

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 PACIFIC WESTERN COMPANY and)

5 LOWELL E. PATTON,)

6)

7 Petitioners,)

8)

9 vs.)

10)

11 LINCOLN COUNTY,)

12)

13 Respondent,)

14)

15 and)

16)

17 MARCIA MICHAEL, ALVIN TORNOW,)

18 BONNIE TORNOW and JANA MARA,)

19 JACK STEDMAN, SARA STEDMAN,)

20 SANDRA LARRABEE, ALLEN LARRABEE,)

21 PATRICIA FRITZ, ROY FRITZ, STAN)

22 BARKER, MARIANNE BARKER, JOHN TOM,)

23 ANN BOFINS, RAYMOND C. CARMAN,)

24 VIKI CARMAN, ROBERT C. McKAY,)

25 PATRICIA A. McKAY, SCOTT STEIN,)

LUBA No. 96-129

26 PATRICIA H. STEIN, JACK W.)

27 MITCHELL, MARY ANN MITCHELL,)

FINAL OPINION

28 DORIS BRENAMAN, DOROTHEA ENTWISLE,)

AND ORDER

29 DIANNE ENTWISLE, THOMAS E.)

30 ENTWISLE, JAMES ROSS, STELLA ROSS,)

31 MARLENE M. ROLLINS, JUDY BJORGE,)

32 JERRY V. SMITH, DORIS SMITH,)

33 GLORIA L. McCORMICK, DOROTHY J.)

34 ANDERSON, OLAF W. ANDERSON,)

35 SUZETTE BELL, FRED HERBOLD,)

36 LOUISE HERBOLD, ALAN JOHNSON,)

37 JEAN JOHNSON, HELEN P. LAVELLE,)

38 JERRY W. CALVERT, MELVIN K. SIKOV,)

39 SHIRLEY SIKOV, PATTIE M. RUSSELL,)

40 DAVID R. RUSSELL, JAMES FRANKFORT,)

41 FRANK LEICHLETTER, VIRGINIA)

42 LEICHLETTER, COLLEEN J. MOORE,)

43 JANET L. CHAPPELL, WALLACE D.)

44 WEST, HERMAN T. WEST AS LEGAL)

45 REPRESENTATIVE FOR VILETTA WEST)

1 DECEASED, ANN M. HANSEN, BARBARA)
2 AMERONGEN, RICH VAN AMERONGEN)
3 and THE NEIGHBORS FOR RESPONSIBLE)
4 DEVELOPMENT,)
5)
6 Intervenor-Respondent.)

7
8
9 Appeal from Lincoln County.

10
11 William C. Cox, Portland, filed the petition for review
12 and argued on behalf of petitioners.

13
14 Wayne Belmont, County Counsel, Newport, and Evan P.
15 Boone, Newport, filed the response brief. With them on the
16 brief was Minor & Boone. Evan P. Boone argued on behalf of
17 intervenors-respondent.

18
19 LIVINGSTON, Referee; HANNA, Chief Referee, participated
20 in the decision.

21
22 TRANSFERRED 01/22/97

23
24 You are entitled to judicial review of this Order.
25 Judicial review is governed by the provisions of ORS
26 197.850.

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision of the county board of
4 commissioners vacating part of a local access road.

5 **MOTION TO INTERVENE**

6 Marcia Michael, Alvin and Bonnie Tornow, Jane Mara,
7 Jack and Sara Stedman, Sandra and Allen Larrabee, Patricia
8 and Roy Fritz, Stan and Marianne Barker, John Tom, Ann
9 Bofins, Raymond C. and Viki Carman, Robert C. and Patricia
10 A. McKay, Scott and Patricia H. Stein, Jack W. and Mary Ann
11 Mitchell, Doris Brenaman, Dorothea and Dianne and Thomas E.
12 Entwisle, James and Stella Ross, Marlene M. Rollins, Judy
13 and Monrad J. Bjorge, Jerry V. and Doris Smith, Gloria L.
14 McCormick, Dorothy J. and Olaf W. Anderson, Suzette Bell,
15 Fred and Louise Herbold, Alan and Jean Johnson, Helen P.
16 Lavelle, Jerry W. Calvert, Melvin K. and Shirley Sikov,
17 Pattie M. and David R. Russell, James Frankfort, Frank and
18 Virginia Leichletter, Colleen J. Moore, Janet L. Chappell,
19 Wallace D. West, Herman T. West (as legal representative for
20 the Estate of Viletta West), Ann M. Hansen, Barbara and Rich
21 Van Amerongen, and the Neighbors for Responsible Development
22 move to intervene on the side of the respondent. There is
23 no opposition to the motion, and it is allowed.

