

1 Opinion by Kressel.

2 NATURE OF THE DECISION

3 Petitioners and others requested approval of lot line
4 adjustments affecting four parcels. On behalf of petitioner
5 Hicks, the application also requested approval of access to
6 Emerald Green Lane, a privately maintained public road. The
7 county approved the lot line adjustments, but denied the
8 requested access to Emerald Green Lane. Petitioners appeal the
9 denial.

10 FACTS

11 In the early 1970s, the county approved the Emerald Green
12 Estates Subdivision. The subdivider dedicated a 60-foot wide,
13 north-south road (Emerald Green Lane) connecting the plat to a
14 nearby county road (Greens Bridge Road). Emerald Green Lane is
15 now maintained at the expense of abutting property owners, the
16 Emerald Road Improvement Association.

17 In the mid-1970s, two proposals (Partition Nos. 75-26 and
18 76-29) to divide land north of the Emerald Green Estates
19 Subdivision were approved by the county. However, in response
20 to objections from residents of Emerald Green Estates, access
21 from the newly divided parcels to Emerald Green Lane was
22 prohibited.¹ Instead, the county required creation of a
23 private roadway, paralleling Emerald Green Lane, and connecting
24 at its southern end with Greens Bridge Road. The parcels at
25 issue in this appeal were acquired by petitioners subject to
26 these restrictions.

1 In 1978, the county filed suit in Marion County Circuit
2 Court to enforce the access restrictions against petitioners.
3 In April 1979, a default order was entered against
4 petitioners. The order states, in pertinent part:

5 "Defendants, and each of them, shall cease and desist
6 from any use of Emerald Road as an access way to their
7 respective properties, and they are permanently
8 enjoined from using the said Emerald Road for purposes
of access into their respective properties;..."
Record at 76.

9 In 1984, petitioner Wagner conveyed 5.25 acres to
10 petitioner Hicks. Although a portion of the acreage now owned
11 by Hicks abuts Emerald Green Lane, access to the lane is barred
12 by the previously described restriction and the circuit court
13 injunction.²

14 Petitioners sought approval of a lot line adjustment
15 corresponding to the 5.25 acre conveyance in November, 1984.
16 Their request also sought approval of access from the Hicks'
17 parcel to Emerald Green Lane.

18 The county planning director approved the lot-line
19 adjustment, but denied the access request. The denial was
20 appealed to the Marion County hearings officer. The appeal
21 states, in part:

22 "The applicants, Marvin and Elenora Hicks, appeal from
23 the Planning Director's Decision not to allow them
24 access in a full and normal manner to their property
25 from Emerald Green Lane on the grounds and for the
26 reason that the Board of Commissioners and the County
Planning Commission should review and rescind the
previous denial of access to Emerald Green Lane by the
Applicants and should set aside the injunctive relief
against the Applicants issued in Circuit Court Case

1 No. 104961 on the basis that with the approval of the
2 Director of Planning and the adoption of the Decision
3 in this Case No. 85-2 and under the current existing
4 ownership of the parcels involved, the access to the
5 Applicants', Marvin and Elenora Hicks, property is
6 more easily had from Emerald Green Lane and the
7 Decision of the Planning Director for and the County
8 prohibiting access to the Hicks' property from Emerald
9 Green Lane should be reviewed and reversed to the
10 benefit of the surrounding property owners." Record
11 at 31.

12 The hearings officer denied the appeal. In pertinent part,
13 his decision states:

14 "7. The reasons advanced by applicants are inadequate
15 to alter the decision of the Planning Director.
16 This hearings officer has no authority to grant
17 Hicks access to Emerald Green Lane contrary to the
18 orders of the Marion County Board of Commissioners
19 and the permanent injunction of the Marion County
20 Circuit Court. Nor has the hearings officer
21 sufficient grounds to recommend modification or
22 vacation of these orders and the injunction.

23 "The county has an existing public interest in
24 limiting access to Emerald Green Lane until it is
25 improved to county road standards. The county has
26 consistantly maintained this interest. To waiver
in favor of the Hicks will invite other
applications for access to Emerald Green Lane
(Exhibit L). Agricultural use of the Wagner
property may be enhanced and personal hardship on
the Hicks may be reduced by granting access to
Emerald Green Lane. But the applicants acquired
their property with knowledge or notice of the
limitations on their access to Emerald Green Lane.
The public interest in adequate public roads
outweighs the personal advantages to applicants."
Record at 14.

