

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 In this consolidated appeal, petitioner appeals
4 decisions of the city planning commission and the city
5 council that a condition imposed in connection with a 1992
6 site plan approval is satisfied.

7 **MOTION TO INTERVENE**

8 Robert A. Jensen and Shirley Jensen (intervenors) move
9 to intervene on the side of the respondent. There is no
10 opposition to the motion, and it is allowed.

11 **FACTS**

12 Petitioner is the owner or operator of a restaurant
13 (Wendy's) located on the north side of State Highway 214.
14 In Site Plan Review Case 92-12, the city planning commission
15 approved a site plan for the construction of a motor lodge
16 (Holiday Inn Express) northwest of petitioner's restaurant.
17 In response to comments of the State Highway Division that
18 access to Highway 214 should be limited, Record 129, the
19 planning commission imposed the following condition
20 (Condition 4):

21 "ACCESS: The affected property owners as
22 described in Section E, Subsection 1 (a-e) of the
23 staff report shall prepare an agreement that meets
24 City and State Highway Division approval prior to
25 the issuance of a building permit for the Holiday
26 Inn Express." Record 3.

27 Section E, Subsection 1 (a-e) of the staff report,
28 which was incorporated by reference into Condition 4,

1 provides, as relevant:

2 "1. Since driveway access points to the State
3 Highway disrupt the flow of through traffic[,]
4 eliminate[,], to the extent possible[,], this
5 number of access points to the Highway. To
6 accomplish this and not jeopardize the
7 affected business requires the following
8 action.

9 * * * * *

10 "b. Eliminate [one] of the two access points
11 on Highway 214 to Wendy's Restaurant[:]
12 that driveway access closest to the
13 Fairway Plaza. An alternative access
14 would be accommodated off the Evergreen
15 Road extension along the westerly
16 portion of the Fairway Plaza property. *
17 * *

18 * * * * *

19 "d. Allow for the driveway access between
20 J's and Wendy's restaurants to be an
21 entrance only. Vehicles accessing
22 Highway 214 from the Holiday Inn would
23 use the Evergreen Road extension north
24 of Highway 214.

25 "e. Curb cuts for * * * Wendy's [restaurant]
26 should be placed on the northerly
27 portion of those properties." Record 7.

28 Petitioner and the other "affected property owners as
29 described in Section E, Subsection 1 (a-e) of the staff
30 report" were not able to reach the agreement required by
31 Condition 4. The challenged decision states:

32 "After it became apparent that this access
33 agreement could not be reached, Planning Staff
34 brought this issue to the Planning Commission by a
35 memo dated August 5, 1993. The issue was
36 discussed briefly by the Commission with staff at
37 the August 12, 1993 meeting and a consensus was

1 reached not to enforce this condition."¹ Record
2 145.

3 On August 13, 1993, the city issued a building permit
4 for the Holiday Inn Express, which is now completed. Record
5 154, 342. The city approved plans which showed two access
6 points at the north boundary of the Wendy's site. Record
7 212, 223. However, the access points were never
8 constructed.

9 Petitioner seeks the enforcement of Condition 4. On
10 August 17, 1995, the planning commission initiated a
11 proceeding to reconsider its August 12, 1993 decision not to
12 enforce the condition. Record 888. After notice and two
13 public hearings, the planning commission concluded that it
14 had jurisdiction over the enforcement of Condition 4 because
15 it was making a discretionary determination under the
16 Woodburn Zoning Ordinance (WZO).² Record 88. The planning
17 commission also concluded that Condition 4 had been
18 substantially complied with. Id. Because of its concern
19 that the city council might not have jurisdiction over an

¹This passage is from "Memorandum Opinion No. 96-01," which was provided by the city attorney to the planning commission. Record 145-50. Memorandum Opinion No. 96-01 is incorporated by reference into the challenged decision. Record 11.

²The present version of WZO chapter 11 contains site plan review standards. We do not know whether the same, different or any site plan review standards were applied at the time of Site Plan Review Case 92-12. Neither Site Plan Review Case 92-12 nor the challenged decision identifies specific WZO standards. Site Plan Review Case 92-12 does discuss access to public streets, which is now addressed in WZO 11.070(d).

1 appeal of the planning commission's decision, petitioner
2 appealed the planning commission's decision to this Board in
3 LUBA No. 96-136.

