

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

3
4 DALE W. BAKER,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF WOODBURN,
10 *Respondent,*

11
12 *and*

13
14 CRAIG REALTY GROUP – WOODBURN, LLC,
15 *Intervenor-Respondent.*

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18 LUBA Nos. 99-149 & 99-162

19
20 FINAL OPINION
21 AND ORDER

22 Appeal from the City of Woodburn.

23
24 Patrick Doyle, Silverton, appeared on behalf of petitioner.

25
26 N. Robert Shields, Woodburn, appeared on behalf of respondent.

27
28 Michael C. Robinson, Portland, appeared on behalf of intervenor-respondent.

29
30 BRIGGS, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member,
31 participated in the decision.

32 TRANSFERRED

01/25/2000

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

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NATURE OF DECISION

Petitioner appeals an ordinance establishing the process to form a reimbursement district, and a resolution approving the formation of a reimbursement district.

FACTS

Petitioner¹ appeals two decisions made by the City of Woodburn. The first, Ordinance No. 2237, establishes a process for the formation of a reimbursement district. The second decision, Resolution No. 1554, uses the process established in Ordinance No. 2237 to form a reimbursement district for the improvement of Arney Road.² Before us are intervenor-respondent’s (intervenor’s) motion to dismiss, petitioner’s alternative request to transfer to circuit court, and petitioner’s objections to the record. Because the motion to dismiss will determine whether we have to address petitioner’s motion to transfer or petitioner’s record objections, we address that matter first.

MOTION TO DISMISS

Intervenor moves to dismiss this appeal, arguing that LUBA does not have jurisdiction to review the decisions appealed by petitioner. Intervenor argues that the decisions made by the city establishing a process for forming reimbursement districts, and then forming the district to reimburse intervenor for the costs associated with improving Arney Road, are not “land use decisions” as defined in ORS 197.015(10)(a), and therefore, LUBA does not have jurisdiction.

LUBA has exclusive jurisdiction to review “land use decisions.” ORS 197.825(1). A local government decision is a “land use decision” if it meets either (1) the statutory

¹Moore-Clear Co., another property owner affected by these decisions, initially joined with Petitioner Baker. However, Moore-Clear Co. moved to dismiss its appeals, and that motion was granted on December 10, 1999. Therefore, only Dale A. Baker remains as petitioner.

²We refer to Ordinance No. 2237 as “the ordinance” and Resolution No. 1554 as “the resolution.” Together, they are referred to as “the city’s legislation.”

1 definition in ORS 197.015(10); or (2) the significant impacts test established by the Oregon
2 Supreme Court in *Billington v. Polk County*, 299 Or 471, 479, 703 P2d 232 (1985); *City of*
3 *Pendleton v. Kerns*, 294 Or 126, 133-34, 653 P2d 992 (1982). The burden is on petitioner to
4 establish that the appealed decisions are land use decisions. *Billington*, 299 Or at 475.

5 **A. Statutory Test**

6 ORS 197.015(10)(a)(A) defines “land use decision” to include:

7 “A final decision or determination made by a local government * * * that
8 concerns the adoption, amendment or application of:

9 “(i) The goals;

10 “(ii) A comprehensive plan provision;

11 “(iii) A land use regulation; or

12 “(iv) A new land use regulation[.]”³

13 Intervenor argues that neither the ordinance nor the resolution constitute a “land use
14 regulation” or a “new land use regulation” as those terms are used in ORS 197.015(11) and
15 ORS 197.015(17), because neither decision concerns or applies the city’s acknowledged
16 comprehensive plan or land use regulations. Intervenor argues that the city’s legislation is a
17 fiscal ordinance, much like the establishment of a public utility district (PUD), a local
18 improvement district (LID), or a systems development charge (SDC). Intervenor cites to
19 cases where the Court of Appeals and LUBA have held that these actions do not constitute
20 land use decisions. *See City of Portland v. Multnomah County*, 19 Or LUBA 468 (1990)

³A “land use regulation” is defined in ORS 197.015(11) as:

“[A]ny local government zoning ordinance, land division ordinance * * * or similar general ordinance establishing standards for implementing a comprehensive plan.”

A “new land use regulation” is defined in ORS 197.015(17) as:

“[A] land use regulation other than an amendment to an acknowledged land use regulation adopted by a local government that already has a comprehensive plan and land use regulations acknowledged under ORS 197.251.”

1 (formation of a PUD is not a land use decision); *Martin v. City of Tigard*, 17 Or LUBA 16
2 (1988) (modification of an existing LID is not a land use decision); *State Housing Council v.*
3 *City of Lake Oswego*, 48 Or App 525, 617 P2d 655 (1980), *rev dismissed* 291 Or 878, 635
4 P2d 647 (1981) (SDC ordinance does not have to comply with statewide planning goals).

5 Petitioners argue that the city’s decisions constitute land use decisions because they
6 modify conditions of approval for the development permits obtained by intervenor.
7 According to petitioner, intervenor could not obtain final approval of its development
8 without the establishment of the reimbursement district.

