

1                           BEFORE THE LAND USE BOARD OF APPEALS  
2                           OF THE STATE OF OREGON  
3

4   FRAN FRANKLIN, KAYE FRANKLIN,   )  
5   and REGENA FRANKLIN,            )  
6                                        )  
7            Petitioners,            )  
8                                        )

9            vs.                        )

10   DESCHUTES COUNTY,                )  
11                                        )  
12                                        )  
13            Respondent,             )  
14                                        )

15            and                        )

16                                        )  
17   WAL-MART STORES, INC., a Delaware    )  
18   corporation,                        )  
19                                        )  
20            Intervenor-Respondent.        )

LUBA No. 94-175

FINAL OPINION  
AND ORDER

21  
22  
23            Appeal from Deschutes County.  
24

25            Paul J. Speck, Richard E. Forcum, and Daniel E. Van  
26   Vactor, Bend, filed the petition for review. With them on  
27   the brief was Forcum & Speck. Paul J. Speck and Daniel E.  
28   Van Vactor argued on behalf of petitioners.  
29

30            Richard L. Isham, County Counsel, filed a response  
31   brief and argued on behalf of respondent.  
32

33            William F. Gary, Anne C. Davies and Yuanxing Chen,  
34   Eugene, filed a response brief. With them on the brief was  
35   Harrang Long Gary & Rudnick. Anne C. Davies argued on  
36   behalf of intervenor-respondent.  
37

38            HOLSTUN, Chief Referee; SHERTON, Referee, participated  
39   in the decision.  
40

41                           DISMISSED                           03/15/95  
42

43            You are entitled to judicial review of this Order.  
44   Judicial review is governed by the provisions of ORS  
45   197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a cooperative improvement agreement  
4 for making certain roadway and roadway-related improvements.

5 **MOTION TO INTERVENE**

6 Wal-Mart Stores, Inc., the applicant below, moves to  
7 intervene on the side of respondent. There is no opposition  
8 to the motion, and it is allowed.

9 **FACTS**

10 On March 9, 1993, a county hearings officer approved  
11 the applicant's request for a conditional use permit and  
12 site plan approval (hereafter 1993 CUP) for a department  
13 store. The 1993 CUP included conditions of approval. One  
14 of those conditions required that the applicant make certain  
15 improvements to Badger Road. Another condition required  
16 that the applicant install a traffic signal at the  
17 intersection of Badger Road and Highway 97 and make certain  
18 improvements to that intersection. Finally, the 1993 CUP  
19 imposed the following condition:

20 "F. The applicant shall dedicate without  
21 reservation all right of way necessary for  
22 the above improvements as specified by the  
23 County Public Works Department and the State  
24 Highway Division, to either Deschutes County  
25 or the State of Oregon." Petition for Review  
26 4.

27 On June 23, 1993, the applicant and the county entered  
28 into a development agreement (hereafter 1993 Development  
29 Agreement). That agreement sets out the manner in which the

1 improvements required by the 1993 CUP will be constructed.  
2 Condition "F," quoted supra, is included on page 4 of the  
3 1993 Development Agreement.

4 In 1994 the applicant, the county and the Oregon  
5 Department of Transportation (ODOT) signed the challenged  
6 cooperative improvement agreement (hereafter 1994  
7 Improvement Agreement), which sets out additional details  
8 concerning how the intersection and roadway improvements  
9 will be made.<sup>1</sup> The obligations of each party are set out in  
10 the agreement. One of the obligations imposed on the county  
11 is as follows:

12 "4. County shall acquire the necessary right of  
13 way and easements for required County roadway  
14 work at [Applicant's] expense." Record 5.

15 Petitioners own land that the applicant would be  
16 required to purchase and dedicate for roadway improvements  
17 under the 1993 CUP and 1993 Development Agreement. However,  
18 under the 1994 Improvement Agreement, although the applicant  
19 will still pay the cost of acquiring the land needed for  
20 roadway improvements, the county apparently will exercise  
21 its power of eminent domain to acquire title to the subject  
22 property.<sup>2</sup>

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<sup>1</sup>The applicant signed the agreement on June 20, 1994. The county signed the agreement on August 31, 1994. ODOT signed the agreement on October 6, 1994.

<sup>2</sup>On May 18, 1994, the county apparently adopted a resolution in preparation for acquiring petitioners' property through eminent domain. Petitioners apparently have filed two or more actions in circuit court to

1 **DECISION**

2 Petitioners contend that under the 1993 CUP and 1993  
3 Development Agreement only the applicant may purchase and  
4 dedicate their property for the required roadway  
5 improvements. Petitioners contend the county erred by  
6 adopting the 1994 Improvement Agreement and changing this  
7 requirement of the 1993 CUP and 1993 Development Agreement,  
8 without following land use decision making notice and  
9 hearing requirements.

