BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

YVONNE LAZARUS and LES POOLE,
Petitioners,

vs.

CITY OF MILWAUKIE,
Respondent,

and

TRIMET,
Intervenor-Respondent.

LUBA No. 2012-080

FINAL OPINION
AND ORDER

Appeal from City of Milwaukie.

David J. Hunnicutt and Tyler D. Smith, Tigard, represented petitioners.

Timothy V. Ramis, Lake Oswego, represented respondent.

Steven W. Abel and Sarah Stauffer Curtiss, Portland, represented intervenor-respondent.

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

TRANSFERRED 03/28/2013

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal a decision by the city approving an application to remove trees.

REPLY BRIEF

Petitioners move for permission to file a reply brief that exceeds five pages. The reply brief is allowed.

FACTS

In a previous Land Use Final Order (LUFO) issued in 2008, Metro authorized the route for the Portland-Milwaukie Light Rail Project. In 2009, the city approved the location and design of a project that the parties refer to as the Trolley Trail, a pedestrian and bicycle trail that runs somewhat adjacent to the section of light rail line that will run along McLoughlin Boulevard in the city. Record 42. The portion of the Trolley Trail at issue in this appeal runs between River Road and Park Avenue.

In November, 2011, the city approved TriMet's application for a modification to the location of the Trolley Trail as a result of a modification in the alignment of the proposed light rail line along McLoughlin Boulevard. As we understand it, that 2011 decision approved removal of trees for relocation of the Trolley Trail. Record 53.

In September, 2012, the city approved TriMet's application to remove trees for construction of the light rail line and relocation of the Trolley Trail between River Road and Park Avenue. On October 4, 2012, petitioners filed a Notice of Intent to Appeal the city's decision, and subsequently filed the petition for review.

JURISDICTION

A. Applicable Standards

Milwaukie Municipal Code (MMC) 19.906.4 sets out the approval criteria for Type I and Type II Development Review applications, and requires in relevant part that the city determine that the proposed tree removal complies with all applicable base zone, overlay

zone, and special area standards and with all applicable supplemental development regulations, off-street parking and loading standards and public facility standards.[1] The city found that the application to remove trees complies with MMC 19.906.4(A) – (E):

> "Compliance with [MMC Chapters 19.300, 400, 500, 600 and 700] is established in the findings for [the 2011 decision], and the facts relevant to compliance have not changed. This criterion is met." Record 12.

B. Ministerial Exception

Respondents argue that the challenged decision falls within the exception to the Board's jurisdiction set out in ORS 197.015(10)(b)(A) for decisions "made under land use standards that do not require interpretation or the exercise of policy or legal judgment,"

---

[1] MMC 19.906.4 provides:

> "The criteria in this subsection are the approval criteria for Type I and Type II development review applications. The criteria are based on a review of development standards throughout Title 19 Zoning. Not all of the standards within the chapters listed below are applicable to a proposal, and the City will identify the applicable standards through the development review process. Though the criteria are the same for Type I and Type II development review, the standards evaluated in a Type I review will be clear and objective or require limited professional judgment, while the Type II review will involve discretionary standards and/or criteria.
>
> "An application for Type I or Type II development review shall be approved when all of the following criteria have been met:
>
> "A. The proposal complies with all applicable base zone standards in Chapter 19.300.
>
> "B. The proposal complies with all applicable overlay zone and special area standards in Chapter 19.400.
>
> "C. The proposal complies with all applicable supplementary development regulations in Chapter 19.500.
>
> "D. The proposal complies with all applicable off-street parking and loading standards and requirements in Chapter 19.600.
>
> "E. The proposal complies with all applicable public facility standards and requirements, including any required street improvements, in Chapter 19.700.
>
> "F. The proposal complies with all applicable conditions of any land use approvals for the proposal issued prior to or concurrent with the development review application."

commonly called the "ministerial exception."[2] Respondents argue that for several reasons the city's decision did not require interpretation or the exercise of policy or legal judgment. Respondents first argue that in approving the application, the city was not required to interpret any provision of the MMC, or exercise policy or legal judgment, because the city's decision merely relied on the underlying land use decision, the 2011 decision, and did not itself apply any land use regulations.

