

1                                   BEFORE THE LAND USE BOARD OF APPEALS  
2                                   OF THE STATE OF OREGON

3  
4                                   BRISTOL CREEK HOMES  
5                                   & DEVELOPMENT,  
6                                   *Petitioner,*

7  
8                                   vs.

9  
10                                  CITY OF PORTLAND,  
11                                  *Respondent.*

12  
13                                  LUBA No. 2016-052

14  
15                                  FINAL OPINION  
16                                  AND ORDER

17  
18                   Appeal from City of Portland.

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20                   Christopher P. Koback, Portland, represented petitioner.

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22                   Lauren King, Deputy City Attorney, Portland, represented respondent.

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

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27                   TRANSFERRED                   08/04/2016

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

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**NATURE OF THE DECISION**

Petitioner appeals a decision by the Portland Bureau of Transportation (PBOT) that denies petitioner’s application for an encroachment permit and orders petitioner to remove a retaining wall built within a public right-of-way.

**MOTION TO DISMISS**

The city moves to dismiss the case on jurisdictional grounds. As relevant to our disposition of this appeal, the city argues that the decision is outside of LUBA’s jurisdiction because it falls within an exception to the ORS 197.015(10)(a) definition of “Land use decision”.<sup>1</sup> A decision is a statutory “land use decision” subject to LUBA's jurisdiction if it is a final local government decision that “concerns the application” of a comprehensive plan provision or land use regulation. ORS 197.015(10)(a)(A). Among the exceptions to that definition is ORS 197.015(10)(b)(D), which provides that

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<sup>1</sup> ORS 197.015(10)(a) defines “Land use decision” 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[.]”

1 “land use decision” does not include a decision of a local government that  
2 “determines final engineering design, construction, operation, maintenance,  
3 repair or preservation of a transportation facility that is otherwise authorized by  
4 and consistent with the comprehensive plan and land use regulations[.]”

5 **A. Background**

6 Prior to the application for an encroachment permit, the city approved a  
7 land division for the subject property and required an additional two-foot  
8 dedication of public right-of-way along North Albina Avenue. Petitioner  
9 recorded a final plat that included the dedication. Then the city issued  
10 petitioner a building permit for townhomes on the subject property that  
11 required reconstruction of the existing sidewalk corridor to current standards.  
12 Petitioner sought a waiver to the current sidewalk standards. The North Albina  
13 Avenue Pedestrian District requires a 6-inch curb zone, a 4-foot furnishing  
14 zone (a planting strip), a 6-foot pedestrian zone (the physical sidewalk), and a  
15 foot-and-a-half wide frontage zone (a buffer between the sidewalk and property  
16 line). A standard curb, planting strip, sidewalk and buffer would occupy a total  
17 of 12 feet.

18 However, petitioner sought a waiver for a one-foot reduction to the  
19 furnishing zone (planting strip) and a one-foot reduction to the frontage zone  
20 (buffer). With these reductions, the curb, planting strip, sidewalk and buffer  
21 would occupy a total of 10 feet. Portland Public Works Alternative Review  
22 Committee permitted the waiver but required petitioner to maintain “the

1 existing sidewalk corridor with the condition that no encroachments are  
2 constructed in the public right-of-way behind the pedestrian through zone.”  
3 Record 18. Due to the waiver, two feet of the dedicated right-of-way is no  
4 longer within the frontage zone or buffer, as it would have been absent the  
5 waiver.

6 Notwithstanding the committee’s specified prohibition on encroachments  
7 within the right-of-way, petitioner constructed a retaining wall within the  
8 public right-of-way, but outside the frontage zone or buffer. A city inspector  
9 alerted petitioner that its retaining wall was illegally located in the public right-  
10 of-way. Petitioner then sought a revocable encroachment permit from PBOT.  
11 The permit was reviewed by the Transportation Development Review manager,  
12 and after consultation with the city’s Encroachment Advisory Committee, was  
13 denied on April 15, 2016. Record 83. On April 18, 2016, PBOT emailed  
14 petitioner, explaining that the application was presented to the committee on  
15 April 15, 2016 and denied.<sup>2</sup>

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<sup>2</sup> There is some disagreement regarding what constitutes the final decision. Petitioner’s notice of intent to appeal asserts that the April 18, 2016 email from the city is the final decision. Conversely, the city argues that the notation on the encroachment permit application form dated April 15, 2016 at Record 83 is the relevant decision for LUBA review. Record 83 includes a “For staff use only” box, which was filled out by city staff and there is a checkmark in the box next to the words “Denied (does not meet city standards) \* \* \*.” Record 83. The city then emailed petitioner on April 18 stating that “your encroachment application was denied.” For purposes of this opinion, it does not matter which document is the final decision denying petitioner’s request for an encroachment permit.

