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

ROBERT LEATHERS and JENNIFER)
LEATHERS and FRIENDS OF LEAHY)
TERRACE,)
Petitioners,)
vs.)
WASHINGTON COUNTY,)
Respondent.)

LUBA No. 95-194
FINAL OPINION
AND ORDER

Appeal from Washington County.

John A. Rankin, Tualatin, filed the petition for review and argued on behalf of petitioners. With him on the brief was Marianne E. Brams.

Dan R. Olsen, Chief Assistant County Counsel, Hillsboro, filed the response brief and argued on behalf of respondent.

GUSTAFSON, Referee; LIVINGSTON, Chief Referee, participated in the decision.

DISMISSED 03/20/96

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

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioners appeal county determinations to permit
4 removal of gates crossing a public road, and paving of a
5 portion of the right of way with an asphalt overlay.

6 **FACTS**

7 This is the second appeal of the county's decisions to
8 remove gates and pave a portion of a county road. In
9 Leathers v. Washington County, 29 Or LUBA 343 (1995)
10 (Leathers I), we described the challenged decisions as
11 follows:

12 "Petitioners challenge an administrative decision
13 by the Washington County Board of Commissioners
14 (Board of Commissioners) authorizing the
15 Washington County Transportation Department
16 (transportation department) to remove two gates
17 which restrict access to a 130-yard unimproved
18 section of NW Leahy Terrace, and to improve that
19 street with a 22-foot 'asphalt overlay,' and a
20 four-foot paved shoulder for pedestrians and
21 bicyclists. Id. at 344.¹

22 In Leathers I, petitioners argued, essentially, that in
23 rendering the challenged decisions the county made a land
24 use decision without providing them notice and a right to be
25 heard. We could not determine whether one or both of the
26 county's decisions was a statutory land use decision. We
27 did, however, determine that, together, they would have a

¹In Leathers I, we incorrectly characterized the two county decisions as a single decision. That characterization did not impact our evaluation.

1 significant impact on land use, and thus remanded the case
2 to the county for "compliance with the procedural and
3 substantive requirements applicable to the evaluation of
4 this land use decision." Id. at 350.

5 On remand, the county interpreted its comprehensive
6 plan and community development code (CDC), and made detailed
7 findings to support its conclusion that both of the
8 challenged decisions are exempt from the county's review
9 procedures and standards.

10 Petitioners again appeal, contending the county has
11 still not identified and complied with applicable procedural
12 and substantive criteria, which would afford petitioners the
13 opportunity to participate in the decisions regarding the
14 gate removal and asphalt overlay of what petitioners
15 consider a "de facto neighborhood park."

16 **MOTION TO DISMISS**

17 The county moves to dismiss this case for lack of
18 jurisdiction. The county contends the decisions do not
19 concern the application of land use regulations, and thus
20 are not land use decisions as defined in ORS
21 197.015(10)(a)(A).² Even if they could be construed to be

²ORS 197.015(10)(a)(A) states that a "land use decision" includes:

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

"(i) The goals:

1 land use decisions under ORS 197.015(10)(a)(A), the county
2 further contends the decisions fall within the statutory
3 exemption for decisions determining design, construction,
4 operation, maintenance and repair of roads under ORS
5 197.015(10)(b)(D).³

6 Petitioners disagree with the county's interpretation
7 of its comprehensive plan and CDC. Petitioners further
8 argue that, notwithstanding any county interpretation that
9 the decisions are not statutory land use decisions, the
10 decisions are nonetheless significant impact land use
11 decisions. Accordingly, petitioners argue the county must
12 provide some sort of process by which petitioners can be
13 involved in the decisions made regarding the gate removal
14 and right of way paving.

15 We must defer to the county's own interpretation of its
16 regulations unless that interpretation is clearly wrong.
17 Zippel v. Josephine County, 128 Or App 458, 461, 876 P2d 854
18 (1994); see ORS 197.829. In this case, the county has made

"(ii) A comprehensive plan provision;

"(iii)A land use regulation; or

"(iv) A new land use regulation[.]"

³ORS 197.015(10)(b)(D) states that a land use decision does not include a local land use decision:

"Which determines final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility which is otherwise authorized by and consistent with the comprehensive plan and land use regulations[.]"

1 detailed findings explaining why the challenged decisions
2 are not land use decisions under its local regulations or,
3 alternatively, why they are exempt from review under those
4 regulations. The county's interpretation is not clearly
5 wrong, and we defer to it. Because the challenged decisions
6 do not involve the application of county land use
7 regulations, under ORS 197.015(10)(a)(A) they are not land
8 use decisions. Moreover, even if they could otherwise be
9 construed to be statutory land use decisions, they fall
10 within the statutory exemption for decisions determining
11 design, construction, operation, maintenance and repair of
12 roads under ORS 197.015(10)(b)(D).

13 The fact that we previously determined these decisions
14 to be significant impact land use decisions does not mandate
15 some additional local process that would not otherwise be
16 required. As the Court of Appeals explained in Oregonians
17 in Action v. LCDC, 103 Or App 35, 795 P2d 1098 (1993),

18 The 'significant impact test' was devised to
19 supplement the legislative grant of jurisdiction
20 to LUBA, by making some land use actions
21 reviewable that do not meet the statutory
22 definition of a 'land use decision.' See Wagner
23 v. Marion County, 79 Or App 233, 719 P2d 31
24 (1987). However, the judicial test does not
25 supersede the express legislative exclusion of
26 jurisdiction over decisions of the kind that
27 petitioner seeks to challenge here. Id. at 38.
28 (Emphasis in Original.)

29 In this case, the challenged decisions are
30 legislatively exempt from our review under ORS
31 197.015(10)(b)(D). That the decisions may significantly

1 impact land uses does not make them subject to any
2 additional county process or to our review.

3 This appeal is dismissed.