10 LUBA's review jurisdiction is limited to land use  
11 decisions.<sup>3</sup> ORS 197.825(1); Anderson Bros. v. City of  
12 Portland, 18 Or LUBA 462, 464 (1989). Intervenor and  
13 respondent (hereafter respondents) contend the challenged  
14 decision is not a land use decision, as defined in ORS  
15 197.015(10). For the reasons explained below, we agree with  
16 respondents that the statutory and Deschutes County Zoning  
17 Ordinance (DCZO) provisions petitioners cite do not  
18 establish that the challenged decision is a land use  
19 decision.

20 **A. ORS 94.504 to 94.528**

21 The 1993 Legislature adopted statutory provisions

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prevent the county from proceeding to acquire the disputed property through eminent domain.

<sup>3</sup>LUBA also has jurisdiction to review "limited land use decisions." However, petitioners do not contend that the challenged decision is a limited land use decision, as defined by ORS 197.015(12).

1 concerning "development agreements."<sup>4</sup> ORS 94.508(2)  
2 specifically provides, "[n]otwithstanding ORS  
3 197.015(10)(b), the approval or amendment of a development  
4 agreement is a land use decision under ORS chapter 197.  
5 ORS 94.522(1) provides, in part:

6       "\* \* \* The governing body of a \* \* \* county shall  
7       amend \* \* \* a development agreement by adoption of  
8       an ordinance \* \* \* setting forth the amendments to  
9       the agreement."

10       Petitioners rely on the above statutes in contending  
11       that the challenged 1994 Improvement Agreement is a land use  
12       decision because "[t]he \* \* \* Cooperative Improvement  
13       Agreement was a purported amendment of the [1993]  
14       development agreement." Petition for Review 9. Petitioners  
15       contend the county violated ORS 94.522(1) by entering the  
16       1994 Improvement Agreement without adopting an ordinance, as  
17       required by that statute, or following the procedures  
18       required to adopt such an ordinance.

19       Petitioners do not contend the 1994 Improvement  
20       Agreement itself is properly viewed as a "development  
21       agreement" under the statute, independent of the 1993  
22       Development Agreement.<sup>5</sup> Rather, petitioners contend the  
23       1993 Development Agreement is a "development agreement" as

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<sup>4</sup>ORS 94.504 sets out a lengthy description of the matters that must be included in a "development agreement."

<sup>5</sup>Even if petitioners' did make such a argument, the 1994 Improvement Agreement does not appear to include many of the requirements for a "development agreement" under ORS 94.504(2).

1 that term is used in ORS 94.504(2). From that unexplained  
2 assumption, petitioners reason the 1994 Improvement  
3 Agreement is a land use decision and subject to  
4 ORS 94.522(1) because it amends a development agreement.

5 The development agreement provisions set out at ORS  
6 94.504 to 94.528 were adopted by the 1993 legislature and  
7 were not in effect when the applicant and county entered the  
8 1993 Development Agreement. Intervenor contends the 1994  
9 Improvement Agreement does not "amend" the 1993 Development  
10 Agreement. More importantly, intervenor argues the  
11 requirements of ORS 94.504 to 94.528 "do not apply to  
12 agreements that may be titled 'Development Agreements' but  
13 that were executed prior to the effective date of the  
14 statute[s]." Intervenor-Respondent's Brief 12. We agree  
15 with intervenor.

16 Petitioners fail to demonstrate the challenged decision  
17 is a land use decision under ORS 94.508 or that the  
18 provisions of ORS 94.522(1) apply to the challenged 1994  
19 Improvement Agreement.

20 **B. Failure to Follow DCZO Permit Procedures and**  
21 **Violation of Due Process**

22 Petitioners contend the 1993 CUP gives petitioners a  
23 right to have their property purchased by the applicant.  
24 According to petitioners, no one else may purchase or  
25 condemn the portion of their property needed to construct  
26 the roadway improvements authorized by the 1993 CUP.  
27 Petitioners argue, because this "right" is granted by the

1 1993 CUP and reflected in the 1993 Development Agreement,  
2 the 1994 Improvement Agreement constitutes a de facto  
3 amendment of the 1993 CUP.

4 Petitioners further argue, and we accept as correct for  
5 purposes of this opinion, that an amendment of the 1993 CUP  
6 would be required to apply provisions of the DCZO and  
7 therefore would constitute a "land use decision," as that  
8 term is defined by ORS 197.015(10)(a).<sup>6</sup> Because the county  
9 failed to follow DCZO provisions governing amendments of  
10 conditional use permits, including notice and public hearing  
11 requirements, petitioners contend a remand is warranted.

12 Respondents contend petitioners fundamentally misread  
13 the 1993 CUP. Respondents argue condition F does not  
14 preclude the county from condemning the portion of  
15 petitioners' property necessary for the improvements  
16 required by the 1993 CUP. According to respondents, the  
17 1993 CUP does not give petitioners a "right" to have the  
18 applicant, and no one other than the applicant, purchase the  
19 portion of petitioners' property needed for the roadway  
20 improvements. Respondents contend the 1993 CUP could not  
21 and does not give up the county's governmental authority to  
22 condemn petitioners' property, if it later elects to do so.

