10/11/19 AM11:39 LUBA

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

JOHN VAN DYKE and BRYAN SCHMIDT,
*Petitioners*,

vs.

YAMHILL COUNTY,
*Respondent*,

LUBA Nos. 2019-038 and 2019-040

FINAL OPINION
AND ORDER

Appeal from Yamhill County.

Wendie L. Kellington, Lake Oswego, represented petitioners.

Timothy S. Sadlo, Assistant County Counsel, McMinnville, represented respondent.

ZAMUDIO, Board Chair; RUDD, Board Member; RYAN, Board Member, participated in the decision.

DISMISSED 10/11/2019

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

Opinion by Zamudio.

## NATURE OF THE DECISION

Petitioners appeal a county board of commissioner's decision to enter into a contract and the contract between the county and an engineering firm for the engineering firm to design three bridges for a proposed public bicycle and pedestrian paved trail, which will be named Yamhelas Westsider Trail (the Trail).

## FACTS

The Trail is proposed to be constructed on a former railroad right-of-way. The right-of-way is located mostly on land zoned for exclusive farm use (EFU), and adjoins several commercial farms, including farms owned by petitioners. The county has amended its transportation system plan and other comprehensive plan elements to recognize the proposed Trail as a transportation and recreation facility. In recent years, the county acquired title to the right-of-way via a quitclaim deed and obtained grants from the Oregon Department of Transportation (ODOT) to plan and develop the right-of-way as a trail. In 2018, the county adopted, via a legislative process, amendments to its Transportation System Plan intended to facilitate the immediate development of portions of the Trail. The county took the position during those legislative proceedings that developing the Trail would not require land use permits or application of discretionary approval standards that generally apply to development of non-farm uses on EFU-zoned land, including standards at ORS 215.296, which require an applicant for a non-farm use in an EFU zone to establish that the non-farm use

will not force a significant change to, or significantly increase costs of, accepted farm practices. Those standards are collectively commonly referred to as the "farm impacts test." *See Stop the Dump Coalition v. Yamhill County*, 364 Or 432, 435 P3d 698 (2019) (explaining and applying the farm impacts test).

The county's legislative amendment was appealed to LUBA and we remanded. *Van Dyke v. Yamhill County*, ___ Or ___ (LUBA No 2018-061, Dec 20, 2018) (*Van Dyke I*). In relevant part, we held in *Van Dyke I*, that approving development of the Trail requires (1) a quasi-judicial land use permit process rather than a legislative process, and (2) application of discretionary approval standards implementing the farm impacts test, ORS 215.296.

The county, which is also the applicant, initiated remand proceedings on February 11, 2019, and conducted a land use permit proceeding, with an evidentiary hearing held on March 7, 2019, before the county board of commissioners. On March 20, 2019, the commissioners deliberated and voted to approve discretionary land use permits for the proposed Trail, with conditions. On March 28, 2019, the county adopted the final written decision approving the Trail, which we sometimes refer to as the March 28, 2019 permit decision. In a separate final opinion and order issued this date, we remanded that decision to the county for further proceedings. *Van Dyke v. Yamhill County*, ___ Or LUBA ___ (LUBA No 2019-047, Oct 11, 2019) (*Van Dyke II*).

On December 28, 2018, shortly after LUBA remanded the legislative decision at issue in *Van Dyke I*, but prior to commencement of the county remand

proceedings, the county advertised for bids to design three bridges that will be part of the Trail. OBEC Consulting Engineers, Inc. (OBEC) gained the bid, and by February 22, 2019, OBEC and county staff had agreed on the scope and terms of the contract.

At a meeting of the board of commissioners on March 14, 2019, the commissioners authorized county representatives to enter into the contract with OBEC that is the subject of the present appeals. On March 18, 2019, the commission chair and the county administrator signed the contract, which is titled Agreement for Consulting and Engineering Services (the Agreement). The Scope of Work and Fee Estimate in the Agreement provides, in part:

> "The purpose of this project is to:
>
> > "1) Develop final, signed and stamped, plans, specs, and estimates for the Stag Hollow bridge, Tributary 1 bridge, and Tributary 2 bridge;
> >
> > "2) Secure all environmental clearances and permits needed to construct the three bridges;
> >
> > "3) Provide bid support for the construction bid advertisement for the Stag Hollow bridge;
> >
> > "4) Provide construction administration and construction engineering/inspection (CA/CEI) for the Stag Hollow Bridge construction phase.
>
> "* * * * *
>
> "The County will advertise and receive bids for the Stag Hollow Bridge, award the construction contract, and the selected contractor will contract directly with the County, and OBEC will provide technical support for the County through this process. [The] County

