LUBA
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1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3
4 JOAN NEICE and MICHAEL GALIZIO,
5 *Petitioners*,
6
7 vs.
8
9 PROSPER PORTLAND and CITY OF PORTLAND,
10 *Respondents.*
11
12 LUBA No. 2023-091
13
14 FINAL OPINION
15 AND ORDER
16
17 Appeal from Prosper Portland and City of Portland.
18
19 Ross Day filed the petition for review and reply brief and argued on behalf
20 of petitioners. Also on the brief was Day Law, P.C.
21
22 Lauren King filed the respondents' brief. Linly F. Rees argued on behalf
23 of respondents.
24
25 RUDD, Board Member; RYAN, Board Chair; ZAMUDIO, Board
26 Member, participated in the decision.
27
28 RYAN, Board Chair, concurring.
29
30 DISMISSED 05/03/2024
31
32 You are entitled to judicial review of this Order. Judicial review is
33 governed by the provisions of ORS 197.850.

1 Opinion by Rudd.

2 **NATURE OF THE DECISION**

3 Petitioners appeal Resolution No. 7512 (Resolution), a resolution adopted
4 by the Prosper Portland Commission on December 13, 2023, authorizing Prosper
5 Portland to enter into an agreement (titled "Use Permit") with the City of Portland
6 for operation of a navigation center to provide short term shelter and assistance
7 accessing social service programs for persons experiencing homelessness.

8 **BACKGROUND**

9 In February 2019, Prosper Portland (Prosper) and the city (together,
10 respondents) entered into a master lease agreement for property owned by
11 Prosper located at 1111 N.W. Naito Parkway.[1] The city then subleased the
12 property to Oregon Harbor of Hope (OHOH).

13 In February 2019, the city approved a building permit and zoning
14 authorization to build and operate a navigation center to provide short term
15 shelter and assistance accessing social service programs for persons experiencing
16 homelessness. *See Madrona Park, LLC v. City of Portland*, 80 Or LUBA 26, 28-
17 29, *aff'd*, 300 Or App 403, 450 P3d 1050 (2019) (explaining the building permit
18 and zoning authorization). As part of the building permit approval, the city
19 concluded that the navigation center use was authorized as a temporary use under
20 the city's zoning code at Portland City Code (PCC) 33.296.030(G), which allows

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[1] Prosper is the City of Portland's urban renewal agency.

1 the activities and the structure during a city-council-declared housing emergency
2 under PCC 15.04.040(F). Also in 2019, OHOH applied for and received design
3 review approval for the navigation center.[2]

4 The master lease expired on December 31, 2023. On December 13, 2023,
5 Prosper's commission adopted the Resolution authorizing Prosper to enter into
6 the Use Permit with the city. This appeal followed.

7 **MOTION FOR OFFICIAL NOTICE**

8 OAR 661-010-0046(1) provides that we may take official notice of
9 relevant law as defined in ORS 40.090. In a footnote to a motion to dismiss filed
10 by respondents at the same time as their joint respondents' brief, respondents
11 request that we take official notice of Ordinance 187371, adopted on October 7,
12 2015, and Ordinance 190756, adopted on March 30, 2022. *See* Motion to Dismiss
13 2 n 1-2, 3 n 3. OAR 661-010-0046(2) requires that motions for official notice not
14 be included within a brief or other filing and shall set out the basis for official
15 notice, what the movant seeks to prove through the item, and the relevance of the
16 item to an issue on appeal. Respondents do not comply with OAR 661-010-0046
17 and we do not address the motion further.

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[2] One of the design review conditions of approval provided that "the proposed structures on the site shall be removed no later than five years after the permit is finaled [*sic*]." Record 45; Deceleration in Support Ex 8, at 28. Respondents state that the building permit was "finaled" on August 22, 2023, and that the design review approval therefore expires on August 22, 2028. Motion to Dismiss 6.

1 **MOTION TO DISMISS**

2 Respondents move to dismiss this appeal for lack of jurisdiction. LUBA
3 has exclusive jurisdiction to review "any land use decision * * * of a local
4 government, special district or a state agency[.]" ORS 197.825(1). As the party
5 seeking LUBA's review, the burden is on petitioners to establish that the
6 appealed decision is subject to LUBA's jurisdiction. *Billington v. Polk County*,
7 299 Or 471, 475, 703 P2d 232 (1985).