24 **FACTS**

25 N.W. Sandy Drive was created by dedication in the plat
26 of the Silver Sands subdivision filed April 29, 1964. It

1 extends from north to south, parallel to Highway 101 and the
2 beach, and ends at the southern boundary of the
3 subdivision.¹

4 Until August 18, 1993, petitioner Lowell E. Patton
5 (Patton) owned the property, called former tax lot 1901, to
6 the south of the point where N.W. Sandy Drive ends. Former
7 tax lot 1901 extended from Highway 101 to the beach and
8 included 23.49 acres. Record 193-94. By deed recorded on
9 August 18, 1993, Patton conveyed approximately 1.01 acres of
10 former tax lot 1901 to Pacific Western Company (Pacific
11 Western), which he controls. The 1.01 acres includes the
12 western portion of former tax lot 1901 that touches N.W.
13 Sandy Drive and borders the beach. That 1.01 acres is
14 called tax lot 1902. That portion of former tax lot 1901
15 remaining after the separation of tax lot 1902, which
16 extends from the eastern boundary of tax lot 1902 to Highway
17 101, is called tax lot 1901.² Tax lot 1901 has some access
18 to Highway 101, but the scope of that access is not clear

¹N.W. Sandy Drive now extends north beyond the Silver Sands subdivision, to the northern boundary of the Silver Sands II subdivision. Record 195. According to the county public works director, the road is "platted in a manner that would allow it to serve properties northerly of that subdivision." Record 192.

²The record is inconsistent in labeling tax lots 1901 and 1902. They are sometimes referred to as tax lots 1900 and 1901. Record 171.

1 from the record.³

2 On December 2, 1993, the county planning department
3 notified Patton that it had become aware of the creation of
4 a new tax lot and stated:

5 "According to Lincoln County Code, the division of
6 land into two or three parcels within a calendar
7 year requires the applicant/owner to apply for a
8 land partition. Further, no person may sell,
9 transfer, or dispose of any parcel in a land
10 partition prior to its final approval.
11 Additionally, no building permits shall be issued
12 for any parcel in a land partition until the
13 partition plat has been granted a final approval.

14 "A search of Planning Division records did not
15 locate an application for the division of your
16 property. Obtaining land use permits for these
17 new tax lots will be difficult without first
18 applying for a land partition, and then receiving
19 a final partition approval." Record 179.

20 On November 10, 1995, the owners of property abutting
21 approximately 105 feet at the south end of N.W. Sandy Drive
22 filed a petition pursuant to ORS 368.341 to initiate
23 proceedings to vacate that portion of the road. As required
24 by ORS 368.346, notice was given and a hearing was provided.
25 On June 26, 1996, the board of commissioners entered an
26 order granting the requested vacation.

27 This appeal followed.

28 **STANDING**

29 Intervenors contend Pacific Western lacks standing to

³A letter from petitioners' attorney to the county counsel states,
"Expansion of tax lot [1901] access to accommodate more than its present
use is not assured." Record 17.

1 appeal. Intervenors maintain that because Pacific Western's
2 interest in tax lot 1902 is the result of an illegal
3 partition, Pacific Western has no legal interest that is
4 adversely affected by the challenged decision.

5 We disagree with intervenors. Amendments adopted in
6 1989 to ORS 197.830 eliminated the requirement that a
7 petitioner be "adversely affected" or "aggrieved" to have
8 standing to appeal a land use decision to LUBA. Subject to
9 certain exceptions that do not apply to Pacific Western, a
10 "person" may petition this Board for review of a land use
11 decision or limited land use decision if that person filed a
12 timely notice of intent to appeal and appeared before the
13 local government orally or in writing.⁴ ORS 197.830(2).
14 Pacific Western filed a timely notice of intent to appeal
15 and appeared before the county by a letter written by its
16 attorney. Record 22. Pacific Western therefore has
17 standing.

