

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

3
4 WILLIAM ANDERSON,)
5)
6 Petitioner,)
7)
8 vs.)
9) LUBA No. 94-135
10 CITY OF GATES,)
11)
12 Respondent,)
13)
14 and)
15)
16 MARION COUNTY,)
17)
18 Intervenor-Respondent.)

FINAL OPINION
AND ORDER

19
20
21 Appeal from City of Gates.

22
23 M. Chapin Milbank, Salem, filed the petition for review
24 and argued on behalf of petitioner.

25
26 James L. McGehee, Stayton, and Jane Ellen Stonecipher,
27 Assistant County Counsel, Salem, filed the response brief.
28 With them on the brief was McGehee & Meiners and Robert C.
29 Cannon, County Counsel. James L. McGehee argued on behalf
30 of respondent. Jane Ellen Stonecipher argued on behalf or
31 intervenor-respondent.

32
33 SHERTON, Chief Referee; GUSTAFSON, Referee; LIVINGSTON,
34 Referee, participated in the decision.

35
36 DISMISSED 06/15/95

37
38 You are entitled to judicial review of this Order.
39 Judicial review is governed by the provisions of ORS
40 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals an inter-governmental agreement
4 transferring jurisdiction over and maintenance
5 responsibility for a section of street from Marion County to
6 the City of Gates.

7 **MOTION TO INTERVENE**

8 Marion County moves to intervene in this proceeding on
9 the side of respondent. There is no objection to the
10 motion, and it is allowed.

11 **FACTS**

12 County Road 968 is a road located in the City of Gates
13 (city) that was owned by Marion County (county) prior to the
14 challenged decision. County Road 968 runs in an east-west
15 direction bordering Highway 22, then curves to the south,
16 terminating in an intersection with Sorbin Street. County
17 Road 968 has a 40-foot right-of-way. Its actual pavement
18 width varies from 20 to 22 feet.

19 On July 5, 1994, city representatives signed an
20 intergovernmental agreement in which the city agrees to
21 assume jurisdiction over and maintenance responsibilities
22 for a 1,700-foot section of County Road 968 located in the
23 center of the city, in exchange for county assumption of the
24 costs of relocating a city water line to a new bridge over
25 the North Santiam River being constructed jointly by Marion
26 and Linn Counties. This appeal followed.

1 **JURISDICTION**

2 LUBA's review jurisdiction is limited to local
3 government, special district and state agency "land use
4 decisions."¹ ORS 197.825(1). We first address respondents'
5 contention that the appealed decision is not a "land use
6 decision" subject to LUBA review. A local government
7 decision is a land use decision if it satisfies either
8 (1) the statutory definition in ORS 197.015(10); or (2) the
9 significant impacts test established by City of Pendleton v.
10 Kerns, 294 Or 126, 133-134, 653 P2d 996 (1982). Billington
11 v. Polk County, 299 Or 471, 479, 703 P2d 232 (1985).
12 Furthermore, as the party seeking LUBA review, petitioner
13 has the burden of establishing that the appealed decision is
14 a land use decision. Billington v. Polk County, 299 Or
15 at 475; City of Pendleton v. Kerns, 294 Or at 134 n 7;
16 Portland Oil Service Co. v. City of Beaverton, 16 Or LUBA
17 255, 260 (1987).

18 **A. Statutory Test**

19 ORS 197.015(10)(a)(A) defines "land use decision" to
20 include:

21 "A final decision or determination by a local
22 government or special district that concerns the
23 adoption, amendment or application of:

¹Under ORS 197.825(1), LUBA also has jurisdiction to review "limited land use decisions," as defined in ORS 197.015(12). However, no party contends the challenged decision is a limited land use decision, and we do not see that it is.

- 1 "(i) The goals;
- 2 "(ii) A comprehensive plan provision;
- 3 "(iii) A land use regulation; or
- 4 "(iv) A new land use regulation[.]"

5 The statement of jurisdiction in the petition for
6 review does not explain the basis for petitioner's assertion
7 that the challenged decision satisfies the statutory test.
8 However, other portions of the petition for review indicate
9 petitioner believes the challenged decision concerns the
10 application of provisions of the City of Gates Comprehensive
11 Plan (plan) and the City of Gates Zone Code (GZC).

