

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CHRISTOPHER ANGIUS,

5 *Petitioner,*

6
7 vs.

8
9 CLEAN WATER SERVICES DISTRICT

10 OF WASHINGTON COUNTY,

11 *Respondent,*

12
13 and

14
15 D. SHANE KOLLENBORN

16 and STEPHANIE N. KOLLENBORN,

17 *Intervenors-Respondent.*

18
19 LUBA Nos. 2004-165 and 2004-179

20
21 FINAL OPINION

22 AND ORDER

23
24 Appeal from Clean Water Services District of Washington County.

25
26 Carrie A. Richter, Portland, filed the petition for review and argued on behalf of petitioner.
27 With her on the brief were Edward J. Sullivan and Garvey Schubert Barer, PC.

28
29 Roger A. Alfred, Portland, filed the response brief and argued on behalf of respondent.
30 With him on the brief was Perkins Coie, LLP.

31
32 Robert A. Browning, Forest Grove, represented intervenors-respondent.

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34 DAVIES, Board Chair; BASSHAM, Board Member; HOLSTUN, Board Member,
35 participated in the decision.

36
37 DISMISSED

09/02/2005

38
39 You are entitled to judicial review of this Order. Judicial review is governed by the
40 provisions of ORS 197.850.

NATURE OF THE DECISION

This appeal involves two separate decisions that were consolidated on appeal. The first is a “Sensitive Area Pre-Screening Site Assessment” determination, confirming the absence of sensitive areas on the subject property. LUBA No. 2004-165. The second is the issuance of an Erosion Control Permit. LUBA No. 2004-179.

FACTS

The subject property lies within unincorporated Washington County and is subject to the jurisdiction of Clean Water Services District of Washington County (CWS). Prior to submitting a land use application to subdivide their property, intervenors were required to obtain an acknowledgment from CWS that the proposed subdivision would not impact any water quality sensitive areas. Accordingly, on May 26, 2004, intervenors filed a request with CWS for a Sensitive Area Pre-Screening Site Assessment (“site assessment” or “pre-screening site assessment”). The site assessment is a determination, issued administratively (*i.e.*, without a hearing), that water quality sensitive areas do not exist on the site or within 200 feet of the site. In processing the request, CWS reviewed a map and an aerial photo of the area, determined that no water quality sensitive areas existed on the site and issued the Pre-Screening Site Assessment on May 28, 2004.

On September 28, 2004, CWS issued an erosion control permit for tree-cutting activities that had previously occurred on the property. The erosion control permit, like the pre-screening assessment, was also issued without notice or a hearing.

This appeal followed.

MOTION TO DISMISS

CWS moves to dismiss these consolidated appeals for the following reasons: (1) petitioner lacks standing, (2) petitioner’s appeal of the pre-screening site assessment was not timely filed, (3) petitioner failed to exhaust available administrative remedies, and (4) the challenged decisions are

1 not land use decisions or limited land use decisions. We address the fourth alleged basis for
2 dismissal first.¹

3 **A. Statutory Land Use Decision**

4 LUBA has exclusive jurisdiction to review land use decisions. ORS 197.825. ORS
5 197.015(10)(a) defines “land use decision” as follows:

6 “(A) A final decision or determination made by a local government or special
7 district that concerns the adoption, amendment or application of:

8 “(i) The goals;

9 “(ii) A comprehensive plan provision;

10 “(iii) A land use regulation; or

11 “(iv) A new land use regulation[.]”

12 A local government decision “concerns” the application of a statewide planning goal, comprehensive
13 plan provision or land use regulation if the decision maker (1) was required by law to apply the
14 goals, its plan or land use regulations as approval standards, but did not, or (2) in fact applied the
15 goals, plan provisions or land use regulations. *Jaqua v. City of Springfield*, 46 Or LUBA 566,
16 574, *rev’d on other grounds* 193 Or App 573, 91 P3d 817 (2004).

17 CWS argues that the challenged decisions are not land use decisions because they do not
18 concern the application of a comprehensive plan provision or land use regulation. There are two
19 decisions challenged in this consolidated appeal, and petitioner must demonstrate that LUBA has
20 jurisdiction over each of the challenged decisions. Petitioner does not separately argue that CWS
21 applied the goals, comprehensive plan or land use regulations in issuing the erosion control permit,
22 but the analysis petitioner relies upon to demonstrate jurisdiction over the pre-screening site

¹ Petitioner filed a Motion to Take Evidence Not in the Record, seeking to present evidence in response to CWS’ claim that petitioner failed to exhaust administrative remedies before filing this appeal. As discussed below, we dismiss this appeal because the challenged decisions are not “land use decisions.” Accordingly, we need not reach the exhaustion issue; and, for that reason, we need not rule on petitioner’s Motion to Take Evidence.

