

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioners challenge an administrative decision by the
4 Washington County Board of Commissioners (board of
5 commissioners) authorizing the Washington County
6 Transportation Department (transportation department) to
7 remove two gates which restrict access to a 130-yard
8 unimproved section of NW Leahy Terrace, and to improve that
9 street with a 22-foot asphalt overlay, and a four-foot paved
10 shoulder for pedestrians and bicyclists.

11 **FACTS**

12 NW Leahy Terrace was deeded to the county in 1976 as a
13 public right-of-way. The Washington County (county)
14 resolution and order accepting the deed of the road were
15 subject to two conditions: (1) that the roadway be used for
16 emergency vehicles only; and (2) that a breakaway gate be
17 installed and a gravel roadway for emergency vehicle usage
18 be constructed. Those conditions were fulfilled, and a gate
19 was installed at the eastern end of NW Leahy Terrace.

20 In 1989 the western portion of NW Leahy Terrace was
21 improved in conjunction with development of the Old Leahy
22 Homestead subdivision.¹ A second gate was then installed at

¹The record reflects that during the approval process for the Old Leahy Homestead subdivision, substantial attention was devoted to access issues, including a concern by the transportation department regarding additional traffic entering NW Leahy Road from NW Leahy Terrace. At one point, the transportation department advocated opening the subject section of NW Leahy Terrace, to provide access to the new subdivision from NW Torreyview Lane

1 the western end of the remaining unimproved section of NW
2 Leahy Terrace. The county contends the record does not
3 reflect why or by whom the second gate was installed.
4 Petitioners contend the second gate was a condition of
5 approval of the Old Leahy Homestead subdivision.²

6 The two gates restrict use of NW Leahy Terrace for
7 ordinary vehicular access between the Torreyview subdivision
8 and NW Leahy Road. According to petitioners, this
9 unimproved section of NW Leahy Terrace has become a de facto
10 neighborhood park. It is bounded by steep residential lots
11 to the south and a small pond and greenway to the north.
12 The area is generally shown on the Cedar Mill Community Plan
13 as part of a drainage hazard area and significant natural
14 resource. That plan is not detailed enough to allow precise
15 identification of the boundaries of the drainage hazard or
16 resource area.

17 Currently there is a single access to the Torreyview
18 subdivision via NW 90th, which intersects with Leahy Road
19 south of NW Leahy Terrace. Portions of the current access
20 are apparently very steep and difficult to negotiate during

and avoid opening the intersection of NW Leahy Terrace and NW Leahy Road. Ultimately, the county decided to leave the subject 130 yards unimproved and instead develop the section of the street which accesses NW Leahy Road.

²The record citation on which petitioner relies contains conditions of approval of the Old Leahy Homestead subdivision. No condition mentions the installation of a gate. However, there is no dispute that the second gate was installed in about 1989, which coincides with the approval date for the Old Leahy Homestead subdivision. The exact date of and purpose for the installation of the second gate are not necessary to resolve the issues in this appeal.

1 inclement weather. Improving NW Leahy Terrace would provide
2 an alternate access to NW Leahy Road from the Torreyview
3 subdivision. NW Leahy Terrace is less steep and,
4 apparently, easier to negotiate during inclement weather.

5 In January, 1994, in response to requests by Torreyview
6 subdivision residents for better access to their homes
7 during inclement weather, the county provided gate keys to
8 area residents to allow them to use the unimproved section
9 of NW Leahy Terrace. Following subsequent neighborhood
10 meetings, county staff recommended to the board of
11 commissioners that the gates be removed and the street be
12 improved with a two-lane, 22-foot wide asphalt overlay and a
13 four-foot pedestrian and bicycle way.

14 After a public meeting, the board of commissioners
15 approved the staff recommendation and issued the resolution
16 and order at issue, directing the transportation department
17 to make the challenged improvements. The board of
18 commissioners further determined the decision to authorize
19 the improvements is not a land use decision, because it
20 involves road usage regulations, maintenance and operational
21 improvements which are exempt from regulation under the
22 county Community Development Code (CDC).

23 **JURISDICTION**

24 The county moves to dismiss this appeal on the basis
25 that the challenged decision is not a land use decision over
26 which this Board has jurisdiction.

1 The county's decision is a "land use decision" if it
2 meets either (1) the statutory definition of land use
3 decision in ORS 197.015(10); or (2) the significant impact
4 test established in City of Pendleton v. Kerns, 294 Or 126,
5 133-34, 653 P2d 996 (1982). Billington v. Polk County, 299
6 Or 471, 479, 703 Pd 232 (1985); City of Portland v.
7 Multnomah County, 19 Or LUBA 468, 471 (1990).³

8 **1. Statutory Test**

9 ORS 197.015(10)(a)(A) provides, in relevant part, that
10 a land use decision includes:

11 "A final decision or determination by a local
12 government* * * that concerns the * * *
13 application of:

14 "(i) The [statewide planning] goals;

15 "(ii) A comprehensive plan provision; [or]

16 "(iii) A land use regulation[.]

