

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

3
4 RANDY HAJ,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF PORTLAND,
10 *Respondent.*

11
12 LUBA No. 2022-091

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from City of Portland.

18
19 Randy Haj represented themselves.

20
21 Lauren A. King, Senior Deputy City Attorney, represented respondent.

22
23 RYAN, Board Chair; RUDD, Board Member; ZAMUDIO, Board
24 Member, participated in the decision.

25
26 TRANSFERRED 12/19/2022

27
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

Petitioner appeals a city staff decision approving a street engineering design.

BACKGROUND

The city’s Transportation System Plan (TSP), part of the city’s comprehensive plan, includes a project named the “NE 7th/9th Ave Neighborhood Greenway.” Record 316. The TSP calls for the Portland Bureau of Transportation (PBOT) to “[d]esign and implement a neighborhood greenway along the NE 7th/9th Ave corridor from Weidler to Holman (alignment to be determined during design phase), using traffic calming treatments as needed to meet recommended performance guidelines for neighborhood greenways and adjacent local streets.” *Id.*

To implement this TSP project, PBOT staff conducted a public process to develop specific street designs, including what the city refers to as the “Safer 7th Ave” improvements. Record 115. The Safer 7th Ave improvements include engineering designs for improvements to the NE Tillamook and 7th Ave intersection. *Id.* That intersection currently includes a traffic circle, but no marked bicycle or pedestrian facilities. The proposed design removes the traffic circle, and installs a speedbump, bicycle lanes and striped crosswalks. The city refers to this portion of the Safer 7th Ave design as the “NE 7th Ave and NE Tillamook

1 St. Design Plan.” Record 5. PBOT adopted the Safer 7th Ave design in February
2 2022. *See* Record 19.

3 On August 26, 2022, PBOT determined a construction schedule for the NE
4 7th Ave and NE Tillamook St. Design Plan and mailed neighboring property
5 owners notice of the upcoming construction. Petitioner, who lives nearby,
6 received the notice and attended a meeting that PBOT held with concerned
7 neighbors on September 14, 2022. In response to the concerns raised at the
8 meeting, PBOT revised the street design to remove some on-street parking, and
9 to add a manhole base planter and two additional speedbumps. Record 9. The city
10 refers to the revised plan as the September 2022 Revised Design. On September
11 15, 2022, the city emailed petitioner and other neighbors with a copy of the
12 September 2022 Revised Design.

13 On October 3, 2022, petitioner filed a Notice of Intent to Appeal and, on
14 October 10, 2022, a corrected Notice of Intent to Appeal (Corrected NITA). We
15 refer to the original NITA and Corrected NITA collectively as the NITA. The
16 NITA describes the challenged decision as the “NE 7th Ave and NE Tillamook
17 St. Design Plan,” which petitioner states became final on September 15, 2022.
18 Attached to the NITA is the city’s September 15, 2022 email and the September
19 2022 Revised Design.

20 On October 26, 2022, the city transmitted the record to LUBA and LUBA
21 received the city’s motion to dismiss the appeal. On October 27, 2022, we
22 suspended deadlines in the appeal other than the deadline to respond to the

1 motion to dismiss. On November 7, 2022, petitioner filed their response to the
2 motion to dismiss and an alternative motion to transfer to circuit court.

3 **JURISDICTION**

4 **A. Land Use Decision**

5 As relevant here, LUBA’s jurisdiction is limited to review of land use
6 decisions. ORS 197.825(1). ORS 197.015(10)(a)(A) defines “land use decision”
7 in relevant part as a final decision by a local government that concerns the
8 application of a comprehensive plan provision or land use regulation.¹ However,
9 ORS 197.015(10)(b) excludes from the definition of “land use decision” several
10 types of decisions that might otherwise fall within that definition, including a
11 decision “[t]hat determines final engineering design, construction, operation,
12 maintenance, repair or preservation of a transportation facility that is otherwise
13 authorized by and consistent with the comprehensive plan and land use
14 regulations[.]” ORS 197.015(10)(b)(D).

