

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

JODY McCAFFREE,
Petitioner,

vs.

CITY OF NORTH BEND,
Respondent,

and

PACIFIC CONNECTOR GAS PIPELINE, LP,
Intervenor-Respondent.

LUBA No. 2019-005

FINAL OPINION
AND ORDER

Appeal from City of North Bend.

Tonia L. Moro, Medford, filed a petition for review and a reply brief and argued on behalf of petitioner.

No appearance by City of North Bend.

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

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

DISMISSED 01/13/2020

You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a Land Use Compatibility Statement (LUCS) issued by
4 a city planner to Pacific Connector Gas Pipeline, LP (intervenor).

5 **MOTION TO TAKE EVIDENCE OUTSIDE THE RECORD**

6 LUBA may take evidence not in the record in “the case of *disputed factual*
7 *allegations* in the parties’ briefs concerning unconstitutionality of the decision,
8 *standing*, ex parte contacts, actions for the purpose of avoiding the requirements
9 of ORS 215.427 or 227.178, or other procedural irregularities not shown in the
10 record and which, if proved, would warrant reversal or remand of the decision.”
11 OAR 661-010-0045(1) (emphases added). A motion to take evidence must
12 include a statement “explaining with particularity what facts the moving party
13 seeks to establish, how those facts pertain to the grounds to take evidence
14 specified in [OAR 661-010-0045(1)], and how those facts will affect the outcome
15 of the review proceeding.” OAR 661-010-0045(2)(a). It is the movant’s burden
16 to demonstrate a sufficient basis for LUBA to take evidence outside the record.

17 On July 19, 2019, intervenor filed and served its response brief, arguing,
18 in part, that petitioner lacks standing in this appeal because she had failed to
19 demonstrate that she is adversely affected by the challenged LUCS. After oral
20 argument was held in this appeal, the Board received from petitioner a motion to
21 consider evidence outside the record in which petitioner argues that the evidence
22 attached to her motion demonstrates that petitioner is adversely affected by the

1 LUCS. Petitioner argues that she is adversely affected because she has opposed
2 the pipeline project since 2013 and “she did everything she could” to participate
3 in the LUCS decision and oppose the compatibility finding, but the city did not
4 allow her to participate in the LUCS decision. Motion to Take Evidence 2.
5 Petitioner argues, more generally, that “there is a presumption that residents of
6 the city of North Bend are adversely affected * * * by the city’s decision that a
7 * * * pipeline may be sited within the city because of its explosion potential.”
8 Motion to Take Evidence 3. After intervenor filed a response opposing the
9 motion to take evidence, petitioner filed a supplemental motion to take evidence,
10 with an attached declaration establishing that petitioner is a resident of the City
11 of North Bend.

12 We understand petitioner’s motion to take evidence and supplemental
13 motion to take evidence are intended to establish that petitioner is a resident of
14 the City of North Bend, that she is opposed to the pipeline project, in part, due to
15 a perceived risk of explosion, and that she attempted to participate and was denied
16 an opportunity to participate in the city’s decision to issue the LUCS. The facts
17 petitioner sets forth are not supported by evidence in the record and relate to the
18 disputed issue of petitioner’s standing. Petitioner argues that those facts establish
19 that she is adversely affected by the LUCS and thus has standing to maintain this
20 appeal. Intervenor argues that we should deny petitioner’s motion to take
21 evidence because petitioner fails to establish that any *facts* are disputed.

1 Intervenor argues that whether petitioner is adversely affected is a legal dispute
2 and not a factual dispute in this appeal.

3 We generally agree with intervenor that petitioner’s motion to take
4 evidence fails to identify any *disputed* factual allegation. Thus, petitioner has not
5 provided a basis for us to consider evidence outside the record. *See Rogers v. City*
6 *of Eagle Point*, 42 Or LUBA 607, 619 (2002) (“Without ‘disputed factual
7 allegations,’ we have no basis to grant a motion to take evidence not in the record
8 under OAR 661-010-0045.”). However, whether petitioner has standing to
9 maintain this appeal is disputed. Accordingly, we will accept and consider
10 petitioner’s undisputed assertions in her motion to take evidence and
11 supplemental motion to take evidence for the limited purpose of resolving
12 petitioner’s standing-related arguments, which we address below.