23 We restate condition F below, emphasizing the portion  
24 of that condition upon which respondents rely in contending

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<sup>6</sup>Under ORS 197.015(10)(a), a final county decision applying a land use regulation is a land use decision.

1 condition F is not violated by the 1994 Improvement  
2 Agreement requirement that the county condemn the required  
3 portion of petitioners' property:

4 "F. The applicant shall dedicate without  
5 reservation all right of way necessary for  
6 the above improvements as specified by the  
7 County Public Works Department and the State  
8 Highway Division, to either Deschutes County  
9 or the State of Oregon."

10 The applicant and the county may well have envisioned, at  
11 the time the 1993 CUP was approved with condition F, that  
12 the applicant would negotiate with petitioners and purchase  
13 the portion of their property needed to make the roadway  
14 improvements and then dedicate that property to the county.  
15 However, the relevant question is whether the 1993 CUP bound  
16 the county and the applicant to proceed in that manner, and  
17 only in that manner.

18 As respondents point out, condition F does not impose a  
19 blanket requirement that the applicant secure and dedicate  
20 all right of way necessary for the improvements. Rather,  
21 only such right of way as may be "specified by the County  
22 Public Works Department" must be secured and dedicated by  
23 the applicant. Under the 1994 Improvement Agreement, the  
24 county will condemn the portion of petitioners' property  
25 needed to make the required roadway improvements.  
26 Presumably there will be no need for the applicant to  
27 dedicate such property and presumably the County Public  
28 Works Department will not specify that the applicant do so.

1 That may not be precisely how petitioners or even the county  
2 and the applicant thought the needed right of way would be  
3 acquired from petitioners when the 1993 CUP was approved.  
4 However, the 1993 CUP says nothing about the county's  
5 ability to purchase or condemn that right of way, if the  
6 county elects to do so. To the extent petitioners read into  
7 condition F a prohibition against the county condemning  
8 their property, no such prohibition on county action exists  
9 in condition F.

10 Under the 1993 CUP, the county has no obligation to  
11 condemn the needed portion of petitioners' property.  
12 Condition F of the 1993 CUP gave the county the right to  
13 insist that the applicant purchase and dedicate any land  
14 needed for the roadway improvements. Nevertheless, the  
15 county's separate, voluntary decision in the 1994  
16 Improvement Agreement, to exercise its power of eminent  
17 domain to condemn the necessary portion of petitioners'  
18 property, with the applicant paying the cost of that  
19 condemnation, is not inconsistent with the 1993 CUP and does  
20 not constitute a de facto amendment of the 1993 CUP.

21 For the reasons explained above, petitioners fail to  
22 demonstrate the 1994 Improvement Agreement modifies the 1993  
23 CUP.<sup>7</sup> Because the 1994 Improvement Agreement is a decision

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<sup>7</sup>Had the 1994 Improvement Agreement modified the 1993 CUP, standards in the DCZO presumably would govern that modification, and the 1994 Improvement Agreement would constitute a land use decision subject to our review jurisdiction.

1 limited to implementing the 1993 CUP, it does not require  
2 application of land use standards and it does not constitute  
3 a "land use decision," as that term is defined by ORS  
4 197.015(10). See Carlson v. City of Dunes City, \_\_\_ Or LUBA  
5 \_\_\_ (LUBA Nos. 94-069 and 94-146, December 7, 1994); Carlson  
6 v. City of Dunes City, \_\_\_ Or LUBA \_\_\_ (LUBA Nos. 94-069 and  
7 94-146, Order, November 7, 1994) (where a local government  
8 decision applies land use standards and authorizes roadway  
9 improvements, and a subsequent decision awards a contract  
10 for roadway paving to implement the initial decision, the  
11 initial decision is a land use decision and the subsequent  
12 decision is not a land use decision).<sup>8</sup> LUBA therefore does  
13 not have jurisdiction to review the 1994 Improvement  
14 Agreement.

15 Where LUBA lacks jurisdiction over the challenged  
16 decision, the appeal must be either dismissed or transferred  
17 to circuit court pursuant to ORS 19.230. Sully v. City of  
18 Ashland, 20 Or LUBA 428 (1991). Petitioners state in the  
19 petition for review that they have an action pending in  
20 Deschutes County Circuit Court concerning this matter, and  
21 have not filed a motion requesting that we transfer this  
22 appeal to circuit court, pursuant to OAR 661-10-075(11).

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<sup>8</sup>The initial decision would also be a land use decision if it has significant impacts on present or future land use. Id.

1           This appeal is dismissed.<sup>9</sup>

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<sup>9</sup>In view of our disposition of this appeal, we do not consider intervenor's motions to strike the petition for review or to strike certain extra-record material attached to the petition for review. Neither do we consider intervenor's argument that this appeal should be dismissed because the notice of intent to appeal was filed prematurely.