1 assessment applies equally to the erosion control permit. We will therefore address the
2 jurisdictional basis for both challenged decisions together.

3 **1. Exercise of Policy or Legal Judgment**

4 Petitioner’s response to CWS’ jurisdictional challenge begins with the assertion that the
5 challenged decisions are land use decisions because CWS exercised policy and legal judgment in
6 issuing them. Petitioner’s Response to Respondent’s Motions to Dismiss 5. This argument is
7 irrelevant to our determination of jurisdiction in this appeal.

8 ORS 197.015(10) provides the statutory definition of “land use decision.” Subsection (a)
9 includes the definition set forth above. Subsection (b) provides exceptions to the definition of “land
10 use decision.” It provides that “land use decisions” do not include decisions of a local government
11 “made under land use standards which do not require interpretation or the exercise of policy or legal
12 judgment.” ORS 197.015(10)(b)(A). Petitioner has it backwards. The question of whether CWS
13 exercised legal or policy judgment is not even relevant if the challenged decisions are not land use
14 decisions under the definition set forth in ORS 197.015(10)(a). We now turn to that question.

15 **2. “Concerns the application of a land use regulation”**

16 CWS asserts that “Petitioner has not established, or even attempted to establish, how the
17 ministerial decision made by CWS staff based solely on review of a CWS map and an aerial photo
18 amounts to the application of a *land use regulation* * * *.” Brief of Respondent Clean Water
19 Services 15 (emphasis added).

20 Although petitioner’s argument is not set out this clearly, petitioner seems to be arguing that
21 the pre-screening site assessment is a land use decision because it concerns the application of a land
22 use regulation. It appears that it is petitioner’s position that the Design and Construction Standards
23 that CWS adopted and applies, and applied in this case, are “land use regulations.” Before
24 discussing the definition of “land use regulation” and its importance in this case, we provide some
25 background on the delegated authority of CWS, which is what petitioner relies upon to support his
26 contention that the site assessment is a land use decision.

1 CWS is a “special district,” “created and authorized under ORS 451.010(1) for the
2 purposes of providing sanitary sewer and stormwater management services to the majority of
3 urbanized Washington County.” Brief of Respondent Clean Water Services 3. Pursuant to a 1990
4 intergovernmental agreement (IGA), Washington County delegated to CWS’ predecessor certain
5 duties.² In 2003, CWS adopted Resolution and Order No. 03-11, adopting Design and
6 Construction Standards for Sanitary Sewer and Surface Water Management (Design and
7 Construction Standards or DCS). Those standards were more recently revised by Resolution and
8 Order No. 04-9 in February, 2004.³ There appears to be no dispute that CWS applied its Design
9 and Construction Standards in issuing the challenged decisions. *See* DCS 2.03.2(c) (Erosion
10 Control Only permits); DCS 2.02 (Pre-Development Site Certification and Assessment).

11 It is petitioner’s position that CWS implemented the obligations delegated to it by
12 Washington County through its Design and Construction Standards and that those delegated
13 obligations include “land use review authority for erosion, water quality and storm sewer review.”

² The 1990 IGA provides, in part:

- “6. Plan review, issuance of permits, inspection and enforcement for new construction, modification and connection to the storm and surface water system, including on-site detention and retention systems for water quantity and quality, erosion control, wetland and flood plain alteration, and the sanitary sewerage system.
- “7. Wetland, floodplain, floodway management. For wetland, floodplain, and floodway permits [CWS] shall provide plan review and analysis of development proposals including the review of floodplain elevations for FEMA requirements, for any work or modification within these areas, in accordance with applicable Agency ordinances and rules, and provisions of the County Development Code. Approvals will be coordinated with the Washington County permit process so as to require only one review and approval process.”

³ We do not set forth the entire substance of the Design and Construction Standards. However, Resolution and Order No. 04-9 summarizes their substance as follows:

“rules and regulations relating to construction standards for sanitary sewerage facilities, storm and surface water management facilities, erosion control, permanent water quality and quantity facilities, required permits for connection to the stormwater system, and related matters * * *.”
Petition for Review, App-6.

1 Petition for Review 8. For the reasons discussed below, we do not agree with petitioner that
2 CWS' Design and Construction Standards are land use regulations.

3 "Land use regulation" is defined as follows:

4 "any local government zoning ordinance, land division ordinance adopted under
5 ORS 92.044 or 92.046 or similar general ordinance establishing standards for
6 implementing a comprehensive plan." ORS 197.015(11).

