BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

THOMAS LINDSEY and JENNIFER LINDSEY,
Petitioners,

vs.

CITY OF EUGENE,
Respondent,

and

TANIA JORGENSEN,
Intervenor-Respondent.

LUBA No. 99-125

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Michael E. Farthing, Eugene, represented petitioners.

No appearance by respondent.

Anne C. Davies, Eugene, represented intervenor-respondent.

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

DISMISSED 2/29/2000

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a temporary surfacing permit issued by the City of Eugene Department of Public Works.

MOTION TO INTERVENE

Tania Jorgensen, the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

On July 13, 1999, the city conditionally approved intervenor's application for a surfacing permit, based on findings of fact set out in that surfacing permit. On August 3, 1999, petitioners filed with LUBA a notice of intent to appeal that permit approval. Intervenor filed a motion to dismiss this appeal on September 27, 1999. Respondent filed a motion to extend the time to file the record on September 28, 1999. Petitioners filed a response to the motion to dismiss and the motion for extension of time to file record on October 12, 1999. Intervenor moved to strike petitioners' response to motion to dismiss on October 19, 1999.

MOTION TO DISMISS

Intervenor contends that this Board lacks jurisdiction because the challenged decision is not a "land use decision" as that term is defined by ORS 197.015(10).[1] Intervenor first

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[1] As relevant, ORS 197.015(10) provides the following definition of "land use decision":

> "'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;

1 argues that the challenged decision was not a *final* decision at the time that the appeal was
2 filed, as required by ORS 197.015(10)(a)(A). Intervenor next argues that the challenged
3 decision is not a land use decision, because it does not apply any of the land use standards
4 identified at ORS 197.015(10)(a)(A)(i)-(iv). Intervenor also argues that the challenged
5 decision is not a land use decision as defined by ORS 197.015(10)(a) because it is
6 specifically excluded by ORS 197.015(10)(b)(D). Finally, intervenor argues that the
7 challenged decision is not a "significant impacts" land use decision under *City of Pendleton*
8 *v. Kerns*, 294 Or 126, 653 P2d 992 (1982). *See Portland Oil Service Co. v. City of*
9 *Beaverton,* 16 Or LUBA 255, 259-60 (1987) (a local government decision is a land use
10 decision if it meets either (1) the statutory definition of ORS 197.015(10) or (2) the
11 significant impacts test of *Kerns*).

12 This Board has jurisdiction to review a "land use decision." ORS 197.825(1). As the
13 party seeking review, petitioners have the burden of establishing that the challenged decision
14 is a land use decision. *Billington v. Polk County*, 299 Or 471, 475, 703 P2d 232 (1985), *1000*
15 *Friends of Oregon v. Columbia County*, 29 Or LUBA 597, 598 (1995), *aff'd* 141 Or App
16 271, 917 P2d 543 (1996). Where a responding party moves to dismiss an appeal on the basis
17 that the challenged decision is not a land use decision, the petitioner's response to the motion

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"(ii) A comprehensive plan provision;

"(iii) A land use regulation; or

"(iv) A new land use regulation * * *

"* * * * *

"(b) Does not include a decision of a local government:

"* * * * *

"(D) Which determines final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility which is otherwise authorized by and consistent with the comprehensive plan and land use regulations[.]"

to dismiss must establish that this Board has jurisdiction. *Bowen v. City of Dunes City*, 28 Or LUBA 324, 328 (1994).

We turn first to the issue of whether the challenged decision is a statutory "land use decision," *i.e.* whether it is a "land use decision" as that term is defined by ORS 197.015(10)(a). Intervenor argues that the challenged decision does not concern the adoption, amendment, or application of the statewide planning goals, a comprehensive plan, or a land use regulation. The city found, in relevant part:

> "The [surfacing permit] approval process applies construction standard provisions applicable through local administrative rules issued by the Department of Public Works. Administrative Order No. 58-97-21-F. Those regulations do not implement the city's land use regulations, but were adopted under the authority granted to the City Engineer by Eugene Code 7.007, which authorizes the adoption of regulations implementing the city's building regulations. The regulations implement E.C. 7.290.
>
> "The [surfacing permit] approval process does not involve the application of the statewide planning goals, the Metro Area General Plan or land use regulations." Temporary Surfacing Permit 1.

Intervenor argues that the city's interpretation that the surfacing permit "approval process applies construction standard provisions" and that such "regulations do not implement the city's land use regulations" is reasonable and correct, and should be affirmed by LUBA. *McCoy v. Linn County*, 90 Or App 271, 275, 752 P2d 323 (1988).

