

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

3
4 KRISTA ANDERSON,)
5)
6 Petitioner,)
7)
8 vs.)
9)
10 WASHINGTON COUNTY,)
11)
12 Respondent.)
13
14

LUBA No. 95-118
FINAL OPINION
AND ORDER

15 Appeal from Washington County.

16
17 Jeffrey L. Kleinman, Portland, filed the petition for
18 review and argued on behalf of petitioner.

19
20 David C. Noren, Senior Assistant County Counsel,
21 Hillsboro, filed the response brief and argued on behalf of
22 respondent.

23
24 LIVINGSTON, Chief Referee; GUSTAFSON, Referee,
25 participated in the decision.

26
27 DISMISSED 12/18/95

28
29 You are entitled to judicial review of this Order.
30 Judicial review is governed by the provisions of ORS
31 197.850.

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a minute order of the board of
4 county commissioners. The minute order accepts a staff
5 report discussing issues associated with the status and
6 removal of a street barricade.

7 **FACTS**

8 In 1989 the county hearings officer approved a single-
9 family subdivision, subject to the following condition
10 (Condition D):

11 "The Applicant shall construct NW Hartford Street
12 to an L-1 standard. NW Hartford Street shall be
13 constructed to connect to the westerly terminus of
14 NW West Road. A temporary barrier shall separate
15 the connection and such barrier shall be designed
16 to allow access for emergency vehicles,
17 pedestrians, and bicycles only. This temporary
18 barrier shall remain in place until NW West Road,
19 from its western terminus to NW South Road, and NW
20 South Road, from its intersection with NW West
21 Road to NW Thompson Road, meet the County standard
22 (or future equivalent) as outlined in * * * the
23 Community Development Code." Record 98.

24 The "temporary barrier" (gate) as constructed is a large
25 structure of brick and iron, with brick planters attached.
26 Its appearance led many local residents to believe it was a
27 permanent fixture, and some claim to have purchased their
28 homes in reliance on its continued presence.

29 The county now intends to make the road improvements
30 described in Condition D. As soon as the improvements are
31 completed, the gate will be removed.

1 Petitioner and others attended a board of county
2 commissioners' meeting on April 4, 1995, to express their
3 collective opposition to removal of the gate. The staff
4 held a community meeting with concerned persons on May 2,
5 1995. At the commissioners' request, a staff report on the
6 gate and its removal, dated May 16, 1995, was prepared for
7 the commissioners' May 23, 1995 meeting.

8 The staff report addresses six questions posed by the
9 commissioners, including a discussion of actions available
10 to the commissioners in view of the county's order to remove
11 the gate; anticipated traffic volumes, trip distribution and
12 traffic safety; road grades; traffic calming options; the
13 county's failure to sign the gate as temporary; and possible
14 future extensions of "stub streets." The staff report
15 contains no findings and makes no recommendations.

16 In discussing options available to the commissioners,
17 the staff report states:

18 "The barrier between Hartford Street and West Road
19 was constructed by the developer as a condition in
20 the final order in a land use decision made by the
21 Hearings Officer. The County is legally bound by
22 the final order of Casefile 89-57 S/MP. The
23 findings and conclusions in the Notice of Decision
24 clearly state that the barrier is temporary and
25 that the Hartford Street/West Road connection must
26 be made upon satisfaction of the '22 foot/five
27 year life' condition." Record 56.

28 The staff report informs the commissioners that they may
29 instruct staff to file an application seeking a modification
30 of the condition under Washington County Community

1 Development Code (CDC) 207-6.7, which provides:

2 "Modification or removal of conditions of approval
3 may be sought on appeal or as a new development
4 action. A new development action shall be
5 processed through the same procedure as was used
6 to impose the conditions."

7 Under CDC 203-1.1, a development action may be
8 initiated only by (1) owners or contract purchasers of
9 property that is the subject of the development action or
10 the agents of the owners or contract purchasers; (2) the
11 board of county commissioners; (3) the planning commission;
12 (4) the planning director; or (5) public agencies or private
13 entities with eminent domain powers, for projects they have
14 the authority to construct. None of those listed in CDC
15 203-1.1 as able to initiate a development action did so in
16 this case.

17 In particular, notwithstanding the pressure applied by
18 petitioner and others, the board of county commissioners
19 chose not to initiate a development action to modify or
20 remove Condition D. The commissioners instead adopted the
21 challenged minute order which states, in its entirety:

22 "At its regular meeting on May 23, 1995, the Board
23 accepted the staff report addressing issues
24 associated with the Bauer Woods II barricade
25 (which would include removing the barricade upon
26 completion of conditions) and directed staff to 1)
27 post a sign which indicates the barricade will be
28 removed, 2) report back to the Board in two weeks
29 relative to the gradient and variance, if any, and
30 3) report back to the Board six months after the
31 gate is opened regarding the issues of safety,

1 speed, and traffic numbers."¹

2 This appeal followed.

3 **LUBA JURISDICTION**

4 The county contends that the minute order is neither a
5 land use decision under ORS 197.015(10)(a)(A), a limited
6 land use decision under ORS 197.015(12), nor a significant
7 impact land use decision, as that term is used in City of
8 Pendleton v. Kerns, 294 Or 126, 135, 653 P2d 992 (1982) and
9 its progeny.² See, e.g., Leathers v. Washington County, 29
10 Or LUBA 343 (1995). The tests for both statutory and
11 significant impact decisions presuppose the existence of a
12 final local government decision. City of North Plains v.
13 Washington County, 24 Or LUBA 78, 81 (1992). The county
14 argues that since no final local government decision was
15 made, we lack jurisdiction over this appeal.

