BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ZRZ REALTY COMPANY
and ZIDELL MARINE CORPORATION,
Petitioners,

vs.

CITY OF PORTLAND,
Respondent,

and

OREGON HEALTH AND SCIENCE UNIVERSITY,
RIVER CAMPUS INVESTORS, LLC
and NORTH MACADAM INVESTORS, LLC,
Intervenors-Respondent.

LUBA No. 2004-098

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Edward H. Trompke, Portland, represented petitioner.

Peter A. Kasting, Chief Deputy City Attorney, Portland, represented respondent.

Christen C. White, Portland, represented intervenor-respondent, Oregon Health and Science University. Dike Dame, Portland, represented intervenors-respondent, River Campus Investors, LLC and North Macadam Investors, LLC.

DAVIES, Board Member, and HOLSTUN, Board Chair, participated in the decision. BASSHAM, Board Member, did not participate in the decision.

TRANSFERRED 04/21/2005

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

Opinion by Davies.

NATURE OF THE DECISION

Petitioners challenge the city's adoption of the third amendment (amendment or third amendment) to the South Waterfront Central District Project Development Agreement (development agreement). Resolution No. 36223 As Amended (Resolution No. 36223).

FACTS

Our previous orders set forth the relevant factual background. *ZRZ Realty Co. v. City of Portland*, ___ Or LUBA ___ (LUBA No. 2004-098, Order on Record Objections, September 16, 2004); *ZRZ Realty Co. v. City of Portland*, ___ Or LUBA ___ (LUBA No. 2004-098, Order, November 29, 2004). We will not reiterate that background here. In a previous order, we permitted petitioners to submit the original development agreement, which we determined was not part of the record, for the sole purpose of ruling on the city's and intervenors' joint motion to dismiss. *ZRZ Realty Co. v. City of Portland*, ___ Or LUBA ___ (LUBA No. 2004-098, Order, November 29, 2004). Intervenors and the city renewed their motion to dismiss by filing an Amended Joint Motion to Dismiss on December 14, 2004.[1] Petitioners responded and filed a Motion to Transfer to Circuit Court in the event LUBA determines it does not have jurisdiction.

MOTION TO DISMISS

The city and intervenors move to dismiss this appeal because the challenged decision is not a land use decision that is subject to LUBA's review authority. They argue that (1) the underlying development agreement is not a statutory "development agreement" as ORS 94.504 defines that term, and thus the challenged decision, the resolution approving the third amendment, is not a land use decision subject to our jurisdiction, (2) the challenged decision is not a land use decision

[1] We address in this order all of the arguments made in the original Motion to Dismiss and the Amended Motion to Dismiss.

pursuant to ORS 197.015(10)(a)(A), and (3) the challenged decision is not a significant impact land use decision.

A. "Land Use Decision" Pursuant to ORS 94.504 *et seq*.

ORS 94.504 *et seq*. authorizes local governments to enter into a "development agreement" with "any person having a legal or equitable interest in real property for the development of that property." ORS 94.504(1).[2] ORS 94.508(2) provides that the approval or amendment of such a

[2] ORS 94.504 provides:

> "(1) A city or county may enter into a development agreement as provided in ORS 94.504 to 94.528 with any person having a legal or equitable interest in real property for the development of that property.
>
> "(2) A development agreement shall specify:
>
> "(a) The duration of the agreement, which may not exceed four years for a development of fewer than seven lots or seven years for a development of seven or more lots;
>
> "(b) The permitted uses of the property;
>
> "(c) The density or intensity of use;
>
> "(d) The maximum height and size of proposed structures;
>
> "(e) Provisions for reservation or dedication of land for public purposes;
>
> "(f) A schedule of fees and charges;
>
> "(g) A schedule and procedure for compliance review;
>
> "(h) Responsibility for providing infrastructure and services;
>
> "(i) The effect on the agreement when changes in regional policy or federal or state law or rules render compliance with the agreement impossible, unlawful or inconsistent with such laws, rules or policy;
>
> "(j) Remedies available to the parties upon a breach of the agreement;
>
> "(k) The extent to which the agreement is assignable; and
>
> "(L) The effect on the applicability or implementation of the agreement when a city annexes all or part of the property subject to a development agreement.

development agreement is a land use decision. ORS 94.508(2).[3] The city and intervenors argue (1) that neither the development agreement nor the third amendment is a statutory development

---

"(3) A development agreement shall set forth all future discretionary approvals required for the development specified in the agreement and shall specify the conditions, terms, restrictions and requirements for those discretionary approvals.

