

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

3
4 RANDY HAJ,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF PORTLAND,
10 *Respondent.*

11
12 LUBA No. 2022-091

13
14 ORDER

15 **BACKGROUND**

16 On October 3, 2022, petitioner filed a Notice of Intent to Appeal and on
17 October 10, 2022, petitioner filed a corrected Notice of Intent to Appeal
18 (Corrected NITA), pursuant to our October 6, 2022 Order. We refer to the Notice
19 of Intent to Appeal and the Corrected NITA together as the NITA.

20 The NITA describes the challenged decision as “the land use decision or
21 limited land use decision of respondent entitled NE 7th Ave & NE Tillamook St.
22 Design Plan, which became final on September 15, 2022, and which involves
23 physical changes to a public right of way and adjacent parcels of property,
24 including traffic flow changes, as further described in Exhibit 1 hereto.” NITA 1
25 (boldface omitted). Exhibit 1 attached to the NITA includes five pages: a four-
26 page email chain that includes on its first page an email dated September 15, 2022
27 from a Portland Bureau of Transportation (PBOT) capital projects manager to
28 several recipients, and a one-page schematic drawing entitled “NE 7th Avenue

1 and NE Tillamook St Design Plan.” As we understand the email correspondence
2 and drawing, they reflect the removal of an existing traffic circle and tree or trees
3 within the intersection, the construction of a marked crosswalk and bikeway, and
4 installation of a base planter and new speed bumps.

5 **MOTION FOR STAY**

6 On October 10, 2022, the Board received petitioner’s motion to stay the
7 challenged decision, pursuant to ORS 197.845(1) and OAR 661-010-0068.¹ For
8 the reasons set forth below, the motion for stay is denied.

¹ The statutory standards under which LUBA may grant a request to stay a decision that has been appealed to LUBA are set out at ORS 197.845(1), which provides:

“Upon application of the petitioner, the board may grant a stay of a land use decision or limited land use decision under review if the petitioner demonstrates:

- “(a) A colorable claim of error in the land use decision or limited land use decision under review; and
- “(b) That the petitioner will suffer irreparable injury if the stay is not granted.”

OAR 661-010-0068 provides, in relevant part:

- “(1) A motion for a stay of a land use decision or limited land use decision shall include:
 - “(a) A statement setting forth movant’s right to standing to appeal the decision;
 - “(b) A statement explaining why the challenged decision is subject to the Board’s jurisdiction;

1 **A. OAR 661-010-0068**

2 OAR 661-010-0068(1)(b) requires the moving party to include “[a]
3 statement explaining why the challenged decision is subject to the Board’s
4 jurisdiction[.]” LUBA has jurisdiction to review “land use decisions” and
5 “limited land use decisions.” ORS 197.825(1). A decision qualifies as a “land use
6 decision” if it is a “final decision or determination made by a local government”
7 that concerns the application of a land use regulation or comprehensive plan
8 provision, or the statewide planning goals. *Id.*; ORS 197.015(10)(a). In order for
9 LUBA to have jurisdiction over a land use decision, petitioners must establish
10 that the decision is “final.” A decision “becomes final when it is reduced to

“(c) A statement of facts and reasons for issuing a stay, demonstrating a colorable claim of error in the decision and specifying how the movant will suffer irreparable injury if a stay is not granted;

“(d) A suggested expedited briefing schedule;

“(e) A copy of the decision under review and copies of all ordinances, resolutions, plans or other documents necessary to show the standards applicable to the decision under review.

“* * * * *

“(5) The Board shall base its decision on the stay, including the right to a stay, amount of undertaking, or conditions of any stay order, upon evidence presented. Evidence may be attached to the motion in the form of affidavits, documents or other materials, or presented by means of a motion to take evidence outside the record.”

1 writing and bears the necessary signatures of the decision maker(s), unless a local
2 rule or ordinance specifies that the decision becomes final at a later date, in which
3 case the decision is considered final as provided in the local rule or ordinance.”
4 OAR 661-010-0010(3). A decision that is a final decision can also qualify as a
5 land use decision if a local government was required but failed to apply a land
6 use regulation, a comprehensive plan provision or a statewide planning goal.
7 *Jaqua v. City of Springfield*, 46 Or LUBA 566, 574 (2004).

8 At the outset, we note that the actual decision that petitioner has appealed
9 is not apparent to us. As noted, the NITA describes the decision as “NE 7th Ave
10 & NE Tillamook St. Design Plan, which became final on September 15, 2022,
11 and which involves physical changes to a public right of way and adjacent parcels
12 of property, including traffic flow changes, as further described in Exhibit 1
13 hereto.” However, Exhibit 1 is a four-page email chain that includes in the
14 correspondence a message from a Capital Project Manager from PBOT to various
15 recipients regarding the intersection of NE 7th Avenue and NE Tillamook Street,
16 and a single page with a graphic, titled “NE 7th Ave & NE Tillamook St. Design
17 Plan.”