7 The Design and Construction Standards are land use regulations only if they are (1) local
8 government zoning ordinances, land division ordinances or similar general ordinances that (2)
9 establish standards for implementing a comprehensive plan.

10 The first inquiry, whether the Design and Construction Standards qualify as "local
11 government zoning ordinances" or "similar general ordinances," is not determinative. *See Boom v.*
12 *Columbia County*, 31 Or LUBA 318 (1996) (notwithstanding the use of the word "ordinance" in
13 ORS 197.015(11), which defines "land use regulation," whether a land use regulation is adopted by
14 resolution or ordinance is unimportant when determining if LUBA has jurisdiction). Accordingly, the
15 fact that CWS adopted the Design and Construction Standards by resolution is not, in itself, fatal to
16 LUBA's jurisdiction.⁴

17 The second inquiry is the threshold issue in this appeal; *i.e.*, whether the Design and
18 Construction Standards establish standards for implementing a comprehensive plan. At oral
19 argument, when asked what comprehensive plan provision the Design and Construction Standards
20 implemented, petitioner cited to Policy 6 of the Washington County Comprehensive Framework
21 Plan for the Urban Area.⁵ Policy 6, Water Resources, provides: "It is the policy of Washington

⁴ CWS does not argue that the Design and Construction Standards cannot be land use regulations because they were adopted by a special district instead of a local government. *See* ORS 197.015(11) (land use regulation is a *local government* zoning ordinance, land division ordinance or similar general ordinance). At oral argument, petitioner discussed the policy implications of allowing a local government to delegate land use review to a special district and thus insulate those determinations from LUBA review. However, we do not understand CWS to argue that a special district enactment could never qualify as a land use regulation, pursuant to ORS 197.015(11). Accordingly, we assume, without deciding, that this first inquiry is satisfied here.

⁵ The county's Comprehensive Framework Plan is an element of the county's comprehensive plan. The policies cited and references to the comprehensive plan are to the Framework Plan.

1 County to support efforts to preserve and improve the quality of water resources.” Petitioner also
2 cites to Policy 25 of the County’s Comprehensive Framework Plan and to Policy 3, which, he
3 asserts, acknowledges that planning services are delegated to service districts as part of the IGA.⁶
4 Petitioner argues that the delegated obligations to protect storm and surface water systems are part
5 of the county’s obligations to achieve compliance with statewide planning goals 5 (Natural
6 Resources, Scenic and Historic Areas, and Open Spaces) and 6 (Air, Water and Land Resources
7 Quality) and that CWS has implemented these obligations through its Design and Construction
8 Standards.

9 Once again, we understand petitioner’s assertion to be that the Design and Construction
10 Standards are land use regulations and that the challenged decisions concern the application of those
11 land use regulations. The question, as stated above, is whether the Design and Construction
12 Standards establish standards for implementing a comprehensive plan. Petitioner cites to *Home*
13 *Builders Assoc. v. City of Eugene*, 41 Or LUBA 453 (2002) and *Rest-Haven Memorial Park v.*
14 *City of Eugene*, 39 Or LUBA 282, 288, *aff’d* 175 Or App 419, 28 P3d 1229 (2001) in support
15 of his position that the Design and Construction Standards do establish standards for implementing
16 the applicable comprehensive plan. While we agree with petitioner’s summary of the facts of those
17 cases, we disagree with his understanding of the significance of those cases to this appeal.

⁶ Policy 25 provides, in part:

“The County will:

- “a. Designate the Clean Water Services (CWS) as the agency with principal responsibility in the County for planning and operation of all sewage treatment facilities in the County and for sewage collection in unincorporated areas, as designated in the regional Wastewater Treatment Management (‘208’) Plan.”

Policy 3 provides, in part:

“Planning in Washington County occurs within a larger context of regional, State and Federal planning. Three levels of government and several agencies are involved in policy development, program management, and the provision of services for the urban portion of the County. All of these activities, together with the specific responsibilities of cities and special service districts, must be coordinated to ensure that their various plans and programs reinforce and are consistent with the County’s Comprehensive Plan.”

1 In *Ramsey v. City of Portland*, 30 Or LUBA 212 (1995), we agreed with the local
2 government that its tree removal ordinance, which was not included in the city’s zoning code, was
3 not a land use regulation. In that case, the petitioner apparently did not identify a comprehensive
4 plan provision that the challenged ordinance applied or implemented.

