



1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals an order of the city council denying  
4 a request to vacate a portion of a city street.

5 **FACTS**

6 The Hawthorne Street right-of-way intersects Highway 97  
7 at a right angle. However, the improved portion of  
8 Hawthorne Street north of Highway 97 terminates in a  
9 cul-de-sac, a short distance from Highway 97. The  
10 unimproved portion of the Hawthorne Street right-of-way  
11 between the current terminus of Hawthorne Street and Highway  
12 97 is the subject of the challenged decision. There is no  
13 dispute that the portion of the street sought to be vacated  
14 is not currently used by the city as a roadway.

15 Petitioner owns two residentially zoned lots which abut  
16 the Hawthorne Street cul-de-sac. The lots are level for a  
17 short distance adjacent to the cul-de-sac and then slope  
18 steeply away from the cul-de-sac. Petitioner states that at  
19 the time she purchased the lots, she understood certain pins  
20 in the middle of the cul-de-sac indicated the borders of her  
21 lots. Petitioner contends she understood her property to  
22 extend about 13 1/2 feet into what is actually the  
23 unimproved right-of-way. Based on this misunderstanding,  
24 petitioner placed a manufactured home on the level portion  
25 of one of the lots, within the setback from the right-of-way  
26 required by the city code.

1           Petitioner presented a hand drawn site plan to the city  
2 planning department, which the city believed indicated that  
3 the manufactured home would be placed outside of the  
4 required city setback from the Hawthorne Street  
5 right-of-way. On the strength of the hand drawn site plan,  
6 the city issued a building permit for placement of the  
7 manufactured home on the subject property.

8           However, after petitioner placed the manufactured home  
9 on the subject property, the city informed her the home was  
10 placed within the required setback from the Hawthorne Street  
11 right-of-way and would have to be moved.<sup>1</sup> Petitioner did  
12 not wish to move her manufactured home due to the costs  
13 associated with such a move and the cost of setting up the  
14 home on the steep portion of petitioner's lots. Instead,  
15 petitioner sought vacation of the unimproved right-of-way.  
16 However, she was unable to obtain a sufficient number of  
17 signatures from adjacent property owners to accomplish a  
18 property owner initiated vacation. Therefore, petitioner  
19 requested the city council to initiate a vacation proceeding  
20 for the unimproved portion of the Hawthorne Street  
21 right-of-way. Upon petitioner's request, the city council  
22 initiated the vacation proceeding. After a public hearing  
23 on the requested vacation, the city council determined that  
24 vacation is not appropriate, and withdrew its "vacation

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<sup>1</sup>Petitioner does not dispute that she is in fact in violation of the setback requirement.

1 initiative." Record 2. This appeal followed.

2 **MOTION TO DISMISS**

3 The city moves to dismiss this appeal proceeding,  
4 arguing this Board lacks jurisdiction on the basis that the  
5 challenged decision is not a final land use decision, but  
6 rather is advisory only. ORS 197.015(10)(a)(A).

7 The city argues it was the applicant of record for the  
8 street vacation. The city contends that once it withdrew  
9 its vacation initiative, there was no longer a valid  
10 application and, therefore, no final land use decision.

11 The challenged decision states as follows:

12 "(1) BASED UPON THE FINDINGS SET FORTH BELOW, the  
13 vacation of that portion of Hawthorne Street  
14 lying between Highway 97 and the developed  
15 cul-de-sac is hereby denied.

16 "(2) The City hereby withdraws its vacation  
17 initiative." Record 2.

18 This is the first time this Board has determined the  
19 effect of a local government order that both makes a land  
20 use decision and withdraws the application for the  
21 underlying proposal. We have stated that where a local  
22 applicant withdraws its application before the local  
23 government makes a final decision on the application, any  
24 decision made by the local government on the application  
25 after its withdrawal is not a final land use decision, and  
26 is not within LUBA's jurisdiction. Torgeson v. City of  
27 Canby, 19 Or LUBA 214, 219 (1990); Randall v. Wilsonville, 8  
28 Or LUBA 185, 189-90 (1983).

1 We have also stated that when an application is  
2 withdrawn after the local government makes a decision on a  
3 pending application, the withdrawal of that application does  
4 not affect an appeal at LUBA of the local government's  
5 decision on the application, unless the local code  
6 explicitly states that such withdrawal invalidates the local  
7 decision. Gilson v. City of Portland, 22 Or LUBA 343, 352  
8 (1991); McKay Creek Valley Assoc. v. Washington County, 16  
9 Or LUBA 1028 (1987).

10 In the instant situation, the city made its final land  
11 use decision and, thereafter, in the same decision, withdrew  
12 the pending vacation application. In these circumstances,  
13 we believe there is a final land use decision to review. We  
14 interpret the city's action in withdrawing the application  
15 as simply recognizing that it was the applicant below and it  
16 would not pursue its application further.

17 **ASSIGNMENT OF ERROR**

18 The disputed standard in this appeal, City Development  
19 Ordinance (CDO) 13.035(3), states that to approve a  
20 vacation, the city council must determine "Whether the  
21 public interest will be prejudiced by the vacation of such \*  
22 \* \* streets or parts thereof."

23 The challenged decision determines the proposed  
24 vacation does not satisfy this standard, as follows:

25 "The State of Oregon and the City of Klamath Falls  
26 have determined that it is in the public interest  
27 to control the uncoordinated use of land through

1 the adoption of local comprehensive plans and  
2 development ordinances which provide standards and  
3 criteria for the planned and regulated development  
4 of property. In this matter, established set  
5 backs were ignored, property lines overlooked and  
6 the submitted plot plan disregarded. To vacate  
7 the right-of-way after the fact serves to condone  
8 this conduct. In this regard, the vacation would  
9 be prejudicial to the public interest and this  
10 criteria [sic] is not satisfied." Record 5.

11 Petitioner argues the city improperly construed  
12 CDO 13.035(3) in determining that it is not in the public  
13 interest to grant development approvals to persons who have  
14 mistakenly violated the CDO. Petitioner contends that, at  
15 most, she made a mistake by placing the manufactured home  
16 within the required setback from the Hawthorne Street  
17 right-of-way.

18 This Board is required to defer to a local government's  
19 interpretation of its own ordinances, unless the  
20 interpretation is clearly contrary to the express words,  
21 policy or context of the enactment. Clark v. Jackson  
22 County, 313 Or 508, 836 P2d 710 (1992); Reusser v.  
23 Washington County, 122 Or App 33, \_\_\_\_ P2d \_\_\_\_ (1993).  
24 The challenged city interpretation, quoted supra, is not  
25 clearly contrary to the words used by CDO 13.035(3), its  
26 context, policy or purpose, and we defer to it.

27 The assignment of error is denied.

28 The city's decision is affirmed.