

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 STACEY MCLAUGHLIN,
5 R. FRANCIS EATHERINGTON,
6 PAMELA BROWN ORDWAY,
7 and JOHN CLARKE,
8 *Petitioners,*

9
10 vs.

11
12 DOUGLAS COUNTY,
13 *Respondent,*

14
15 and

16
17 PACIFIC CONNECTOR GAS PIPELINE LP,
18 *Intervenor-Respondent.*

19
20 LUBA No. 2017-008

21
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23 FINAL OPINION
24 AND ORDER

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26 Appeal from Douglas County.

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28 Stacey McLaughlin, R. Francis Eatherington, Pamela Brown Ordway,
29 and John Clarke, Roseburg, filed the petition for review.

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31 Paul E. Meyer, County Counsel, Roseburg, filed a response brief on
32 behalf of respondent.

33
34 Steven L. Pfeiffer, Portland, filed the response brief on behalf of
35 intervenor-respondent. With him on the brief were Seth J. King and Perkins
36 Coie LLP.

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38 BASSHAM, Board Member; RYAN, Board Chair; HOLSTUN, Board

1 Member, participated in the decision.

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TRANSFERRED

07/20/2017

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

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3 **NATURE OF THE DECISION**

4 Petitioners appeal a county planning director’s decision to approve a
5 one-year extension of a conditional use permit authorizing a natural gas
6 pipeline.

7 **JURISDICTION**

8 Intervenor-respondent Pacific Connector Gas Pipeline, LP (intervenor)
9 moves to dismiss this appeal on the grounds that the conditional use permit
10 decision is excluded from the definition of “land use decision” at ORS
11 197.015(10). In the alternative, intervenor moves to dismiss some of the
12 petitioners on the grounds that they did not appear in any county proceeding
13 below and thus lack standing to appeal.

14 **A. Reply Pleading**

15 Petitioners filed a response to the motion to dismiss, arguing in relevant
16 part that (1) the county’s decision is subject to LUBA’s jurisdiction as a
17 “significant impacts” land use decision; and (2) petitioners have standing
18 because they were entitled to notice of the application and therefore would
19 have been parties to the required local proceeding, had the county conducted
20 one. Intervenor filed a reply to the response. Petitioners object to the reply,
21 arguing that LUBA’s rules do not provide for a reply to a response to motions.
22 While that is correct, LUBA’s rules also do not prohibit such a reply, and
23 LUBA’s practice is to consider them to the extent they address new issues

1 raised in the response. *Frevach v. Multnomah County*, 38 Or LUBA 729
2 (2000). Intervenor’s reply pleading addresses the two new issues raised in
3 petitioners’ response pleading. Therefore, we will consider the reply.

4 **B. Factual Background**

5 On December 10, 2009, the county planning commission approved a
6 conditional use permit (CUP) to allow intervenor to construct a new liquefied
7 natural gas (LNG) pipeline extending 7.31 miles through the county’s Coastal
8 Zone Management Area, on lands zoned for farm and forest use, subject to
9 conditions. Although multiple parties appealed the planning commission’s
10 decision, the county board of commissioners declined to review the matter, and
11 the planning commission’s decision became the county’s final decision. LUBA
12 dismissed the subsequent appeal of the county’s decision. *Friends of Living*
13 *Oregon Waters v. Douglas County*, __ Or LUBA __ (LUBA No. 2010-010,
14 June 9, 2010). The county subsequently granted one-year extensions to the
15 permit in 2011, 2012, 2013, 2014 and 2015. Pursuant to the 2015 extension,
16 the development approval period was scheduled to expire December 10, 2016.

17 On December 8, 2016, intervenor filed an application with the county
18 requesting an additional one-year extension of the development period for the
19 permit. Requests for extensions of permits granted for development on farm
20 and forest land are subject to Douglas County Land Use and Development

1 Ordinance (LUDO) 2.800.2¹ (Permit Expiration Dates on Farm and Forest
2 Lands). As discussed below, LUDO 2.800.2 implements an almost identically
3 worded administrative rule, adopted by the Oregon Land Conservation and

¹ LUDO 2.800 is entitled “Permit Expiration Dates on Farm and Forest Land,” and provides, in pertinent part:

- “1. A discretionary decision, except for land divisions and those residential developments listed in §2.800.5, made after August 7, 1993, approving a proposed development on agricultural or forest land * * * is void two years from the date of the final decision if the development action is not initiated in that period.
- “2. An extension of 12 months may be granted if:
 - “a. The applicant makes a written request for an extension of the development approval period;
 - “b. The request is submitted to the county prior to the expiration of the approval period;
 - “c. The applicant states the reasons that prevented the applicant from beginning or continuing development within the approval period; and
 - “d. The Approving Authority determines that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible.
- “3. Approval of an extension granted under this provision is not a land use decision as described in ORS 197.015 and is not subject to appeal as a land use decision.
- “4. Additional one year extensions may be authorized where applicable criteria for the decision have not changed.”