Respondents also argue that the city's decision did not require interpretation or the exercise of policy or legal judgment because Section 8(1)(b) of Oregon Laws 1996, chapter 12 (the 1996 statute) *requires* local governments that are affected by the light rail project to "[i]ssue the appropriate development approvals, permits, licenses, and certificates necessary for construction of the project or project extension, consistent with a land use final order."[3] We understand respondents to argue that the statutory requirement to issue the appropriate development approvals means that the city may not deny the application to remove the trees, and for that additional reason the ministerial exception applies.

As the party seeking review by LUBA, petitioner has the burden of establishing that LUBA has jurisdiction. *Billington v. Polk County*, 299 Or 471, 475, 703 P2d 232 (1985). Petitioners provide a cursory statement regarding jurisdiction in the petition for review. In the reply brief, petitioners first respond to respondents' jurisdictional challenges by arguing that the challenged decision is a "land use decision" as defined in ORS 197.015(10)(a) because the city should have, but failed to, apply two provisions of the MMC in making its

---

[2] ORS 197.015(10)(b)(A) provides that a "land use decision" does not include a decision by a local government:

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

[3] We previously denied petitioners' motion to take evidence not in the record that sought to elicit testimony from unnamed TriMet officials in order to defend against that jurisdictional challenge, and gave petitioners additional time to respond to respondents' remaining jurisdictional challenges. *Lazarus v. City of Milwaukie*, _ Or LUBA __ (Order, LUBA No. 2012-080, February 12, 2013).

decision. *See Jaqua v. City of Springfield*, 46 Or LUBA 566, 574 (2004) (generally, a local government decision "concerns" the application of a comprehensive plan provision or land use regulation if the plan provision or land use regulation is actually applied in making the decision, or should have been applied in making the decision). Petitioners argue that the city was required to but did not apply MMC 16.32.020 and MMC 9.28.060(I). MMC Chapter 16.32 is entitled "Tree Cutting" and is a chapter of Title 16 of the MMC, the city's Environmental Protection Ordinance. MMC 16.04.010. MMC Chapter 9.28 is entitled "Park Uses" and is a chapter of Title 9 of the MMC entitled "Public Peace, Morals and Welfare."

ORS 197.015(11) defines "land use regulation" as "any local government zoning ordinance, land division ordinance * * * or similar general ordinance establishing standards for implementing a comprehensive plan." MMC Title 19 is the city's Zoning Ordinance, and implements the city's comprehensive plan. MMC 19.101-102.[4] The provisions that petitioners cite are located in MMC sections that are not part of the city's Zoning Ordinance and that location outside of the Zoning Ordinance at least suggests that the cited provisions are not "land use regulations." Petitioners do not further explain why MMC 16.32.020 and MMC 9.28.060 are "land use regulations" as defined in ORS 197.015(11), or otherwise argue that the cited provisions "establish[] standards for implementing" the city's comprehensive plan. Absent any explanation from petitioners as to why MMC 16.32.020 and MMC 9.28 are "land use regulations," we disagree with petitioners that the cited provisions are "land use regulations" or that the city was required to determine whether those provisions are satisfied in considering the application for tree removal.

Petitioners next respond that the city should have applied MMC 19.1001.6(A) to the application, and that determining whether MMC 19.1001.6(A) is satisfied requires the city to

---

[4] MMC 19.102 provides in relevant part:

> "This title implements the Comprehensive Plan, which provides the policy framework within which land use and development review is conducted in the city."

interpret that provision and exercise policy or legal judgment. MMC 19.1001.6(A) provides in relevant part:

> "Type I, II, III, and IV applications may be initiated by the property owner or contract purchaser of the subject property, any person authorized in writing to represent the property owner or contract purchaser, *and any agency that has statutory rights of eminent domain for projects they have the authority to construct*.* * *" (emphasis added.)

Petitioners concede that, as a general matter, TriMet is an "* * * agency that has statutory rights of eminent domain for projects they have the authority to construct * * *," under ORS 267.200(2).[5] However, petitioners argue that TriMet's rights of eminent domain under ORS 267.200(2) are complicated by another statute, ORS 451.550(3), which grants county service districts similar condemnation authority.[6] Petitioners argue that the alleged conflict between the two statutes requires the city to interpret the statutes, and that required interpretational exercise means the city's decision is not subject to the ministerial exception.

