



1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city hearings officer decision that affirms a decision by a city  
4 building official concerning a structure on petitioner's property.

5 **FACTS**

6 Petitioner operates a business on her property that produces and sells a variety of pet  
7 related products. Petitioner's property is located outside the City of Eugene corporate limits,  
8 but under an agreement with the county the city enforces the county's building code in the  
9 area where petitioner's property is located.<sup>1</sup> The challenged decision finds that a 20-foot by  
10 32-foot canvas-covered wooden-frame structure that petitioner utilizes in her business is  
11 subject to and in violation of the building code.

12 **MOTION TO DISMISS**

13 LUBA's review jurisdiction is limited to land use decisions and limited land use  
14 decisions. ORS 197.825(1). The city moves to dismiss this appeal, arguing that the  
15 challenged decision is not a land use decision, as that term is defined by ORS  
16 197.015(10)(a).<sup>2</sup>

17 It is petitioner's obligation to establish that we have jurisdiction in this matter.  
18 Billington v. Polk County, 299 Or 471, 475, 703 P2d 232 (1985); Fraser v. City of Joseph,  
19 30 Or LUBA 13, 15 (1995); Bowen v. City of Dunes City, 28 Or LUBA 324, 330 (1994);  
20 City of Portland v. Multnomah County, 19 Or LUBA 468, 471 (1990); Portland Oil Service  
21 Co. v. City of Beaverton, 16 Or LUBA 255, 260 (1987). Petitioner does not claim that the  
22 challenged decision is a limited land use decision. However, petitioner does argue that the

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<sup>1</sup>According to the challenged decision, the county's building code applicable to the subject property is identical to the city's building code.

<sup>2</sup>Under ORS 197.015(10)(a) "[a] final decision or determination made by a local government \* \* \* that concerns the \* \* \* application of: \* \* \* [a] land use regulation\* \* \*" is a "land use decision."

1 challenged decision qualifies as a land use decision, because the city applied or should have  
2 applied a city land use regulation.<sup>3</sup>

3 The challenged decision determines that the disputed structure violates the building  
4 code, because a building permit is required and the structure was placed on the subject  
5 property without first obtaining a building permit. The challenged decision addresses and  
6 rejects petitioner's arguments that under relevant provisions of the building code a building  
7 permit is not required. The building code is not a land use regulation, and petitioner does not  
8 argue that it is.<sup>4</sup> The closest petitioner comes to explaining why she believes the challenged  
9 decision applies a land use regulation, and therefore constitutes a land use regulation, is set  
10 out below:

11 "The fact that the Respondent City of Eugene did not agree with Petitioner's  
12 arguments and conclusions that the issues involved in Petitioner's use of the  
13 structure in connection with her home occupation were relevant [does] not  
14 deprive LUBA of jurisdiction in this appeal. Petitioner's position is that the  
15 Respondent sought to unduly restrict and narrow the issues to only encompass  
16 those involving the application of the One and Two Family Dwelling Code,  
17 where the structure was clearly recognized as being used in connection with  
18 Petitioner's home occupation, under Eugene Municipal Code sections 9.494  
19 and 9.496. In addition, the Code is deficient in that it does not specifically  
20 address the type of structure in question, so the One and Two Family  
21 Dwelling Code should never have been made applicable in this case to  
22 Petitioner's structure.

23 "The Petitioner is allowed the use of an accessory structure under the Eugene  
24 Municipal code sections EMC 9.494 and EMC 9.496 which regulate home  
25 occupations in the [C]ity of Eugene. Petitioner was operating her business  
26 known as 'Balanced Innovations' and using the structure in [question] in  
27 connection with the business. The structure is of a type which Petitioner  
28 argued is exempt from the building code requirements and which is not  
29 specifically regulated and which is allowed as an accessory structure to her  
30 home occupation. \* \* \*

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<sup>3</sup>ORS 197.015(11) defines "land use regulation" as including "any local government zoning ordinance, land division ordinance \* \* \* or similar general ordinance establishing standards for implementing a comprehensive plan."

<sup>4</sup>The statutory definition of "land use regulation" is set forth at n 3, and petitioner makes no attempt to argue the building code falls within that definition.

1 "Petitioner has argued and presented evidence of the agricultural similarity of  
2 these products. Petitioner's property is zoned RA, in which Petitioner has  
3 maintained her activities on her land were allowable and not subject to the  
4 Respondent's application of the specialty code in this case. The Respondent  
5 failed to recognize the lawful use of Petitioner's land in connection with her  
6 home occupation, and failed to recognize the exemptions for non-farm  
7 agricultural structures which produce products similar to agricultural products  
8 and are allowed in the RA zoned areas.

