

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

3  
4 CURTIS SERVE N SAVE, INC.,            )  
5    )  
6                    Petitioner,            )            LUBA No. 92-197  
7    )  
8            vs.                            )            FINAL OPINION  
9    )            AND ORDER  
10 CITY OF EUGENE,                        )  
11    )  
12                    Respondent.            )

13  
14  
15            Appeal from City of Eugene.

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17            Bill Kloos, Eugene, represented petitioner.

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19            J. Lee Lashway, Eugene, represented respondent.

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21            KELLINGTON, Referee; SHERTON, Chief Referee; HOLSTUN,  
22 Referee, participated in the decision.

23  
24                    TRANSFERRED                            12/11/92

25  
26            You are entitled to judicial review of this Order.  
27 Judicial review is governed by the provisions of ORS  
28 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the county hearings  
4 officer determining that petitioner's property violates the  
5 city's fire code.

6 **MOTION TO DISMISS**

7 As we understand it, the Eugene Code (EC) 8.100  
8 contains the city's fire code, and is part of EC Section 8  
9 entitled "Structures." The EC adopts by reference the  
10 requirements of the state fire code, as apparently required  
11 by ORS chapter 476. In the challenged decision, the city  
12 hearings officer determined petitioner's property is in  
13 violation of certain EC fire code requirements.<sup>1</sup>

14 A local government decision is a land use decision if  
15 it meets either (1) the statutory definition in  
16 ORS 197.015(10); or (2) the significant impact test  
17 established by City of Pendleton v. Kerns, 294 Or 126,  
18 133-34, 653 P2d 996 (1982). Billington v. Polk County, 299

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<sup>1</sup>Specifically, the hearings officer found the following violations:

- "1. The dike wall is less than five feet from the tanks in the diked area \* \* \*.
- "2. The metal support of the one tank in the diked area is not constructed of protected steel \* \* \*.
- "3. The walls of the diked area are not of a construction designed to be liquid tight or withstand full hydrostatic head \* \* \*.
- "4. There are connections between the aboveground tanks and the underground tanks \* \* \*." Record 2.

1 Or 471, 479, 703 P2d 232 (1985). City of Portland v.  
2 Multnomah County, 19 Or LUBA 468, 471 (1990). The city  
3 moves to dismiss this appeal on the basis that the  
4 challenged decision is not a land use decision subject to  
5 our review authority under either the statutory or  
6 significant impact test.<sup>2</sup>

7 **A. Statutory Land Use Decision**

8 ORS 197.825(1) provides that LUBA has exclusive  
9 jurisdiction to review "land use decision[s]."  
10 ORS 197.015(10) defines land use decision, as relevant here,  
11 as a local government's final determination concerning the  
12 application of a comprehensive plan provision, land use  
13 regulation or statewide planning goal.<sup>3</sup> The challenged  
14 decision applies EC 8.100. There is no dispute that EC  
15 8.100 is the city's fire code. Petitioner does not argue  
16 that EC 8.100 is a (1) a land use regulation, (2) a  
17 comprehensive plan provision, or (3) a goal provision.  
18 Therefore, we conclude the challenged decision is not a  
19 statutory land use decision.

20 **B. Significant Impact Land Use Decision**

21 The significant impact test provides a separate basis

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<sup>2</sup>Petitioner filed a conditional motion to transfer this appeal to the circuit court pursuant to ORS 19.230 and OAR 660-10-075(10)(c), but no other response to the motion to dismiss was submitted by petitioner, and petitioner has indicated that it does not plan to file a response.

<sup>3</sup>There is no contention that the challenged decision is a limited land use decision as defined by ORS 197.015(12), and we do not see that it is.

1 for this Board to assume jurisdiction to review a local  
2 government decision, even though that decision may not  
3 satisfy the definition of land use decision articulated by  
4 ORS 197.015(10). The city argues that the challenged  
5 decision simply determines petitioner's property is in  
6 violation of the city's fire code in four particulars and,  
7 therefore, it is not a significant impact test land use  
8 decision. In the absence of an explanation from petitioner  
9 concerning why such a decision is a significant impact test  
10 land use decision, we agree with the city that it does not  
11 appear to be one.

12 **C. Conditional Motion to Transfer**

13 Petitioner moves that the Board transfer this appeal to  
14 the Lane County Circuit Court, if it determines the  
15 challenged decision is not a land use decision subject to  
16 its review authority. We determine above that the  
17 challenged decision is not a land use decision or a limited  
18 land use decision. OAR 660-10-075(10)(c) provides:

19 "If the Board determines the appealed decision is  
20 not reviewable as a land use decision or limited  
21 land use decision as defined in ORS 197.015(10) or  
22 (12), and a motion to transfer to circuit court if  
23 filed \* \* \* the Board shall not dismiss the appeal  
24 and shall transfer the appeal to the circuit court  
25 of the county in which the appealed decision was  
26 made."

27 The motion to dismiss is denied. The conditional  
28 motion to transfer to the Lane County Circuit Court is  
29 allowed.

1           This appeal is transferred.