

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

DARLA LUTHER,
Petitioner,

vs.

CITY OF ALBANY,
Respondent.

LUBA No. 2022-107

FINAL OPINION
AND ORDER

Appeal from City of Albany.

Bob Tyler represented petitioner.

M. Sean Kidd represented respondent.

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

DISMISSED

04/07/2023

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

NATURE OF THE DECISION

Petitioner appeals a decision described in petitioner’s corrected notice of intent to appeal (NITA) as

“the land use decision or limited land use decision of respondent entitled *Appeal of City Code – Darla Luther* (as reflected on the Albany City Counsel Meeting Summary for Wednesday, December 14, 2022, attached hereto) which absent additional determination became final on December 14, 2022, and which involves the City of Albany’s interpretation of ‘can be’ in subsection (2)(a) of Albany Municipal Code 11.0[1].225 to mean ‘anytime it would be physically possible to’ connect an auxiliary water supply to the city’s potable water piping a backflow prevention device is required.” Notice of Intent to Appeal 1 (*italics in original*).

BACKGROUND

We take the facts from the parties’ pleadings and the minutes of the December 14, 2022 city council meeting included in the supplemental record. As we understand it, in September 2022, the city notified petitioner that Albany Municipal Code (AMC) 11.01.225(2)(a) requires petitioner to install a backflow device on a well located on their property. Petitioner sought relief from that requirement and presented argument to the city council during the public business portion of its December 14, 2022 meeting. At that meeting, the city council denied the requested relief. This appeal followed.

JURISDICTION

ORS 197.825(1) provides that “[LUBA] shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local

1 government, special district or a state agency in the manner provided in ORS
2 197.830 to 197.845.” In an order dated February 27, 2023, we raised the issue of
3 jurisdiction and directed petitioner and the city to file memoranda regarding the
4 basis for LUBA’s jurisdiction over the appeal. Petitioner filed a memorandum
5 asserting that the decision described in the NITA is a land use decision over
6 which LUBA has jurisdiction, and the city filed a memorandum in response,
7 asserting that the decision is not a land use decision over which LUBA has
8 jurisdiction. Petitioner then filed a reply to the city’s response.¹ For the reasons
9 explained below, we conclude that the decision described in the NITA is not a
10 land use decision and that we lack jurisdiction over the appeal.²

11 **A. The Decision Is Not a Statutory Land Use Decision**

12 As the party seeking LUBA review, the burden is on petitioner to establish
13 that the appealed decision is a land use decision. *Billington v. Polk County*, 299
14 Or 471, 475, 703 P2d 232 (1985). “Land use decision” includes a local
15 government decision that concerns the adoption, amendment, or application of:

16 “(i) The goals;

¹ Although our February 27, 2023 order did not direct or allow petitioner to file a reply to the city’s responsive memorandum, we have considered it.

² As defined by ORS 197.015(10)(a), a “land use decision” must be a “final” decision. The city does not allege that the decision described in the NITA, the “Meeting Summary,” is not a “final” decision within the meaning of ORS 197.015(10)(a) or OAR 661-010-0010(3). Respondent’s Memorandum on Jurisdiction 3. We therefore do not consider that question.

1 “(ii) A comprehensive plan provision;

2 “(iii) A land use regulation; or

3 “(iv) A new land use regulation[.]” ORS 197.015(10)(a)(A).

4 “Comprehensive plan” means

5 “a generalized, coordinated land use map and policy statement of
6 the governing body of a local government that interrelates all
7 functional and natural systems and activities relating to the use of
8 lands, including but not limited to sewer and water systems,
9 transportation systems, educational facilities, recreational facilities,
10 and natural resources and air and water quality management
11 programs.” ORS 197.015(5).

12 “Land use regulation” means “any local government zoning ordinance, land
13 division ordinance, * * * or similar general ordinance establishing standards for
14 implementing a comprehensive plan.” ORS 197.015(11).

15 The Albany Development Code (ADC) is Exhibit A to the ordinance
16 codified at AMC title 20. AMC 20.04.010. The purpose of the ADC is, in part,
17 to “[s]erve as the principal vehicle for implementation of the City’s
18 Comprehensive Plan in a manner that protects the health, safety, and welfare of
19 the citizens of Albany.” ADC 1.020(1). Differently, AMC title 11, which contains
20 the provision on which the city relied to require installation of a backflow device,
21 is entitled “Water” and contains rules and regulations for the city’s water system.³

³ AMC 11.01.225 contains “[b]ackflow prevention requirements.” AMC 11.01.225(2) provides, in part:

“Backflow prevention assemblies shall be installed by a State-licensed installer, at customer’s expense, on each service line of the