17 "* * * * *

18 Petitioner contends the county's decision satisfies the
19 statutory definition of land use decision because it
20 concerns the application of the CDC, particularly those
21 sections relating to development in natural hazard areas.
22 According to petitioners, CDC 201-2.7 subjects the proposed

³As we recently noted in Carlson v. City of Dunes City, ___ Or LUBA ___,
(LUBA Nos. 94-069 and 94-146, December 14, 1994) we question the continued
validity of the significant impact test since all cities and counties in
the state now have acknowledged comprehensive plans and land use
regulations. However, until the Oregon Supreme Court overturns its
decisions creating that test, we are bound to apply it.

1 improvements to the development permit requirements because
2 it requires permits for otherwise exempt activities if they
3 involve development of facilities within a floodplain or
4 drainage hazard area.⁴ Petitioners also contend the CDC 702
5 exemptions from the development permit requirements do not
6 apply here because the challenged decision involves more
7 than the transportation uses and decisions that are exempt
8 under that section.⁵

9 The county argues petitioners have not established that

⁴CDC 201-2.7 exempts from the development permit requirements,

"Establishment, construction, maintenance, preservation or termination of local public streets substantially in the public right-of-way together with piping and culverting, accessory drainage systems such as catch basins, and necessary accessory structures and easements. Notwithstanding this exemption, said facilities within a flood plain or drainage hazard area shall obtain a development permit. This development (alteration) permit shall be approved if the applicant demonstrates compliance with the applicable standards in the following sections: Sections 412, 421, 422 and 426[.]"

⁵CDC 702 cites the public transportation uses and decisions that are exempt from the provisions of the CDC and includes, in relevant part:

"702-2 Maintenance, preservation and repair of existing public roads, transportation facilities and structures within existing right-of-way and ancillary easements. This shall include but is not limited to: vegetation removal or cutting, ditch or culvert clearing, spraying, pot hole repair, road resurfacing, sealing or obstruction removal.

"* * * * *

"702-4 Reconstruction or in-kind replacement of a public transportation facility within existing right of way provided they are not located in a flood plain, drainage hazard area or significant Natural Resource or they would not change or alter a designated historic or cultural resource pursuant to Section 373."

1 the right of way is in a drainage hazard area, and contends
2 now that it is not. Absent such a showing by petitioners,
3 the county argues it was not obligated to evaluate the
4 proposed road improvements under the standards relevant to
5 development in drainage hazard areas. Moreover, the county
6 argues that, regardless of whether it is in a drainage
7 hazard area, because the decision involves road usage,
8 maintenance and operation of an existing road, it is exempt
9 from regulation.

10 The county appears to argue petitioners waived their
11 right to raise the issue regarding the drainage hazard
12 requirements because they did not raise the issue below.
13 However, the county did not conduct a land use hearing, and
14 did not follow the requirements of ORS 197.763 before
15 issuing the decision. Petitioners do not waive the right to
16 raise issues on appeal when they have not been provided the
17 forum in which to raise them at the local level.⁶

18 The challenged decision includes no findings
19 determining whether this unimproved roadway is located
20 within a natural hazard area. Nor does the decision explain
21 why CDC 207-2.7 does not apply or why the exemptions of
22 CDC 702 do apply to this decision. Rather, without
23 interpretation, the county concluded that this is a road

⁶The county held a public meeting on the proposed road improvements. It does not contend the procedural safeguards of ORS 197.763 were provided at that meeting.

1 maintenance issue exempt from regulation under CDC 700, and
2 that, accordingly, it is not a land use decision.⁷

3 This Board cannot interpret local government ordinances
4 in the first instance. Weeks v. City of Tillamook, 117 Or
5 App 449, 454, 844 P2d 914 (1982.) We may only review the
6 local government's interpretation of its own code. See Gage
7 v. City of Portland, 319 Or 308, ___ P2d ___ (1994). In the
8 absence of an interpretation of the applicability of CDC
9 201-2.7 or CDC 702, we cannot determine whether the decision
10 is a statutory land use decision.⁸

⁷The county contends its decision does include an interpretation of the CDC sufficient to determine that this is not a statutory land use decision. According to the county, that "interpretation" is contained in two county counsel memoranda, dated July 31, 1989 and November 14, 1994. While the decision refers to those memoranda, it does not incorporate them and only the November 14, 1994 memorandum is in the record. In contrast, a staff report, on which the decision relies, is expressly incorporated into the county's decision and is attached to it. We decline to find that two county counsel memoranda, one of which is not in the record, should be deemed incorporated into the challenged decision when the county's decision does not incorporate them.

