BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FIRE MOUNTAIN GEMS AND BEADS, INC.,
Petitioner,

vs.

CITY OF GRANTS PASS,
Respondent,

and

TIMBER PRODUCTS CO. LIMITED PARTNERSHIP,
Intervenor-Respondent.

LUBA No. 2008-106

FINAL OPINION
AND ORDER

Appeal from City of Grants Pass.

Gregory S. Hathaway and Jeff N. Evans, Portland, filed the petition for review and argued on behalf of petitioner. With them on the brief was Davis Wright Tremaine LLP.

David F. Doughman, Portland, filed a response brief and argued on behalf of respondent. With him on the brief was Beery, Elsner & Hammond, LLP.

Micheal M. Reeder, Eugene, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Arnold Gallagher Saydack Percell Roberts & Potter, PC.

BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

RYAN, Board Member, did not participate in the decision.

TRANSFERRED 10/20/2008

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner Fire Mountain Gems and Beads (Fire Mountain) appeals Resolution 5357, which removes an access control line along a street.

MOTION TO INTERVENE

Timber Products Co. Limited Partnership (Timber Products), moves to intervene on the side of the respondent in this appeal. There is no opposition to the motion and it is granted.

MOTION TO FILE REPLY BRIEF

Fire Mountain moves to file a reply brief to address the respondents' jurisdictional challenge. There is no opposition to the motion and it is allowed.

FACTS

In 2002, with the assistance and encouragement of the city's redevelopment agency, Fire Mountain purchased tax lot 900, a 14.77-acre parcel zoned for industrial use, as a site for its distribution facility. Shortly after purchasing tax lot 900, Fire Mountain applied to the city to subdivide tax lot 900 into seven lots, served by a proposed public roadway to be called Fire Mountain Way.

In negotiations, Fire Mountain and the city agreed that Fire Mountain would dedicate the public right of way for and contribute to the construction costs of Fire Mountain Way by participating in an Advanced Finance District (AFD). The city agreed to fully construct Fire Mountain Way, and seek repayment through the AFD.

As proposed on the subdivision plat, the Fire Mountain Way right of way borders tax lot 1000, an adjacent 15.5-acre parcel owned by Timber Products, which was developed at the time with a plywood mill served by access to Mill Street. Timber Products opposed including tax lot 1000 in the AFD because it did not need access from Fire Mountain Way, and the city chose not to include tax lot 1000 in the AFD. However, for reasons that are in

dispute, the city chose to require that Fire Mountain's final subdivision plat depict an access control line where Fire Mountain Way borders tax lot 1000. The access control line essentially prevents Timber Products from using Fire Mountain Way as a means of access to tax lot 1000. The city subsequently created the AFD in 2004, the final subdivision plat was recorded, and Fire Mountain Way was duly constructed.

In 2007, Timber Products moved its mill to a different location, and began preparations to redevelop tax lot 1000 into a Home Depot. To ensure secondary access for the proposed Home Depot, Timber Products requested inclusion in the AFD and proposed to pay 72 percent of the cost of constructing Fire Mountain Way, in return for the city removing the access control line. At a public hearing on the request, Fire Mountain appeared in opposition, taking the position that the city can remove the access control line only by modifying Fire Mountain's final subdivision plat, which would require that Fire Mountain consent to filing a replat.[1] In December 2007, the city adopted an ordinance amending the AFD to include tax lot 1000, with directions that the access control line "shall be removed." Record 183. The ordinance did not specify how the access control line would be removed.

In April 2008, the city and Timber Products entered into a development agreement that obligates the city to use all reasonable efforts to remove the access control line. In May 2008, the city adopted an ordinance that amends Chapter 6.02.010 of the Grants Pass Municipal Code (GPMC), entitled "Traffic Administration," to state that "[t]he creation, removal, modification, and control of any access control lines or other traffic restrictions relating to access upon streets, alleys or rights of way which are under municipal control" is reserved to the city council.[2]

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[1] Fire Mountain also argued that the amount Timber Products must pay to reimburse the city for the costs of constructing Fire Mountain Way (which would reduce the amount that Fire Mountain must pay) is insufficient. Fire Mountain filed a writ of review in circuit court challenging the city council's ordinance that amends the AFD to include tax lot 1000, but the circuit court ultimately dismissed the writ.

