

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

Nov 22 11 04 AM '89

ANDERSON BROS., INC., an Oregon)
corporation, ROTH MOTOR COMPANY,)
an Oregon corporation, CITY)
ANTIQUES, INC., an Oregon)
corporation, and BURNS BROS.,)
INC., an Oregon corporation,)

LUBA No. 89-054

Petitioners,)

ORDER TRANSFERRING
APPEAL

vs.)

CITY OF PORTLAND,)

Respondent.)

Appeal from City of Portland.

Jeffrey J. Bennett, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Bauer, Hermann, Fountain and Rhoades.

Adrienne Brockman, Portland, filed the response brief and argued on behalf of respondent.

HOLSTUN, Referee; SHERTON, Chief Referee; KELLINGTON, Referee, participated in the decision.

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1 Opinion by Holstun.

2 NATURE OF THE DECISION

3 Petitioners appeal City of Portland Ordinance No. 161815
4 which renames Union Avenue, a city street, Martin Luther King,
5 Jr. Boulevard.

6 FACTS

7 On August 19, 1987, the city adopted Resolution 34333 which
8 establishes a "Policy for Renaming Streets."¹ Record 275-283.
9 On October 9, 1987, a committee seeking to rename a city street
10 after Reverend Martin Luther King Jr. (King Committee)
11 recommended three city streets for possible renaming, S.W. Front
12 Avenue, S.W. Fifth Avenue, and Union Avenue. An application to
13

14 ¹The policy establishes procedures and requirements for renaming city
15 streets. Under the policy, an applicant obtains petition forms,
16 instructions, and an application form from the city engineer. The petition
17 forms must include a map showing the street to be renamed, and the
18 applicant is required to obtain 2500 signatures in favor of the proposal or
19 the signatures of 75% of the abutting property owners. The policy also
requires the applicant to obtain letters of support from a majority of the
abutting neighborhood and business associations, and to make a good faith
effort to obtain a letter of concurrence with the proposed street renaming
from the honoree's surviving family. The completed application together
with a fee may then be submitted to the city engineer.

20 The city engineer refers street renaming applications to a Historian
21 Panel for review. The Historian Panel determines whether the application
22 is consistent with standards in the policy and the historical significance
23 of the existing street name. While the Historian Panel conducts its
review, the city auditor conducts a postcard survey of property owners and
residents abutting the street, and the city engineer prepares a budget
impact statement.

24 The Historian Panel recommendation, a summary of the postcard survey and
25 the budget impact statement are forwarded to the planning commission. The
26 planning commission holds a public hearing and makes a recommendation to
the city council. The city council holds a public hearing and renders a
decision on the application.

1 rename Union Avenue was filed on November 8, 1988.

2 After a request by the city that the applicant provide
3 additional letters of support for the application, the
4 application was accepted by the city on January 26, 1989. The
5 application was forwarded to the Historian Panel, and the city
6 auditor was requested to conduct the required postcard survey.
7 Upon completion of the postcard survey and Historian Panel
8 review, the application was forwarded to the planning
9 commission. The planning commission conducted a hearing and
10 recommended to the city council that approval of the application
11 would be in the "best interest of the city."²

12 The city council held a hearing on the application on April
13 13, 1989. At the close of the hearing an ordinance granting the
14 application and approving the renaming was passed to a second
15 reading on April 20, 1989. At the April 20 meeting the
16 ordinance was amended and approved as amended with an emergency
17 clause. This appeal followed.

18 JURISDICTION

19 Respondent moves for dismissal of this appeal, arguing the
20 challenged city decision is not a land use decision. According
21 to respondent, the challenged decision is neither a "land use
22 decision, as that term is defined in ORS 197.015(10), nor a
23 "significant impact test" land use decision, as that term has

24
25 ²Section III. K of the street renaming policy requires the planning
26 commission to "make a recommendation to City Council as to the best
interest of the City in accordance with ORS 227.120."

1 been explained in appellate court and LUBA decisions.

2 LUBA's jurisdiction extends only to land use decisions.
3 ORS 197.825(1). Petitioners have the burden of establishing
4 that we have jurisdiction by showing that the challenged
5 decision is a land use decision. Billington v. Polk County, 299
6 Or 471, 475, 703 P2d 232 (1985); Wagner v. Marion County, 15 Or
7 LUBA 260, 268, aff'd 85 Or App 220 (1987). Petitioners allege
8 the challenged decision is a land use decision under both the
9 statutory definition of that term and the significant impact
10 test.

