

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

3
4 GEORGE COLE and SUZANNE COLE,)
5)
6 Petitioners,)
7)
8 vs.)
9)
10 LANE TRANSIT DISTRICT,)
11)
12 Respondent.)

LUBA No. 97-017

FINAL OPINION
AND ORDER

13
14
15 Appeal from Lane Transit District.

16
17 Michael E. Farthing, Eugene, represented petitioners.

18
19 Gregory Skillman and Allen L. Johnson, Eugene,
20 represented respondent.

21
22 LIVINGSTON, Referee; HANNA, Chief Referee; GUSTAFSON,
23 Referee, participated in the decision.

24
25 DISMISSED 05/14/97

26
27 You are entitled to judicial review of this Order.
28 Judicial review is governed by the provisions of ORS
29 197.850.

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision authorizing the staff of
4 the Lane Transit District (LTD) to conduct an environmental
5 assessment of petitioners' property.

6 **INTRODUCTION**

7 The challenged decision states, as background, that
8 LTD's board

9 "directed staff to solicit proposals for
10 Environmental Assessment (EA) services for a West
11 11th Park & Ride lot. Since the last Board
12 meeting, staff have reviewed proposals, conducted
13 interviews, and selected Parametrix, Inc. A cost
14 proposal to conduct an EA for a West 11th Park &
15 Ride lot will be distributed at the Board meeting.

16 "Staff recommend proceeding with the EA as the
17 next step in the West 11th Park & Ride project."
18 Record 3.

19 We understand that the staff's recommendation was accepted
20 and that the acceptance gave rise to this appeal.¹

21 On February 25, 1997, LTD moved to dismiss on the
22 ground we have no jurisdiction over the decision to proceed
23 with the EA. On February 26, 1997, LTD filed the record of
24 the local proceeding. On March 10, 1997, petitioners filed

¹The decision contains a "proposed motion," which apparently was adopted. It states:

"It is hereby resolved that the LTD Board of Directors directs staff to conduct an Environmental Assessment to determine the feasibility and measure the potential impacts of constructing a Park & Ride lot on Tax Lots 100 and 200, Map 17-04-35-42, also known as the Cole's Furniture and Saw Shop site." Record 3.

1 record objections directed at the omission from the record
2 of almost 30 documents related to the proposed park and ride
3 facility. Petitioners asked that we decide the objections
4 prior to requiring a response to LTD's motion to dismiss.
5 On March 12, 1997, LTD filed a reply, asking us to decide
6 the motion to dismiss immediately on the ground that
7 petitioners have neither explained why a supplemental record
8 would have any bearing on the motion to dismiss nor
9 responded to that motion.

10 **MOTION TO DISMISS**

11 We agree with LTD that petitioners have neither
12 explained why a supplemental record would have any bearing
13 on the motion to dismiss nor responded to the motion. LTD's
14 motion to dismiss raises the issue of whether the challenged
15 decision is itself a land use decision, not whether it was
16 properly justified. Petitioners contend the decision
17 identifies their property "as the best location for a park
18 and ride station on West 11th Avenue in Eugene."
19 Petitioners' Objection to Record and Response to
20 Respondent's Motion to Dismiss 4. Petitioners then argue
21 that the record should include materials relevant to that
22 identification.

23 We disagree with petitioners' characterization of the
24 challenged decision. Although authorizing the staff to
25 conduct an EA indicates LTD is interested in the subject
26 property, it also indicates LTD is not certain the property

1 is the best location for a park and ride station. We
2 therefore discuss the merits of LTD's motion to dismiss on
3 the ground that the challenged decision is neither a land
4 use decision nor a limited land use decision.

5 With the exception of ORS 197.540, which authorizes us
6 to review a moratorium on land construction or development
7 alleged to have been adopted in violation of the moratorium
8 statute (ORS 197.505 to 197.540), our jurisdiction is
9 limited to the review of "any land use decision or limited
10 land use decision of a local government." ORS 197.825(1).
11 Subject to certain exclusions that are not relevant here,
12 ORS 197.015(10) defines "land use decision" as

13 "(A) A final decision or determination made by a
14 local government or special district that
15 concerns the adoption, amendment or
16 application of:

17 "(i) The goals;

18 "(ii) A comprehensive plan provision;

19 "(iii) A land use regulation; or

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

21 "(B) A final decision or determination of a state
22 agency other than the commission with respect
23 to which the agency is required to apply the
24 goals[.]"

25 ORS 197.015(12) defines "limited land use decision" as

26 "a final decision or determination made by a local
27 government pertaining to a site within an urban
28 growth boundary which concerns:

29 "(a) The approval or denial of a subdivision or
30 partition as described in ORS chapter 92.

1 "(b) The approval or denial of an application
2 based on discretionary standards designed to
3 regulate the physical characteristics of a
4 use permitted outright, including but not
5 limited to site review and design review."

6 In addition to the category of land use decision
7 defined by ORS 197.015(10), the courts have created a
8 category of "significant impact" land use decisions. See
9 City of Pendleton v. Kerns, 294 Or 126, 653 P2d 992 (1982);
10 Petersen v. Klamath Falls, 279 Or 249, 566 P2d 1193 (1977);
11 Pacific Western Co. v. Lincoln County, ___ Or LUBA ___ (LUBA
12 No. 96-129, January 22, 1997), slip op 9-11. Significant
13 impact land use decisions must also be final before they can
14 be appealed to LUBA. Interlachen, Inc. v. City of Fairview,
15 25 Or LUBA 618, 623 n7 (1993).

16 LTD contends the challenged decision is neither a land
17 use decision nor a limited land use decision because it is
18 not final. LTD argues the challenged decision "simply
19 identifies a preferred alternative and authorizes further
20 evaluation pursuant to federal laws and regulations that
21 expressly require consideration of alternatives and deferral
22 of final decisions." Lane Transit District's Motion to
23 Dismiss 4. LTD explains that the National Environmental
24 Policy Act (NEPA) requires the preparation of an
25 "Environmental Assessment" (EA) to determine whether a full
26 environmental impact statement (EIS) will be necessary. 40
27 CFR 1501; 40 CFR 1508.9; 23 CFR 771.115(c). Under NEPA
28 regulations, until a decision is made and an agency issues a

1 record of decision, no action can be taken that would have
2 an adverse environmental impact or limit the choice of
3 reasonable alternatives. The NEPA process is to be
4 implemented at the earliest possible time to insure that
5 planning and decisions reflect environmental values, to
6 avoid delay later in the process and to avoid potential
7 conflicts. 40 CFR 1501.2.

8 We agree with LTD that the decision to proceed with an
9 EA as part of a feasibility determination is not a final
10 decision over which we have jurisdiction. It may be that
11 the city has already decided or will, in the future, decide
12 the subject property is the best location for a park and
13 ride station, but this cannot be inferred from either the
14 decision appended to petitioners' notice of intent to appeal
15 or any statement in the notice of intent to appeal itself.

16 Because the challenged decision does not actually
17 approve or deny a land use, it does not constitute a final
18 land use decision subject to our jurisdiction. N.O.P.E. in
19 Mulino v. Port of Portland, 2 Or LUBA 243 (1980). See also
20 Crist v. City of Beaverton, 143 Or App 79, 922 P2d 1253
21 (1996) (the time for redress arises if applicable
22 substantive or procedural land use standards are not
23 followed in connection with any land use decision that may
24 be required during the implementation of a preannexation
25 agreement).

1 This appeal is dismissed.²

²Because we conclude dismissal is appropriate, we do not address petitioners' record objections.