[2] GPMC 6.02.010 is entitled "Municipal Traffic Authority," and states, in relevant part:

Shortly thereafter, the city initiated a resolution to remove the Fire Mountain Way access control line, pursuant to GPMC 6.02.010(B)(10). Fire Mountain appeared in opposition, arguing again that the city can remove the access control line only if Fire Mountain consents to revise the final subdivision plat. The city council voted to adopt the resolution, and this appeal followed.

JURISDICTION

The city and Timber Products argue that LUBA lacks jurisdiction over the this appeal, because the challenged resolution is not a "land use decision" as defined at ORS 197.015(10) or "significant impact" land use decision subject to LUBA's jurisdiction.

A. Statutory Land Use Decision

As relevant here, LUBA's jurisdiction is limited to "land use decisions," which are defined at ORS 197.015(10)(a)(A) [3] as "[a] final decision or determination made by a local government or special district that concerns the adoption, amendment or application" of the statewide planning goals, a comprehensive plan provision, a new land use regulation or a

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"A. Subject to State Laws, the City Council shall exercise all municipal traffic authority for the City except those powers specifically and expressly delegated * * *.

"B. The power to modify the following subjects shall be reserved in the Council:

"* * * * *

"10. The creation, removal, modification, and control of any access control lines or other traffic restrictions relating to access upon streets, alleys or rights of way which are under municipal control"

[3] ORS 197.015(10)(a) defines "land use decision" to include:

"(A) 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[.]"

land use regulation.[4] Respondents argue that the city's resolution concerned only the application of GPMC 6.02.010(B)(10), which is not a land use regulation or part of the city's development code, and therefore does not concern the application of any "land use regulation," as that term is defined at ORS 197.015(11).[5] To the extent that the city's removal of the access control line concerns any land use regulation, respondents argue, the city's action falls within one or more of the exceptions to the definition of "land use decision," at ORS 197.015(10)(b)(A) and (D).[6]

Fire Mountain does not argue that GPMC 6.02.010(B)(10) is a land use regulation, but instead argues that the decision concerns the application of the city's subdivision procedures and standards in Grants Pass Development Code (GPDC) Article 17, which Fire Mountain argues the city should have applied as the only permissible means of removing the access control line that is depicted on Fire Mountain's final subdivision plat. Because the city chose, for whatever reason,[7] to embody the access control line on the subdivision plat,

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[4] LUBA also exercises jurisdiction over "limited land use decisions," as defined at ORS 197.015(12). However, no party argues that the challenged decision is a "limited land use decision," and we do not consider that question.

[5] ORS 197.015(11) provides:

> "'Land use regulation' means any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan."

[6] ORS 197.015(10)(b) provides that "land use decision" does not include a decision of a local government:

> "(A) That is made under land use standards that do not require interpretation or the exercise of policy or legal judgment;
>
> "* * * * *
>
> "(D) That determines final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility that is otherwise authorized by and consistent with the comprehensive plan and land use regulations[.]"

[7] Petitioner argues that the city chose to place the access control line on the subdivision plat in order to give petitioner the right to determine whether or not tax lot 1000 could access Fire Mountain Way. We understand respondents to argue that the city intended the access control line to ensure that Timber Products would not benefit from access to Fire Mountain Way unless its property was included in the AFD and Timber Products

Fire Mountain argues, removing the access control line is essentially a modification of the final subdivision plat, and therefore must be accomplished through a process that results in a land use decision. Specifically, Fire Mountain argues that removing the access line constitutes a "reconfiguration" of a public easement, and therefore requires a "replat" under ORS 92.185.[8] In turn, respondents dispute that removing the access control line constitutes a "reconfiguration" of the final subdivision plat or that the city's action can be accomplished only by means of a replat.

As framed by the parties, the jurisdictional question depends on whether the city's action constitutes or requires a "reconfiguration" of a public easement. ORS chapter 92 does not include a definition of "reconfiguration," but Fire Mountain argues that it is reasonably

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agreed to reimburse the city for its share of the construction costs. There is no evidence in the record supporting either view, and we need not and do not resolve that dispute.