8 ORS 197.015 provides that "as used in ORS chapters 195, 196, 197 and
9 197A, unless the context requires otherwise[,]" the definition of a "[l]and use
10 decision" includes a local government or special district decision that

11 "concerns the adoption, amendment, or application of:

12 "(i) The goals;

13 "(ii) A comprehensive plan provision;

14 "(iii) A land use regulation; or

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

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[3] ORS 197.015(19) defines "special district" to mean "any unit of local government, other than a city, county, Metro or an association of local governments performing land use planning functions under ORS 195.025, authorized and regulated by statute and includes but is not limited to water control districts, domestic water associations and water cooperatives, irrigation districts, port districts, regional air quality control authorities, fire districts, school districts, hospital districts, mass transit districts and sanitary districts."

"Land use regulation" means "any local government zoning ordinance, land division ordinance[,] * * * or similar general ordinance establishing standards for implementing a comprehensive plan." ORS 197.015(11).

In *Billington*, the Supreme Court held that a decision is a land use decision over which LUBA has jurisdiction if the "decision will have significant impact on present or future land uses." 299 Or at 480. Petitioners concede that the Resolution is not a "land use decision" under ORS 197.015(10)(a). Petitioners' Response to Respondents' Motion to Dismiss 2. Petitioners argue that the Resolution is a "decision that will have a significant impact on present or future land uses." Petitioners' Response to Respondents' Motion to Dismiss 3.

To be a significant impacts land use decision, the challenged decision must create "an actual, qualitatively or quantitatively significant impact *on present or future land uses*." *Carlson v. City of Dunes City*, 28 Or LUBA 411, 414 (1994) (emphasis added). In *Marks v LCDC*, 327 Or App 708, 536 P3d 995 (2023), the Court of Appeals held that an intergovernmental agreement (IGA) among three local governments to delay adoption of concept plans for areas in the Metro urban reserve was a "land use decision" within the meaning of ORS 197.320, and thus subject to a petition for Land Conservation and Development Commission (LCDC) enforcement pursuant to that statute, because it was "a decision not to move forward with the steps necessary for the urbanization and eventual

1 annexation of Stafford."[4] *Id.* at 734. Citing *Marks*, petitioners argue that the
2 Resolution is a decision by Prosper that is analogous to the IGA at issue in *Marks*
3 because, according to petitioners, it is a decision to not change an existing land
4 use. Petition for Review 5-6. However, we see nothing analogous between the
5 IGA at issue in *Marks* and the Resolution. *Marks* concerned an alleged failure to
6 move forward with planning for urbanization and annexation and a resulting
7 petition for LCDC enforcement action. Here, there is no failure to move ahead
8 with a land use action and no petition for LCDC enforcement action.

9 Land use authorization to use the property for the purposes intended by the
10 city was obtained in the 2019 Building Permit and the 2019 Design Review
11 decision. The Resolution authorizes Prosper's executive director to authorize the
12 city to occupy Prosper's property through an agreement that is similar to the
13 previous master lease agreement. The Resolution does not purport to include land
14 use or zoning authorization to use the property for the use identified in the Use
15 Permit and we conclude that the Resolution has no effect on land uses.

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[4] ORS 197.320 identifies circumstances in which

> "[LCDC] shall issue an order requiring a local government, state agency or special district to take action necessary to bring its comprehensive plan, land use regulation, limited land use decisions or other land use decisions or actions into compliance with the goals, acknowledged comprehensive plan provisions, land use regulation [or] housing production strategy[.]"

1 Petitioners also argue that the navigation center has had a significant
2 impact on their personal safety and safety in the surrounding neighborhood.
3 While we do not doubt that the record supports their argument, the significant
4 impacts test is not concerned with general non-land-use impacts to the area, but
5 with impacts on the "land use status quo of the area." *City of Pendleton v. Kerns*,
6 294 Or 126, 135, 653 P2d 992 (1982). Petitioners do not argue that the navigation
7 center has any impacts on the land use status quo in the area.

8 In their second assignment of error, petitioners assert that the use is
9 contrary to the River District Urban Renewal Plan (RDURP). *See* Petition for
10 Review 11-13. The RDURP is an urban renewal plan as defined in ORS
11 457.010(19), originally adopted by Prosper in 1998. To the extent petitioners
12 argue that the RDURP is a "land use regulation," petitioners do not establish that
13 the RDURP is a "local government zoning ordinance, land division ordinance[,]
14 * * * or similar general ordinance establishing standards for implementing a
15 comprehensive plan," and thus do not establish that the RDURP is a land use
16 regulation as defined in ORS 197.015(11).[5]

17 We agree with respondents that the Resolution is not a land use decision
18 as defined in ORS 197.015(10)(a)(A) or a significant impacts decision, and
19 LUBA lacks jurisdiction over the appeal.

