

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

3
4 JEREMY MONROE, TONY HOWELL, PATRICIA
5 BENNER, and BARBARA BULL,
6 *Petitioners,*

7
8 vs.

9
10 CITY OF CORVALLIS,
11 *Respondent.*

12
13 and

14
15 HOLLINGSWORTH & VOSE FIBER COMPANY,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2022-036

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from City of Corvallis.

24
25 Jesse A. Buss represented petitioners.

26
27 David E. Coulombe represented respondent.

28
29 Steven P. Hultberg represented intervenor-respondent.

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31 RUDD, Board Member; RYAN, Board Member, participated in the
32 decision.

33
34 ZAMUDIO, Board Chair, did not participate in the decision.

35
36 DISMISSED

08/02/2022

37
38 You are entitled to judicial review of this Order. Judicial review is
39 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a city council decision affirming a city manager’s decision that upheld a city planner’s decision issuing a land use compatibility statement (LUCS) to fulfill an Oregon Department of Environmental Quality (DEQ) requirement for issuance of air quality related permits.

BACKGROUND

A. Property Operations

The subject property is located at 1115 Crystal Lake Drive and is improved with two industrial plants manufacturing glass fiber. Plant 1 is located in the Mixed-Use Transitional (MUT) and Willamette Greenway overlay (WRG) zones. Plant 2 is located in the MUT zone. We refer to Plants 1 and 2 collectively as the facility.

We set out relevant history of the facility’s air quality permitting and intervenor’s decision to request a LUCS in *Phillips v. City of Corvallis*, as follows

“In 1995, Evanite Fiber Corporation (Evanite), HVFC’s predecessor in interest, applied to construct the second manufacturing building on the subject property, Plant 2.

‘In that application, Evanite proposed the use of nitrogen oxide (NOx) and carbon monoxide (CO) emission factors for boilers in order to estimate fiberizer emissions. In order to avoid becoming a major source Evanite requested a synthetic minor limit for NOx. As part of the 1995 application, Evanite demonstrated through modeling that the Facility’s NOx emissions would not cause or contribute to an exceedance of the National Ambient Air Quality Standards or result in a [Prevention of Significant Deterioration] increment exceedance. Evanite also offset its particulate emissions with

1 90 tons of particulate (PM) and 65 tons of particulate with
2 aerodynamic diameter of less than or equal to 10 micrometers
3 (PM10) contemporaneous reductions at their adjoining
4 hardboard plant, thus demonstrating that the project would
5 result in a net air quality benefit.’ Petitioner’s Response to
6 Respondent’s Motion to Dismiss Ex 3, at 1.

7 “On May 17, 1996, DEQ issued Evanite a minor source Air
8 Contaminant Discharge Permit (ACDP) modification authorizing
9 new construction and limiting certain emissions. Petitioner’s
10 Response to Respondent’s Motion to Dismiss Ex 3, at 2.

11 “HVFC later acquired the facility from Evanite. In October and
12 December 2014, HVFC performed emission testing for Plant 1, and
13 in February 2015, HVFC performed emission testing for Plant 2.
14 The 2014 and 2015 test results indicated that the Facilities’
15 combined carbon monoxide emissions exceeded the Title V major
16 source threshold. The Mutual Agreement explains that when
17 Evanite submitted the 1995 expansion application, Plant 1 and 2’s
18 combined potential CO emissions exceeded the allowed thresholds

19 “We understand DEQ to have determined that the results of the 2014
20 and 2015 testing revealed that the facility expansion permitted in
21 1996 had the capacity to create emissions requiring an ACDP that
22 Evanite did not obtain, and HVFC’s operation of the facility since
23 its acquisition of the facility has been in violation of air quality
24 standards. Petitioner’s Response to Respondent’s Motion to Dismiss
25 Ex 3, at 3. As a consequence of that determination, DEQ is now
26 requiring HVFC to obtain an ACDP, necessitating HVFC to obtain
27 a LUCs from the city. * * * we also understand that HVFC seeks to
28 update another air permit to reflect the installation of new pollution
29 control equipment resulting in the reduction of certain other
30 emissions.” ___ Or LUBA ___, ___ - ___ (LUBA No 2022-019, Aug
31 2, 2022) (slip op at 4-6).

32 **B. Completion of the DEQ LUCS**

33 “ORS 197.180(1)(b) requires state agencies to take actions that are
34 authorized by law with respect to programs affecting land use ‘[i]n a manner

1 compatible with acknowledged comprehensive plans and land use regulations.’
2 All agencies are required to adopt and have adopted rules to comply with ORS
3 197.180(1)(b).” *Zenith Energy Terminals Holdings LLC v. City of Portland*, ___
4 Or LUBA ___, ___ (LUBA No 2021-083, Feb 3, 2022) (slip op at 10), *aff’d* 319
5 Or App 538, 509 P3d 120, *appeal pending* (S068613).