"(4) A development agreement shall also provide that construction shall be commenced within a specified period of time and that the entire project or any phase of the project be completed by a specified time.

"(5) A development agreement shall contain a provision that makes all city or county obligations to expend moneys under the development agreement contingent upon future appropriations as part of the local budget process. The development agreement shall further provide that nothing in the agreement requires a city or county to appropriate any such moneys.

"(6) A development agreement must state the assumptions underlying the agreement that relate to the ability of the city or county to serve the development. The development agreement must also specify the procedures to be followed when there is a change in circumstances that affects compliance with the agreement."

[3] ORS 94.508 provides:

"(1) A development agreement shall not be approved by the governing body of a city or county unless the governing body finds that the agreement is consistent with local regulations then in place for the city or county.

"(2) The governing body of a city or county shall approve a development agreement or amend a development agreement by adoption of an ordinance declaring approval or setting forth the amendments to the agreement. *Notwithstanding ORS 197.015 (10)(b), the approval or amendment of a development agreement is a land use decision under ORS chapter 197.*" (Emphasis added).

ORS 197.015(10)(b) provides:

"(10) 'Land use decision':

"* * * * *

"(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;

"(B) Which approves or denies a building permit issued under clear and objective land use standards;

"(C) Which is a limited land use decision;

agreement under ORS 94.504 and, therefore, the approval of the third amendment challenged in this appeal, is not a land use decision subject to LUBA's jurisdiction, (2) the city adopted the development agreement pursuant to its charter authority, not pursuant to ORS 94.504, and (3) petitioners' appeal of the third amendment is an impermissible collateral attack on the resolution adopting the original development agreement.

The city and intervenors argue that the city has authority through its charter to enter into development agreements, and they assert that the city, in fact, adopted the third amendment pursuant to its charter authority.[4] Petitioners counter that the statutes provide the exclusive avenue for cities to adopt development agreements. Petitioners' Response to Amended Joint Motion to Dismiss 4, 7-8. They submitted legislative history that they argue demonstrates that the statutory development agreements were intended as an exclusive process; *i.e.*, if a local government wishes to enter into a development agreement with a private party, it must do so pursuant to ORS 94.504

> "(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; or
>
> "(E) Which is an expedited land division as described in ORS 197.360."

[4] The city submitted an affidavit by a city employee who states that the development agreement was adopted pursuant to the city's charter authority, not pursuant to ORS 94.504. Joint Motion to Consider Evidence Relating to Jurisdictional Question, Affidavit of Donald Mazziotti 1-2.

Section 2-105 of the city's charter provides:

> "The City of Portland, by its council, has power and authority, subject to the provisions, limitations and restrictions contained in this Charter or in statute, to exercise any power or authority granted to the City by statute, general or special, or by this Charter, and may do any other act necessary or appropriate to carry out such authority, or exercise any other power implied by the specific power granted.
>
> "* * * * *"

Among the powers listed under 2-105 is the following the power:

> "3. To provide for entering into contracts by the City for a period not exceeding five (5) years and the extension or renewal thereof by option or otherwise, or not to exceed an additional five (5) years, except as to property contracts, which may extend for more than five (5) years, or as otherwise permitted by this Charter."

et seq. Petitioners appear to agree with the city and intervenors that the statutes were intended to provide local governments the authority to enter into development agreements with private parties. The parties to this appeal disagree, however, regarding the effect this authorizing legislation had on existing authority.

