

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

SAVE STAFFORD ROAD,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent,

and

PORTLAND GENERAL ELECTRIC COMPANY,
Intervenor-Respondent.

LUBA No. 2024-057

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Gregory S. Hathaway represented petitioner.

Caleb J. N. Huegel represented respondent.

William L. Rasmussen represented intervenor-respondent.

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

ZAMUDIO, Board Chair; did not participate in the decision.

DISMISSED

12/12/2024

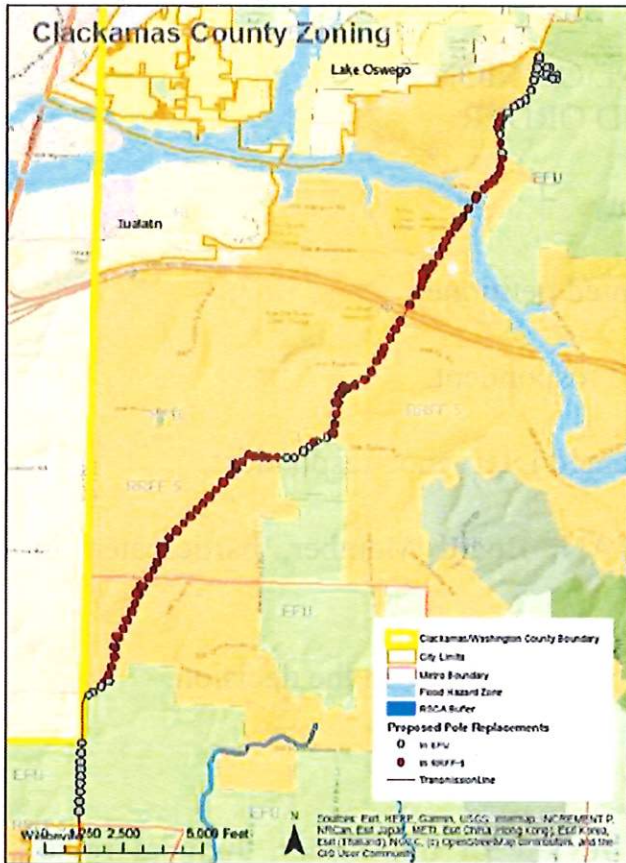
You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

NATURE OF DECISION

Petitioner appeals the county’s issuance of a land use compatibility statement (LUCS) for a transmission line.

BACKGROUND

Intervenor Portland General Electric Company (PGE) wishes to construct its Rosemont-Wilsonville Transmission Line (RW Line). As shown on the drawing below, the RW Line is proposed to cross certain private properties within the county zoned Exclusive Farm Use (EFU) and Rural Residential Farm Forest 5 Acre (RRFF-5.)



Record 6.

1 In order to condemn property interests necessary for construction and operation
2 of the RW line, PGE must acquire a certificate of public convenience and
3 necessity from Oregon’s Public Utilities Commission (OPUC).¹

4 ORS 197.180(1) provides:

5 “(1) Except as provided in ORS 197.277 or subsection (2) of this
6 section or unless expressly exempted by another statute from
7 any of the requirements of this section, state agencies shall
8 carry out their planning duties, powers and responsibilities
9 and take actions that are authorized by law with respect to
10 programs affecting land use:

11 “(a) In compliance with the goals, rules implementing the
12 goals and rules implementing this section; and

13 “(b) In a manner compatible with acknowledged
14 comprehensive plans and land use regulations.”

15 OAR 660-030-0070(1) provides, in part, that state agencies will “adopt
16 appropriate rules and procedures to assure that the agency’s land use programs
17 are compatible with acknowledged comprehensive plans.” OPUC has determined
18 that it is required to determine that its issuance of a certificate of public
19 convenience and necessity is consistent with acknowledged city and county
20 comprehensive plans and land use regulations. County Motion to Dismiss Ex A,
21 at 24. OPUC’s OAR 860-025-0040 provides, in part:

¹ OAR 860-025-0030(1) provides: “Petitions under ORS 758.015, for a certificate of public convenience and necessity to construct an overhead transmission line that will necessitate a condemnation of land or an interest therein, must be filed in accordance with OAR 860-001-0170.”

