

NATURE OF THE DECISIONS/CONSOLIDATION

In LUBA No. 2012-024, petitioner appeals Resolution 2867, a city resolution that expresses the city’s commitment to constructing improvements to an existing surface water supply facility. In LUBA No. 2012-032, petitioner appeals a city decision that authorizes an amendment to a construction contract that the city had previously entered into for construction of the surface water supply facility improvements. For the reasons explained below, the decisions are closely related decisions and are hereby consolidated.¹

MOTIONS TO DISMISS

A. Background

The city’s water is supplied in part from Bridge Creek, located approximately 13 miles outside of the city. The Bridge Creek water supply facility has supplied water to the city for approximately 85 years, and the water is currently delivered to the city through existing transmission pipelines that cross federal forest and county land. Various portions of the Bridge Creek facility are in need of repair or replacement.

In 2008, the city adopted a Water Public Facilities Plan (PFP) that identified as a public facility project extensive improvements to the Bridge Creek facility.² The parties call

¹ Under OAR 661-010-0055, LUBA:

“* * * may consolidate two or more proceedings, provided the proceedings seek review of the same or closely related land use decision(s) or limited land use decision(s).”

² OAR 660-011-0005 defines “public facility plan” as “* * *a support document or documents to a comprehensive plan. The facility plan describes the water, sewer and transportation facilities which are to support the land uses designated in the appropriate acknowledged comprehensive plans within an urban growth boundary containing a population greater than 2,500. Certain elements of the public facility plan also shall be adopted as part of the comprehensive plan, as specified in OAR 660-11-[0]045.”

OAR 660-011-0045(1) requires that the city adopt the public facility plan as a supporting document to the city’s comprehensive plan and also adopt as part of the city’s comprehensive plan:

“(a) The list of public facility project titles, excluding (if the jurisdiction so chooses) the descriptions or specifications of those projects;

1 the improvement project the Surface Water Improvement Project (SWIP). The 2008 Water
2 PFP was appealed to the Land Conservation and Development Commission (LCDC), and
3 LCDC subsequently remanded the 2008 Water PFP to the city.

4 In March, 2012, the city adopted Resolution 2867, the decision challenged in LUBA
5 No. 2012-024. Resolution 2867 expresses the city’s continued commitment to constructing
6 certain aspects of the SWIP and also directs city planning staff to delay construction of a
7 membrane filtration treatment facility that is a part of the SWIP.

8 In March 2011 the city entered into a contract for design and construction of the
9 SWIP improvements. No LUBA appeal was filed to challenge that contract. In April, 2012,
10 the city council authorized an amendment of the March, 2011 contract for design and
11 construction of the SWIP improvements. That authorization of the March 2011 contract
12 amendment is the decision challenged in LUBA No. 2012-032.

13 Finally, in May, 2012, approximately two months after the city adopted the
14 Resolution and approximately one month after the city entered into the contract amendment,
15 the city adopted a revised Water PFP (the 2012 Water PFP) that includes the SWIP as a
16 public facility project. Petitioner appeals that city ordinance in LUBA No. 2012-043.

17 **B. Motion to Dismiss (LUBA No. 2012-024)**

18 The city moves to dismiss LUBA No. 2012-024, the appeal of the Resolution.
19 According to the city, in adopting the Resolution, the city did not make a final “land use
20 decision” as defined in ORS 197.015(10)(a)(A).³ The city maintains that in adopting the

“(b) A map or written description of the public facility projects’ locations or service areas as specified in sections (2) and (3) of this rule; and

“(c) The policy(ies) or urban growth management agreement designating the provider of each public facility system. If there is more than one provider with the authority to provide the system within the area covered by the public facility plan, then the provider of each project shall be designated.”

³ As defined in ORS 197.015(10)(a)(A), a land use decision includes:

1 Resolution the city did not apply and was not required to apply any statewide planning goal,
2 comprehensive plan provision, or land use regulation. The city also maintains that the
3 Resolution is not a “final” decision and that under ORS 197.015(10)(a)(A) a land use
4 decision must be a “final” decision. See n 3. According to the city, the city’s final land use
5 decision is the Ordinance that adopted the 2012 Water PFP that has been appealed in LUBA
6 No. 2012-043.

