

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

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,
350PDX, WILLAMETTE RIVERKEEPER, NANCY HISER,
MICHAEL POUNCIL, LAURA FELDMAN, SARAH TAYLOR,
SHAWN LOONEY, LAURIE KING, LORENE SCHEER,
DEAN HISER, DARISE WELLER, ANN RUTTAN,
JAN ZUCKERMAN, DAVE LOONEY, SUSAN BLADHOLM,
DIANE MEISENHELTER, DAVE KING, KATRI LAUKKANEN,
JOE MILLER, and SARAH HEINECKE,
Petitioners,

vs.

CITY OF PORTLAND,
Respondent,

and

ZENITH ENERGY TERMINALS HOLDINGS LLC,
Intervenor-Respondent.

LUBA No. 2025-019

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Jesse A. Buss represented petitioners.

Lauren A. King represented respondent.

Merissa A. Moeller represented intervenor-respondent.

BASSHAM, Board Member; ZAMUDIO, Board Chair; WILSON, Board
Member, participated in the decision.

TRANSFERRED

06/05/2025

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

NATURE OF THE DECISION

Petitioners appeal a city Land Use Compatibility Statement (LUCS) concluding that an existing petroleum and renewable fuel facility is a use allowed in a city industrial zone.

MOTION TO FILE REPLY AND SUR-REPLY

Zenith Energy Terminals Holdings LLC (Zenith) moves to file a reply to petitioners' opposition to the motions to dismiss, discussed below. Zenith states that its reply is limited to a new unanticipated issue raised in petitioners' opposition. In turn, petitioners move for leave to file a sur-reply to Zenith's reply, to address a new issue raised in that reply. We agree that the additional briefing is warranted. Both motions are granted.

FACTS

Zenith operates a fossil fuel facility located in the city's Heavy Industrial (IH) zone. The facility currently consists of a petroleum and renewable fuels distribution terminal, with bulk storage tanks with a capacity of approximately 64 million gallons. It also includes an asphalt refinery. As discussed below, under the city's land use code, Zenith's existing fuel facility is categorized as a Bulk Fossil Fuel Terminal, a use category that is described in some detail at Portland

1 City Code (PCC) 33.920.300.¹ Portions of the site are located within the
2 Willamette River Greenway, and the facility includes a dock used for marine
3 transshipment of fuels.
4 Zenith’s existing facility operates under Air Contaminant Discharge
5 Permits issued in 2022 by the Oregon Department of Environmental Quality

¹ PCC 33.920.300 is part of a chapter entitled “Description of Use Categories,” and describes the use category “Bulk Fossil Fuel Terminal” as follows:

- “A. **Characteristics.** Bulk Fossil Fuel Terminals are establishments primarily engaged in the transport and bulk storage of fossil fuels. Terminal activities may also include fuel blending, regional distribution, and wholesaling. Terminals have access to marine, railroad, or regional pipeline to transport fuels to or from the site, and either have transloading facilities for transferring a shipment between transport modes, or have transloading facilities and storage tank capacity exceeding 2 million gallons. There is minimal on-site sales activity with the customer present.
- “B. **Accessory uses.** Accessory uses may include retail sales of petroleum products, offices, food membership distribution, parking, storage, truck fleet parking and maintenance areas, rail spur or lead lines, and docks.
- “C. **Examples.** Examples include crude oil terminals, petroleum products terminals, natural gas terminals, propane terminals, and coal terminals.
- “D. **Exceptions.** [Listing eight exceptions that constitute different land use categories, including Warehouse and Freight Movement facilities]” (Boldface in original.)

1 (DEQ). To obtain those 2022 DEQ permits, Zenith submitted a DEQ LUCS form
2 to the city, requesting that the city make a LUCS decision. A LUCS decision is a
3 determination by a local government that a proposed state agency action, such as
4 issuing a state agency permit regulating some aspect of a land use, is or is not
5 compatible with the local government's comprehensive plan and land use
6 regulations. *See* ORS 197.180(1)(b) (setting out the obligation of state agencies
7 to take actions "in a manner compatible with acknowledged comprehensive plans
8 and land use regulations"). Typically, the applicant for a state agency permit
9 regulating some aspect of a land use will submit an agency LUCS form to the
10 local government planning staff, who then evaluate the applicant's proposal to
11 determine whether and how it is regulated under the comprehensive plan and
12 local codes, including whether local land use review or approval is required. The
13 results of that evaluation are entered on the LUCS form, sometimes supported by
14 findings, and then returned to the state agency. The state agency relies on the
15 LUCS decision to ensure that its decision on the requested state agency action is
16 consistent with the agency's land use coordination obligations.