6 DEQ has adopted regulations setting out its coordination program and has
7 developed a standard LUCS form. Petitioners attached the LUCS form to their
8 Notice of Intent to Appeal (NITA). The preprinted language on the LUCS form
9 explains that

10 “state agencies with permitting or approval activities that affect land
11 use are required by Oregon law to be consistent with local
12 comprehensive plans and have a process for determining
13 consistency. DEQ activities affecting land use and the requirement
14 for a LUCS may be found in Oregon Administrative Rules (OAR)
15 Chapter 340, Division 18.” Attach to NITA 8.

16 The DEQ LUCS form includes a portion to be completed by the permit applicant
17 and a portion to be completed by the relevant land use jurisdiction.

18 **1. Portion of LUCS completed by HVFC**

19 The portion of the LUCS to be completed by the applicant includes a place
20 to identify the relevant DEQ permits. The permits identified on the appealed
21 LUCS are “Air Quality Title V Permit” and “Air Contaminant Discharge Permit.”
22 Attach at 9.

23 The portion of the LUCS to be completed by the applicant also includes a
24 place for the applicant to describe the project for which the LUCS is sought. This
25 portion of the LUCS, as attached to the NITA, states “See Attachment” and the

1 only attachment provided is a copy of an Emissions Rate Agreement (Emissions
2 Agreement).

3 **2. Portion of LUCS completed by the city**

4 On June 4, 2021, the city planner signed the portion of the form directed
5 to the local land use jurisdiction. The instructions on this part of the form state:

6 “Written findings of fact for all local decisions are required; written
7 findings from previous actions are acceptable. For uses allowed
8 outright by the acknowledged comprehensive plan, DEQ will accept
9 written findings in the form of a reference to the specific plan
10 policies, criteria, or standards that were relied upon in rendering the
11 decision with an indication of why the decision is justified based on
12 the plan policies, criteria, or standards.” Attach at 10.

13 As quoted above, the instructions on the form explain that written findings are
14 required and DEQ will accept a reference to specific plan policies, criteria, or
15 standards relied upon in rendering the decision with an indication of why the
16 decision is justified.

17 The city planner completed the LUCS on June 24, 2021. The city manager
18 denied petitioners’ appeal of the city planner’s decision. The city council
19 considered an appeal of the city manager’s decision and denied the appeal,
20 affirming issuance of the LUCS.

21 This appeal followed.

22 **MOTION TO DISMISS**

23 The city filed a motion to dismiss petitioners’ appeal on the basis that the
24 appealed decision is not a “final decision” within the meaning of ORS
25 197.015(10)(a) because the decision referenced in petitioners’ original NITA had

1 not been reduced to writing.¹ Subsequent to the city’s filing of its motion to
2 dismiss, petitioners filed a second amended NITA to which petitioners attached
3 a copy of the city council’s final written decision. The city objected to the filing
4 of the second amended NITA. We need not address the motion to dismiss based
5 on the decision cited in the original NITA or the objection to the filing of the
6 second amended NITA because we conclude that we lack jurisdiction under the
7 LUCs exclusion set out in ORS 197.015(10)(b)(H).

8 The city council’s final decision includes a statement that “City Council
9 did not conduct a *de novo* appeal, did not make a new decision on issuance of the
10 Land Use Compatibility Statement, *and did not apply any land use criteria or*
11 *land use standards* when Council conducted its limited review of the record as
12 required by CMC 1.11.030.” Second Amended NITA 5 (emphasis added).
13 However, whether or not the city council concluded that it did not apply land use
14 criteria or standards as part of its review of the planner’s decision has no bearing
15 on whether the challenged decision is a land use decision. In addition, the fact
16 that the appeal was accepted and processed under the Corvallis Municipal Code

¹ The city argued in its motion that its city council

“reviewed an administrative decision (not a land use decision) and found that the City Manager was not arbitrary or capricious in denying an appeal by Petitioners. To date, the City Council has made a tentative decision that has *not* been reduced to writing. The City Council’s three-month calendar shows that the Council will consider the adoption of an Order related to its tentative decision.” Motion to Dismiss 2-3 (emphasis in original).

1 (CMC), rather than the Land Development Code, does not determine whether the
2 city applied land use regulations. The city council reviewed a city manager's
3 decision reviewing the planner's completion of the LUCS. The planner's
4 completion of the LUCS required the consideration of land use regulations in the
5 development code. But for the LUCS Exclusion to our jurisdiction, we would
6 agree with petitioners that the challenged decision is a land use decision over
7 which LUBA has jurisdiction. However, for the reasons set out below, the
8 decision is nonetheless excluded from our review.