27 Petitioners appealed the hearings officer's decision to the
28 Marion County governing body. The governing body upheld the
29 hearings officer, adopting his findings of fact and conclusions
30 of law.

1 JURISDICTION

2 We construe the county's decision as a refusal to exempt
3 petitioner Hicks from the previously adopted restrictions on
4 access to Emerald Green Lane. Petitioners assign various
5 errors to the refusal. However, none of the assignments
6 address the critical threshold issue of whether the challenged
7 decision is a "land use decision" within LUBA's statutory
8 jurisdiction. We address that issue below, concluding that the
9 appeal must be dismissed on jurisdictional grounds.

10 Our jurisdiction is confined to decisions (1) meeting the
11 definition of "land use decision" set forth in ORS 197.015(10)
12 or (2) constituting a significant impact on present or future
13 land use. See Billington v. Polk County, 299 Or 471, 479 ___
14 P2d ___ (1985); City of Pendleton v. Kerns, 294 Or 126, 653 P2d
15 922 (1982). ORS 197.015(10) defines land use decision as:

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

- 19 (i) the goals;
20 (ii) a comprehensive plan provision;
21 (iii) a land use regulation; or
22 (iv) a new land use regulation...."

23 Petitioners ask us to review the county's refusal to waive
24 or rescind orders that were adopted in 1975 and 1976. They
25 argue that the county's "decision to approve or deny...access
26 onto Emerald Lane should be based on whether current facts
27 satisfy the applicable criteria and not on passed (sic)
28 restrictive interpretations and actions decided under different

1 circumstances." Petition at 9. However, nowhere in the
2 petititon are "the applicable criteria" identified. We cannot
3 review a decision for conformance with unidentified criteria.
4 Correspondingly, we cannot conclude that such a decision
5 concerns the application of the statewide goals, a compre-
6 hensive plan, or a land use regulation. ORS 197.015(10). See
7 Billington v. Polk County, supra; see also Allen Associates v.
8 City of Beaverton, 11 Or LUBA 140, 146 (1984). Petitioners'
9 disagreement with the county seems to be over the wisdom of the
10 previously imposed access restrictions, rather than over the
11 proper application of approval criteria to a present land use
12 application. We conclude that the petitioners have not carried
13 the burden of demonstrating that the challenged decision is a
14 "land use decision" under ORS 197.015(10). Billington v. Polk
15 County, supra, 299 Or at 475.

16 The second category of decisions reviewable by this board
17 includes those having a "significant impact on present or
18 future land use in the area." Billington v. Polk County,
19 supra, 299 Or at 474. In this appeal, we have considerable
20 difficulty applying the significant impact test. As we
21 construe the decision, the county refused to waive or rescind
22 previously adopted orders. This has the effect of maintaining
23 the status quo. The significant impact test does not appear to
24 contemplate a situation in which the status quo is maintained
25 by rejection of a proposal to waive or rescind a prior order.

1 Even if the significant impact test could be applied to the
2 circumstances here, we believe petitioners have not
3 demonstrated that the test is met. As noted, the decision
4 maintains, rather than alters the status quo in this area. The
5 petition does not demonstrate why the county's refusal to allow
6 requested access will have a significant impact on present or
7 future land use in the area.

8 CONCLUSION

9 This board is well aware of the intensity of the long-term
10 dispute over the proper use of Emerald Green Lane. However, as
11 an agency created by statute, LUBA is not in a position to
12 second-guess the wisdom of the county's choice. Because the
13 challenged action is not a "land use decision" we must dismiss
14 this appeal.

FOOTNOTES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

1

In addition to the restrictions set forth in orders 75-26 and 76-29, the county controls access to Emerald Green Lane by its ownership of a narrow strip ("street plug") at the northern end of the lane. Petitioner could not use the lane without obtaining an easement from the county, in addition to relief from orders 75-26 and 76-29.

2

As noted in our opinion, Hicks has access to a public road (Greens Bridge Road) via the private roadway traversing land owned by petitioner Wagner.