

1 Opinion by Kellington.

2 NATURE OF THE DECISION

3 Petitioner appeals a decision of the City of Independence
4 denying approval of a motor vehicles wrecker certificate.

5 INTRODUCTION

6 In order to lawfully engage in the business of motor
7 vehicle wrecking, a person must have a wrecker certificate
8 issued by the Division of Motor Vehicles (DMV) pursuant to
9 ORS 822.100 to 822.150.

10 Under ORS 822.110(4) and 822.140, before the DMV will issue
11 a wrecker certificate an applicant must obtain, and submit to
12 the DMV, local government approval for the wrecker certificate.
13 ORS 822.140(2) provides in relevant part:

14 "A city * * * governing body shall grant approval of a
15 wrecker certificate * * * when requested under this
16 section if the governing body:

17 "(a) Approves the applicant as being suitable to
18 establish, maintain or operate a wrecker yard or
19 business;

20 "(b) Determines that the location or proposed
21 location meets the requirements for location
22 under ORS 822.110;

23 "(c) Determines that the location does not violate
24 any prohibition under ORS 822.135; and

25 "(d) Approves the location and determines that the
26 location complies with any regulations adopted
by a city or county under this section."

27 Additionally, under the location requirements of
28 ORS 822.110(1):

29 "* * * the area approved under the wrecker certificate
30 for use in the wrecking business [must meet] one of
31 the following criteria:

1 "(a) The area is more than 1,100 feet from the
2 nearest edge of the right of way of any state
 highway.

3 "(b) The business conducted within the area is hidden
4 or adequately screened by the terrain or other
5 natural objects or by plantings, fences or other
6 appropriate means, so as not to be visible from
7 the main traveled way of the highway, in
 accordance with rules adopted by the State
 Highway Engineer or a duly authorized
 representative of the highway engineer.

8 "(c) The area and the business thereon are located in
9 an area zoned for industrial use under authority
 of the laws of this state." (Emphasis
 supplied.)

10 FACTS

11 Petitioner applied to the city for local government
12 approval for a wrecker certificate. The proposed wrecking yard
13 is located on 1.3 acres of property zoned Light Industrial.

14 After discussion of petitioner's application at a city
15 council meeting, the city denied petitioner's application
16 without giving any reason for denial, and without issuing a
17 written order or findings.¹

18 Prior to the filing of the record in this case, the city
19 moved to dismiss this appeal proceeding on the basis that the
20 city's decision is not a land use decision subject to our
21 review. In response to the city's motion to dismiss, petitioner
22 stated:

23 "Respondent made a decision in this case which did
24 concern the application of the comprehensive plan and

25
26 ¹The only written evidence in the record regarding the city's decision
 is contained in the minutes of the city council meeting.

1 zoning ordinance. The comprehensive plan and zoning
2 ordinances were discussed * * *; the items at issue
3 before the city council are the traditional land use
4 issues of screening, liveability, traffic, paving,
5 public facilities, and natural hazards. * * *

6 "At the June 13, 1989 meeting, it is clear that the
7 focus of the city council's meeting was on the
8 application of land use criteria. * * * a spokesman
9 for concerned neighbors, urged the council to deny
10 Petitioner's request on the basis of 'land use law.'
11 Further, the minutes state unequivocally:

12 "'Council also discussed zoning and the
13 comprehensive plan.'

14 "The Mayor offered a compromise that would allow the
15 application if Petitioner agreed to certain
16 conditions, all of which relate to traditional land
17 use criteria. For instance, proposed conditions
18 included enclosing the operation in a building;
19 installing catch basins; regulating noise; installing
20 landscaping; connecting the property to the sewer and
21 paving the access." Objection to Respondent's Motion
22 to Dismiss 4-5.

