

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

VAGABOND PROPERTIES, LLC,
Petitioner,

vs.

CITY OF PORT ORFORD,
Respondent.

LUBA No. 2021-042

FINAL OPINION
AND ORDER

Appeal from City of Port Orford.

Ellen H. Grover and Josh Newton represented petitioner.

Shala M. Kudlac represented respondent.

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

TRANSFERRED 12/06/2021

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 an email from the city's mayor describing the city's phased construction of a pedestrian trail within currently unimproved portions of two city rights-of-way (ROW) to establish public access to a scenic area.

BACKGROUND

On October 2, 2018, at a meeting of the city parks commission, a member of the public presented a proposal to construct a pedestrian trail within currently unimproved portions of the Jackson Street and Fourth Street city ROW to allow members of the public to access a scenic bluff on top of Fort Point (Fort Point Overlook Trail). The minutes of that meeting reflect that the parks commission authorized the individual to "move forward" with the proposed Fort Point Overlook Trail. Record 37.¹

On October 3, 2018, the individual submitted to the city administrator an application on behalf of the parks commission for an ROW usage license under

¹ The city transmitted the record in this appeal on April 28, 2021. Petitioner filed record objections on May 12, 2021. The city filed its motion to dismiss on May 25, 2021, while petitioner's record objections were pending and before the Board settled the record. Petitioner does not contend that the Board should settle the record before resolving the motion to dismiss. Petitioner attaches to its response to the motion to dismiss additional documents that are not included in the transmitted record. The Board may consider extra-record evidence for the purpose of evaluating its jurisdiction. *Murray v. Multnomah County*, 56 Or LUBA 370, 373 (2008); *No Tram to OHSU v. City of Portland*, 40 Or LUBA 588, 590 (2001). We consider and refer to the unsettled record and the documents attached to petitioner's response in resolving the motion to dismiss.

1 Port Orford Municipal Code (POMC) 12.24.040. Record 25-28. POMC
2 12.24.040(A) provides: "No person may occupy or encroach on a public [ROW]
3 without the permission of the City. The City grants permission to use [ROW] by
4 franchises, licenses and permits." The ROW usage license application form
5 instructs applicants to address six "[c]riteria that will be used to evaluate
6 proposed [ROW] use." Record 26. Those "criteria," which are not codified in the
7 POMC, include:

8 "A. Potential impact on existing utilities (water, sewer, storm
9 water, etc.) including potential future maintenance
10 requirements for those utilities.

11 "B. Will the proposed use negatively impact visibility for traffic
12 on adjoining roadways?

13 "C. Are there any other potential public safety concerns?

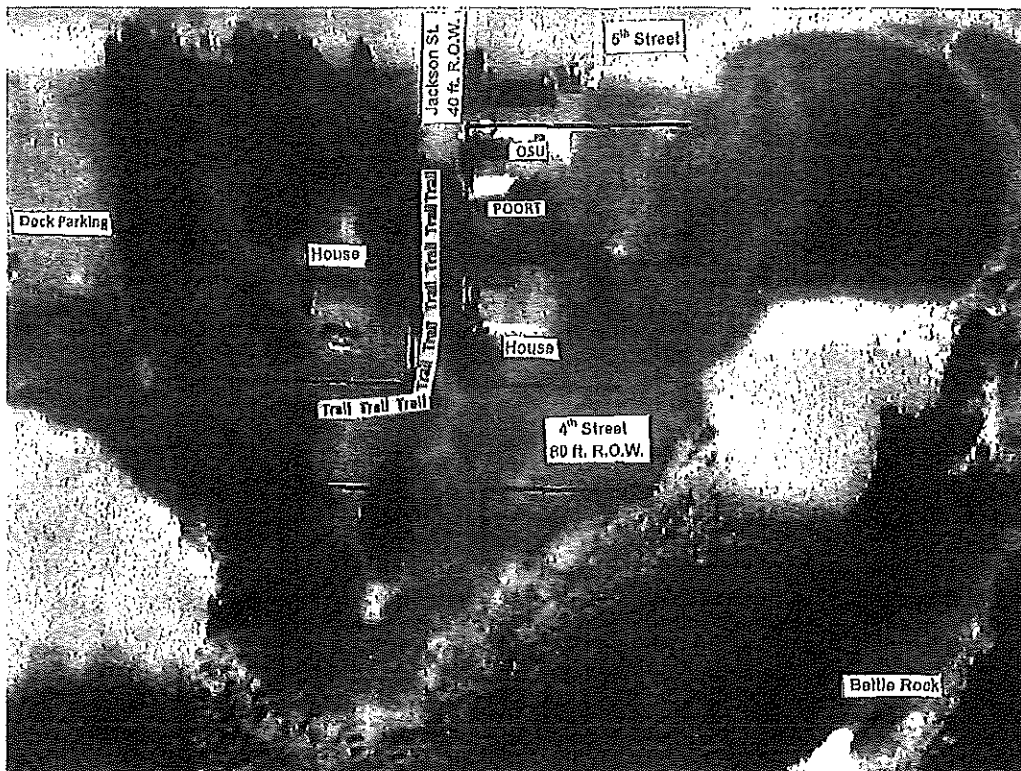
14 "D. Will the proposed use be likely to create negative visual
15 impact on adjoining properties?

