

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

3
4 ROGUE ADVOCATES, WILLIAM M.
5 CORCORAN II and ELIZABETH A. CORCORAN,
6 *Petitioners,*

7
8 vs.

9
10 JOSEPHINE COUNTY,
11 *Respondent,*

12
13 and

14
15 SUNNY VALLEY SAND & GRAVEL, INC.,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2015-059

19 ORDER ON MOTION TO DISMISS

20 **INTRODUCTION**

21 The decision challenged in this appeal is Ordinance No. 2015-001,
22 adopted July 1, 2015, which amends the county’s comprehensive plan text and
23 map, and the county’s zoning map. Specifically, the amendments
24 accomplished by Ordinance 2015-001 add intervenor-respondent’s
25 (intervenor’s) property to the county’s list of significant aggregate sites, amend
26 the property’s comprehensive plan designation to Aggregate, and rezone the
27 property to Mineral and Aggregate Resource Zone (MARZ). Ordinance No.
28 2015-001 incorporates by reference an attachment Exhibit A, which consists of

1 an 88-page set of findings the county adopted in an earlier, separate land use
2 decision, dated October 8, 2014.

3 That October 8, 2014 decision is entitled “Findings of Fact and
4 Conclusions of Law and Decision,” and includes findings concluding that the
5 subject property should be included in the county’s list of significant aggregate
6 sites, and applying a number of statewide planning goals, administrative rules,
7 county comprehensive plan policies, and land use regulations to conclude that
8 the subject property should be designated Aggregate and zoned MARZ.¹

9 The October 8, 2014 decision was timely appealed to LUBA, by the
10 same petitioners in the present appeal, and assigned LUBA Nos. 2014-095/096.
11 During the pendency of that appeal, the county adopted Ordinance 2015-001,
12 which led to this appeal. On August 12, 2015, the county moved to consolidate
13 the two appeals. On August 28, 2015, intervenor moved to dismiss LUBA No.
14 2015-059, or, alternatively, to consolidate the two sets of appeals. Intervenor
15 also challenged the standing of petitioner Rogue Advocates.

¹ Typically, a local government would adopt the ordinances necessary to accomplish a post-acknowledgment plan amendment, along with any supporting findings, in a single decision or set of decisions, issued on the same date. For unexplained reasons, in the present case the county adopted the findings supporting the post-acknowledgment plan amendment on October 8, 2014, but waited until July 1, 2015 to adopt the ordinance necessary to actually amend the comprehensive plan text, map and zoning map. Possibly the county intended all challenges to the findings to be resolved before going to the trouble of actually amending its plan and land use regulations. If so, it is not clear why the county went ahead and adopted the amendments while an appeal of the findings document was pending before LUBA.

1 Because consolidation would have required canceling oral argument in
2 LUBA Nos. 2014-095/96, then scheduled for September 17, 2015, and
3 significantly delayed resolution of that appeal, LUBA denied the motion for
4 consolidation. LUBA’s order, dated September 3, 2015, suspended LUBA No.
5 2015-059 pending resolution of the motion to dismiss.

6 The appeal of the October 8, 2014 decision at issue in LUBA Nos. 2014-
7 095/096 proceeded to oral argument. On October 15, 2015, the Board issued
8 its final opinion and order remanding the October 8, 2014 decision to the
9 county to correct a variety of procedural and substantive errors. *Rogue*
10 *Advocates v. Josephine County*, __ Or LUBA __ (LUBA Nos. 2014-095/96,
11 October 15, 2015).

12 We now resolve the standing challenge and motion to dismiss LUBA
13 No. 2015-059, the appeal of Ordinance No. 2015-001.

14 **STANDING**

15 Intervenor argues that petitioner Rogue Advocates did not appear during
16 the proceedings leading to adoption of Ordinance No. 2015-001, and therefore
17 lacks standing to appeal the ordinance to LUBA pursuant to ORS
18 197.830(2)(b) (a person who has appeared before the local government orally
19 or in writing may appeal a land use decision to LUBA).

20 Rogue Advocates responds that its president, Steven Rouse, appeared in
21 opposition to Ordinance No. 2015-001 during a May 20, 2015 proceeding, on
22 behalf of Rogue Advocates. *See* Response to Motion to Dismiss, Exhibit A

1 (Minutes of May 20, 2015 proceeding) and Exhibit B (Declaration of Steven
2 Rouse). Petitioner Rogue Advocates has demonstrated that it appeared during
3 the proceedings below leading to adoption of Ordinance No. 2015-001.

4 Petitioner Rogue Advocates has standing in this appeal.

5 **MOTION TO DISMISS**

6 Intervenor argues that the appeal of Ordinance No. 2015-001 must be
7 dismissed, because it is not a “land use decision” subject to LUBA’s
8 jurisdiction.