5 In *Rest-Haven*, we explained the narrow holding in *Ramsey* as follows:

6
7 “The principle stated in *Ramsey* is relatively narrow. Where a local government makes it
8 clear that the ordinance it is adopting is not intended to be a land use regulation, LUBA
9 does not have jurisdiction to review such an ordinance, provided there is no clear
10 connection between the ordinance and the comprehensive plan. In that circumstance, and
11 with that limitation, the ordinance is not a land use regulation even though it may arguably
12 further some comprehensive plan provisions in a general or indirect way. * * *” *Rest-*
13 *Haven*, 39 Or LUBA at 288.

14 *Rest-Haven* involved a comprehensive plan that included certain provisions to improve
15 water quality; *e.g.*, maintenance of flood control, drainage and water quality treatment capacities
16 along stormwater conveyance corridors while protecting wildlife habitat. *Id.* at 286. The purpose
17 of the open waterways ordinance challenged in that appeal was “to establish interim protection for
18 constructed and natural open waterways that provide multiple stormwater benefits to the entire
19 community.” *Id.* The ordinance itself required that all open waterways remain open and prohibited
20 the placement of foreign materials or construction in or over the channel of an open waterway. We
21 applied the “clear connection” requirement articulated in *Ramsey*, and held that the connection
22 between the ordinance and the plan provisions was “direct and clear.” *Id.* at 288. Although the
23 challenged ordinance was not adopted as part of the land use code, because it was clear that the
24 ordinance established standards for implementing the comprehensive plan provisions cited by the
25 petitioner, we held that the adoption of the challenged open waterways ordinance was the adoption
26 of a “new land use regulation.” *Id.* Accordingly, it was a land use decision over which we had
27 jurisdiction.

28 The *Home Builders* case involved the appeal of an amendment of a tree preservation
29 ordinance added to Chapter 6 of the code, a portion of the code that was not the land use code.

1 The city argued that the tree removal provisions on appeal were not associated with land use
2 development and did not implement Goal 5. Petitioner, however, pointed to an acknowledgement
3 report from the Land Conservation Development Commission regarding the Eugene/Springfield
4 metropolitan area’s Goal 5 addendum that listed the tree preservation regulations in Chapter 6 as
5 part of Eugene’s program implementing Goal 5. Based on that report, we held that the challenged
6 decision concerned the amendment of a land use regulation. 41 Or LUBA at 455-58.

7 While the decisions challenged in those appeals involved decisions that adopted the alleged
8 land use regulations, and the decisions challenged in this appeal involve the *application* of the
9 alleged land use regulations, the pivotal issue is the same: does the enactment at issue qualify as a
10 “land use regulation”; *i.e.*, does it establish standards for implementing the comprehensive plan? In
11 *Home Builders*, we identified the critical issue as “whether there is a clear connection between the
12 ordinance and the statewide planning goal or comprehensive plan provision it allegedly implements.”
13 *Id.* at 457. It is petitioner’s burden to demonstrate this connection. *See Billington v. Polk*
14 *County*, 299 Or 471, 475, 703 P2d 232 (1985); *City of Portland v. Multnomah County*, 19 Or
15 LUBA 468, 471 (1990); *Portland Oil Service Co. v. City of Beaverton*, 16 Or LUBA 255, 260
16 (1987) (all providing that burden is on petitioner to establish that the challenged decision is a land
17 use decision or limited land use decision). As explained below, petitioner has not satisfied his
18 burden because the connection between the Design and Construction Standards and the
19 comprehensive plan provisions cited by petitioner is anything but clear.

20 First, unlike the ordinance at issue in the *Home Builders* case, the Design and Construction
21 Standards apparently were not relied upon by the Department of Land Conservation and
22 Development as a basis for the county’s compliance with Goal 5, Goal 6 or any other statewide
23 planning goal. Petitioner notes that the county’s acknowledgment occurred in 1983, seven years
24 before CWS’ predecessor was delegated duties through the IGA. Accordingly, the
25 acknowledgement does not reference CWS or the Design and Construction Standards. While the
26 timing involved in this case precludes the demonstration made in *Home Builders*, petitioner provides

1 no evidence that the Design and Construction Standards were subsequently relied upon for
2 compliance with Goal 5 or Goal 6.⁷

3 Second, petitioner’s reliance on Policy 3 does not support his position. Policy 3 explains
4 that there are many jurisdictions and agencies that take actions touching on the comprehensive plan.
5 See n 6. Those actions must be consistent with the comprehensive plan. However, we do not see
6 that that means that every action CWS takes applies or implements the comprehensive plan. See
7 *Ramsey*, 30 Or LUBA at 217 (“not every regulation that arguably furthers the objectives of Goal 5
8 applies Goal 5”). In this case, the county delegated certain duties to CWS. Those duties may have
9 furthered the objectives of the comprehensive plan and of certain statewide planning goals; in fact,
10 they were probably required to. See Policy 3, n 6 (activities of various governments and agencies
11 “must be coordinated to ensure that their various plans and programs reinforce and are consistent
12 with the County’s Comprehensive Plan”). However, that is not enough to demonstrate a “clear
13 connection” between the Design and Construction Standards and the comprehensive plan.