13 **BACKGROUND**

14 A LUCS is a local government decision that determines whether a
15 proposed state agency action is compatible with the local government’s
16 acknowledged comprehensive plan and land use regulations. *See* ORS
17 197.180(1)(b) (setting out the obligation of state agencies to take actions “in a
18 manner compatible with acknowledged comprehensive plans and land use
19 regulations”). On December 11, 2018, intervenor requested from the city
20 planning department a LUCS for an Oregon Department of Environmental
21 Quality (DEQ) permit application. The DEQ permit is necessary in order for
22 intervenor to install a natural gas pipeline on land within city limits and

1 intervenor requested that the city determine whether DEQ approval to install a
2 natural gas pipeline is compatible with the city’s land use regulations, *i.e.*,
3 whether the natural gas pipeline the DEQ permit would authorize is prohibited,
4 permitted without review, or requires review.

5 Only a portion of the pipeline project is proposed to be sited on property
6 that is within city limits. That property is zoned Heavy Industrial (M-H). Only a
7 portion of that property is subject to estuary and floodplain overlays: Floodplain
8 (F-P) and Coos Bay Estuary Management Plan (CBEMP), which require specific
9 development review and permits, as explained further below.¹

10 On December 13, 2018, without public notice or hearing, a city planner
11 issued the LUCS, determining that the portions of the pipeline project subject to
12 the DEQ permit outside the overlay zones are allowed outright under the North
13 Bend Zoning Ordinance (NBZO), and other portions of the pipeline project
14 require city land use reviews—namely, estuary, floodplain, and engineering
15 permits “prior to start of work.” Record 13. The LUCS indicated that a pre-

¹ The CBEMP is an agreement among Coos County, the Cities of North Bend and Coos Bay, and the Oregon International Port of Coos Bay. The CBEMP is not in the record. The city adopts and implements the CBEMP in North Bend Zoning Ordinance (NBZO) Chapter 18.88. The LUCS refers to the CBEMP and petitioner cites the CBEMP in her petition for review. We take official notice of the CBEMP. ORS 40.090(7).

1 application conference had been held, but the LUCS decision does not approve
2 or deny any permits or development.² Record 16.

3 On December 21, 2018, petitioner received notice of the planner’s LUCS
4 decision when the city responded to her public records request. Petitioner
5 attempted to file a local appeal, which the city rejected. On January 11, 2019,
6 petitioner filed a notice of intent to appeal (NITA) the LUCS to LUBA.³

7 **JURISDICTION**

8 As the party seeking review by LUBA, petitioner has the burden of
9 establishing that LUBA has jurisdiction. *Billington v. Polk County*, 299 Or 471,
10 475, 703 P2d 232 (1985). LUBA has statutory authority to review “land use
11 decisions” and “limited land use decisions.” ORS 197.825(1); ORS 197.015(10)
12 (defining “land use decision”); (ORS 197.015(12) (defining “limited land use
13 decision”). See n 4. In the petition for review, petitioner must “[s]tate the facts
14 that establish petitioner’s standing” and “[s]tate why the challenged decision is a

² In October 2019, the city council approved an estuary permit and floodplain development permit for the pipeline project. At the time of this decision, those decisions are currently pending review in a separate appeal, *Citizens for Renewables v. City of North Bend*, LUBA No 2019-120.

³ After LUBA received the record from the city, petitioner filed record objections in which petitioner took the position that her NITA appealed both the LUCS and the city’s decision denying her local appeal. On April 26, 2019, the Board issued an order directing petitioner to notify the Board in writing of her election to appeal only the LUCS or submit a separate NITA and separate filing fee and deposit for costs for the appeal of the city’s decision denying her local appeal. Petitioner elected to proceed on the single appeal of the LUCS.

1 land use decision or a limited land use decision subject to the Board's
2 jurisdiction." OAR 661-010-0030(4)(a), (c).

3 Intervenor argues that LUBA lacks jurisdiction for two reasons: (1) the
4 LUCS is not a land use decision, and (2) petitioner lacks standing because she is
5 not "adversely affected" by the challenged decision. Intervenor argues that
6 whether petitioner is adversely affected is the threshold jurisdictional issue that
7 can be decided without reaching whether the LUCS is a land use decision. We
8 disagree. The threshold jurisdictional issue is whether LUBA has subject matter
9 jurisdiction over the appeal, which depends on the nature of the challenged
10 decision. If the challenged decision is not a land use decision subject to LUBA
11 review, we lack jurisdiction and whether petitioner is adversely affected by the
12 decision may be irrelevant to our ability to review the decision. *See* ORS
13 197.825(1) ("[T]he Land Use Board of Appeals shall have exclusive jurisdiction
14 to review any land use decision or limited land use decision of a local
15 government[.]"); ORS 197.830 (providing standing requirements for review of
16 land use decisions or limited land use decisions).

