

NATURE OF THE DECISION

This appeal concerns a city decision regarding possible purchase of petitioner’s property for use as a poplar tree plantation in conjunction with the city’s sewage treatment facility.

FACTS

The city has not adopted a written decision in this matter, other than the minutes of city council meetings on October 7, 1999 and on November 18, 1999. The October 7, 1999 city council meeting minutes show that in 1998 the city submitted a plan to the Oregon Department of Environmental Quality for upgrade of its sewage treatment facilities. As part of this proposed upgrading of its sewage treatment facilities, the city plans to acquire 50 acres of land for disposal of wastewater from its sewage treatment facility. The city anticipates planting poplar trees on the 50 acres to absorb the wastewater. The city council considered seven alternative combinations of parcels for possible purchase for the poplar tree plantation, including some exclusive farm use (EFU) zoned property. Record 32-33.

At the October 7, 1999 city council meeting, the city council was informed of the process it would need to follow to acquire the 50 acres. Following testimony from property owners, a number of potential legal issues associated with any proposal to apply wastewater to EFU-zoned land were discussed. The city council later voted to select petitioner’s property as the “preferred choice” for acquisition. Record 40. However, the city council also voted to allow petitioner one month to prepare suggested alternatives and present those alternatives to the city.

At a November 18, 1999 city council meeting, the city council considered and voted to reject the three alternatives that were suggested by petitioner. Although the city council’s ultimate decision at the November 18, 1999 meeting is somewhat unclear, it apparently

1 determined that it would proceed to obtain appraisals and attempt to purchase or condemn
2 petitioner's property for use as a poplar tree plantation.

3 **MOTION TO DISMISS**

4 The city moves to dismiss this appeal, arguing that the challenged decision is not a
5 land use decision subject to review by LUBA.¹ The city contends that it has only decided to
6 authorize appraisals and attempt to acquire petitioner's property. The city argues in its
7 motion:

8 "At this point in the process the City has done no more than authorize a
9 couple of appraisals to be completed and the land owners [to] be informed that
10 the City wishes to acquire their property. This is not a final decision, it is the
11 *first* step in a large number of steps which will be taken which *may* result in
12 the petitioner's land being the subject of the City's eminent domain power.
13 This has not yet happened. Once the City has received the appraisals,
14 determined that the projected [purchase] price is reasonable and within the
15 resources of the City, the City will then, as part of the same hearing, address
16 the land use issues raised by Petitioner. The Petitioner's appeal is premature
17 and does not afford the City an opportunity for orderly decision making.
18 There is simply no reason for the City to engage in a lengthy land use decision
19 making process until and unless it decides to actually purchase Petitioner's

¹As relevant in this appeal, LUBA's jurisdiction is limited to land use decisions. ORS 197.825(1). ORS 197.015(10) defines "land use decision" as follows:

"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 goals;

"(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:

"(A) Which is made under land use standards which do not require interpretation or the exercise of policy or legal judgment[.]"

1 land. No decision to purchase the land has yet been made.” Motion to
2 Dismiss 3 (emphasis in original).

3 We understand the city to argue that it has not yet made a *final* decision that petitioner’s
4 property or any other property may be used as a poplar tree plantation for application of
5 wastewater under relevant state and local land use standards. Based on that understanding,
6 we agree with the city that this appeal should be dismissed, because land use decisions must
7 be *final* decisions. *Hemstreet v. Seaside Improvement Comm.*, 16 Or LUBA 748, 752, *aff’d*
8 93 Or App 73, 761 P2d 533 (1988); *CBH Company v. City of Tualatin*, 16 Or LUBA 399,
9 405 n 7 (1988).

10 Petitioner offers three reasons why it believes the city has rendered a land use
11 decision subject to our review. We address each of those reasons separately below.

12 **A. Discretionary Decision Making**

13 First, petitioner argues the city’s decision to authorize purchase or condemnation of
14 its property required “interpretation or legal judgment.” Citing *Friends of Clean Living v.*
15 *Polk County*, ___ Or LUBA ___ (LUBA Nos. 98-150, 98-162 and 98-177, August 31, 1999),
16 petitioner argues that such a decision constitutes a land use decision.

17 The only similarity between the facts in this appeal and those in *Friends of Clean*
18 *Living* is the similar planned ultimate use as a poplar tree plantation. In *Friends of Clean*
19 *Living* the county adopted a final decision that the proposed poplar tree plantation in that
20 case was an allowed use in its EFU zone under applicable statutes and county land use
21 regulations.² Based on our review of the record and the parties’ arguments, we conclude that
22 in the present case the city has not made such a *final* determination. The fact that such a final

²In *Friends of Clean Living* we concluded that because the challenged decision was a final decision applying land use standards it was a land use decision. In reaching that conclusion, we rejected the county’s argument that its decision qualified for the statutory exception from the definition of land use decision that is provided by ORS 197.015(10)(b)(A), *see* n 1, for certain nondiscretionary decisions. *Friends of Clean Living*, slip op 12.

1 decision may constitute a land use decision, when and if it is made, does not mean that the
2 decision challenged in *this* appeal is a land use decision.

3 **B. Significant Impacts**

4 Even if a decision does not satisfy the statutory definition of "land use decision," it
5 may nevertheless be a "land use decision" if it meets the "significant impact test" enunciated
6 in *Petersen v. Klamath Falls*, 279 Or 249, 566 P2d 1193 (1977) and *City of Pendleton v.*
7 *Kerns*, 294 Or 126, 653 P2d 992 (1982). *Billington v. Polk County*, 299 Or 471, 703 P2d 232
8 (1985). We need not decide here whether a final decision to purchase petitioner's property
9 could constitute a significant impacts test land use decision, as petitioner argues. We have
10 already determined that the city has not yet made such a final decision. Like statutory land
11 use decisions, significant impacts test land use decisions must be *final* decisions. *Hemstreet*
12 *v. Seaside Improvement Comm.*, 16 Or LUBA at 752; *CBH Company v. City of Tualatin*, 16
13 Or LUBA at 405 n 7. Because the challenged decision is not a final decision, it is not subject
14 to our jurisdiction.

15 **C. Filing of the Record**

16 Petitioner finally argues that by filing the record in this matter, the city "has agreed
17 that LUBA has jurisdiction over this matter." Objection to Respondent's Motion to Dismiss
18 2.

19 Objections to LUBA's jurisdiction may be raised at any time. *Elliott v. Lane County*,
20 18 Or LUBA 871, 874 (1990); *Standard Insurance Co. v. City of Hillsboro*, 17 Or LUBA
21 886, 890 n 3 (1989); *Osborne v. Lane County*, 4 Or LUBA 368, 369 (1981). The city's filing
22 of the record did not and could not have the legal effect of establishing our jurisdiction in this
23 appeal. *See Wilson v. Matthews*, 48 Or App 491, 494, 617 P2d 302 (1980) (parties cannot
24 stipulate to jurisdiction where jurisdiction is provided by statute).

1 **D. Conclusion**

2 For the reasons set out above, we agree with the city that the challenged decision does
3 not adopt a final decision to purchase petitioner’s property and does not make a final
4 determination that petitioner’s property may be used to dispose of waste by irrigation, under
5 relevant land use approval criteria. Therefore, the challenged decision is not a land use
6 decision subject to our jurisdiction.

7 This appeal is dismissed.