1. Home Rule

Petitioners provide an argument prefaced by the following heading: "The City May Not Rely on Its Charter Under Home Rule When Legislating Matters of Statewide Concern." Petitioners' Response to Amended Joint Motion to Dismiss 2 (citing *City of La Grande v. Public Employees Retirement Bd.*, 281 Or 137, 149, 576 P2d 1204, *on reh'g* 284 Or 173, 586 P2d 765 (1978) (*LaGrande/Astoria*)). Although petitioners' home rule argument is difficult to follow, we will attempt to summarize and address it. Petitioners assert that land use is a statewide concern, a proposition that is hard to refute. Petitioners then argue as follows:

> "State law displaces a City Charter when the city attempts to ignore state statutory requirements in how it elects to promote or initiate particular land uses within its jurisdiction. As a result, if the statewide land use planning system and the City's Charter conflict as to how to interpret and apply the terms of a development agreement, the statewide system supercedes. State law displaces Portland's City Charter in two areas: the substantive area of land use regulation (ORS Chapter 197); and, development agreements (ORS 94.504 to 94.528)." Petitioners' Response to Amended Joint Motion to Dismiss 3 (footnote omitted) (relying on *LaGrande/Astoria* and *Seto v. Tri-County Metropolitan Transportation District of Oregon*, 311 Or 456, 464-65, 814 P2d 1060 (1991)).

If the development agreement statutes are indeed intended to provide the exclusive avenue for adopting development agreements, then petitioners would probably be correct that the city could not rely on its charter authority when entering into development agreements with private developers. However, we do not see that as a home rule issue, and analyzing it as such introduces complications that are unnecessary. We see the question to be whether ORS 94.504 to 94.528 were intended to occupy the field with regard to development agreements and thereby provide the exclusive method for a local government to enter into development agreements.

2. ORS 94.504 *et seq*. Do Not Occupy the Field

The city and intervenors argue that the express language of the statutes, the context and the legislative history support their position that the statute was not intended to create an exclusive process with regard to development agreements. They argue that the legislative history provided by petitioners, intended to show that the statutes are exclusive, actually supports the opposite conclusion. We agree with the city and intervenors.

The city and intervenors identify the following "discretionary" language in the statute: "A city or county *may* enter into a development agreement as provided in ORS 94.504-94.508 * * *." The use of the word "may" in the statute does not answer the central question: whether statutory development agreements are the sole means for a local government to enter into a development agreement. The word "may" simply makes it clear that a local government is not required to enter into a development agreement "*in order for development to take place*." Petitioners' Response to Amended Joint Motion to Dismiss 7.

The intent in this respect, we believe, is made clear in the legislative history of HB 3045. The following written testimony was submitted to the House Subcommittee on Government:

> "There is no burden placed on local governments by this bill, since development agreements would be optional and voluntary. Nothing in this bill requires local governments to change existing systems * * *." Testimony, House Subcommittee on Government, General Government Committee, HB 3045, May 5, 1993, Ex F. (statement of Jon Chandler).

The legislative staff summary of HB 3045 also supports that conclusion:

> "HB 3045 allows, but does not require a local government to make pre-development agreements with a developer on the standards under which a particular development will take place. The intent is for developers to be able to proceed with some assurance that standards will remain in place through the development. Decisions made on an initial set of zoning or building standards can lead to expensive modifications if they must be changed. HB 3045 does not require a development agreement before development can proceed." Testimony, House Committee on General Government, HB 3045, May 13, 1993, Ex I. (Oregon Legislative Assembly Staff Measure Summary).

The legislative history, we believe, makes clear that the legislation was intended to add a tool to the local government's tool kit and was in no way intended to further bind the hands of local

governments. *See* Petitioners' Response to Joint Motion to Consider Evidence Relating to Jurisdictional Question, Affidavit of Edward H. Trompke, Exhibit A, page 4 (Testimony, House Subcommittee on Government, General Government Committee, HB 3045, May 5, 1993, Ex F. (statement of Jon Chandler) ("Absent specific statutory authority, some local governments have been reluctant to enter into such agreements; HB 3045 will provide the legislative authorization that has been lacking.").[5] Where local authority to enter into development agreements already existed, through local charter or otherwise, the legislation was not intended to alter that. We acknowledge that, in most circumstances where a local government has the authority to enter into development agreements pursuant to its charter, it would choose that option over the seemingly more restrictive alternative of adopting the development agreement pursuant to the strict guidelines of ORS 94.504. However, the legislative history seems relatively clear that the intent was to add to a local government's options, not to further restrict the choices that may have already been available for negotiating with private developers.