17 On October 3, 2022, the interim planning director issued the 2022 LUCS
18 concluding in relevant part that the facility "is allowed; findings are attached."
19 City's Motion to Dismiss Ex 1, at 3. The findings attached consist of Zenith's
20 four-page narrative that accompanied the LUCS application. *Id.* at 4-7. The
21 narrative describes the facility as the "Repositioned Facility," and includes a
22 project description of "Near-Term Phase Out of All Crude Oil." *Id.* at 4-5. The

1 narrative describes operations that are part of an ongoing transition from one that
2 mostly handles fossil fuels toward an operation that handles only sustainable
3 fuels.² In addition, the narrative attached to the 2022 LUCS described four
4 “limitations” or “conditions” on how the facility would operate, which Zenith
5 stipulated could be enforced by the city. The 2022 LUCS was not appealed or
6 challenged.

² As we understand the relevant history, Zenith’s transition from a fossil fuel terminal to a sustainable fuel terminal is responsive to legislative zoning code amendments first adopted in 2016 called the Fossil Fuel Terminal (FFT) amendments, which in turn implemented certain policies in the 2035 Comprehensive Plan. City’s Motion to Dismiss 2-3. The FFT amendments generally prohibit new FFTs in the city, and limit the size of existing FFTs. *See* PCC 33.140.100(16). The FFT amendments bounced up and down the appellate ladder, and were most recently re-adopted in 2022. The city states that those 2022 amendments did not become final until February 2024. Prior to that date, the city would apply the 2035 Comprehensive Plan policies directly to decisions involving fossil fuel terminals, including a 2021 LUCS submitted by Zenith. *See Zenith Energy Terminal Holdings v. City of Portland*, LUBA No 2021-083 (Feb 3, 2022), *aff’d*, 319 Or App 538, 509 P3d 120, *rev den*, 370 Or 303 (2022) (concluding that, in issuing the 2021 LUCS, the city correctly addressed whether the then-existing Zenith facility was compatible with 2035 Comprehensive Plan policies). In the present case, we understand the city to take the position that after the FFT amendments became final in February 2024, the city’s zoning code and 2035 Comprehensive Plan policies became “aligned,” and the 2035 Comprehensive Plan policies no longer apply directly to decisions involving a fossil fuel terminal allowed in the IH zone. City’s Motion to Dismiss 9, 12; *see* PCC 33.800.050(B) (approval criteria are based on the comprehensive plan; reviews against the goals and policies of the comprehensive plan are not required unless specifically stated).

1 In the present case, Zenith is seeking updated DEQ Air Contamination
2 Discharge Permits. The updated permits would extend DEQ approval for certain
3 proposed operational changes to Zenith's existing fossil fuel facility. As we
4 understand it, the changes include expanding the geographic scope of the DEQ
5 permits to include adjacent land owned by third parties, and installing new
6 equipment to produce sustainable jet fuel. To obtain the new or updated DEQ
7 permits, Zenith submitted a new DEQ LUCS form to the city, supported by an
8 applicant narrative that describes the facility with the proposed minor changes.
9 Like the 2022 LUCS, the facility is described as the "Repositioned Facility," and
10 the project description is titled "Near-Term Phase Out of All Crude Oil." Notice
11 of Intent to Appeal (NITA) Ex 1, at 5-6. The narrative includes the same four
12 "limitations" described in the 2022 LUCS, but with additional detail. The
13 narrative also includes an analysis of relevant zoning code provisions and 2035
14 Comprehensive Plan policies governing Fossil Fuel Terminals, and concludes
15 that the facility as described in the LUCS narrative is compatible with the cited
16 zoning code and plan policies.

