

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 HOME BUILDERS ASSOCIATION OF

4 LANE COUNTY,

5 *Petitioner,*

6 vs.

7 CITY OF EUGENE,

8 *Respondent,*

9 and

10 KEVIN MATTHEWS, ROBERT ZAKO,

11 and JOHN KLINE,

12 *Intervenors-Respondent.*

13 LUBA No. 2001-060

14 FINAL OPINION

15 AND ORDER

16 Appeal from the City of Eugene.

17 Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioner.

18 Emily N. Jerome, Eugene, filed the response brief and argued on behalf of
19 respondent. With her on the brief were Glenn Klein, Kathryn P. Brotherton, and Harrang
20 Long Gary Rudnick P.C.

21 Kevin Matthews, Robert Zako, and John Kline, Eugene, represented themselves.

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

24 REMANDED

25 02/28/2002

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

NATURE OF THE DECISION

Petitioner appeals a city decision that adopts a tree removal and replacement ordinance (hereafter tree ordinance).

MOTIONS TO INTERVENE

Kevin Matthews, Robert Zako, and John Kline move to intervene on the side of respondent. There is no opposition to the motions, and they are allowed.

MOTION TO FILE REPLY BRIEF

Petitioner moves for permission to file a reply brief. The motion states that the reply brief responds to the city’s assertion that the tree preservation ordinance is no longer effective as a land use regulation and requests that the Board take official notice of documents in support of the city’s position. A reply brief accompanies the motion. The city does not object to the proposed reply brief, and the reply brief addresses issues that were raised for the first time in the response brief. Accordingly, we grant petitioner’s motion to file a reply brief. OAR 661-010-0039.

FACTS

Prior to the challenged decision, the City of Eugene regulated all tree removal provisions through chapter 6 of its municipal code, titled Environment and Health. Land use development was regulated by chapter 9, the land use code. The city recently completed an update to chapter 9, the Land Use Code Update (LUCU), and as part of the LUCU the city changed the way it regulates tree removal. The city amended chapter 6 so that any tree removal proposals relating to land use development are now governed by the chapter 9 land use code, while tree removal proposals not involving development applications are regulated by chapter 6. This bifurcation was accomplished through two ordinances. One ordinance added to chapter 9 a set of tree removal provisions applicable to land use development applications. That ordinance is the subject of a separate opinion issued this day in LUBA

1 Nos. 2001-059/063. A second ordinance added to chapter 6 a set of tree removal provisions
2 not associated with land use development. This appeal followed.

3 **JURISDICTION**

4 The city argues that we do not have jurisdiction to hear this appeal because the city's
5 adoption of the tree ordinance in chapter 6 is not a land use decision. Petitioner replies that
6 the decision is both a statutory land use decision as well as a land use decision under the
7 significant impact test.

8 Under ORS 197.825, LUBA has exclusive jurisdiction over land use decisions. ORS
9 197.015(10)(a)(A) defines "land use decision" to include:

10 "A final decision or determination made by a local government or special
11 district that concerns the adoption, amendment or application of:

12 "(i) The goals;

13 "(ii) A comprehensive plan provision;

14 "(iii) A land use regulation; or

15 "(iv) A new land use regulation."

16 The parties dispute the purpose and effect of the tree ordinance. According to
17 petitioner, the original tree ordinance was submitted to the Department of Land Conservation
18 and Development (DLCD) during the city's acknowledgment process in 1981 as a Goal 5
19 (Natural Resources) implementing measure. Therefore, petitioner argues, the challenged
20 decision is a land use decision because it: (1) involves the application of the goals; (2) adopts
21 a new land use regulation; and (3) amends an existing land use regulation. The city replies
22 that the 1981 tree ordinance only implemented Goals 3 (Agricultural Lands) and 4 (Forest
23 Lands), and because no Goal 3 or 4 lands now exist inside the city, the ordinance does not
24 affect the goals or implement a comprehensive plan provision.

1 Petitioner relies on a 1981 DLCD acknowledgment report regarding the
2 Eugene/Springfield Metropolitan Area’s Goal 5 addendum to support its argument that the
3 chapter 6 ordinance is a land use regulation. The DLCD report states:

4 “Eugene’s implementation program for natural resources preservation
5 consists of ‘The South Hills Study’ adopted in June of 1974, the Eugene
6 Zoning Code, Sections 9.508–9.520 (Planned Unit Development Regulations),
7 9.536 (Building Height Limitations), 6.30 –6.330 (*Tree Preservation*), 9.684–
8 9.694 (Site Review), 9.466 and 9.470 (Aggregate Extraction Permitted in M-2
9 and M-3 zones), and the Eugene Land Division Code.” Petitioner’s Appendix
10 33 (emphasis added).

