 cubic yards of fill where proposed parking areas are to be located. City staff took the position that the proposed grading and excavation was inconsistent with the prohibition in the two annexation agreements on "development" of the subject property prior to city approval of a master plan.

On September 8, 2003, the city council voted to approve amendments to the two annexation agreements that provide an express exception to the prohibition on "development" prior to master plan approval, for "grading activities authorized under a Land and Drainage Alternation permit approved by the City of Springfield." Petitioners appeared at the September 8, 2003 city council meeting and testified in opposition to the proposed amendments. The city council's September 8, 2003 decision is the subject of LUBA No. 2003-145.

On September 10, 2003, a city planner issued an LDAP allowing intervenor to excavate and grade approximately 67,000 cubic yards of earth on the subject property. The LDAP decision includes findings rejecting petitioners' argument that GRP Residential Element Policies 13.0 and 13.3 apply to the LDAP. On September 11, 2003, city planning staff issued a floodplain permit under Springfield Development Code (SDC) Chapter 27 (FP Floodplain Overlay District) approving proposed fill in the McKenzie River floodplain. These city decisions are the subject of LUBA Nos. 2003-146 and 2003-147, respectively. These three appeals were filed on September

18, 2003. On September 23, 2003, LUBA issued an order consolidating the three appeals for LUBA review. Subsequently, LUBA denied a motion from petitioners to stay the challenged LDAP and floodplain permits. *Jaqua v. City of Springfield*, ___ Or LUBA ___ (LUBA No. 2003-145/146/147, October 1, 2003, Order).[2]

JURISDICTIONAL ISSUES

A. Standing

The city argues that petitioners' only appearance before the city in this matter is their appearance at the city council's September 8, 2003 meeting. According to the city, the September 8, 2003 city council meeting was not a "hearing" at which a petitioner could "appear" within the meaning of ORS 197.830(2), because the city council merely authorized staff to amend the annexation agreements and did not "determine a land use matter within the meaning of ORS 197.830." Respondent's Brief 1.

We do not understand the city's argument. ORS 197.830(2) does not require that petitioners appear at a "hearing," only that petitioners appear "before" the local government orally or in writing.[3] Petitioners appeared both orally and writing before the only public proceeding the city conducted with respect to any of the three challenged decisions. That the proceeding the city conducted may or may not have constituted a "hearing" has no bearing on whether petitioners "appeared" before the local government for purposes of ORS 197.830(2).

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[2] It is our understanding that the grading and excavation work authorized by the challenged LDAP and floodplain permits was completed in October 2003.

[3] ORS 197.830(2) provides:

> "* * * a person may petition [LUBA] for review of a land use decision or limited land use decision if the person:
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> "(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section; and
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> "(b) Appeared before the local government, special district or state agency orally or in writing."

B. Mootness

Intervenor moves to dismiss these consolidated appeals because the only issue raised in the petition for review—whether the challenged decisions violate the GRP provisions amended by Ordinance 6051—is a moot question in light of LUBA's remand of Ordinance 6051 in *Jaqua I*. According to intervenor, the result of LUBA's remand is that Ordinance 6051 is ineffective, which means the GRP provisions that petitioners rely upon no longer apply. *See Western States Dev. Corp v. Multnomah County*, 37 Or LUBA 835 (2000) (a final appellate decision remanding post-acknowledgment plan amendments means that the amendments are no longer "effective" and can no longer be applied to approve a land use permit). Because Ordinance 6051 is no longer "effective," intervenor argues, LUBA's resolution of whether the challenged decisions violate Ordinance 6051 would have no practical effect. *Barr v. City of Portland*, 22 Or LUBA 504 (1991) (LUBA will dismiss an appeal as moot if LUBA's decision on the merits would be without practical effect).

We disagree with intervenor that these appeals are moot. First, it is not clear to us that the plan amendments at issue in *Jaqua I* are "ineffective" by virtue of our remand in that case, under the reasoning in *Western States Dev. Corp*. The permit at issue in *Western States Dev. Corp.* was issued after the 21-day period to appeal LUBA's decision to the Court of Appeals had expired, a point we relied upon in concluding that a "final appellate decision" remanding post-acknowledgment plan amendments renders those amendments "ineffective." Here, both petitioners and the city have appealed LUBA's remand in *Jaqua I* to the Court of Appeals. Whether our remand in *Jaqua I* renders Ordinance 6051 "ineffective" under the present circumstances is not clear to us.

