

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

3
4 NO TRAM TO OHSU, LAWRENCE J. BECK and
5 SEAN BRENNAN,
6 *Petitioners,*

7
8 vs.

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10 CITY OF PORTLAND,
11 *Respondent,*

12
13 and

14
15 OREGON HEALTH SCIENCES UNIVERSITY,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2001-125

19
20 FINAL OPINION
21 AND ORDER

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23 Appeal from City of Portland.

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25 William C. Cox, Portland, represented petitioners.

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27 Kathryn S. Beaumont, Portland, represented respondent.

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29 Stephen T. Janik and Christen C. White, Portland, represented intervenor-respondent.

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31 BASSHAM, Board Member; BRIGGS, Board Chair; HOLSTUN, Board Member,
32 participated in the decision.

33
34 DISMISSED

09/24/2001

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

38

NATURE OF THE DECISION

Petitioners appeal a city council resolution directing the city planning bureau to continue with development of a Marquam Hill Plan.

FACTS

We draw the following facts from the record and the parties' pleadings. The main campus of intervenor Oregon Health Sciences University (OHSU) is located on Marquam Hill. OHSU contemplates considerable growth in its mission and facilities over the next 30 years and has developed a "proposed expansion plan" that in relevant part calls for development of additional facilities in the North Macadam area, located at the base of Marquam Hill. OHSU's proposed expansion plan concludes that development of the North Macadam campus is dependent on direct and rapid access to and from the main campus, and proposes an aerial tram between the two campuses to accommodate that need.

Apparently in response to OHSU's proposals, the city planning bureau began a legislative process to develop a Marquam Hill Plan that encompasses OHSU's main campus and the adjoining Veterans' Hospital. In February 2001, the planning bureau began meeting with a citizen advisory group composed of representatives from OHSU, neighborhood groups, and others. The city council conducted two work sessions on the proposed plan. At the conclusion of a May 3, 2001 work session, the council directed planning staff to propose a resolution to establish the scope of the planning effort and to guide the planning process. Accordingly, staff prepared a resolution with an attached work program, and presented it to the city council at a July 11, 2001 public hearing. In relevant part, the resolution directs planning staff

"to continue the Marquam Hill Plan as a legislative project including consideration and evaluation of OHSU's proposed Central Campus and aerial tram, to conduct appropriate studies, to review relevant City policies and regulations, to involve the community, and to develop a Proposed Marquam

1 Hill Plan addressing OHSU’s proposed expansion and neighborhood needs[.]”
2 Record 7.

3 With respect to the proposed aerial tram, the work program attached to the resolution directs
4 planning staff to “[c]oordinate and collaborate with the Office of Transportation to conduct
5 an evaluation of the Marquam Hill to North Macadam aerial tram proposal.” Record 10.
6 The work program directs staff to prepare a proposed Marquam Hill Plan and Plan District
7 by February 2002.

8 The city council adopted the resolution at the July 11, 2001 hearing. This appeal
9 followed.

10 **MOTION TO DISMISS**

11 The city moves to dismiss this appeal, arguing that the challenged resolution is not a
12 land use decision subject to the Board’s jurisdiction.

13 According to the city, the challenged resolution is not a land use decision as defined
14 by ORS 197.015(10)(a), or a “significant impacts” land use decision under *City of Pendleton*
15 *v. Kerns*, 294 Or 126, 653 P2d 992 (1982).¹ The city argues that the decision is not a “final”
16 decision of any kind, because it simply directs planning staff to continue development of the
17 Marquam Hill Plan, and provides guidance as to the scope and focus of that planning effort.
18 The city also argues that the resolution is not a statutorily defined “land use decision,”
19 because it does not concern “the adoption, amendment or application” of any statewide

¹As relevant here, LUBA’s jurisdiction is limited to “land use decisions.” ORS 197.015(10)(a)(A) defines “land use decision” to include:

“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[.]” (Emphasis added.)

1 planning goal, comprehensive plan provision, or land use regulation. Finally, the city argues
2 that the challenged resolution is not a “significant impacts” land use decision under *Kerns*,
3 because it has no land use impacts whatsoever. The city concedes that the planning process
4 that is called for by the challenged resolution will probably result in the adoption of new land
5 use regulations, and that a decision to adopt such land use regulations would indisputably be
6 a land use decision. However, the city argues that a decision to initiate or further a process
7 that might ultimately lead to a land use decision is not itself a final land use decision.

8 Petitioners respond that the challenged resolution represents a *de facto* final decision
9 to allow OHSU to site an aerial tram. Petitioners argue that the aerial tram is inconsistent
10 with a number of city comprehensive plan provisions and with OAR 660-012-0060, part of
11 the Transportation Planning Rule. Therefore, petitioners argue, the city’s decision is a final
12 decision concerning the application of comprehensive plan provisions and rules
13 implementing the statewide planning goals, and thus is a statutory land use decision.
14 Further, petitioners contend, the city’s decision to allow an aerial tram that will pass over
15 residential property has significant land use impacts, and is thus subject to LUBA’s
16 jurisdiction under *Kerns* and its progeny.

17 We need not address each of petitioners’ arguments, because petitioners’ initial and
18 fundamental premise—that the challenged resolution is a final decision authorizing the
19 disputed aerial tram—is incorrect. Under either the statutory test or the significant impact
20 test, a “land use decision” must be a *final* decision. *Knee Deep Cattle Company v. Lane*
21 *County*, 28 Or LUBA 288, 295 (1994), *aff’d* 133 Or App 120, 890 P2d 449 (1995).
22 Petitioners do not cite to anything in the challenged resolution that approves the proposed
23 tram or makes a final determination with respect to the tram or any other matter. We agree
24 with the city that the challenged resolution does little more than direct planning staff and

1 other affected bureaus to continue development of the Marquam Hill Plan, including
2 consideration of the proposed tram.²

3 Because the decision in this appeal is not a final decision subject to our jurisdiction,
4 this appeal must be, and accordingly is, dismissed.

²Petitioners may be arguing that the resolution's directive to consider the proposed tram demonstrates that the city favors the proposal and intends to approve it in subsequent decisions, either in the legislative decision to adopt the Marquam Hill Plan, or in a subsequent quasi-judicial decision based on the adopted plan. Petitioners argued to the city, and repeat those arguments to us, that the proposed tram should be considered in a quasi-judicial land use application under existing legislation, rather than in the context of a legislative proceeding. Be that as it may, petitioners have not demonstrated that the decision before us constitutes a final decision approving the disputed tram or is otherwise a final land use decision subject to our jurisdiction.