11 The city attempts to rebut the DLCD report by providing two pages from an
12 unidentified document that was apparently submitted by the city to DLCD at some point
13 during the acknowledgment process. The pages contain a list of plans, policies, and
14 implementing measures that the city presumably relied upon to obtain acknowledgment. In a
15 column to the right of the list, there is a handwritten chart that purports to display which
16 plans, policies, and implementing measures correspond to different goals. The chart next to
17 the tree ordinance is checked for Goals 3 and 4, but not for Goal 5. The city asks us to take
18 official notice of the pages, while petitioner urges us to reject them while taking notice of the
19 DLCD reports. We will consider both parties’ submissions for the purpose of determining
20 whether we have jurisdiction.

21 The pages submitted by the city are of little to no assistance to its position. As
22 petitioner points out, the pages are undated, they are part of a larger document that was not
23 submitted to LUBA, and there is nothing to support the city’s assertion that the document
24 was submitted to DLCD or that DLCD relied on it in determining acknowledgment with the
25 goals. Furthermore, the accuracy of the chart is belied by the June 12, 1981 DLCD report
26 that clearly states that Goals 3 and 4 were not applicable inside the city. We agree with
27 petitioner that the 1981 tree ordinance was acknowledged by DLCD as an ordinance that
28 implemented Goal 5 by protecting natural resources inside the city.

1 The city also argues that any Goal 5 compliance is accomplished by the tree removal
2 provisions now included in chapter 9. According to the city, because the provisions in
3 chapter 6 are clearly not intended to be land use regulations, we do not have jurisdiction over
4 the decision pursuant to *Ramsey v. City of Portland*, 30 Or LUBA 212 (1995). In *Ramsey*,
5 we found that a tree removal ordinance was not a land use decision. We rejected the
6 petitioner’s argument that the ordinance applied Goals 4 and 5. We also recognized that the
7 tree removal ordinance in that case was not included in the city’s zoning code. *Id.* at 217-18.
8 *Ramsey*, however, has limited applicability:

9 “The principle stated in *Ramsey* is relatively narrow. Where a local
10 government makes it clear that the ordinance it is adopting is not intended to
11 be a land use regulation, LUBA does not have jurisdiction to review such an
12 ordinance, provided there is no clear connection between the ordinance and
13 the comprehensive plan. In that circumstance, and with that limitation, the
14 ordinance is not a land use regulation even though it may arguably further
15 some comprehensive plan provisions in a general or indirect way. * * *”
16 *Rest-Haven Memorial Park v. City of Eugene*, 39 Or LUBA 282, 288, *aff’d*
17 175 Or App 419, 28 P3d 1229 (2001).

18 Although the present case appears similar to *Ramsey*, the cases are distinguishable.
19 While both cases involve situations where the local government specifically attempted to
20 treat tree ordinances as non-land use decisions by placing them outside of the local land use
21 code, that factor is not dispositive. The critical issue is whether there is a clear connection
22 between the ordinance and the statewide planning goal or comprehensive plan provision it
23 allegedly implements. Mere labeling of the ordinance or its location within a local code does
24 not make a land use regulation something else. *See Rest-Haven Memorial Park*, 39 Or
25 LUBA at 284 (City of Eugene adopted ordinance as part of chapter 6, rather than as part of
26 its land use code, but the decision was nonetheless a land use decision).