4 Petitioner also appealed the planning commission's
5 decision to the city council. The city council concluded
6 that it did have jurisdiction and that Condition 4 had been
7 substantially complied with. Record 10-11. Petitioner
8 appeals the city council's decision in LUBA No. 96-219.

9 **MOTION TO DISMISS**

10 Pursuant to ORS 197.825(2)(a), the city moves to
11 dismiss LUBA No. 96-136 on the ground that petitioner failed
12 to exhaust its administrative remedies prior to appealing
13 the planning commission decision to LUBA. The city contends
14 the WZO provides for an appeal from the planning commission
15 to the city council. Petitioner acknowledges the appeal to
16 this Board from the planning commission's decision was
17 precautionary. Since petitioner was able to appeal the
18 planning commission's decision to the city council and since
19 the parties agree the decision of the city council is the
20 city's final decision, we dismiss LUBA No. 96-136.

21 **JURISDICTION**

22 Petitioner challenges our jurisdiction, contending that
23 the challenged decision is an enforcement decision, and
24 requests under OAR 661-10-075(11)(a) that we transfer this

1 proceeding to circuit court.³ Petitioner maintains the
2 local proceeding was limited to consideration of whether
3 Condition 4 had been substantially complied with and should
4 be further enforced. Petitioner contends further both that
5 the statutes defining LUBA's jurisdiction do not include
6 enforcement decisions and that the statutes reserving
7 jurisdiction to the circuit courts do include enforcement
8 decisions. Intervenors and the city disagree with
9 petitioner's characterization of the challenged decision.
10 They contend it is an interpretation of the city's earlier
11 site plan approval, which itself resulted from the
12 application of comprehensive plan provisions and land use
13 regulations.

14 With exceptions not relevant to this case, our
15 jurisdiction is limited to the review of "any land use
16 decision or limited land use decision of a local
17 government."⁴ ORS 197.825(1). These terms are defined in

³Petitioner contends that under ORS 197.825, the circuit court has jurisdiction to enforce local land use decisions. ORS 197.825(3)(a) provides for circuit court jurisdiction over two kinds of proceedings: those arising out of ORS 197.015(10)(b) and those brought to enforce comprehensive plan and regulatory provisions. The challenged decision concerns a condition imposed as part of an earlier land use approval, which we understand to actualize the application of adopted land use regulations. If the conditions of the approval are not implemented, then the application of the land use regulations themselves has been frustrated, and enforcement by the circuit court may be appropriate.

⁴In addition to the category of land use decision defined by ORS 197.015(10), the courts have created a category of "significant impact" land use decisions. See City of Pendleton v. Kerns, 294 Or 126, 653 P2d 992 (1982); Petersen v. Klamath Falls, 279 Or 249, 566 P2d 1193 (1977);

1 ORS 197.015(10) and (12).⁵

Pacific Western Co. v. Lincoln County, ___ Or LUBA ___ (LUBA No. 96-129, January 22, 1997), slip op 9-11. The parties agree the challenged decision is not a significant impact land use decision.

⁵ORS 197.015(10) provides, 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

"* * * * *"

ORS 197.015(12) provides:

"'Limited land use decision' is a final decision or determination made by a local government pertaining to a site within an urban growth boundary which concerns:

"(a) The approval or denial of a subdivision or partition, as described in ORS chapter 92.

"(b) The approval or denial of an application based on discretionary standards designed to regulate the physical

1 The city's description in the notice of local
2 proceedings -- "Interpretation/Potential Enforcement of
3 Access Conditions of Site Plan Approval 92-12" -- emphasizes
4 an interpretive role, to precede any enforcement action.
5 The decision itself states that the city council "is called
6 upon to interpret the terms of the access condition
7 previously imposed by the Planning Commission" in 1992.
8 Record 7.

9 Petitioner argues the challenged decision is not a
10 statutory land use decision because

11 "[n]o plan provision was adopted, amended or
12 applied. No land use regulation was adopted,
13 amended or applied. No new land use regulation
14 was adopted, amended or applied. The scope of
15 this proceeding was limited to determining whether
16 a condition previously imposed on a land use
17 decision has been complied with and, as a kind of
18 alternative decision, whether the city should
19 itself proceed to fully enforce the condition.
20 The scope of this proceeding appears to have been
21 limited to examining the permittee's actions and
22 holding them up against what was required by the
23 permit condition previously imposed."
24 Petitioner's Motion to Determine Jurisdiction 8.