18 In their motion for stay, petitioner argues that the “the Project” is a land
19 use decision because the city was required but failed to apply the city’s
20 comprehensive plan and the statewide planning goals to “the Project.” Motion
21 for Stay 10. Petitioner also argues that “the Project” is a significant impacts land
22 use decision. *City of Pendleton v. Kerns*, 294 Or 126, 134-35.

1 **1. Statutory Land Use Decision**

2 All of petitioner’s arguments take the position that “the Project” is a land
3 use decision. Motion for Stay 10-13. LUBA reviews appeals of final land use
4 decisions (or final limited land use decisions). LUBA does not review appeals of
5 “Projects.” None of petitioner’s arguments explain why whatever decision is
6 actually challenged in the NITA is a “final decision or determination of [the city]”
7 as defined in ORS 197.015(10)(a) and OAR 661-010-0010(3). Petitioner has not
8 established that the city made a final decision, within the meaning of OAR 661-
9 010-0010(3), that either applied or was required to apply a land use regulation, a
10 comprehensive plan provision, or a statewide planning goal.²

² ORS 197.175(2) provides:

“Pursuant to ORS chapters 195, 196 and 197, each city and county in this state shall:

- “(a) Prepare, adopt, amend and revise comprehensive plans in compliance with goals approved by the commission;
- “(b) Enact land use regulations to implement their comprehensive plans;
- “(c) If its comprehensive plan and land use regulations have not been acknowledged by the commission, make land use decisions and limited land use decisions in compliance with the goals;
- “(d) If its comprehensive plan and land use regulations have been acknowledged by the commission, make land use decisions and limited land use decisions in compliance with the acknowledged plan and land use regulations; and

1 For purposes of the requirement in OAR 661-010-0068(1)(a) that
2 petitioner’s motion include “[a] statement explaining why the challenged
3 decision is subject to the Board’s jurisdiction,” and without more specific
4 arguments explaining what the challenged decision encompasses and why it is a
5 final land use decision, we conclude that petitioner has not established that the
6 appealed decision is a land use decision as defined in ORS 197.015(10)(a)(A) or
7 a limited land use decision as defined in ORS 197.015(12).

8 2. Significant Impacts Land Use Decision

9 “A ‘significant impacts’ land use decision is a decision that does not
10 qualify under the definition of ‘land use decision’ at ORS 197.015(10)(a)(A) but,
11 nonetheless, is deemed to be reviewable as a land use decision if, among other
12 things, it creates ‘an actual, qualitatively or quantitatively significant impact on
13 present or future land uses.’” *Vagabond Properties, LLC v. City of Port Orford*,
14 ___ Or LUBA ___, ___ (LUBA No 2021-042, Dec 6, 2021) (quoting *Carlson v.*
15 *City of Dunes City*, 28 Or LUBA 411, 414 (1994) (slip op at 21)). In *Northwest*
16 *Trail Alliance v. City of Portland*, we explained:

17 “In the very rare cases when the significant impacts test is deemed
18 met, LUBA’s review is typically conducted under statutes or other
19 laws, such as road vacation statutes, that provide standards for the

“(e) Make land use decisions and limited land use decisions subject to an unacknowledged amendment to a comprehensive plan or land use regulation in compliance with those land use goals applicable to the amendment.”

1 decision, and that have some direct bearing on the use of land. * * *

2 “In our view, LUBA should exercise review jurisdiction over a
3 decision under the significant impacts test only if the petitioner
4 identifies the non-land-use standards that the petitioner believes
5 apply to the decision and would govern LUBA’s review. Further,
6 we believe that those identified non-land-use standards must have
7 *some* bearing on or relationship to the use of land.” 71 Or LUBA
8 339, 346 (2015) (emphasis in original).

9 According to petitioner, the “Project” is a significant impacts land use
10 decision because it permanently alters the intersection of NE 7th Street and NE
11 Tillamook by removing a traffic circle and the tree within the circle.³ According
12 to petitioner, these changes will potentially lead to increased traffic volumes and
13 speed.

14 We will generally only exercise review jurisdiction under the significant
15 impacts test if the petitioner identifies non-land-use standards that have some
16 direct bearing on or relationship to the use of land that the petitioner believes
17 apply to the decision and would govern LUBA’s review. *Vagabond*, ___ Or
18 LUBA at ___ (slip op at 21). Petitioner has not identified non-land-use standards
19 that have a direct bearing on or relationship to the use of land that petitioner
20 believes apply to the decision and would govern LUBA’s review. Accordingly,
21 petitioner has not demonstrated in the motion for stay that LUBA has jurisdiction
22 over the challenged decision under the significant impacts test.

³ The motion for stay explains that petitioner owns a home with frontage on N.E. 7th Avenue approximately 100 feet from the intersection of N.E 7th Avenue and N.E. Tillamook Street. Motion for Stay 2-3.

1 **CONCLUSION**

2 We conclude that for purposes of the motion for stay, petitioner has failed
3 to satisfy the requirement in OAR 661-010-0068(1)(a) that the motion for stay
4 include “[a] statement explaining why the challenged decision is subject to the
5 Board’s jurisdiction.” Accordingly, the motion for stay is denied.

6 Dated this 19th day of October 2022.

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Melissa M. Ryan
Board Chair