14 Finally, petitioner’s reliance on Washington County Community Development Code
15 (WCCDC) 410-1.1 is not sufficient to demonstrate a clear connection.⁸ Petitioner argues:
16

⁷ In a footnote, petitioner cites to a website that he argues demonstrates that:

“Metro, in adopting new Goal 5 regulations, has determined that CWS Design and Construction Standards will be adequate to deem Washington County and other cities within CWS boundaries in compliance with Goal 5.” Petitioner’s Response to Respondent’s Motions to Dismiss 8 n 4.

The information located at that website is not in the record, and petitioner does not allege that it is material of which we may take official notice. Accordingly, we will not consider it further.

⁸ WCCDC 410-1.1 provides, in relevant part:

“All grading and drainage activities are to occur pursuant to the provisions of Appendix Chapter 33 of the 1994 Uniform Building Code and the applicable State of Oregon Plumbing Code, or their successors and this Code. All grading and drainage activities on lands located within the Clean Water Services boundary shall also occur pursuant to the provisions of the ‘Design and Construction Standards for Sanitary Sewer and Surface Water Management’ or its successor.”

1 “the Site Assessment and Erosion Control Permit obligations were required as part of the
2 CWS Design and Construction Standards and compliance with these standards are, in turn,
3 required as part of the Washington County CDC Section 410.1.1. The County has
4 delegated review of drainage and fill activities to CWS. Since compliance with the Design
5 Standard is required by the County Code and CWS applies the Design Standards, CWS is
6 applying a local government zoning ordinance.” Petitioner’s Response to Respondent’s
7 Motions to Dismiss 9.

8 However, that same code provision also requires that grading and drainage activities occur pursuant
9 to the Uniform Building Code and the Oregon Plumbing Code. That does not make every building
10 permit or plumbing permit a land use decision, just as it does not make every decision CWS makes
11 pursuant to its design standards a land use decision.

12 In conclusion, petitioner does not articulate a basis for concluding that there is a clear
13 connection between CWS’ Design and Construction Standards and any of the comprehensive plan
14 provisions he cites. Accordingly, he has not demonstrated that the challenged decisions apply a
15 land use regulation, and those decisions are therefore not land use decisions.

16 **B. Limited Land Use Decision**

17 Petitioner asserts that the challenged decisions “could be” limited land use decisions under
18 ORS 197.015(12)(b) because (1) they “are elements of obtaining stormwater approval for a
19 subdivision,” or (2) they “apply discretionary standards designed to regulate the physical
20 characteristics of a use allowed outright.”⁹ Petition for Review 9. Petitioner provides no more
21 argument in support of his contention than the argument set forth above. CWS argues that the
22 provisions regarding limited land use decisions apply only to local governments. *See* ORS

⁹ ORS 197.015(12) provides:

“‘Limited land use decision’ is a final decision or determination made by a local government pertaining to a site within an urban growth boundary which concerns:

“(a) The approval or denial of a subdivision or partition, as described in ORS chapter 92.

“(b) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review.”

1 197.015(12)(b), n 9 (“[l]imited land use decision’ is a final decision or determination made by a
2 local government * * *”); *compare* ORS 197.015(10)(a)(A) (“land use decision” is “a final
3 decision or determination made by a local government or special district”); *see also* ORS
4 197.195(1). As discussed above, CWS is a special district, not a local government, and we
5 therefore agree with CWS that the challenged decisions are not limited land use decisions.¹⁰

6 Neither of the decisions challenged in this consolidated appeal is a statutory land use
7 decision or a limited land use decision, and LUBA lacks jurisdiction to review them.¹¹

8 These consolidated appeals are dismissed.

¹⁰ Petitioner does not allege that the challenged decisions satisfy the significant impact test, and we therefore decline to address that possible argument. *See Price v. Clatsop County*, 25 Or LUBA 341, 348 (1993) (where petitioner does not argue that a challenged decision is a land use decision under the significant impact test, and it is not obvious that it is, petitioner fails to establish jurisdiction).

¹¹ Because we conclude that the challenged decisions are not land use decisions or limited land use decisions, we need not address the remainder of CWS’ alleged bases for dismissal. We also need not address petitioner’s assignments of error.