17 However, as explained further below, whether petitioner has standing is
18 relevant to the correct disposition of this appeal. Accordingly, for the reasons
19 explained below, we conclude both that the LUCS is not a land use decision and
20 that petitioner lacks standing; thus, we lack jurisdiction to review the LUCS.

1 **A. The LUCS is Not a Land Use Decision**

2 ORS 197.015(10)(b)(H) provides an exception to our jurisdiction by
3 excluding certain local government decisions from the definition of “land use
4 decision.” ORS 197.015(10)(b)(H) provides:

5 “‘Land use decision’ * * * [d]oes not include a decision of a local
6 government:

7 “* * * * *

8 “(H) That a proposed state agency action subject to ORS
9 197.180(1) is compatible with the acknowledged
10 comprehensive plan and land use regulations implementing
11 the plan, if:

12 “(i) The local government has already made a land use
13 decision authorizing a use or activity that encompasses
14 the proposed state agency action;

15 “(ii) The use or activity that would be authorized, funded or
16 undertaken by the proposed state agency action is
17 allowed without review under the acknowledged
18 comprehensive plan and land use regulations
19 implementing the plan; or

20 “(iii) The use or activity that would be authorized, funded or
21 undertaken by the proposed state agency action
22 requires a future land use review under the
23 acknowledged comprehensive plan and land use
24 regulations implementing the plan.”

25 We explained in *Bishop v. Deschutes County*, 72 Or LUBA 103, 113
26 (2015):

27 “The subject of the exclusions at ORS 197.015(10)(b)(H) are certain
28 decisions issued by local governments on a LUCS request, which
29 conclude that a proposed state agency action is compatible with the

1 local government’s comprehensive plan and land use regulations,
2 for one or more of the three reasons listed in (i) through (iii). Other
3 types of decisions resulting from a LUCS request, however, do not
4 fall within those three exclusions. For example, if a local
5 government decides that the proposed agency action is *not*
6 compatible with its plan and land use regulations, or that the action
7 is compatible for reasons other than the three listed at (i) [through]
8 (iii), or if the local government decides that land use review is
9 necessary, conducts that review and approves or denies the proposed
10 use, then the resulting decision does not fall within the exclusions at
11 ORS 197.015(10)(b)(H)(i) [through] (iii). *See Campbell v.*
12 *Columbia County*, 67 Or LUBA 53, 59–60 (2013) (a LUCS decision
13 that also verifies a nonconforming use and approves alterations is
14 not subject to the exclusions at ORS 197.015(10)(b)(H)(i) [through]
15 (iii)).” (Emphasis in original.)

16 The DEQ LUCS form asks the city to answer the following question: “Is
17 the activity or use compatible with your acknowledged comprehensive plan as
18 required by OAR 660-031?” Record 16. Under that question, the city planner
19 marked two options provided on the form: (1) “Yes, the activity or use is allowed
20 outright by (*provide reference for local ordinance*):” and (2) “No, (*complete*
21 *below or attach findings for noncompliance and identify requirements the*
22 *applicant must comply with before compatibility can be determined*).” *Id.*
23 (emphasis in original).

24 In the “Yes” box, the city planner noted that the use is allowed outright by
25 NBZO 18.44.010(1), which provides that uses permitted outright in the M-H zone
26 include those uses permitted in the Light Industrial (M-L) zone. As discussed
27 further below, in the M-L zone, “utility operations and facilities,” is an outright
28 permitted use. NBZO 18.40.010.

1 Under the “No” box, the city planner explained:

2 “The project includes a new alternate alignment of the Pacific
3 Connector Gas Pipeline extending from the eastern City boundary
4 on Coos Bay through the North Point area to the western City
5 boundary north of APCO 1 and 2. A gas pipeline is allowed outright
6 as a ‘utility facility operation’ in the Heavy Industrial (M-H) zoning
7 district. Within the CBEMP management units through which the
8 pipeline passes, the facility is allowed as a ‘low intensity utility’
9 subject to Administrative Estuarine Permit authorization by the
10 Planning Director. A pre-application conference has been held.
11 Also, subject to Floodplain Development Permit authorization and
12 applicable Engineering Permits.” Record 16.