> will clear vegetation up to the location of the Stag Hollow Bridge from the bus barn property and up to the southernmost tributary bridge location (tributary 1) prior to [when] survey and geotech tasks begin. It is the County's goal to have all design and construction complete by April 20, 2020. OBEC will design the Stag Hollow Bridge first to streamline bid let so this bridge can be constructed by April 2020." Precautionary Notice of Intent to Appeal (NITA), LUBA No. 2019-040, Exhibit 1, 8–9.[1]

The decisions challenged in these consolidated appeals are the board of commissioners' March 14, 2019 decision to enter into the Agreement and the March 18, 2019 signed Agreement. In this opinion, we refer to those county decisions collectively as the Agreement.

**INTRODUCTION**

Before the Board are several motions, including the county's motion to dismiss these appeals for lack of jurisdiction. In relevant part, the county argues that the Agreement is not a "land use decision" as defined at ORS 197.015(10)(a).[2] The county also contends that the Agreement does not qualify

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[1] The county has not transmitted the record in this appeal. We rely on the attachments to petitioners' pleadings. We refer to the executed Agreement attached to the Precautionary Notice of Intent to Appeal (NITA) received by the Board on March 22, 2019.

[2] LUBA has exclusive jurisdiction to review appeals of land use decisions. "Land use decision" is defined at ORS 197.015(10)(a)(A) to include:

> "A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
>
> "(i) The goals;

as a "significant impacts" land use decision, as described in *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 992 (1982) (*Kerns*).[3] We address several preliminary motions before resolving the county's jurisdictional challenge.

**MOTION TO COMPEL FILING THE RECORD**

On April 3, 2019, the county filed a motion to dismiss these consolidated appeals for lack of jurisdiction, along with a motion to suspend the deadline for submitting the local record, pending resolution of the motion to dismiss. On April 24, 2019, petitioners filed (1) a response to the motion to dismiss, (2) a motion to compel the county to file the record, or in the alternative, a motion for evidentiary hearing, and (3) a motion to consolidate with *Van Dyke II*, which as noted above is an appeal of a county decision approving a discretionary land use permit for the proposed Trail. On May 7, 2019, the county filed a reply in support of the motion to dismiss and an objection to petitioners' motions to compel submittal of the record and consolidate appeals. On May 16, 2019, we issued an order denying petitioners' motion to consolidate, and suspending all deadlines in this

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"(ii) A comprehensive plan provision;

"(iii) A land use regulation; or

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

[3] A "significant impacts" land use decision is one that does not qualify under the definition of ORS 197.015(a)(A), but nonetheless is deemed to be reviewable as a land use decision if, among other things, 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).

case until such time as we ruled on the county's motion to dismiss. The county and petitioners thereafter filed several replies and responses to the county's motion to dismiss and petitioners' motion to compel submittal of the record.

With respect to submittal of the record, the county argues that its jurisdictional challenge is a legal issue that can be resolved based on examination of the Agreement. Petitioners respond that, while petitioners and LUBA have a copy of the Agreement, including the Scope of Work and Fee Schedule, LUBA's record does not include several other documents that are incorporated by reference into the Agreement.[4] Petitioners state that, despite petitioners' request, the county has not provided petitioners copies of all of the incorporated documents. Petitioners contend that a complete copy of the Agreement, including the incorporated documents, is necessary for petitioners to provide an effective

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[4] The contract states in relevant part:

> "This Agreement includes by reference the following Contract Documents that are part of the Project:
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> "(A) Request for Proposals
> "(B) Addenda (if any)
> "(C) Responsive Proposal
> "(D) This Agreement
> "(E) Agreement Amendments (if any)
> "(F) Insurance Certificates
> "(G) Notice to Proceed
> "(H) Project Change Request (if any)
> "(I) Project Acceptance
> "(J) Work Plan
> "(K) Fee Schedule." Precautionary NITA, Exhibit 1, 1.

response to the county's motion to dismiss, and for LUBA to resolve that motion. More broadly, petitioners argue that resolution of the county's jurisdictional challenge requires the complete local record of the county's decision to enter into the Agreement, which would illuminate the county's motivations for signing the Agreement.