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[5] Moreover, petitioners do not explain why, even if the RDURP is a land use regulation, a point which we do not decide, the Resolution concerns the application of the RDURP.

1 The appeal is dismissed.

2 RYAN, Board Chair, concurring.

3 I agree with the majority that the Resolution is not a significant impacts
4 decision. I write separately to explain my view that a significant impacts decision
5 is not a decision over which LUBA has jurisdiction pursuant to ORS 197.825(1).

6 LUBA is a state agency, a creation of statute, and the scope of its power is
7 set forth in and confined by its enabling statute. *PNW Metal Recycling v. Dept.*
8 *of Environmental Quality*, 371 Or 673, 676, 540 P3d 523 (2023), *adh'd to as*
9 *modified on recons*, 372 Or 158, ___ P3d ___ (2024); *SAIF v. Shipley*, 326 Or
10 557, 561, 955 P2d 244 (1998) ("an agency has only those powers that the
11 legislature grants and cannot exercise authority that it does not have"); *Diack v.*
12 *City of Portland*, 306 Or 287, 293, 759 P2d 1070 (1988) (an agency's
13 "'[j]urisdiction' depends on whether the matter is one that the legislature has
14 authorized the agency to decide"). LUBA's enabling legislation at ORS
15 197.825(1) provides that LUBA has exclusive jurisdiction to review "any land
16 use decision of a local government, special district or a state agency." ORS
17 197.015(10)(a)(A) provides that, as used in ORS chapter 197, a "land use
18 decision" includes a local government decision that "concerns the adoption,
19 amendment, or application of: "(i) The goals; (ii) A comprehensive plan
20 provision; (iii) A land use regulation; or (iv) A new land use regulation[.]"

21 In my view, as explained below, the Supreme Court's decision in
22 *Billington* impermissibly expanded LUBA's jurisdiction set forth in ORS

1 197.825(1) by creating common law subject matter jurisdiction over some local
2 government decisions that do not qualify as statutory land use decisions. In my
3 view, judicially created subject matter jurisdiction that has no basis in the statutes
4 governing LUBA review cannot be a basis for LUBA jurisdiction.

5 The significant impacts decision was first articulated in 1977 in *Petersen*
6 *v. Klamath Falls*, 279 Or 249, 566 P2d 1193 (1977), two years before LUBA was
7 created by the legislature in 1979, and before the first definition of "land use
8 decision" was enacted at the same time that LUBA was created. Or Laws 1979,
9 ch 772, §§ 3-4. *Petersen* involved *circuit court* review in a writ of review
10 proceeding of a City of Klamath Falls ordinance annexing into the city 141 acres
11 of land in agricultural use. At that time, ORS 197.175 (1973) provided in relevant
12 part:

13 "(1) Cities and counties shall exercise *their planning and zoning*
14 *responsibilities* in accordance with ORS 197.005 to 197.430,
15 215.055, 215.510, 215.515, 215.535 and 469.350 and the
16 state-wide planning goals and guidelines approved under
17 ORS 197.005 to 197.430, 215.055, 215.510, 215.515,
18 215.535 and 469.350.

19 "(2) "Pursuant to ORS 197.005 to 197.430, 215.055, 215.510,
20 215.515, 215.535 and 469.350, each city and county in this
21 state shall:

22 "(a) Prepare and adopt comprehensive plans consistent with
23 state-wide planning goals and guidelines approved by
24 the commission; and

1 "(b) Enact zoning, subdivision and other ordinances or
2 regulations to implement their comprehensive plans."
3 *Petersen*, 279 Or at 251, 253 n 3 (emphasis added.)[6]

4 In the ordinance annexing the property, the city did not adopt any findings
5 addressing the statewide goals. The petitioners filed a writ of review in circuit
6 court, and the circuit court upheld the ordinance. The Court of Appeals upheld
7 the circuit court's decision, concluding that annexation of land did not qualify as
8 an exercise of the city's responsibilities under ORS 197.175(1) because the
9 zoning of the property was unchanged after annexation.