9 "The Respondent [C]ity of Eugene is clearly applying or failing to recognize  
10 application of a land use regulation in this case, and the Respondent's actions  
11 [have] adversely affected the Petitioner's substantive rights related to the use  
12 of her land. Therefore, this matter falls within the Board's jurisdiction."  
13 Petitioner's Response to Respondent's Motion to Dismiss 2.

14 The above quoted arguments confuse two issues. First, did the city apply or  
15 improperly fail to apply a land use regulation in reaching its decision? Second, did the city  
16 misconstrue its building code in deciding that the disputed structure requires a building  
17 permit? Because we agree with the city that petitioner has not demonstrated that the city  
18 applied or improperly failed to apply a land use regulation in reaching its decision, we  
19 conclude the challenged decision is not a land use decision subject to our review. We  
20 therefore do not consider the second issue petitioner raises in the above-quoted findings.

21 The only land use regulations that petitioner identifies as potentially applicable to the  
22 challenged decision are EMC 9.494 and 9.496. Those two sections comprise the "Home  
23 Occupation" section of the land use chapter of the Eugene Municipal Code. EMC 9.494  
24 states the purpose of the home occupation provisions, and EMC 9.496 establishes siting and  
25 operational standards for home occupations. We have explained that in determining whether  
26 an appealed decision constitutes a land use decision, because it concerns the application of a  
27 comprehensive plan provision or a land use regulation,

28 "\* \* \* it is not sufficient that a decision may touch on some aspects of the  
29 comprehensive plan [or land use regulations], rather the comprehensive plan  
30 [or regulations] must contain provisions intended as standards or criteria for  
31 making the appealed decision." Portland Oil Service, 16 Or LUBA at 260  
32 (citing Billington, 299 Or at 475).

1 The question of our jurisdiction in this appeal turns on whether petitioner has demonstrated  
2 that the city's land use regulations include applicable standards and criteria that the city either  
3 applied or should have applied in making the challenged decision.

4 Petitioner's Response to Respondent's Motion to Dismiss makes no attempt to explain  
5 why those two sections have any bearing on whether a building permit is required for the  
6 disputed structure. The challenged decision does not turn on whether petitioner's business  
7 qualifies as a home occupation. The hearings officer's decision simply explains that a home  
8 occupation is not exempt from building code requirements that may apply to any structures  
9 that are employed as part of that home occupation.

10 "Appellant at various points raises numerous arguments. These include a  
11 claim that the building is protected by the Home Occupation provisions of the  
12 Eugene Code Chapter 9. Allowing residents to run a business as a secondary  
13 use from their home is a privilege, not a right that operates to exempt persons  
14 operating a home occupation from other laws. If the appellant cannot operate  
15 without using a structure that violates the building code, the appellant cannot  
16 operate the home occupation." Decision 10.

17 The challenged decision might be a land use decision if relevant land use regulations  
18 could be construed to have the legal effect of modifying or overriding the building code's  
19 requirements that certain structures must obtain building permits. However, petitioner does  
20 not argue that the only two land use regulation provisions that she identifies have such a  
21 legal effect, and we do not see that they do.<sup>5</sup> Those land use regulation provisions therefore  
22 do not provide standards or criteria that are applicable to the challenged decision. The city's  
23 position is simply that, without regard to whether petitioner's business is allowed as a home  
24 occupation under relevant land use regulations, any structures that petitioner employs as part  
25 of that home occupation must comply with any applicable building code requirements.

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<sup>5</sup>We therefore have no occasion to consider whether any city land use regulations that purported to obviate or modify building code requirements might run afoul of other statutory requirements. See ORS 455.040(1) (prohibiting local regulations relating to the state building code unless authorized by the Director of the Department of Consumer and Business Services).

1 Without reaching the question of whether the city correctly interpreted the building code in  
2 deciding that a building permit is required for the disputed structure, petitioner has identified  
3 no land use regulations that the city misapplied or failed to apply in reaching that decision.  
4 As far as we can tell the hearings officer's decision is based entirely on standards and criteria  
5 in the building code; and the challenged decision is, therefore, not a land use decision.<sup>6</sup>

6 **MOTION FOR STAY**

7 Petitioner filed a motion to stay the city's decision pending review by LUBA. OAR  
8 661-010-0068. Because we conclude that we lack jurisdiction in this matter, we do not  
9 consider the motion for stay.

10 **CONCLUSION**

11 LUBA lacks jurisdiction to review the challenged decision. Petitioner has not filed a  
12 motion requesting that this appeal be transferred to circuit court under OAR 661-010-  
13 0075(11). Therefore, this appeal is dismissed.

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<sup>6</sup>Petitioner does not argue that the challenged decision is a significant impacts test land use decision. Billington v. Polk County, 299 Or at 479; City of Pendleton v. Kerns, 294 Or 126, 133-34, 653 P2d 992 (1982).