

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 PARKER JOHNSTONE  
5 WILSONVILLE HONDA,  
6 *Petitioner,*

7  
8 vs.

9  
10 OREGON DEPARTMENT  
11 OF TRANSPORTATION,  
12 *Respondent.*

13  
14 LUBA No. 2010-019

15  
16 FINAL OPINION  
17 AND ORDER

18  
19 Appeal from the Oregon Department of Transportation.

20  
21 John R. Osburn, Portland, filed the petition for review and argued on behalf of  
22 petitioner. With him on the brief was Bullivant Houser Bailey PC.

23  
24 Kathryn A. Lincoln, Senior Assistant Attorney General, Oregon Department of  
25 Justice, Salem, filed the response brief and argued on behalf of respondent. With her on the  
26 brief was John R. Kroger, Attorney General.

27  
28 HOLSTUN, Board Chair; BASSHAM, Board Member; RYAN, Board Member,  
29 participated in the decision.

30  
31 AFFIRMED

10/04/2010

32  
33 You are entitled to judicial review of this Order. Judicial review is governed by the  
34 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioner appeals an Oregon Transportation Commission (OTC) decision that approves an Interchange Area Management Plan (IAMP) for the Interstate 5/Wilsonville Road interchange in the City of Wilsonville. The OTC is the policy making body for the Oregon Department of Transportation (ODOT).

**FACTS**

Interstate 5 is a north/south freeway through the City of Wilsonville. The Interstate 5/Wilsonville Road interchange is a “traditional urban diamond interchange.” Respondent’s Brief 3. Wilsonville Road is an east/west five-lane major arterial. Petitioner operates an auto dealership that is visible from Interstate 5 approximately one-quarter of a mile south of the interchange, on the east side of Interstate 5. Access to and from petitioner’s dealership via Wilsonville Road is provided by Parkway Avenue, which parallels I-5 and was constructed as a frontage road by ODOT. There is an existing right-in right-out access to and from Parkway Avenue on Wilsonville Road approximately 165 feet east of the northbound interstate off-ramp. Traffic traveling east on Wilsonville Road wishing to access petitioner’s dealership and traffic leaving petitioner’s dealership wishing to travel east on Wilsonville Road may use the existing Parkway Avenue access onto Wilsonville Road. Respondent explains the alternate travel route required for westbound traffic on Wilsonville Road and for traffic from petitioner’s dealership wishing to travel west on Wilsonville Road:

“There is currently a median on Wilsonville Road that restricts turning movements. Vehicles traveling east on Wilsonville Road are limited to right turns only onto Parkway Avenue and vehicles traveling north on Parkway Avenue are limited to right turns only onto Wilsonville Road. No other turning movements are possible. Vehicles traveling west on Wilsonville Road and desiring to go south on Parkway Avenue, and vehicles going north on Parkway Avenue desiring to go west on Wilsonville Road must use the signalized intersection of Wilsonville Road and Town Center Loop West, located [approximately 500] feet east of Parkway Avenue.” Repondent’s Brief 6.

1 Under the challenged IAMP, the current Parkway Avenue access onto Wilsonville Road is to  
2 be closed. After that closure, all traffic between Wilsonville Road and petitioner's dealership  
3 will be required to exit Wilsonville Road at Town Center Loop and travel south  
4 approximately 200 feet to Main Street and then turn and travel approximately 500 feet west  
5 on Main Street to Parkway Avenue. From the intersection of Main Street and Parkway  
6 Avenue, the route to and from Wilsonville Road to petitioner's property is unchanged under  
7 the IAMP.<sup>1</sup>

8 Following public workshops and public meetings, the IAMP was adopted by the City  
9 of Wilsonville on November 16, 2009, as part of the city's comprehensive plan. The IAMP  
10 was presented to the OTC at a public meeting on January 14, 2010, and the OTC adopted the  
11 IAMP as part of the State of Oregon Transportation Plan. This appeal followed.

12 **MOTIONS TO STRIKE**

13 Petitioner moves to strike portions of Respondent's Brief: page 6 lines 13-22, page 7,  
14 lines 9-13 and page 33, lines 13-17. Petitioner contends that factual statements that appear at  
15 those pages of the respondent's brief are not supported by the evidentiary record in this  
16 matter. Petitioner also moves to strike an e-mail message in the record that postdates the  
17 decision.