- 1 “(1) *The Commission, as part of its approval of a petition filed*
2 *under OAR 860-025-0030, shall adopt findings which assure*
3 *the proposed transmission project complies with the*
4 *Statewide Planning Goals and is compatible with the*
5 *acknowledged comprehensive plan(s) and land use*
6 *regulations of each local government where the project is to*
7 *be located. The Commission’s findings shall be developed*
8 *consistent with the rules and procedures in the Commission’s*
9 *state agency coordination program pursuant to ORS 197.180.*
- 10 “(2) *The Commission’s land use findings assuring the proposed*
11 *project’s goal compliance and plan compatibility shall be*
12 *based on the hearing record, which shall include at least one*
13 *of the following:*
- 14 “(a) *A copy of the local land use permit from each affected*
15 *city or county planning agency, building department,*
16 *or governing body stating that the proposed*
17 *transmission project has received the jurisdiction’s*
18 *approval; or*
- 19 “(b) *A copy of a letter from each affected local planning*
20 *agency, building department, or governing body stating*
21 *that the proposed transmission project is permitted*
22 *under the jurisdiction’s comprehensive plan, land use*
23 *regulations, and development codes, but does not*
24 *require specific approval by the jurisdiction; or*
- 25 “(c) *Other written or oral land use information and*
26 *documentation equivalent to OAR 860-025-0040(2)(a)*
27 *or (b) above properly presented to the Commission*
28 *from an authorized representative from each affected*
29 *city or county.*
- 30 “(3) *In making findings under section (2) of this rule, the*
31 *Commission may rely on a Land Use Compatibility Statement*
32 *(‘LUCS’) issued by an authorized representative from an*
33 *affected city or county to the extent the LUCS:*

1 “(a) *Confirms the city or county has issued a land use*
2 *permit approving the proposed transmission project;*
3 *or*

4 “(b) *States the applicable city or county acknowledged*
5 *comprehensive plan does not require specific approval*
6 *of the proposed transmission project; or*

7 “(c) *States the proposed transmission project will be*
8 *compatible with the jurisdiction’s acknowledged*
9 *comprehensive plan if petitioner obtains the land use*
10 *permits identified in the LUCS, and the LUCS confirms*
11 *the acknowledged comprehensive plan’s general*
12 *provisions will not be substantially affected by*
13 *issuance of a certificate if those permits are obtained.*

14 “(4) A petitioner must notify the Commission promptly when a
15 land use permit or land use compatibility statement submitted
16 to support findings under this subsection has been appealed
17 or has been modified or withdrawn before a final order has
18 issued in a CPCN proceeding.”² (Emphases added.)

19 As part of its application for a certificate of public necessity, PGE sought a LUCS
20 in compliance with OAR 860-025-0040(3). On August 23, 2024, the county
21 issued its LUCS setting out the relationship between segments of the RW Line
22 and the county code (ZDO). This appeal followed.

² In the 1991 OPUC State Agency Coordination Program, the OPUC explains that section III of the document “responds to the requirements of OAR 660-30-060(4).” County Motion to Dismiss Ex A, at 24. Portions of OAR 660-30-060(4) quoted in section III of the coordination document closely track OAR 660-030-0040, which we understand was adopted after 1991.

1 **MOTION TO DISMISS**

2 On September 13, 2024, petitioner filed its notice of intent to appeal.³ On
3 October 1, 2024, the county moved to dismiss the appeal for lack of jurisdiction.
4 On October 24, 2024, petitioner filed its response to the county’s motion to
5 dismiss. On October 30, 2024, intervenor filed its motion to dismiss for lack of
6 jurisdiction. On November 7, 2024, the county filed a reply to petitioner’s
7 response to its motion to dismiss. On November 13, 2024, petitioner filed its
8 response to intervenor’s motion to dismiss.⁴

9 **A. ORS 197.015(10)(b)(H)**

10 ORS 197.015(10)(b)(H) provides that land use decisions subject to our
11 review do not include:

12 “* * * a decision of a local government:

13 “* * * * *

14 “(H) That a proposed state agency action subject to ORS
15 197.180(1) is compatible with the acknowledged
16 comprehensive plan and land use regulations
17 implementing the plan, if:

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

³ Petitioner filed a corrected NITA on September 24, 2024.