17 On February 3, 2025, without public notice or hearing, the interim
18 planning director issued the LUCS decision challenged in this appeal (2025
19 LUCS). On the form, the interim planning director checked two boxes. One box
20 indicates that "the activity or use is allowed outright," with the following notation
21 added by the director: "PCC 33.140.100. Because it is allowed outright under
22 Zoning Code and the Zoning Code has been aligned with the acknowledged

1 comprehensive plan with respect to this use or activity by Ordinance No.
2 #190978 it is compatible with the acknowledged comprehensive plan.” NITA Ex
3 1, at 4. We understand that “Ordinance No. #190978” is the ordinance that
4 adopted the FTT amendments.

5 The interim planning director also checked a second box indicating that
6 “the activity or use is allowed; findings are attached.” NITA Ex 1, at 4. As
7 findings, the interim planning director attached to the LUCS the narrative
8 supplied by Zenith. The narrative identifies four “limitations” that will govern
9 the Repositioned Facility’s operation. *Id.* at 6. The same four limitations were
10 also described, in less detail, in the 2022 LUCS. The four limitations are (1) near-
11 term phase out of all crude oil, (2) near-term reduction in existing storage tank
12 capacity, (3) reduced allowable emissions of volatile organic compounds, and (4)
13 termination of a DEQ permit to operate an asphalt refinery on the property, and
14 closure of that refinery. The narrative attached to the 2025 LUCS as findings
15 states that these four limitations will be “conditions enforceable by the City of
16 Portland pursuant to PCC 33.700.030[.]”³ NITA Ex 1, at 6. The narrative also

³ The narrative states, in relevant part:

“The Repositioned Facility will continue to be subject to the limitations and compliance measures imposed by the City under 2022-182133-000-00-PR (the ‘2022 LUCS’) for so long as the pending [DEQ permit] application to which the 2022 LUCS and this LUCS pertains remains pending and the resulting [DEQ permit]

1 includes findings that address applicable PCC title 33 code provisions, discussed
2 below, specifically the “Special Limitations” at PCC 33.140.100(B)(16). The
3 narrative also addresses over a dozen policies in the 2035 Comprehensive Plan
4 that relate in some way to Bulk Fossil Fuel Terminals. Those findings are too
5 lengthy to quote in full, but we quote one set of findings in the margin as a fairly
6 representative example.⁴

remains in full force and effect (with such limitations being conditions enforceable by the City of Portland pursuant to PCC 33.700.030). For avoidance of doubt, the Repositioned Facility will be limited by the following after affirmative approval of this LUCS application (the ‘Approval’) and for so long as the aforementioned [DEQ permit] application remains pending and the resulting [DEQ] permit remains in full force and effect (with such limitations being conditions enforceable by the City of Portland pursuant to PCC 33.700.030.” NITA Ex 1, at 6 (footnote and boldface omitted).

PCC 33.700.030 provides, in part:

“**A. Violations.** It is unlawful to violate any provisions of this Title, a land use decision, or conditions of a land use approval. This applies to any person undertaking a development or land division, to the proprietor of a use or development, or to the owner of the land underlying the development or land division. For the ease of reference in this chapter, all of these persons are referred to by the term ‘operator.’” (Boldface in original.)

⁴ The narrative attached as findings state, in relevant part:

“Policy 6.48: Fossil fuel distribution. Limit fossil fuels distribution and storage facilities to those necessary to serve the regional market.

1 This appeal followed.

2 **MOTIONS TO DISMISS**

3 The city and Zenith (together, respondents) both filed motions to dismiss
4 this appeal for lack of jurisdiction. Petitioners oppose the motions, and also filed
5 a contingent motion to transfer this appeal to circuit court, in the event LUBA
6 determines that it lacks jurisdiction over the challenged decision. We issued an
7 order suspending the appeal pending our resolution of the jurisdictional dispute.
8 The city has not yet transmitted the record, so the documentary record before us
9 consists only of the 2022 LUCS and the 2025 LUCS, attached to the parties'
10 pleadings.

“Response: The Repositioned Facility is compatible with Policy 6.48. Policy 6.48 calls for the City to ‘limit’ certain facilities, and the 2035 Comprehensive Plan defines ‘limit’ as ‘[m]inimize or reduce something or the effects of something relative to the current situation or to a potential future situation.’ No expansion of the Repositioned Facility’s fossil fuel storage or distribution facilities is proposed in connection with this LUCS. Rather, 30 storage tanks will be removed, and crude oil will be eliminated at the Zenith Property.

