

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 RANDALL L. SCHOCK, ANGELA M. SCHOCK,
5 CHARLES L. BOYER and JAMES D. STRAUS,
6 *Petitioners,*
7

8 vs.
9

10 JACKSON COUNTY,
11 *Respondent.*
12

13 LUBA No. 2010-045
14

15 FINAL OPINION
16 AND ORDER
17

18 Appeal from Jackson County.
19

20 Jack H. Swift, Grants Pass, represented petitioners.
21

22 G. Frank Hammond, Jackson County Counsel, Medford, represented respondent.
23

24 RYAN, Board Member; BASSHAM, Board Member; participated in the decision.
25

26 HOLSTUN, Board Chair; concurring.
27

28 DISMISSED

07/01/2010
29

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

1 **NATURE OF THE DECISION**

2 Petitioners appeal Order No. 80-10, a board of county commissioners’ order that
3 directs the county administrator to direct the county’s contractor to take steps necessary to
4 remove Gold Ray Dam, a dam that is owned by the county and located in the Rogue River.

5 **MOTION TO DISMISS**

6 The county moves to dismiss the appeal, arguing that the challenged decision is not a
7 “land use decision” as defined in ORS 197.015(10)(a)(A) because no approval standards in
8 the Jackson County Comprehensive Plan (CCP) or the Jackson County Land Development
9 Ordinance (LDO) apply to the challenged decision.¹ After the county filed its motion to
10 dismiss, petitioners filed a motion for stay under ORS 197.845 and OAR 661-010-0068. On
11 June 25, 2010, we issued an order granting an interim stay and setting forth an expedited
12 briefing schedule. For the reasons set out below, we agree with the county that the
13 challenged decision is not a “land use decision” as defined in ORS 197.015(10)(a)(A). We
14 also conclude that the decision is not a “significant impacts” decision, for the reasons set out
15 below.²

16 We briefly summarize the facts from the county’s Motion to Dismiss, Petitioners’
17 Opposition to the Motion to Dismiss Appeal, the county’s Affidavit in Support of the Motion

¹ ORS 197.015(10)(a)(A) defines a “land use decision” as:

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

- “(i) The goals;
- “(ii) A comprehensive plan provision;
- “(iii) A land use regulation; or
- “(iv) A new land use regulation[.]”

² On June 30, 2010, we received a Motion to Participate as Amici from Rogue Flyfishers, Rogue Riverkeeper, and Waterwatch of Oregon. Because we dismiss the appeal, we need not resolve the amici motion.

1 to Dismiss, Petitioners' Petition for Stay, and the county's Response to the Motion for Stay.³
2 As far as we can tell, the material facts are not in dispute. The Gold Ray Dam is a wooden
3 and concrete dam located on the Rogue River. The dam was built in 1904 and was operated
4 for electrical power generation until 1972, when the dam was donated to the county for park
5 purposes. It was later decommissioned. The dam has a fish ladder that does not meet current
6 federal standards for protection of threatened and endangered fish. According to the county,
7 the National Oceanic and Atmospheric Administration (NOAA) prepared a draft
8 Environmental Impact Statement (EIS) regarding the proposed dam removal. The county
9 anticipates receiving federal funds to finance the dam removal, and the county maintains that
10 the availability of the federal funds is scheduled to expire on December 31, 2010. Response
11 to Motion to Stay and Motion to Increase Undertaking 2.

12 On May 5, 2010, the board of commissioners adopted Order No. 80-10, and on May
13 24, 2010, petitioners appealed that decision to LUBA. In relevant part, Order No. 80-10
14 orders the County Administrator to direct the county's authorized contractor to "proceed with
15 the removal of the Gold Ray Dam." On June 3, 2010, the board of county commissioners
16 submitted an application for a permit to remove the dam.⁴ On June 11, 2010, the county
17 planning department issued a notice of tentative staff decision granting the county board of
18 commissioners' application for a land use permit. According to the county and petitioners,
19 petitioners have appealed that permit decision to the hearings officer and that appeal is
20 pending.⁵

³ We previously issued an order granting the county's motion to suspend the deadline for transmitting the record.

⁴ According to petitioners, on March 8, 2010, almost two months before it adopted Order No. 80-10, the board of county commissioners applied for a permit from the county planning department to remove the dam, and the application was rejected as incomplete. Petitioners' Opposition to Motion to Dismiss Appeal 2.