⁴ Petitioner titled its response to intervenor’s motion to dismiss as also a sur-reply to the county’s reply. Our rules do not provide for sur-replies.

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

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

12 The county determined that the portion of the RW Line within public right-
13 of-way within the EFU zone, is allowed as an outright use as

14 “reconstruction or modification of public roads and highways,
15 including the placement of utility facilities overhead and in the
16 subsurface of public roads and highways along the public right-of-
17 way, but not including the addition of travel lanes, where no removal
18 or displacement of buildings would occur, or no new land parcels
19 result.” County Motion to Dismiss Ex G, at 2.

20 The county concluded that specific county approval was not required for this
21 portion of the RW Line within the public right-of-way.

22 PGE has an existing distribution line along Stafford Road but outside the
23 public right-of-way. The county concluded that if the existing distribution line is
24 verified to be a nonconforming use and an alteration of the nonconforming use
25 in the EFU and RRFF-5 zones is approved, the portion of the RW Line so
26 approved would be compatible with the acknowledged comprehensive plan and

1 the acknowledged comprehensive plan general provisions would not be
2 substantially affected.⁵ County Motion to Dismiss Ex G, at 2-3.

3 The county determined that the portion of the RW Line on private property
4 zoned EFU could be approved as a utility facility necessary for public service.
5 ZDO Table 401-1.⁶ County Motion to Dismiss Ex G, at 2. Once approved, the

⁵ The county found that nonconforming use law is part of the county's land use system.

“As required by state law, the ZDO and, therefore, Clackamas County's ‘acknowledged comprehensive plan’ allow the alteration of nonconforming uses. ORS 215.130; ZDO 1206.07. If the proposed transmission project is verified as a nonconforming use and an alteration of that nonconforming use is approved, then the acknowledged comprehensive plan's general provisions will not be substantially affected by issuance of a certificate because they will not apply.” County Motion to Dismiss Ex G, at 3.

⁶ Table 401-1 allows, subject to a Type II process, “Utility facilities necessary for public service, including associated transmission lines as defined in ORS 469.300 and wetland waste treatment systems but not including commercial facilities for the purpose of generating electrical power for public use by sale or transmission towers over 200 feet in height” per ZDO 401.05(G)(2). ZDO Table 401-1. This language is similar to ORS 215.283(1)(c), authorizing on EFU land:

“Utility facilities necessary for public service, including wetland waste treatment systems but not including commercial facilities for the purpose of generating electrical power for public use by sale or transmission towers over 200 feet in height. A utility facility necessary for public service may be established as provided in:

“(A) ORS 215.275; or

“(B) If the utility facility is an associated transmission line, as defined in ORS 215.274 and 459.300.”

1 county determined that this element of the project would be compatible with the
2 acknowledged comprehensive plan and the acknowledged comprehensive plan's
3 general provisions would not be substantially affected.

4 In the RRFF-5 zone, the county concluded that the portions of the RW Line
5 on private property zoned RRFF-5 could be approved as a public utility facility.
6 ZDO Table 316-1. County Motion to Dismiss Ex G, at 3. Once approved, the
7 county determined that this element of the project would be compatible with the
8 acknowledged comprehensive plan and the acknowledged comprehensive plan's
9 general provisions would not be substantially affected.

10 Lastly, the county explained:

11 "[I]f detailed construction plans reveal proposed development or
12 vegetation removal in a floodplain or stream or wetland buffer in
13 either EFU or RRFF-5, additional land use permitting may be
14 required pursuant to ZDO Sections 703, Floodplain Management
15 District; 704, River and Stream Conservation Area; 706, Habitat
16 Conservation Area District; or 709, Water Quality Resource Area
17 District." County Motion to Dismiss Ex G, at 3.