[8] ORS 92.010(13) defines a "replat" as "the act of platting the lots, parcels and easements in a recorded subdivision or partition plat to achieve a reconfiguration of the existing subdivision or partition plat or to increase or decrease the number of lots in the subdivision." ORS 92.185 provides:

> "The act of replatting shall allow the reconfiguration of lots or parcels and public easements within a recorded plat. Except as provided in subsection (5) of this section, upon approval by the reviewing agency or body as defined in ORS 92.180, replats will act to vacate the platted lots or parcels and easements within the replat area with the following conditions:
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> "(1) A replat, as defined in ORS 92.010 shall apply only to a recorded plat.
>
> "(2) Notice shall be provided as described in ORS 92.225 (4) when the replat is replatting all of an undeveloped subdivision as defined in ORS 92.225.
>
> "(3) Notice, consistent with the governing body of a city or county approval of a tentative plan of a subdivision plat, shall be provided by the governing body to the owners of property adjacent to the exterior boundaries of the tentative subdivision replat.
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> "(4) When a utility easement is proposed to be realigned, reduced in width or omitted by a replat, all affected utility companies or public agencies shall be notified, consistent with a governing body's notice to owners of property contiguous to the proposed plat. Any utility company that desires to maintain an easement subject to vacation under this section must notify the governing body in writing within 14 days of the mailing or other service of the notice.
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> "(5) A replat shall not serve to vacate any public street or road.
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> "(6) A replat shall comply with all subdivision provisions of this chapter and all applicable ordinances and regulations adopted under this chapter."

understood to include removal of an access control line depicted on a subdivision plat, because that action restructures which properties are served by the public easement. The city responds that an access control line is not itself an easement, public or private, and removing an access control line is therefore not a "reconfiguration" of an easement. According to the city, a "reconfiguration of lots or parcels and public easements within a recorded plat" can occur only if the action changes the physical dimension or location of a lot, parcel or public easement.

Both parties cite *Haber v. City of Gates*, 39 Or LUBA 137 (2000), in support of their position. The decision at issue in *Haber* was a replat that (1) moved existing private easements on a recorded subdivision plat and (2) added new private easements to the plat. The applicant cross-petitioned, arguing that the city erred in requiring the applicant to file an application for a replat, because a replat is necessary only to reconfigure a lot, parcel or public easement, not a private easement. We agreed with the cross-petitioner that, while ORS 92.050(6) requires that a subdivision plat depict both private and public easements, ORS 92.185 does not require a replat in order to reconfigure *private* easements on a recorded subdivision plat, only public easements. Fire Mountain cites *Haber* for the proposition that reconfiguration of a public easement requires a replat; the city cites *Haber* for the proposition that "reconfiguration" of an easement within the meaning of ORS 92.185 means a modification to the physical dimensions or locations of the easement, as were the facts in *Haber*. However, *Haber* does not directly address or resolve the issue of what constitutes a "reconfiguration" of a public easement.

The most pertinent dictionary definition of the root term "configuration" indicates that it means the arrangement between the parts or elements of some design. Webster's Third New Int'l Dictionary 476 (unabridged ed 1981). The meaning of "reconfiguration," then, is a re-arrangement of the parts or elements of a design. That meaning readily includes changes in the physical dimensions of lots, parcels, and easements, as the city argues, but it is

less clear that it includes other changes that arguably affect the functioning of a public easement but does not amend or otherwise reconfigure the easement itself, as Fire Mountain argues.

Two contextual indications lend some support to the city's narrower view. ORS 92.170(1) sets out various corrections or amendments that can be made to a recorded plat without filing a replat.[9] ORS 92.170(2) limits the changes that are permissible without a replat by stating that "[n]othing in this section shall be construed to permit changes in courses or distances for the purpose of redesigning lot or parcel configurations." ORS 92.170(2) uses the root term "configuration" in a context that clearly refers to changes in the physical dimensions or locations of lots or parcels. Similarly, ORS 92.185(4), part of the replat section of the statute, states that "[w]hen a utility easement is proposed to be realigned, reduced in width or omitted by a replat," notice must be provided to the utility company or public agency. The statute clearly refers to changes that go to the physical dimensions, location or existence of a public easement. Fire Mountain cites to no similar textual or contextual support for its broader view that removing an access control line that

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[9] ORS 92.170(1) provides:

> "(1) Any plat of a subdivision or partition filed and recorded under the provisions of ORS 92.018 to 92.190 may be amended by an affidavit of correction:
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> > "(a) To show any courses or distances omitted from the subdivision or partition plat;
> >
> > "(b) To correct an error in any courses or distances shown on the subdivision or partition plat;
> >
> > "(c) To correct an error in the description of the real property shown on the subdivision or partition plat; or
> >
> > "(d) To correct any other errors or omissions where the error or omission is ascertainable from the data shown on the final subdivision or partition plat as recorded.
>
> "(2) Nothing in this section shall be construed to permit changes in courses or distances for the purpose of redesigning lot or parcel configurations."

separates a public easement from adjoining property "reconfigures" that public easement within the meaning of ORS 92.185(2) and thus would require a replat.