1 Petitioner acknowledges that AMC title 11 is not a part of the ADC but
2 argues that “[petitioner’s] situation qualifies as a general ordinance establishing
3 standards for implementing a comprehensive plan.” Petitioner’s Memorandum
4 on Jurisdiction 4. Although their argument is difficult to follow, we understand
5 petitioner to argue that AMC title 11 implements the Albany Comprehensive Plan
6 (ACP). Petitioner quotes the purpose statement in the introduction section of the
7 ACP, which explains that the ACP “provides a framework for making better
8 decisions about the uses of land and its resources.” *Id.* at 3. Petitioner then quotes
9 the background summary for ACP Goal 6 (Air, Water, and Land Resources
10 Quality), which states that the city “relies on the Oregon Department of
11 Environmental Quality for water quality monitoring and enforcement of state and
12 federal water quality laws.” *Id.* at 3-4; Reply to Respondent’s Memorandum on
13 Jurisdiction 3. Accordingly, petitioner argues, the city’s decision concerns the
14 application of a comprehensive plan provision. ORS 197.015(10)(a)(A)(ii).

15 The city responds that AMC title 11 is not a land use regulation and does
16 not implement the ACP. We agree. Petitioner’s citation to general statements in
17 the ACP are not sufficient to demonstrate that AMC title 11 implements the ACP.

customer’s system at or near the property line or, if approved,
immediately inside the building being served, but in all cases, before
the first branch line leading off the service line wherever any of the
following conditions exist:

“(a) Where there is an auxiliary water supply which is or can be
connected to the potable water piping.”

1 Further, as the city correctly points out, “[i]t is not sufficient that a decision may
2 touch on some aspects of the comprehensive plan, rather the comprehensive plan
3 must contain provisions intended as standards or criteria for making the appealed
4 decision.” *Portland Oil Service Co. v. City of Beaverton*, 16 Or LUBA 255, 260
5 (1987) (citing *Billington*, 299 Or at 475). Petitioner does not identify any specific
6 provisions in the ACP that serve as criteria for the decision, and petitioner’s
7 arguments do not establish that AMC title 11 implements the ACP. Accordingly,
8 we conclude that the challenged decision is not a statutory land use decision.

9 **B. The Decision Is Not a Significant Impacts Land Use Decision**

10 Alternatively, petitioner argues that LUBA has jurisdiction because the
11 “Meeting Summary” is a “significant impacts” land use decision recognized by
12 the Supreme Court in *Petersen v. Klamath Falls*, 279 Or 249, 566 P2d 1193
13 (1977), and *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 992 (1982). The
14 Supreme Court’s decisions in those cases make it clear that, to qualify as a
15 significant impacts land use decision, and for LUBA to have review jurisdiction,
16 the decision must create an actual, qualitatively or quantitatively significant
17 impact on present or future land uses. *Carlson v. City of Dunes City*, 28 Or LUBA
18 411, 414 (1998).

19 In *Northwest Trail Alliance v. City of Portland*, we explained our view of
20 the limited circumstances under which LUBA should exercise its review
21 jurisdiction under the judicially created significant impacts test:

22 “In the very rare cases when the significant impacts test is deemed

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

14 "In our view, LUBA should exercise review jurisdiction over a
15 decision under the significant impacts test only if the petitioner
16 identifies the non-land-use standards that the petitioner believes
17 apply to the decision and would govern LUBA's review. Further,
18 we believe that those identified non-land-use standards must have
19 *some* bearing or relationship to the use of land." 71 Or LUBA 339,
20 346 (2015) (emphasis in original).

21 Thus, in order to establish LUBA's jurisdiction over the decision, (1) petitioner
22 must identify the non-land-use standards that petitioner believes apply to the
23 decision memorialized in the "Meeting Summary," and (2) those standards must
24 have some direct bearing on petitioner's use of their land. While AMC 11.01.225
25 could be the non-land-use standard identified by petitioner, and while it is
26 undisputed that the city applied that code provision to the decision, petitioner has
27 not established that the city's application of AMC 11.01.225 will have any

1 bearing on petitioner's use of their land at all.⁴ We conclude that the challenged
2 decision is not a significant impacts land use decision.

3 **C. Conclusion**

4 For the foregoing reasons, petitioner has not established that the decision
5 described in the NITA is either a statutory or a significant impacts land use
6 decision subject to LUBA's limited jurisdiction.

7 Petitioner has not moved for this appeal to be transferred to circuit court
8 pursuant to ORS 34.102 and OAR 661-010-0075(9). Accordingly, this appeal
9 must be dismissed.

10 The appeal is dismissed.

⁴ Petitioner also argues that the decision described in the NITA will affect other property owners in the city. However, the decision requiring installation of a backflow device applies only to petitioner.