

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

ARBOR LODGE NEIGHBORHOOD ASSOCIATION,
Petitioner,

vs.

CITY OF PORTLAND,
Respondent,

and
JENNIFER NYE,
Intervenor-Respondent.

LUBA Nos. 2019-089/107

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Daniel Kearns, Portland, represented petitioner.

Tony Garcia, Portland, represented respondent.

Michael C. Robinson, Garrett Stephenson, and J. Kenneth Katzaroff,
Portland, represented intervenor-respondent.

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

ZAMUDIO, Board Member, did not participate in the decision

DISMISSED 05/19/2020

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

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NATURE OF THE DECISION

Petitioner appeals two city decisions granting extensions of a building permit application to construct a new apartment building in North Portland.

FACTS

On May 11, 2018, intervenor applied for a building permit to construct a new four-story apartment building, with basement, located at 6545 North Denver Avenue (the property) in North Portland. Supplemental Record 64. Intervenor requested and received three extensions to its building permit application, granted by the city’s Bureau of Development Services (Bureau). The record does not reflect that the city ever issued the building permit.

On September 26, 2018, the Bureau issued intervenor a letter stating its permit application was about to expire due to “lack of progress.” Record 96. The city’s letter states that the city building code provides that “any permit application remaining inactive for a period of six (6) months or more is abandoned[.]” *Id.* In response, on September 28, 2018, intervenor sent an email to the city requesting an extension to its building permit application. Record 95. That same day, the city issued the first extension, granting intervenor’s request by letter and extending the time for the building permit to be issued until March 27, 2019. Record 94. In approving the first extension, the city cited International Building Code [IBC] 2007, section 105.3.2, and applied the IBC’s “Permit Cancellation, Extension, and Expiration Program Guide,” which in turn relies on the Oregon

1 Structural Specialty Code (OSSC), and Portland City Code (PCC) 24.10.070(J).

2 The letter states:

3 “This permit has been extended until March 27, 2019, as per [IBC]
4 2007, Section 105.3.2: Time limit of application:

5 “An application for a permit for any proposed work shall be
6 deemed to have been abandoned 180 days after the date of
7 filing, unless such application has been pursued in good faith
8 or a permit has been issued; except that the building official
9 is authorized to grant one or more extensions of time for
10 additional periods not exceeding 90 days each. The extension
11 shall be requested in writing and justifiable cause
12 demonstrated.” Record 94 (emphasis in original).

13 On September 12, 2019, petitioner appealed this first extension decision. That
14 decision is the subject of LUBA No. 2019-089.

15 On March 8, 2019, intervenor requested a second permit application
16 extension via email. Record 49. On April 8, 2019, the Bureau granted
17 intervenor’s second extension request via letter, again applying IBC 2007,
18 section 105.3.2, extending the time for the building permit to be issued until
19 September 28, 2019. Record 44. Petitioner has not appealed that decision.

20 On August 29, 2019, intervenor requested a third permit application
21 extension via email. Record 2-3. On September 26, 2019, the Bureau issued the
22 third extension by letter to intervenor, extending the time for the building permit
23 to be issued until December 23, 2019. Record 1. Although the first building
24 permit extension cited IBC 2007 Section 105.3.2 and the third building permit
25 extension letter cited OSSC section 105.3.2, both extensions recited identical

1 language as authorizing the building permit extension. On October 16, 2019,
2 petitioner appealed this third permit application extension decision in LUBA No.
3 2019-107. On November 1, 2019, we consolidated the two appeals.

4 **MOTION TO DISMISS**

5 ORS 197.825(1) provides that LUBA “shall have exclusive jurisdiction to
6 review any land use decision or limited land use decision[.]”¹ The city and
7 intervenor (respondents) move to dismiss this appeal, alleging that neither of the
8 appealed decisions qualify as “land use decisions.”

9 **A. Statutory Land Use Decision**

10 As relevant here, ORS 197.015(10)(a) provides that a land use decision:

11 “Includes:

12 “(A) A final decision or determination made by a local government
13 or special district that concerns the adoption, amendment or
14 application of:

15 “(i) The goals;

16 “(ii) A comprehensive plan provision;

17 “(iii) A land use regulation; or

18 “(iv) A new land use regulation[.]”²

¹ Petitioner does not argue that the decisions are limited land use decisions, as defined at ORS 197.015(12).