We agree with the city that the development agreement statutes do not provide the exclusive avenue for a city to adopt a development agreement, and we see nothing in petitioners' arguments to cause us to question the city's assertion that it adopted the development agreement pursuant to the city's charter authority, not pursuant to ORS 94.504 *et seq*. Joint Motion to Consider Evidence Relating to Jurisdictional Question, Affidavit of Donald Mazziotti 1-2. Because the development

---

[5] Exhibit F also provides:

> "HB 3045 is designed to give local governments and developers a new tool – development agreements. These agreements will give local governments a new planning mechanism, in that they will allow flexibility in establishing development standards over a multi-phase, multi-year project. They will also give developers protection from changes in city policy that affect the financial viability of such a project. And, most importantly, they will give both parties the ability to negotiate, up front, for development that builds communities rather than separate, discrete neighborhoods.
>
> "* * * * *
>
> "* * * HB 3045 simply provides a means for local governments and developers to work together more closely than they have in the past, but only if both parties believed it to be mutually beneficial. * * *."

agreement was not adopted pursuant to the statutes, the city and intervenor argue, the provision in ORS 94.508(2) providing that the approval or amendment of a development agreement is a land use decision does not apply. While we agree with the city and intervenor on this point, we do not see that the inquiry ends here. The question remains whether the challenged decision is a "land use decision" subject to LUBA's jurisdiction pursuant to ORS 197.015(10)(a)(A). We now turn to that question.

B. Statutory "Land Use Decision"

The challenged decision is subject to our jurisdiction if it is a final decision or determination that concerns the adoption, amendment or application of the goals, a comprehensive plan provision or a land use regulation. ORS 197.015(10)(a)(A).[6] Although the parties focus on the "finality" requirement, we begin our analysis by addressing the city's and intervenors' argument that the challenged decision does not concern the adoption, amendment or application of the goals, a comprehensive plan provision or a land use regulation.

Although it is the third amendment that is at issue in this appeal, the nature of the provisions in that amendment can only be understood in the context of the development agreement itself. We therefore summarize the key provisions of the development agreement. The development agreement is a contract among the Portland Development Commission, Oregon Health & Science University, River Campus Investors, LLC, and North Macadam Investors, LLC. The purpose of the agreement is to memorialize the parties' understanding of their roles and commitments regarding

---

[6] ORS 197.015(10)(a) defines "land use decision" in relevant part to include:

> "(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[.]"

intended development of property within the North Macadam Urban Renewal Plan and the South Waterfront Plan Area. The development agreement includes a funding strategy for construction of infrastructure. Development Agreement 3. It is structured as a contract with contingent obligations, and those obligations are not triggered until certain "project contingencies" are satisfied. Pursuant to the terms of the development agreement, construction of anticipated development cannot commence until all land use approvals and building permits have been obtained. Development Agreement sections 6.9.2.2, 6.10.2.2, 9.8.[7] The development agreement includes similar requirements that

[7] Section 6.9.2 of the development agreement provides:

> "Project Contingencies to Construction of the Phase I Condominiums
>
> "NMI or its property transferee will commence construction of the Phase I Condominium in accordance with the Schedule and as soon as the following Project Contingencies have been satisfied:
>
> "* * * * *
>
> "6.9.2.2 NMI or its property transferee shall have obtained Final Approval of all land use approvals and building foundation permits necessary to authorize construction of the Phase 1 Condominiums[.]"