Nonetheless, we need not and do not resolve the question of whether the city's action "reconfigures" a public easement within the meaning of ORS 92.185(2) and therefore requires a replat. The city argues in the alternative that even if the city's action to remove the access control line requires a replat or would otherwise fall within the definition of "land use decision" at ORS 197.015(10)(a), the decision is subject to the exception at ORS 197.015(10)(b)(D) for a decision that "determines final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility that is otherwise authorized by and consistent with the comprehensive plan and land use regulations."

Fire Mountain does not dispute that Fire Mountain Way is authorized by and consistent with the city's comprehensive plan and land use regulations. The only apparent effect of the challenged resolution (or any replat for the same purpose) is to allow tax lot 1000 to access Fire Mountain Way. That action is on its face a determination regarding the "operation" of Fire Mountain Way. Thus the decision appears to fall squarely within the exception to the definition of "land use decision" at ORS 197.015(10)(b)(D). *See Leathers v. Washington County*, 31 Or LUBA 43, 46 (1996) (a decision to remove gates that prevented access to a public right of way and to pave the right of way falls within the ORS 197.015(10)(b)(D) exclusion and is therefore not a land use decision subject to LUBA's jurisdiction). Accordingly, even if Fire Mountain is correct that the city's action concerns the application of a land use regulation and would otherwise qualify as a "land use decision" under ORS 197.015(10)(a), the exclusion at ORS 197.015(10)(b)(D) for decisions that determine the "operation" of a transportation facility applies, and therefore the city's decision is not a statutory land use decision subject to our jurisdiction.

B. Significant Impacts Land Use Decision

In its reply brief, Fire Mountain argues that even if the city's resolution does not qualify as a statutory land use decision, it qualifies as a "significant impacts" land use decision under *City of Pendleton v. Kerns*, 294 Or 126, 134, 653 P2d 992 (1982).

The Court held in *Kerns* that a local government decision that is not a statutory land use decision may nonetheless be subject to LUBA's review if the decision will have a "significant impact" on present or future land uses in the area. 294 Or at 134. The city argues that removing the access control line has no impact on present or future land uses in the area, because tax lot 1000 already has an existing access point on Mill Street that it can continue to rely upon for any redevelopment of the site. The city contends that whether tax lot 1000 will ultimately use Fire Mountain Way for primary or secondary access will be determined in a future proceeding. Similarly, Timber Products argues that there is no evidence in the record that tax lot 1000 cannot be redeveloped without access to Fire Mountain Way, and thus no evidence that removing the access control line will have any impact on redevelopment of tax lot 1000 or on present or future land uses in the area.

Fire Mountain replies that removing the access control line will pave the way for transformation of an unused industrial site into a large commercial development anchored by a large format retailer, which will likely generate significant levels of traffic and strain the local transportation infrastructure. We understand Fire Mountain to argue that the redevelopers of tax lot 1000 will likely use Fire Mountain Way to provide secondary access to that development, in an attempt to reduce traffic impacts on certain transportation facilities in the area with limited capacity, and thus reduce the off-site transportation improvements that the city may require the developers to provide. Because removal of the access control line will change the traffic patterns in the area, and facilitate redevelopment of tax lot 1000, Fire Mountain argues, the city's action therefore has a "significant impact" on present and future land uses in the area.

Timber Products appears to be willing to pay a large amount of money to join the AFD and to remove the access control line, which suggests that obtaining access to Fire Mountain Road will considerably facilitate the proposed redevelopment of tax lot 1000 into a large-scale commercial retail use. However, even if Fire Mountain is correct that removal of the access control line would "significantly impact" present and future land uses in the area under the *Kerns* test, the city argues, and we agree, that we cannot exercise jurisdiction over the challenged decision under *Kerns*, because as explained above the challenged resolution falls within an express exception to our jurisdiction, at ORS 197.015(10)(b)(D). *Oregonians in Action v. LCDC*, 103 Or App 35, 38, 795 P2d 1098 (1990).