“The City Council has concluded that continued operation of existing bulk liquid fuel terminals, including Zenith’s terminal (which will be more limited as a Repositioned Facility), is consistent with Policy 6.48. Ordinance 190978, Ex. A, Finding [No.] 219. The transition to renewable fuel distribution will help ensure a supply of liquid transportation fuels necessary to serve the regional market.” NITA Ex 1, at 16 (emphasis omitted, boldface in original).

1 For the following reasons, we agree with respondents that the challenged
2 LUCS is excluded from our jurisdiction, and accordingly grant petitioners'
3 motion to transfer the appeal to circuit court.

4 As noted, a LUCS decision is a determination by a local government that
5 a proposed state agency action, such as issuing a state agency permit regulating
6 some aspect of a land use, is or is not compatible with the local government's
7 comprehensive plan and land use regulations. Because such an inquiry typically
8 involves the "application" of a comprehensive plan provision or land use
9 regulation, a decision on a LUCS decision can constitute a "land use decision" as
10 defined at ORS 197.015(10)(a)(A) subject to LUBA's jurisdiction. However,
11 under ORS 197.015(10)(b)(H), three types of LUCS decisions are excluded from
12 the definition of "land use decision," and hence excluded from LUBA's review.⁵

⁵ ORS 197.015(10)(b)(H) provides that "land use decision" does not include a decision by a local government:

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

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

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

1 As relevant here, ORS 197.015(10)(b)(H)(ii) excludes from the definition
2 of “land use decision” a LUCS decision determining that the state agency action
3 is compatible with the local government’s plan and land use regulations because
4 the “use or activity” that would be authorized by the proposed state agency action
5 “is *allowed without review* under the acknowledged comprehensive plan and land
6 use regulations implementing the plan.” ORS 197.015(10)(b)(H)(ii). The phrase
7 “allowed without review” is not defined in the statute, but we understand it to
8 mean that no local government approval is necessary for that use, under the local
9 government’s comprehensive plan and land use regulations. *Curl v. Deschutes*
10 *County*, 69 Or LUBA 186, 195 (2014).

11 Respondents contend that the challenged 2025 LUCS falls squarely within
12 the exclusion at ORS 197.015(10)(b)(H)(ii) because the land use for which Zenith
13 seeks DEQ permits that require a LUCS is “allowed without review under the
14 acknowledged comprehensive plan and land use regulations implementing the
15 plan.” According to respondents, the LUCS decision concludes, accurately, that
16 the Repositioned Facility is “allowed outright,” *i.e.*, allowed without review
17 under PCC 33.140.100 and, for that reason, compatible with the city’s
18 comprehensive plan.

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

1 In response, petitioners argue that the 2025 LUCS exceeded the scope of
2 the ORS 197.015(10)(b)(H)(ii) “allowed without review” exclusion, in several
3 ways. Petitioners argue that the 2025 LUCS identified a number of
4 comprehensive plan provisions and land use regulations that the city deemed to
5 require at least limited review, including the “Special Limitations” at PCC
6 33.140.100(B)(16), and over a dozen 2035 Comprehensive Plan policies
7 concerning FTTs. The city not only identified those review standards, petitioners
8 argue, but went on to determine whether the Zenith facility, as limited by the four
9 “conditions” specified in the narrative, is compatible with the identified plan and
10 code provisions. The city adopted findings that conduct that review, and attached
11 those findings to support its second determination on the DEQ form, that the
12 proposed facility is “allowed; findings are attached.” We understand petitioners
13 to argue that that “review” demonstrates that the facility is not “allowed without
14 review.”

15 Moreover, petitioners argue that the 2025 LUCS imposed enforceable
16 “conditions” that are apparently intended to ensure compatibility with the
17 applicable code and plan provisions. Petitioners contend that it is completely
18 incompatible with a determination that a use is “allowed without review” to
19 impose such conditions. For that reason alone, petitioners contend that the 2025
20 LUCS does not fit within the ORS 197.015(10)(b)(H)(ii) exclusion for decisions
21 determining that the proposed use is “allowed without review.”

