

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

3  
4 MILDRED ANNE FRASER,                           )  
5    )  
6                    Petitioner,                    )  
7    )  
8            vs.                                    )  
9    )            LUBA No. 94-067  
10 CITY OF JOSEPH,                                )  
11    )            FINAL OPINION  
12                    Respondent,                 )            AND ORDER  
13    )  
14            and                                    )  
15    )  
16 GARY PARMENTER, RAYMOND PARMENTER,)                            )  
17 and WGK DEVELOPMENT CORPORATION,                                )  
18 an Oregon corporation,                        )  
19    )  
20                    Intervenors-Respondent.                        )

21  
22  
23            Appeal from City of Joseph.

24  
25            Mildred Anne Fraser, Joseph, filed the petition for  
26 review and argued on her own behalf.

27  
28            No appearance by respondent.

29  
30            D. Rahn Hostetter, Enterprise, filed the response brief  
31 and argued on behalf of intervenors-respondent. With him on  
32 the brief was Mautz Baum Hostetter & O'Hanlon.

33  
34            SHERTON, Referee; HOLSTUN, Chief Referee; KELLINGTON,  
35 Referee, participated in the decision.

36  
37                    REMANDED                                    11/04/94

38  
39            You are entitled to judicial review of this Order.  
40 Judicial review is governed by the provisions of ORS  
41 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city council decision to provide  
4 city sewer and water services to an approved residential  
5 subdivision located outside city limits.

6 **MOTION TO INTERVENE**

7 Gary Parmenter, Raymond Parmenter, and WGK Development  
8 Corporation move to intervene on the side of respondent in  
9 this proceeding. There is no opposition to the motion, and  
10 it is allowed.

11 **FACTS**

12 Intervenors own 68 acres of land located within the  
13 City of Joseph Urban Growth Boundary (UGB), adjoining the  
14 city limits. The subject property is zoned Urban Growth  
15 (UG) by Wallowa County (county). Single-family dwellings  
16 are permitted uses in the UG zone. Wallowa County Land  
17 Development Ordinance (LDO) 26.015.3. On June 28, 1993, the  
18 county granted preliminary plat approval for a 72-lot  
19 residential subdivision of the subject property.<sup>1</sup> The 1993  
20 order, at p. 4, states sewer service will be provided by  
21 either the city or the Wallowa Lake County Service District.  
22 The 1993 order also states water service will be provided  
23 either by the city or by domestic wells. Id. at 5. A

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<sup>1</sup>The parties agree that we may consider the county's June 28, 1993 order granting preliminary plat approval (hereafter 1993 order), a copy of which has been submitted to the Board by intervenors.

1 condition of approval requires that prior to approval of the  
2 subdivision final plat, "development of an adequate water  
3 supply for 72 residences shall be complete." Id. at 8.

4 On October 4, 1993, intervenors applied to the city for  
5 connections to the city's water and sewer systems to serve  
6 72 dwellings on the subject property. On May 3, 1994, after  
7 two public hearings, the city council approved the  
8 challenged decision to provide sewer and water services to  
9 72 dwellings on the subject property.

10 **JURISDICTION**

11 LUBA's review jurisdiction is limited to local  
12 government, special district and state agency "land use  
13 decisions." ORS 197.825(1).<sup>2</sup> The city's decision is a  
14 "land use decision" if it meets either (1) the statutory  
15 definition of land use decision in ORS 197.015(10); or  
16 (2) the significant impact test established by City of  
17 Pendleton v. Kerns, 294 Or 126, 133-34, 653 P2d 996 (1982).  
18 Billington v. Polk County, 299 Or 471, 479, 703 P2d 232  
19 (1985); City of Portland v. Multnomah County, 19 Or LUBA  
20 468, 471 (1990).

21 Intervenors contest our jurisdiction over the  
22 challenged decision. Intervenors contend it satisfies  
23 neither the statutory definition of "land use decision" nor

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<sup>2</sup>LUBA's review jurisdiction also includes "limited land use decisions," as defined in ORS 197.015(12). However, no party contends the challenged decision is a limited land use decision, and we do not see that it is.