7 It is petitioner’s burden to establish that LUBA has jurisdiction to consider the appeal
8 of the Resolution. *Billington v. Polk County*, 299 Or 471, 475, 703 P2d 232 (1985). We
9 understand petitioner to contend that the Resolution is a land use decision because the city
10 was required to apply Statewide Planning Goal 11 (Public Facilities) and the Goal 11
11 administrative rule and its comprehensive plan directly to the decision. That is so, petitioner
12 argues, because the SWIP was not included in the city’s comprehensive plan or an effective
13 public facilities plan on the date the city adopted the Resolution.⁴ As such, we understand
14 petitioner to argue, in deciding to proceed with a public facility project that is not included in
15 the city’s comprehensive plan, the city was required to apply Goal 11, OAR 660-011-0045,
16 and its related comprehensive plan provisions directly to the decision.

17 Petitioner cites *Homebuilders Assoc. of Lane County v. City of Springfield*, 50 Or

“A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

“(i) The goals;

“(ii) A comprehensive plan provision;

“(iii) A land use regulation; or

“(iv) A new land use regulation[.]”

⁴ According to petitioner, the city repealed its 1996 Water System Master Plan in 2008 when it adopted the 2008 Water PFP, and the 2008 Water PFP was remanded by LCDC and was not effective at the time the Resolution was adopted.

1 LUBA 109, 133 (2005), *aff'd* 204 Or App 270 (2006) in support of its argument. However,
2 *Homebuilders* does not assist petitioner, because *Homebuilders* involved a city resolution
3 that no party disputed was a *final* decision to adopt a wastewater treatment facility plan in
4 order to comply with obligations under ORS 223.309.⁵ We held that the challenged decision
5 was not a land use decision because the local government respondents were not required to
6 apply Goal 11 or the Goal 11 rules in adopting a plan in order to comply with ORS 223.309.

7 We agree with the city that the Resolution is not a final decision and that in order to
8 be a land use decision as defined in ORS 197.015(10)(a)(A), the decision must be a final
9 decision. *E & R Farm Partnership v. City of Gervais*, 37 Or LUBA 702, 705 (2000);
10 *Hemstreet v. Seaside Improvement Comm.*, 16 Or LUBA 748, 752, *aff'd* 93 Or App 73, 761
11 P2d 533 (1988); *CBH Company v. City of Tualatin*, 16 Or LUBA 399, 405 n 7 (1988). In
12 *Setniker v. Polk County*, 58 Or LUBA 87 (2008), we concluded that a resolution that initiated
13 a legislative comprehensive plan amendment process was not a final decision subject to
14 LUBA's jurisdiction where the county's code made clear that the decision to initiate a
15 legislative plan amendment would culminate in a final board of commissioners decision to
16 approve the comprehensive plan amendment that could be appealed to LUBA. *See also No*
17 *Tram to OHSU v. City of Portland*, 40 Or LUBA 411 (2001) (a resolution that directs

⁵ ORS 223.309 provides in relevant part:

“(1) Prior to the establishment of a system development charge by ordinance or resolution, a local government shall prepare a capital improvement plan, public facilities plan, master plan or comparable plan that includes a list of the capital improvements that may be funded with improvement fee revenues and the estimated cost and timing for each improvement.

“(2) A local government that has prepared a plan and the list described in subsection (1) of this section may modify such plan and list at any time. * * *”

ORS 223.314 provides:

“The establishment, modification or implementation of a system development charge, or a plan or list adopted pursuant to ORS 223.309, or any modification of a plan or list, is not a land use decision pursuant to ORS chapters 195 and 197.”

1 planning staff to continue a legislative process to develop a plan governing future expansion
2 of the state medical university is not a land use decision because it is not a final decision).

3 In the present appeal the city takes the position that the city's adoption of the
4 Resolution is merely a step in a multi-step, multi-year planning process to proceed with the
5 SWIP that has culminated in the city's adoption of the 2012 Water PFP that includes the
6 SWIP. Given that position, we agree with the city that the Resolution is not the city's final
7 decision to proceed with the SWIP, and that the final decision to proceed with the SWIP was
8 made when the city adopted the 2012 Water PFP. Petitioner has not pointed to anything in
9 the Resolution itself that indicates that it is a final decision to proceed with the SWIP. The
10 Resolution generally contains a chronology of the surface water supply system from its early
11 days to the present and a chronology of the SWIP, and refers to four other resolutions
12 relating to the SWIP that the city has previously adopted. It is an expression of the city's
13 commitment to maintaining the surface water supply facility and improving it that was
14 somewhat contemporaneous with the city's adoption of the 2012 Water PFP. The resolution
15 is merely one of several iterations of the city's commitment to moving forward with the
16 SWIP, and that expression of commitment does not convert the Resolution into the city's
17 final decision to proceed with the project. For that reason the Resolution is not a land use
18 decision under ORS 197.015(10)(a). Rather, the city's final land use decision to proceed
19 with the SWIP was made in May, 2012 when it adopted the 2012 Water PFP that includes the
20 SWIP. As noted, that decision is appealed in LUBA No. 2012-043.

