

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

3
4 DAVID A. CARLSON,
5 *Petitioner,*

06/11/18 AM 11:07 LUBA

6
7 vs.

8
9 CITY OF BROOKINGS,
10 *Respondent.*

11
12 LUBA No. 2017-134

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from City of Brookings.

18
19 David A. Carlson, Brookings, filed the petition for review on his own
20 behalf.

21
22 Martha D. Rice, Crescent City, filed a response brief on behalf of the
23 respondent. With her on the brief was Black & Rice LLP.

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

27
28 DISMISSED 06/11/2018

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

NATURE OF THE DECISION

Petitioner appeals a city council decision authorizing removal of 35 trees in a city park.

REPLY BRIEF

Petitioner moves to file a reply brief under OAR 661-010-0039 to address two jurisdictional challenges raised in the response brief. There is no objection to the motion or brief and they are allowed.

FACTS

In 2016, after consultation with the Oregon State Forester and other tree experts, city staff recommended to the city's parks and recreation commission that approximately 60 trees be removed from a city park, the 33-acre Azalea Park. The staff recommendation was based on concerns that some of the identified trees are diseased and immediately hazardous, that others would become hazardous over time, and that others should be removed for aesthetic reasons or to promote the growth of higher-value vegetation in the park, specifically native azaleas.

On November 17, 2016, the city's parks and recreation commission voted to recommend to the city council that the identified trees be removed. On December 12, 2016, the city council unanimously approved the recommendation. However, after a citizen petition was circulated, the city council agreed to reconsider the matter and, at a May 8, 2017 meeting,

1 scheduled a public workshop to study the issue. The city contracted with an
2 arborist to collect data and recommend which trees should be removed. The
3 arborist recommended that eight trees be immediately removed as hazardous,
4 and identified three others that may need to be removed in the near future. The
5 arborist recommended that most of the remaining trees identified for removal
6 by staff be treated, pruned and maintained.

7 At a November 13, 2017 city council meeting, staff presented three
8 options to the city council: to authorize removal of (1) only the eight trees
9 deemed immediately hazardous in the arborist's report, (2) 35 of the most
10 problematic trees, or (3) all of the original 60 trees identified by staff.
11 Petitioner attended the November 13, 2017 meeting and presented comments.
12 By a 3-1 vote, the city council chose the second option, and voted to authorize
13 removal of 35 trees. The city council's decision is reflected in the minutes of
14 the November 13, 2017 meeting, which the city council adopted at its next
15 meeting, on December 11, 2017.

16 On December 29, 2017, petitioner filed a notice of intent to appeal
17 challenging the November 13, 2017 decision to authorize removal of 35 trees.

18 **JURISDICTION**

19 In its response brief, the city argues that LUBA lacks jurisdiction over
20 this appeal on two grounds: (1) the appeal was untimely filed, and (2) the
21 decision on appeal is not a "land use decision" as defined at ORS
22 197.015(10)(a)(A). Because we agree with the city that the challenged

1 decision is not a land use decision or other decision subject to LUBA's
2 jurisdiction, we do not address whether the appeal was timely filed.

3 **A. Land Use Decision as defined at ORS 197.015(10)(a)**

4 As relevant here, LUBA's jurisdiction is limited to appeals of land use
5 decisions. ORS 197.015(10)(a)(A) defines "land use decision" as:

6 "A final decision or determination made by a local government or
7 special district that concerns the adoption, amendment or
8 application of:

9 "(i) The goals;

10 "(ii) A comprehensive plan provision;

11 "(iii) A land use regulation; or

12 "(iv) A new land use regulation[.]"

13 LUBA has held that a decision qualifies as a "land use decision" under ORS
14 197.015(10)(a)(A) if it either applies, or should have applied, one of the four
15 bodies of land use legislation listed in the statute, *i.e.*, the statewide planning
16 goals, a comprehensive plan provision, or an existing or new land use
17 regulation. *Jaqua v. City of Springfield*, 46 Or LUBA 566, 574 (2004). ORS
18 197.015(11) defines land use regulation" to mean "any local government
19 zoning ordinance, land division ordinance adopted under ORS 92.044 or
20 92.046 or similar general ordinance establishing standards for implementing a
21 comprehensive plan."

