

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

3  
4                   1ST JOHN 2:17, LLC, and JONATHAN TALLMAN,  
5                                   *Petitioners,*

6  
7                                   vs.

8  
9                                   CITY OF BOARDMAN,  
10                                   *Respondent.*

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12                                   LUBA No. 2021-086

13  
14                                   FINAL OPINION  
15                                   AND ORDER

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17                   Appeal from City of Boardman.

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19                   Sarah C. Mitchell represented petitioners.

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21                   Christopher D. Crean represented respondent.

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

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26                   TRANSFERRED                   09/02/2022

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

**NATURE OF THE DECISION**

Petitioners appeal a construction contract between the city and a construction company for construction of a road.

**BACKGROUND**

In 2012, the city adopted the Port of Morrow Interchange Area Management Plan (IAMP) as part of its Transportation System Plan (TSP). One of the transportation projects included in the IAMP is the “South of [Port of Morrow] Interchange,” depicted in Figure 7-2 and described as Projects C, D, E, F, and G in Table 7-1 of the IAMP. Motion to Dismiss Ex 2, at 98-99. That project is referred to in this opinion as the Loop Road.

In 2021, the city sought bids for a contract for construction of the Loop Road. Motion to Dismiss Ex 1. On August 2, 2021, the city issued an addendum to remove the western portion of the Loop Road from the anticipated work under the contract. Motion to Dismiss Ex 3. We refer to the contract and the addendum together as the Contract. Shortly thereafter, the city awarded the Contract to one of the bidders, resulting in a contract authorizing construction of the eastern half of the Loop Road, which includes the construction of Yates Lane, Devin Loop, and improvements to the intersection of Laurel Lane and Yates Lane.<sup>1</sup>

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<sup>1</sup> Article 6 of the Contract provides that the work “will be substantially complete and will be completed and ready for final payment in accordance with Paragraph 15.06 of the General Conditions on or before the dates or within the number of calendar days indicated in the Agreement.” Motion to Dismiss Ex 3,

1           Petitioners own property that is located south of the Port of Morrow  
2 Interchange and west of Laurel Lane and that is accessed from two points on  
3 Laurel Lane. Petitioners operate a drive-through coffee stand on the property. On  
4 September 21, 2021, petitioners filed their “precautionary” notice of intent to  
5 appeal the Contract. Notice of Intent to Appeal 1. On September 29, 2021, the  
6 parties stipulated to suspend the appeal on the basis that “[t]here are related  
7 proceedings under way before the City that may affect the outcome of this  
8 appeal.” Motion to Suspend 1. On March 11, 2022, the city approved a zoning  
9 permit for the project described in the Contract, that is, construction of the eastern  
10 half of the Loop Road.<sup>2</sup> Motion to Dismiss Ex 4.

11           On April 22, 2022, petitioners requested that the appeal be reactivated. The  
12 city subsequently moved to dismiss the appeal.

### 13 **JURISDICTION**

14           LUBA has exclusive jurisdiction to review “land use decisions.” ORS  
15 197.825(1). ORS 197.015(10)(a) defines “land use decision,” in relevant part, as

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at 9. However, no party provided a copy of the General Conditions, and we cannot tell when the Contract requires the work to be “substantially complete.”

<sup>2</sup> Petitioners appealed the planning director’s issuance of the zoning permit to LUBA in LUBA No. 2022-037, and that appeal is pending.

Petitioners also filed a local appeal of the planning director’s issuance of the zoning permit, and the city conducted hearings before the planning commission and then the city council. The city council subsequently adopted a decision affirming the issuance of the zoning permit, and petitioners appealed that decision to LUBA in LUBA No. 2022-062. That appeal is pending.

1 a “final decision or determination made by a local government” that “concerns”  
2 the application of a comprehensive plan provision or land use regulation.