21 **C. Motion To Dismiss LUBA No. 2012-032**

22 The city moves to dismiss LUBA No. 2012-032, the appeal of the authorization of the
23 contract amendment. According to the city, the authorization of the amendment to the
24 construction contract was not the city's final decision to proceed with the construction of the
25 SWIP and therefore was not a "land use decision" as defined in ORS 197.015(10)(a)(A).
26 The city also argues that the contract was properly awarded under the Oregon Public

1 Contracting Code at ORS Chapter 279C and under the Attorney General’s model contracting
2 rules, at OAR 137-49-0600. According to the city, contract awards may only be challenged
3 by filing a protest, which petitioner has not filed.

4 Petitioner responds that the contract amendment is the city’s final decision to proceed
5 with the construction of the SWIP and for the same reasons explained above, the city was
6 required to apply Goal 11, OAR 660-011-0045, and its comprehensive plan provisions to the
7 decision to approve the contract amendment. *See Jaqua v. City of Springfield*, 46 Or LUBA
8 566, 574, *remanded on other grounds* 193 Or App 573, 91 P3d 817 (2004) (local government
9 decision “concerns” the application of a comprehensive plan provision or land use regulation
10 if (1) the decision maker was required by law to apply its plan or land use regulations as
11 approval standards, but did not, or (2) the decision maker in fact applied plan provisions or
12 land use regulations). Petitioner takes the position that the fact that no protest challenging
13 the contract award was filed under the Oregon Public Contracting Code is legally irrelevant
14 in determining whether the challenged decision is a land use decision subject to LUBA’s
15 jurisdiction.

16 While we agree with petitioner that the issue of whether the contract was properly
17 awarded under the Oregon Public Contracting Code has no bearing on the question of
18 whether the authorization of the construction contract amendment is a “land use decision” as
19 defined in ORS 197.015(10)(a)(A), we agree with the city that the challenged decision is not
20 the city’s final decision to proceed with the construction of the SWIP and therefore is not a
21 final “land use decision.”

22 Petitioner’s caution in filing the appeal is understandable, given the timing of the
23 contract, the contract amendment and the subsequently enacted ordinance that finally adopted
24 the 2012 Water PFP. But it is the 2012 Water PFP that is the city’s final decision that

1 approves the SWIP.⁶ Despite that timing, the city’s authorization of an amendment to a
2 previously executed construction contract is not the city’s final decision to proceed with
3 construction of the SWIP.⁷ For the same reasons we determine above that the Resolution is
4 not the city’s final decision to proceed with the project, we conclude that the city’s
5 authorization of the contract amendment is not the city’s final decision to proceed with the
6 project and is therefore not a “land use decision” under ORS 197.015(10)(a)(A).

7 Accordingly, we do not have jurisdiction over the appeals.

8 LUBA Nos. 2012-024 and 2012-032 are dismissed.

⁶ This is not a case where a city entered into a contract to construct a public facility that was not authorized by its acknowledged PFP and proceeded to actually construct the facility, while contemporaneously proceeding to amend its PFP to include the public facility. Such a circumstance might provide a basis for a different conclusion about whether a contract to construct a public facility is a final decision and a land use decision.

⁷ We also do not think the contract amendment is a decision that has a significant effect on present or future land uses in the area under *City of Pendleton v. Kerns*, 294 Or 126, 135, 653 P2d 992 (1982). A local government decision can be a decision subject to LUBA review if it will have a significant effect on present or future land uses, and is not simply a *de minimis* improvement project. *Id.* Although arguably *the project* that is the subject of the amendment is more than a *de minimis* improvement project since its estimated cost is over \$20 million, petitioner does not explain how the decision to authorize an amendment to a construction contract “effects a significant change in the land use status quo * * *,” since, as we explain above, it is not the amendment that authorizes the SWIP.