⁸Petitioners also contend the challenged decision is a statutory land use decision because "[e]ven the county's own analysis attempting to exempt this decision from the requirements of the WCCDC and [Washington County Comprehensive Plan] requires the interpretation of various terms in the Code." Petition for Review 8. The ORS 197.015(10)(a)(A) statutory definition of land use decision does not include every application of the CDC. To be a land use decision under ORS 197.015(10)(a)(A), the local regulations must contain provisions that are standards or criteria for making a decision. It is not enough that a local decision merely touch on some aspect of a land use regulation. Local jurisdictions have the authority to apply their codes to non-discretionary matters without rendering such administrative actions land use decisions under ORS 197.015. See Knee Deep Cattle Company v. Lane County, ___ Or LUBA ___, LUBA Nos. 94-108, 94-125 and 94-126 (November 4, 1994).

1 **2. Significant Impact Test**

2 Petitioners contend that removing the gates and
3 improving the public right-of-way will have significant
4 impacts on land use. Petitioners argue improvements to a
5 street, which has been used by the neighborhood for twenty
6 years as a de facto park, to allow approximately 300 daily
7 vehicular trips will have a significant detrimental impact
8 on the existing activities in the area and a devastating
9 effect on wildlife and vegetation.

10 The county responds that the road improvements will not
11 cause a significant impact because they will not create any
12 new traffic but will only provide an alternate access for
13 the residents of the existing Torreyview subdivision.

14 As we recently reiterated in Carlson v. City of Dunes
15 City, ___ Or LUBA ___, (LUBA Nos. 94-069 and 94-146,
16 December 14, 1994), in order to qualify as a significant
17 impact land use decision over which we have jurisdiction,
18 the decision must create an actual, qualitatively or
19 quantitatively significant impact on present or future land
20 uses, and be likely to occur as a result of the decision.
21 Fraser v. City of Joseph, ___ Or LUBA ___ (LUBA No. 94-067,
22 November 4, 1994).

23 In Carlson, we determined that a local decision to pave
24 a 230 foot public right-of-way adjacent to a beach was a
25 significant impact land use decision subject to our review

26 "* * * because it authorizes the paving of an area
27 used as a public recreational area for a long

1 period of time and changes the character of the
2 area by opening up a dead end street at a beach
3 and converting the dead end street into a public
4 thoroughfare. These impacts are actual and will
5 have a significant impact on the present and
6 future land uses in the area." Id. at 6.

7 The facts of the challenged decision are similar to
8 those in Carlson. The challenged decision authorizes
9 improvements to a public right-of-way which will
10 significantly alter the long-established character of the
11 area. Those improvements will change not only the physical
12 attributes of the property but also the traffic patterns of
13 the surrounding neighborhoods, including an increase of
14 approximately 300 vehicles per day using the intersection of
15 NW Leahy Road and NW Leahy Terrace.⁹ These actual impacts
16 are sufficient to make the decision a significant impact
17 land use decision.

18 The county's motion to dismiss this appeal for lack of
19 jurisdiction is denied.

20 **FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR**

21 Petitioner's first three assignments of error challenge
22 the county's failure to address the procedural and
23 substantive requirements necessary for evaluation of a land
24 use decision. Because the county did not evaluate the
25 challenged decision as a land use decision, it does not

⁹The record reflects that during consideration of the Leahy Homestead subdivision the county considered traffic through that intersection to be a land use issue warranting substantial attention.

1 dispute that those requirements were not addressed. Because
2 we have determined that the challenged decision is a land
3 use decision, it must be remanded for compliance with the
4 procedural and substantive requirements applicable to the
5 evaluation of this land use decision.

6 The first, second and third assignments of error are
7 sustained.

8 **FOURTH ASSIGNMENT OF ERROR**

9 Petitioners contend the challenged decision violates
10 the Oregon State Transportation Planning Rule (TPR) and the
11 county's Ordinance 432, which implements the TPR.
12 Petitioners argue the proposed road improvements will
13 frustrate non-vehicular traffic along this street and make
14 pedestrian access to public transportation on NW Leahy Road
15 less convenient. Petitioners also claim the decision fails
16 to satisfy OAR 660-12-045(3)(b) and because "[t]he county
17 has failed to conduct any objective analyses of the existing
18 uses of the gated, de facto neighborhood park[,] it has not
19 demonstrated compliance with the TPR and Ordinance 432.
20 Petition for Review 20-21.

21 Petitioner's generalized allegation that the county has
22 not "conduct[ed] any objective analyses" of the existing
23 uses of NW Leahy Terrace does not establish how the TPR or
24 its implementing ordinance apply to the challenged decision
25 or how the proposed road improvements will frustrate
26 compliance with the TPR. The specific rule petitioners cite

1 applies to "new subdivisions, planned developments, shopping
2 centers and industrial parks." Petitioners have not
3 established that the proposed street improvements fall
4 within the requirements of the TPR.

5 The fourth assignment of error is denied.

6 The county's decision is remanded.