The county replies, and we agree, that petitioners have not demonstrated that resolution of the county's jurisdictional challenge requires review of either (1) the documents incorporated by reference into the Agreement, or (2) the entire local record of the county's decision to enter into the Agreement. As discussed below, the county's motion to dismiss argues that the Agreement is neither a statutory "land use decision," as defined at ORS 197.015(10), nor any other type of land use decision subject to LUBA's limited jurisdiction. The county's jurisdictional challenge is largely legal in nature, and the legal question presented does not, as far as petitioners have established, require more than examination of the body of the Agreement itself.

Petitioners do not argue that any of the documents incorporated by reference into the Agreement have any bearing on the question of whether the Agreement itself constitutes a land use decision, as defined at ORS 197.015(10), or is otherwise a land use decision subject to LUBA's jurisdiction. Similarly, petitioners have not established that the county's motivations in entering into the Agreement are relevant to determining whether the Agreement is a land use decision, or any other reason to require the county to submit the local record

leading to signing the Agreement, in order to resolve the county's motion to dismiss.[5] We understand petitioners to allege that the county was motivated to enter into the Agreement with OBEC to design the three bridges, prior to issuing the land use approvals at issue in *Van Dyke II*, because the county was concerned that delays in starting the design process might lead to delayed construction, which in turn might result in the county having to repay a $1.2 million grant from ODOT to construct the bridges and the Trail. However, even if those allegations are true, we do not see that the county's motivation in entering into the Agreement has any bearing on whether the Agreement is a land use decision subject to LUBA's jurisdiction. Accordingly, we see no purpose in requiring the county to compile and submit the local record of the proceedings leading to execution of the Agreement.

Petitioners' motion to compel the county to submit the local record is denied.

**MOTION TO TAKE EVIDENCE**

We turn next to petitioners' alternative motion for an evidentiary hearing under OAR 661-010-0045.[6] OAR 661-010-0045(1) sets out the permissible bases

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[5] The processes leading to the county entering into the Agreement did not follow a land use process. It is likely that any record that the county would transmit in this appeal would be subject to dispute regarding the contents of the record, which would cause unnecessary and undue delay in resolving whether we have jurisdiction to review these appeals.

[6] OAR 661-010-0045 provides, in relevant part:

for taking evidence not in the record. Petitioners cite two bases listed in OAR 661-010-0045(1) supporting their motion: (1) procedural irregularities not shown in the record, and (2) *ex parte* contacts. Petitioners do not identify the alleged "procedural irregularity," but from arguments elsewhere in petitioners' pleadings

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> "(1) Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. * * *
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> "(2) Motions to Take Evidence:
>
> > "(a) A motion to take evidence shall contain a statement explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in section (1) of this rule, and how those facts will affect the outcome of the review proceeding.
> >
> > "(b) A motion to take evidence shall be accompanied by:
> >
> > > "(A) An affidavit or documentation that sets forth the facts the moving party seeks to establish; or
> > >
> > > "(B) An affidavit establishing the need to take evidence not available to the moving party, in the form of depositions or documents as provided in subsection (2)(c) or (d) of this rule."

we understand petitioners to contend that the county's decision to enter into the Agreement should have been conducted according to the procedures that apply to an application for a land use permit, under proceedings implementing the procedures at ORS 197.763 and ORS 215.416, which generally require notice and a land use hearing.

That same premise supports petitioners' arguments regarding *ex parte* contacts. Generally, ORS 215.422(3) requires disclosure of *ex parte* contacts with governing body decision makers during certain land use proceedings. Petitioners argue that county staff and perhaps others engaged in *ex parte* contacts with the commissioners in the non-land use proceedings leading to execution of the Agreement. We understand petitioners to argue that these alleged procedural irregularities warrant considering evidence outside the record under OAR 661-010-00045, specifically (1) requiring the county to submit the local record of the proceedings to LUBA, and (2) authorizing an evidentiary hearing to determine the existence and substance of any *ex parte* contacts.

The immediate question presented is whether LUBA should consider evidence outside the record, specifically a complete local record of the proceedings leading to execution of the Agreement, or evidence generated at an evidentiary hearing regarding alleged *ex parte* contacts, in order to resolve the county's jurisdictional challenge, in other words, to determine whether the decision to enter into the contract is a statutory land use decision as defined at

ORS 197.015(10) or a "significant impacts" land use decision. We conclude the answer is no.

