BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MCLOUGHLIN NEIGHBORHOOD ASSOCIATION,
CAMERON B. McCREDIE and JESSE A. BUSS,
Petitioners,

vs.

CITY OF OREGON CITY,
Respondent.

LUBA No. 2015-098

FINAL OPINION
AND ORDER

Appeal from City of Oregon City.

Jesse A. Buss, Oregon City, represented petitioners.

William K. Kabeiseman, Portland, represented respondent.

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

TRANSFERRED 02/09/2016

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 Oregon City Resolution 15-29, which determines that a certain city property is not a "park" for purposes of Chapter X of the Oregon City Charter.

MOTION TO DISMISS

The subject property is the so-called "upper yard" section of the city public works operations facility. The subject property is apparently located in proximity to a city park known as Waterboard Park. Waterboard Park is one of the city parks designated in Chapter X of the City Charter. Chapter X, adopted by the voters in 1970, generally prohibits transfer of or significant changes to designated parks without voter approval. As shorthand, we refer to these designated parks as "Charter Parks." The subject property is not mentioned in Chapter X, and the boundary description of Waterboard Park in Chapter X does not encompass the subject property. Section 43 of Chapter X provides in relevant part that real property owned or acquired by the city "may be designated as a park by ordinance."[1]

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[1] Chapter X, Section 40 sets out the purpose of the chapter, to "prevent the transfer, sale, vacation or major change in use of city parks without first obtaining an approving vote of the legal voters of this city [and] to designate certain park areas and their use[.]"

Although the parties do not explain the background, apparently some question arose whether the subject property is subject to the restrictions in Chapter X, as part of a designated Charter Park. That question possibly arose in part because the city's comprehensive plan map had at one time designated the upper yard as a "park," and a 1991 city Parks and Recreation Master Plan included a map that appears to show the subject property to be part of Waterboard Park, which as noted is a Charter Park.[2] During the proceedings before the city commission leading to adoption of Resolution 15-29, petitioners apparently argued that these land use planning documents effectively designated the subject property as a "park" for purposes of Chapter X and that,

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Section 41 lists the actions that are prohibited without first obtaining voter approval. Section 42 lists the designated parks, including Waterboard Park, which boundaries are described in a manner that excludes the subject property. Section 43 is entitled "Additional Parks," and provides:

> "Additional parks may be created and land established as parks upon the acceptance by the commission of a gift to the city for park purposes or a dedication of land as a park. Real property owned or acquired by the city in other manners may be designated as a park by ordinance. Park areas may be specifically designated as natural parks and when so designated shall be maintained as provided in Section 41. Whenever any real property is designated as a park as provided herein, it is subject to all of the provisions of this Chapter X."

[2] As far as we are informed, nothing in the current comprehensive plan or current parks master plan indicates that the subject property is designated as a "park" for any purpose.

because no vote of the citizens had removed the property from the protections of Chapter X, it remained a Charter Park.

In Resolution 15-29, the city commission essentially rejected that argument. The city commission interpreted Section 43 to the effect that "designation as a park by ordinance" means the adoption of an ordinance that "specifically identifies the area and evidences an intent for the property to be subject to the protections provided by Chapter X of the City Charter." Response to Motion to Dismiss, Exhibit A, page 4. Because no such ordinance was ever adopted regarding the subject property, the city commission concluded, the subject property was never "designated as a park" for purposes of Chapter X.

In the resolution's recitals and findings, the city commission also addressed the comprehensive plan maps and parks master plan provisions cited by petitioners, and ultimately concluded that "a designation appearing on the Comprehensive Plan Land Use Map adopted by ordinance does not control whether or not a specific property is 'designated as a park' and subject to the provisions of Chapter X of the City Charter." *Id*., page 3. In short, the city commission concluded that designation of property as a "park" on the comprehensive plan map (whether current or superseded) is not sufficient to designate the property as a "park" or Charter Park for purposes of Section 43 of Chapter X. The city commission also resolved an apparent conflict between

the 1991 master parks map and text, and interpreted the map and text to the effect that the subject property was never part of Waterboard Park.