23 We denied the city's motion to dismiss, stating:

24 "* * * It is undisputed that the city had not, at the
25 time of petitioner's application, adopted any specific
26 regulations under ORS 822.140 for regulation of
wrecking businesses. However, the minutes supplied by
petitioner indicate that the city applied its zoning
ordinance and comprehensive plan to petitioner's
application. From the information produced to date,
there does not appear to be any basis for the city's
denial of petitioner's application other than the
application of the city's comprehensive plan and land
use regulations. While we cannot tell with certainty
at this point what law the city applied in making its
decision, it appears as though the regulations applied
may be 'land use regulations.' Decisions which
concern the application of land use regulations are
'land use decisions' under ORS 197.015(10)(a)(A)(iii)
which we have authority and responsibility to review,
unless they satisfy the 'ministerial' exception of
ORS 197.015(10)(b). * * *" (Footnotes omitted;
emphasis in original.) Bradbury v. City of
Independence, ___ Or LUBA ___ (LUBA No. 89-079, Order
on Motion to Dismiss, September 11, 1989), slip op 3-
4.

1 We noted that we had not received the record and did not
2 have a copy of petitioner's application and concluded:

3 "* * * [w]e do not have enough information absent the
4 filing of the record to evaluate the applicable
5 jurisdictional questions." Bradbury v. City of
Independence, supra, at page 4, n 5.

6 JURISDICTION

7 The city renews its Motion to Dismiss and argues that the
8 appealed decision is neither a statutory land use decision under
9 ORS 197.015(10)² nor a "significant impact" test land use
10 decision, as that phrase has been defined in appellate court and
11 LUBA decisions.

12
13 _____
14 ²ORS 197.015(10) provides:

15 "'Land Use decision':

16 "(a) Includes:

17 "(A) A final decision or determination made by a local
18 government * * * that concerns the adoption,
19 amendment or application of:

20 "(i) The goals;

21 "(ii) A comprehensive plan provision; or

22 "(iii) Land use regulation; or

23 "(iv) A new land use regulation; or

24 "* * * * *

25 "(b) Does not include a ministerial decision of a local
26 government made under clear and objective standards
contained in an acknowledged comprehensive plan or land
use regulation for which no right to a hearing is
provided by the local government under * * * ORS 227.160
to 227.185."

1 Petitioner argues that the city's decision is a statutory
2 land use decision and renews his Objection to Respondent's
3 Motion to Dismiss. Petitioner also also argues that even if we
4 determine that the city's decision is not a statutory land use
5 decision, it is, nevertheless, subject to our review because it
6 is a significant impact test land use decision.³

7 LUBA has jurisdiction to review land use decisions.
8 ORS 197.825. It is petitioner's responsibility to establish
9 that LUBA has jurisdiction by demonstrating that the challenged
10 decision is a land use decision. Billington v. Polk County,
11 supra; Anderson Bros. v. City of Portland, ___ Or LUBA ___ (LUBA
12 No. 89-054, November 22, 1989).

13 We consider whether the city's decision is a statutory land
14 use decision.⁴ In order to determine whether the city's
15 decision is a statutory land use decision, we must determine
16 whether it is a final decision and whether it concerns the
17 adoption, amendment or application of the goals, the city's
18 comprehensive plan or a land use regulation.

19 A. Final Decision

21
22 ³In City of Pendleton v. Kerns, 294 Or 126, 133-134, 653 P2d 996 (1982),
23 the Court determined that a decision is a land use decision if it will have
24 a "'significant impact on present or future land uses' in the area."
25 Therefore, the city's decision is a land use decision if it satisfies
either the statutory requirements of ORS 197.015(10) or the significant
impacts test referred to in City of Pendleton v. Kerns, supra, and
Billington v. Polk County, 299 Or 471, 475, 703 P2d 232 (1985).

26 ⁴If the city's decision is a statutory land use decision then the
significant impact test need not be applied.

1 The city argues that its decision is not a "final" decision
2 because the DMV is charged by statute with the responsibility
3 for making "the final decision on the issuance of the permit."
4 Respondent's Brief 5.

5 Under ORS 822.140 and 822.110, the governing body's
6 approval of a wrecker certificate application is required. The
7 city's approval of the application is the approval which
8 conclusively determines the suitability of the proposed site for
9 a wrecking yard. The DMV can only issue the wrecker certificate
10 after city approval has been obtained, and the applicant
11 supplies the DMV with certain information, pays a fee and
12 delivers a bond. DMV is bound by the city's determination
13 regarding the suitability of the proposed location for a
14 wrecking yard. ORS 822.110; 822.140. We conclude the city made
15 a final determination, within the meaning of
16 ORS 197.015(10)(a)(A), when it disapproved petitioner's
17 application for a wreckers certificate.⁵

18 B. Adoption, Amendment or Application of Goals,

19
20 _____
21 ⁵We note OAR 661-10-010(3) provides:

22 "'Final decision': A decision becomes final when it is reduced
23 to writing and bears the necessary signatures of the
24 decisionmaker(s) * * *."