Second, we note that prior to amendment by Ordinance 6051, GRP Residential Element Policy 13.0 required approval of a "CDP" prior to "urban development of any portion of the site" within the McKenzie-Gateway MDR site. Similarly, GRP Residential Element Implementation Action 13.3 provided that "[a]ll development within the McKenzie-Gateway MDR Site shall be consistent with an approved CDP." A "CDP" is apparently a "conceptual development plan," a

type of discretionary approval. As relevant here, Ordinance 6051 simply exchanged the term "CDP" in policies 13.0 and 13.3 for the term "Master Plan." Ordinance 6051 did not impose the prohibition or sequencing requirement at issue in this appeal; as relevant here it only changed the type of approval that must precede "urban development" or "development." In other words, even if the GRP amendments in Ordinance 6051 are "ineffective," it would appear that the unamended GRP imposes the same or similar prohibition or sequencing requirement that is at issue in this appeal. No party contends that the city has issued a "CDP" for the subject property. For that reason, we cannot say that LUBA's remand in *Jaqua I* renders our decision on the merits of the present appeals without practical effect, or otherwise moots these appeals.

C. Land Use Decisions

Petitioners contend that the challenged decisions are either "land use decisions" as defined by ORS 197.015(10) or "significant impact" land use decisions under *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 992 (1982), and therefore subject to LUBA's exclusive jurisdiction over land use decisions. The city and intervenor dispute that any of the challenged decisions are within LUBA's jurisdiction.

1. Statutory Land Use Decision

In relevant part, ORS 197.015(10) defines "land use decision" as a final local government decision that "concerns the adoption, amendment or application of" a comprehensive plan provision or land use regulation.[4] A "land use decision" does not include a decision subject to land use standards that do not require interpretation or the exercise of policy or legal judgment.

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[4] ORS 197.015(10) provides, in relevant part:

"'Land use decision:'

"(a) Includes:

"(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

"(i) The goals;

a. LUBA No. 2003-146: LDAP Decision

According to respondents, the challenged LDAP decision is not a "land use decision" because in issuing that decision the city did not apply any "comprehensive plan provision" or "land use regulation." Respondents argue that the regulations governing LDAPs at Springfield Municipal Code (SMC) Chapter 8 are not "land use regulations" within the definition of that term at ORS 197.015(11), because they do not establish standards for implementing a comprehensive plan. While GRP policies 13.0 and 13.3 are "comprehensive plan provisions," respondents concede, the city did not *apply* those policies in issuing the challenged LDAP decision. Even if those policies are understood to prohibit grading under a LDAP prior to master plan approval, as petitioners contend, respondents argue that the challenged LDAP decision would not "concern the * * * application" of those GRP policies unless the LDAP decision actually applied those policies or the policies contain independent approval criteria for the LDAP. Because nothing in the SMC, SDC or GRP requires that the city apply GRP policies 13.0 and 13.3 as approval criteria to a LDAP decision, respondents contend, such policies are inapplicable and, therefore, there is no basis to conclude that the challenged LDAP decision is a statutory land use decision.

Petitioners respond, and we agree, that whether the city actually *applied* GRP policies 13.0 and 13.3 as approval criteria is not dispositive, because ORS 197.015(10) defines "land use decision" to include decisions that "concern" the application of comprehensive plan provisions and land use regulations. A local government decision "concerns" the application of a plan provision or

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"(ii) A comprehensive plan provision;

"(iii) A land use regulation; or

"(iv) A new land use regulation;

"* * * * *

"(b) Does not include a decision of a local government:

"(A) Which is made under land use standards which do not require interpretation or the exercise of policy or legal judgment[.]"

land use regulation if (1) the decision maker was required by law to apply its plan or land use regulations as approval standards, but did not, or (2) the decision maker in fact applied plan provisions or land use regulations. *Bradbury v. City of Independence*, 18 Or LUBA 552, 559 (1989). Here, the question is whether the city was required by law to apply GRP policies 13.0 and 13.3 as approval standards. We turn to that question.[5]