18 **A. The Alternative Route via Town Center Loop West**

19 We do not understand petitioner to challenge respondent's contention on page 6 of its  
20 brief that if Parkway Avenue is closed under the IAMP, the alternative route for access to  
21 and from petitioner's property will be via Parkway Avenue, Main Street and Town Center  
22 Loop West. If petitioner does challenge that contention, we reject the challenge. Record 42.  
23 ODOT clarifies that Town Center Loop West is approximately 500 feet east of Parkway

---

<sup>1</sup> According to ODOT, this Town Center Loop West/Main Street route between the intersection of Main Street and Parkway Avenue is the same route now used by westbound traffic on Wilsonville Road to petitioner's dealership and traffic from petitioner's dealership that wishes to travel westbound on Wilsonville Road.

1 Avenue, not 400 feet east of Parkway Avenue as stated in its brief. Record 112, 161. With  
2 that clarification, this part of petitioner’ motion to strike is denied.

3 **B. The City’s Decision to Adopt the IAMP**

4 Petitioner moves to strike respondent’s contention on page 7 of its brief that  
5 petitioner did not appeal the city’s decision to adopt the IAMP. We do not understand  
6 petitioner to claim that it did appeal that decision, and the appeal status of the city’s action in  
7 this matter has no bearing on our ultimate disposition of this appeal. This part of petitioner’s  
8 motion to strike is denied.

9 **C. Visibility of Petitioner’s Property**

10 On page 33 of its brief, respondent argues in response to petitioner’s argument that its  
11 property has been taken without just compensation:

12 “\* \* \* Customers and delivery trucks can reach Petitioner’s driveways from  
13 Parkway Avenue via Main Street and Town Center Loop West, and Memorial  
14 Drive. Petitioner still has a very visible presence in the interchange area and  
15 from I-5. The property retains significant economic value. Thus there is no  
16 regulatory taking.” Respondent’s Brief 33.

17 The map at Record 42 shows the alternative routes to access petitioner’s property from  
18 Wilsonville Road and shows the location of petitioner’s property next to I-5. This part of  
19 petitioner’s motion to strike is denied.

20 **D. The April 14, 2010 E-Mail Message**

21 Petitioner did not object to the record filed by Respondent in this matter. Its motion  
22 to strike is in essence a belated record objection. This part of petitioner’s motion to strike is  
23 denied.

24 Petitioner’s motions to strike are denied.

25 **REPLY BRIEF**

26 Petitioner moves for permission to file a reply brief. The motion is allowed.

1 **WAIVER/EXHAUSTION/JURISDICTION**

2 On pages 9 to 17 of respondent’s brief, in arguing that petitioner failed to preserve all  
3 but one of its assignments of error, respondent argues for a significant extension of the Court  
4 of Appeals’ holding in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003).  
5 Respondent also argues that the decision in the IAMP to close the Wilsonville Road/Parkway  
6 Avenue intersection is not reviewable by LUBA as a land use decision. Respondent further  
7 argues that LUBA lacks jurisdiction to determine whether the decision to close the  
8 Wilsonville Road/Parkway Avenue intersection leaves petitioner with reasonable access or  
9 constitutes a taking under Article I, section 18 of the Oregon Constitution.

10 We would normally turn first to any challenge to our jurisdiction before considering  
11 any other arguments on the merits. *See Adams v. City of Ashland*, 33 Or LUBA 552, 554  
12 (1997) (LUBA is obligated to consider whether it has jurisdiction over an appeal regardless  
13 of whether the issue is raised by the parties). However, respondent’s “jurisdictional”  
14 arguments are really arguments about our scope of review, rather than a jurisdictional  
15 challenge. Elsewhere in its brief, respondent concedes that the OTC decision to adopt the  
16 IAMP is a land use decision subject to LUBA’s review jurisdiction. Respondent’s Brief 8.  
17 Because there is no challenge to our jurisdiction, and our disposition of petitioner’s  
18 assignments of error make it unnecessary for us to decide the waiver, exhaustion and scope  
19 of review issues that respondent raises on those pages of its brief, we do not attempt to  
20 resolve those issues.