² ORS 197.015(1) sets out a number of exclusions from its statutory definition of land use decision. One of those is the ORS 197.015(10)(b)(A) exclusion from the definition of land use decision a “decision of a local government * * * [t]hat

1 A decision qualifies as a “land use decision” under ORS 197.015(10)(a)(A) if it
2 either applies, or should have applied, one of the four bodies of land use
3 legislation listed in the statute, *i.e.*, the statewide planning goals, a comprehensive
4 plan provision, or an existing or new land use regulation. *Jaqua v. City of*
5 *Springfield*, 46 Or LUBA 566, 574 (2004). ORS 197.015(11) defines “[l]and use
6 regulation” to mean “any local government zoning ordinance, land division
7 ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance
8 establishing standards for implementing a comprehensive plan.” In their motion
9 to dismiss, respondents argue that neither extension decision either applied or
10 required the city to apply any goal, comprehensive plan provision, or land use
11 regulation, so the building permit application extensions are not statutory land
12 use decisions.

13 Petitioner argues that the decision is a statutory land use decision, or
14 subject to our jurisdiction based on the significant impacts test. For the reasons
15 explained below, we agree with respondents that the challenged decisions are not
16 land use decisions.

17 **1. No Land Use Regulations Were Applied**

18 Respondents argue neither the Bureau’s first or third extension decisions
19 applied any land use regulations. Rather, they applied IBC 2007 section 105.3.2.

is made under land use standards that do not require interpretation or the exercise
of policy or legal judgment.” Another exclusion from the definition of land use
decision is the ORS 197.015(10)(b)(B) exclusion of a decision “[t]hat approves
or denies a building permit issued under clear and objective land use standards.”

1 Respondents contend the IBC 2007, the OSSC and PCC Title 24 are not land use
2 regulations.³ Respondents also argue that the “Permit Cancellation, Extension,
3 and Expiration Program Guide” which relies upon the OSSC and PCC
4 24.10.070(J), does not apply any portion of Title 33, the city’s land use code.
5 Motion to Dismiss 2; Record 94, 172-76. The Bureau’s third extension decision
6 applied the same authority as the first and second extension decisions, as well as
7 the OSSC, section 105.3.2, which pertains to extensions of time on building
8 permits. Respondents argue this third extension decision again did not apply any
9 land use regulation. Record 1.

10 Petitioner has the burden of demonstrating that LUBA has jurisdiction to
11 review the appealed decision. *Billington v. Polk County*, 299 Or 451, 475, 703
12 P2d 232 (1985). Petitioner does not argue that the IBC 2007, the OSSC, or PCC
13 Title 24 are land use regulations. We agree with respondents that they are not.
14 *See Barnas v. City of Portland*, 51 Or LUBA 750, 757-58 (2006) (concluding that
15 building and other structural code provisions are not “[l]and use regulation[s]”
16 within the meaning of *former* ORS 197.015(12) (2005) (*renumbered* as ORS
17 197.015(11) (2007))).

³ The second extension decision, which was not appealed, also applied the 2007 IBC, section 105.3.2. Respondents also contend the second extension decision relied upon an updated program guide entitled “Permit Extension, Abandonment, Expiration and Reactivation Program Guide,” and does not apply the city’s land use code (PCC Title 33). Motion to Dismiss 2-3; Record 44, 51-62.

1 **2. No Land Use Regulations Should Have Been Applied**

2 Petitioner’s arguments are difficult to follow and appear to us to address
3 the merits of the city’s decisions, rather than the jurisdictional question.
4 Petitioner’s main argument regarding why the permit extension decisions are
5 land use decisions is that the city should have applied zoning regulations that
6 applied after the property’s zoning changed June 6, 2018, after intervenor
7 submitted its initial building permit application.