9 **LUCS EXCLUSION TO LUBA'S JURISDICTION**

10 ORS 197.015(10)(b)(H) provides that land use decisions do not include a
11 local government decision

12 "That a proposed state agency action subject to ORS 197.180 (1) is
13 compatible with the acknowledged comprehensive plan and land use
14 regulations implementing the plan, if:

15 "(i) The local government has already made a land use decision
16 authorizing a use or activity that encompasses the proposed
17 state agency action;

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

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

1 In *McPhillips Farm Inc. v. Yamhill County*, we explained that resolution
2 of this jurisdictional issue requires us

3 “to resolve the likely merits of the appeal, and determine whether
4 the [local government] *correctly* concluded that the proposed
5 landfill expansion was authorized under the [prior decision and did
6 not require further review]. However, that is sometimes necessary,
7 depending on the wording of the relevant statutory exclusion. In
8 *Southwood Homeowners v. City Council of Philomath*, 106 Or App
9 21, 23-25, 806 P2d 162 (1991), the Court of Appeals held that where
10 a statutory exclusion is worded such that LUBA’s jurisdiction turns
11 on whether the decision is correct or not, LUBA must address the
12 merits of an appeal to the extent necessary to determine whether the
13 challenged decision falls within the statutory exclusion. *Southwood*
14 involved a now superseded statutory exclusion for subdivisions and
15 partitions within urban growth boundaries that are ‘consistent with
16 land use standards.’ The Court held that in order for LUBA to
17 determine whether the exclusion applies, LUBA must resolve the
18 parties’ disputes on the merits whether the decision is in fact
19 ‘consistent with land use standards.’ On remand from the Court of
20 Appeals, LUBA ultimately agreed with the petitioners that the
21 decision was not consistent with one or more land use standards,
22 concluded that jurisdiction to review the decision lay with LUBA
23 rather than the circuit court, and remanded the decision to the city.
24 *Southwood Homeowners Assoc. v. City of Philomath*, 21 Or LUBA
25 260 (1991).

26 “The exclusions at ORS 197.015(10)(b)(H) are worded in a similar
27 manner to the exclusion at issue in *Southwood*, in that they apply
28 only if the local government determines that the proposed agency
29 action is *compatible* with its plan and regulations because it (1) was
30 authorized in a prior decision, (2) does not require review, or (3) is
31 required to undergo future land use reviews. Under the reasoning in
32 *Southwood*, the jurisdictional question cannot be simply resolved
33 based on the fact that the decision on its face concludes that the
34 agency action is compatible for one of the reasons listed in ORS
35 197.015(10)(b)(H)(i) through (iii). LUBA must determine whether
36 the local government *correctly* concluded that the agency action is

1 compatible for one of those listed reasons, which in turn entails
2 resolving the likely merits of the appeal.” 66 Or LUBA 355, 359-61
3 (2012), *aff’d* 256 Or App 402, 300 P3d 299 (2013) (holding “the
4 effect of ORS 197.015(10) and ORS 197.825(1) is to allow LUBA
5 the authority to review the merits of a LUCS determination that a
6 proposed state action is not compatible with local land use laws and
7 to preclude such review of a LUCS determination of existing or
8 potential compatibility, as described in ORS 197.015(10)(b)(H)(i),
9 (ii).” 256 Or App at 408.).

10 The city planner checked the LUCS box next to “Yes, the activity is
11 allowed outright by (provide reference for local ordinance):” and added the
12 following language “The *existing* Intensive Industrial use is permitted by right
13 based on the MUT zone standards. The MUT zone was adopted as part of the
14 2006 Corvallis Land Development Code/periodic review update (Ordinance
15 2006-24 and 2006-29).” Attach at 10 (emphasis added).

16 According to the Corvallis Development Code (CDC), the MUT land use
17 category “Intensive Industrial” is “limited to properties zoned Intensive Industrial
18 at the time of change to MUT and subject to limitations in Section 3.27.40 of
19 Chapter 3.27-Mixed Use Employment (MUE) Zone.” CDC Table 3.21-1. CDC
20 Table 3.21-1 states that conditional development review is required for

21 “Changes in operations of existing General and Intensive Industrial
22 Uses under the following conditions:

- 23 “1. A change in operation or increase in production that
24 creates the need to secure approval from an
25 environmental permitting agency to increase air, water,
26 or noise emissions, unless such emission levels were
27 approved by the City through a previous land use
28 process; or

1 “2. Specific limits or conditions related to operations,
2 and/or physical expansion, established by a previous
3 land use approval are exceeded.”