If petitioners' premise is correct that, in the course of entering into the Agreement, the county was required to conduct proceedings consistent with ORS 197.763 and ORS 215.416, and to apply land use standards consistent with ORS 215.296, then it would follow without more that the county's action would be a land use decision as defined at ORS 197.015(10)(a). However, that premise is incorrect, as we explain in addressing the merits of the county's motion to dismiss. For present purposes, we conclude petitioners have not established a basis under OAR 661-010-0045(1) to consider evidence outside the record in support of claims regarding procedural error or *ex parte* contacts.

Petitioners also cite a third basis not listed in OAR 661-010-0045(1): evidence necessary to establish that the Agreement constitutes a "significant impact" land use decision subject to LUBA's jurisdiction. For this purpose, petitioners request that LUBA consider evidence attached as Exhibits 8 to 11 to their response to the motion to dismiss, which consists of evidence suggesting that the Trail, when constructed, will cause adverse impacts on adjoining farm operations.

We may consider evidence outside the record, even in the absence of a motion under OAR 661-010-0045, for the limited purpose of determining whether we have jurisdiction over a decision. *Murray v. Multnomah County*, 56 Or LUBA 370 (2008). We assume, without deciding, that it would be appropriate

to consider evidence outside the record of potential land use impacts in order to determine whether the significant impacts test is met. We also assume, without deciding, that the evidence petitioners cite in Exhibits 8 to 11 would suffice to demonstrate that a county decision that approves development of the Trail would be subject to LUBA's jurisdiction under the significant impacts test, if for some reason that decision did not constitute a statutory land use decision. However, even under those assumptions, we see no need to consider the evidence in Exhibits 8 to 11, because as explained below petitioners' reliance on that evidence is based on the false premise that the decision challenged in these appeals—to enter into a contract to design the bridges and obtain consulting services—represents a county decision to construct or approve the Trail. As explained below, the only county decision that approves construction of any component of the Trail is the county board of commissioners' March 28, 2019 decision, and which as mentioned above, is the subject of a separate final opinion and order issued this date. *Van Dyke II*, ___ Or LUBA ___ (LUBA No 2019-047, Oct 11, 2019).

Petitioners' requests for an evidentiary hearing and for the Board to consider evidence outside the record are denied.

**MOTION TO DISMISS**

We proceed to the county's motion to dismiss, which requires us to address whether the Agreement is a land use decision as defined at ORS 197.015(10)(a) or, if not, whether it qualifies as a "significant impacts" land use decision under

the reasoning in *Kerns*. Petitioners' arguments under both tests share similar premises. Petitioners argue that the Agreement in fact authorizes construction of the three bridges, and that any decision that authorizes construction of such bridges on land zoned EFU requires the application of land use standards, specifically the farm impacts test required by ORS 215.296 and the county's implementing land use regulations and, thus, the Agreement falls within the definition of "land use decision" at ORS 197.015(10)(a). See n 2. Alternatively, petitioners argue that the three bridges, when constructed, will have an obvious and significant impact on present and future land uses, and thus the contract authorizing construction of those bridges qualifies as a land use decision under the significant impacts test.

As evidence that the Agreement authorizes the construction of the three bridges, petitioners point to a schedule of events set out in Exhibit A to the Agreement, which anticipates that the contract to construct the Stag Hollow Bridge will be awarded by October 15, 2019, with construction completed by spring 2020. Petitioners also note that the $1.2 million ODOT grant that the county is relying upon to pay OBEC its fee of $534,695 is intended not only to pay for the design of the bridges, but also their actual construction. Further, petitioners argue that under the terms of the ODOT grant the county is obligated to construct at least the Stag Hollow Bridge, or potentially return the grant money. Finally, petitioners also cite to various statements by OBEC, county commissioners, and ODOT personnel suggesting that everyone involved believes

that the Agreement is a significant step toward the actual construction of at least the Stag Hollow Bridge.

While the interested parties clearly anticipate that the Agreement is an important step toward actual construction of the bridges, the county is correct that nothing in the Agreement *authorizes* bridge construction, or any use or development of land. The Agreement authorizes only (1) design work and (2) consulting services. That design work and consulting services concern development actions that must be (and in fact were) authorized by other land use decisions. Because the Agreement does not authorize the use or development of land, neither ORS 215.296 nor any other land use regulation cited to us applies to the Agreement. Consequently, the Agreement is not a land use decision as defined at ORS 197.015(10)(a)(A).