11 In City of Pendleton v. Kerns, 294 Or 126, 133-134, 653 P2d
12 996 (1982), the Supreme Court explained that a local government
13 decision is a land use decision if it will have a "'significant
14 impact on present or future land uses' in the area." A local
15 government decision, therefore, is a land use decision if it
16 meets either (1) the statutory definition in ORS 197.015(10), or
17 (2) the significant impacts test referred to in City of
18 Pendleton v. Kerns, supra. Billington v. Polk County, supra 299
19 Or at 479. We first consider whether the city's decision comes
20 within the statutory definition of "land use decision."

21 A. Statutory Test

22 ORS 197.015(10) provides in part:

23 "'Land use decision':

24 "(a) Includes:

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

- 1 "(i) The goals;
- 2 "(ii) A comprehensive plan provision;
- 3 "(iii) A land use regulation; or
- 4 "(iv) A new land use regulation;

5 "* * * * *

6 1. ORS 197.015(10)(a)(A)(i)

7 Because the city's comprehensive plan and land use
8 regulations have been acknowledged pursuant to ORS 197.251 the
9 Statewide Planning Goals (goals) do not apply to the city's land
10 use decisions, unless the decision amends the city's
11 acknowledged comprehensive plan or land use regulations. Byrd
12 v. Stringer, 295 Or 311, 666 P2d 1332 (1983); 1000 Friends of
13 Oregon v. Jackson County, 79 Or App 93, 97, 718 P2d 753 (1986);
14 See ORS 197.835(3) and (4). Petitioners do not argue the city's
15 decision adopts or amends a comprehensive plan or land use
16 regulation. Therefore, we conclude the city's decision is not a
17 decision concerning application of the goals and is not a land
18 use decision by virtue of ORS 197.015(10)(a)(A)(i).

19 2. ORS 197.015(10)(a)(A)(ii)

20 We do not understand petitioners to argue that the city's
21 decision is a land use decision because it adopts, amends, or
22 applies a comprehensive plan provision. Although petitioners
23 allege in their fifth assignment of error that the city erred by
24 failing to adopt findings addressing the comprehensive plan,
25 petitioners identify no comprehensive plan provision the city
26 was required to apply in reaching its decision. Because

1 petitioners identify no applicable comprehensive plan provision,
2 we conclude the city's decision is not a land use decision by
3 virtue of ORS 197.015(10) (a) (A) (ii).

4 3. ORS 197.015(10) (a) (A) (iii)

5 Petitioners contend that the city's decision is a land use
6 decision because it applies a land use regulation.³ Petitioners
7 argue that Resolution 34333 is a land use regulation in that it
8 "implements the comprehensive plan because it relates to the
9 City's transportation system, and relates to use of the lands
10 abutting that system." Petition for Review 15. Petitioners go
11 on to point out Resolution 34333

12 "requires the City to consider the historical
13 significance of the street to be renamed, requires
14 letters of support from a majority of the abutting
15 neighborhood and business associations recognized by
16 the City, requires an analysis of the impact the name
17 change will have on the City's budget and requires the
18 City Planning Commission to conduct a public hearing
19 on the application and make a recommendation to the
20 City Council as to the 'best interest if the City in
21 accordance with ORS 227.120,' a statute which is set
22 forth in the City planning and zoning portions of the
23 Oregon Revised Statutes. Accordingly, the City's
24 adoption of Ordinance No. 161815 was a land use
25 decision as that term is defined in
26 ORS 197.015(10) (a) (A) (iv) [sic iii]." Petition for
Review 15.

27 The city responds that Resolution 34333 is not a land use
28 regulation as that term is defined in ORS 197.015(11). The city

29 ³ORS 197.015(11) provides in part:

30 "'Land use regulation' means any local government zoning
31 ordinance, land division ordinance adopted under ORS 92.044 or
32 92.046 or similar general ordinance establishing standards for
33 implementing a comprehensive plan. * * *"

1 contends street renaming is not a planning commission
2 responsibility listed under ORS 227.090. The city contends the
3 goals do not mention street naming as a planning function. The
4 city points out that ORS 227.120, enacted in 1946, governs
5 renaming of streets located outside city limits and therefore
6 does not apply in this case.

