

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CAROL KNAPP, ALVIN REISS, and)

5 NOEL LESLIE,)

6)

7 Petitioners,)

LUBA No. 97-108

8)

9 vs.)

FINAL ORDER AND

OPINION

10 CITY OF JACKSONVILLE,)

11)

12 Respondent.)

13
14 Appeal from City of Jacksonville.

15
16 James R. Dole, Grants Pass, represented petitioners.

17
18 Robert E. Bluth, Medford, represented respondent.

19
20 GUSTAFSON, Referee; HANNA, Chief Referee; LIVINGSTON,
21 Referee, participated in the decision.

22
23 DISMISSED 08/19/97

24
25 You are entitled to judicial review of this Order.
26 Judicial review is governed by the provisions of ORS
27 197.850.
28

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the award of a construction contract
4 to improve a street.

5 **FACTS**

6 On May 14, 1997 the city council accepted a bid to
7 construct improvements on F Street, including a bridge
8 across Jackson Creek to link the two sections of F Street,
9 divided by the creek. F Street has been platted for over a
10 century, and is currently a narrow, asphalt road which runs
11 east from Oregon Street to the creek, then continues on the
12 creek's other side to 5th Street.

13 The city adopted the current Jacksonville Comprehensive
14 Plan (the plan) in 1995. Chapter Five of the plan outlines
15 transportation goals for the city, and provides a list of
16 prioritized proposed road facility improvements.
17 Improvement number six on that list is "'F' Street." The
18 city asserts, and petitioners do not contest, that the first
19 five improvements are completed or largely so. The priority
20 list itself does not describe what improvements are planned;
21 however, other parts of the plan designate F Street as a
22 "collector" street and set out building standards for a
23 collector street. Further, a map describing "internal
24 connections to be made" shows the two sections of F Street
25 linked at the creek crossing. Respondent's Motion to
26 Dismiss, Exhibit B, page 15.

1 At the conclusion of the May 14, 1997 meeting, the city
2 voted to accept a bid to build the F Street improvements,
3 and awarded the contract. That decision is memorialized in
4 the unsigned city minutes, and petitioners identify those
5 minutes as the challenged decision.

6 **MOTION TO DISMISS**

7 The city moves to dismiss this appeal for lack of
8 jurisdiction, arguing that its decision to award the
9 contract to build the bridge over F Street and related
10 improvements is not a land use decision. The city relies on
11 ORS 197.015(10)(b), which defines "land use decision"
12 subject to our review as not including a decision:

13 "(A) Which is made under land use standards which
14 do not require interpretation or the exercise of
15 policy or legal judgment;

16 "* * * * *

17 "(D) Which determines final engineering design,
18 construction, operation, maintenance, repair or
19 preservation of a transportation facility which is
20 otherwise authorized by and consistent with the
21 comprehensive plan and land use regulations;

22 "* * * * *"

23 The city argues under ORS 197.015(10)(b)(A) that its
24 award of a construction contract is not a land use decision
25 because it required no interpretation or exercise of policy;
26 the city had already exercised its policy judgment in
27 providing for F Street connection in its comprehensive plan.
28 In the alternative, the city argues that the decision merely
29 determined construction of a transportation facility,

1 otherwise authorized and consistent with the plan, and is
2 thus not a land use decision, pursuant to ORS
3 197.015(10)(b)(D).

4 Petitioners dispute that the comprehensive plan
5 actually calls for connecting the two sections of F Street.
6 Hence, petitioners reason the May 14, 1997 decision is the
7 decision actually authorizing the connection, bringing it
8 within the ambit of the statutory definition of land use
9 decision at ORS 197.015(10)(a). Alternatively, petitioners
10 argue that the May 14, 1997 decision is a land use decision
11 under the "significant impacts" test.

12 The proper analysis in this context is to determine
13 whether the decision is not a land use decision under the
14 specific exclusions at ORS 197.015(10)(b)(A) or (D). If the
15 answer is affirmative, then our inquiry ends, and the city's
16 motion to dismiss should be granted. If the answer is
17 negative, then we must determine whether the decision is a
18 land use decision under the general inclusions of ORS
19 197.015(10)(a). See Carlson v. City of Dunes City, 28 Or
20 LUBA 770, 772 (1994). Therefore, we first examine the
21 city's argument that the May 14, 1997 decision is not a land
22 use decision under ORS 197.015(10)(b)(A).

23 ORS 197.015(10)(b)(A) is one of the "nondiscretionary"
24 exceptions to LUBA jurisdiction, which removes from LUBA
25 review certain decisions which do not require interpretation
26 or the exercise of policy. Generally, where a local

1 government approves a street improvement and then, in a
2 subsequent decision, awards a contract to build that
3 improvement, the reviewable decision is the initial decision
4 to approve the project. See Carlson, 28 Or LUBA at 771
5 (dismissing city's argument that the subsequent decision to
6 award the contract was the final decision).¹ In the present
7 case, the key questions are (1) did the city approve the
8 connection of F Street in its comprehensive plan, and (2)
9 was the May 14, 1997 decision to award the contract
10 connecting F Street nondiscretionary in nature, requiring
11 neither interpretation nor policy judgment?