16 "E. Will the proposed use impact any other existing uses?

17 "F. Is granting the ROW usage license in the public interest?"
18 Record 26.

19 An information sheet attached to the completed application form includes
20 responses to those criteria and a description of the proposed Fort Point Overlook
21 Trail. Record 28. The information sheet explains that "[t]he coastal cape Fort
22 Point is a significant historical site with a spectacular, panoramic 180-degree
23 ocean view that extends to the west with Port Orford Heads and the Port of Port
24 Orford to the east with Battle Rock, Humbug Mountain and the Redfish Rocks

Marine Reserve.” Record 28. The information sheet describes the proposed Fort Point Overlook Trail as beginning where the paved portion of Jackson Street ends between the Fourth Street and Fifth Street ROW, extending south within the Jackson Street ROW for 40 feet in a three-foot-wide gravel path to the top of the bluff, extending west within the Fourth Street ROW on top of the bluff for 40 feet in a four-foot-wide cut grass path, and terminating at the western edge of the bluff. As proposed, the Fourth Street ROW would be delineated by the construction of a minimum visual impact fence and the placement of signage on the fence.



Record 43.

On October 31, 2018, the city administrator approved the ROW usage

1 license application and forwarded it to the planning commission for review.
2 Record 27, 20. On November 13, 2018, the planning commission voted to
3 recommend that the city council approve the ROW usage license with the
4 “consideration” that the city “accept the trail as a City park.” Record 15-17. On
5 November 15, 2018, the city council voted to approve the ROW usage license
6 (2018 ROW license). Record 13. On December 4, 2018, the parks commission
7 voted to “approve and include the Fort Point [Overlook] Trail as a part of the city
8 wide Parks Master Plan.” Record 9.

9 Petitioner owns two lots adjacent to the proposed trail. On March 16, 2021,
10 the mayor sent petitioner an email (the mayor’s email) indicating that the city
11 was commencing construction of the Fort Point Overlook Trail, describing two
12 phases of construction, and indicating that “access to [petitioner’s] property will
13 not be interrupted except for a few brief times during construction.” Record 4-5.
14 The mayor’s email states that the trail will begin at the intersection of Jackson
15 Street and Fifth Street, extend south on Jackson Street to the end of the pavement,
16 and extend south within the Jackson Street ROW for 40 feet in a four-foot-wide
17 gravel path that will lead to a to-be-constructed stairway to the top of the bluff.
18 The email states that the stairway will be anchored by a concrete pad at the top
19 of the bluff. The email states that the Fourth Street ROW will be delineated
20 through the placement of signage alone, with no fence.

21 This appeal followed.

1 **JURISDICTION**

2 On May 25, 2021, the city filed a motion to dismiss, arguing that LUBA
3 lacks jurisdiction because the 2018 ROW license is neither a land use decision
4 nor a limited land use decision. Petitioner responds that it is not appealing the
5 2018 ROW license. Rather, petitioner appeals the mayor’s email.² Petitioner
6 argues that LUBA has jurisdiction because the mayor’s email is a statutory land
7 use decision under the definition at ORS 197.015(10), set out below.
8 Alternatively, petitioner argues that LUBA has jurisdiction because the mayor’s
9 email is a “significant impacts” land use decision. *City of Pendleton v. Kerns*,
10 294 Or 126, 653 P2d 992 (1982) (*Kerns*).