18 The county determined:

19 "If the proposed transmission project is approved pursuant to ZDO
20 Section 703, 704, 706, or 709, then the acknowledged
21 comprehensive plan's general provisions will not be substantially
22 affected by issuance of a certificate because those code sections
23 implement the Water Resources policies of Chapter 3 and the
24 Floodplains policies of Chapter 4 of the Comprehensive Plan."
25 County Motion to Dismiss Ex G, at 3.

26 The county argues in its motion to dismiss that the LUCS falls under the
27 exclusions to our jurisdiction in ORS 197.015(10)(b)(H)(ii) and (iii).

1 The county argues that *within the right-of-way*, the LUCS decision is not
2 a land use decision under ORS 197.015(10)(b)(H)(ii), because the activity is
3 authorized without review, given

4 “ZDO Table 401-1 allows outright the ‘reconstruction or
5 modification of public roads and highways, including the placement
6 of utility facilities overhead and in the subsurface of public roads
7 and highways along the public right-of-way, but not including the
8 addition of travel lanes, where no removal or displacement of
9 buildings would occur, or no new land parcels result.’”⁷ County
10 Motion to Dismiss Ex G, at 2.

11 The county maintains that the LUCS decision concerning the remaining
12 portions of the RW Line not located in the right-of-way fall within the exception
13 to LUBA’s jurisdiction at ORS 197.15(10)(b)(H)(iii) because the county
14 identified the future land use review required to achieve compatibility with the
15 local comprehensive plan and land use regulations. In its motion to dismiss, PGE
16 also argues that the LUCS is excluded from our review under ORS
17 197.015(10)(b)(H) and phrases the “central question” as “whether OAR 860-025-
18 0040 requires more than just a determination of compatibility between the local

⁷ This is consistent with ORS 215.283(1)(i) which provides that allowed uses on EFU land include

“[r]econstruction or modification of public roads and highways, including the placement of utility facilities overhead and in the subsurface of public roads and highways along the public right of way, but not including the addition of travel lanes, where no removal or displacement of buildings would occur, or no new land parcels result.”

1 comprehensive plan and the project under consideration.” PGE Motion to
2 Dismiss 2.

3 In *McPhillips Farm, Inc. v. Yamhill County*, we dismissed the petitioner’s
4 appeal of a county decision approving a LUCS certifying that a state agency
5 permit to construct a landfill berm was compatible with county land use laws,
6 explaining:

7 “[T]he jurisdictional question cannot be simply resolved based on
8 the fact that the decision on its face concludes that the agency action
9 is compatible for one of the reasons listed in ORS
10 197.015(10)(b)(H)(i) through (iii). LUBA must determine whether
11 the local government correctly concluded that the agency action is
12 compatible for one of those listed reasons, which in turn entails
13 resolving the likely merits of the appeal.” 66 Or LUBA 355, 360
14 (2012).

15 The Court of Appeals affirmed our decision dismissing the petitioner’s appeal of
16 the county’s issuance of a LUCS, concluding:

17 “LUBA did not err in determining that it lacked jurisdiction, because
18 the county’s LUCS is not a ‘land use decision’ under ORS
19 197.015(10)(b)(H)(i). That is so because (1) the county’s 1980 land
20 use decisions specifically contemplated and explicitly authorized a
21 landfill with berms, and the MSE berm is included or encompassed
22 within the scope of that authorization, and (2) the 1992
23 interpretation of the county’s site design review ordinance by its
24 board to not require review of approved components of an expressly
25 permitted land use was a reasonable construction of its site design
26 review ordinance, so that (3) further land use review of the landfill
27 use is not required by the county’s land use regulations and the
28 existing authorization is sufficient to qualify as a compatibility
29 determination under ORS 197.015(10)(b)(H)(i).” *McPhillips Farm,*
30 *Inc. v. Yamhill County*, 256 Or App 402, 410 (2013).

1 Petitioner does not dispute that the proposed use is authorized by the
2 provisions cited by the county in the LUCS. Petitioner agrees with part of the
3 county and PGE’s position, positing:

4 “[T]he County’s determination that PGE’s Proposed Transmission
5 Line would be ‘compatible’ with the County’s acknowledged
6 Comprehensive Plan and land use regulations if PGE obtained
7 approval of its Application is not a land use decision nor subject to
8 LUBA’s review. *On the other hand, the County’s determination that*
9 *the County’s acknowledged Comprehensive Plan’s general*
10 *provisions would not be ‘substantially affected’ if PGE obtained*
11 *approval of its Application is a land use decision subject to LUBA’s*
12 *jurisdiction.”* Petitioner’s Response to County Motion to Dismiss 11
13 (emphasis added; record citations omitted).