The city's LDAP decision includes findings concluding that GRP policies 13.0 and 13.3 are not applicable approval criteria with respect to the LDAP decision.[6] The findings rely on the fact that SMC Chapter 8 does not expressly require compliance with the GRP, and further cite to SMC 8.318(7), which contemplates that an LDAP may issue prior to the approval of preliminary or tentative development plans. The city's findings do not address the terms of GRP policies 13.0 and 13.3 or explain the basis for the city's apparent view that the challenged LDAP does not authorize "development" within the meaning of those policies. For the following reasons, we agree with

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[5] It is awkward at least that, in order to resolve that question and the jurisdictional issue in the present case, we must also effectively determine the merits of petitioners' assignment of error, which argues that GRP policies 13.0 and 13.3 apply to prohibit the city from approving "development" prior to master plan approval. However, given the statutory definition of "land use decision" and the nature of petitioners' assignment of error, that awkwardness is inescapable. *See Southwood Homeowners v. City Council of Philomath*, 106 Or App 21, 806 P2d 162 (1991) (LUBA must decide the merits of whether a challenged subdivision is consistent with applicable land use standards in order to rule on a motion to dismiss, under *former* ORS 197.015(10)(a)(B), which excluded from LUBA's jurisdiction approval or denial of a subdivision that is consistent with land use standards).

[6] The LDAP decision includes the following unsigned findings apparently drafted by planning staff:

> "The City's issuances of [LDAPs] are not quasi-judicial land use decisions because they do not require application of either the [SDC] or the Comprehensive Plan. The record for this LDAP includes a letter [from petitioners]. These findings have been adopted solely to respond to this letter.
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> "The letter alleges that the issuance of the LDAP violates GRP Residential Element Policies 13.0 and 13.3 because the LDAP allows 'development' before the approval of a master plan for the PeaceHealth property. The City finds that the issuance of the LDAP does not violate either GRP policy because the policies are not applicable approval criteria for the LDAP. [SMC] Chapter 8, which regulates the issuance of LDAPs, does not require compliance with the Metro Plan or individual GRP policies or implementation measures. Moreover, [SMC] 8.318(7) specifically allows for the issuance of LDAPs prior to the approval of preliminary or tentative development plans. Consequently, the City finds that issuance of the LDAP does not require compliance with the notice, hearing and other requirements of ORS 197.763 or the City's Type III procedures." Record 25 (LUBA No. 2003-146).

petitioners that the city's interpretation of the GRP and the SMC is incorrect. *McCoy v. Linn County*, 90 Or App 271, 275-76, 752 P2d 323 (1988) (LUBA's standard of review of a staff interpretation of local land use regulations is whether the interpretation is reasonable and correct.)

Starting with the text of the GRP policies, the terms of GRP policies 13.0 and 13.3 clearly prohibit approval of "urban development" or "development" prior to master plan approval in the McKenzie-Gateway MDR-zoned area that includes the subject property. However, the GRP policies do not define or otherwise specify the activities that constitute either "urban development" or "development." We understand the city and intervenor to argue that issuance of an LDAP does not authorize "development" as that term is used in GRP policies 13.0 and 13.3, and therefore those policies are not "applicable" to issuance of the challenged LDAP. Petitioners, on the other hand, point out that the SDC defines the term "development" broadly to include "[a]ny human-made change to improved or unimproved real estate," including "excavation."[7] Petitioners contend that there is no reason to believe that the term "development" used in GRP policies 13.0 and 13.3 is intended to mean something other than, or less than, the SDC definition of that term, and therefore the proposed excavation and fill authorized by the challenged LDAP constitute "development" under the GRP policies.

In addition, petitioners note that the city apparently views language in the annexation agreements, that "no part of the Property may be developed prior to City approval of a Master Plan," to prohibit issuance of the challenged LDAP prior to master plan approval, but the city does

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[7] SDC 2.020 defines" development" in relevant part as follows:

> "Any human-made change to improved or unimproved real estate, including but not limited to a change in use; construction, installation or change of a structure; subdivision and partition; establishment or termination of a right of access; storage on the land; drilling and site alteration such as that due to land surface mining, dredging, paving, *excavation* or clearing of trees and vegetation. * * * As used in Article 27, FP Floodplain Overlay District, ['development' means] any human-made change to improved or unimproved real estate, including, but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation, or drilling operations located within the area of special flood hazard." (Emphasis added).