18 **JURISDICTION**

19 Respondent moves to dismiss this appeal on the ground
20 that the challenged decision is not a land use decision over
21 which this Board has jurisdiction.

22 Under ORS 197.825(1), LUBA has exclusive jurisdiction,
23 subject to limitations stated in ORS 197.825(2) and (3),
24 over the review of "land use decisions" and "limited land

⁴ORS 197.015(18) defines "person" to include corporations.

1 use decisions"⁵ that meet either the statutory definitions
2 in ORS 197.015(10) and (12), or the significant impact test
3 referred to in Petersen v. Klamath Falls, 279 Or 249, 566
4 P2d 1193 (1977) and City of Pendleton v. Kerns, 294 Or 126,
5 653 P2d 992 (1982).⁶ As the party seeking LUBA review, the
6 burden is on petitioners to establish that the appealed
7 decision is a land use decision. Billington v. Polk County,

⁵Petitioner does not contend the county's partial vacation of N.W. Sandy Drive is a limited land use decision.

⁶ORS 197.015(10) states, in relevant part:

"'Land use decision':

"(a) Includes:

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

"(i) The goals;

"(ii) A comprehensive plan provision;

"(iii) A land use regulation; or

"(iv) A new land use regulation; or

"(B) * * * ; and

"(b) Does not include a decision of a local government:

"(A) Which is made under land use standards which do not require interpretation or the exercise of policy or legal judgment;

"(B) Which approves or denies a building permit issued under clear and objective land use standards;

"(C) Which is a limited land use decision; or

"* * * * *"

1 299 Or 471, 475, 703 P2d 232 (1985); City of Portland v.
2 Multnomah County, 19 Or LUBA 468, 471 (1990); Portland Oil
3 Service Co. v. City of Beaverton, 16 Or LUBA 255, 260
4 (1987).

5 **A. Statutory Test**

6 Petitioners contend the challenged decision concerns
7 the application of the Statewide Planning Goals, the
8 county's comprehensive plan and land use regulations.
9 However, petitioners identify no provisions in any of these
10 enactments that apply to the challenged decision, and the
11 decision itself does not apply such provisions. The
12 decision instead applies the road vacation procedures and
13 criteria stated in ORS chapter 386. ORS chapter 386 itself
14 does not require that a local government body apply its
15 comprehensive plan or land use regulations in making a
16 decision concerning a road vacation. Billington v. Polk
17 County, 299 Or at 479. The absence of any clear legislative
18 requirement that either the plan or implementing regulations
19 be applied as standards means the challenged decision is not
20 a statutory land use decision. Id. at 480.

21 Petitioners rely on ORS 197.250, which states:

22 "* * * [A]ll comprehensive plans and land use
23 regulations adopted by a local government to carry
24 out those comprehensive plans and all plans,
25 programs, rules or regulations affecting land use
26 adopted by a state agency or special district
27 shall be in compliance with the goals within one
28 year after the date those goals are approved by
29 the commission."

1 We understand petitioners to argue generally that the
2 challenged decision is a "plan" that must be in compliance
3 with the Statewide Planning Goals.

4 We disagree with petitioners that the decision to
5 vacate 105 feet of a public road is a "plan," as that term
6 is used in ORS 197.250. Moreover, the county's land use
7 "plans, programs, rules or regulations affecting land use"
8 are contained in its acknowledged comprehensive plan and
9 implementing regulations. Because these are acknowledged by
10 the Land Conservation and Development Commission, the
11 Statewide Planning Goals are not directly applicable to the
12 challenged decision. ORS 197.175(2)(d); Byrd v. Stringer,
13 295 Or 311, 316-17, 666 P2d 1332 (1983); Penland v.
14 Josephine County, 29 Or LUBA 213, 219 (1995).⁷

15 **B. Significant Impact Test**

16 LUBA has jurisdiction over local government final
17 decisions that will have a significant impact on present or
18 future land uses City of Pendleton v. Kerns, 294 Or 126,
19 133, 653 P2d 992 (1982). As the Oregon Supreme Court in
20 Kerns acknowledged, the significant impact standard is
21 nebulous. Id. at 133. As elaborated in subsequent cases,
22 the standard requires both a demonstrated relationship
23 between the challenged decision and expected impacts, and

⁷Petitioner does not challenge the county's interpretation of its comprehensive plan and land use regulations. Thus ORS 197.829(1)(d), which requires we consider the Statewide Planning Goals in evaluating a local government interpretation, does not apply in this case.