21 **FIRST ASSIGNMENT OF ERROR**

22 Petitioner’s first assignment of error is actually two very different assignments of  
23 error. First, petitioner argues the IAMP is a final “facility plan” as OAR 731-015-0015(10)  
24 defines that term.<sup>2</sup> OAR chapter 731, division 15 sets out the Oregon Department of

---

<sup>2</sup> As defined by OAR 731-015-0015(10) a “facility plan” is “a plan for a transportation facility such as a highway corridor plan and an airport master plan.”

1 Transportation’s (ODOT’s) state agency coordination program under the statewide planning  
2 program.<sup>3</sup> OAR 731-015-0065(6) requires that the OTC “adopt findings of compatibility  
3 with the acknowledged comprehensive plans of affected cities and counties and findings of  
4 compliance with applicable statewide planning goals when” the OTC adopts a final “facility  
5 plan.”<sup>4</sup> Petitioner argues the OTC adopted no findings that the IAMP is compatible with the  
6 city’s comprehensive plan or complies with applicable statewide planning goals.

7 Petitioner next argues that although the IAMP states that the issue of whether to close  
8 the current Parkway Avenue access onto Wilsonville Road was to have been further  
9 reviewed before closure, the IAMP also acknowledges that such further review never  
10 occurred. Petitioner contends the IAMP is therefore inconsistent with ODOT’s  
11 intergovernmental agreement with the city.

12 **A. Failure to Adopt Findings of Compatibility with the City’s Acknowledged**  
13 **Comprehensive Plan.**

14 Action to adopt the “Interstate 5/Wilsonville Road IAMP” was “Agenda [Item] E” at  
15 the January 14, 2010 OTC meeting that led to the challenged decision. Record 52. The  
16 documents that were before the OTC at that meeting as Agenda Item E included a staff report

---

<sup>3</sup> OAR 731-015-005 sets out the purpose of the division:

“The purpose of this division is to establish the procedures used by the Department of Transportation to implement the provisions of its State Agency Coordination Program which assure that Department land use programs are carried out in compliance with the statewide planning goals and in a manner compatible with acknowledged comprehensive plans, as required by ORS 197.180 and OAR 660, Divisions 30 and 31.”

<sup>4</sup> OAR 731-015-0065(6) implements ORS 197.180(1), which provides in part as follows:

“[S]tate agencies shall carry out their planning duties, powers and responsibilities and take actions that are authorized by law with respect to programs affecting land use:

- “(a) In compliance with the goals, rules implementing the goals and rules implementing this section; and
- “(b) In a manner compatible with acknowledged comprehensive plans and land use regulations.”

1 (Record 56-61), proposed findings that address the statewide planning goals and the city's  
2 comprehensive plan (Record 62-84 ) and the IAMP itself (Record 87-274). The staff report  
3 explains that findings concerning state and local land use plans have been prepared and the  
4 staff report expressly refers to the proposed findings at Exhibit B. The staff report also  
5 includes the following:

6 **“Suggested Motion Language**

7 “I move to adopt the I-5/Wilsonville Road Interchange Area Management  
8 Plan as an element of the Oregon Highway Plan and adopt the findings in  
9 support of this action.” Record 61 (bold lettering in original).

10 The minutes of the January 14, 2010 OTC meeting include the following:

11 “Commissioner Wilson moved to approve the IAMP. The motion was  
12 unanimously approved.” Record 12.

13 We understand petitioner to argue that the OTC's action on January 14, 2010, as  
14 evidenced by the above minutes, was adequate to adopt the IAMP but was not sufficient to  
15 adopt the proposed findings. We understand petitioner to further argue that because those  
16 findings are required by OAR 731-015-0065(6) remand is required.

17 The recording of the January 14, 2010 meeting included in the record indicates the  
18 actual motion was worded somewhat differently than the above-quoted minutes:

19 “Is there a motion on Agenda Item E? I so move. All those in favor [all  
20 member vote aye].”

21 It is clear that the OTC intended to adopt the proposed findings that appear at Record 62-84,  
22 which were part of Agenda Item E, and the above motion was sufficient to do so. Even if it  
23 were not sufficient, we do not understand petitioner to dispute that the OTC adopted the  
24 IAMP document. The findings that appear at Record 62-84 also appear as Appendix G of the  
25 IAMP. Record 199-224. The findings in Appendix G address the statewide planning goals  
26 and the city's comprehensive plan and appear to be nearly identical to the findings at Record  
27 62-84. Petitioner does not challenge the substance of either set of findings, and it is difficult

1 to imagine how the IAMP could be incompatible with a comprehensive plan that was  
2 amended to include the IAMP.