not give the same effect to the similarly-worded restriction in the GRP policies. According to petitioners, the city provides no explanation for why "develop[ment]" includes excavation and fill for purposes of the annexation agreements, but "development" does not include the same excavation and fill for purposes of GRP policies 13.0 and 13.3. Finally, petitioners argue that the obvious purpose of GRP policies 13.0 and 13.3 is to prevent piecemeal development that may preclude effective master planning. That purpose is thwarted under the city's interpretation, petitioners argue, because the challenged LDAP authorizes excavation and fill that will as a practical matter determine the location of the proposed hospital and parking area prior to master planning.

We agree with petitioners that as far as the text of the GRP policies and the context provided by relevant SDC provisions are concerned, we perceive no textual basis to conclude that "development" as used in GRP policies 13.0 and 13.3 does not include the excavation authorized by the challenged LDAP. The work authorized by the challenged LDAP appears to fall within the code definition of "development," and we are cited to no language in the code or GRP indicating that "development" as used in the GRP policies means something other than the code definition.[8]

The city's strongest argument to the contrary is the context provided by the LDAP regulations at SMC Chapter 8. The city argues that nothing in SMC Chapter 8 subjects LDAP applications to review under the GRP or any comprehensive plan provision. Therefore, the city argues, the only "approval criteria" applicable to an LDAP application are those contained in SMC Chapter 8. The city notes that SMC 8.328(1) requires a finding that the application "conform to the requirements * * * of other pertinent laws and ordinances," but argues that that reference

[8] We note also that the SDC exempts from the requirement to obtain "development approval" any "excavation or filling of land involving 50 cubic yards or less," except in the FP Flood Plain zone, where any amount of excavation or fill requires "development approval." SDC 3.020(6). Because the excavation and fill authorized in the present case involve more than 50 cubic yards and also involve filling in the FP Flood Plain zone, it would appear by negative implication that the SDC classifies the proposed excavation and fill as something that requires "development approval." Presumably, proposals that require "development approval" are "development" as the city defines that term. That classification and consistent use of the term "development" lends support to the view that "development" as used in GRP policies 13.0 and 13.3 includes the proposed excavation and fill.

does not include the GRP.[9] According to the city, SMC 8.328(1) contemplates that other city departments, for example the planning department, may review the proposed excavation and fill for compliance with applicable regulations such as those in SDC Chapter 27, governing development in the FP Floodplain zone, and then "sign-off" on the LDAP application. However, the city argues, SMC 8.328(1) does not contemplate that the public works director or city planning staff review the LDAP application for compliance with GRP policies or other comprehensive plan policies.

The city further relies on SMC 8.318(7), which allows issuance of an LDAP "in the absence of an approved or conditionally approved preliminary or tentative development plan," subject to additional requirements.[10] According to the city, SMC 8.318(7) indicates that the city

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[9] SMC 8.328(1) provides, in relevant part:

> "The application, plans and specifications and other data filed by an applicant for permit shall be reviewed by the director of public works. Such plan may be reviewed by other departments and agencies to verify compliance with any applicable laws, ordinances, rules, and regulations. If the director of public works finds that the work described in the application for permit and the plans, specifications, and other data filed therewith conform to the requirements as stipulated by the controlling agencies, and other pertinent laws and ordinances, and that the fees specified in section 8.332 of this code have been paid, he shall issue a permit to the applicant."

[10] SMC 8.318(7) provides, in relevant part:

> "All grading done under sections 8.300 to 8.338 must substantially conform to the design and layout of any approved or conditionally approved preliminary or tentative plan and violation of this clause may be grounds for suspension or revocation of the grading permit as prescribed in section 8.330 of this code, as well as being subject to the penalty provisions of this code. Exception: If an applicant requests a grading permit in the absence of an approved or conditionally approved preliminary or tentative development plan, the following requirements shall apply:
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> "(a) The grading shall not result in the need to extend public storm systems to the site or to alter, reconstruct or redirect any existing public open-water stormwater facility,
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> "(b) The permit application shall contain the following additional information:
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> "(i) The name, location, dimensions, direction of flow and top of bank of all adjacent watercourses including those that are shown on the city's Water Quality Limited Watercourse Map;
>
> "(ii) The 100-year floodplain and floodway boundaries and areas of special flood hazard designated by the city engineer as susceptible to inundation of water from any source that may affect the site. If fill occurs in the flood plain, the

did not intend, in adopting the requirements of GRP policies 13.0 and 13.3, to include LDAPs in the scope of development approvals that must be preceded by a master plan.