1 In the present case, petitioner argues that the city council should have
2 applied as criteria for its decision Goal 5 of the Brookings Comprehensive Plan
3 (BCP), which provides that it is the city’s goal:

4 “To conserve open space and protect natural, scenic resource,
5 cultural, and historic areas while providing for the orderly growth
6 and development of the City.”

7 Petitioner contends that BCP Goal 5 requires the city to protect all natural
8 resources, including the trees in Azalea Park. According to petitioner,
9 protection of natural resources means the city must budget funds to treat and
10 maintain the trees in the park, rather than remove them.

11 The city disputes that BCP Goal 5 is applicable to the city council’s
12 decision to authorize removal of 35 trees in Azalea Park. The city notes that
13 the Implementation section of BCP Goal 5 states that Goal 5 policies are
14 implemented through zoning and subdivision ordinances, and argues that
15 petitioner has not identified any zoning or subdivision regulations that would
16 govern the city’s decision whether or not to remove trees from a city park.

17 BCP Goal 5 presumably implements Statewide Planning Goal 5 (Natural
18 Resources, Scenic and Historic Areas, and Open Spaces), which in relevant
19 part requires local governments to inventory significant natural resource sites,
20 and adopt a program to protect inventoried sites. Petitioner does not contend
21 that Azalea Park or the trees in Azalea Park are inventoried as significant Goal
22 5 resources, or identify any Goal 5 program that would apply to protect the 35
23 trees at issue. As the city notes, BCP Goal 5 itself is implemented through

1 policies and land use regulations. Petitioner does not identify any BCP Goal 5
2 policies or implementing land use regulations that would apply to a proposal to
3 remove 35 trees in Azalea Park.

4 Under the fourth assignment of error in the petition for review, petitioner
5 argues that the city council decision to remove the 35 trees is not authorized
6 under the Public Open Space (P/OS) zone that applies to Azalea Park, at
7 Brookings Municipal Code (BMC) 17.40. Petitioner contends that one of the
8 reasons the city council chose to remove 35 trees, as opposed to removing only
9 the eight trees deemed immediately hazardous by the arborist, is to generate
10 enough revenue from selling the timber to offset the costs of removal, as well
11 as to limit the expense of treating and maintaining trees that are not hazardous
12 or not yet hazardous. Petitioner argues that this proposal to remove trees to
13 generate revenue constitutes “logging,” which is not listed as a permitted or
14 conditional uses in the P/OS zone. According to petitioner, the city council
15 should have applied the provisions of BMC 17.40 to its decision, and decided
16 that the removal of 35 trees from Azalea Park was not consistent with BMC
17 17.040.

18 The city responds, and we agree, that the proposed removal of 35 trees in
19 a city park does not constitute “logging” for purposes of BMC 17.40 or any
20 land use regulation cited to us. BMC 17.40 includes no regulations cited to us
21 that govern or apply to removal of trees in a city park. That the decision to
22 remove some trees was apparently motivated in part to generate revenue to

1 offset the costs of removing currently hazardous trees, and to avoid the cost of
2 treating and maintaining compromised trees that are not yet hazardous, does
3 not convert the tree removal proposal into a logging operation.

4 It is petitioner's burden to demonstrate that LUBA has subject matter
5 jurisdiction, by demonstrating that the challenged decision is a land use
6 decision or other decision subject to LUBA's limited jurisdiction. Petitioner
7 has not demonstrated that any comprehensive plan provisions or land use
8 regulations apply to the city council's decision to authorize removal of 35 trees
9 in Azalea Park. Accordingly, the city's decision is not a "land use decision" as
10 defined at ORS 197.015(10)(a)(A).

11 **B. Significant Impacts Land Use Decision**

12 In limited circumstances, LUBA has jurisdiction to review an appeal of a
13 decision that does not qualify as a "land use decision" as defined at ORS
14 197.015(10)(a)(A), if the decision nonetheless qualifies as "significant impact"
15 land use decision under *City of Pendleton v. Kerns*, 294 Or 126, 133-34, 653
16 P2d 992 (1982). To satisfy the significant impact test, a petitioner must show
17 that the decision has significant qualitative or quantitative effects on present or
18 future land uses. *Carlson v. City of Dunes City*, 28 Or LUBA 411, 414 (1994).