3 **B. Failure to Further Review Closure of Parkway Avenue Access Onto**  
4 **Wilsonville Road**

5 The IAMP includes the following explanation for why the existing Parkway Avenue  
6 Access onto Wilsonville Road should be closed:

7 “Parkway Avenue Access

8 “Parkway Avenue access at Wilsonville Road will be closed as part of the  
9 current Interchange Reconstruction Project. The closure of Parkway Avenue  
10 at Wilsonville Road is a key strategy to maintain safety for turning  
11 movements from the northbound I-5 exit ramp to Wilsonville Road. The  
12 current ODOT interchange access spacing standard for right-in/right out  
13 access is 750’. Parkway Avenue is currently located 165’ from the I-5  
14 northbound ramp intersection which is well below the current standard.  
15 Parkway Avenue is within ODOT’s access control and such, ODOT has the  
16 authority to close the street access.

17 “The agreement to modify Parkway Avenue was formalized between the City  
18 and ODOT in 1994. During the original Phase 1 reconstruction of the  
19 interchange, the City signed an intergovernmental agreement \* \* \* with  
20 ODOT stating the following:

21 ““ODOT and the City agree that upon completion of the project, the access at  
22 Wilsonville Road and Parkway Avenue will have been reconstructed as a  
23 right-in/right-out and will remain as such until an alternative access is  
24 provided by the City. At which time, direct access from Parkway Avenue to  
25 Wilsonville Road will be reviewed by the City and ODOT for possible  
26 modification or elimination.’

27 “Although there has been no formal ‘review’ of the Parkway closure  
28 requirement as previously agreed to between the City and ODOT, it is  
29 ODOT’s position that alternative access has been provided by Main Street via  
30 a connection from Town Center Loop West to Parkway Avenue. This  
31 alternative was planned, adopted, and constructed in the middle to late 1990’s  
32 as part of the Village at Main Street Master Plan in anticipation of the  
33 Parkway Avenue closure. The City of Wilsonville provided the majority of  
34 the street improvement funds to create the public alternative access.” Record  
35 113.

36 The above text in the IAMP explains the safety reasons for closing the existing  
37 Parkway Avenue access onto Wilsonville Road. The IAMP explains that while

1 intergovernmental agreement between ODOT and the city may have envisioned a more  
2 “formal review,” a safer access to Wilsonville Road for Parkway Avenue has already been  
3 constructed. Even if we assume the intergovernmental agreement did envision a more formal  
4 review, petitioner does not explain how a deviation from that aspect of the intergovernmental  
5 agreement would provide a basis for remand of the OTC’s decision to adopt the IAMP. We  
6 understand the IAMP to take the position that no further review is needed because an  
7 acceptable alternative access has already been constructed since the intergovernmental  
8 agreement was entered. To the extent any explanation was legally required to explain the  
9 OTC’s decision to adopt the IAMP with its proposal to close the Parkway Avenue access  
10 onto Wilsonville Road, the explanation set out in the IAMP is adequate.

11 The first assignment of error is denied.

12 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

13 OAR 734-051-0155(1) expresses a policy of encouraging “the development of  
14 Access Management Plans and Interchange Area Management Plans to maintain and  
15 improve highway performance and safety by improving system efficiency and management \*  
16 \* \*.” Petitioner argues that OAR 734-051-0155(5)(c) requires that ODOT and the OTC  
17 develop IAMPs “in coordination with local governments and property owners in the affected  
18 area.” Petitioner also argues that OAR 734-051-0155(7)(f) requires that when developing an  
19 IAMP ODOT and the OTC must “[c]onsider existing and proposed uses of all the property  
20 within the designated study area \* \* \*.” Petitioner contends the coordination with “property  
21 owners in the affected areas” that is required by OAR 734-051-0155(5)(c) and the  
22 consideration of existing uses of property that is required by 734-051-0155(5)(c) did not  
23 occur with regard to petitioner’s property.