1 the significant impact test and, therefore, is not subject  
2 to review by this Board.

3 **A. Statutory Test**

4 As relevant here, ORS 197.015(10)(a)(A) provides that  
5 "land use decision" includes:

6 "A final decision or determination by a local  
7 government \* \* \* that concerns the \* \* \*  
8 application of:

9 "(i) The [statewide planning] goals;

10 "(ii) A comprehensive plan provision; [or]

11 "(iii) A land use regulation[.]

12 " \* \* \* \* \* "

13 Petitioner does not specifically contend the challenged  
14 decision satisfies the ORS 197.015(10)(a) statutory  
15 definition of "land use decision," but does argue that the  
16 exceptions to that definition set out in ORS 197.015(10)(b)  
17 do not apply. Additionally, petitioner contends the  
18 decision violates Statewide Planning Goal 5 and Goal VI of  
19 the City of Joseph Land Use Plan (comprehensive plan).<sup>3</sup>  
20 Therefore, we treat petitioner's arguments as contentions  
21 that the challenged decision is a statutory land use  
22 decision under ORS 197.015(10)(a)(A)(i) and (ii), because it

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<sup>3</sup>The petition for review does not contain a separate statement of the basis for our jurisdiction, as required by OAR 661-10-030(3)(c). However, we may consider arguments in the body of the petition for review, including petitioner's first and second assignments of error, which are responsive to intervenors' jurisdictional challenge. Adkins v. Heceta Water District, 23 Or LUBA 207, 214 (1992).

1 concerns the application of the statewide planning goals and  
2 comprehensive plan.<sup>4</sup>

3 With regard to application of the statewide planning  
4 goals, there is no dispute that the city comprehensive plan  
5 and land use regulations have been acknowledged by the Land  
6 Conservation and Development Commission under ORS 197.251.  
7 With certain exceptions that no party contends apply here,  
8 after acknowledgment a city is not required to apply the  
9 statewide planning goals to land use decisions that do not  
10 amend the acknowledged plan or land use regulations.  
11 ORS 197.175(2)(d); Smith v. Clackamas County, 313 Or 519,  
12 524, 836 P2d 716 (1992); Byrd v. Stringer, 295 Or 311, 666  
13 P2d 1332 (1983); Frankton Neigh. Assoc. v. Hood River  
14 County, 25 Or LUBA 386, 391 (1993). Therefore, the  
15 challenged decision does not concern the application of the  
16 statewide planning goals.

17 With regard to application of the plan, petitioner  
18 contends the challenged decision violates the following

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<sup>4</sup>Petitioner also contends the challenged decision exceeds the city's authority under City of Joseph Ordinances 93-4 and 92-2, which govern the operation of the city's water and sewer systems, respectively. However, petitioner does not contend either of these ordinances is a "land use regulation," as that term is defined in ORS 197.015(11), or argue that the decision violates any provision of the city's zoning or land division ordinances. Therefore, we do not treat petitioner's argument as including contentions that the challenged decision is a statutory land use decision, under ORS 197.015(10)(a)(A)(iii), because it concerns the application of a "land use regulation." See Curtis Serve N Save v. City of Eugene, 24 Or LUBA 341, 342-43 (1992).

1 provisions from the "background"<sup>5</sup> section of Chapter VI  
2 (Air, Water, and Land Resources Quality) of the plan:

3 "Currently, the City's policy regarding extensions  
4 of water or sewer service beyond the City limits  
5 is that such extensions not occur. There are no  
6 sewer services outside the city. Those water  
7 services now existing beyond the City limits are  
8 charged twice the rates of water users inside the  
9 City.

10 \* \* \* \* \*

11 "The City will continue to cooperate with DEQ  
12 (Department of Environmental Quality) by not  
13 allowing uses that do not meet DEQ requirements.  
14 The City will rely on DEQ's regulations regarding  
15 air, water, solid/hazardous waste and noise  
16 pollution in reviewing land use  
17 changes/applications." (Emphasis added.) Plan,  
18 p. 30.

