

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 ROBERT C. WILLIAMSON,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF SALEM,
10 *Respondent,*

11 and

12
13 CP DEVELOPMENT, LLC,
14 *Intervenor-Respondent.*

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16 LUBA No. 2006-116

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18 FINAL OPINION
19 AND ORDER

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22 Appeal from City of Salem.

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24 Robert C. Williamson, Salem, filed the petition for review and represented himself.

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26 Richard D. Faus, Assistant City Attorney, Salem, filed a joint response brief and
27 argued on behalf of respondent. Kris Jon Gorsuch, Salem, filed a joint response brief and
28 argued on behalf of intervenor-respondent. With them on the brief was Saalfeld Griggs, PC.

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

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32 AFFIRMED

10/02/2006

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

NATURE OF THE DECISION

Petitioner appeals a temporary facilities access agreement (TFAA) to allow the use of a water reservoir to provide water to a subdivision.

MOTION TO INTERVENE

CP Development, LLC (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is granted.

FACTS

The subject property is inside the city limits, but outside the city’s urban service area (USA). Under the Salem Revised Code (SRC), the development process for property outside the USA begins with an analysis of public facilities. After notice and hearing, a preliminary declaration is issued which lists any necessary public facilities to be constructed. After a preliminary declaration is issued, the applicant may apply for tentative subdivision approval. After tentative subdivision approval is granted, a TFAA may be entered into between the developer and the city. A TFAA specifies how improvements required under the approved preliminary declaration and subdivision tentative plan will be financed and constructed.

Intervenor obtained a preliminary declaration and tentative subdivision approval for the subject property. Petitioner was provided notice of both those applications but did not participate in or appeal the preliminary declaration or the tentative subdivision approval. The city and intervenor then negotiated the TFAA, which allows intervenor to temporarily use an existing water reservoir by means of a pumping station to reach the elevation of the subject property until a new reservoir is built. The city council approved the TFAA over petitioner’s objections. This appeal of the TFAA followed.

MOTION TO DISMISS

The city and intervenor (respondents) argue that the TFAA is not a land use decision. According to respondents, although the preliminary declaration and the tentative subdivision

1 approval were decisions over which LUBA would have jurisdiction, the TFAA is a
2 nondiscretionary decision under ORS 197.015(11)(b)(A), and therefore not a “land use
3 decision” subject to LUBA’s jurisdiction.¹

4 Petitioner asserts that the TFAA decision is a “land use decision” as that term is
5 defined at ORS 197.015(11)(a)(A), because at the very least it involves application of a land
6 use regulation, SRC 66.120(a). *See* n 2, below. Petitioner also contends that the challenged
7 decision is a “significant impacts” land use decision, under the reasoning in *Billington v.*
8 *Polk County*, 299 Or 471, 703 P2d 232 (1985).

9 Although it is not entirely clear from the challenged decision or the briefs, it appears
10 the city applied SRC 66.120(a) in making the TFAA decision. SRC 66.120(a) is arguably a
11 land use regulation, as petitioner contends. Respondents’ jurisdictional challenge does not
12 discuss SRC 66.120(a), assert that it is not a land use regulation, or explain why it “does not
13 require the interpretation or the exercise of policy or legal judgment,” for purposes of
14 ORS 197.015(11)(b)(A). Given the lack of argument on that point, we will assume that the
15 TFAA is a land use decision as defined in ORS 197.015(11)(a)(A) and is not subject to the
16 nondiscretionary exception to that definition at ORS 197.015(11)(b)(A).

17 Respondents’ motion to dismiss is denied.

18 **FIRST ASSIGNMENT OF ERROR**

19 Petitioner argues that the TFAA acts as an amendment to the city’s Water System
20 Master Plan or authorizes intervenor to amend the plan. In the latter case, petitioner argues,
21 the city “impermissibly delegates amending authority of a public document to a private
22 developer in violation of the Oregon and U.S. constitutions.” Petition for Review 4.

¹ ORS 197.015(11)(a)(A) defines “land use decision” in relevant part to include a final decision that applies a “land use regulation.” ORS 197.015(11)(b)(A) provides that the definition of land use decision does not include a decision of a local government:

“That is made under land use standards that do not require interpretation or the exercise of policy or legal judgment[.]”

1 The TFAA clearly does not purport to amend the city’s Water System Master Plan.
2 Even if it did, petitioner identifies nothing in the TFAA that purports to grant intervenor
3 authority to amend the master plan. Petitioner does quote language from the preliminary
4 declaration that can be read to grant intervenor that authority. However, even if the
5 preliminary declaration grants that authority, petitioner could not now collaterally attack the
6 preliminary declaration after the appeal period to challenge the preliminary declaration has
7 run. *Butte Conservancy v. City of Gresham*, 47 Or LUBA 282, 195 Or App 763, 100 P3d
8 218 (2004).

9 The first assignment of error is denied.

10 **SECOND ASSIGNMENT OF ERROR**

11 Petitioner argues that the TFAA does not comply with SRC 66.120(a) because it does
12 not include all facilities necessary for a transition to permanent facilities.² Intervenor
13 responds that this issue was not raised below and cannot be raised for the first time before
14 LUBA. ORS 197.763(1); 197.835(3).³ Petitioner has not identified where the issue was

² SRC 66.120(a) provides:

“The Development Review Committee shall require that the proposed development be linked to existing adequate facilities by the construction of water distribution lines, reservoirs and pumping stations which connect to such existing water service facilities. Specific location, size and capacity of such facilities will be determined with reference to any one or combination of the following: (1) the Water Master Plan or (2) specific engineering capacity studies approved by the director of public works. With respect to facilities not shown in the master plan but necessary to link to adequate facilities, the location, size and capacity of such facilities to be constructed or linked to shall be determined by the Development Review Committee. Temporary water facilities, including pumping stations and reservoirs, will be permitted only if the temporary facilities include all facilities necessary for transition to permanent facilities, and are approved by the director of public works. Design, construction and material standards shall be as specified by the director of public works for the construction of all such public water facilities in the city.”

³ ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission,

1 raised below, and we will not search the record without his assistance.⁴ Therefore, the issue
2 is waived.

3 The second assignment of error is denied.

4 The city's decision is affirmed.

hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

ORS 197.835(3) provides:

“Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.”

⁴ Petitioner did not file a reply brief to address the waiver issue. Petitioner also did not appear at oral argument.