24 **A. Coordination with Property Owners (Second Assignment of Error)**

25 In response to petitioner’s contention that there was a failure to coordinate with  
26 petitioner as an affected property owner, ODOT points out that the record establishes that

1 developing the IAMP was a joint city and ODOT project and there was extensive public  
2 outreach, including workshops and open houses, prior to the city’s action to adopt the IAMP  
3 as part of its comprehensive plan. Record 61; 194-98; 228; 284-89, 385-87. The closure of  
4 the current access from Parkway Avenue onto Wilsonville Road was a specific topic of  
5 discussion. Record 198. Petitioner appeared before the OTC on January 14, 2010 and  
6 objected to the proposal to close the current access from Parkway Avenue onto Wilsonville  
7 Road. At that meeting there was a presentation showing the alterative access from Parkway  
8 Avenue to Wilsonville Road via Main Street and Town Center Loop West. Record 42.

9 Petitioner and ODOT disagree regarding whether ODOT’s safety concerns about the  
10 current Parkway Avenue access onto Wilsonville Road warrant closing that access in favor  
11 of the alternate access to the east via Main Street and Town Center Loop West. But the  
12 record is sufficient to demonstrate that ODOT coordinated with petitioner as an affected  
13 property owner, as required by OAR 734-051-0155(5)(c). Petitioner suggests that most of  
14 the public outreach that ODOT relies on occurred before the city adopted the IAMP as part  
15 of the city’s comprehensive plan and petitioner contends *ODOT* cannot rely on the *city’s*  
16 efforts to coordinate with affected property owners. We reject the suggestion. Adoption of  
17 the IAMP was a joint city/ODOT planning effort, and ODOT was not required to repeat the  
18 public outreach and discussion effort that preceded city action on the IAMP.

19 **B. Consideration of Existing Uses of Property (Third Assignment of Error)**

20 The record includes a map showing the study area that was examined in adopting the  
21 IAMP. Record 98. Appendix C of the IAMP is a description of the “Existing Land Use and  
22 Transportation Conditions.” Record 155-73. The IAMP specifically addresses the safety  
23 reasons that support closure of the existing Parkway Avenue access onto Wilsonville Road  
24 and concludes that the alternative access at Town Center Loop West is sufficient. Record  
25 113. ODOT contends that the record is sufficient to establish that ODOT considered  
26 “existing uses of property,” as required by 734-051-0155(7)(f). We agree with ODOT.

1           The second and third assignments of error are denied.

2           **FOURTH AND FIFTH ASSIGNMENTS OF ERROR**

3           Under Statewide Planning Goal 2 (Land Use Planning) “actions related to land use”  
4 must be supported by “an adequate factual basis.” That Goal 2 requirement has been  
5 interpreted to require that actions related to land use must be supported by “substantial  
6 evidence.” *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372, 377-78, *aff’d*  
7 130 Or App 406, 882 P2d 1130 (1994). Substantial evidence exists in support of a finding  
8 when the evidentiary record is such that a reasonable person could make the finding. *Dodd*  
9 *v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993).

10           The stated basis for closing the Parkway Avenue access at Wilsonville Road is that  
11 the access at that point violates ODOT spacing standards. But there are a number of other  
12 existing access points on Wilsonville Road that also violate current ODOT spacing  
13 standards, and yet are not to be closed under the IAMP. Petitioner contends the closure of  
14 the Parkway Avenue access on Wilsonville Road is therefore arbitrary and unsupported by  
15 substantial evidence.

16           Petitioner also argues that the IAMP provides that “short range actions shall  
17 accommodate existing development needs, unless the property is to be purchased by ODOT.”  
18 Record 109. Petitioner contends there has been no accommodation of its loss of access and  
19 ODOT is not proposing to purchase petitioner’s property. Petitioner contends the closing is  
20 therefore is “not internally consistent with the IAMP’s requirements and policies, as required  
21 by ORS 197.835.” Petition for Review 7.<sup>5</sup>

---

<sup>5</sup> We are not sure which of the 16 subsections of ORS 197.835 petitioner is relying on.