27 In *Ramsey*, we stated that “not every regulation that arguably furthers the objectives
28 of Goal 5 applies Goal 5.” 30 Or LUBA at 217. However, when an ordinance is specifically
29 identified as an implementing measure to achieve compliance with a goal for purposes of
30 acknowledgment, that ordinance applies the goal. The 1981 tree ordinance was adopted to

1 protect some of the city’s Goal 5 resources. As far as we can tell, the 1981 tree ordinance
2 did not distinguish between preservation of trees in the context of land use approvals and
3 other contexts: it simply regulated removal of trees. There is no suggestion in any of the
4 materials submitted to us that tree preservation requirements outside the context of land use
5 approvals are not part of the city’s program to achieve Goal 5. In short, there is a clear
6 connection between the 1981 ordinance amended by the challenged decision and Goal 5.
7 Because the tree ordinance amended in this decision is a Goal 5 implementing regulation, the
8 challenged decision implicates Goal 5. Therefore, the challenged decision is a land use
9 decision, and we have jurisdiction to decide this appeal.¹

10 **FIRST ASSIGNMENT OF ERROR**

11 Petitioner asserts that the challenged decision should be remanded because the city
12 failed to provide pre-adoption or post-adoption notice to DLCD as required by ORS
13 197.610(1) and 197.615(1).² The city concedes that if we find that the goals apply to the

¹ Because we find that the challenged decision is a statutory land use decision, we need not decide whether it also satisfies the significant impact test.

² ORS 197.610 provides in pertinent part:

“(1) A proposal to amend a local government acknowledged comprehensive plan or land use regulation shall be forwarded to the Director of the Department of Land Conservation and Development at least 45 days before the first evidentiary hearing on adoption. The proposal forwarded shall contain the text and any supplemental information that the local government believes is necessary to inform the director as to the effect of the proposal. The notice shall include the date set for the first evidentiary hearing. The director shall notify persons who have requested notice that the proposal is pending.

“(2) When a local government determines that the goals do not apply to a particular proposed amendment or new regulation, notice under subsection (1) of this section is not required. In addition, a local government may submit an amendment or new regulation with less than 45 days’ notice if the local government determines that there are emergency circumstances requiring expedited review. In both cases:

“(a) The amendment or new regulation shall be submitted after adoption as provided in ORS 197.615(1) and (2); and

1 challenged ordinance then the decision must be remanded. Because we find that Goal 5
2 applies to the challenged decision, the city was required to provide notice to DLCD, and the
3 failure to do so requires remand. *Oregon City Leasing, Inc. v. Columbia County*, 121 Or App
4 173, 177, 854 P2d 495 (1993).

5 The first assignment of error is sustained.

6 **SECOND ASSIGNMENT OF ERROR**

7 Petitioner’s second assignment of error is as follows:

8 “The City violated the Needed Housing Statute, Goal 10, the Goal 10 Rule,
9 Goal 9, and the Goal 9 Rule, and failed to make a decision based upon an
10 adequate factual base or adequate findings by subjecting all lands in the city’s
11 acknowledged residential lands inventories, commercial lands inventories,
12 and industrial lands inventories to the restrictions on tree removal created by
13 the ordinance.” Petition for Review 8.

14 Petitioner’s entire argument consists of the following sentence:

15 “For purposes of brevity, here the petitioner incorporates assignments of error
16 two and three in the petition of the Chamber of Commerce filed in the zoning
17 code appeal, LUBA Nos. 2001-059/063.” *Id.*

18 Petitioner’s assignment of error is insufficiently developed for review. The practice
19 of incorporating other parties’ arguments or assignments of error, while permissible, carries
20 the risk that, without additional explanation, the Board will not be able to relate the

“(b) Notwithstanding the requirements of ORS 197.830(2), the director or any other person may appeal the decision to the board under ORS 197.830 to 197.845.”

ORS 197.615(1) provides:

“A local government that amends an acknowledged comprehensive plan or land use regulation or adopts a new land use regulation shall mail or otherwise submit to the Director of the Department of Land Conservation and Development a copy of the adopted text of the comprehensive plan provision or land use regulation together with the findings adopted by the local government. The text and findings must be mailed or otherwise submitted not later than five working days after the final decision by the governing body. If the proposed amendment or new regulation that the director received under ORS 197.610 has been substantially amended, the local government shall specify the changes that have been made in the notice provided to the director. If the text and findings are mailed, they shall include a signed statement by the person mailing them indicating the date of deposit in the mail.”

1 incorporated arguments to the matter at hand. Here, petitioner refers us to 22 pages of
2 argument in another brief that challenges a very different set of code provisions for a number
3 of diverse reasons. We are left to speculate why petitioner believes the tree preservation
4 requirements in chapter 6 violate the needed housing statutes, or Goals 9 and 10 and their
5 interpretive rules. We decline to do so.

6 The second assignment of error is denied.

7 The city's decision is remanded.