12 We conclude from the facts described above that the
13 city did approve the F Street connection in its
14 comprehensive plan. The map linking the two sections of F
15 Street at the creek crossing shows that the city intended to
16 put a bridge on that spot. The plan's designation of F
17 Street as a collector² and its assignment of relative
18 priority to F Street improvements reinforces this reading.

19 The next issue is whether the subsequent decision

¹The present case, like Carlson, might be analyzed in terms of which decision was the final decision, rather than in terms of jurisdictional exclusions. Because the parties have framed the issue as a matter of jurisdictional exclusion, we continue under that framework.

²The plan defines a "collector" as:

"A street that is designed to gather and disperse traffic between local neighborhoods, businesses, industries, and arterial streets. Collector streets provide some access, but are also intended to move traffic. * * *" Plan, Chapter Five, at 18.

1 awarding the construction contract is nondiscretionary. The
2 minutes of the May 14, 1997 meeting demonstrate that the
3 only issue was whether to accept the bid by Booker
4 Construction to build the bridge and reconstruct F Street as
5 a collector street. The city made no explicit policy
6 judgments, interpretations of the plan, or approval or
7 modification of the project at the meeting.

8 A similar issue arose in Dames v. City of Medford, 10
9 Or LUBA 179 (1984), aff'd 69 Or App 675 (1985). In Dames,
10 the city comprehensive plan designated as an arterial a
11 street which was at that time a collector. The city later
12 assigned funding to a project to widen the street to
13 arterial proportions, and subsequently passed an ordinance,
14 with elaborate findings about compliance, which awarded a
15 contract for the widening. We held under those
16 circumstances that the ordinance awarding the contract was
17 not a ministerial act under a former version of ORS
18 197.015(10)(b) because the plan designation was only a
19 general policy, and the decision to actually implement that
20 designation at that time was made in an "arena of
21 alternatives" involving discretion and choice.³ Dames, 10
22 Or LUBA at 182. A dissent argued that the only real choices

³Former ORS 197.015(10)(b) provided that a "land use decision"

"Does not include a ministerial decision of a local government made under clear and objective standards contained in an acknowledged comprehensive plan or land use regulation and for which no right to a hearing is provided * * *."

1 had been made by the time the project was funded; simply
2 choosing who would actually build the project was not a
3 discretionary decision. Id. at 187.

4 The current exclusion embodied at ORS 197.015(10)(b)(A)
5 has significantly different operative terms than the
6 exclusion at issue in Dames. Whether or not those terms
7 have similar meanings, we think that under ORS
8 197.015(10)(b)(A) the facts in this case fall on the
9 nondiscretionary end of the spectrum. The comprehensive
10 plan provides for connecting the two sections of F Street,
11 and converting it into a collector street under the
12 established collector streets standards. The plan assigns
13 that project a specific priority vis-a-vis other projects.
14 We see no interpretation needed or policy judgment left to
15 make. The only substantive question remaining is who will
16 win the contract to make the improvements.

17 Petitioners cite historic review criteria and street
18 standards which they contend the city should have considered
19 before going forward with the F Street project. To the
20 extent those standards are inconsistent with the F Street
21 project, they reflect policy choices made when the
22 comprehensive plan was adopted. To the extent petitioners
23 argue that the city should have applied these criteria in a
24 land use proceeding, failure to engage in land use decision
25 making does not convert an otherwise nondiscretionary
26 decision into a land use decision. An allegation that the

1 city should have conducted land use proceedings before
2 issuing the contract does not make the issuance of the
3 contract a land use decision.

4 Finally, petitioners point to an administrative permit
5 approval issued June 18, 1997, after the challenged decision
6 in this case, which they contend reflects the existence of
7 an "issue" regarding application of the historical review
8 standards. However, the fact that there may be a subsequent
9 "issue" about historical review standards does not make the
10 challenged decision to award the contract on May 14, 1997 a
11 land use decision. To the extent that petitioners imply
12 that the administrative permit approval itself is a "land
13 use decision," petitioners have not appealed that approval.

14 We find that the challenged decision was not a land use
15 decision as defined in ORS 197.015(10)(b), and therefore
16 that we lack jurisdiction to review it. Because we conclude
17 that the city's decision was not a land use decision under
18 ORS 197.015(10)(b)(A), it is not necessary for us to
19 consider the city's alternative argument under ORS
20 197.015(10)(b)(D).

21 The city's motion to dismiss is granted.