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NATURE OF THE DECISION

Petitioner appeals a county decision that approves a license to encroach one foot into a county right of way.

FACTS

Petitioner owns property in the unincorporated community of Neskowin. On December 27, 2007, the county sent a letter to petitioner advising her that certain improvements on her property encroach into the county right of way and must be removed within 15 days. Record 199. Petitioner ultimately filed an application for an encroachment license to allow the improvements to remain in the county right of way. Record 161. The county approved a license that allows only a one-foot encroachment into the county right of way, rather than the larger encroachment proposed by petitioner. This appeal followed.

RECORD OBJECTIONS

The parties have reached an agreement regarding the record in this appeal. That agreement is reflected in a February 5, 2009 letter from the county, which agrees that the affidavit that appears at Record 31-33 was signed and that Record pages 35, 171-185 and 201-206 should be stricken from the record. With those corrections to the Record and the Supplemental Record that was received by LUBA on February 10, 2009, the record is settled.

MOTION TO DISMISS

LUBA has exclusive jurisdiction to review land use decisions. ORS 197.825(1).¹ As defined by ORS 197.015(10), a land use decision must be a “final” decision that “concerns

¹ ORS 197.825(1) provides in part:

“[T]he Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district or a state agency in the manner provided in ORS 197.830 to 197.845.”

Petitioner argues the challenged decision is a land use decision. Petitioner does not argue that the challenged decision is a limited land use decision.

1 the adoption, amendment or application of” one or more of the land use planning standards
2 identified at ORS 197.015(10)(a)(A).² The county moves to dismiss arguing that the
3 challenged decision is not a “final” decision and does not apply any of the ORS
4 197.015(10)(a)(A) land use standards.

5 **A. Final Decision**

6 In its motion to dismiss the county argued that the challenged decision is not a final
7 decision because it was not reduced to writing and does not bear the signatures of the
8 decision makers.³

9 The Supplemental Record that LUBA received on February 10, 2009 includes a copy
10 of the minutes of the November 12, 2008 Board of Commissioners (BOC) meeting at which
11 the BOC took action on the disputed license. The minutes describe petitioner’s request, the
12 county’s reasoning in only partially granting the request and the county’s ultimate decision.
13 Supplemental Record 224-225. The minutes are signed by all three members of the BOC.

² As relevant, ORS 197.015(10) provides:

“Land use decision”:

“(a) Includes:

“(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

“(i) The [statewide planning] goals;

“(ii) A comprehensive plan provision;

“(iii) A land use regulation; or

“(iv) A new land use regulation[.]”

³ OAR 661-010-0010(3) provides that “[a] decision becomes final when it is reduced to writing and bears the necessary signatures of the decision maker(s), unless a local rule or ordinance specifies that the decision becomes final at a later date, in which case the decision is considered final as provided in the local rule or ordinance.”

1 Record 228. We conclude that the minutes are sufficient to constitute a final decision.⁴
2 *Hood River Sand v. City of Mosier*, 24 Or LUBA 381, 383 (1993).

3 **B. Application of a Land Use Regulation**

4 Petitioner does not argue that the challenged decision “adopts” or “amends” any of
5 the land use standards set out at ORS 197.015(10)(a)(A). Petitioner does argue, however,
6 that the challenged license is a land use decision because it “concerns the application * * * of
7 a land use regulation.”

8 On April 30, 2003, the Tillamook County Public Works Director adopted a “Right of
9 Way Encroachment License Policy.” Record 219-21. That policy sets out “Principles” and
10 “Considerations” regarding requests to allow right of way encroachments. The statewide
11 planning goals, the county comprehensive plan and county land use regulations are not listed
12 as Principles or Considerations. On October 12, 2005, the BOC adopted Order 05-104,
13 which is entitled: “In the Matter of Setting Clear Direction Regarding Fences and other
14 Improvements on County Right of Ways.” Record 211-13. That order prohibits specified
15 encroachments onto county rights of way without county approval. Order 05-104 does not
16 mention the statewide planning goals, the county comprehensive plan or county land use
17 regulations. The Right of Way Encroachment License Policy and Order 05-104 apparently
18 were applied by the county in making its decision on the requested license.

19 Although petitioner argues the Right of Way Encroachment License Policy and Order
20 05-104 are land use regulations, because they were adopted to implement the county’s
21 comprehensive plan, we are not persuaded. As far as we can tell from the documents
22 themselves, the Right of Way Encroachment License Policy and Order 05-104 were adopted
23 to address perceived public safety concerns with right of way encroachments rather than to
24 implement the statewide planning goals, the county’s comprehensive plan or any planning

⁴ Petitioner filed a motion to strike. We are not sure we understand the motion to strike, but our conclusion that the minutes are sufficient to constitute a final decision makes it unnecessary to resolve the motion to strike.

1 policies expressed in those documents. Petitioner cites provisions from the Tillamook
2 County Comprehensive Plan, the county’s Transportation System Plan (TSP) and the
3 Neskowin Community Plan that address local roads, explain the purpose of the TSP, call for
4 roadway design standards and adopt a “skinny streets” standard for Neskowin. If any of
5 those cited comprehensive plan provisions actually addressed right of way encroachments,
6 we might agree with petitioner that the Right of Way Encroachment License Policy and
7 Order 05-104 are land use regulations, even though they do not specifically mention the
8 comprehensive plan. However the cited plan provisions have no relevance that we can see
9 regarding how the county goes about deciding whether it will allow requested encroachments
10 into county rights of way.

11 As the party seeking review by LUBA, petitioner has the burden of establishing that
12 LUBA has jurisdiction. *Billington v. Polk County*, 299 Or 471, 475, 703 P2d 232 (1985).
13 We conclude that petitioner has not carried her burden to establish that the county’s decision
14 to grant a one-foot right of way encroachment license is a land use decision. It follows that
15 we do not have jurisdiction to proceed with this appeal.

16 **C. Motion to Transfer**

17 Under OAR 661-010-0075(11)(b), where LUBA’s jurisdiction is challenged, a
18 petitioner may file a conditional motion to transfer the appeal to circuit court, in the event
19 LUBA concludes that it lacks jurisdiction over the appeal.⁵ Petitioner filed a conditional
20 motion to transfer this appeal to circuit court on February 9, 2009. That motion was filed 14
21 days after the motion to dismiss was filed, rather than within 10 days as required by OAR

⁵ OAR 661-010-0075(11)(b) provides:

“A request for a transfer pursuant to ORS 34.102 shall be initiated by filing a motion to transfer to circuit court not later than ten days after the date a respondent’s brief or motion that challenges the Board’s jurisdiction is filed. If the Board raises a jurisdictional issue on its own motion, a motion to transfer to circuit court shall be filed not later than ten days after the date the moving party learns the Board has raised a jurisdictional issue.”

1 661-010-0075(11)(b). However, the county has not objected to the four-day delay, and even
2 if it had we do not see that the four-day delay in filing the motion to transfer prejudiced the
3 county's substantial rights. We therefore overlook the delay in filing the motion to transfer.
4 *See* OAR 661-010-0005 (“[t]echnical violations not affecting the substantial rights of the
5 parties shall not interfere with the review of a land use decision”). Petitioner’s motion to
6 transfer is granted.

7 This appeal is transferred to Tillamook County Circuit Court.⁶

⁶ LUBA’s practice is to transmit its file and the local government record to the circuit court within one week after it issues a final opinion that transfers an appeal to circuit court.