7 In Bettis v. City of Roseburg, 1 Or LUBA 174, 177
8 (1980) (Bettis), we explained:

9 "Not all issues that somehow affect property may be
10 said to be subject to or 'implement' statewide land
11 use goals and comprehensive plans. However, streets
12 and improvement of streets can have an effect on land
13 development within a local government's jurisdiction.
14 Indeed, the definition of comprehensive plan requires
15 inclusion of 'transportation systems' with the
16 'coordinated land use map' that is the comprehensive
17 plan.

14 "* * * * *

15 "Streets seem to us to be part of a 'transportation
16 system,' As such, streets and street improvements,
17 arguably, should be included in comprehensive plans.
18 Street improvements are subjects 'relating to the use
19 of lands.' * * *"

18 In Bettis, the City of Roseburg adopted a resolution
19 establishing "standards for the improvement of 'unimproved
20 dedicated and platted street right-of-way and [providing] an
21 appeal procedure from those standards." Id. at 175. The
22 decision before LUBA in that case was a decision applying those
23 street improvement standards to require the petitioner to make
24 certain improvements to his street. In considering the city's
25 jurisdictional challenge, LUBA concluded that the street
26 improvement standard was a land use regulation because it

1 contained standards adopted to "implement the Roseburg
2 Comprehensive Plan. Id. at 178.⁴

3 Petitioners suggest that Resolution 34333, like the
4 resolution establishing street improvement standards in Bettis,
5 relates to the city's transportation system and is, therefore,
6 properly viewed as a land use regulation. We disagree. We
7 believe there is a significant difference between a resolution
8 establishing standards for constructing streets and a resolution
9 establishing standards for naming them. Unless the city chooses
10 to adopt provisions concerning street names in its comprehensive
11 plan, or to include a requirement in its street naming standards
12 that the comprehensive plan be applied, we find the connection
13 between a street naming policy and the city's transportation
14 related comprehensive planning responsibilities too tenuous to
15 support a conclusion that the street naming policy was adopted
16 to implement the comprehensive plan.

17 Although it is certainly possible that a street renaming
18 procedure could be a land use regulation, if it required that
19 plan or land use regulation standards be applied as part of the
20 street renaming process, that is not the case here. Resolution

21
22 ⁴Although LUBA concluded the challenged decision applying those
23 standards was, therefore, potentially a land use decision subject to LUBA
24 review, the appeal was dismissed because LUBA concluded there had not yet
25 been a "final" decision. There is language in our decision in Bettis which
26 suggests that LUBA also considered the challenged decision to be one that
would have significant impacts or that LUBA partially based its conclusion
that the street standard resolution implemented the comprehensive plan on
the likelihood of such impacts. We discuss the significant impacts test,
infra.

1 34333 makes no reference to the acknowledged plan or land use
2 regulations.⁵ The simple fact that street names have some
3 relation to the transportation system is an insufficient basis
4 upon which to conclude the city's street renaming procedure is a
5 land use regulation.⁶ We believe there must be some basis for
6 connecting the street renaming procedure with the acknowledged
7 plan either in the procedure itself or in the plan. Here there
8 is no basis for that connection in either, and we agree with
9 respondent that Resolution 34333 is not a procedure
10 "establishing standards for implementing a comprehensive plan."

11 We conclude Resolution 34333 is not a land use regulation
12 as defined in ORS 197.015(11) and, therefore, the city's
13 decision is not a land use decision under
14 ORS 197.015(10) (a) (A) (iii).

15 4. ORS 197.015(10) (a) (A) (iv)

16 The city's decision would be a land use decision under
17 ORS 197.015(10) (a) (A) (iv) if it concerned adoption, amendment or
18

19 ⁵Respondent advised the Board at oral argument that the city did not
20 follow post acknowledgment plan and land use regulation amendment
procedures of ORS 197.610 to 197.625 in adopting Resolution 34333.

21 ⁶Petitioners agree with the city that ORS 227.120 is inapplicable to a
22 street renaming decision within the city limits. However, petitioners
23 contend Resolution 34333 expressly references ORS 227.120 and requires the
24 city to adopt the finding described in that statute that the new street
25 name "is in the best interest of the city in accordance with ORS 227.120."
26 Petitioners do not explain, however, why the codification of a 1946 law in
ORS chapter 227 necessarily makes street renaming decisions under
ORS 227.120 exercises of planning authority. As the city correctly notes,
street renaming is not listed among the powers and duties granted to
planning commissions under ORS 227.090. More importantly, we find no basis
for concluding the reference in Resolution 34333 to ORS 227.120 was
intended to make street renaming a planning function.