12 In determining whether a local government decision
13 concerns the application of a comprehensive plan or land use
14 regulation:

15 "* * * it is not sufficient that a decision may
16 touch on some aspects of the comprehensive plan
17 [or land use regulations], rather the
18 comprehensive plan [or regulations] must contain
19 provisions intended as standards or criteria for
20 making the appealed decision. Billington v. Polk
21 County, 299 Or at 475." Portland Oil Service Co.
22 v. City of Beaverton, supra.

23 With regard to the GZC, petitioner cites GZC 19.110,
24 which sets out certain street design standards. However,
25 GZC 19.110 is expressly limited in application to partitions
26 and subdivisions. Petitioner cites nothing in the GZC that
27 arguably establishes a standard for a city decision to
28 assume jurisdiction over and maintenance responsibility for
29 a developed street in the downtown area.

1 With regard to the plan, petitioner contends the
2 following transportation policies apply:

3 "2. Existing streets shall be extended in a
4 logical manner to serve adjacent properties."
5 Plan, p. 40.

6 "3. The City will not accept new streets unless
7 they meet or exceed city standards." Plan,
8 p. 43.

9 Petitioner also contends the record shows County Road 968
10 does not meet city street standards.

11 We agree with respondents that the challenged decision
12 does not concern the application of plan Transportation
13 Policy 2 because it does not involve any extension of an
14 existing street.

15 With regard to plan Transportation Policy 3,
16 respondents call our attention to the following portion of
17 the plan's discussion of the city's current street system:

18 "Collectors

19 "[County Road 968] runs parallel to Highway 22 and
20 connects to the Linn County Road (CR 820) via
21 Riverview Street. This is a county-maintained
22 right-of-way, 30 feet in paved width with open
23 drainage ditches and no paved shoulders. * * *
24 No extensions of this right-of-way are expected
25 during the planning period." Plan, p. 40.

26 Respondents argue the reference to acceptance of "new"
27 streets in plan Transportation Policy 3 does not apply to an
28 existing, developed street that is described by the plan as
29 part of the city's existing street system, but rather to
30 newly built streets. Respondents further argue that to

1 interpret Policy 3 as applying to an existing road like
2 County Road 968 would make no sense because the city
3 standards for streets apply only to streets newly created or
4 improved through the partition or subdivision process.

5 We agree with respondents. The challenged decision
6 does not satisfy the statutory test for a "land use
7 decision."

8 **B. Significant Impact Test**

9 Even if a local government decision does not satisfy
10 the statutory definition of "land use decision," it is
11 nevertheless a land use decision subject to LUBA review if
12 it will have a significant impact on present or future land
13 uses in the area. City of Pendleton v. Kerns, *supra*, 294 Or
14 at 133-134. That a decision "would have potential impact,"
15 or "would have any impact," on present or future land uses
16 is not sufficient. Billington v. Polk County, *supra*, 299 Or
17 at 478-79.

18 Petitioners argue that in Bettis v. Roseburg, 1 Or LUBA
19 174, 177-78 (1980), this Board concluded that a decision
20 involving modifications to city streets could have a
21 significant impact on development of city land and,
22 therefore, was a land use decision. We also understand
23 petitioner to argue that city assumption of jurisdiction
24 over County Road 968 may have future impacts on maintenance
25 and improvement of that street.

26 Respondents argue that petitioner's reliance on Bettis

1 is misplaced, because Bettis dealt with a city resolution
2 that established standards for certain street improvements
3 throughout the city, and the Board simply concluded that
4 resolution implemented the city's comprehensive plan.
5 Respondents are correct.

6 Respondents further argue this case is akin to Many
7 Rivers Group v. City of Eugene, 25 Or LUBA 518 (1993), where
8 the decision at issue was an intergovernmental agreement
9 transferring ownership of park land from one jurisdiction to
10 another. Respondents contend that as in Many Rivers Group,
11 petitioner here has failed to establish that the transfer of
12 jurisdiction from one local government to another will have
13 a significant impact on present or future land uses. Once
14 again, we agree with respondents. See also, City of
15 Portland v. Multnomah County, 19 Or LUBA 468, 477-78 (1990)
16 (transfer of ownership of existing water system will not
17 have a significant impact on present or future land uses).

18 The challenged decision does not satisfy either the
19 statutory or significant impact test and, therefore, is not
20 a "land use decision" over which we have review
21 jurisdiction.

22 This appeal is dismissed.