- 1 Development Commission (LCDC), that governs expiration and extension of
- 2 permits on farm and forest land, at OAR 660-033-0140.²

² OAR 660-033-0140 is entitled “Permit Expiration Dates,” and provides, in relevant part:

- “(1) “[A] discretionary decision, except for a land division, made after the effective date of this division approving a proposed development on agricultural or forest land * * * is void two years from the date of the final decision if the development action is not initiated in that period.
- “(2) A county may grant one extension period of up to 12 months if:
 - “(a) An applicant makes a written request for an extension of the development approval period;
 - “(b) The request is submitted to the county prior to the expiration of the approval period;
 - “(c) The applicant states reasons that prevented the applicant from beginning or continuing development within the approval period; and
 - “(d) The county determines that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible.
- “(3) *Approval of an extension granted under this rule is an administrative decision, is not a land use decision as described in ORS 197.015 and is not subject to appeal as a land use decision.*
- “(4) Additional one-year extensions may be authorized where applicable criteria for the decision have not changed.” (Emphasis added).

1 The county planning director reviewed intervenor’s extension request
2 administratively, without notice or hearing, and subsequently approved the
3 request on December 20, 2016. This appeal followed.

4 **C. ORS 197.015(10)(a) Land Use Decision**

5 Intervenor argues that LUBA lacks jurisdiction over petitioners’ appeal,
6 because the county’s decision to grant intervenor’s requested one-year
7 extension of the development period for the permit pursuant to LUDO 2.800.2
8 is not a land use decision.

9 As relevant to this appeal, LUBA has jurisdiction to decide appeals of
10 “land use decisions.” ORS 197.825(1). ORS 197.015(10)(a) defines a “land
11 use decision” in relevant part as a final decision or determination made by a
12 local government that concerns the application of a “land use regulation.” ORS
13 197.015(10)(a)(A)(iii). As defined in 197.015(11), a land use regulation means
14 “any local government zoning ordinance, land division ordinance adopted
15 under ORS 92.044 or 92.046 or similar general ordinance establishing
16 standards for implementing a comprehensive plan.”

17 As noted, the county’s decision concerns the application of LUDO
18 2.800.2, which is indisputably a “land use regulation” as defined at ORS
19 197.015(11). Therefore, the challenged decision meets the definition of “land
20 use decision” at ORS 197.015(10)(a), unless some exclusion applies. ORS
21 197.015(10)(b) lists a number of exclusions, including “a decision of a local
22 government * * * made under land use standards that do not require

1 interpretation or the exercise of policy or legal judgment[.]” ORS
2 197.015(10)(b)(A).

3 Intervenor argues that the county’s decision is excluded from LUBA’s
4 jurisdiction based upon *Jones v. Douglas County*, 63 Or LUBA 261, 281, *aff’d*,
5 247 Or App 81, 270 P3d 278 (2011). Citing to *Jones*, intervenor argues that
6 “extensions of permits for development on farm or forest land, or otherwise []
7 controlled by OAR 660-033-0140” are not land use decisions subject to
8 LUBA’s jurisdiction. 63 Or LUBA at 282.

9 In *Jones*, we explained that LUDO 2.800.2, the same LUDO section at
10 issue here, implements OAR 660-033-0140. *Id.* at 266. OAR 660-033-0140
11 expressly provides that permit extension decisions on farm or forest land are
12 not land use decisions. *Id.* at 282-283. We explained the rationale for this, as
13 follows:

14 “OAR 660-033-0140(3) possibly represents LCDC’s interpretation
15 of the ORS 197.015(10) definition of ‘land use decision’ or one of
16 the exclusions to that definition, at ORS 197.015(10)(b). Or
17 possibly it represents an additional exclusion, independent from
18 those set out in the statute. LCDC has general statutory authority
19 to ‘adopt rules that it considers necessary to carry out ORS
20 chapters 195, 196 and 197.’ ORS 197.040(1)(b). LCDC also has
21 broad statutory authority to adopt rules regarding use of farm and
22 forest lands. *See generally Lane County v. LCDC*, 325 Or 569, 942
23 P2d 278 (1997). Petitioners do not argue that OAR 660-033-
24 0140(3) exceeds LCDC’s authority, or is inconsistent with any
25 statute, and we express no opinion in that regard. Because
26 petitioners offer no basis for concluding that OAR 660-033-
27 0140(3) does not control the present circumstances, we apply and
28 give effect to the rule.” *Id.*

1 In the present case, petitioners also do not challenge OAR 660-033-
2 0140(3), or our reasoning in *Jones*. Instead, petitioners argue that in the
3 present case, the county misconstrued intervenor’s permit extension application
4 as one that could be approved administratively, *i.e.*, without notice or hearing.
5 According to petitioners, intervenor’s request to extend the CUP authorizing
6 construction of an LNG pipeline under the standards for an extension at LUDO
7 2.800.2 requires the exercise of discretion. Citing *Bard v. Lane County*, 63 Or
8 LUBA 1, *aff’d* 243 Or App 245, 256 P3d 205 (2011), petitioners argue that the
9 extension approval under those standards is not subject to the exclusion at ORS
10 197.015(10)(b)(A), and is therefore a “land use decision.”