1           **B.     Exception to the Definition of Land Use Decision**

2           As noted, the city argues that the challenged decision is excluded from  
3 LUBA’s jurisdiction under ORS 197.015(10)(b)(D). Petitioner argues that the  
4 ORS 197.015(10)(b)(D) exception does not apply, because the requested  
5 encroachment is not into a “transportation facility” as that term is used in ORS  
6 197.015(10)(b)(D). According to petitioner, the application requested a  
7 retaining wall within “a bare dedication[,]” in an area of the sidewalk right-of-  
8 way that due to the waiver will never include any sidewalk or other  
9 transportation facility. Petitioner’s Response 6-7. Petitioner argues that the  
10 dictionary definition of “facility” indicates that the term means something built  
11 for a specific purpose. *Id.* (citing an on-line dictionary.) Because nothing  
12 transportation-related will be built within the area encroached by the retaining  
13 wall, petitioner argues, the decision does not concern the “operation,  
14 maintenance, \* \* \* or preservation of a transportation facility[,]” and therefore,  
15 the ORS 197.015(10)(b)(D) exception does not apply.

16           We disagree with petitioner. Petitioner does not dispute that a sidewalk  
17 is a transportation facility for purposes of ORS 197.015(10)(b)(D). In our  
18 view, a sidewalk transportation facility includes more than the built portion of  
19 the sidewalk. It includes all portions of the sidewalk right-of-way that are  
20 subject to city standards for transportation facilities, and that contribute to the  
21 function of the sidewalk as a transportation facility, including built and unbuilt  
22 portions of the right-of-way. The city prohibits encroachments or built

1 elements within the dedicated portion of the right-of-way, and that prohibition  
2 presumably helps preserve the functionality of the facility. The city’s policy  
3 document states that “the retaining wall must be located so that it does not  
4 restrict the minimum sidewalk corridor width and must be at least 1’ away from  
5 the Through Pedestrian Zone[.]” Record 39. In our view, a decision  
6 concerning a request to place an encroachment within the right-of-way  
7 bordering a pedestrian walkway is a decision that concerns the “maintenance”  
8 and “preservation” of a transportation facility, purposes of ORS  
9 197.015(10)(b)(D).

10 **C. A Facility that is Consistent with the Comprehensive Plan**

11 The ORS 197.015(10)(b)(D) exception extends only to decisions that  
12 determine the “ \* \* \* construction, operation, maintenance, \* \* \* or  
13 preservation of *a transportation facility that is otherwise authorized by and*  
14 *consistent with the comprehensive plan and land use regulations[.]*” (Emphasis  
15 added.) In *7th Street Station v. City of Corvallis*, 58 Or LUBA 93, 99 (2008),  
16 *aff’d*, 227 Or App 506, 206 P3d 286 (2009), we determined that the phrase  
17 “otherwise authorized by and consistent with the comprehensive plan and land  
18 use regulations” qualifies the term transportation facility.

19 Petitioner argues that the sidewalk corridor is not a facility that is  
20 consistent with the comprehensive plan. According to petitioner, because  
21 petitioner previously received waivers of existing sidewalk standards, the  
22 current sidewalk corridor does not meet the requirements in the City’s

1 transportation system plan and comprehensive plan, and is therefore not “a  
2 transportation facility that is otherwise authorized by and consistent with the  
3 comprehensive plan[.]”

4 We disagree with petitioner. That the city approved petitioner’s request  
5 to waive or vary certain sidewalk standards does not mean that the sidewalk as  
6 built is not authorized by and consistent with the comprehensive plan.  
7 Petitioner does not dispute that the city decision to grant the waivers was itself  
8 authorized by and consistent with the city’s comprehensive plan and land use  
9 regulations. The sidewalk that was constructed pursuant to those waivers is  
10 thus authorized and consistent with the city’s comprehensive plan and land use  
11 regulations, for purposes of ORS 197.015(10)(b)(D). In our view, the language  
12 “authorized by and consistent with” is intended to remove from the scope of the  
13 exclusion decisions that concern the design, construction, operation,  
14 maintenance, etc., of new or previously unauthorized transportation facilities,  
15 for example approval of a new street that is not included in the local  
16 government’s transportation system plan. That language is not intended to  
17 remove from the scope of the exclusion decisions concerning the operation or  
18 maintenance of previously approved facilities that differ from applicable  
19 standards because in approving construction the local government authorized  
20 waivers or variances from those applicable standards.

1           **D.   Disposition**

2           Based on the foregoing, we conclude that the decision falls within the  
3 exclusion to LUBA’s jurisdiction at ORS 197.015(10)(b)(D). Petitioner filed an  
4 alternative motion to transfer the matter to circuit court in the event that LUBA  
5 determines it lacks jurisdiction. OAR 661-010-0075(11). Petitioner’s motion to  
6 transfer is timely, and the appeal is transferred to Multnomah County Circuit  
7 Court.