BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LINDA JESINGHAUS and JIM JESINGHAUS,
Petitioners,

vs.

CITY OF GRANTS PASS,
Respondent,

and

GRAYSTONE ESTATES, LLC,
Intervenor-Respondent.

LUBA No. 2002-081

FINAL OPINION
AND ORDER

Appeal from City of Grants Pass.

Alan D.B. Harper, Medford, represented petitioners.

William K. Kabeiseman, Portland, represented respondent.

Ben Freudenberg, Grants Pass, represented intervenor-respondent.

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

TRANSFERRED 08/15/2002

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal an ordinance creating a reimbursement district.

MOTION TO INTERVENE

Graystone Estates, LLC (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

We take the following facts from the record and the parties' pleadings. Intervenor applied to the city to subdivide and develop property tax lot 1100 into 26 residential lots, known as the Nunnwood subdivision. Apparently as a condition of subdivision approval, the city required intervenor to construct a water line and stormwater drains in Redwood Avenue nearby, and to construct a water line, stormwater drains and sanitary sewer lines in George Tweed Boulevard, which adjoins tax lot 1100.

On April 19, 2002, intervenor applied to the city to form an Advance Finance District (AFD), pursuant to a city ordinance allowing formation of such districts.[1] The purpose of an AFD is to provide a developer with financial reimbursement for public improvements, from owners of undeveloped properties that benefit from the improvements. Under the ordinance, the owners of such benefited properties need not reimburse the developer until the owners apply to develop their own property. Petitioners own property within the proposed AFD, and appeared at the hearings before the city council on intervenor's application to form the AFD. On June 11, 2002, the city council issued Ordinance 5126, which creates the requested AFD. This appeal followed.

---

[1]The record contains a copy of the city ordinance that allows formation of AFDs. Record 86-94. The cited record pages reflect that the ordinance is codified at "Section 9.40," but does not indicate in what code "Section 9.40" is located. As far as we can tell, "Section 9.40" is not part of the city's comprehensive plan or development code.

JURISDICTION

On July 24, 2002, the city moved to dismiss this appeal, arguing that the challenged ordinance is neither a "land use decision" as defined at ORS 197.015(10), nor a "significant impacts" land use decision as described in *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 992 (1982) and *Billington v. Polk County*, 299 Or 471, 703 P2d 232 (1985). Petitioners dispute those contentions. In the event the Board finds that the appealed decision is not within LUBA's jurisdiction, petitioners move to transfer this appeal to circuit court, pursuant to OAR 661-010-0075(11).[2]

The city's motion argues that the challenged decision to establish a reimbursement district is purely a "fiscal ordinance" and, therefore, not within LUBA's jurisdiction. *See Housing Council v. City of Lake Oswego*, 48 Or App 525, 617 P2d 655 (1980), *rev dismissed* 291 Or 878, 635 P2d 647 (1981) (ordinance imposing system development charges does not have to comply with statewide planning goals); *Baker v. City of Woodburn*, 37 Or LUBA 563, 566-69, *aff'd* 167 Or App 259, 4 P3d 775 (2000) (resolution establishing reimbursement district is neither statutory nor significant impacts land use decision); *The Petrie Company v. City of Tigard*, 28 Or LUBA 535, 540 (1995) (denial of application for reimbursement district is a fiscal ordinance not reviewable by LUBA).

A. Statutory Land Use Decision

Petitioners acknowledge the foregoing cases, but argue nonetheless that the challenged decision is a "land use decision" as defined at ORS 197.015(10)(a)(A), for one of two reasons.[3] Petitioners argue first that the city's decision necessarily involved the

---

[2]Petitioners advise us that, if transferred, the appeal will be consolidated with a writ of review previously filed in the Circuit Court for Josephine County.

[3]ORS 197.015(10)(a)(A) defines "land use decision" to include:

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

application of Grants Pass Development Code (GPDC) 28.056, 28.074 and 28.092, which provide standards for the construction and financing of public utilities such as water, sewer and storm water facilities.[4] Second, petitioners argue that the reimbursement district involves financing for improvements imposed as conditions of approving the Nunnwood subdivision, which presumably was a land use decision. According to petitioners, the city's subsequent action related to a condition of approval imposed in a land use decision is, itself, a land use decision.

As relevant here, to constitute a statutory land use decision, the decision must concern the application of the goals, a comprehensive plan provision, or a land use regulation. The challenged decision does not apply GPDC 28.056, 28.074 or 28.092, and petitioners have not established that those regulations are applicable to establishment of an

---

"(i) The goals;

"(ii) A comprehensive plan provision;

"(iii) A land use regulation; or

"(iv) A new land use regulation[.]"