11 The city replies that the mayor’s email is neither a statutory land use
12 decision nor a significant impacts land use decision. Alternatively, the city argues
13 that the mayor’s email falls within the transportation facility exception to
14 LUBA’s jurisdiction in ORS 197.015(10)(b)(D) (the transportation facility
15 exception).³

² Petitioner argues that the city “approved” different ROW improvements in the 2018 ROW license and the mayor’s email. We explain the differences between the ROW improvements described in the information sheet attached to the ROW usage license application form and the mayor’s email further below. Ultimately, we conclude that any difference in those descriptions is irrelevant to whether LUBA has jurisdiction over this appeal.

³ ORS 197.015(10)(b)(D) provides that a “land use decision” does not include a decision of a local government “[t]hat determines final engineering design, construction, operation, maintenance, repair or preservation of a transportation

1 For the reasons explained below, we agree with the city that the mayor's
2 email is not a statutory land use decision or a significant impacts land use
3 decision. Because we conclude that the mayor's email is not a statutory land use
4 decision or a significant impacts land use decision over which we have
5 jurisdiction, we do not reach or decide whether the transportation facility
6 exception applies.

7 As a preliminary matter, we note that petitioner contends that *the record*
8 *does not demonstrate* that Fourth Street is an ROW "dedicated to the public for a
9 street or that the scope of any such rights dedicated to the public permit the siting
10 of public park." Response to Motion to Dismiss 13. However, we do not
11 understand petitioner to dispute that Fourth Street is *in fact* a public ROW for
12 purposes of its response to the motion to dismiss. Petitioner observes that the
13 record includes testimony that Fourth Street is a public ROW and a tax map
14 depicting that street.

15 For its part, the city asserts that Fourth Street is a platted street. POMC
16 12.24.010 ("Public [ROW]' means and includes, but is not limited to, streets,
17 roads, highways, bridges, alleys, sidewalks, trails, paths, public easements and
18 all other public ways or areas, including subsurface and air space over these
19 areas."); POMC 12.04.010 ("Streets are defined as those [ROW] which are
20 platted on the official plat of the City of Port Orford, or which [ROW] have been

facility that is otherwise authorized by and consistent with the comprehensive
plan and land use regulations."

1 previously dedicated to the City of Port Orford.”). While the city does not point
2 us to an official plat in the record or attach the plat to its pleadings, we do not
3 understand petitioner to dispute the city’s assertion that Fourth Street is platted
4 and/or has been dedicated to the city for public use. Accordingly, for purposes of
5 this decision, we accept the city’s assertion that Fourth Street is a public ROW.

6 **A. The mayor’s email is not a statutory land use decision.**

7 LUBA has exclusive jurisdiction to review appeals of land use decisions.
8 ORS 197.825(1). Under ORS 197.015(10)(a)(A), a “land use decision” includes:

9 “A final decision or determination made by a local government or
10 special district that concerns the adoption, amendment or
11 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[.]”

16 We have explained that a decision “concerns” the application of a
17 comprehensive plan provision or land use regulation if a provision or regulation
18 (1) is actually applied in making the decision or (2) should have been applied in
19 making the decision. *Jaqua v. City of Springfield*, 46 Or LUBA 566, 574 (2004).

20 The city asserts that use of the ROW for the Fort Point Overlook Trail was
21 “approved” by the 2018 ROW license. It is not clear to us, and no party has
22 explained, that the POMC or any other law required the parks commission to
23 obtain an ROW usage license in order to improve and use the city ROW for the

1 Fort Point Overlook Trail.⁴ Thus, it is not clear that the city was required to make
2 any formal decision to allow a trail use of existing city ROW, let alone a land use
3 decision. Nevertheless, the city did review and approve a public use of the city
4 ROW in 2018. The city contends, and we agree, that the list of “criteria” in the
5 ROW usage license application form do not concern the application of a
6 comprehensive plan provision or land use regulation. More importantly, even if
7 the 2018 ROW license constituted a statutory land use decision, that decision was
8 not appealed and is not before us for review in this appeal.