16 The county relies on our opinion in Salem-Keizer School
17 Dist. 24-J v. City of Salem, 27 Or LUBA 351 (1994) (School
18 District I). In School District I, a member of the public
19 sent a letter to the city council alleging that use of a
20 particular site for a middle school would violate certain

¹The street gradient and variance issue arose because of the residents' concern that the steep grade of Hartford Street will make the Hartford Street/West Road connection unsafe.

²The petition for review uses the terms "land use decision" and "limited land use decision" interchangeably in describing the minute order. The inconsistency has no significance, however, since we conclude the minute order is not a decision at all.

1 city comprehensive plan policies. The city council referred
2 the letter to the planning staff, which prepared a report
3 outlining the process followed by the school district and
4 explaining the staff's involvement in that process. The
5 council decided upon motion to "accept the staff report as
6 information only." Id. at 359.

7 We agreed with the city

8 "that the city council's decision to receive a
9 staff report as information only and not to
10 proceed with a public hearing on the matter of the
11 * * * site [was] not a land use decision. Rather,
12 the city council's action on April 5, 1993 was
13 specifically not to make a land use decision."
14 Id.

15 Our opinion in School District I cited Owen Development
16 Group v. City of Gearhart, 111 Or App 476, 826 P2d 1016
17 (1992). In Owen Development, after issuance of a
18 development permit for a shopping center, the petitioners
19 and the city disagreed about the uses that would be allowed
20 in the center. Although the city code provided for no
21 declaratory or interpretive land use procedures, the
22 petitioners requested an "interpretation" of the earlier
23 approval. The city planning commission took no action on
24 the request except to discuss it at a regular meeting and
25 arrive at a "consensus," which was memorialized in an
26 administrator's letter to the petitioners. The Court of
27 Appeals stated:

28 "The purpose of [petitioner's] application was to
29 obtain permission for a prospective use by
30 maintaining that it had already been granted,

1 rather than by asking for an independent decision
2 in which the city could determine whether the
3 proposed use was permitted under the zoning
4 ordinance. Stated differently, petitioners did
5 not ask for the 'application of a zoning
6 ordinance'; rather, they sought permission for a
7 use without the direct application of the zoning
8 ordinance." Id. at 480-81.

9 In upholding the city's contention that no land use decision
10 had been made, the Court of Appeals added that the city "was
11 free to insist--as it did--that petitioners not obtain a
12 land use decision without applying for one in accordance
13 with its established procedures." Id. at 481.

14 Petitioners rely on Weeks v. City of Tillamook, 113 Or
15 App 285, 832 P2d 1246 (1992) (Weeks), which concerned the
16 validity of a conditional use permit in view of certain city
17 code provisions requiring commencement of development within
18 one year of approval. The petitioners in Weeks

19 "filed a document 'requesting [the city] Council
20 to * * * either (1) direct staff to acknowledge
21 the fact that the permit has indeed expired, or
22 (2) specify why Council feels the permit has not
23 expired and to authorize staff to continue the
24 denial of the permit's expiration * * *.'" Id. at
25 287. (First ellipsis in original.)

26 When the matter was presented to the city council, a
27 discussion occurred and a consensus was reached that the
28 conditional use permit was still valid. The petitioners
29 appealed from the entry in the meeting minutes that
30 reflected the consensus.

31 LUBA concluded that the consensus, reached without a
32 formal motion or vote, was not a final determination of the

1 question posed by the petitioners. The Court of Appeals
2 reversed, stating:

3 "This is not a situation of the kind contemplated
4 in [Owen Development] or Terraces Condo. Assn. v.
5 City of Portland, 110 Or App 471, 823 P2d 1004
6 (1992), where 'advisory' interpretations of
7 earlier land use decisions were sought from the
8 cities. Petitioners here requested a direct
9 application of a land use regulation * * * to a
10 discrete land use question, and the city council's
11 minutes state an answer to that question. In
12 other words, a land use decision, as defined in
13 ORS 197.015(10)(a)(A), was sought and one was
14 made. It is not consequential that the decisive
15 language was prefaced by the words 'consensus of
16 Council.'" Id. at 289.

17 Weeks does not support petitioner's case because, as
18 the board of county commissioners' minute order makes
19 obvious, the commissioners chose not to initiate the
20 development action under CDC 203-1.1 which would have
21 enabled them to apply the county's land use regulations to
22 decide whether to modify or remove Condition D. Stated
23 differently, rather than applying land use regulations to a
24 discrete land use question, the commissioners refused to
25 take the step that would have permitted them to apply the
26 regulations. This case is more like School District I (and
27 Owen Development) than Weeks. See also Bach v. Deschutes
28 County, 28 Or LUBA 58, 61 (1994).

29 Petitioner assigns error to the county's failure to
30 follow "Type III" hearing procedures "because the disputed
31 condition was part of a Type III decision." Petition for
32 Review 6. Petitioner also assigns error to the county's

1 failure to make adequate findings supported by substantial
2 evidence that its decision complied with various CDC
3 criteria. We do not reach petitioner's assignments of error
4 because neither petitioner nor the county initiated the
5 requisite "development action" under CDC 207-6.7 for
6 modification of Condition D. Petitioner did not place
7 herself in a position to pose any question to the county,
8 much less demand an answer.

9 As for the county, to the extent the minute order
10 reflects any decision, it is a decision not to decide
11 anything: to let Condition D, which was imposed by the
12 unchallenged 1989 decision, stand and be enforced; to gather
13 additional information pertaining to concerns raised by
14 petitioner and others; and to reexamine the situation in six
15 months. The county only "accepted" the staff report, which
16 itself made no recommendations; it did not take any action,
17 based upon the staff report, regarding Condition D. The
18 county's decision not to initiate a development action is
19 not itself a decision over which we have jurisdiction.

20 This appeal is dismissed.