13 The LUCS determines that no further land use reviews are required for
14 sections of the project within the city’s jurisdiction that are not within the overlay
15 zones. Accordingly, those portions of the project outside of the overlay zones
16 appear to be a “use or activity that * * * is allowed without review,” and thus,
17 those portions of the decision may be excluded from our review under ORS
18 197.015(10)(b)(H)(ii).

19 With respect to those portions of the pipeline within the overlay zones, the
20 LUCS identifies three land use reviews that are required: estuary, floodplain, and
21 engineering permits. That determination falls within the exclusion at ORS
22 197.015(10)(b)(H)(iii), for a LUCS determination that the proposed action
23 “requires a future land use review under the acknowledged comprehensive plan
24 and land use regulations implementing the plan[.]”

25 The jurisdictional question is whether the city planner correctly
26 categorized the proposed action in a manner that brings the decision within the

1 exclusions at ORS 197.015(10)(b)(H)(ii) and (iii). *See Todd v. Clackamas*
2 *County*, 73 Or LUBA 369 (2016) (LUBA must determine whether the local
3 government correctly categorized the proposed action in a manner that brings the
4 decision within the relevant exclusion); *Bishop*, 72 Or LUBA at 113 (citing
5 *McPhillips Farm Inc. v. Yamhill County*, 66 Or LUBA 355, 360–62 (2012), *aff'd*,
6 256 Or App 402, 300 P3d 299 (2013)).

7 Petitioner generally asserts that the LUCS is not subject to any exception
8 in ORS 197.015(10)(b)(H) and the decision is reviewable “at least as a limited
9 land use decision.” Petition for Review 8. However, petitioner does not explain
10 why the LUCS is a “limited land use decision” as defined by ORS 197.015(12).⁴
11 It is not obvious to us that the LUCS is a limited land use decision. We will not
12 speculate what petitioner means to argue or supply legal argument for petitioner.
13 *Deschutes Development Co. v. Deschutes County*, 5 Or LUBA 218, 220 (1982)

⁴ ORS 197.015(12) defines “limited land use decision”:

“(a) Means a final decision or determination made by a local government pertaining to a site within an urban growth boundary that concerns:

“(A) The approval or denial of a tentative subdivision or partition plan, as described in ORS 92.040(1).

“(B) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review.”

1 (“It is not our function to supply petitioner with legal theories or to make
2 petitioner’s case for petitioner.”).

3 Further, intervenor argues, and we agree, the LUCS decision is not a
4 limited land use decision as defined in ORS 197.015(12). See n 4. The LUCS
5 does not approve or deny a tentative subdivision or partition plat and the LUCS
6 does not approve or deny “an application based on discretionary standards
7 designed to regulate the physical characteristics of a use permitted outright,
8 including but not limited to site review and design review.” ORS
9 197.015(12)(a)(B); n 4. Although the LUCS concludes that a portion of the
10 pipeline project is permitted outright under the city’s land use regulations, the
11 LUCS does not apply any discretionary standards designed to regulate the
12 physical characteristics of the pipeline use.

13 **1. A Use or Activity That Is Allowed Without Review**

14 In her second assignment of error, petitioner argues that the city
15 mischaracterized the pipeline use or activity. In the M-H zone, uses permitted
16 outright include those permitted in the M-L zone. NBZO 18.44.010(1). In the M-
17 L zone, “utility operations and facilities,” is an outright permitted use. NBZO
18 18.40.010.⁵ Petitioner argues that the city mischaracterized the pipeline as a

⁵ NBZO 18.40.010 provides:

“In an M-L zone, subject to the limitations provided herein, uses permitted outright include wholesale supply, utility operations and facilities, warehousing, compounding, packaging, processing,

1 “utility facility and operation.” Petitioner observes that the city’s comprehensive
2 plan and land use regulations do not define “utility operations and facilities.”