14 As petitioner observes, the county’s LUCS is structured to answer two
15 questions posed by OAR 860-025-0040(3)(c), that is whether the LUCS (1)
16 “[s]tates the proposed transmission project will be compatible with the
17 jurisdiction’s acknowledged comprehensive plan if petitioner obtains the land use
18 permits identified in the LUCS,” and (2) “the LUCS confirms the acknowledged
19 comprehensive plan’s general provisions will not be substantially affected by
20 issuance of a certificate if those permits are obtained.” The body of the LUCS
21 explains that the answer to the two questions posed by OAR 860-025-0040(3)(c)
22 is yes if listed land use permits are obtained for the various segments of the
23 transmission line.

24 Petitioner argues that rules of statutory construction require that we
25 consider the text and context. *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009),
26 *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). ORS

1 174.010 provides that we may not omit what has been inserted. Petitioner
2 maintains that OAR 860-025-0040 goes beyond the parameters of ORS
3 197.015(10)(b)(H)(iii) and requires a finding that the general provisions of the
4 comprehensive plan are not substantially affected.

5 The county anticipated this argument in its motion and argues that it is
6 possible that the LUCs would be a land use decision subject to our jurisdiction

7 “if, in concluding that the county’s general plan provisions will not
8 be substantially affected, the LUCS actually applied the county’s
9 general plan provisions to the line. However, the LUCS does not do
10 that. Instead, the LUCS concludes that the county’s general plan
11 provisions will not be substantially affected if certain permits are
12 obtained. The LUCS did not need to apply the county’s general plan
13 provision to the line to conclude that they will not be substantially
14 affected because the LUCS concludes that that result is assured by
15 the nature of and the criteria for the required future land use review.
16 Put differently, the LUCS concludes that the county’s general plan
17 provisions will not be substantially affected because the line
18 requires future land use review. *The county observes that a*
19 *conclusion that ‘the acknowledged comprehensive plan’s general*
20 *provisions will not be substantially affected’ by a use is itself a*
21 *conclusion that the use is ‘compatible.’* See OAR 660-030-
22 0070(2)(b).” County Motion to Dismiss 14-15 (emphasis added).

23 We understand the county to argue that it did not in fact apply general plan
24 provisions to the LUCS request and instead found that obtaining the stated land
25 use permits would ensure that the comprehensive plan’s general provisions were
26 not substantially affected.

27 Similarly, PGE argues that OAR 860-025-0040 does not require the county
28 to answer two separate questions because “[d]etermining that a state agency

1 proposal will not substantially affect the local comprehensive plan is the legal
2 equivalent of determining that the proposal is ‘compatible’ with the local
3 comprehensive plan under [OAR 660-030-0070(2)(b).]” PGE Motion to Dismiss
4 2. PGE argues: “The core question is whether a County determination that its
5 comprehensive plan ‘will not be substantially affected’ by a project for purposes
6 of OAR 860-025-0040(3)(c) is the same as a decision that the project is
7 ‘compatible’ with the comprehensive plan for purposes of ORS
8 197.015(10)(b)(H).” PGE Motion to Dismiss 9. PGE also argues, even if the PUC
9 arguably asks for more, the county did not apply the substance of the
10 comprehensive plan provisions to the LUCS. PGE Motion to Dismiss 3.
11 Furthermore, PGE argues that if there are two determinations or two decisions,
12 each is exempt because they both fall under ORS 197.015(10)(b)(H)(iii) and
13 determine that the project will be compatible with the comprehensive plan and
14 land use regulations if required permits are obtained.