4 Under the “Additional Comments” section of the LUCS form, the city
5 planner stated:

6 “The MUT zone requires a Conditional Development approval if the
7 use intensifies (a change in operation or increase in production that
8 creates need to obtain permit from DEQ because emissions have
9 increased). [HVFC] has entered into voluntary restriction on
10 emissions (lower than allowed by DEQ) based on agreement with
11 the City of Corvallis. Exhibit A – Emission Rate Agreement is
12 attached to this LUCS.” Attach at 10.

13 By attaching the Emissions Agreement to the LUCS, the city made that
14 agreement additional LUCS findings. The terms of the Emissions Agreement
15 include the statement “The City finds that the ongoing operation and production
16 levels of the Facility consistent the intensity of use evaluated in relation to the
17 1996 LUCS is consistent with all applicable land use requirements.” Attach at
18 11. The city also restated the requirement that a Conditional Development Permit
19 be obtained prior to increasing emissions.

20 “A minimum of 3 months prior to any planned increase in
21 production that based on modeling/analysis/sampling is reasonably
22 likely to increase actual emissions of pollutants beyond the
23 1996/2004 LUCS limits (calculated as shown in Attachment 3),
24 [HVFC] will submit an application for a Conditional Development
25 Permit to the City for approval prior to this increase.” Attach at 12.

26 The recitals in the Emission Agreement attached to the LUCS provide a
27 history of compatibility statements issued for the property, beginning with that
28 issued to HVFC’s predecessor in interest in 1996. These recitals express the city’s

1 position that operations or production levels beyond what was permitted in 2004
2 will require a Conditional Development Permit. They state, in relevant part:

3 “B. In 1996, [Evanite] obtained a Land Use Compatibility
4 Statement (‘LUCS’) from the city and an air permit from the
5 Oregon Department of Environmental Quality (‘DEQ’)
6 authorizing a substantial expansion of the Facility consisting
7 of increasing the existing Plant 1 to include 30 fiberizing
8 positions and constructing a new Plant 2 consisting of 42
9 fiberizing positions (the ‘1996 air permit’). [HVFC] has not,
10 to date, built all of the fiberizing positions allowed by the
11 1996 LUCS/air permit.

12 “C The 1996 LUCS included estimated air emission rates
13 intended to reflect the intensity of use associated with use of
14 the equipment authorized by the 1996 air permit (the
15 ‘emission rates’).

16 “D. As information and measurement technology have improved,
17 the emission rates associated with the use of the equipment
18 and production levels authorized by the 1996 air permit have
19 been refined. This occurred most recently in 2004. The 1996
20 and 2004 LUCS limits for emissions are set out in Attachment
21 2.

22 “E. In 2017, the City Planning Commission approved a
23 Willamette River Greenway Conditional Development
24 Permit and [HVFC] installed new air filters that substantially
25 reduced particulate and Fluoride emissions.

26 “F. [HVFC] has applied for a revised air permit that would revise
27 its emission limits to reflect the new air filters and new testing
28 data showing higher carbon monoxide emissions (the ‘2021
29 air permit’).

30 “G. Although the DEQ permit allows emissions that exceed what
31 the 1996 and 2004 LUCS allow, [HVFC] will not increase
32 operation or production levels beyond what was allowed in
33 2004 without requesting a Conditional Use Permit.” Attach at

1 11.

2 We agree with the city's conclusion. The challenged LUCS states both that the
3 existing MUT use is permitted by right under the MUT standards and that an
4 intensification (a change in operation or increase in production that creates a need
5 to obtain a permit from DEQ based on increased emissions) will require a
6 Conditional Development Approval. CDC 1.6 defines "Conditional
7 Development" as a

8 "Land use process that provides an opportunity to allow a use when
9 potential adverse effects can be mitigated or deny a use if concerns
10 cannot be resolved to the satisfaction of the hearing authority.
11 Procedures for this type of land use application are outlined in
12 Section 1.2.110.02 - Special Development and Chapter 2.3.40 -
13 Conditional Development Modification."

14 The LUCS is needed to obtain the DEQ permits required for operations as
15 they were approved in 1996 and 2004, prior to imposition of the current zoning,
16 when actual emissions were underestimated. The city has clearly stated that
17 HVFC is required to limit its emissions to locally approved levels as stated in the
18 tables attached to the Emissions Agreement or obtain a Conditional Development
19 Permit. It may be that HVFC will, if DEQ issues a permit or permits authorizing
20 an increase in emissions, apply to the city for a Conditional Development
21 Approval authorizing it to operate its facility at that level. The LUCS is not,
22 however, a land use decision subject to our review. Existing operations are
23 consistent with the local approvals and exempt from our review under ORS
24 197.015(10)(b)(H)(i). Any change in operations increasing emissions will require

- 1 a conditional development permit and is exempt from our review under ORS
- 2 197.015(10((b)(H)(iii).
- 3 The appeal is dismissed.