Finally, the city and intervenor contend that if LDAPs are subject to review for compliance with the GRP or Metro Plan that every grading permit would necessarily be a land use decision subject to the procedural requirements of ORS 197.763 for quasi-judicial hearings. The city and intervenor argue that such a result would overwhelm the city's resources.

The context provided by SMC Chapter 8 does not persuade us that the city intended to exclude excavation and fill authorized by LDAPs from the GRP policy 13.0 and 13.3 requirements that master plan approval precede "development." The city is correct, of course, that nothing in SMC Chapter 8 expressly requires compliance with the GRP or Metro Plan. That is not surprising,

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public works director may require analysis of the effects of the fill on flooding of adjacent properties;

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"(iv) Physical features including, but not limited to riparian vegetation, trees over 5 inches or greater DBH, open drainage ways, watercourses shown on the Water Quality Limited Watercourse Map and their riparian areas, identified archeological and/or historical sites, identified threatened or endangered species habitat, areas considered for inclusion in the City's Goal 5 lands inventory, jurisdictional wetlands and rock outcroppings.

"(c) Unless specifically allowed by the public works director, the features listed in subsection (b)(iv) above shall be retained and protected until such features are fully considered through a site plan review preliminary plan, subdivision tentative plan application, partition tentative plan application, and/or tree felling permit. To ensure retention of trees over 5 inches or greater DBH, the public works director may require a tree protection plan.

"(d) * * * [A]n informational notification shall be provided to owners and residents of property within 100 feet of the property line where the grading will take place. This notification shall be mailed a minimum of 5 days prior to the date the grading will commence and shall include the property address, an 8 1/2" x 11" map of the location of the property including the area where the grading will take place, the amount of material to be graded and approximate dates the work is to take place. * * *

"* * * * *

"(h) All other approvals necessary to proceed with the proposed grading, including such overlay district requirements for floodplain, hillside, historic district, the Willamette Greenway, tree felling or any regulated wetland, or any permits necessary from any other agency having jurisdiction over all or a portion of the work, shall be secured by the applicant prior to issuance of the grading permit."

as in the normal course of events applications for excavation, grading and fill would either accompany a subdivision or similar development request or, if standing alone, would not implicate refinement plan policies such as GRP policies 13.0 and 13.3, which are specific to a particular sub-area within the Gateway Refinement area. Nonetheless, SMC 3.328 contemplates that city departments such as the planning department review LDAP applications for "compliance with any applicable laws, ordinances, rules, and regulations." Planning staff in the present case apparently reviewed the proposed excavation and fill for compliance with SDC standards, concluded that the standards for development within the FP Floodplain district apply, and accordingly evaluated the proposal under those SDC standards. However, the city does not explain why planning staff review under SMC 8.328 is limited to the SDC. It is not immediately apparent to us why planning staff review of a proposal to excavate and fill within the area governed by the GRP could not also include review of the GRP to determine if any specific policies, such as GRP policies 13.0 and 13.3, might govern or regulate such excavation and fill proposals. In the event such policies exist, we see no reason why such refinement plan policies would not constitute "applicable laws, ordinances, rules and regulations." SMC 3.328(1).

Similarly, the context provided by SMC 8.318 is not particularly helpful to city. SMC 8.318(7) certainly indicates that under some circumstances an LDAP may precede approval of a "preliminary or tentative development plan." That phrase appears to refer to subdivision or partition plat approvals, and it is not clear to us whether SMC 8.318(7) would also authorize an LDAP to precede master plan approval, on property where a master plan is indisputably required prior to "development." Be that as it may, we see no reason why the city council could not, as it arguably has, adopt a refinement plan policy governing one sub-area of the city that overrules the sequence allowed elsewhere in the city by SMC 8.318(7). In short, the context provided by SMC 8.318(7) does little to support the city's apparent view that "development" subject to the requirements of GRP policies 13.0 and 13.3 does not include excavation and fill authorized under LDAP permits.