3 ORS 197.015(10)(b)(D), however, provides that a “land use decision” does  
4 not include a decision of a local government “[t]hat determines final engineering  
5 design, construction, operation, maintenance, repair or preservation of a  
6 transportation facility that is otherwise authorized by and consistent with the  
7 comprehensive plan and land use regulations.” The city moves to dismiss the  
8 appeal on the basis that the Contract falls under the exception to LUBA’s  
9 jurisdiction at ORS 197.015(10)(b)(D). Petitioners respond that the exclusion at  
10 ORS 197.015(10)(b)(D) does not apply because, according to petitioners, the  
11 Contract is not “consistent with” the city’s comprehensive plan and land use  
12 regulations. That is so, petitioners argue, because the drawings that are attached  
13 to and part of the Contract demonstrate that the Loop Road does not comply with  
14 applicable land use standards. For example, petitioners argue that the drawings  
15 do not include bike lanes, which petitioners argue are required by Boardman  
16 Comprehensive Plan chapter 12 and Boardman Development Code 3.4.100.

17 We conclude that we lack jurisdiction over the appeal, albeit for a different  
18 reason than that argued by the city. We lack jurisdiction over the appeal because  
19 the Contract does not concern the *application* of a land use regulation. Generally,  
20 a local government that enters into a contract for construction of a road project  
21 does not apply, and is not required to apply, provisions of the city’s zoning code  
22 or comprehensive plan. Rather, the local government is simply choosing who will

1 build the road.<sup>3</sup> That is the case here. In entering into the Contract, the city was  
2 simply choosing who would actually build the Loop Road in the future. That  
3 choice did not require the city to apply the IAMP or the comprehensive plan. That  
4 the project is identified in and authorized by the comprehensive plan does not  
5 mean that the Contract “concerns the \* \* \* application of” the comprehensive  
6 plan.

7 Further, petitioners point to nothing in the Contract that authorizes  
8 construction of the Loop Road to commence upon entering into the Contract. *See*  
9 n 1. Rather, as the city explains, the city entered into the Contract in August 2021  
10 and then sought and received a zoning permit in March 2022 that authorized  
11 construction of part of the Loop Road.<sup>4</sup> The city’s subsequent issuance of a

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<sup>3</sup> As noted, the IAMP includes, as a specifically authorized project, construction of the Loop Road. In the ordinance adopting the IAMP as part of the TSP, the city concluded that “the Port of Morrow IAMP is consistent with Boardman Comprehensive Plan Chapters 1, 2, 9, 10, 11, and 12.” Motion to Dismiss Ex 2, at 2.

<sup>4</sup> In this regard, this appeal differs from *Van Dyke v. Yamhill County*, \_\_\_ Or LUBA \_\_\_ (LUBA Nos 2020-032/033, June 1, 2020). In *Van Dyke*, the petitioners appealed (1) a January 2020 order adopted by the board of county commissioners authorizing the county to enter into a contract for construction of a bridge and trail approaches on county-owned land zoned exclusive farm use and (2) the contract itself. We concluded that the order and the contract were land use decisions because they authorized construction of the bridge and trail approaches to commence in the absence of the conditional use permit that was required under the county’s zoning ordinance and state statute to construct and use the bridge and trail.

1 zoning permit suggests that we lack jurisdiction over the appeal for an additional  
2 or alternative reason: The Contract is not a “final” decision, as required by ORS  
3 197.015(10)(a).

4 Because we conclude that the city’s decision does not concern the  
5 application of a land use regulation and is therefore not a land use decision, it is  
6 not necessary for us to consider the city’s alternative argument under ORS  
7 197.015(10)(b)(D).<sup>5</sup>

8 **MOTION TO TRANSFER**

9 Petitioners move to transfer the appeal in the event that we conclude we  
10 lack jurisdiction. OAR 661-010-0075(9). The appeal is transferred to Morrow  
11 County Circuit Court.

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<sup>5</sup> The city also argues that petitioners are not “adversely affected” by the Contract, within the meaning of ORS 197.830(3), because the Contract includes only construction of the eastern half of the Loop Road and petitioners’ property is located on the west side of Laurel Lane. Motion to Dismiss 3-4. Our disposition of this appeal makes it unnecessary for us to address the city’s argument.