3 Petitioner argues that the pipeline is not a utility facility because it is
4 proposed to transport gas to a port for export and not local consumption.
5 Intervenor responds, and we agree, that petitioner has not identified anything in
6 the city’s code that requires a utility facility and operation to involve distribution
7 lines to serve local customers. We conclude for the purposes of determining
8 whether we have jurisdiction in this decision that, in issuing the LUCS, the city
9 did not mischaracterize the pipeline use for those portions of the pipeline outside
10 the overlay zones.⁶ Thus, with respect to those portions of the pipeline, the LUCS
11 decision falls within the exclusion at ORS 197.015(10)(b)(H)(ii) as a use or
12 activity that is allowed without review under the city’s comprehensive plan and
13 land use regulations.

repairing, fabricating, marshalling, shipping, light manufacturing,
and servicing of materials, equipment, supplies and other personal
property, and other compatible uses having similar impacts on
traffic and surrounding or adjoining properties.”

⁶ In so concluding, we do not intend to preclude further arguments in an appeal
of a separate land use decision challenging the city’s characterization of the
pipeline use. We note that the city’s decision on appeal in *Citizens for
Renewables v. City of North Bend*, LUBA No 2019-120 involves extensive
findings that the city issued after a public process. See n 2. Our holding here is
limited to the LUCS decision and the parties’ arguments to us related to the LUCS
decision in this appeal.

1 **2. A Use or Activity Requires A Future Land Use Review**

2 The exclusion in ORS 197.015(10)(b)(H)(iii) would not apply if the
3 challenged decision identifies the required future local land use reviews and goes
4 further to approve or deny those reviews. *Campbell*, 67 Or LUBA at 59–60. The
5 challenged LUCS identifies the required future land use reviews; however,
6 nothing in the LUCS decision purports to approve or deny the required reviews.

7 Petitioner contends that ORS 197.015(10)(b)(H)(iii) does not preclude our
8 review because estuary and floodplain permits are only required for the portions
9 of the pipeline within the CBEMP and F-P overlay zones, and not along the entire
10 alignment of the pipeline within the city’s jurisdiction.

11 Intervenor responds that the pipeline is a single development project; thus,
12 if intervenor does not obtain the required estuary, floodplain, and engineering
13 permits, then the entire development will be foreclosed. Intervenor argues that
14 the need for those permits underlies the entire project and thus the exclusion
15 under ORS 197.015(10)(b)(H)(iii) applies to the entire project.

16 As explained above, the LUCS determines that no further land use reviews
17 are required for sections of the pipeline project within the city’s jurisdiction that
18 are not within those overlay zones. Accordingly, we conclude that those
19 determinations are excluded from our review under ORS 197.015(10)(b)(H)(ii).
20 The part of the LUCS that finds that the section of the pipeline within the overlay
21 zones requires further review is precluded from our review under ORS

1 197.015(10)(b)(H)(iii). Thus, the LUCS is not a land use decision and LUBA
2 lacks jurisdiction over this appeal.

3 **B. Petitioner is not Adversely Affected by the LUCS**

4 Intervenor argues that petitioner lacks standing because she is not
5 adversely affected by the LUCS. We concluded above that the LUCS is not a
6 land use decision over which we have review. Additionally, we agree with
7 intervenor that petitioner lacks standing, which is an independent, alternative
8 basis for dismissing this appeal.

9 The city did not hold a hearing on the LUCS request. Thus, there was no
10 opportunity for petitioner to participate in a local proceeding. Petitioner asserts
11 that she has standing under ORS 197.830(3) and (4). In her petition for review,
12 petitioner does not elaborate on her basis for standing under either ORS
13 197.830(3) or (4).

14 ORS 197.830(4) applies to appeals of city permit decisions made under
15 ORS 227.175. Petitioner does not explain why the LUCS is a “permit,” and it
16 does not appear to us that it is. ORS 227.160(2) provides: “As used in ORS
17 227.160 to 227.186: * * * ‘Permit’ means discretionary approval of a proposed
18 development of land, under ORS 227.215 or city legislation or regulation.” The
19 LUCS is a compatibility determination and is not discretionary approval of a
20 proposed development of land. Thus, the LUCS is not a “permit” and ORS
21 197.830(4) does not apply.