Finally, the respondents' concern that subjecting LDAP applications to review under GRP policies would render all LDAP decisions statutory "land use decisions," and require the city to conduct hearings under ORS 197.763 for all grading permit applications, is not well-taken. First, the city is free to define "development" as used in the GRP more narrowly to exclude excavation and fill authorized under an LDAP and, more generally, to draft GRP or comprehensive plan policies in ways that ensure they do not apply to LDAPs. Second, even if some GRP policies apply to some LDAP decisions, and those decisions thereby become statutory land use decisions, it does not follow that the city is obligated to follow the procedures for quasi-judicial hearings set out at ORS 197.763 in making those decisions. ORS 197.763 governs the conduct of any quasi-judicial land use hearings on an application for a land use decision, but does not itself require that a hearing be conducted for land use decisions. As relevant here, the closest arguable statutory basis to require that the city conduct a hearing is the requirements for statutory "permits" as defined by ORS 227.160(2).[11] However, petitioners do not argue that the challenged LDAP decision, or LDAPs in general, are statutory "permits." *See Tirumali v. City of Portland*, 41 Or LUBA 231, 240, *aff'd* 180 Or App 613, 45 P3d 519, *rev den* 334 Or 632 (2002) (a building permit decision that is a land use decision because it concerns an ambiguous standard requiring interpretation, and therefore is not within the exception to "land use decision" at ORS 197.015(10)(b)(A) or (B), is not necessarily also a statutory "permit" under ORS 227.160(2)).

In sum, the city is incorrect that the only standards applicable to the challenged LDAP are those included within SMC Chapter 8. The city offers no explanation for its apparent view that the proposed excavation and fill do not constitute "development" within the meaning of GRP policies 13.0 and 13.3. Read in context with the code definition of that term, other usages of that term in the

[11] ORS 215.402(4) (applicable to counties) and 227.160(2) (applicable to cities) define "permit" in relevant part as the "discretionary approval of a proposed development of land." ORS 215.402 to 215.437 and ORS 227.160 to 227.186 require that the local government hold at least one hearing on a permit application. ORS 215.416(11) and ORS 227.175(10) allow the local government to approve or deny a permit application without a hearing, if the local government gives notice of the decision and provides an opportunity for local appeal involving a *de novo* hearing.

SDC, and the SMC Chapter 8 provisions governing issuance of LDAPs, we conclude that "development" within the meaning of GRP policies 13.0 and 13.3 includes the proposed excavation and fill. It follows that the proposed development is subject to the GRP policy 13.0 and 13.3 requirement that master plan approval precede development in the area including the subject property. Therefore the LDAP decision concerns the application of a comprehensive plan provision and is a "land use decision" subject to our jurisdiction.

b. LUBA No. 2003-147: Floodplain Permit

Proposals for "development" within the FP Floodplain Overlay District require "development approval" under SDC Chapter 27. SDC 27.030(1).[12] A number of the specific criteria in SDC Chapter 27 relate to structures or other development not implicated by the proposal, and the city found such criteria to be inapplicable. City planning staff applied the SDC Chapter 27 standards deemed to be pertinent to the proposed excavation and fill, and issued a floodplain permit concluding that the proposal complies with those standards.

We understand the city and intervenor to argue that the floodplain permit, while issued under what are indisputably "land use regulations," falls within the exception to the statutory definition of "land use decision" at ORS 197.015(10)(b)(A). *See* n 4. According to respondents, the standards in SDC Chapter 27 "do not require interpretation or the exercise of policy or legal judgment." Further, respondents argue, nothing in SDC Chapter 27 calls for development subject to that chapter to be measured for compliance with the Metro Plan or the GRP, and thus GRP policies 13.0 and 13.3. are not applicable standards, for purposes of ORS 197.015(10)(a) or (b).

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[12] SDC 27.030(1) provides in relevant part:

> "Development proposals within the FP [Floodplain] Overlay District shall be reviewed under Type I procedure * * *. Development approval within the FP [Floodplain] Overlay District, including a Land and Drainage Alteration Permit, shall be obtained before construction or development begins within any area of special flood hazard established in [SDC] 27.010(2) of this Article. Approval shall be required for all structures, manufactured homes and development as defined in this Code."