19 Petitioner contends that the city's choice to remove 35 trees from Azalea
20 Park will have significant qualitative and quantitative effects on present or
21 future land uses, because present and future generations will not be able to
22 enjoy the sight and presence of the removed trees. The city responds that the

1 challenged tree removal will have no impact at all on any land uses of the park.
2 According to the city, Azalea Park will continue to be a city park that offers a
3 full range of park uses allowed under the P/OS zone. To the extent individual
4 trees in the park constitute “uses” or are viewed as part of a land “use,” the city
5 argues that removal of 35 trees, out of hundreds or thousands of trees in the 33-
6 acre park, do not constitute a “significant” impact on present or future land
7 uses.

8 In *Northwest Trail Alliance v. City of Portland*, 71 Or LUBA 339
9 (2015), we explained our view of the limited circumstances under which
10 LUBA should exercise review its jurisdiction under the judicially-created
11 significant impacts test:

12 “In the very rare cases when the significant impacts test is deemed
13 met, LUBA’s review is typically conducted under statutes or other
14 laws, such as road vacation statutes, that provide standards for the
15 decision, and that have some direct bearing on the use of land.
16 *Billington [v. Polk County*, 299 Or 471, 480, 703 P2d 232 (1985)],
17 for example, involved a road vacation decision under the then-
18 applicable statutes, which included standards requiring the county
19 to consider the impacts on access for nearby property owners, and
20 whether the vacation is in the ‘public interest.’ *See also Mekkers v.*
21 *Yamhill County*, 38 Or LUBA 928, 931 (2000) (road vacation that
22 would set ‘the stage for further development that will alter the
23 character of the surrounding land uses’); *Harding v. Clackamas*
24 *County*, 16 Or LUBA 224, 228 (1987), *aff’d* 89 Or App 385, 750
25 P2d 167 (1988) (vacation of road that would alter traffic pattern of
26 nearby properties).

27 “In our view, LUBA should exercise review jurisdiction over a
28 decision under the significant impacts test only if the petitioner
29 identifies the non-land-use standards that the petitioner believes
30 apply to the decision and would govern LUBA’s review. Further,

1 we believe that those identified non-land-use standards must have
2 *some* bearing or relationship to the use of land.” *Id.* at 346
3 (emphasis in original).

4 We agree with the city that petitioner has not demonstrated that the
5 challenged tree removal will have significant qualitative or quantitative impacts
6 on present or future land uses. The decision does not alter any of the land uses
7 allowed in the P/OS zone or any of the present or future land uses in Azalea
8 Park. The trees themselves are not land “uses” in any legally cognizable sense.
9 To the extent removal of 35 trees in a 33-acre city park might impact a present
10 or future land use of that park, petitioner has not demonstrated that the impact
11 on those land uses would be significant.

12 **DISPOSITION**

13 Petitioner has not established that the challenged decision is subject to
14 LUBA’s jurisdiction. OAR 661-010-0075(11) provides that if a party requests,
15 LUBA shall transfer to circuit court the appeal of a decision that is not
16 reviewable as a land use decision.¹ However, petitioner has not filed a motion

¹ OAR 661-010-0075(11) provides:

“Motion to Transfer to Circuit Court:

“(a) Any party may request, pursuant to ORS 34.102, that an appeal be transferred to the circuit court of the county in which the appealed decision was made, in the event the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in 197.015(10) or (12).

1 or request to transfer this appeal to circuit court. Accordingly, this appeal must
2 be dismissed. OAR 661-010-0075(11)(c).

3 The appeal is dismissed.

“(b) A request for a transfer pursuant to ORS 34.102 shall be initiated by filing a motion to transfer to circuit court not later than 14 days after the date a respondent’s brief or motion that challenges the Board’s jurisdiction is filed.

* * *

“(c) 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.”