⁵ In addition, several federal and state permits have been issued in connection with the removal of the dam. According to the county, the county has received the following permits and determinations by state and federal agencies on the following dates:

1 **A. Statutory Land Use Decision**

2 The county maintains that the challenged decision is merely a preliminary
3 administrative decision by the board of commissioners, the body with responsibility for
4 management of the dam, to direct the county administrator to move forward with securing a
5 permit to remove the dam, and that the June 11, 2010 tentative staff decision that has been
6 appealed to the hearings officer is the decision that authorizes removal of the dam.⁶ A final
7 local government decision that “concerns” the application of a comprehensive plan provision
8 or land use regulation is a land use decision. ORS 197.015(10)(a)(A). *See* n 1. A final local
9 government decision “concerns” the application of a comprehensive plan provision or land
10 use regulation if the decision maker was required by law to apply approval standards in its
11 comprehensive plan or land use regulations to that decision, even if the decision maker did
12 not do so. *Jaqua v. City of Springfield*, 46 Or LUBA 566, 574 (2004).

13 In petitioners’ Opposition to Motion to Dismiss Appeal, petitioners argue that “the
14 decision to remove the dam is a decision to which statewide planning goals, particularly
15 [Statewide Planning] Goal 5 [(Open Spaces, Scenic and Historic Areas, and Natural Areas)]

-
1. U.S. Army Corps of Engineers permit on June 14, 2010;
 2. Oregon Department of Environmental Quality National Pollutant Discharge Elimination System (NPDES) permit on June 14, 2010;
 3. Oregon Department of State Lands permit on June 10, 2010; and
 4. United States National Marine Fisheries Service Finding of No Significant Impact (FONSI) determination under the National Environmental Policy Act (NEPA) on June 10, 2010. County’s Affidavit in Support of Motion to Dismiss 1-2.

⁶ In its response to petitioners’ motion for stay, the county argues:

“The Jackson County Planning Department has issued a preliminary approval of the permit required for this action, a permit for land use activities within a designated floodplain, on June 11, 2010. This permit allows the holder to remove the dam as a fish habitat restoration project within the floodplain. The land on which the dam sits is zoned Exclusive Farm Use and Open Space Reserve, both of which permit outright the use of land for habitat restoration type projects. Jackson County Land Development Ordinance, Tables 4.2.1, 4.3.1.” Response to Motion to Stay and Motion to Increase Undertaking 3.

1 should have applied.” Opposition to Motion to Dismiss Appeal 5. In petitioners’ Petition for
2 Stay, petitioners quote the following language from Section 16 of the CCP:

3 “The backwaters of the Gold Ray Dam, a wetland habitat located in central
4 Jackson County, is a good example of a local environment which has been
5 designated as a natural area and will be included in the Bear Creek Greenway.
6 A portion of the backwaters is already in public ownership. According to the
7 Oregon Natural Areas, the background waters of Gold Ray Dam are in Kelly
8 Slough, and are: ‘Bayou-like with an intricate maze of channels and sloughs
9 densely clothed with vegetation. There are at least three distinct plant
10 communities or habitat types. This diverse riparian site provides excellent
11 wildlife habitat. The most notable species include nesting osprey and
12 northern bald eagles and a great blue heron colony with 34 active nests.’”
13 Petitioners’ Memorandum in Support of Stay 3-4.

14 The county takes the position that the provision of the CCP quoted above contains a
15 goal and policy related to the backwaters behind the dam, but no approval standards for
16 actions that affect those backwaters, such as the proposal to remove the dam that creates the
17 backwaters in the first place. If Order No. 80-10 was the only decision by the county
18 regarding removal of the dam, we might disagree with the county and agree with petitioners
19 that the county was required in adopting Order No. 80-10 to at a minimum explain why the
20 quoted CCP provision does not apply to a county decision to order the dam removed. The
21 quoted provision indicates that the backwaters behind the dam are a designated natural area
22 under the county’s acknowledged Goal 5 comprehensive plan provisions, and the decision
23 does not explain why the quoted provision is not implicated by removal of the dam or how
24 removal is consistent with those provisions.