[4]GPDC 28.056 addresses city participation in water system costs, and provides in relevant part:

"For property within the City limits of the City of Grants Pass, or under a Service and Annexation Agreement with the City, and on a first come-first served basis within budgetary restraints, the City shall participate in the cost of water system improvements as follows:

"* * * * *

"(2) Area facilities (pump station and oversizing):

"(a) No participation except as would be required as a landowner (does not include right-of-way).

"(b) These facilities will be advance-financed by the City or a developer but paid by served properties pro-rated on an acreage basis or other basis determined by the City Engineer. Charges will be on an actual cost basis plus current interest."

GPDC 28.074 and 28.092 contain similar provisions regarding sewer and storm water facilities, respectively.

AFD under the ordinance at Record 86-94. In any case, even if the decision applied or should have applied GPDC 28.056, 28.074 or 28.092, and thus falls within the literal terms of ORS 197.015(10)(a)(A), the decision is purely a "fiscal ordinance," and therefore it is not subject to our jurisdiction. *The Petrie Company*, 28 Or LUBA at 538-40 (the "fiscal ordinance" exception to LUBA's jurisdiction applies even if the city applied land use regulations to form a reimbursement district).

Further, simply because the city's decision is related to a condition of approval imposed in a previous land use decision does not bring the city's subsequent decision within our jurisdiction. *See Mar-Dene Corp. v. City of Woodburn*, 149 Or App 509, 514-15, 944 P2d 976 (1997) (city decision that condition of approval had been substantially complied with is not a land use decision). Absent a showing that the city applied or interpreted the goals, a plan provision or a land use regulation in its decision establishing the reimbursement district, the fact that the district will reimburse the developer for improvements required as a condition of land use approval does not render the city's decision a land use decision. *See Garrard v. City of Newport*, 40 Or LUBA 258, 261 (2001) (city decision that improvements required as a condition of approval do not satisfy the condition is not within LUBA's jurisdiction); *Frevach Land Company v. Multnomah County*, 38 Or LUBA 729, 734-35 (2000) (interpretation of condition does not apply land use regulation or necessarily interpret the land use regulation under which the condition was imposed, and thus is not a land use decision subject to LUBA's jurisdiction); *Balk v. Multnomah County*, 38 Or LUBA 1, 7 (2000) (determination that the applicant had failed to satisfy condition of permit approval is a factual determination unrelated to any land use regulation). *Compare Cedar Mill Creek Corr. Comm. v. Washington County*, 37 Or LUBA 1011, 1016 (2000) (county decision that applies a comprehensive plan provision to determine that a condition of approval is satisfied is a land use decision).

Petitioners have failed to establish that the city's decision is a statutory land use decision.

B. Significant Impacts Land Use Decision

Petitioners argue that the reimbursement district subjects owners within the district to an obligation to pay intervenor potentially large sums of money, upon development of their own property. Petitioners suggest that such obligations constitute "takings" of property that are subject to analysis under *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994), and therefore the city's decision is a land use decision under the "significant impacts" test.

However, we rejected a similar argument in *Baker*. As we explained in that case:

> "To satisfy the significant impacts test, petitioner must show that the effect of the decision on present or future land uses is qualitatively or quantitatively significant. *Fraser v. City of Joseph*, 28 Or LUBA 217, 224 (1994). Petitioner must also establish a relationship between the decision and the projected impacts, and provide evidence demonstrating that the projected impacts are likely to occur. *Id.*
>
> "The transportation infrastructure improvements have been made. Petitioner has not articulated what effect the establishment of the reimbursement district will have on land use, other than delay in the development of his property. While an unconstitutional taking may occur in the course of a land use decision, a taking, by itself, does not necessarily cause a significant impact on land use. Further, petitioner has not demonstrated that he is unable to develop his property, even though the cost of such development has increased as a result of the reimbursement assessment. Thus, petitioner has not demonstrated that the city's legislation will have a significant impact on land use." 37 Or LUBA at 568.

Similarly, in the present case, petitioners make no attempt to demonstrate that the effect of the reimbursement district will be to "take" their property without just compensation. In any case, even if petitioners had demonstrated that the challenged decision satisfied the significant impacts test, the decision is purely a "fiscal ordinance," and thus we lack jurisdiction to review it. *See The Petrie Company*, 28 Or LUBA at 540 n 11 ("[T]he exception to reviewability for compliance with land use standards for fiscal measures

identified in *Housing Council* applies equally to decisions that would otherwise qualify as significant impact land use decisions.").

For the foregoing reasons, we agree with the city that we lack jurisdiction over the challenged decision.

MOTION TO TRANSFER

Petitioners filed a timely motion to transfer the decision to circuit court, pursuant to OAR 661-010-0075(11). There is no opposition to the motion. Accordingly, this appeal is transferred to the Circuit Court for Josephine County.