25 Neither party disputes that the minutes satisfy the requirement in
26 OAR 661-10-010(3) that a decision be reduced to writing before it is
considered final. We assume in this case that the minutes satisfy the
OAR 661-10-010(3) requirement for a "writing." Astoria Thunderbird v. City
of Astoria, 13 Or LUBA 297, 300 (1985); see Hemstreet v. Seaside
Improvement Comm., ___ Or LUBA ___ (LUBA No. 87-118, June 23, 1988),
slip op 4.

Comprehensive Plan or Land Use Regulations

1
2 The city contends that the appealed decision is not a
3 statutory land use decision because the city did not apply any
4 land use regulations or provisions of its comprehensive plan in
5 making its decision. Furthermore, the city argues that the only
6 determination it was required to make under ORS 822.140
7 involving its land use regulations and plan provisions, is
8 whether the proposed wrecking business will be located on land
9 zoned for industrial use as provided in ORS 822.110(1)(c). The
10 city contends that this determination is ministerial only and,
11 therefore, under ORS 197.015(10)(b), is not a land use decision
12 subject to LUBA's jurisdiction.

13 Petitioner contends the city council minutes establish that
14 LUBA has jurisdiction. Petitioner contends that while the
15 city's decision articulates no specific basis, the only
16 regulations the minutes disclose that the city did discuss, in
17 its deliberations leading up to the challenged decision, are
18 land use regulations. Petitioner reasons that the city's
19 decision must have applied those land use regulations as
20 approval criteria in denying petitioner's application.⁶
21 Petitioner's claim is that the city's decision did, in fact,
22 concern the application the city's land use regulations and

23
24 ⁶Petitioner acknowledges that no specific land use regulations are
25 mentioned in the minutes, but contends that land use regulations were the
26 only laws that the city did discuss in connection with denial of
petitioner's application. According to petitioner, this means that the
only standards that the city could have relied upon in reaching its
decision are, then, land use regulations.

1 comprehensive plan and is, therefore, subject to our review.⁷

2 _____
3 ⁷Petitioner points to the following minutes as constituting the complete
4 city discussion regarding the challenged decision:

5 "Mayor Rossi reviewed the application process and the history
6 of the application. Both sides of the issue were cautioned in
7 language use and relevancy of their arguments.

8 "Skip Russell, representing Jim Bradbury, came forward and
9 reviewed for council the four questions the City needs to
10 answer before signing the application. He brought to council's
11 attention the third paragraph of the letter City Manager Poole
12 received from the DMV showing that the governing body will rely
13 on ordinances or regulations previously adopted. Mr. Russell
14 told council that although there may be concerns about the
15 wrecking yard, the application cannot be denied.

16 "Bob Rusconi, spokesman for concerned citizens, told council he
17 had spoken with an attorney who specializes in land use law and
18 was informed that council does have the authority to deny the
19 application. Council's primary duty is to protect the health
20 and safety of the public. Mr. Rusconi cited to the City
21 Charter - Section 5 as giving council authority to deny this
22 application.

23 "City Manager Poole reviewed and clarified the summary of the
24 arguments and told council that they cannot prohibit the
25 wrecking yard but can regulate it.

26 "Council discussed this issue; particularly enforcement of
27 regulations and establishment of new ones. Council also
28 discussed zoning and the comprehensive plan.

29 "Mayor Rossi gave Mr. Russell a proposed list of conditions.
30 Mayor Rossi reviewed each requirement and the law backing it.
31 The list contained the following: enclose the operation in a
32 building large enough to crush and store the autos; install a
33 cement catch basin for contaminants; control noise through
34 hours of operation; install fence and landscaping; connect to
35 the sewer; and pave the road to the operation.

36 "Mr. Russell responded to the conditions although he had not
37 seen them before. In summary he told council that all of the
38 conditions were responding to circumstances that could happen
39 but have not happened yet. If the conditions were not met, his
40 client could be cited regardless of the listed agreement.