19 Intervenor's reply that the plan provisions quoted above  
20 are not standards or criteria for making the challenged  
21 decision, but rather a "background" statement describing  
22 that when the plan was adopted, "the City's sewer system was  
23 in need of repair and that, therefore, the City had a  
24 policy, at that time, not to extend water or sewer services  
25 beyond City limits." Intervenor's Brief 4 n 2. Intervenor's  
26 argue that subsequent to the adoption of the above quoted  
27 background provisions, the city sewer system was upgraded  
28 and the city adopted, in plan Chapter XI (Public Facilities  
29 and Services), the following policies specifically allowing

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<sup>5</sup>The plan's introduction explains each chapter consists of five sections -- summary, background, findings of fact, policies, recommendations -- and describes the nature and purpose of each section. Plan, pp. 1-2.

1 extension of city water and sewer services to land outside  
2 city limits within the UGB:

3 "1. The City will abide by its [UGB] and will  
4 provide sewage or water services outside  
5 existing city limits, only if the developer  
6 will pay for the improvements.

7 "2. New developments within the service boundary  
8 (city limits) will be reviewed and approved  
9 subject to the capacity of existing  
10 facilities." Plan, p. 45.

11 The challenged decision states the city council  
12 believes its decision is not a land use decision subject to  
13 review by LUBA and, therefore, findings and conclusions in  
14 support of the decision are not required. Record 29. The  
15 decision goes on to state, however, that because the city's  
16 position was contested at the local level and the decision  
17 might be appealed to LUBA, findings are adopted "for the  
18 purpose of saving time should an appeal be filed and the  
19 jurisdiction of LUBA be confirmed." Id. With regard to  
20 compliance with the comprehensive plan, the findings state  
21 only the following:

22 "The purpose of the City's comprehensive plan is  
23 to encourage appropriate and orderly development  
24 in the City for the benefit of the general  
25 welfare, health, safety and convenience of the  
26 public.

27 "\* \* \* \* \*

28 "Providing water and sewer services under the  
29 terms and conditions in the attached agreement  
30 will encourage the appropriate and orderly  
31 development of the [UGB] for the benefit of the  
32 general welfare, health, safety and convenience of

1 the public and is in compliance with the City's  
2 comprehensive plan." Record 32.

3 For a decision to concern the application of a  
4 comprehensive plan, as provided in  
5 ORS 197.015(10)(a)(A)(ii), it is not enough that the  
6 decision touch on some aspect of the plan; the plan must  
7 contain provisions that are standards or criteria for making  
8 the challenged decision. Price v. Clatsop County, 25  
9 Or LUBA 341, 347 (1993); City of Portland v. Multnomah  
10 County, 19 Or LUBA 468, 474 (1990); Portland Oil Service Co.  
11 v. City of Beaverton, 16 Or LUBA 255, 260 (1987).  
12 Accordingly, to decide whether the challenged decision  
13 concerns the application of the plan, we must determine  
14 whether the arguably relevant plan provisions cited by the  
15 parties (the cited portions of the Chapter VI background  
16 section and Chapter XI, Policies 1 and 2) are standards or  
17 criteria for making the challenged decision.<sup>6</sup>

18 This Board is required to defer to a local governing  
19 body's interpretation of its own enactment, unless that  
20 interpretation is contrary to the express words, purpose or  
21 policy of the local enactment or to a state statute,

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<sup>6</sup>In view of the statement in the decision that the city council does not believe the decision is a land use decision subject to LUBA review, and because the city adopted findings only as a precaution in case it is ultimately determined that the decision is a land use decision subject to LUBA review, we do not believe the findings quoted in the text, supra, in themselves constitute a city determination that the plan's general "purpose" statement (plan p. 2) is an approval standard for the challenged decision.