Section 6.10.2 provides:

> "Project Contingencies to Commencing Construction of Phase I Apartments
>
> "NMI or its property transferee will be required to commence construction of the Phase 1 Apartments as soon as the following Project Contingencies have been satisfied:
>
> "* * * * *
>
> "6.10.2.2 NMI, or its property transferee, shall have obtained Final Approval of all City land use approvals and a foundation building permit necessary to authorize construction of the Phase 1 Apartments[.]"

Section 9.8 provides, in relevant part:

> "Any party having a construction obligation under this Agreement will be responsible for obtaining all permits, including land use approvals, building permits and any other approvals necessary to construct the Contingent Project * * *. [Portland Development Commission's] cooperation does not guarantee City approval and does not constitute a waiver of the City's regulatory powers over the Contingent Projects."

land use approvals be acquired for other anticipated development called for in the agreement prior to construction.

The development agreement, then, is merely a contract among public and private parties memorializing aspirations about their intended use of an area of the city. It is an attempt to spell out for the participating parties the financial and other obligations that each party will have with regard to that potential development. However, the agreement anticipates that required land use approvals will be obtained at a later date, and that the obligations of the parties are contingent upon their ability to obtain those future land use approvals that will implement the agreement.

The challenged decision in this appeal "concerns" the application of a comprehensive plan provision or land use regulation if (1) the decision maker was required by law to apply its plan or land use regulations as approval standards, but did not, or (2) the decision maker in fact applied plan provisions or land use regulations. *Jaqua v. City of Springfield*, 46 Or LUBA 566, 574 (2004). Petitioners have not demonstrated how the adoption of the underlying development agreement concerns the adoption, amendment or application of the goals, a comprehensive plan provision or a land use regulation. Further, petitioners do not explain how the adoption of the third amendment might provide a basis for determining that it is a land use decision pursuant to ORS 197.015(10)(a)(A). *See Rohrer v. Crook County*, 38 Or LUBA 8, 11, *aff'd* 169 Or App 587, 9 P3d 162 (2000) (it is petitioner's burden to establish that the appealed decision is a land use decision or limited land use decision subject to LUBA's jurisdiction).

As far as we can tell, the third amendment makes the following changes to the development agreement, among others. First, it extends the termination date. Second, it adopts a revised funding and financing plan that reflects reprioritization of new funding sources. Third, it increases the number of condominium and apartment units proposed for the anticipated first phase of development. The amendments do not appear to do anything to change the contingent nature of the development agreement or otherwise require application, adoption or amendment of the statewide

planning goals, provisions of the comprehensive plan or land use regulations.[8] Petitioners do not even argue that the challenged resolution amends a land use regulation or that there is a land use regulation or comprehensive plan provision that they believe the city applied, or should have applied but did not apply, to the amendment. *See E & R Farm Partnership v. City of Gervais*, 39 Or LUBA 251, 254 (2000) (where petitioner does not establish that the city either applied or was required to apply land use standards, the challenged decision is not a land use decision over which LUBA has jurisdiction). Accordingly, petitioners have failed to carry their burden of establishing that the challenged decision satisfies the statutory definition of "land use decision."

C. Significant Impact Test

Petitioners argue that, even if the approval of the third amendment is not a statutory land use decision, LUBA may review it because it will have a significant impact on the present and future use of land. *Billington v. Polk County*, 299 Or 471, 703 P2d 232 (1985). The significant impact test, however, does not apply to challenged decisions that have only a potential impact on land uses. *Id*. at 479; *see also McKenzie River Guides Assoc. v. Lane County*, 19 Or LUBA 207, 213 (1990) (county order selecting a preferred site for a bridge and instructing staff to file the necessary land use applications was contingent on subsequent land use approvals and would have, at most, a potential effect on future land use). Here, the third amendment is contingent on future land use approvals, and any significant impacts on land uses resulting from its approval are merely potential.