10 The Supreme Court reversed, holding that a city's decision to annex land
11 outside its existing borders is an exercise of the city's "planning * * *
12 responsibilities" within the meaning of ORS 197.175(1) (1973), even if the land's
13 zoning remained the same after annexation. *Petersen*, 279 Or at 255. The Court
14 held:

15 "In other words, the exercise of 'planning and zoning
16 responsibilities' [under ORS 197.175(1)] must be read to refer not
17 only to the preparation of comprehensive plans and the enactment
18 of zoning and other ordinances to implement those plans but also to
19 other local planning activities which will have a significant impact
20 on present or future land uses, such as the decision to extend city
21 boundaries by annexation." *Id.* at 253-54.

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[6] ORS 215.515 (1969) adopted the statewide interim goals and included an urbanization goal and an agricultural lands goal. ORS 197.225 directed LCDC to adopt the goals, and the LCDC goals were adopted by the LCDC in late 1974. *Petersen*, 279 Or at 257 n 7. At the time the challenged annexation ordinance was adopted, the city had adopted a comprehensive plan but that plan had not yet been acknowledged by the LCDC.

1 The Supreme Court reversed and remanded the decision to the city council to
2 apply the goals. And thus, in the context of interpreting the meaning of the phrase
3 "planning and zoning responsibilities" in ORS 197.175(1) as it applied to a city
4 council ordinance annexing property, the significant impacts test was born.[7]
5 In 1979, two years after *Petersen* was decided, the legislature created
6 LUBA and gave LUBA exclusive jurisdiction to review "land use decisions" as
7 the legislature defined that term in the same legislation. Or Laws 1977, chap 772,
8 §§ 3-4. In *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 922 (1982), the
9 Supreme Court affirmed LUBA's and the Court of Appeals' conclusion that a
10 city ordinance that authorized the improvement of an already dedicated street and
11 set up a local improvement district to finance the construction was an exercise of
12 the city's "planning and zoning responsibilities" under ORS 197.175(1) (1977),
13 and thus that statute required the city to apply the statewide goals and the city's
14 comprehensive plan. Because of the requirement to apply the goals and the
15 comprehensive plan, the ordinance was a "land use decision" within the meaning
16 of Oregon Laws 1979, chapter 772, section 3. *See* n 9.
17 In *Billington v. Polk County*, 10 Or LUBA 135, *rev'd and rem'd*, 68 Or
18 App 914, 683 P2d 568 (1984), *rem'd*, 299 Or 471, 703 P2d 232 (1985), the

[7] The Court also held that pursuant to ORS 197.300(1)(d) (1973), LCDC had "the authority to review local ordinances which relate to activities designated in the statewide planning goals and to determine if such ordinances are in violation of those goals." *Petersen*, 279 Or at 255. LCDC's jurisdiction over future review of the ordinance was not further discussed.

1 petitioners appealed a county ordinance vacating the west 20 feet of a 40-foot-
2 wide road abutting the petitioners' property for 1400 feet pursuant to ORS
3 chapter 368. The county argued that the ordinance was reviewable through a writ
4 of review proceeding in circuit court and not by appeal to LUBA because the
5 ordinance did not apply any provisions of the county's acknowledged
6 comprehensive plan or zoning ordinance, and thus did not meet the definition of
7 "land use decision." LUBA concluded that the decision to vacate the road was a
8 land use decision as defined in ORS 197.015(10) because the decision concerned
9 three policies in the county's acknowledged comprehensive plan. *Billington*, 10
10 Or LUBA at 138.

11 The Supreme Court reversed LUBA's conclusion that the county
12 comprehensive plan provisions should have been applied in considering whether
13 to vacate the road, and concluded that there was no basis under ORS
14 197.015(10)(a) (1983) for LUBA to review the challenged county ordinance
15 because it was not a "land use decision" as defined in that statute. 299 Or at 479.
16 The Court then held:

17 "In conclusion, there are two tests to determine whether a decision
18 is a land use decision: (1) The statutory test defined by ORS
19 197.015(10), and (2) The significant impact test as referred to
20 *Petersen* and *Kerns* for decisions not expressly covered in *a land*
21 *use norm*.

22 "* * * * *

23 "In the absence of a direct statutory mandate to apply a
24 comprehensive plan provision or ordinance, the next step is to

> determine whether the decision will have significant impact on present or future land uses. If the decision will have significant impact, it is a land use decision and LUBA has jurisdiction over the land use matters." *Id.* at 479-80 (emphasis added).

Here, for the first time, the Supreme Court applied the significant impacts test to a local government decision with no linkage to the county's planning and zoning responsibilities under ORS 197.175(1), and no linkage to the statewide goals, the county's comprehensive plan, or its zoning ordinance.