1 Determining whether a LUCS decision falls within one of three exclusions
2 at ORS 197.015(10)(b)(H) is often not a simple task. As we explained in *Bishop*
3 v. *Deschutes County*, 72 Or LUBA 103, 113 (2015):

4 “The subject of the exclusions at ORS 197.015(10)(b)(H) are certain
5 decisions issued by local governments on a LUCS request, which
6 conclude that a proposed state agency action is compatible with the
7 local government’s comprehensive plan and land use regulations,
8 for one or more of the three reasons listed in (i) through (iii). Other
9 types of decisions resulting from a LUCS request, however, do not
10 fall within those three exclusions. For example, if a local
11 government decides that the proposed agency action is *not*
12 compatible with its plan and land use regulations, or that the action
13 is compatible for reasons other than the three listed at (i) [through]
14 (iii), or if the local government decides that land use review is
15 necessary, conducts that review and approves or denies the proposed
16 use, then the resulting decision does not fall within the exclusions at
17 ORS 197.015(10)(b)(H)(i) [through] (iii). *See Campbell v.*
18 *Columbia County*, 67 Or LUBA 53, 59-60 (2013) (a LUCS decision
19 that also verifies a nonconforming use and approves alterations is
20 not subject to the exclusions at ORS 197.015(10)(b)(H)(i) [through]
21 (iii)).” (Emphasis in original.)

22 We have explained that in determining whether a challenged LUCS
23 decision falls with the statutory exception to our jurisdiction, the central question
24 is whether the local government correctly categorized the proposed land use in a
25 manner that brings the decision within the exclusions at ORS 197.015(10)(b)(H).
26 *McCaffree v. City of North Bend*, 81 Or LUBA 32, 37-38 (2020). The applicant
27 for the LUCS describes and characterizes the proposed land use in the LUCS
28 request. The local government must then categorize the described land use and
29 determine whether and how its land use regulations govern the land use described

1 in LUCS request. *Bishop v. Deschutes County*, 75 Or LUBA 504, 514-15 (2017).

2 If the local government determines that the relevant land use described in the
3 LUCS is compatible with the comprehensive plan and land use code because it is
4 subject to an existing land use decision, is a use category that is allowed without
5 review, or because the use requires future land use review, then one or more of
6 those exclusions apply. ORS 197.015(10)(b)(H). However, as we noted in
7 *Bishop*, 72 Or LUBA at 113, if the local government makes any other kind of
8 determination, for example, if the local government decides that the use is
9 compatible with the comprehensive plan and land use regulations for reasons
10 *other than those* stated in ORS 197.015(10)(b)(H)(i) through (iii), then the
11 exclusions do not apply. Similarly, as in *Campbell*, if the local government
12 determines that land use review and approval is required, and actually conducts
13 that review and issues that approval as part of the LUCS decision, the decision is
14 not subject to any of the three exclusions. 67 Or LUBA 53.

15 As noted, the 2025 LUCS decision makes two compatibility
16 determinations, one that the proposed use is “allowed outright” under the city’s
17 code and a second that the proposed use is “allowed” based on attached findings.
18 The first determination, if accurate, appears to fall squarely within the exclusion
19 at ORS 197.015(10)(b)(H)(ii).

20 However, it is less clear whether the second determination corresponds to
21 the exclusion in ORS 197.015(10)(b)(H)(ii). If that second determination is
22 understood as categorizing the proposed facility as a use that requires city

1 approval after conducting a required review of land use regulations and
2 comprehensive plan policies, then the exclusion at (ii) would not apply. Similarly,
3 if the second determination is understood as actually conducting the required
4 review and “approving” the use under the applicable review standards, then the
5 (ii) exclusion would also not apply.

6 Neither the city nor Zenith address in their briefing the second
7 determination, that the proposed use is “allowed; findings are attached.” But we
8 understand respondents to take the position that the second determination is
9 simply a more comprehensive demonstration of the first determination, that the
10 use is “allowed outright” under the city’s comprehensive plan and land use
11 regulations.