[8] Petitioners also argue that the legislature has already expressly granted LUBA authority to review development agreements, pursuant to ORS 94.508(2), and that the approvals of the development agreement and third amendment are land use decisions, "notwithstanding the contingent nature of the contemplated development and the need for future discretionary review and approval." Opposition to Joint Motion to Dismiss 6-7. This argument fails for several reasons. First, pursuant to the statute, the local government is required to adopt a finding that the agreement is consistent with applicable local land use regulations. ORS 94.508(1). *See* n 3. That finding itself would likely make the development agreement a land use decision. Petitioners point us to no such provision in the third amendment. Second, the legislature's choice to make approval or amendment for a particular development agreement a "land use decision" subject to LUBA's review says nothing about LUBA's jurisdiction over the approval of an amendment of a contract that is not adopted pursuant to that statute and that may not otherwise satisfy the statutory requirements for a "land use decision."

Because the challenged decision satisfies neither the statutory test nor the significant impact test, it is not a land use decision subject to our jurisdiction.[9]

The city and intervenors' motion to dismiss is granted.

MOTION TO TRANSFER TO CIRCUIT COURT

On December 29, 2004, petitioners filed a conditional Motion to Transfer to Circuit Court, pursuant to OAR 661-010-0075(11), in the event we determined the challenged decision was not a land use decision.[10] Intervenors object to the motion to transfer for several reasons. We will set out each of those reasons and petitioners' responses to them in turn.

A. Untimely Filing

First, intervenors argue that the motion should be denied because it is untimely. OAR 661-010-0075(11)(b) requires that a motion to transfer to circuit court be filed "not later than ten days

---

[9] The city and intervenors also argue that petitioners' appeal of the city's approval of the third amendment is a collateral attack on the city's approval of the development agreement. Because we determine that the resolution approving the third amendment is not a land use decision, and dismiss on that basis, we need not address this argument.

[10] OAR 661-010-0075(11) provides:

"(11) Motion to Transfer to Circuit Court:

"(a) Any party may request, pursuant to ORS 34.102, that an appeal be transferred to the circuit court of the county in which the appealed decision was made, in the event the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015(10) or (12).

"(b) A request for a transfer pursuant to ORS 34.102 shall be initiated by filing a motion to transfer to circuit court not later than ten days after the date a respondent's brief or motion that challenges the Board's jurisdiction is filed. If the Board raises a jurisdictional issue on its own motion, a motion to transfer to circuit court shall be filed not later than ten days after the date the moving party learns the Board has raised a jurisdictional issue.

"(c) If the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015(10) or (12), the Board shall dismiss the appeal unless a motion to transfer to circuit court is filed as provided in subsection (11)(b) of this rule, in which case the Board shall transfer the appeal to the circuit court of the county in which the appealed decision was made."

after the date a respondent's brief or motion that challenges [LUBA's] jurisdiction is filed." The rule also provides that an appealed decision that LUBA determines is not reviewable as a land use decision or limited land use decision "shall be dismissed" unless a motion to transfer is filed as provided in OAR 661-010-0075(11)(b). The city's original motion to dismiss was filed August 2, 2004. In anticipation of an argument that petitioners never make, intervenors point out that an amended Joint Motion to Dismiss was filed December 13, 2004. They argue that, even if the 10-day time limit for filing a motion to transfer runs from this amended motion, petitioners' motion is late because it was filed on December 29, 2004, sixteen days after the amended motion to dismiss.

Further, intervenors claim prejudice to their substantial rights by the late filing of the motion. *Compare Baker v. City of Woodburn*, 37 Or LUBA 563, 569 (2000) (filing of motion to transfer to circuit court one day late is a technical violation, and where no prejudice to substantial rights demonstrated, motion was allowed). Petitioners apparently filed a writ of review in circuit court on October 14, 2004, challenging the city's ordinance adopting a local improvement district (LID) for the construction of an aerial tramway, in which intervenors allege petitioners made similar claims to those made to date in this appeal. Petitioners challenged the intervenors' motion to intervene in that case, causing "great expense to the [intervenors]." Response to Petitioners' Motion to Transfer to Circuit Court 3. Intervenors seem to believe that an earlier filing of the motion to transfer would have eliminated this expense.