The Court of Appeals has explained:

> "The 'significant impact test' was devised to supplement the legislative grant of jurisdiction to LUBA, by making some *land use actions* reviewable that do not meet the statutory definition of a 'land use decision.' *See Wagner v. Marion County*, 79 Or App 233, 719 P 2d 31, *rev den*, 302 Or 86, 726 P 2d 1185 (1986)." *Oregonians in Action v. LCDC*, 103 Or App 35, 38, 795 P2d 1098 (1990) (emphasis added).

The power to define and expand or contract a state agency's jurisdiction lies solely with the legislative branch. In my view, the Supreme Court lacked then and lacks now the authority to expand LUBA's jurisdiction beyond the legislative grant to LUBA in ORS 197.825(1) of exclusive authority to review "land use decisions" as defined in ORS 197.015(10)(a). ORS 197.825(1) vests LUBA with the power to review "land use decisions." It does not use the phrase "land use norms," as used in *Billington*, or "land use actions," as used in *Oregonians in Action*.

As a practical matter, as more than 40 years of LUBA and Court of Appeals' decisions demonstrate, the significant impacts test is an unworkable test

1 for local governments, participants in local government processes, LUBA, and
2 the courts.[8] The test is always applied *post hoc* and in a way that delays resolution
3 of the dispute, because by the time a local government learns from a reviewing
4 body that it made a significant impacts decision that is subject to procedural
5 safeguards for land use decisions without applying those procedural safeguards,
6 much time has elapsed between the initial local government decision and the time
7 when the local government essentially starts over, applying procedural
8 safeguards.

9 I respectfully urge the legislature, or the Supreme Court when presented
10 with the opportunity to do so, to expressly overrule *Billington* and recognize that
11 only the legislature has the authority to define LUBA's powers, including its
12 subject matter jurisdiction. The legislature did so in 1979 when it created LUBA
13 and defined LUBA's jurisdiction to include exclusive review of "land use
14 decisions" as that term was defined in Oregon Laws 1979, chapter 772, section

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[8] For examples of decisions that passed the test, *see Mekkers v. Yamhill County*, 38 Or LUBA 928, 931 (2000) and *Citizens for Better Transit v. Metro*, 15 Or LUBA 623 (1987).

For examples of decisions that did not pass the test, *see Billington v. Polk County*, 14 Or LUBA 173 (1985); *Miller v. City of Dayton*, 22 Or LUBA 661, 666, *aff'd*, 113 Or App 300 (1992); *Hashem v. City of Portland*, 34 Or LUBA 629, 631 (1998); *Butts v. Hillsboro School District 1J*, 33 Or LUBA 211, 215 (1997); *Decker v. City of Cornelius*, 45 Or LUBA 539, 547 (2003); *Phillips v. City of Hermiston*, 39 Or LUBA 581, 583 (2001); *Arlington Heights Neighborhood Association v. City of Portland*, 45 Or LUBA 559, 564 (2003).

1 3.[9] Local government decisions that are not statutory "land use decisions" over
2 which LUBA has exclusive review jurisdiction continue to be reviewable
3 pursuant to a writ of review under ORS 34.010 through 34.102.

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[9] Oregon Laws 1979, chapter 772, section 3 provided that:

"'Land use decision' *means*:

"(a) A final decision or determination made by a city, county or special district governing body that concerns the adoption, amendment or application of:

(A) The state-wide planning goals;

(B) A comprehensive plan provision; or

(C) A zoning, subdivision or other ordinance that implements a comprehensive plan; or

"(b) A final decision or determination of a state agency other than the [LCDC], with respect to which the agency is required to apply the statewide planning goals." (Emphasis added.)

In Oregon Laws 1983, chapter 827, section 1, the legislature amended the definition of "land use decision" to use the word "includes" instead of "means" to describe the same decisions previously described in Oregon Laws 1979, chapter 772, section 3, and added subsection (b), which described, for the first time, decisions that the definition of "land use decision" "does not include" – ministerial decisions. *Madrona Park, LLC,* 80 Or LUBA at 30-31 (explaining the legislative history of ORS 197.015(10)(b) (1983)). I do not view the legislature's change from the word "means" to define "land use decision" to using the words "includes" and "does not include" to have any significance, or to convert the definition of land use decision into a non-exhaustive one. Rather, I view it as comparing and contrasting the universe of decisions that are land use decisions (decisions that concern the goals, the comprehensive plan, or the land use

1 For the above reasons, I respectfully concur in the decision.

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regulations) with the universe of decisions that are not land use decisions (ministerial decisions).