25 The city argues that Medford Assembly of God v. City of
26 Medford, 297 Or 138, 681 P2d 790 (1984), cert den 474 US
27 1020 (1985); Weeks v. Tillamook County, 113 Or App 285, 832
28 P2d 1246 (1992); and Brogioitti v. Wallowa County, 23 Or LUBA
29 247 (1992), support its contention that the challenged
30 decision is a land use decision. Medford Assembly of God

characteristics of a use permitted outright, including
but not limited to site review and design review."

1 and Brogoitti conclude that a local government's formal
2 declaratory ruling interpreting a comprehensive plan
3 provision or land use regulation is a land use decision
4 subject to our review. Weeks makes clear that procedural
5 defects in the adoption of a decision, while assignable as
6 error, do not alter the decision's nature as a land use
7 decision appealable to LUBA.

8 Intervenor's rely on Forman v. Clatsop County, 297 Or
9 129, 681 P2d 786 (1994), where the court concluded that the
10 determination of a vested right is a statutory land use
11 decision.

12 Both the city and intervenors miss petitioner's point,
13 which is not that the city improperly made an interpretation
14 based on the application of land use regulations or that the
15 city's process was flawed. Petitioner contends the city
16 neither applied plan provisions or land use regulations, nor
17 made an interpretation.

18 Petitioner correctly points out that this case may be
19 distinguished from Franklin v. Deschutes County, 30 Or LUBA
20 33, 42, aff'd 139 Or App 1 (1996) (Franklin), where an
21 appeal was taken from the modification of a condition of
22 development approval. As we noted in Franklin, the
23 condition modified there "originally resulted from the
24 exercise of policy judgment in the application of land use
25 regulations. In modifying that order, the planning director
26 was required to exercise similar policy judgment." Id. In

1 contrast to the county in Franklin, the city has not
2 modified a condition of development approval, but has
3 instead purported to interpret the condition in such a way
4 that it can be considered satisfied.

5 Petitioner also contends this case may be distinguished
6 from Terraces Condo. Assn. v. City of Portland, 110 Or App
7 471, 823 P2d 1004 (1991) (Terraces Condo.), where the issue
8 was whether earlier land use decisions with respect to a
9 parcel subsequently divided would allow the property owner
10 of one of the resultant lots a right to develop that lot at
11 a greater density than applicable zoning regulations
12 allowed. The Court of Appeals concluded the city's
13 interpretation of the earlier land use decisions was itself
14 a land use decision, because it required the application of
15 the density provisions in the city's land use regulations,
16 and it involved the application of the land use regulations
17 in force when the variance was allowed. 110 Or App at 476-
18 77. We understand Terraces Condo. to say that when a later
19 decision interprets the provisions of an earlier land use
20 decision or limited land use decision, which itself required
21 the application of discretionary standards, and the
22 interpretation necessarily involves the application of land
23 use standards, the interpretation is also a land use or
24 limited land use decision subject to our jurisdiction.

25 The city's 1992 site plan approval involved the
26 exercise of judgment and the application of the WZO. There

1 can be no dispute that it was a land use decision or limited
2 land use decision.⁶ The challenged decision purports to
3 interpret Condition 4, which was part of the 1992 approval.
4 To the extent there has been an interpretation of Condition
5 4, we have jurisdiction to consider that interpretation if
6 it necessarily involves the application of land use
7 standards.

8 The determination in the challenged decision that
9 Condition 4 has been substantially complied with is not
10 based on the interpretation and application of land use
11 regulations, but on the conclusion that at least some parts
12 of Condition 4 have been complied with. The fact that
13 Condition 4(1)(b) and (e) were not complied with is
14 acknowledged, but noncompliance is explained and excused by
15 constitutional concerns and the statement that "Wendy's * *
16 * refused to pay Holiday Inn Express for a pro rata share of
17 the Evergreen Road extension improvement, but still wants to
18 be given an installed driveway." Record 9. Although these
19 could be relevant considerations during enforcement
20 proceedings, they do not proceed from the interpretation and
21 application of land use regulations. Therefore, we have no
22 jurisdiction over the challenged decision.

23 As requested by petitioner, the appeal of LUBA No. 96-

⁶The site plan approval appears to be a limited land use decision under ORS 197.015(12)(b), but the parties discuss it as if it were a land use decision. Whether it is a land use decision or limited land use decision does not affect our resolution of the jurisdictional question presented.

1 219 is transferred to the Marion County Circuit Court.