8 At the time of the initial building permit application on May 11, 2018, the
9 property was zoned general commercial (CG), with a residential 5,000 (R5)
10 designation. Record 158. Petitioner concedes “[u]nder the former (prior to June
11 6, 2018) zoning, which intervenor took advantage of, *a multi-family structure*
12 *such as the one proposed is allowed out-right (no land use or limited land use*
13 *permit otherwise required) with only a building permit.”⁴ Response 2 (emphasis
14 added).*

15 After June 6, 2018, the property was zoned commercial employment (CE)
16 with a mixed use-dispersed (MU-D) comprehensive plan designation. Response
17 2. According to petitioner, the project as proposed would now conflict with
18 several of the city’s updated code provisions that apply to the CE/MU-D zone,
19 including height restrictions (PCC 33.130.210(B)(2)), ground floor windows

⁴ Petitioner did not challenge the initial building permit application decision.

1 (PCC 33.130.230(B)), outdoor use requirements (PCC 33.130.228), and bicycle
2 parking development standards (PCC 33.266.210). Petitioner argues that after the
3 new CE/MU-D zoning, intervenor would have to pursue a permit under a
4 discretionary land use process. Response 7. Petitioner argues that granting the
5 building permit extensions required a determination that the proposal complied
6 with zoning regulations and that it should have received notice of the building
7 permit decision.⁵ PCC 33.700.010 (Uses and Development Which Are Allowed
8 By Right); Response 13.

9 PCC 33.700.010 applies to the initial review of the building permit
10 application for compliance with the then-applicable zoning code. Petitioner has
11 not established that the city should have applied any land use regulations to the
12 building permit extension applications. Petitioner points to nothing in the IBC,
13 the OSSC, or PCC Title 24 or Title 33 (the city’s land use code) that requires
14 application of any of PCC Title 33’s criteria to an application for a building
15 permit application extension.

16 Petitioner argues that the standards under which the city granted the permit
17 application extensions are “discretionary.” Response 12; ORS
18 197.015(10)(b)(B). However, whether the criteria that actually apply are
19 “discretionary” or “clear and objective” has no bearing on whether the city made

⁵ Type I and Type Ix proceedings are administrative proceedings with public notice but no hearing. PCC 33.730.014 - 33.730.015.

1 a statutory land use decision because petitioner has failed to establish that the city
2 either applied or was required to apply the goals, a comprehensive plan provision,
3 a land use regulation, or a new land use regulation. ORS 197.015(10)(a)(A).

4 Because the city did not and was not required to apply any land use
5 regulations, the challenged decisions are not statutory land use decisions.

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

7 In limited circumstances, LUBA has jurisdiction to review an appeal of a
8 decision that does not qualify as a “land use decision” as defined at ORS
9 197.015(10)(a)(A), if the decision nonetheless qualifies as “significant impact”
10 land use decision under *City of Pendleton v. Kerns*, 294 Or 126, 133-34, 653 P2d
11 992 (1982). To satisfy the significant impact test, a petitioner must show that the
12 decision has significant qualitative or quantitative effects on present or future
13 land uses. *Carlson v. City of Dunes City*, 28 Or LUBA 411, 414 (1994). Petitioner
14 contends that the building permit extensions allow the apartment building,
15 despite the fact that the apartment building as proposed will not meet the city’s
16 post-June 2018 zoning requirements and therefore results in a significant impact
17 on land use. Respondents did not respond to petitioner’s argument that the
18 building permit extension decisions constitute a “significant” impact on present
19 or future land uses.

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

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

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

23 Petitioner has not demonstrated that the challenged building permit extension
24 decisions will have significant qualitative or quantitative impacts on present or
25 future land uses. The decision does not alter any of the land uses allowed in the
26 CE zone or any of the present or future land uses in that zone. Further, petitioner
27 has not shown that the non-land use standards applied by the Bureau in order to
28 determine whether to issue the building permit application extensions have some
29 bearing or relationship to the use of land. Whether the building permit has been
30 “pursued in good faith” and “justifiable cause” for an extension has been shown

1 as required by IBC Section 105.3.2 has no bearing or relationship to the use of
2 land. Response 12.

3 **C. Conclusion**

4 Because petitioner has not established that either of the challenged
5 decisions are a “land use decision,” within the meaning of ORS
6 197.015(10)(a)(A), or a land use decision under the significant impact test,
7 LUBA does not have jurisdiction to review the decisions. Accordingly, these
8 appeals are dismissed.