1 statewide planning goal or administrative rule which the  
2 local enactment implements. ORS 197.829; Gage v. City of  
3 Portland, 319 Or 308, 316-17, \_\_\_ P2d \_\_\_ (1994); Clark v.  
4 Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992).<sup>7</sup>  
5 Under Weeks v. City of Tillamook, 117 Or App 449, 453-54,  
6 844 P2d 914 (1992), and Cope v. City of Cannon Beach, 115 Or  
7 App 11, 836 P2d 775 (1992), aff'd 317 Or 339 (1993), this  
8 Board is required to review a governing body's  
9 interpretation of a local enactment and may not interpret  
10 the local enactment in the first instance.<sup>8</sup> See Woodstock  
11 Neigh. Assoc. v. City of Portland, \_\_\_ Or LUBA \_\_\_ (LUBA  
12 No. 94-093, October 11, 1994), slip op 14 n 8.

13 The challenged city council decision does not interpret  
14 the provisions of Chapters VI and XI of the plan relating to  
15 extension of city sewer and water services outside city  
16 limits, cited by the parties and described above, with  
17 regard to whether any of these provisions constitute  
18 approval criteria for the challenged decision. If any of  
19 these plan provisions does constitute an approval criterion

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<sup>7</sup>ORS 197.829 was enacted to codify Clark, but was not in effect when this Board made the decision reviewed in Gage. Nevertheless, the court of appeals has stated that it will interpret ORS 197.829 to mean what the supreme court, in Gage, interpreted Clark to mean. Watson v. Clackamas County, 129 Or App 428, 431-32, \_\_\_ P2d \_\_\_ (1994).

<sup>8</sup>In Gage v. City of Portland, 123 Or App 269, 860 P2d 282, on reconsideration 125 Or App 119 (1993), rev'd on other grounds 319 Or 308 (1994), the court of appeals stated there may be circumstances in which local provisions are so unambiguous, that this Board could apply its own interpretation of those provisions. This is not such a case.

1 for the challenged decision, then the decision concerns the  
2 application of the comprehensive plan, within the meaning of  
3 ORS 197.015(10)(a)(A)(ii), and is a land use decision  
4 subject to LUBA review. Therefore, the decision must be  
5 remanded to the city to adopt interpretations of these plan  
6 provisions before we can determine whether the challenged  
7 decision satisfies the statutory test for a land use  
8 decision subject to LUBA review.<sup>9</sup>

9 **B. Significant Impact Test**

10 Petitioner does not contend the extension of sewer and  
11 water lines to the subject property, of itself, will have  
12 significant impacts on land use. Rather, petitioner argues  
13 that residential development of the subject property will  
14 have significant impacts on traffic densities and safety of  
15 city streets, use of city services, assessed property values  
16 and noise levels in the area, wildlife habitat, water  
17 quality and archaeological sites. Petitioner's second  
18 argument is that because of sewer and water capacity  
19 problems and limited economic resources, provision of city  
20 sewer and water service to the subject property will have a  
21 significant impact on the future development of buildable  
22 lots within city limits.

23 The Oregon Supreme Court's decisions in City of

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<sup>9</sup>A remand is required because we determine, *infra*, that petitioner fails to establish the challenged decision satisfies the alternative, court-adopted significant impact test for a "land use decision" subject to LUBA review.

1 Pendleton v. Kerns, supra, and Billington v. Polk County,  
2 supra, emphasize that the impact of a decision not otherwise  
3 subject to LUBA review under ORS 197.015(10) and 197.825(1)  
4 on present or future land uses must be qualitatively or  
5 quantitatively significant in order for LUBA to have review  
6 jurisdiction. Additionally, there must be both a  
7 demonstrated relationship between the decision and the  
8 expected impacts, and evidence demonstrating that the  
9 expected impacts are likely to occur as a result of the  
10 decision. Keating v. Heceta Water District, 24 Or LUBA 175,  
11 181-82 (1992); Anderson Bros. v. City of Portland, 18  
12 Or LUBA 462, 471 (1989). Finally, as the party seeking  
13 review by LUBA, petitioner has the burden of establishing  
14 that the challenged decision satisfies the significant  
15 impact test. Billington v. Polk County, supra, 299 Or  
16 at 475; City of Pendleton v. Kerns, supra, 294 Or at 134  
17 n 7; Miller v. City of Dayton, 22 Or LUBA 661, 665, aff'd  
18 113 Or App 300, rev den 314 Or 573 (1992).