9 As the party seeking LUBA review, the burden is on petitioner to establish
10 that the appealed decision is a land use decision. *Miller v. City of Dayton*, 22 Or
11 LUBA 661, 665 (1992); *Billington v. Polk County*, 299 Or 471, 475, 703 P2d 232

⁴ The individual who applied for the 2018 ROW license commented in an email to the city administrator:

“I will submit the City of Port Orford ‘City [ROW] License’ form to City Hall tomorrow. However, the form is actually a licensing agreement between a private individual/landowner and the City. Since I am acting on behalf of the City of Port Orford Parks Commission, which is an official city government entity, it does not make sense for me (or the Parks Commission) to be a licensee. I assume the City Administration and City Parks Commission jointly supervise all public trails within the Port Orford Trail System.

“However, I will submit the form and address the six criteria * * *.”
Record 25.

The city administrator noted in a comment on the application form: “This is the City asking to use its own ROW? Why?” Record 27.

1 (1985). Petitioner must establish that the mayor's email is a land use decision
2 because the mayor did or should have applied a comprehensive plan provision or
3 land use regulation to the decision to construct the Fort Point Overlook Trail.

4 The city responds that the mayor's email is not a decision at all and did not
5 approve any development or use of the ROW. Instead, the mayor simply
6 summarized and provided notice to petitioner of the city's timeline and activities
7 involved in the physical creation of the Fort Point Overlook Trail.

8 Petitioner argues that the physical characteristics of the Fort Point
9 Overlook Trail described in the mayor's email are different from those trail
10 components described in the 2018 ROW license and, therefore, according to
11 petitioner, the mayor's email approved a new use of the ROW.⁵ Petitioner argues

⁵ Petitioner explains that the 2018 ROW license includes descriptions of the following improvements: (1) a 40-foot-long, three-foot-wide compacted gravel trail within the Jackson Street ROW starting from the southern end of the Jackson Street ROW pavement and continuing up the incline to terminate at the top of the Fort Point bluff; (2) a 40-foot-long, four-foot-wide cut grass trail within the Fourth Street ROW; (3) a minimum visual impact fence (36-inch-high double wood rail); and (4) signage, including "No Trespassing" signs on the fence to delineate the Fourth Street ROW from adjacent private land, "No Parking" signs at the end of the Jackson Street pavement, and a Port Orford Trail System trailhead sign. Response to Motion to Dismiss 5; Record 28.

Petitioner explains that the mayor's email describes the following improvements: (1) a three- to four-foot-wide trail on the western edge of the Jackson Street ROW from Fifth Street to the end of the Jackson Street ROW pavement (similar to a bike lane) with a continuous white line and painted stencils that say "No Parking" and "Pedestrian Walkway;" (2) a 40-foot-long, four-foot-wide gravel path within the Jackson Street ROW from the end of the pavement

1 that the mayor's email "eliminates" the trail described in the 2018 ROW license
2 and "instead approves a roughly 4,800 square foot park spanning the entire grassy
3 expanse of Fourth Street, a staircase anchored to a concrete pad, and trail within
4 Jackson Street that runs all the way from 5th Street to a new concrete pad."
5 Response to Motion to Dismiss 9.

6 The city disputes that the mayor's email describes a use of the ROW that
7 is different from the use described in the 2018 ROW license. As explained below,
8 we conclude that the mayor's email does not constitute a statutory land use
9 decision because petitioner has not established that the mayor actually applied or
10 should have applied any comprehensive plan provision or land use regulation to
11 the mayor's email. We also conclude that the mayor's email does not constitute
12 a significant impacts land use decision. Whether the use described in the mayor's
13 email is different from the use described in the 2018 ROW license does not affect,
14 let alone undermine, our conclusion that the mayor's email is not a land use
15 decision.

to the bottom of a stairway leading up to the top of the bluff; (3) a wooden stairway with stainless steel handrails; (4) a four-by-six-by-eight-foot concrete pad at the eastern edge of the bluff to anchor the stairway; and (5) signage on the bluff along the northern and southern boundaries of the Fourth Street ROW to delineate public and private property, including two or three "No Trespassing/Private Property" signs on each boundary and two or three "Foot Traffic Only" signs on the northern boundary to protect a designated historical site. Each sign will be attached to a two-foot-tall, four-by-four-inch wood post with a post cap. Each post will be anchored to a brown-stained, round precast concrete pier block. Response to Motion to Dismiss 8-9; Record 4-7.