Petitioners appealed Resolution 15-29 to LUBA. The city now moves to dismiss this appeal, arguing that the resolution is not a "land use decision" subject to LUBA's jurisdiction, as that term is defined at ORS 197.015(10)(a)(A).[3] In relevant part, a land use decision is a final decision by a local government that "concerns" the "application" of a comprehensive plan provision or a land use regulation. The city argues that Resolution 15-29 does not apply, or concern the application of, any comprehensive plan provision or land use regulation, within the meaning of ORS 197.015(10)(a)(A).

Petitioners respond that a decision concerns the application of a comprehensive plan provision or land use regulation in one of two ways: either the decision (1) actually applies a plan provision or land use regulation, or (2)

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

> "A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
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> "(i) The goals;
>
> "(ii) A comprehensive plan provision;
>
> "(iii) A land use regulation; or
>
> "(iv) A new land use regulation[.]"

the decision should have applied an applicable plan provision or land use regulation. *Jaqua v. City of Springfield*, 46 Or LUBA 566, 574 (2004). In the present case, petitioners argue, Resolution 15-29 does both. First, petitioners argue that the city commission actually applied the comprehensive plan maps and parks master plan maps and text, in the course of rejecting petitioners' arguments that those maps and text control the question of whether the subject property is "designated as a park" for purposes of Section 43 of Chapter X. Second, petitioners argue, the city commission misinterpreted and hence failed to correctly apply the cited comprehensive plan maps and text to control on the question of whether the subject property is a designated park under Chapter X. In either case, petitioners contend, Resolution 15-29 concerns the application of the cited comprehensive plan provisions and text, and therefore qualifies as a land use decision subject to LUBA's jurisdiction.

The city responds that a decision applies or concerns the application of a comprehensive plan provision within the meaning of ORS 197.015(10)(a) only if the local government decision is made in an exercise of the local government's land use planning responsibilities, and the local government is therefore required to apply the comprehensive plan provision as the basis to make the decision. According to the city, the city commission addressed and rejected arguments made below regarding the cited comprehensive plan provisions only in the course of determining the meaning of a city charter provision. But rejecting petitioners' comprehensive plan arguments does not

transform that decision into a land use decision. The city argues that the city charter is not a land use planning document, and the question of whether land is "designated as a park" for the limited purposes of Chapter X has nothing to do with land use planning.

We generally agree with the city. In our view, ORS 197.015(10)(a) encompasses only decisions where the local government is required to apply the goals, comprehensive plan provisions, land use regulations, or new land regulations as decision-making authority, and either did apply them or should have applied them. In most cases, it is reasonably clear whether a goal, comprehensive plan provision or land use regulation applies in making a particular type of decision. However, in some cases, the nature of the decision being made is such that there is only a tangential connection to land use, and there is no legal requirement to apply any goals, comprehensive plan provisions or land use regulations as decisional authority in making that type of decision. In the latter case, even if the local government decision in fact addresses the goals or a comprehensive plan provision, etc., in making the decision, the resulting decision is not a land use decision.

One example of the latter circumstance, cited by the city, is *Westside Neighborhood Quality Project v. School District 4J*, 58 Or App 154, 647 P2d 962 (1982). In that case, the school district closed a school for a variety of reasons, including fiscal reasons, safety, declining enrollment, etc. The school district's decision addressed consistency with statewide planning goals and the

Metro area comprehensive plan, including a neighborhood plan policy requiring the City of Eugene to maintain the school, in cooperation with the school district, as an educational, social, recreational and community center. The school district concluded that the plan policy did not govern the district's decision to close the school. LUBA concluded that the comprehensive plan policy applied to the school closure decision, and therefore the decision was a land use decision. The Court of Appeals reversed, concluding that the district's decision to close the school was not an exercise of its land use planning responsibilities, and that LUBA therefore lacked jurisdiction to review the decision, notwithstanding that the school district addressed whether the school closure was consistent with the Metro area comprehensive plan policies. The Court concluded that the same reasoning underlying the so-called "fiscal exception" to land use review jurisdiction, articulated in *Housing Council v. City of Lake Oswego*, 48 Or App 525, 617 P2d 655 (1980), applied equally to the school closure decision. According to the Court, the district decided only that the district would cease to operate the school, which was not an exercise of the district's land use planning responsibility, but rather an exercise of its responsibilities for "educational policy and basic district management." 58 Or App at 161.