We reject petitioners' argument. First, ORS 197.015(10)(b)(A) provides that a "land use decision" does not include a decision by a local government "[t]hat is made under land use standards that do not require interpretation or the exercise of policy or legal judgment[.]" MMC 19.1001.6(A) is an application submittal requirement, and petitioners do not argue that it is connected to any other substantive MMC approval criterion or standard, or otherwise explain why it is a "land use standard[]" within the meaning of ORS 197.015(10)(b)(A). *See Davenport v. City of Tigard*, 121 Or App 135, 141, 854 P2d 483 (1993) (standards and criteria "* * * assure both proponents and opponents of an application that the substantive factors that are actually applied and that have a meaningful impact on the decision permitting

---

[5] TriMet is a Mass Transit District under ORS chapter 267. ORS 267.200(2) provides in part that TriMet "shall have full power to carry out the objects of its formation and to that end may * * * [a]cquire by condemnation, purchase, lease, devise, gift or voluntary grant real and personal property or any interest therein[.]"

[6] According to petitioners, the property on which the trees have been removed is owned by the North Clackamas Parks and Recreation District (NCPRD), a county service district, and ORS 451.550(3) provides NCPRD with condemnation authority.

or denying an application will remain constant throughout the proceedings.")

Second, even if MMC 19.1001.6(A) is a "land use standard[]," within the meaning of ORS 197.015(10)(b)(A), the crux of petitioners' argument is that the city is required to interpret *the two statutes* that petitioners argue are ambiguous, and that interpretational exercise means that the ministerial exception does not apply. However, applying MMC 19.1001.6(A) itself does not require interpretation or the exercise of policy or legal judgment. All that the city must determine in applying MMC 19.1001.6(A) is whether the applicant is (1) the property owner or contract purchaser of the subject property or (2) an agency that has statutory rights of eminent domain over the project that will utilize the property. In making the second determination, all the city is required to do is confirm that the applicant agency has a "statutory right of eminent domain for the project[.]" ORS 267.200(2) provides that statutory right. *See* n 5. MMC 19.1001.6(A) does not require that the city must confirm that TriMet's statutory right of eminent domain can be successfully exercised against every property that will be necessary for the project to be constructed. To the extent petitioners suggests that it does, we reject the suggestion. Again, the city was not required to exercise any interpretative, policy or legal judgment in determining that ORS 267.200(2) grants TriMet a statutory right of eminent domain for transportation projects.

Finally, petitioners respond to respondents' argument regarding the effect of the 1996 statute by disputing that the statute applies to the application to remove the trees. However, because we agree with respondents for the reasons set out above that the city's decision falls within the exception to LUBA's jurisdiction set out in ORS 197.015(10)(b)(A) for decisions "made under land use standards that do not require interpretation or the exercise of policy or legal judgment," determining whether the 1996 statute applies to the city's decision has no effect on our resolution of the jurisdictional issues and we need not resolve that dispute.

For the reasons set out above, we conclude that we lack jurisdiction over the appeal.

C. Mootness

LUBA has determined that, with limited exceptions, it will dismiss appeals if they become moot. *Fujimoto v. Metropolitan Service District*, 1 Or LUBA 93 (1980). An appeal is moot where a decision on the merits of an appeal by LUBA will have no practical effect. *Gettman v. City of Bay City*, 28 Or LUBA 121 (1994) (appeal of decision authorizing tree removal became moot after trees were cut and removed).

Respondents argue that this appeal is moot because the trees that are the subject of the city's decision have been removed. Petitioners respond that the appeal is not moot because the city could require TriMet to plant new trees to replace the ones that it has removed if LUBA concludes that the city erred in allowing removal of the trees. Although we tend to agree with respondents that the appeal is moot, we need not determine whether there is an additional basis to conclude that we lack jurisdiction over the appeal when we have already concluded above that the city's decision falls within the ministerial exception to our jurisdiction.

TRANSFER

OAR 661-010-0075(11)(c) provides:

> "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."

Petitioners filed a precautionary motion to transfer the appeal to circuit court in the event we determine we do not have jurisdiction.

The appeal is transferred.