In *Oregonians in Action*, the petitioner argued that an LCDC decision was a "significant impacts" land use decision subject to LUBA's jurisdiction, notwithstanding a statute that excluded LCDC decisions from the definition of "land use decision," at ORS 197.015(10)(a)(B).[10] The Court disagreed, stating:

> "The 'significant impact test' was devised to supplement the legislative *grant* of jurisdiction to LUBA, by making some land use actions reviewable that do not meet the statutory definition of a "land use decision." *See Wagner v. Marion County*, 79 Or App 233, 719 P2d 31, *rev den*, 302 Or 86, 726 P2d 1185 (1986). However, the judicial test does not supersede the express legislative *exclusion* of jurisdiction over decisions of the kind that petitioner seeks to challenge here." *Id*. at 38.

See also Leathers, 31 Or LUBA at 46 (decision removing access gates is not a significant impact land use decision because it falls within a statutory exclusion to the definition of land use decision). We agree with the city that because the challenged decision falls within a class of decisions that the legislature has explicitly chosen to exclude from LUBA's jurisdiction, *Kerns* is inapplicable, and therefore we cannot exercise jurisdiction over the decision as a "significant impacts" land use decision.

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[10] ORS 197.015(10)(a)(B) provides that a "land use decision" includes "[a] final decision or determination of a state agency other than the commission [LCDC] with respect to which the agency is required to apply the goals[.]"

MOTION TO TRANSFER

Fire Mountain moves to transfer this appeal to circuit court, in the event that the Board determines it lacks jurisdiction over the challenged decision.

Although the respondents do not expressly oppose the motion to transfer, in its response brief Timber Products includes an argument that the challenged resolution is a legislative rather than a quasi-judicial decision, and therefore the circuit court cannot exercise jurisdiction over the appeal under ORS 34.040. That statute provides that a writ of review shall be allowed in all cases in which a local government "in the exercise of judicial or quasi-judicial functions" appears to have committed one of several listed errors. Timber Products argues that the city's resolution is a legislative decision under the factors described in *Strawberry Hill 4-Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 601 P2d 769 (1979), and therefore the circuit court has no jurisdiction to issue a writ under ORS 34.040.

Fire Mountain replies, and we agree, that under ORS 34.102 LUBA must transfer the decision to the circuit court once LUBA determines that the decision is not a land use or limited land use decision subject to its jurisdiction, and that LUBA has no occasion to reject a motion to transfer and dismiss an appeal based on LUBA's views regarding the circuit court's jurisdiction or scope of review.[11] The motion to transfer is granted.

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[11] ORS 34.102 provides, in relevant part:

> "(2) Except for a proceeding resulting in a land use decision or limited land use decision as defined in ORS 197.015, for which review is provided in ORS 197.830 to 197.845, or an expedited land division as described in ORS 197.360, for which review is provided in ORS 197.375 (8), the decisions of the governing body of a municipal corporation acting in a judicial or quasi-judicial capacity and made in the transaction of municipal corporation business shall be reviewed only as provided in ORS 34.010 to 34.100, and not otherwise.
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> "(3) A petition for writ of review filed in the circuit court and requesting review of a land use decision or limited land use decision as defined in ORS 197.015 of a municipal corporation shall be transferred to [LUBA] and treated as a notice of intent to appeal if the petition was filed within the time allowed for filing a notice of intent to appeal pursuant to ORS 197.830. If the petition was not filed within the time allowed by ORS 197.830, the court shall dismiss the petition.

1 The appeal is transferred.

"(4) A notice of intent to appeal filed with [LUBA] pursuant to ORS 197.830 and requesting review of a decision of a municipal corporation made in the transaction of municipal corporation business that is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015 shall be transferred to the circuit court and treated as a petition for writ of review. If the notice was not filed with the board within the time allowed for filing a petition for writ of review pursuant to ORS 34.010 to 34.100, the court shall dismiss the petition.

"(5) In any case in which [LUBA] or circuit court to which a petition or notice is transferred under subsection (3) or (4) of this section disputes whether it has authority to review the decision with which the petition or notice is concerned, the board or court before which the matter is pending shall refer the question of whether the board or court has authority to review to the Court of Appeals, which shall decide the question in a summary manner."