1           **A.     The OTC’s Decision to Close the Existing Parkway Avenue Access is**  
2           **Arbitrary and is not Supported by Substantial Evidence (Fourth**  
3           **Assignment of Error)**

4           ODOT responds that the ODOT spacing standards that form the basis of petitioner’s  
5 second assignment of error are standards that ODOT strives to achieve over time, as opposed  
6 to absolute standards.<sup>6</sup> The IAMP specifically recognizes that the IAMP was adopted to  
7 move in the direction to meeting ODOT spacing standards for all access points.<sup>7</sup> The IAMP  
8 separately addresses all current accesses to Wilsonville Road within one-quarter of a mile of  
9 the interchange, sets out proposed short and long range actions for those accesses and  
10 explains why decisions are made concerning each of those accesses. Record 110-11. The  
11 reasons specified for closing the existing Parkway Avenue access were set out earlier under  
12 our discussion of the first assignment of error. ODOT contends that the record in this appeal  
13 is sufficient to show that the OTC’s decision to close the current Parkway Avenue access  
14 onto Wilsonville Road is not arbitrary and is supported by substantial evidence. We agree  
15 with ODOT.

---

<sup>6</sup> OAR 734-051-0015(1), provides in part:

“Access management spacing standards for approaches to state highways:

“\* \* \* \* \*

“(c) Do not apply to approaches in existence prior to April 1, 2000 except where any of the following occur:

“\* \* \* \* \*

“(C) For a highway or interchange construction or modernization project or other roadway or interchange project determined by the Region Manager, the project will improve spacing and safety factors by moving in the direction of the access management spacing standards, with the goal of meeting or improving compliance with the access management spacing standards.”

<sup>7</sup> One of the stated objectives of the IAMP is to “[m]eet, or move in the direction of meeting, ODOT adopted access management spacing standards for access to interchange crossroads.” Record 107.

1           **B.       Short Range Actions Shall Accommodate Existing Development Needs**

2           The IAMP includes a number of objectives, including the following:

3           “8.       Short-range actions shall accommodate existing development needs,  
4                    unless property is to be purchased by ODOT.” Record 109.

5           Petitioner argues ODOT does not propose to buy its property and has failed to accommodate  
6           its existing development needs.

7           As previously explained, under the IAMP, the existing Parkway Avenue access onto  
8           Wilsonville Road a short distance north of the northbound off-ramp is to be replaced with a  
9           slightly longer route to connect with Wilsonville Road via Main Street and Town Center  
10          Loop West. Petitioner and OTC clearly disagree about the adequacy of that alternative  
11          access. However, based on the current record we are unable to agree that OTC’s decision to  
12          select that alternative results in a failure to “accommodate existing development needs.”

13          The fourth and fifth assignments of error are denied.

14          **SIXTH ASSIGNMENT OF ERROR**

15          Under its sixth assignment of error, petitioner argues:

16          “The IAMP itself acknowledges that it must provide affected properties with  
17          ‘reasonable access to the transportation system.’ In addition, Petitioner has a  
18          common law right to reasonable access to its property. [*ODOT*] v. *Hanson*,  
19          162 Or App 38, 44, 987 P2d 538 (1999).” Petition for Review 7.

20          Petitioner goes on to argue that its customers will no longer be able to use the existing  
21          frontage road (Parkway Avenue) to access the dealership, and car hauling semi-trailers will  
22          no longer be able to access the dealership “because the width of Town Center Loop West is  
23          too narrow to accommodate these large trucks making the turn without going into oncoming  
24          lanes.” Petition for Review 8.

25          The record does not support petitioner’s contention that its customers will no longer  
26          be able to access the dealership from Wilsonville Road via Parkway Avenue. Its customers  
27          traveling east on Wilsonville Road will be required to drive approximately 500 feet farther  
28          east on Wilsonville Road, past the existing Parkway Avenue access. At Town Center Loop

1 West, those customers will turn south and travel approximately 200 feet to Main Street  
2 where they will turn west and travel 500 feet to Parkway Avenue. From the intersection of  
3 Main Street and Parkway Avenue petitioner's customers' access along Parkway Avenue to  
4 petitioners' property is not affected by the IAMP. Some of the trips petitioner's customers  
5 make will be required to travel approximately 1000 feet farther between the intersection of  
6 Main Street and Parkway Avenue and Wilsonville Road. But it is simply not accurate to say  
7 that under the IAMP petitioners' customers will no longer have access to the dealership via  
8 Parkway Avenue.