1 **1. Land Use Regulations**

2 As explained above, a statutory land use decision includes a final decision
3 by a local government that concerns the application of a land use regulation. ORS
4 197.015(10)(a)(A)(iii). In turn, “[l]and use regulation’ means any local
5 government zoning ordinance, land division ordinance adopted under ORS
6 92.044 or 92.046 or similar general ordinance establishing standards for
7 implementing a comprehensive plan.” ORS 197.015(11). Petitioner argues that
8 the mayor’s email necessarily involved a determination that the proposed use
9 qualifies as a park, or as some other use allowed in the applicable Battle Rock
10 Mixed Use (10-MU) zone. Petitioner argues that the 2018 ROW license approved
11 a trail use, but the use that is described in the mayor’s email is a park.

12 The city’s zoning code is codified at POMC title 17. POMC chapter 17.04
13 establishes general provisions applicable to the city’s zoning code, and POMC
14 17.04.040 provides that “[n]o structure or lot shall hereafter be used or occupied
15 and no structure or part thereof shall be erected, moved, reconstructed, extended,
16 enlarged or altered contrary to the provisions of [the zoning code].” We
17 understand petitioner to contend that the staircase is a “structure” and that the
18 land area of the ROW is a “lot” and, thus, POMC 17.04.040 requires land use
19 review and approval for the erection of the staircase and public use of the ROW.
20 However, by its own terms, POMC 17.04.040 does not require land use review
21 for all structures and land uses. Instead, POMC 17.04.040 prohibits structures
22 and uses that are “contrary to the provisions of [the zoning code].” Petitioner has

1 not identified any provisions of the zoning code to which the described ROW
2 improvements and uses are contrary. It is not clear to us that POMC 17.04.040
3 itself requires the mayor to review the zoning code to determine that the ROW
4 improvements described in the mayor's email are consistent with the zoning
5 code. We conclude that the mayor was not required to apply POMC 17.04.040 to
6 the mayor's email.

7 Starting from the premise that the use is a park, and not a trail, petitioner
8 argues that the mayor was required to determine whether the described use of the
9 ROW is an outright permitted use in the 10-MU zone, or an unlisted similar use.
10 A "park playground" is an outright permitted use in the 10-MU zone. POMC
11 17.12.090(B)(11). Petitioner argues that the mayor was required to determine
12 "whether a 4,800 square foot grassy open space demarcated for public use is or
13 is not a 'park playground' and, thus, may be constructed in [an ROW] claimed to
14 be dedicated for street purposes in an area zoned 10-MU." Response to Motion
15 to Dismiss 11. POMC 17.12.090(I) provides that unlisted uses that are deemed
16 by the planning director "to be similar and not more obnoxious or detrimental to
17 the public health safety, and welfare" than the listed uses are included as outright
18 permitted uses and conditional uses in the zone. Petitioner argues that, in moving
19 forward with the construction of a park in the Jackson Street and Fourth Street
20 ROW, the city was required to apply the provisions of its zoning code to
21 determine whether a park is an allowed use in the 10-MU zone. Relatedly,

1 petitioner argues that, in approving a park use in the 10-MU zone, the city was
2 required but failed to follow the city procedures applicable to land use actions.