Petitioners respond, first, that the resolution of this issue is dictated by statute. ORS 34.102(4) provides:

> "A notice of intent to appeal filed with the Land Use Board of Appeals pursuant to ORS 197.830 and requesting review of a decision of a municipal corporation made in the transaction of municipal corporation business that is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015 *shall be transferred to the circuit court* and treated as a petition for writ of review. If the notice was not filed with the board within the time allowed for filing a petition for writ of review pursuant to ORS 34.010 to 34.100, the court shall dismiss the petition." (Emphasis added).

Petitioners argue that to the extent LUBA's rules impose a time limit for filing a motion to transfer to circuit court, they exceed the authority granted LUBA by statute. According to petitioners, LUBA may not elect to refuse to transfer to circuit court if no jurisdiction is found. The transfer statute, petitioners argue, is mandatory and "was adopted in order to prevent the inherent unfairness of a petitioner who timely files in the wrong venue in good faith, and whose rights are therefore terminated." Petitioners' Reply to Intervenors' Response to Petitioners' Motion to Transfer to Circuit Court 2.

We do not agree with petitioners that the time limit provided by OAR 661-010-0075(11) exceeds LUBA's authority. However, we do agree with their explanation of the policy underlying the statutory grant of authority to LUBA to transfer appeals to circuit court. Absent prejudice to one or more parties' rights, no purpose is served in denying an untimely motion to transfer to circuit court in a case where it would otherwise be proper, other than to cut off a petitioner's right of appeal for having filed in the wrong venue. As petitioners explain, this is the result ORS 34.102(4) was intended to eliminate. In this case, petitioners' motion to transfer was filed sixteen days after "the date a * * * motion that challenges [LUBA's] jurisdiction [was] filed." The untimeliness of that motion, whether measured from the first motion to dismiss or the amended motion to dismiss, is a mere technicality and is not a basis for denying the motion unless prejudice to some party's substantial rights is demonstrated.

Intervenors allege prejudice to a substantial right, as explained above. We do not see how a late filing of the motion to transfer could have impacted the writ of review proceedings in any way. The motion is a conditional one; *i.e.*, it is not relevant unless LUBA determines that it lacks jurisdiction. We could not have ruled on the motion to transfer until we determined that we lacked jurisdiction, and the briefing on the amended motion to dismiss was not even completed until December 27, 2004. Finally, we agree with petitioners that the writ of review proceeding challenging the LID ordinance, although perhaps related to a writ of review of the challenged decision, constitutes a separate action. Upon transfer, a new circuit court case will be initiated, and

the circuit court may opt to consolidate those cases. We do not see that intervenors' substantial rights have been prejudiced.

B. Final Decision

Intervenors also argue that the motion should be denied because the challenged decision is not a *final* decision. *See Grabhorn v. Washington County*, 46 Or LUBA 672, 678-79 (2004) (LUBA will not transfer appeals of non-final decisions or land use decisions to the circuit court). In that case, the challenged decisions were (1) a letter from the county determining that a berm was constructed on the petitioner's property without the necessary permits and requiring the petitioner to comply, and (2) a letter suspending enforcement action pending a future county decision. We determined the letters were not a final decision because the second letter was "in the nature of an interlocutory determination, intermediate to reaching a final decision, rather than a *final* determination on any issue." *Id*. at 678 (emphasis in original). Our reasoning in *Grabhorn* for denying the motion to transfer was that the legislature could not have intended that LUBA transfer appeals of non-final decisions because the circuit court would merely dismiss the appeal if it were transferred. *Id*. at 679.

We have not determined that the challenged decision in this case is not a *final* decision or determination. In this case, we determined that the challenged decision was not a land use decision because it was contingent on future land use approvals and did not itself make any land use determinations or apply the statewide land use goals or local land use regulations or comprehensive plan. However, the challenged decision is certainly a *final decision* to amend the development agreement. If petitioners had filed a timely petition for writ of review in the appropriate circuit court, we can see no reason why the circuit court would not have jurisdiction. *See* ORS 34.020. Accordingly, we conclude that the rule announced in *Grabhorn* does not apply and transfer to circuit court is appropriate.

Petitioners' motion to transfer to circuit court is granted.

The challenged decision is transferred to Multnomah County Circuit Court.