The present case is somewhat similar. The narrow question before the city commission was whether the subject property is a "designated as a park" as that phrase is used in Section 43 of Chapter X. More specifically, the city

commission had to identify the process by which property is "designated as a park" by ordinance for purposes of Section 43 of Chapter X. Answering those questions does not require exercise of the city's land use planning responsibilities, and there is nothing in any law cited to us that would require the city to apply its comprehensive plan maps or regulations in order to answer that question. The city rejected petitioners' arguments that superseded comprehensive plan maps and park master plan maps and text were sufficient to designate land as a park by ordinance, for purposes of Section 43 of Chapter X. That the city addressed those plan maps and text in the course of rejecting petitioners' arguments does not mean that the city applied, or that the city was required to apply, those superseded plan maps and text as an exercise of its land use planning responsibilities.

For the foregoing reasons, petitioners have not established that the city's decision is a land use decision as defined at ORS 197.015(10)(a).

In the alternative, petitioners argue that the city's decision is subject to LUBA's jurisdiction under the "significant impacts" test articulated in *Peterson v. City of Klamath Falls*, 279 Or 249, 566 P2d 1193 (1977), *Pendleton v. Kerns*, 294 Or 126, 653 P2d 992 (1982), and *Billington v. Polk County*, 299 Or 471, 703 P2d 232 (1985). Under the significant impacts test, a local government decision that does not qualify as a "land use decision" as defined at ORS 197.015(10)(a) can, at least theoretically, be subject to LUBA's review, if the decision creates an "actual, qualitatively or quantitatively significant impact

on present or future land uses." *Carlson v. City of Dunes City*, 28 Or LUBA 411, 414 (1994).

We say "theoretically," because the significant impacts test was first articulated prior to the creation of LUBA and adoption of ORS 197.015(10)(a) in 1979, and as a practical matter has been superseded by the statutory test. One of the problems with the significant impact test is that by its nature it operates only where no statewide planning goal, comprehensive plan provision, or land use regulation applies to the challenged decision. Such a decision may be subject only to laws or standards that have little to do with land use. For that reason, we have held that a petitioner who invokes the significant impacts test must identify the non-land use standards that the petitioner believes apply to the decision and that would be the subject of LUBA's review. *Northwest Trail Alliance v. City of Portland*, __ Or LUBA __ (LUBA No. 2015-015, June 3, 2015) slip op 11. Further, the petitioner must demonstrate that the identified non-land use standards have some bearing or relationship to the use of land. *Id.*

In the present case, petitioners argue that the non-land use standard at issue is Chapter X of the City Charter, which petitioners argue has a bearing or relationship to the use of land, because it effectively requires designated parks to remain in park use absent voter approval. If the voter protections of Chapter X are lifted from a designated park, petitioners argue, the park can be developed or used for non-park uses without a vote of the citizenry, which

petitioners allege could have significant impacts on land uses. Petitioners contend that there are several parks designated on the city's current comprehensive plan map as "parks" that are, by virtue of the city commission's interpretation, not subject to the protections of Chapter X because they are not listed in Chapter X and there are no ordinances beyond those that adopted the comprehensive plan that expressly designate these plan-designated parks as "parks" for purposes of Chapter X.

However, in order to cause a "significant impact" on present or future land uses, we believe the decision must change the land use status quo in some way. The challenged decision does not change the status quo; it simply determines the subject property is not (and never has been) a Charter Park for purposes of Chapter X of the City Charter. The decision does nothing to change the use of the property, or cause any impact, significant or otherwise, on present or future land use of the property or surrounding properties. In effect, petitioners want the city to make a *different* decision that would, arguably, have consequences with respect to future use of the property, *i.e.*, cause it to be treated as a park, at least for purposes of Chapter X. However, the focus of the significant impact test (to the extent that test still has any practicable application) is on decisions that actually change present or future land uses. Petitioners' arguments that the city should have made a different decision that would or could change the land use status quo does not establish that the significant impacts test is met in this case.

In sum, petitioners have not established that the city's decision is a land use decision subject to our jurisdiction.

MOTION TO TRANSFER

Petitioners move to transfer this appeal to circuit court, pursuant to ORS 34.102 and OAR 661-010-0075(11), in the event that the Board concludes that we lack jurisdiction over the challenged decision.[4] The city does not oppose the motion, and it is granted.

The appeal is transferred to Clackamas County Circuit Court.

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[4] OAR 661-010-0075(11)(c) provides, in relevant part:

> "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."