3 The city maintains that the use of the ROW described in the mayor's email
4 is a trail. Neither party points to an applicable definition of "trail" or "park" in
5 the POMC, and it is not clear to us that those two uses are necessarily mutually
6 exclusive. As explained above, after the city council approved the 2018 ROW
7 license, the parks commission voted on December 4, 2018, to add the Fort Point
8 Overlook Trail to the city's Parks Master Plan. Petitioner does not explain why
9 inclusion of the trail in the city parks plan makes the trail a "park." If inclusion
10 of the trail on the parks plan makes the trail a park, petitioner does not explain
11 why the December 4, 2018 parks commission decision, rather than the mayor's
12 email, did not actually approve a "park" in the Jackson Street and Fourth Street
13 ROW.⁶

⁶ POMC title 12 addresses "Streets, Sidewalks and Public Places," and POMC chapter 12.16 sets out "City Park Regulations." POMC 12.16.010 provides: "'Park' means an area designated by the City of Port Orford as a public park and recreation area pursuant to ORS 226.320."

ORS 226.320 provides:

"Whenever the municipal authorities determine by ordinance to do so, the city may purchase, acquire, take, use, enter upon and appropriate land and property within or without its corporate limits for the purpose of:

"(1) Public squares, parks, memorial monuments or buildings, pioneer memorials, pioneer museums, memorials and

1 In all events, regardless of whether the ROW use described in the mayor's
2 email is properly characterized as a trail or a park, we agree with the city that the
3 mayor's email announcing that the city would proceed with the physical
4 development and use of the ROW does not concern the application of any land
5 use regulation. The mayor's email did not actually apply and was not required to
6 apply any land use regulation.

7 Again, the city's zoning code is codified at POMC title 17. Petitioner has
8 pointed to nothing in the city's zoning code that regulates ROW use on the subject
9 property. ROW use is regulated by POMC title 12 which, again, governs "Streets,
10 Sidewalks and Public Places." Petitioner has provided no indication that POMC
11 title 12 implements the city's comprehensive land use plan. POMC 12.24.020
12 provides that the city "exercises regulatory control over all public [ROW] within
13 the City under the authority of the City Charter and State law." POMC 12.24.010
14 defines "public [ROW]" to include "streets, roads, highways, bridges, alleys,

monuments to United States war veterans, sites or buildings
for meeting places for such war veterans, auto campgrounds,
playgrounds or comfort stations.

"(2) Enlarging any public square, park, auto campground,
playground or comfort station."

No party cites POMC 12.16.010 or ORS 226.320 or explains whether the
parks commission vote designated the Fort Point Overlook Trail as "a public park
and recreation area pursuant to ORS 226.320." POMC 12.16.010. We express no
opinion about whether or how POMC 12.16.010 or ORS 226.320 apply to the
subject of this appeal.

1 sidewalks, *trails*, paths, public easements *and all other public ways or areas.*”
2 (Emphases added.) Petitioner has not pointed to anything indicating that the
3 zoning code applies to development or use of city ROW for the uses listed in
4 POMC 12.24.010. Thus, we conclude that the city’s zoning code does not
5 regulate any of those uses when they occur in an ROW.

6 *Allen v. City of Portland*, 15 Or LUBA 464, *rev’d on other grounds*, 87 Or
7 App 459, 742 P2d 701 (1987), *rev den*, 305 Or 103 (1988), is instructive. In that
8 case, the petitioners appealed the city’s approval of a conditional use permit
9 (CUP) that allowed placement of fill in a portion of the east bank of the
10 Willamette River, new highway construction, reconstruction of the Greenway
11 Trail and improvements to the esplanade. Similar to the circumstances in this
12 case, the city’s parks bureau and representatives of the surrounding community
13 developed plans to facilitate the proposed development and associated
14 improvements to the esplanade. The challenged CUP approval incorporated the
15 design developed by those participants.

16 The subject property was zoned for industrial use with Willamette
17 Greenway Scenic (WSR) and Willamette Scenic Development (WSD) overlay
18 zones. The purpose of the WSR and WSD overlay zones was to “protect,
19 conserve, enhance and maintain the natural, scenic, historical, agricultural,
20 economic, and recreational qualities of lands along the Willamette River.” *Allen*,
21 15 Or LUBA at 468. The petitioners argued, in part, that the city misconstrued
22 its own land use regulations and comprehensive plan by permitting a use (a

1 highway on-ramp) not authorized or allowed by the applicable zones. The city
2 responded that its code did not regulate freeways, and the city simply assumed
3 that the use of ROW for street purposes and pedestrian trails was allowed in every
4 zone.