25 However, we agree with the county that in adopting Order No. 80-10, the county was
26 not authorizing the dam to be removed, but was merely directing the County Administrator to
27 move forward with securing the permit that was ultimately issued on June 11, 2010. The
28 county asserts, and petitioners appear to agree, that the permit issued on June 11, 2010, is the
29 county’s land use approval to remove the dam. It is petitioners’ burden to establish that the
30 appealed decision is a land use decision. *Billington v. Polk County*, 299 Or 471, 475, 703
31 P2d 232 (1985). Petitioners have not pointed to anything in Order No. 80-10 that purports to

1 constitute the county’s land use approval to remove the dam, and the language of the order
2 can be understood to simply direct the county’s contractor to proceed with securing
3 necessary approvals to remove the dam, including county land use approvals, which the
4 contractor subsequently did. *See Dorall v. Coos County*, 53 Or LUBA 32, 34 (2006)
5 (nothing in an agreement to use county property that was entered into between the county
6 and a private contractor purported to authorize the use of the county’s property that was
7 proposed in the agreement). Accordingly, petitioners have not established that the
8 challenged decision is a statutory land use decision.

9 **B. Significant Impacts**

10 The county also argues that the decision is not a “significant impacts” land use
11 decision under the judicially-created doctrine first articulated in *City of Pendleton v. Kerns*,
12 294 Or 126, 653 P2d 992 (1982). In *Kerns*, the Supreme Court held that a local government
13 decision that is not a statutory land use decision may nonetheless be subject to LUBA’s
14 review if the decision will have a “significant impact” on present or future land uses in the
15 area. 294 Or at 134.

16 In their Opposition to Motion to Dismiss Appeal, petitioners argue that “[t]he
17 decision in question, to proceed with the removal of the dam, will have [a] significant impact
18 on land use patterns in the environmentally sensitive natural resource areas inventoried in the
19 [CCP]. Moreover, the decision to remove the dam is a decision to which statewide planning
20 goals, particularly Goal 5, should have applied.” Opposition to Motion to Dismiss Appeal 5.
21 Beyond that argument, petitioners do not explain how the decision actually has an impact on
22 land uses, or how the impacts are likely to occur as a result of the decision. *Carlson v. City*
23 *of Dunes City*, 28 Or LUBA 411, 414 (1994). Given that petitioners’ stated position in its
24 pleadings is that the June 11, 2010 permit authorizes removal of the dam, we fail to see how
25 petitioners can also argue that the challenged decision will have the likely result of impacting

1 land uses. For that reasons, we agree with the county that the decision is not a “significant
2 impacts” land use decision.

3 Accordingly, because we agree with the county that the challenged decision is neither
4 a statutory land use decision under ORS 197.015(10)(a)(A) or a significant impacts land use
5 decision, we do not have jurisdiction over the decision.

6 The county’s motion to dismiss is granted.

7 The appeal is dismissed.

8 **MOTION FOR STAY**

9 As explained above, in a June 25, 2010 order, we granted an interim stay of the
10 challenged decision and set out an expedited briefing schedule on the stay. Under ORS
11 197.845(1) and OAR 661-010-0068(1)(c), LUBA is authorized to stay a land use decision
12 pending its review if petitioner demonstrates (1) a colorable claim of error in the decision
13 under review, and (2) that petitioner will suffer irreparable injury if the stay is not granted.
14 *Marson v. Clackamas County*, 22 Or LUBA 804, 805 (1991). However, because we
15 determine that the challenged decision is not a land use decision, we do not have authority to
16 stay the decision. Accordingly, petitioners’ motion for stay is denied and the interim stay
17 that was ordered on June 25, 2010 is dissolved.

18 Holstun, Board Chair, concurring.

19 I agree with the majority that the challenged order is not a land use decision, but I
20 reach that conclusion for a different reason than the majority. Petitioners have the burden to
21 demonstrate that LUBA has jurisdiction to review Order No. 80-10. *Billington v. Polk*
22 *County*, 299 Or at 475. Petitioners failed to carry that burden, and in my view that failure
23 has nothing to do with the pending permit proceedings before Jackson County or the
24 likelihood that the permit decision that is pending on appeal before the county hearings
25 officer may authorize removal of the dam.