1 evidence demonstrating that the expected impacts are likely
2 to occur as a result of the decision. Keating v. Heceta
3 Water District, 24 Or LUBA 175, 181-82 (1992); Anderson
4 Bros. v. City of Portland, 18 Or LUBA 462, 471 (1989). The
5 expected impacts cannot be simply speculative. Carlson v.
6 City of Dunes City, 28 Or LUBA 411, 414 (1994).

7 Petitioners contend the challenged decision satisfies
8 the significant impact test because N.W. Sandy Drive is the
9 only local access right-of-way, parallel to Highway 101,
10 between Highway 101 and the Pacific Ocean. They maintain
11 that vacating N.W. Sandy Drive north of tax lot 1902 will
12 alter traffic patterns in a way that will affect present and
13 future land uses on tax lots 1901 and 1902. Petitioners
14 rely on a letter to the county board of commissioners from
15 the county public works director. That letter states:

16 "* * * Granting this request would prevent the
17 owner of the large parcel to the south [i.e., tax
18 lots 1901 and 1902] from continuing * * * part of
19 the local [access] pattern. It is in the public
20 interest that local access roads provide for
21 appropriate traffic circulation within the general
22 area that they serve. * * *" Record 193.

23 The letter and petitioners' argument are inadequate to
24 persuade us that the vacation of 105 feet of N.W. Sandy
25 Drive as it ends on the northern boundary of tax lot 1902
26 will have a significant impact on present and future land
27 uses in the area. Neither the challenged decision nor
28 petitioners identify the present zoning of tax lots 1901 and

1 1902.⁸ We cannot determine that tax lots 1901 and 1902 are
2 legal lots for planning purposes.⁹ Without more
3 information, we cannot draw any conclusions regarding their
4 development potential with or without access to N.W. Sandy
5 Drive. We know that former tax lot 1901 has some access to
6 Highway 101 which is apparently adequate to serve present
7 legal uses on the lot. The most we can infer is that the
8 county's decision to vacate the street might potentially
9 have some impact on the future subdivision and development
10 of former tax lot 1901, now called tax lots 1901 and 1902.
11 That is not enough to pass the significant impact test. See
12 Billington v. Polk County, 14 Or LUBA 173 (1985) (that a
13 partial road vacation may subject land division applications
14 in the area to greater burdens does not mean the decision to
15 vacate the road meets the significant impact test).

16 Because the challenged decision meets neither the
17 statutory test nor the significant impact test for a "land
18 use decision," we lack jurisdiction to review it.

⁸A 1994 circuit court complaint for nuisance abatement, which is included in the record, states tax lots 1901 and 1902 are located "within a rural residential zone subject to a [coastal] shorelands overlay zone." (Emphasis added.) Record 127. Assuming the complaint is accurate, we still don't know which rural residential zone.

⁹If tax lot 1902 was not legally divided from tax lot 1901, as described in ORS 92.040, it is not a legal lot for land use planning purposes. See Yamhill County v. Ludwick, 294 Or 778, 790, 663 P2d 398 (1983). Assuming a legal partition was not completed, the existence of tax lot 1902 and the fact that it will be land-locked if the road vacation occurs cannot be used to support an argument that the road vacation will have significant impacts on present and future land uses in the area.

1 Petitioners request that in the event this Board
2 decides the challenged decision is not reviewable as a land
3 use decision, we transfer their appeal to the circuit court
4 pursuant to ORS 19.230. See OAR 661-10-075(10)(a). The
5 request is granted, and this appeal is transferred to the
6 Lincoln County Circuit Court.