12 Viewed in context with the city’s first determination, the second
13 determination can be understood as a conclusion that, because the proposed
14 facility is consistent with the special limitations at PCC 33.140.100(B)(16), and
15 does not conflict with any comprehensive plan policies that concern fossil fuel
16 terminals, the Zenith facility is correctly categorized as a use allowed outright in
17 the IH zone, without any required land use review process or other city decision-
18 making needed to approve the proposed changes. If the second determination is
19 framed in that manner, and its predicate conclusions are accurate that the use is
20 consistent with the special limitations, and not in conflict with any
21 comprehensive plan policies, we would agree with respondents that the city

1 correctly categorized the use as one that is “allowed without review” for purposes
2 of ORS 197.015(10)(b)(H)(ii).

3 As noted, a Bulk Fossil Fuel Terminal is categorized as a Limited Use
4 “[L]” in the IH zone, not an “allowed” or “[Y]” use. However, Limited Uses are
5 treated as uses allowed outright, unless the applicable limitations specify that land
6 use review is required. PCC 33.700.010. The special limitations applicable to
7 Bulk Fossil Fuel Terminals do not specify that any land use review is required.
8 Accordingly, the city is at least facially correct that such terminals are uses
9 allowed outright in the IH zone.

10 The Special Limitations that apply to such terminals essentially prohibit
11 new fossil fuel terminals, coal storage, and expansion of fossil fuel storage at
12 existing terminals. Those limitations do not function as approval criteria in the
13 usual sense, at least not criteria that call for the exercise of any judgment or
14 discretion. The Special Limitations allow outright all Bulk Fossil Fuel Terminals,
15 except those expressly prohibited. Unless those prohibitions apply, a proposed
16 facility is otherwise treated as allowed outright. There is no dispute in the present
17 case that the Zenith facility fits within the special limitations and is not prohibited
18 by them.

19 With respect to the comprehensive plan policies concerning fossil fuel
20 terminals, no party argues that those plan policies apply as review criteria in any
21 sense, now that the FFT amendments are final. PCC 33.800.050(B). Apparently
22 as a precaution, Zenith submitted findings that evaluate those plan policies and

1 conclude, essentially, that the proposed Zenith facility does not conflict with any
2 language in those policies. Those findings apparently serve to reinforce the
3 conclusion that the proposed facility is a use allowed outright in the IH zone.
4 While it is perhaps unusual for a LUCS decision to address whether a use allowed
5 outright under the code conflicts with comprehensive plan policies, that inquiry
6 is not inappropriate, given that the question underlying every LUCS decision is
7 whether the use is compatible with the acknowledged comprehensive plan and
8 implementing regulations. The findings' general conclusion that the proposed
9 facility does not conflict with any comprehensive plan policies is consistent with
10 its determination that under the city code the facility is a use allowed outright in
11 the IH zone.

12 Petitioners' most forceful arguments are directed at the four limitations or
13 conditions proposed by the narrative, and apparently accepted by the city.
14 Petitioners contend that imposition of those four conditions exceeds the
15 permissible bounds of the ORS 197.015(10)(b)(H)(ii) exclusion for uses
16 "allowed without review." Zenith responds that the four conditions set out in the
17 narrative are not "conditions of approval" because (1) the city lacks authority to
18 impose conditions on a LUCS decision, and (2) the four limitations are not
19 intended, or needed, to ensure consistency with any applicable review standard.
20 Zenith characterize the four conditions as mere "operational limitations" that
21 Zenith voluntarily proposed, in order to show consistency with the 2022 LUCS
22 decision. Petitioners reject that characterization, arguing that the "conditions" are

1 expressly characterized as enforceable conditions, not mere operational
2 limitations. Further, petitioners note the four conditions imposed in the 2025
3 LUCS are not mere re-applications of the 2022 LUCS limitations, but are more
4 expansive and detailed than the similar conditions imposed in the 2022 LUCS.