1 application of a new land use regulation. Petitioners do not
2 contend that Ordinance 161815 adopted, amended or applied a new
3 land use regulation.

4 Because we conclude petitioners fail to demonstrate that
5 the city's decision is a land use decision as defined in
6 ORS 197.015(10)(a), we next consider whether the city's decision
7 is a land use decision reviewable by this Board as a significant
8 impact test land use decision.

9 B. Significant Impact Test

10 Respondent suggested at oral argument that the significant
11 impact test should not be applied by LUBA as a basis for
12 asserting jurisdiction over a local government decision that
13 does not satisfy the statutory definition of "land use
14 decision." According to respondent, the significant impact test
15 was created not by the legislature but by the Supreme Court and,
16 therefore, should not be used to provide LUBA jurisdiction over
17 decisions the legislature has not seen fit to place within our
18 jurisdiction.

19 As recently as 1985, the Supreme Court made it clear that
20 the significant impact test is to be applied as a basis for LUBA
21 review of a local government decision, independent of the
22 definition of "land use decision" in ORS 197.015(10).
23 Billington v. Polk County, supra. This Board is bound to follow
24 and apply decisions rendered by the appellate courts of this
25 state in our review proceedings. See ORS 197.805. We therefore
26 turn to petitioners' arguments that the city's decision will

1 have "significant impacts on present or future land use," such
2 that we have jurisdiction to review the city's decision.

3 Petitioners contend that throughout the local proceedings
4 in this matter there was testimony concerning the significant
5 effects the change in name would have on the neighborhoods and
6 business districts along Union Avenue. Petitioners contend the
7 record shows Union Avenue experiences prostitution, drug related
8 and other criminal problems. Petitioners cite testimony in the
9 record that businesses along the street are failing and the
10 street is in a state of physical disrepair. During the local
11 proceedings, the Urban League of Portland, in supporting the
12 application, stated that it felt the name change would be "a
13 catalyst to resurrect the street into a viable commercial
14 resource for the City of Portland." Record 101. Similarly, the
15 planning commission recommendation to city council stated

16 "Members of the Commission expressed their belief that
17 the symbolism associated with the name Martin Luther
18 King, Jr. could act as a catalyst in the rejuvenation
19 of our city's North and Northeast sectors and that
everything possible should be done to spark the
renewal of that very important part of Portland."
Record 176.

20 We understand petitioners to contend the hoped-for benefits that
21 may in the future result from the name change are significant
22 and, therefore, the decision will have a significant impact on
23 present or future land use.

24 In City of Pendleton v. Kerns, supra, the Supreme Court
25 conceded that "'significant impact on present or future land
26 uses' is a nebulous standard * * *." 294 Or at 133. The court

1 went on to explain the following limitation on the significant
2 impact test:

3 "Public works and road projects are an aspect of a
4 city's 'planning and zoning responsibilities' and as
5 such must be in compliance with the applicable goals
6 and comprehensive plan provisions. A city's final
7 decision authorizing a significant project of this
8 nature is, as a result, reviewable by LUBA for goal
9 and plan compliance. We do not believe, however, that
10 the legislature intended the myriad of prosaic
11 administrative decisions regarding routine maintenance
12 and minor public works and road projects to be subject
13 to LUBA and judicial review for compliance.
14 Consequently, we reiterate the standard set forth in
15 Peterson [sic] and hold that [the city's decision] is
16 subject to LUBA review if, but only if, it can be said
17 that the street improvement work will have a
18 'significant impact on present or future land uses' in
19 the area." 294 Or at 133-134.

20 Although the Supreme Court in Billington v. Polk County,
21 supra, repeated that the significant impact test may give LUBA
22 jurisdiction over decisions not within the definition of land
23 use decision in ORS 197.015(10), the court also determined in
24 that case that LUBA applied the test too expansively.