41 "Mayor Rossi told council they could take three positions which
42 included approving or disapproving the application or continue
43 the matter. Councilmember Cairns moved to deny the DMV permit.
44 Councilmember Severance seconded the motion. All
45 councilmembers voted in favor of the motion except for

1 Petitioner also contends that the city's denial of his
2 application amounts to an amendment of its land use regulations
3 by prohibiting a use that is otherwise permitted outright.

4 The city's decision is a land use decision under
5 ORS 197.015(10) if it concerns the application of the city's
6 comprehensive plan or land use regulations.⁸ In this case, the
7 city's decision "concerns" the application of the city's plan or
8 land use regulations and is subject to our review, if (1) the
9 city was required by law to apply provisions of its land use
10 regulations or plan as approval standards for petitioner's
11 application, or (2) the city did in fact apply provisions of its
12 land use regulations or plan as the basis for denying
13 petitioner's application.

14 The record is not particularly helpful in determining what
15 regulations, if any, the city did apply because there is no
16 written order either identifying the criteria applied or
17 explaining how the city reached its decision. Additionally, the
18 minutes do not specifically identify what regulations the city
19 applied to deny petitioner's application. However, the only
20 regulations the record shows the city council addressed in its
21

22 Councilmember Valdez who abstained because this was her first
23 council exposure to the issue." Record 2-3.

24 ⁸We disagree with petitioner that the city's refusal to approve his
25 wrecker certificate can be characterized as an amendment to the city's land
26 use regulations. Furthermore, the city's plan and implementing regulations
are acknowledged under ORS 197.251, making the Statewide Planning Goals
inapplicable under ORS 197.835(3). Therefore, the city's decision does not
concern adoption or amendment of the city's plan or land use regulations or
application of the Goals.

1 discussions regarding petitioner's application are unidentified
2 "regulations" and "zoning and the comprehensive plan."
3 Record 3.

4 Under the minutes cited by petitioner, it appears the city
5 applied undisclosed "zoning and comprehensive plan" provisions
6 as approval criteria to deny the application. A local
7 government's final decision concerning application of a
8 comprehensive plan or land use regulations is a land use
9 decision under ORS 197.015(10) subject to our review under
10 ORS 197.825(1).⁹ Although the city's decision does not clearly
11 identify the land use regulations and comprehensive plan
12 provisions on which it is based, petitioner has adequately shown
13 that the city's decision concerns the application of the city's
14 land use regulations and comprehensive plan.¹⁰

15
16 ⁹Whether the land use regulations the city apparently applied are in
17 fact approval criteria applicable to the subject decision is an issue
18 bearing on the outcome of our review, rather than on our authority to
19 review. See 1000 Friends v. Jackson County, 79 Or App 93, 98, 718 P2d 753
(1986), rev den 301 Or 445 (1987).

19 ¹⁰Respondent does not claim it has specifically adopted regulations
20 under ORS 822.140(2)(d) to govern wrecking yards. We note, however, that
21 if the city has not specifically adopted regulations under
22 ORS 822.140(2)(d), the only other standards that the city is required by
23 ORS ch 822 to apply to petitioner's application are (1) standards regarding
24 the suitability of the applicant under ORS 822.140(2)(a); (2) the
25 requirement of ORS 822.140(2)(c) that the proposed wrecking yard does not
26 or will not, as designed, commit certain offenses listed in ORS 822.135;
and (3) the requirement of ORS 822.140(2)(b) that the "* * * location meets
the requirements for location under ORS 822.110." Only one of these
location requirements of ORS 822.110 requires the application of land use
regulations. That requirement (ORS 822.110(1)(c)) is satisfied by a
determination that the property proposed for use as a wrecking yard is
located on land zoned for industrial use. This appears to require only
that the city consult its zone map and determine what the zone designation
for such property is. No significant discretion would appear to be

1 Because the city's decision is a final decision concerning
2 the application of its comprehensive plan or land use
3 regulations, we conclude that we have jurisdiction over this
4 appeal.

5 The city concedes its decision must be remanded if its
6 decision is within our jurisdiction. Accordingly, no purpose
7 would be served by reviewing petitioner's assignments of error.

8 The city's decision is remanded.

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involved in this determination.