5 It is highly unusual for a LUCS decision concluding that the proposed use
6 is allowed outright to include “conditions” of any kind. PCC 33.800.070
7 authorizes the city to “attach conditions to the approval of all discretionary
8 reviews[,]” but no PCC provision cited to us authorizes attachment of conditions
9 to a use deemed to be allowed outright.⁶ It may be that the city’s acceptance of
10 the limitations proposed by Zenith as “conditions” was not authorized by the city
11 code or otherwise was erroneous. We express no opinion on that point. However,
12 even if that is assumed to be the case, petitioners have not demonstrated how lack
13 of authority to impose conditions or error in imposing conditions would change
14 the jurisdictional analysis. If the city is correct that the proposed facility is
15 allowed outright, and the exclusion at ORS 197.015(10)(b)(H)(ii) therefore
16 applies, then jurisdiction to review any challenges to the lawfulness of the
17 conditions would lie with the circuit court, not LUBA. We do not see how

⁶ PCC 33.800.070 provides:

“The [c]ity may attach conditions to the approval of all discretionary reviews. However, conditions may be applied only to ensure that the proposal will conform to the applicable approval criteria for the review or to ensure the enforcement of other [c]ity regulations.”

1 resolution of such a challenge would alter the conclusion that the proposed use is
2 “allowed without review” for purposes of ORS 197.015(10)(b)(H)(ii), and thus
3 excluded from our jurisdiction.

4 In sum, the city correctly categorized the proposed Zenith facility under its
5 code as a use that is allowed outright, without any required land use review,
6 subject only to a set of special limitations that function to prohibit certain types
7 of FTTs, prohibitions that are not applicable in the present case. The city also
8 conducted a review of comprehensive plan policies, apparently to confirm that
9 the proposed facility does not conflict with any policy. That review of applicable
10 code provisions and comprehensive plan policies served to confirm the facial
11 reading of the zoning code, which classifies the proposed facility as a use allowed
12 outright. For unknown reasons, the city accepted four “limitations” or
13 “conditions” proposed by Zenith, but acceptance of those conditions, even if
14 erroneous, does not disturb the city’s conclusion that the proposed facility is
15 allowed outright and without review, for purposes of the jurisdictional analysis.

16 Accordingly, we agree with respondents that the challenged LUCS
17 decision falls within the ORS 197.015(10)(b)(H)(ii) exclusion for a LUCS
18 decision determining that the use is compatible with the acknowledged
19 comprehensive plan and implementing regulations, because it is “allowed
20 without review,” meaning the code requires no land use review or city approval.
21 Because the exclusion applies, LUBA lacks statutory jurisdiction over the appeal.

1 **SIGNIFICANT IMPACTS**

2 Petitioners argue in the alternative that, even if the ORS
3 197.015(10)(b)(H)(ii) exclusion applies, LUBA nonetheless has jurisdiction to
4 review the 2025 LUCS decision, under the common-law “significant impacts”
5 test.

6 Briefly, under the significant impacts test, LUBA may exercise jurisdiction
7 to review a decision that does not qualify as a “land use decision” as defined at
8 ORS 197.015(10)(a)(A), if the decision would likely have a significant impact on
9 current or present land uses. *Akiyama v. Tillamook County*, 333 Or App 315, 317,
10 554 P3d 268, *rev den*, 373 Or 154 (2024). Petitioners contend that the four
11 enforceable conditions imposed in the present case (elimination of fossil fuel
12 handling, removal of storage tanks, termination of the asphalt plant, etc.) will
13 have a significant impact on land uses on the subject property.

14 However, we have held that the common law significant impacts land use
15 decision test does not operate where a decision is subject to a legislatively
16 adopted exception to ORS 197.015(10)(a). *Haj v. City of Portland*, LUBA No
17 2022-091 (Dec 19, 2022) (slip op at 7-8); *Fire Mountain Gems and Beads v. City*
18 *of Grants Pass*, 57 Or LUBA 597, 606-07 (2008) (citing *Oregonians in Action v.*
19 *LCDC*, 103 Or App 35, 38, 795 P2d 1098 (1990)). Because we have held in the
20 present case that the legislatively adopted exclusion at ORS
21 197.015(10)(b)(H)(ii) applies, the significant impacts test cannot operate to grant
22 LUBA jurisdiction over the 2025 LUCS decision.

1 **MOTION TO TRANSFER**

2 Petitioners have filed motions to transfer this matter to circuit court.
3 Pursuant to OAR 661-010-0075(9)(c) and ORS 34.102, this appeal is hereby
4 transferred to Multnomah County Circuit Court.