¹ ORS 197.015(10)(a)(A) defines “land use decision” 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;
- “(ii) A comprehensive plan provision;
- “(iii) A land use regulation; or
- “(iv) A new land use regulation[.]”

1 The city moves to dismiss this appeal, arguing that the challenged decision
2 falls within the exclusion at ORS 197.015(10)(b)(D) and is thus not a “land use
3 decision” as defined at ORS 197.015(10)(a). The city argues that the NE 7th Ave
4 and NE Tillamook St. Design Plan, either in its original form or as revised,
5 determines the final engineering design of a transportation facility that is
6 authorized by the city’s TSP, and thus falls squarely within the exclusion.

7 Petitioner responds that the exclusion at ORS 197.015(10)(b)(D) does not
8 apply, because the proposed street improvements are in fact inconsistent with the
9 TSP. Petitioner argues that the TSP requires a traffic circle at the NE 7th Ave and
10 NE Tillamook Street intersection, and therefore the proposed removal of the
11 traffic circle is inconsistent with the TSP. As the sole support for that assertion,
12 petitioner attaches to their response a copy of a TSP map downloaded and printed
13 from the internet.² The attached map, which is not detailed or in high-resolution,
14 depicts the intersection of NE 7th Ave and NE Tillamook Street as a simple T-
15 intersection, without any visible traffic circle. Even if a map in the TSP did depict
16 a traffic circle at that location, that might simply reflect existing conditions rather
17 than a TSP directive to maintain a traffic circle at that intersection. Nothing cited
18 to us in the TSP or elsewhere supports petitioner’s argument that the TSP requires
19 the continued existence of a traffic circle at the intersection. As noted above, the
20 TSP identifies as a project the reconstruction of NE 7th Ave as a part of a

² Petitioner does not state whether the map is in the record.

1 greenway, and instructs PBOT to develop a design for the project, none of which
2 suggests a directive to preserve existing features of the street.

3 Petitioner next argues that the ORS 197.015(10)(b)(D) exclusion does not
4 apply because the proposed improvements are inconsistent with TSP policies that
5 govern bikeways and greenways. Petitioner notes that NE 7th Ave is designated
6 as a major city bikeway and is part of a designated greenway corridor. According
7 to petitioner, bikeways and greenways are subject to TSP policies that, among
8 other things, require measures to slow vehicle operating speeds. Petitioner
9 contends that the existing traffic circle functions to slow vehicular speeds, and
10 removing the traffic circle is therefore inconsistent with such TSP policies.

11 The city argues that city engineers relied on other techniques to slow
12 vehicle speeds, including speedbumps, the manhole planter, and striped bicycle
13 lanes and crosswalks. We agree with the city that petitioner's disagreement with
14 city traffic engineers regarding appropriate means of slowing vehicular speeds
15 does not demonstrate that the challenged street improvements are inconsistent
16 with TSP provisions governing bikeways and greenways, or that the exclusion at
17 ORS 197.015(10)(b)(D) does not apply.

18 Petitioner also argues that removing the traffic circle may induce traffic to
19 cut through from nearby arterial streets, which might increase traffic on NE 7th
20 Ave to a degree that undermines its functional classification as a local street. The
21 city responds that the city's traffic engineers determined that the proposed

1 improvements are consistent with the street’s functional classification. Petitioner
2 cites no basis or evidence to conclude otherwise.

3 Petitioner has the ultimate burden of demonstrating that LUBA has
4 jurisdiction over the challenged decision. Petitioner has not demonstrated that the
5 exception at ORS 197.015(10)(b)(D) does not apply. The challenged decision
6 appears to fall squarely within the exception, as the final engineering design for
7 a transportation facility that is otherwise authorized by and consistent with the
8 comprehensive plan and land use regulations. Accordingly, we conclude that the
9 challenged decision is not a land use decision subject to our jurisdiction.

10 **B. Significant Impact Land Use Decision**

11 In prior opinions addressing the issue, LUBA has held that it may exercise
12 jurisdiction to review a local government decision that does not qualify as a
13 statutory land use decision as defined in ORS 197.015(10)(a), where among other
14 things the decision creates an “actual, qualitatively or quantitatively significant
15 impact on present or future land uses.” *Carlson v. City of Dunes City*, 28 Or
16 LUBA 411, 414 (1994) (citing *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d
17 996 (1982), and *Billington v. Polk County*, 299 Or 471, 703 P2d 232 (1985)).