Petitioners respond that one of the conditions of approval that is included in the challenged decision makes the surfacing permit a "land use decision." The condition states:

> "Applicant shall submit a tree index matrix which shows: an index number for each tree, species, size of tree, and percent of critical root zone impacted by construction. Applicant shall submit a report which identifies each tree which is proposed for removal or preservation. For each tree proposed for removal, *Applicant shall show the criterion justifying the removal*, this could include but is not limited to the general health of tree and the percent of construction-related impacts to the tree and the critical root zone. For each tree proposed for preservation, Applicant shall show specific detail of protection measures, which could include type of fencing or other protection, the specific location of the protective measures and the specific root pruning details for the impacted root zone. The pruning details should include the techniques

> identified for the various sized roots. The report must include preservation guidelines for contractors." Temporary Surfacing Permit 2 (emphasis added).

Petitioners contend that the requirement that intervenor "show the criterion justifying the removal" for each tree proposed for destruction makes the surfacing permit a "land use decision." Petitioners further argue that "identifying which trees are to be removed requires the exercise of discretion in applying the tree removal criteria to each tree." Response to Motion to Dismiss 4-5.

The surfacing permit identifies Eugene Code 6.300 and 6.330 as regulating tree removal on private property. Petitioners do not argue that these provisions are land use regulations, and they do not appear in the land use chapter of the Eugene Code.[2] Even if those sections of the Eugene Code were land use regulations, that would not help petitioners here. The challenged decision specifically states "[t]his permit does not authorize or permit the removal of these trees." Temporary Surfacing Permit 2. The condition simply requires an inventory and information regarding trees on the subject property. Petitioners attach information to their response to the motion to dismiss about illegal tree cutting on the subject property that has occurred since the city issued the challenged decision. Disregarding the problem that the attachments post-date the challenged decision and for that reason would not be part of the record of this appeal, the attachments merely show that trees may have been cut in violation of the code and the surfacing permit.[3] Such information does not show that the challenged decision applies the tree regulations to authorize tree removal.

Petitioners also argue that "[i]t is not sufficient to state that the Metro Plan does not apply to the [surfacing permit] without providing some evidence that the conclusion is based

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[2] 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."

[3] At respondent's request, the Board suspended the deadline for filing the record in this appeal.

1 on substantial evidence." Response to Motion to Dismiss 12. Petitioners, however, do not
2 point to any portion of the Metro Plan or any land use standards other than Eugene Code
3 6.300 and 6.330 and argue that they apply to the surfacing permit. Because petitioners have
4 the burden of proving that this Board has jurisdiction, petitioners must establish that the
5 Metro Plan or one of the other land use standards identified by ORS 197.015(10)(a)(A)(i)
6 through (iv) applies. *See Price v. Clatsop County*, 25 Or LUBA 341, 347-48 (1993) (where
7 the petitioner fails to identify any comprehensive plan provision as applicable to, or argue
8 that any plan provision is an approval standard for, the challenged decision, LUBA will
9 conclude that the challenged decision does not concern the application of a comprehensive
10 plan).

11 We hold that petitioners have not satisfied their burden of showing that the surfacing
12 permit appeal is a statutory land use decision.[4] Even if the city did exercise discretion in
13 issuing the surfacing permit, as petitioners allege, that would not establish that the challenged
14 decision is a land use decision unless one or more of the land use standards identified by
15 ORS 197.015(10)(a)(A)(i) through (iv) was applied or should have been applied. Petitioners
16 do not argue that the challenged decision is a "significant impacts" land use decision.
17 Therefore, this Board does not have jurisdiction over the challenged decision.

18 Where LUBA lacks jurisdiction, an appeal must either be dismissed or transferred to
19 circuit court pursuant to ORS 34.102(4). *Sully v. City of Ashland*, 20 Or LUBA 428, 430
20 (1991). Petitioners have not filed a motion to transfer this appeal to circuit court, as required
21 by OAR 6610010-0075(11)(b). Therefore, we dismiss the appeal. OAR 661-010-
22 0075(11)(c); *Miller v. City of Dayton*, 22 Or LUBA 661, 666, *aff'd* 113 Or App 300, 833 P2d
23 299, *rev den* 314 Or 573 (1992).

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[4] Because we agree with intervenor that petitioners fail to demonstrate that the challenged decision applied or should have applied one or more of the land use standards identified by ORS 197.015(10)(a)(A)(i) through (iv), we need not address intervenor's other arguments that the challenged decision does not qualify as a statutory land use decision.

1 Intervenor's motion to dismiss is sustained. In view of our resolution of intervenor's

2 motion to dismiss, we need not consider other pending motions.[5]

3 This appeal is dismissed.

[5] Petitioners object to the city's request to delay filing the record. Intervenor moves to strike certain documents attached to petitioners' response to the motion to dismiss. Our resolution of the motion to dismiss is based on the parties' legal arguments, the challenged decision, and city legislation of which we may take official notice. Other documents attached to the parties' motions and responses play no role in our decision.