1 We analyze petitioner’s standing under ORS 197.830(3), which requires
2 that if no hearing is held prior to adopting a land use decision, a petitioner must
3 demonstrate that it is “adversely affected” by the decision.⁷ A petitioner is
4 “adversely affected” when the challenged decision “either applies to the person
5 directly or affects the person’s interests in an adverse way.” *Devin Oil Co., Inc.*
6 *v. Morrow County*, 275 Or App 799, 807, 365 P3d 1084 (2015). “Mere
7 dissatisfaction with a land use decision is not an adverse effect under ORS
8 197.830(3).” *Id.* “A person is adversely affected by a decision that authorizes a
9 land use * * * when the operation of the allowed land use impinges upon that
10 person’s property or personal interests.” *Id.*

11 Petitioner responded to the standing challenge in her reply brief and
12 additionally made new arguments not presented in the reply brief at oral

⁷ ORS 197.830(3) provides:

“If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416 (11) or 227.175 (10), or the local government makes a land use decision that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:

“(a) Within 21 days of actual notice where notice is required; or

“(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required.”

1 argument. Intervenor objected. The Board will not consider arguments petitioner
2 made for the first time at oral argument. OAR 661-010-0040(1).

3 It is undisputed that the challenged LUCS does not apply directly to
4 petitioner. Petitioner does not contend that her personal or property interests are
5 affected by the LUCS. In her reply brief, petitioner argues that she is adversely
6 affected by the LUCS because the city failed to provide her an opportunity to
7 argue that the pipeline is not a utility facility. Petitioner's argument is premised
8 on a claim that she had a right to participate in the LUCS decision. However,
9 petitioner cites no authority for that claim. Moreover, petitioner elected to appeal
10 only the LUCS and not the city's decision to deny her local appeal of the LUCS.
11 Petitioner's argument that she is adversely affected because the city denied her
12 an opportunity to argue against the LUCS does not provide a basis for standing
13 in this appeal.

14 Petitioner also argues that she is opposed to the pipeline project, at least in
15 part, due to a perceived risk of explosion. Petitioner argues, without any
16 supporting citation, that "there is a presumption that residents of the city of North
17 Bend are adversely affected" by the pipeline because of a perceived risk of
18 explosion. Motion to Take Evidence 3. Even if we assume that the future gas
19 pipeline project will adversely affect petitioner, petitioner has failed to establish
20 that *the challenged decision*, the LUCS, will adversely affect petitioner. The
21 LUCS does not authorize any development activity; instead, it merely determines
22 that the proposed pipeline is compatible with the city's comprehensive plan and

1 land use regulations, subject to further permit review. We agree with intervenor
2 that petitioner has not established that she is adversely affected by the decision.
3 Accordingly, petitioner lacks standing to bring this appeal, and we lack review
4 authority.

5 **MOTION TO TRANSFER TO CIRCUIT COURT**

6 On July 26, 2019, petitioner requested this appeal be transferred to Coos
7 County Circuit Court pursuant to OAR 661-010-0075 and ORS 34.102, in the
8 event LUBA determines the appealed decision is not subject to its jurisdiction.⁸

9 Intervenor opposes the motion to transfer. Intervenor argues that transfer
10 to the circuit court is not appropriate where LUBA concludes that it lacks
11 jurisdiction because petitioner has failed to establish that it is adversely affected
12 by the decision. Intervenor argues the appeal should be dismissed and not
13 transferred.

⁸ ORS 34.102(4) provides:

“A notice of intent to appeal filed with the Land Use Board of Appeals pursuant to ORS 197.830 and requesting review of a decision of a municipal corporation made in the transaction of municipal corporation business that is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015 shall be transferred to the circuit court and treated as a petition for writ of review. If the notice was not filed with the board within the time allowed for filing a petition for writ of review pursuant to ORS 34.010 to 34.100, the court shall dismiss the petition.”

1 In *MGP X Properties LLC v. Washington County*, 74 Or LUBA 378
2 (2016), *aff'd*, 283 Or App 648, 389 P3d 1199 (2017), we explained that transfer
3 to circuit court is not appropriate where LUBA concludes that it lacks jurisdiction
4 for reasons other than that the decision is not a land use decision. We denied a
5 motion to transfer after concluding that LUBA lacked jurisdiction because
6 petitioner failed to establish that it was adversely affected by the decision under
7 ORS 197.830(3). We see no reason why the result should differ in this case.

8 For the foregoing reasons, we agree with intervenor that this appeal should
9 be dismissed and not transferred.

10 The appeal is dismissed.