25 "LUBA's reasoning goes against City of Pendleton v.
26 Kerns, supra, and Petersen v. Klamath Falls, 279 Or
27 249, 566 P2d 1193 (1977), which require a significant
28 impact on present or future land use in the area
29 before the decision could be classified as a land use
30 decision. Here LUBA only requires a finding of
31 'potential impact,' 'any impact' or 'would affect' to
32 trigger a conclusion that a decision was a land use
33 decision. * * *

34 "* * * * *

35 "* * * In this case, the test that should have been
36 used is the significant impact test rather than 'would
37 have potential impact,' 'would affect' or 'would have
38 any impact' on current or future land uses." 299 Or
39 at 478-479.

40 We understand the Supreme Court's decisions in City of

1 Pendleton v. Kerns and Billington v. Polk County to emphasize
2 that the impact of a decision, not otherwise subject to our
3 review under ORS 197.015(10) and 197.825(1), must be
4 qualitatively or quantitatively significant in order for LUBA to
5 have review jurisdiction. In addition, and more importantly for
6 purposes of this appeal, in expressly rejecting the "will have
7 potential impact" test we believe the Supreme Court requires
8 that there be some demonstrated relationship between the
9 decision and the expected impacts as well as evidence that the
10 expected impacts are likely to occur.

11 In this case, the benefits the city hopes to derive from
12 the street name change appear to be speculative. There is
13 simply no way to determine, with any reasonable certainty,
14 whether the hoped-for benefits are likely or simply possible.
15 We conclude that, at best, the record shows the impacts
16 petitioners cite as a basis for our jurisdiction in this matter
17 are "potential impacts" and are, therefore, insufficient to give
18 this Board review jurisdiction.⁷

19 Finally, we note the decision at issue in this case is very
20 different from the city's decision in Bettis v. City of
21 Roseburg, supra. In that case the city's requirement for
22
23

24
25 ⁷As respondent notes in its brief, Portland is not the first city to
26 name a street or other public facilities for Reverend King, and petitioner
points to no evidence demonstrating the nature of the impacts that resulted
from such name changes elsewhere.

1 physical improvements in the right of way was at issue.⁸ As
2 respondent correctly notes, the only immediate and certain
3 impact of the city's decision in this case is a change in the
4 lettering on street signs. Although the renaming of Union
5 Avenue might have greater impacts than the improvement of a
6 single street, those impacts are far less certain -- they are
7 "potential," as opposed to "definite" or "likely," impacts.
8 While the hoped-for benefits of renaming the street may well
9 lead the city in the future to adopt new or amended plans, land
10 use regulations or other decisions subject to our review, we
11 conclude the decision to rename the street is not such a
12 decision.

13 Because we conclude the city's decision is neither a
14 statutory nor a significant impacts test land use decision, LUBA
15 does not have jurisdiction to review the challenged decision.

16 MOTION TO TRANSFER

17 ORS 19.230(4) provides in part

18 "A notice of intent to appeal filed with the Land Use
19 Board of Appeals pursuant to ORS 197.830 and
20 requesting review of a decision of a municipal

21 ⁸Similarly, City of Pendleton v. Kerns, supra concerned the city's
22 ordinance authorizing improvement of an existing right of way. We also
23 believe the decision challenged in this appeal is materially different than
24 other decisions the appellate courts have found to satisfy the significant
25 impacts test, such as street vacations (Billington v. Polk County, supra)
26 and annexation or incorporation decisions (Petersen v. Klamath Falls, supra; 1000 Friends of Oregon v. Wasco County Court, 299 Or 344, 703 P2d 207 (1985)). Unlike a change in street name, street vacations, annexations, and incorporation decisions have a direct, immediate and actual impact on the allowable use of the affected property as well as the planning and zoning decisions that may properly be taken concerning the property in the future.

1 corporation made in the transaction of municipal
2 corporation business that is not reviewable as a land
3 use decision as defined in ORS 197.015(10) shall be
4 transferred to the circuit court and treated as a
5 petition for writ of review. * * * "

6 Petitioners filed a "Conditional Motion to Transfer to
7 Circuit Court" requesting that LUBA transfer this appeal to the
8 Multnomah County Circuit Court "in the event LUBA determines
9 that the decision of the City of Portland to adopt Ordinance
10 No. 161815 is not 'a land use decision' reviewable by LUBA as
11 provided in ORS 197.830 to 197.845." Conditional Motion to
12 Transfer to Circuit Court 1. Respondent does not object to the
13 motion.

14 As explained above, we conclude the city's decision is not
15 a land use decision reviewable by this Board. Accordingly, we
16 grant petitioners' motion and transfer this appeal to the
17 Multnomah County Circuit Court.
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