9 ORS 197.015(10)(a) defines “land use decision” in relevant part as a
10 final decision by a local government that “concerns the adoption, amendment
11 or application of” the statewide planning goals, a comprehensive plan
12 provision or a land use regulation. Ordinance No. 2015-001 amends the
13 comprehensive plan text and map, and the zoning map, which is a land use
14 regulation. Petitioners argue, and we agree, that on its face Ordinance No.
15 2015-001 fits squarely within the ORS 197.015(10)(a) definition of land use
16 decision, as a decision that amends a comprehensive plan provision and land
17 use regulation.

18 Intervenor argues, nonetheless, that Ordinance No. 2015-001 did not
19 “apply” any statewide planning goals, comprehensive plan provisions or land
20 use regulations. According to intervenor, the only element of Ordinance No.
21 2015-001 that concerns the “application” of any goals, plan provisions or land
22 use regulations is the incorporated findings that constitute the October 8, 2014

1 decision. We understand intervenor to argue that those incorporated findings,
2 which are the subject of a separate appeal, are the only substantive part of
3 Ordinance No. 2015-001, which simply implements the decisions already made
4 in the October 8, 2014 decision regarding compliance with the goals, rules,
5 comprehensive plan provisions and land use regulations that apply to the
6 proposed aggregate mining use. We understand intervenor to argue that
7 compliance with those applicable goals, rules, comprehensive plan provisions
8 and land use regulations cannot be challenged in an appeal of Ordinance No.
9 2015-001. Accordingly, intervenor argues, there is really only one appealable
10 land use decision stemming from intervenor's applications: the October 8,
11 2014 decision. Ordinance No. 2015-001 cannot be challenged for compliance
12 with any applicable criteria, intervenor argues, and therefore Ordinance No.
13 2015-001 is not a land use decision subject to LUBA's jurisdiction.

14 Intervenor's arguments are properly characterized as challenges to
15 LUBA's scope of review of Ordinance 2015-001, not to LUBA's jurisdiction
16 over the appeal. As noted, Ordinance No. 2015-001 squarely fits within the
17 definition of "land use decision" at ORS 197.015(10)(a) because it plainly
18 amends comprehensive plan provisions and land use regulations. That the
19 decision may not "apply" any goals, plan provisions or land use regulations
20 within the meaning of ORS 197.015(10)(a) does not mean that, as a post-
21 acknowledgment plan amendment, the ordinance does not "amend" the

1 comprehensive plan and land use regulations within the meaning of that
2 definition.²

3 Intervenor may be correct that in this appeal all challenges to the
4 incorporated findings from the October 8, 2014 decision will fall outside
5 LUBA's scope of review, under one or more theories. *See Kalmiopsis*
6 *Audubon Soc. Of Curry County v. Curry County*, 131 Or App 308, 312, 884
7 P2d 894 (1994) (assuming that a second decision that simply replaces a missing
8 page in the first, unappealed, decision is also an appealable decision, the only
9 issues petitioners could raise in an appeal of the second decision are issues that
10 could not have been raised in an appeal of the first decision). However, even if
11 so, that would not mean that *all* challenges to Ordinance No. 2015-001 are
12 outside LUBA's scope of review. For example, petitioners might seek to
13 establish that the county committed procedural error in processing Ordinance
14 No. 2015-001, or possibly that the county lacked authority to issue Ordinance
15 No. 2015-001 during the pendency of the appeal over the October 8, 2014
16 decision, which adopted the only land use findings supporting Ordinance No.
17 2015-001. If petitioners advance no challenges properly within our scope of
18 review, or we reject all such challenges, we would affirm the county's decision,
19 not dismiss the appeal for lack of jurisdiction.

² ORS 197.015(10)(b)-(d) identify a number of exclusions to the definition of "land use decision" at ORS 197.015(10)(a). Intervenor does not argue that Ordinance No. 2015-001 falls within any of those exclusions.

1 In sum, petitioners are correct that Ordinance No. 2015-001 is a land use
2 decision subject to LUBA’s review. The motion to dismiss is denied.³

3 **REVIEW SCHEDULE**

4 The next event in this review proceeding is the filing of the record. The
5 county shall file the record in LUBA No. 2015-059 within 21 days of the date
6 of this order. We note that, pursuant to ORS 197.830(13)(b) and OAR 661-
7 010-0021, the county may withdraw Ordinance No. 2015-001 for
8 reconsideration prior to the date set for filing the record, or that, pursuant to
9 OAR 661-010-0071(2)(e), the parties may stipulate to voluntary remand. In
10 light of our recent decision remanding the October 8, 2014 decision to the
11 county for further proceedings, withdrawal or voluntary remand to join
12 together the bifurcated elements of the county’s decisions regarding
13 intervenor’s applications would be a reasonable course of action.

14 Dated this 12th day of November, 2015.
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21 _____
22 Tod A. Bassham
Board Chair

³ We need not address intervenor’s arguments that Ordinance No. 2015-001 does not qualify as a limited land use decision or a “significant impacts” land use decisions, two other types of decision subject to LUBA’s exclusive jurisdiction.