9 The ordinance adopted by the city contains language referring to the conditions of
10 approval adopted in earlier land use decisions approving intervenor’s applications for the
11 development of the Woodburn Company Stores. The ordinance states, in relevant part:

12 “WHEREAS, the City in 1998 previously approved land use applications in
13 City of Woodburn File Nos. Annexation 98-02, Comprehensive Plan Map
14 Amendment 98-01, Zone Map Amendment 98-03, Finding of Conformance
15 92-01 and 92-02, Site Plan Review 98-05 and Variances 98-04, 98-05 and 98-
16 06 (hereinafter ‘the land use approvals’) submitted by Craig Realty Group,
17 Woodburn LLC (hereinafter ‘the Developer’); and

18 “WHEREAS, one development condition, contained in the land use
19 approvals, related to the installation of the traffic signal to be located at the
20 intersection of Woodland Avenue and State Highway 219:

21 “*The applicant shall install a traffic signal at the intersection of Woodland*
22 *Avenue and State Highway 219, using applicant’s proceeds, as well as those*
23 *of previously conditioned applicants, and other subsequently benefitted*
24 *properties, and funds from any local improvement district (LID). In the event*
25 *the LID is not approved, the applicant shall abide by the cost sharing decision*
26 *of the City Council. The installation of the signal shall be subject to ODOT*
27 *approval. * * ** and;

28 “WHEREAS, another development condition, contained in the land use
29 approvals, related to the improvement and extension of Arney Road to
30 Woodland Avenue and its connection to State Highway 219:

31 “*To accomplish the portion of the project for which costs are to be shared by*
32 *other benefitted properties, a formal city LID process shall be followed. * * **
33 *In the event the LID is not approved, the applicant shall abide by the decision*

1 *of the City Council as to project transportation improvement cost sharing.* * *
2 *’” Motion to Dismiss Exhibit 1 (italics in original; underlining omitted).

3 We agree with intervenor that the city’s decision to establish a reimbursement district
4 does not modify conditions contained in the city’s approval of intervenor’s development.
5 Instead, the reimbursement district was the city’s alternative cost-sharing choice, one which
6 intervenor was obliged by conditions of approval not to contest.

7 **B. Significant Impacts Test**

8 Petitioner argues that even if the city’s decision is not a “land use decision” as
9 defined in statute, the enabling ordinance and the resolution for establishing a reimbursement
10 district for the Arney Road improvements do have an impact on land use. Petitioner contends
11 that the city’s legislation allocates a portion of the costs of the improvements to petitioner,
12 and petitioner is now obligated to pay the reimbursement fees before being allowed to submit
13 a development application for his assessed property. Petitioner contends that this “pre-
14 condition” effects an unconstitutional taking. Finally, petitioner contends that the city’s
15 legislation creates a fiscal allocation of the costs of certain public improvements associated
16 with the Craig Realty development, and that the allocation of the cost of development in
17 conjunction with the enforcement of a condition of approval and the “pre-condition” applied
18 to petitioner’s property “have the principal attributes of a land use decision.” Petitioner’s
19 Response to [Intervenor’s] Motion to Dismiss 4.

20 To satisfy the significant impacts test, petitioner must show that the effect of the
21 decision on present or future land uses is qualitatively or quantitatively significant. *Fraser v.*
22 *City of Joseph*, 28 Or LUBA 217, 224 (1994). Petitioner must also establish a relationship
23 between the decision and the projected impacts, and provide evidence demonstrating that the
24 projected impacts are likely to occur. *Id.*

25 The transportation infrastructure improvements have been made. Petitioner has not
26 articulated what effect the establishment of the reimbursement district will have on land use,
27 other than delay in the development of his property. While an unconstitutional taking may

1 occur in the course of a land use decision, a taking, by itself, does not necessarily cause a
2 significant impact on land use. Further, petitioner has not demonstrated that he is unable to
3 develop his property, even though the cost of such development has increased as a result of
4 the reimbursement assessment. Thus, petitioner has not demonstrated that the city's
5 legislation will have a significant impact on land use.

6 **C. Conclusion**

7 We conclude that the challenged decisions are fiscal ordinances, with impacts only
8 tangentially related to land use. Facial challenges to city fiscal ordinances and challenges to
9 the application of fiscal policies are not reviewable as land use decisions. *State Housing*
10 *Council v. City of Lake Oswego; The Petrie Company v. City of Tigard*, 28 Or LUBA 535,
11 540 (1995) (adoption of a sewer improvement reimbursement district ordinance is a fiscal
12 ordinance and not a land use decision). Because the challenged decisions are not land use
13 decisions, we do not have jurisdiction to review them.

14 **MOTION TO TRANSFER TO CIRCUIT COURT**

15 Petitioner moves to transfer this case to circuit court. Intervenor opposes the motion,
16 because petitioner failed to file his motion within 10 days of the filing of intervenor's motion
17 to dismiss.

18 ORS 34.102(4) provides:

19 "A notice of intent to appeal filed with the Land Use Board of Appeals
20 pursuant to ORS 197.830 and requesting review of a decision of a municipal
21 corporation made in the transaction of municipal corporation business that is
22 not reviewable as a land use decision * * * shall be transferred to the circuit
23 court and treated as a petition for writ of review. * * *"

24 OAR 661-010-0075(11)(b) requires that a request for transfer be made within 10 days
25 after the date a respondent's motion challenging the Board's jurisdiction is filed. Petitioner
26 contends that, notwithstanding LUBA's rule, the statute requires LUBA to transfer a decision
27 to circuit court, if the decision is not reviewable as a land use decision. Petitioner contends

1 that filing a motion to transfer one day late is a technical violation of LUBA's rules, and that
2 the late filing did not prevent the speediest practicable review.

3 We agree with petitioner that the untimely filing of the motion to transfer is only a
4 technical violation of LUBA's rules. OAR 661-010-0005. Neither intervenor nor respondent
5 have established that their rights have been substantially prejudiced by the late filing of the
6 motion to transfer.

7 Petitioner's motion to transfer to Marion County Circuit Court is granted.

8 **RECORD OBJECTIONS**

9 Because we transfer the decisions to circuit court, we do not resolve petitioner's
10 record objections.

11 The decision is transferred.