In the usual course of events, a decision under SDC Chapter 27 might well fall within the ministerial exception to the definition of "land use decision" at ORS 197.015(10)(b)(A). However, for the reasons expressed above, we have concluded that GRP policies 13.0 and 13.3 require that master plan approval precede "development" of the subject property. The respondents do not argue that "development" subject to SDC Chapter 27 means something other than "development" as defined by the SDC and as that term is used in GRP policies 13.0 and 13.3. As explained above, the terms of GRP policies 13.0 and 13.3 appear to prohibit the city from approving "development" on the subject property prior to master plan approval. The challenged floodplain permit approves "development" on the subject property, and there is no dispute that the city has not approved a master plan for the site. The floodplain permit thus "concerns the * * * application" of GRP policies 13.0 and 13.3, and falls within the ORS 197.015(10)(a) definition of land use decision for that reason alone. While it may be that the standards in SDC Chapter 27 do not require interpretation, the same cannot be said for GRP policies 13.0 and 13.3. At the least, the scope of "development" subject to those policies requires interpretation, and therefore the floodplain permit does not fall within the exception to "land use decision" at ORS 197.015(10)(b)(A). *See Tirumali v. City of Portland*, 169 Or App 241, 7 P3d 761 (2000), *rev den* 331 Or 674 (2001) (building permit height standard that is unclear and ambiguous requires interpretation and thus the permit is not within the ORS 197.015(10)(b)(A) exception to "land use decision"). The challenged floodplain permit is a "land use decision" subject to our jurisdiction.

c. LUBA No. 2003-145: Annexation Agreements

The city argues, and we agree, that the city council decision authorizing staff to amend the annexation agreements between the city and intervenor is not a land use decision subject to our jurisdiction.

Petitioners' argument to the contrary is again based on GRP policies 13.0 and 13.3. According to petitioners, the amendments authorized by the city council are contrary to GRP

policies 13.0 and 13.3 because they purport to allow approval of "development," specifically an LDAP, prior to master plan approval. However, the challenged amendments do not "approve" development. Instead, they remove a contractual impediment that prevented intervenor from obtaining an LDAP. Removing a contractual impediment in an annexation agreement does not approve "development" or otherwise grant intervenor a permit for development. Thus, even assuming GRP policies 13.0 and 13.3 could potentially apply to an annexation agreement, the challenged amendments do not implicate those policies. The decision at issue in LUBA No. 2003-145 is not within our jurisdiction.

D. Significant Impact Land Use Decisions

Our conclusion that the decisions appealed in LUBA Nos. 2003-146 and 2003-147 are statutory land use decisions makes it unnecessary to determine whether those decisions are "significant impact" land use decisions under the reasoning in *City of Pendleton v. Kerns*. With respect to LUBA No. 2003-145, we have concluded that removing a contractual impediment in an annexation agreement to future land use applications does not approve or authorize "development" of the subject property. To qualify as a significant impact land use decision, the decision must "create 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). The challenged amendments to the annexation agreements, in themselves, create no impact on present or future land uses, and therefore do not qualify as significant impact land use decisions.

D. Conclusion

Petitioners have moved to transfer any challenged decision to circuit court that the Board concludes is not within our jurisdiction. ORS 34.102; OAR 661-010-0075(11). Accordingly, we will bifurcate LUBA No. 2003-145 from these consolidated appeals, so that it can be transferred to circuit court pursuant to ORS 34.102 and OAR 661-010-0075(11). For the foregoing reasons, we have jurisdiction over the decisions appealed in LUBA Nos. 2003-146 and 2003-147, and respondents' motions to dismiss directed at those appeals are denied.

ASSIGNMENT OF ERROR

Petitioners contend that the LDAP and floodplain permit are inconsistent with GRP policies 13.0 and 13.3, because they authorize "development" prior to master plan approval. For the foregoing reasons, we agree with petitioners that the LDAP and the floodplain permit are inconsistent with GRP policies 13.0 and 13.3.

The assignment of error is sustained.

LUBA No. 2003-145 is bifurcated from these appeals and hereby transferred to circuit court.

LUBA Nos. 2003-146 and 2003-147 are remanded.