19 With regard to petitioner's first argument, we have  
20 determined that although a local government decision  
21 authorizing residential development of particular property  
22 might be a "significant impact test" land use decision, a  
23 decision simply approving the provision of domestic water  
24 service to property that is designated and zoned for  
25 residential development under an acknowledged plan and land  
26 use regulations does not satisfy the significant impact

1 test. Keating v. Heceta Water District, supra. Here, the  
2 decisions authorizing residential development of the subject  
3 property, and any impacts of such development on present and  
4 future land uses, were made by the county in designating and  
5 zoning the property for residential use and adopting the  
6 1993 order approving a 72-lot residential subdivision, not  
7 by the city in agreeing to provide sewer and water service  
8 for the approved residential use of the property.

9 With regard to petitioner's second argument,  
10 petitioner's claims that provision of city sewer and water  
11 service to the subject property will have a significant  
12 impact on the future development of buildable lots within  
13 the city are not supported by evidence that such impacts are  
14 likely to occur. Petitioner cites testimony by Frank Conley  
15 at a March 16, 1994 city council meeting. Record 18-19.  
16 According to the minutes, Mr. Conley stated that  
17 "[r]egarding buildable lots within [city limits,] he did not  
18 think we are going to use all the sewer and water  
19 allocations within the city." Record 18. Mr. Conley also  
20 stated:

21 "[There have been precedents] where other city  
22 council[s] and municipalities have extended water  
23 and sewer rights to subdivisions outside the city  
24 and have used all their water and sewer  
25 allocations and then people living in the city  
26 limits have actually sued the city because they  
27 have no water or sewer available to them. That is  
28 something you want to make sure you are on solid  
29 ground before you give all the water and sewer  
30 rights away to immediate developments [outside the  
31 city]." Record 19.

1 The above quoted testimony is simply an observation that  
2 extending city water and sewer service to developments  
3 outside city limits could limit future development within  
4 city limits, and an admonition to the city council to make  
5 sure that does not occur. It does not constitute evidence  
6 that providing city sewer and water service to the 72-lot  
7 subdivision at issue in this appeal is likely to have the  
8 consequence of limiting future development within the city.

9 Petitioner also cites minutes from a January 8, 1993  
10 meeting where the city council considered its recommendation  
11 to the county regarding the proposed subdivision of the  
12 subject property. The minutes state the city intends to  
13 recommend that the property be annexed before development  
14 occurs because "it is in the [UGB]; the proximity to the  
15 city; the city streets being impacted by the subdivision;  
16 logical and orderly extension of the city services of fire,  
17 water, sewer, police." Record 49. This does not constitute  
18 evidence that providing city sewer and water service to the  
19 development will have significant impacts on the present or  
20 future development of land within the city.

21 The only other evidence cited by petitioner in support  
22 of this argument is the "McKetta Report." The McKetta  
23 report is an approximately 300-page document entitled  
24 "Socio-Economic Implications of a Below Cost Timber Program  
25 on the Wallowa-Whitman National Forest." Petitioner argues  
26 the McKetta Report shows the timber-based economy of the

1 area is depressed. Based on this, petitioner contends  
2 devoting city "resources to the subdivision will have the  
3 impact of limiting future land use options for economic  
4 development in the city." Petition for Review 11.

5 The purpose of the McKetta Report is to analyze the  
6 impacts of various timber programs for the Wallowa-Whitman  
7 National Forest. The report does note that any timber  
8 harvest reductions will adversely affect the economy of  
9 Wallowa County. However, petitioner does not cite, and we  
10 are unable to find, any portion of the report relating to  
11 impacts on development within the city due to providing city  
12 water and sewer services to residential developments outside  
13 of city limits.

14 Petitioner fails to establish that the challenged  
15 decision satisfies the significant impact test.

16 The city's decision is remanded.