18 In the present case, petitioner argues that the proposed street improvements
19 will create actual qualitatively and quantitatively significant impacts on nearby
20 land uses, and thus the city’s decision qualifies as a “significant impacts” land
21 use decision subject to LUBA’s review. However, as the city notes, LUBA has
22 held that the court-created significant impacts land use decision test does not

1 operate where a decision is subject to a legislatively adopted exception to ORS
2 197.015(10)(a). *Fire Mountain Gems and Beads v. City of Grants Pass*, 57 Or
3 LUBA 597, 606-07 (2008) (citing *Oregonians in Action v. LCDC*, 103 Or App
4 35, 38, 795 P2d 1098 (1990)). Because we have concluded that the exclusion at
5 ORS 197.015(10)(b)(D) applies, it follows that the challenged decision is not
6 subject to our jurisdiction under the significant impacts test.

7 **C. Timely Appeal**

8 ORS 197.830(3)(b) requires that a land use decision made without a
9 hearing or notice must be appealed to LUBA within 21 days of the date the
10 petitioner knew or should have known of the decision. The city argues that even
11 if the decision is a “land use decision” of some type, petitioner failed to file a
12 timely appeal of the decision. The city argues that petitioner’s challenges to the
13 NE 7th Ave and NE Tillamook St. Design Plan are almost exclusively directed
14 at the removal of the traffic circle. The city contends that the decision to remove
15 the traffic circle was made in February 2022, and the September 2022 Revised
16 Design did not modify that earlier decision. Therefore, the city argues that
17 petitioner knew or should have known of the February 2022 decision by
18 September 3, 2022, the date he was mailed the notice of construction. However,
19 the city argues, petitioner did not file an appeal of the February 2022 decision
20 until more than 21 days later. Accordingly, the city argues that the appeal was
21 untimely filed.

1 As noted, petitioner argues that the NE 7th Ave and NE Tillamook St.
2 Design Plan did not become final until the city issued the September 2022
3 Revised Design, on September 15, 2022. Petitioner contends that their appeal was
4 timely filed within 21 days of that date.

5 We need not resolve this issue, which is framed as an alternative to the
6 city's primary jurisdictional challenge. Because we have concluded that the
7 challenged decision is not a land use decision, it is unnecessary to decide whether
8 the appeal deadlines governing land use decisions were met.

9 **MOTION TO TRANSFER**

10 In the event LUBA concludes that the challenged decision is not a land use
11 decision or otherwise subject to LUBA's jurisdiction, petitioner moves to transfer
12 this appeal to circuit court, pursuant to ORS 34.102(4) and OAR 661-010-
13 0075(9).³

³ OAR 661-010-0075(9) states

“Motion to Transfer to Circuit Court:

“(a) Any party may request, pursuant to ORS 34.102, that an appeal be transferred to the circuit court of the county in which the appealed decision was made, in the event the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in 197.015(10) or (12).

“(b) A request for a transfer pursuant to ORS 34.102 shall be initiated by filing a motion to transfer to circuit court not later than 14 days after the date a respondent's brief or motion that

- 1 The city does not oppose the motion to transfer. The motion is granted.
- 2 The appeal is transferred to Multnomah County Circuit Court.

challenges the Board’s jurisdiction is filed. If the Board raises a jurisdictional issue on its own motion, a motion to transfer to circuit court shall be filed not later than 14 days after the date the moving party learns the Board has raised a jurisdictional issue.

“(c) If the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015(10) or (12), the Board shall dismiss the appeal unless a motion to transfer to circuit court is filed as provided in subsection (9)(b) of this rule, in which case the Board shall transfer the appeal to the circuit court of the county in which the appealed decision was made.”

Further, it should be noted that LUBA’s rules were amended, effective August 1, 2022, to require “[a]ll motions * * * be filed as a separate document and shall not be included with any other filings.” OAR 661-010-0065(3). This requirement is for all motions, including motions to transfer.