11 In *Bard*, we held that a county’s approval of a requested extension of a
12 special use permit for a six-bed hospice facility involved extension standards
13 that were discretionary in nature, which meant that the exclusion at ORS
14 197.015(10)(b)(A) did not apply, and the extension decision was therefore a
15 land use decision subject to LUBA’s jurisdiction. 63 Or LUBA at 9. However,
16 as we later explained in *Jones*, our decision in *Bard* (and other cases holding
17 similarly) was based upon the distinguishing fact that the permit extension
18 request was for a project *not* located on agricultural or forest land:

19 “Indeed, in *Bard* we addressed a code extension criterion identical
20 to that in OAR 660-033-0140(2)(d) and concluded that an
21 extension under that criterion was an ‘extremely discretionary’
22 decision [citing to *Bard*]. However, it is important to note that
23 [neither *Bard* nor other cases holding similarly] appear to involve
24 extensions of permits for development on farm or forest land, or

1 otherwise did not involve circumstances controlled by OAR 660-
2 033-0140.” *Jones*, 63 Or LUBA at 282.

3 Here, unlike in *Bard*, it is uncontested that intervenor’s request for a
4 permit extension involves a permit for a pipeline situated on agricultural and
5 forest lands. Accordingly, consistent with *Jones*, based on the plain language
6 of OAR 660-033-0140(3), we conclude that a “decision extending a permit
7 decision on agricultural or forest land is not a ‘land use decision’ as defined in
8 ORS 197.015 and therefore is not subject to LUBA’s jurisdiction.” 63 Or
9 LUBA at 283.

10 **C. Significant Impacts Land Use Decision**

11 Finally, petitioners also argue that respondent’s decision is a “significant
12 impacts” land use decision, and therefore subject to LUBA’s jurisdiction. A
13 local government decision is a “land use decision” if it meets either the
14 statutory definition of “land use decision” in ORS 197.015(10) or the
15 judicially-created significant impact test. *Knee Deep Cattle Co. v. Lane County*,
16 28 Or LUBA 288, 299 (1994), *aff’d* 133 Or App 120, 890 P2d 449 (1995). To
17 meet this test, a decision must create “an actual, qualitatively or quantitatively
18 significant impact,” and the petitioner must demonstrate that that impact is
19 likely to occur. *Carlson v. City of Dunes City*, 28 Or LUBA 411, 414 (1994).

20 However, where the legislature adopts a statute that excludes certain
21 decisions from the statutory definition of “land use decision,” LUBA has no
22 review authority over such decisions under the significant impact test.
23 *Oregonians in Action v. LCDC*, 103 Or App 35, 38, 795 P2d 1098 (1990). As

1 discussed above, OAR 660-033-0140(3) excludes a decision extending a
2 permit on farm or forest land from land use decision as defined at ORS
3 197.015(10)(a). Petitioners do not dispute that LCDC has the statutory
4 authority to adopt OAR 660-033-0130(3). Absent an argument to that effect,
5 we see no reason not to extend the holding in *Oregonians in Action* to include
6 exclusions from the definition of “land use decision” found in administrative
7 rules adopted by LCDC, pursuant to its statutory authority to adopt rules it
8 considers necessary to carry out ORS chapter 197. Accordingly, because OAR
9 660-033-0140(3) excludes the challenged decision from statutory definition of
10 “land use decision,” the significant impacts test has no application here.

11 **D. Standing**

12 Intervenor also argues, in the alternative, that some petitioners lack
13 standing to appeal the challenged extension decision to LUBA, under ORS
14 197.830(2) or (3). However, given that we have concluded that the challenged
15 decision is not subject to our jurisdiction at all, we need not resolve
16 intervenor’s challenges to the standing of some petitioners to appeal the
17 decision to LUBA.

18 **MOTION TO TRANSFER**

19 Pursuant to ORS 34.102 and OAR 661-010-0075(11), petitioners filed a
20 contingent motion to transfer this appeal to circuit court, in the event LUBA
21 determines that the challenged decision is not reviewable as a “land use

1 decision.”³ Intervenor does not oppose the motion. Because we have
2 concluded that the challenged decision is not reviewable as a land use decision,
3 the motion to transfer is granted.

4 The decision is transferred.

³ 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.”