The parties to the Agreement anticipated that land use approval for the bridges (and the Trail) would be made in other county decisions.[7] As discussed

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[7] The Agreement, Scope of Work and Fee Estimate, Section 3.4 provides:

"**3.4 Local Land Use Permits**

"Consultant shall:

"• Attend one (1) pre-application meeting with Yamhill County planning staff to confirm permitting requirements for this project.

"• Prepare a Yamhill County Land Use Application, including a narrative discussing code compliance and all supplemental materials.

above, the Trail was approved by the March 28, 2019 permit decision, issued ten days after the Agreement was executed. That permit decision was issued pursuant to procedures for land use permits at ORS 215.416 and applied the farm impacts test and other land use approval criteria. To be sure, in the usual course of events, a land use applicant would typically enter into an engineering design and consulting contract only *after* obtaining necessary land use approvals. However, in this case the county—as the landowner and land use permit applicant—chose

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> "• Prepare a Building Permit Application for the Stag Hollow Creek Bridge, including the required plot plan.
>
> "*Assumptions:*
>
> "• The County will submit the permit documents and will be responsible for all permit application fees.
>
> "• Additional Land Use Applications and Building Permits may be required to cover future construction activities for the trail project.
>
> ***Deliverables and Schedule:***
>
> "Consultant shall provide:
>
> "• Electronic (Word) copy of the draft Land Use Application package and Building Permit Application to County for review 8 months following [notice to proceed].
>
> "• Electronic (PDF) copy of the final Land Use Application and Building Permit submittal packages to the County two (2) weeks following receipt of draft review comments." Precautionary NITA, Exhibit 1, 14-15 (bold, italics, and underscoring in original).

to engage OBEC's engineering services prior to obtaining the necessary land use approvals. While that sequence may be unusual, petitioners do not explain why proceeding in that manner converts the Agreement into a land use decision.

Relatedly, the fact that the county is both the landowner and applicant for a land use decision and the land use decision maker in a separate but related proceeding does not convert the county's role as a signatory to the Agreement into a role as land use decision maker.

In sum, the Agreement authorizes only design and consulting services. The Agreement does not authorize bridge construction, or any use or development of the Trail. A decision that authorizes only design and consulting services does not concern the application of any land use regulation, and thus the contract does not qualify as a statutory land use decision as defined at ORS 197.015(10)(a).

Similarly, because the contract does not authorize any use or development of land, it does not, and cannot, have any impacts itself on land use, significant or otherwise, and therefore does not qualify as a significant impacts land use decision under *Kerns*. Petitioners do not identify any actual, qualitatively or quantitatively significant impacts on present or future land uses that are attributable to the Agreement itself. The potential land use impacts that petitioners cite stem solely from the March 28, 2019 permit decision, which approves construction of the three bridges and the Trail.

Nonetheless, petitioners argue that despite the absence of any direct land use impacts the Agreement should be viewed as a significant impacts land use

decision, because it effectively commits the county to authorize construction of the three bridges that OBEC will design under the Agreement. Petitioners argue that when the county chose to expend $534,695 in state grant money to design the three bridges—money that the county may have to forfeit or pay back if the bridges are not constructed—it became a foregone conclusion that the commissioners would approve a land use permit authorizing bridge construction and the Trail. In this sense, petitioners argue, the decision to enter into the Agreement had a significant impact on future land use, indeed perhaps a more significant impact than the March 28, 2019 permit decision itself.

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

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

> "In our view, LUBA should exercise review jurisdiction over a decision under the significant impacts test only if the petitioner identifies the non-land-use standards that the petitioner believes apply to the decision and would govern LUBA's review. Further, we believe that those identified non-land-use standards must have *some* bearing or relationship to the use of land." *Id.* at 346 (emphasis in original).

Petitioners identify no statutes or other standards or laws that applied to the commissioners' decision to enter into the Agreement. To the extent petitioners contend that the commissioners, in approving the March 28, 2019 permit application to construct the Trail and three bridges, impermissibly prejudged the merits of that application based on considerations other than compliance with applicable approval criteria, that argument is properly made in the appeal of the March 28, 2019 permit decision. Even if petitioners are correct that March 28, 2019 permit decision process was marred by prejudgment, that prejudgment does not convert the Agreement into a land use decision.

**CONCLUSION**

For the foregoing reasons, the county's motion to dismiss is granted.

These appeals are dismissed.