5 We agreed with the city that,

6 “in general, [ROW] for public use are assumed permitted in every
7 zone. However, the city’s code includes an express provision that
8 roads and highways are not to be ‘generally’ considered dependent
9 or related to water location needs. This provision appears, when
10 considered with regulations regarding setback in the Greenway
11 Zone and the purpose of the Greenway Zone, to limit this particular
12 zone designation to uses which are clearly water related or water
13 dependent. It must be remembered that the WSR and WSD zones
14 are overlay zones which impose additional restrictions on the
15 underlying industrial zone. While the city’s argument makes sense
16 with respect to the underlying industrial zone, it is less persuasive
17 when considering the very restrictive provisions included in the
18 overlay zones.” *Id.* at 470 (citation omitted).

19 While it was undisputed that the CUP in *Allen* that was a land use decision
20 and that LUBA had jurisdiction, the reasoning in that case is helpful here. In
21 *Allen*, LUBA agreed with the city that public use of the ROW could be assumed
22 permitted in the underlying industrial zone. However, the Willamette Greenway
23 overlay zones included specific restrictions on uses that might otherwise have
24 been permitted (or unregulated) in the underlying zone.

25 Differently, here, petitioner points to no applicable overlay zone or
26 restrictions within the underlying 10-MU zone that the city was required to apply
27 to the public uses of the ROW. That is, petitioner has identified no land use

1 regulations that apply to the public uses of the ROW that are described in either
2 the 2018 ROW license or the mayor's email. That is true whether the public uses
3 of the ROW described in the mayor's email are characterized as a park or a trail.

4 Regardless of whether the use described in the mayor's email is properly
5 characterized as a trail, a park, or both, it is indisputably a "public way or area."
6 POMC 12.24.010. The use described is consistent with the uses of public ROW
7 under POMC title 12. The city was not required to determine whether the
8 development and use of the ROW described in the mayor's email is permitted in
9 the 10-MU zone under the city's zoning code. The city could, as it apparently
10 did, assume that the use is permitted in the underlying zone. That assumption
11 does not transform the mayor's email into a statutory land use decision.

12 **2. Comprehensive Plan Provisions**

13 Petitioner argues that the mayor's email concerns the application of the
14 Port Orford Comprehensive Plan (POCP). Petitioner argues that the city should
15 have applied six POCP goals and policies in approving the improvements
16 described in the mayor's email.⁷ In determining whether a local government was

⁷ Those POCP goals and policies include: (1) POCP Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Space), City Goal 3, which is to "[w]ork to acquire viewshed resource property if and when funding is available;" (2) POCP Statewide Planning Goal 5, City Policy 6, which is to "[e]xamine publicly owned lands including street and alley [ROW] for potential open space and visual resources prior to vacating property or other actions that convert publicly owned lands to private property;" (3) POCP Statewide Planning Goal 8 (Recreational Needs), City Policy 11, which is to "[a]cquire a parcel of

1 required to apply certain comprehensive plan provisions in making the
2 challenged decision, “it is not sufficient that [the] decision may touch on some
3 aspects of the comprehensive plan, rather the comprehensive plan must contain
4 provisions intended as standards or criteria for making the appealed decision.”
5 *Portland Oil Service Co. v. City of Beaverton*, 16 Or LUBA 255, 260 (1987)
6 (citing *Billington*, 299 Or at 475). Petitioner quotes POMC 17.04.140(B), which
7 applies to land use decisions and provides: “The proposal must be supported by
8 proof that it conforms to the applicable elements of the comprehensive plan and
9 to applicable provisions of this ordinance, especially the specific criteria set forth
10 for the particular type of decision under consideration.” Petitioner does not
11 identify any “specific criteria set forth for the particular type of decision under
12 consideration”—public use of the ROW. Petitioner also does not identify any
13 applicable criterion for the proposed uses of the ROW that require a city finding
14 of consistency with the POCP. Generally, goals and policies in a comprehensive
15 plan are not applicable to specific land use decisions unless an applicable

land that is surrounded by Battle Rock City Park to further enhance the park and its beaches;” (4) POCP Statewide Planning Goal 9 (Economic Development), City Goal 2, which is to “[d]iversify and improve the economy of Port Orford, while protecting the natural environment that makes the city a unique and inviting place;” (5) POCP Statewide Planning Goal 9, City Policy 6, which is to “[e]ncourage human-scale amenities within commercial areas and adjacent to trails and lookouts to encourage tourism and enhance the city’s sense of place;” and (6) POCP Statewide Planning Goal 11 (Public Facilities and Services), City Policy 1, which requires the city to “[p]romote the social, safety, health and well being of the citizens and visitors by encouraging adequate public facilities and services to meet the needs of the citizens,” including transportation facilities.

