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

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HOWARD J. BRUNER, RICHARD )  
JOHNSTON and ELIZABETH )  
MONTGOMERY, )  
 )  
Petitioners, )  
 )  
vs. )  
 )  
CITY OF ASTORIA, )  
 )  
Respondent, )  
 )  
and )  
 )  
ALDERBROOK COMMUNITY CLUB, )  
 )  
Respondent. )

LUBA No. 83-039  
  
FINAL OPINION  
AND ORDER

Appeal from City of Astoria.

Kenneth S. Eiler, Seaside, filed the Petition for Review and argued the cause on behalf of Petitioners. With him on the brief were Bauske & Eiler.

Donn C. Bauske, Seaside, filed a motion to intervene for Respondent Aldberook Community Club to appear on behalf of Petitioners.

Robert Anderson, Astoria, filed a brief and argued the cause on behalf of Respondent City of Astoria.

BAGG, Board Member.

DISMISSED 8/10/83

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a), as amended by Oregon Laws 1981, ch 748.

1 BAGG, Board Member.

2 NATURE OF THE DECISION

3 Petitioners appeal an action by the city council of the  
4 City of Astoria directing city personnel to excavate an  
5 unspecified amount of sand from a dredge material disposal site  
6 (the Alderbrook site) for use on city playing fields.

7 Petitioners ask that the decision be invalidated on the ground  
8 the city failed to make any findings of fact or conclusions of  
9 law and failed to apply procedures and criteria set forth in  
10 its acknowledged comprehensive plan. Petitioners add that the  
11 action is in violation of the statewide planning goals.

12 FACTS

13 The property known as the Alderbrook site was created in  
14 1966 when dredge material moved from a portion of the Columbia  
15 River Channel was deposited on the site. Prior to 1966, the  
16 site was under water. No dredge material has since been  
17 deposited at Alderbrook. The site is approximately 10 acres  
18 and, at times, is covered with water.

19 The city's comprehensive plan has been acknowledged by the  
20 Land Conservation and Development Commission as being in  
21 compliance with the statewide planning goals. The plan  
22 designates Alderbrook as a Priority II dredge material disposal  
23 site. The plan designates sites Priority II if they meet  
24 probable or projected dredging needs. These properties may be  
25 required in the future to receive spoils associated with  
26 long-range development.

1 On March 21, 1983, the city council voted to proceed with  
2 excavation of sand from Alderbrook. This action was taken by  
3 oral motion and vote. There was no written order entered.  
4 Petitioners appeal this decision.

5 ASSIGNMENTS OF ERROR NO. 1 and 2

- 6 1. "The respondent erred in deciding to proceed with  
7 sand excavation at the Alderbrook site because it  
8 failed to make any findings or conclusions in  
9 support of its decision."  
10 2. "The respondent erred in deciding to proceed with  
11 sand excavation at the Alderbrook site because it  
12 failed to consider the standards for conditional  
13 use and review use as set out in it's [sic]  
14 comprehensive plan and zoning ordinance."

15 Petitioners' first two assignments of error are premised on  
16 the conclusion that the city's decision to remove sand was a  
17 land use decision over which the Board has jurisdiction.<sup>1</sup>  
18 Removal of sand has an impact on land use. However, this  
19 impact alone does not make the decision a "land use decision"  
20 over which the Board has jurisdiction. As the Oregon Court of  
21 Appeals noted in Westside Neighborhood v School District 4J, 58  
22 Or App 154, 647 P2d 962, rev den 294 Or 78, 653 P2d 999 (1982),

23 "[m]any kinds of governmental actions can have an  
24 impact on land use, but that fact does not make every  
25 governmental action a land use decision. Our premise  
26 in Housing Council (State Housing Council v City of  
Lake Oswego, 48 Or App 525, 617 P2d 655 (1980), pet.  
dis. 291 Or 878, 635 P2d 647 (1981)) was that the  
legislature did not intend through the statutory  
scheme then applicable to review of land use  
decisions, that the Land Conservation and Development  
Commission (LCDC) has authority to invalidate  
exercises of basic non-planning responsibilities by  
other governmental bodies, even though the exercise of  
such responsibilities can have substantial secondary

1 effects on land use."

2 The Court of Appeals then concluded in Westside that the School  
3 District's decision to close a school for economic reasons was  
4 not a land use decision over which LUBA had jurisdiction. Such  
5 a land use decision occurs only where a government exercises  
6 its planning and zoning responsibilities. Peterson v Klamath  
7 Falls, 279 Or 249, 566 P2d 1193 (1977). Although the meaning  
8 of "planning and zoning responsibilities" is broader than  
9 simply adoption of zoning ordinances, the Board does not  
10 believe removal of sand from a dredge material disposal site  
11 constitutes an exercise of the city's planning and zoning  
12 authority.

13 Petitioners cite City of Pendleton v Kerns, 56 Or App 818,  
14 643 P2d 658, aff'd, 294 Or 126, 653 P2d 992 (1982). In that  
15 case, the Supreme Court observed:

16 "We do not believe, however, that the legislature  
17 intended the myriad of prosaic administrative  
18 decisions regarding routine maintenance and minor  
19 public works and road projects be subject to LUBA and  
20 judicial review for compliance. Consequently, we  
21 reiterate the standard set forth in Peterson and hold  
that Ordinance No. 3141 is subject to LUBA review if,  
but only if, it can be said that the street  
improvement work will have a 'significant impact on  
present or future land uses' in the area."

22 Here, the sand, owned by the city, is to be removed from an  
23 area designated in the zoning ordinance and the acknowledged  
24 comprehensive plan as a dredge material disposal site. It is  
25 similar to a landowner moving mounds of earth about his  
26

1 property. The Board believes this kind of action constitutes  
2 the de minimis impact on land use which the Supreme Court stated  
3 was beyond LUBA's jurisdiction in Kerns.

4 Because the decision on review is not a land use decision  
5 over which this Board has review authority, this case is  
6 dismissed.

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FOOTNOTE

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3 ORS 197.015(10) defines "land use decision" as

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

6 "(A) The goals;

7 "(B) A comprehensive plan provision; or

8 "(C) A land use regulation; or

9 "(b) A final decision or determination of a state  
10 agency other than the commission with respect to which  
11 the agency is required to apply the goals."

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