15 “[W]here a local government issues a LUCS decision concluding
16 that a proposed agency action is compatible with the local
17 government’s plan and land use regulations for one of the three
18 reasons listed at ORS 197.015(10)(b)(H)(i-iii), LUBA must
19 determine whether the LUCS decision correctly categorized the
20 proposed use in order to determine whether the exclusion applies. If
21 the answer is yes, * * * LUBA lacks jurisdiction over the appeal of
22 that decision.” *Bishop v. Deschutes County*, 72 Or LUBA 103, 114
23 (2015).

24 LCDC rule OAR 660-030-0070 provides, in part:

25 “(2) *An agency can achieve compatibility in several ways*
26 *depending upon the nature of its land use program and the*

1 *organization and specificity of the acknowledged*
2 *comprehensive plan in question.* Each agency shall
3 incorporate one or more of the following approaches as
4 appropriate into its own compatibility procedures pursuant to
5 section (4) of this rule. *An agency program or action is*
6 *compatible when the agency:*

7 “(a) Receives land use approval from the local government
8 where the acknowledged comprehensive plan contains
9 requirements or conditions specifically applicable to
10 the agency’s land use program or action thereunder; or

11 “(b) *Determines, based on the response to written notice*
12 *provided to local government, the results of meetings*
13 *held pursuant to subsection (4)(a) of this rule, or other*
14 *equivalent steps as described in the agency’s certified*
15 *coordination program, that the acknowledged*
16 *comprehensive plan’s general provisions will not be*
17 *substantially affected by the agency’s program or*
18 *action; or*

19 “(c) Determines based on the results of steps taken under
20 subsection (2)(b) of this rule, that the acknowledged
21 comprehensive plan contains no specific or general
22 provisions applicable to the agency’s program or
23 action. In this situation, however, an agency shall
24 comply with the statewide planning goals as provided
25 in OAR 660-030-0065(3)(c); or

26 “(d) Utilizes in conjunction with a local government, the
27 provisions of this division and the agency’s
28 coordination program, where certified, to resolve a
29 land use dispute involving the agency’s land use
30 program or action and the acknowledged
31 comprehensive plan; or

32 “(e) Issues a permit in accordance with the requirements of
33 OAR chapter 660, division 31.” (Emphases added.)

1 We agree with the county and PGE that we do not have jurisdiction. OAR
2 660-030-0070(2)(b) provides that an agency action is compatible with an
3 acknowledged comprehensive plan when “the acknowledged comprehensive
4 plan’s general provisions will not be substantially affected by the agency’s
5 program or action.” ORS 197.015(10)(b)(H)(iii) provides “land use decision”
6 does not include a local government decision that a proposed agency action is
7 compatible with the comprehensive plan and land use regulations if the agency
8 action requires a future land use review under the applicable comprehensive plan
9 and land use regulations. The county’s LUCS falls within the exception because
10 the county’s finding that the issuance of the certificate will not adversely affect
11 the acknowledged comprehensive plan’s general provisions is simply a finding
12 that issuance of agency action is compatible with the plan *if* the identified land
13 use permits are obtained, and we agree with the county that the use is allowed if
14 approved under the cited ZDO provisions.

15 **B. Significant Impacts Test**

16 Petitioner also argues that the LUCS is subject to our jurisdiction under the
17 significant impacts test discussed in *Marks v. Land Conservation and*
18 *Development Commission*, 327 Or App 708, 710-11, 536 P3d 995, 998 (2023).
19 Response to PGE Motion to Dismiss 10. A significant impacts land use decision
20 creates “an actual, qualitatively, or quantitatively significant impact on present
21 or future land uses.” *Carlson v. City of Dunes City*, 28 Or LUBA 411, 414 (1994).
22 We have explained that “where the legislature adopts a statute that excludes

1 certain decisions from the statutory definition of ‘land use decision,’ LUBA has
2 no review authority over such decisions under the significant impact test.”
3 *McLaughlin v. Douglas County*, 76 Or LUBA 77, 83 (2017). Petitioner identifies
4 nothing in *Marks* that leads to the conclusion that land use decisions expressly
5 excluded from our jurisdiction under ORS 197.015(10)(b) may nonetheless be
6 reviewed by us because the decision has a significant impact on land use.

7 The motion to dismiss is granted.

8 The appeal is dismissed.