9 With regard to the additional difficulty large trucks may have in reaching petitioners'  
10 property, we do not understand petitioner to argue that the IAMP gives petitioner a greater  
11 right of access than it enjoys under common law. Under common law, while petitioner may  
12 have a right of access, that right of access does not extend to a right to access of a particular  
13 type or at a particular location:

14 "The state insists that, under *Oregon Investment Co. v. Schrunk*, 242 Or 63,  
15 408 P2d 89 (1965), it is entitled to restrict access to a public highway without  
16 compensation in the interests of public safety. \* \* \* At common law, any  
17 property owner has a right of access to public thoroughfares. *State Highway*  
18 *Com. v. Burk et al.*, 200 Or 211, 228, 265 P2d 783 (1954). But the right of  
19 access is specific to no particular location and, thus, is subject to regulation by  
20 the state without compensation as long as some reasonable access remains  
21 available. Thus, the court was careful to hold in *Oregon Investment Co.* that  
22 the state was authorized to deny access to a property at one location 'if  
23 adequate means of access remain to the owner at the other street or streets.'  
24 *Oregon Investment Co.*, 242 Or at 73. That makes sense, because the  
25 common-law right entitles the owner only to access generally, not access at a  
26 particular location. As a result, when the state regulates access merely at a  
27 particular location, there has been no taking of the common-law right, because  
28 access remains available." *ODOT v. Hanson*, 162 Or App at 44.

29 Petitioner has both a common law and property right to access Parkway Avenue from its  
30 property, but petitioner has no property or common law right to access Wilsonville Road at  
31 its current connection with Parkway Avenue.

1           Petitioner also argues that “closure of the Parkway Avenue access [to Wilsonville  
2 Road] transforms Parkway from a frontage road into nothing more than a local street, in  
3 violation of a deed held by Petitioner \* \* \*.” Petition for Review 7. In a 1980 deed from  
4 petitioner’s predecessor to ODOT, petitioner’s predecessor reserved a right of access from  
5 petitioner’s property to Parkway Avenue and referred to Parkway Avenue as a “frontage  
6 road:”

7           “Reserving for service of [petitioner’s predecessor’s] remaining property,  
8 rights of access to the frontage road located on the easterly side of the  
9 highway (Parkway Ave.) opposite Highway Engineer’s Station 552+50,  
10 unrestricted as to use and 50 feet in width. Said frontage road shall be  
11 connected to the main highway or to other public ways only at such places as  
12 [ODOT] may select.” Record 279A.

13           Replacing Parkway Avenue’s existing connection with Wilsonville Road with a  
14 connection via Main Street and Town Center Loop West does not make Parkway Avenue  
15 something other than a frontage road and is not inconsistent with any rights reserved to  
16 petitioner’s predecessor under the 1980 deed.

17 **SEVENTH ASSIGNMENT OF ERROR**

18           Finally, petitioner argues that the decision to close the existing Parkway Avenue  
19 connection with Wilsonville Road and provide access to Wilsonville Road from the Parkway  
20 Avenue/Main Street intersection via Main Street and Town Center Loop West results in an  
21 uncompensated taking of petitioner’s property, in violation of Article I, section 18 of the  
22 Oregon Constitution and the Fifth Amendment to the United States Constitution.

23           We reject petitioner’s seventh assignment of error for two reasons. First, the  
24 Clackamas County Circuit Court has already entered a judgment rejecting petitioner’s taking  
25 claim against respondent. Second, petitioner’s taking argument is premised on its contention  
26 that it has a protected property interest in the existing access provided by Parkway Avenue  
27 onto Wilsonville Road. Petitioner has no such property interest, and without a protected  
28 property interest petitioner has no taking claim. *McDonald v. Halverson*, 92 Or App 478,

1 487, 760 P2d 263 (1988). Under the 1980 deed, petitioner has a property interest to access  
2 *Parkway Avenue from its property*. But that deed does not grant petitioner any property  
3 interest in Parkway Avenue’s connection with Wilsonville Road, over one-quarter of a mile  
4 from petitioner’s property. To the contrary, that 1980 deed expressly provides that the  
5 location that Parkway Avenue is “connected to the main highway or to other public ways” is  
6 to be “at such places as [ODOT] may select.” Record 279A.

7 The seventh assignment of error is denied.

8 OTC’s decision is affirmed.