1 Under ORS 197.015(10)(a), Order No. 80-10 is a land use decision if it concerns the
2 application of a statewide planning goal, comprehensive plan or land use regulation. *See* n 1.
3 In its motion to dismiss, the county offers the following argument in support of its position
4 that LUBA does not have jurisdiction to review Order No. 80-10, because it is not a “land
5 use decision” as ORS 197.015(10)(a) defines that term:

6 “In this case, the Order does not fit any of the categories for a land use
7 decision. First, it does not concern the application of the comprehensive plan
8 or any land use regulation because neither one contains any individual
9 standards for approval of the specific county action at issue here.

10 “Jackson County’s comprehensive plan contains a goal and a policy related to
11 the backwaters behind the dam, but no approval standards for individual
12 action.” Motion to Dismiss 4 (footnote omitted).

13 In their written opposition to the county’s motion to dismiss, petitioners merely
14 assert:

15 “Petitioners contend that it is clear in the circumstances that the decision
16 evidenced in Board Order No. 80-10 is a land use decision because it was a
17 final order by the board of commissioners regarding the application of the
18 Goals, comprehensive plan provisions, and existing land use regulations.”
19 Opposition to Dismissal 4.

20 With regard to petitioners’ suggestion that Order No. 80-10 may qualify as a land use
21 decision because it concerns the application of the statewide planning goals, the county’s
22 comprehensive plan and land use regulations have been acknowledged, and petitioners offer
23 no explanation for why they believe the county was required to apply the statewide planning
24 goals in adopting Order No. 80-10. *Byrd v. Stringer*, 295 Or 311, 316-17, 666 P2d 1332
25 (1983); *Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 46, 911 P2d 350
26 (1996); *Urquhart v. Lane Council of Governments*, 80 Or App 176, 181, 721 P2d 870 (1986).
27 Similarly, in their opposition to the county’s motion to dismiss, petitioners do not identify
28 any comprehensive plan or land use regulation standard that they believe the county should
29 have applied when adopting Order No. 80-10. Petitioners simply suggest that there are some

1 applicable comprehensive plan provisions and land use regulations, without identifying them.
2 On that basis alone, the appeal should be dismissed.

3 In their motion for stay, but not in their written opposition to the county's motion to
4 dismiss, petitioners cite text from Section 16 of the CCP that discusses the backwaters of
5 Gold Ray Dam and the majority quotes that language. But even if that CCP language is
6 treated as a response to the county's motion to dismiss, it is not sufficient to establish that the
7 comprehensive plan includes language that touches in some way on Gold Ray Dam or its
8 backwaters. The comprehensive plan must include language that constitutes standards,
9 criteria or other mandatory considerations that must be addressed before removing the dam.
10 *Knee Deep Cattle Company v. Lane County*, 28 Or LUBA 288, 298 (1994), *aff'd* 133 Or App
11 120, 890 P2d 449 (1995); *City of Portland v. Multnomah County*, 19 Or LUBA 468, 474
12 (1990); *Portland Oil Service Co. v. City of Beaverton*, 16 Or LUBA 255, 260 (1987).
13 Petitioners do not respond to the county's position that the quoted text from Section 16 of the
14 CCP is not properly understood to impose standards that the county was required to consider
15 in adopting Order 80-10. The majority suggests that CCP language might impose such
16 standards, but without some argument from petitioners explaining why they believe that to be
17 the case, I do not agree. Goal 5 imposes a fairly regimented planning process for
18 inventorying Goal 5 resources, determining the significance of those resources and then
19 going through an economic, social, environmental, and energy consequences analysis to
20 determine whether to adopt programs to protect such resources and how. OAR chapter 660,
21 divisions 16 and 23. Petitioners make absolutely no effort to establish that the county has
22 adopted any measures to protect Gold Ray Dam or its backwaters or imposed any standards
23 that would govern a decision to remove Gold Ray Dam. It is petitioners' burden to make that
24 showing, and petitioners failed to do so.

1 Finally, in claiming that Order 80-10 qualifies as a significant impacts test land use
2 decision under *City of Pendleton v. Kerns*, 294 Or 126, 133, 653 P2d 992 (1982), petitioners
3 merely assert:

4 “Alternatively, Petitioners contend that LUBA has significant impact
5 jurisdiction. The decision in question, to proceed with the removal of the
6 dam, will have significant impact on land use patterns in the environmentally
7 sensitive natural resource areas inventoried in the County’s Comprehensive
8 Plan.” Opposition to Dismissal 5.

9 That bare and undeveloped assertion is not sufficient to establish that removal of the Gold
10 Ray Dam will have significant impacts on land use.