1 criterion requires a demonstration of consistency with the comprehensive plan.
2 Even then, local and statutory requirements that land use decisions be consistent
3 with the comprehensive plan do not necessarily mean that all parts of the
4 comprehensive plan are approval standards. *Friends of the Hood River*
5 *Waterfront v. City of Hood River*, 68 Or LUBA 459 (2013), *rev'd on other*
6 *grounds*, 263 Or App 80, 326 P3d 1229 (2014); *Save Our Skyline v. City of Bend*,
7 48 Or LUBA 192, 209-10 (2004).

8 It is not clear to us from petitioner's argument that any POCP provisions
9 provide applicable approval standards for the disputed ROW uses. As we
10 understand it, petitioner argues that the POCP goals and policies are "applicable
11 elements of the comprehensive plan" based on their subject matter and that they
12 are made applicable to the mayor's email through POMC 17.04.140(B). The first
13 three POCP goals and policies that petitioner cites concern the retention or
14 acquisition of property by the city, and do not concern a public use of an ROW.
15 See n 7. Petitioner has not cited any evidence indicating that the city considered
16 acquiring or disposing of any property interest in relation to developing the Fort
17 Point Overlook Trail. The last three POCP goals and policies that petitioner cites
18 are aspirational, requiring the city to achieve certain results or to "encourage"
19 certain behavior. See n 7. Petitioner has not established that the cited POCP goals
20 or policies provide any standards or criteria applicable to the construction and
21 use of the Fort Point Overlook Trail. We conclude that the mayor was not
22 required to apply any provisions of the POCP to the mayor's email.

1 We conclude that, in making the challenged decision, the city was not
2 required to apply any comprehensive plan provisions or land use regulations.
3 Accordingly, we conclude that the challenged decision is not a statutory land use
4 decision.

5 **B. The mayor's email is not a significant impacts land use decision.**

6 A "significant impacts" land use decision is a decision that does not qualify
7 under the definition of "land use decision" at ORS 197.015(10)(a)(A) but,
8 nonetheless, is deemed to be reviewable as a land use decision if, among other
9 things, it creates "an actual, qualitatively or quantitatively significant impact on
10 present or future land uses." *Carlson v. City of Dunes City*, 28 Or LUBA 411,
11 414 (1994). In *Kerns*, the Oregon Supreme Court recognized that

12 "significant impact on present or future land uses' is a nebulous
13 standard, particularly in the context of a city's decision to undertake
14 street improvement work. Whereas some decisions, such as to
15 resurface a street or repair a pothole, have only a *de minimis* impact
16 on land use, and some, such as to construct a major arterial road or
17 a bridge, have a substantial impact, a large number of a city's day-
18 to-day decisions regarding public works and roads fall in between."
19 294 Or at 133.

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

23 "In the very rare cases when the significant impacts test is deemed
24 met, LUBA's review is typically conducted under statutes or other
25 laws, such as road vacation statutes, that provide standards for the
26 decision, and that have some direct bearing on the use of land.

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

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

18 Petitioner identifies no non-land-use standards that petitioner believes
19 apply to the mayor’s email and would govern LUBA’s review in this appeal. We
20 conclude that the challenged decision is not a significant impacts land use
21 decision.

22 **MOTION TO TRANSFER**

23 Petitioner requests that this appeal be transferred to circuit court pursuant
24 to ORS 34.102(4) and OAR 661-010-0075(11) if LUBA determines that it lacks
25 jurisdiction over the appeal. Petitioner’s motion to transfer is granted.

26 The appeal is transferred to Curry County Circuit Court.