

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

3
4 PATRICIA J. DECKER,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF CORNELIUS,
10 *Respondent,*

11 and

12
13 SUMCO, LTD.,
14 *Intervenor-Respondent.*

15
16 LUBA No. 2003-110

17
18 FINAL OPINION
19 AND ORDER

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21 Appeal from City of Cornelius.

22 David C. Noren, Hillsboro, represented petitioner.

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24 Christopher A. Gilmore, Portland, represented respondent.

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26 John A. Rankin, Sherwood, represented intervenor-respondent.

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30 HOLSTUN, Board Member; BASSHAM, Board Chair; BRIGGS, Board Member;
31 participated in the decision.

32
33 DISMISSED

10/23/2003

34
35 You are entitled to judicial review of this Order. Judicial review is governed by the
36 provisions of ORS 197.850.

NATURE OF THE DECISION

In LUBA Nos. 2003-109, 2003-110 and 2003-116, petitioner seeks review of three closely related city decisions. In an order dated September 10, 2003, we consolidated those three appeals. In an order issued this date, we bifurcate LUBA No. 2003-110 from LUBA Nos. 2003-109 and 2003-116. We briefly describe each of the appealed decisions before turning to respondent’s motion to dismiss LUBA No. 2003-110.

A. Planning Commission Design Review Decision

In LUBA No. 2003-109 petitioner appeals a January 28, 2003 planning commission decision that grants intervenor-respondent (the applicant) design review approval for a “25-Lot Detached Single Family Residential Development.” Supplemental Record (LUBA No. 2003-109) 2.¹ That planning commission decision includes conditions of appeal. Two of those conditions of approval are as follows:

“24. Prior to approval of the construction/engineered plans the applicant/developer shall provide documentation to the City Engineer for approval that the intersection of [Susbauer Road] and proposed N. Irvine Street meet AASHTO requirements for line of sight.”

“25. The applicant shall construct a left-hand turn lane to provide safe access from N. 19th Avenue onto N. Irvine Street.” Supplemental Record (LUBA No. 2003-109) 13.

Petitioner’s notice of intent to appeal the planning commission’s January 28, 2003 decision was filed with LUBA on July 16, 2003. In the notice of intent to appeal, petitioner explains that neither the notice that preceded the planning commission’s hearing on intervenor’s proposed subdivision nor the notice the city sent out following its decision “indicated that * * * condition [25] would result in a taking or other use of petitioner’s property to accommodate the left turn lane.” Notice of Intent to Appeal (2003-109) 1.

¹ The city has submitted separate records for each of the three appeals.

1 **B. City Council Resolution 1561**

2 In LUBA No. 2003-110, petitioner appeals City Council Resolution 1561.
3 Resolution 1561 is dated July 7, 2003 and declares a “need to acquire property for the
4 purpose of constructing, maintaining and operating street improvements and other related
5 improvement.” Notice of Intent to Appeal (2003-110) 1. Pursuant to Resolution 1561,
6 petitioner’s property may be acquired by the city or taken through an exercise of eminent
7 domain. Respondent moves to dismiss LUBA No. 2003-110.

8 **C. Public Works Director Improvement Plan Approval**

9 On July 18, 2003, the city public works director approved plans for road
10 improvements to Susbauer Road in conjunction with intervenor’s subdivision. Some of the
11 approved road improvements are to be constructed on petitioner’s property. Petitioner filed a
12 notice of intent to appeal that decision in LUBA No. 2003-116 on August 7, 2003.

13 **FACTS**

14 We take the facts from respondent’s motion to dismiss and petitioner’s response to
15 the motion to dismiss. As far as we can tell, the material facts are not in dispute.

16 Intervenor’s proposed 25-lot subdivision is located east of Susbauer Road. Access to
17 that subdivision from Susbauer Road is to be provided by constructing a short portion of a
18 new east-west road, N. Irving Street. Southbound traffic on Susbauer Road would exit east
19 onto N. Irving Street, travel a short distance east, and then turn south and enter the proposed
20 subdivision’s internal loop roadway. Petitioner’s dispute with the city concerns the proposed
21 new left-turn lane and other improvements that would be constructed to accommodate
22 southbound traffic on Susbauer Road turning left (east) onto N. Irving Street.

23 Petitioner alleges, and we do not understand the city or intervenor to dispute, that
24 following the planning commission’s January 28, 2003 design review approval decision, it
25 was determined by the city and intervenor that in addition to the existing Susbauer Road
26 right-of-way, approximately 5,000 square feet of petitioner’s property along Susbauer Road

1 north of the intersection of Susbauer Road and N. Irving Street is needed to meet line of site
2 requirements and construct the left turn lane. Meeting line of sight requirements and
3 constructing the left turn lane will require grading on petitioner’s property and removal of
4 three large Douglas fir trees.²

5 **MOTION TO DISMISS**

6 As relevant here, LUBA has exclusive jurisdiction to review “land use decisions.”
7 ORS 197.825(1). As we explained in *Anderson v. City of Gates*, 29 Or LUBA 320, 321-22
8 (1995), LUBA has jurisdiction if the appealed decision “satisfies either (1) the statutory
9 definition of “land use decision” in ORS 197.015(10); or (2) the significant impacts test
10 established by *City of Pendleton v. Kerns*, 294 Or 126, 133-34, 653 P2d 992 (1982).”³ The
11 city argues that Resolution 1561 is neither a statutory nor a significant impacts test land use
12 decision and, for that reason, moves to dismiss LUBA No. 2003-110.

13 According to the city, Resolution 1561 is the first step in the process that the city
14 must follow to acquire petitioner’s property through an exercise of eminent domain. ORS

² Petitioner also alleges that her current access onto Susbauer Road may be eliminated.

³ As relevant, ORS 197.015(10) provides the following definition of ‘land use decision’:

“‘Land use decision’:

“(a) Includes:

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

“(i) The [statewide planning] goals;

“(ii) A comprehensive plan provision;

“(iii) A land use regulation [.]”

As petitioner correctly notes, there are no clear guidelines for determining whether a particular decision satisfies the significant impacts test.

1 35.235(1).⁴ If the city is unable to reach agreement with petitioner for city purchase of
2 petitioner’s property, the next step is for the city to file a complaint in circuit court to
3 condemn the needed portion of petitioner’s property. According to the city, there is no legal
4 requirement that it apply the statewide planning goals or city comprehensive plan or land use
5 regulations when it adopted Resolution 1561. For that reason, the city argues, Resolution
6 1561 is not a statutory land use decision that is subject to review by LUBA. The city also
7 argues that Resolution 1561 is not a significant impacts test land use decision, because it is
8 simply the first step in a process that may lead to city purchase or condemnation of
9 petitioner’s property. According to the city, the only impact that might result from
10 Resolution 1561 is a change of ownership and that a change of ownership, in and of itself,
11 does not have a significant impact on present or future land use and cannot result in a
12 significant impact test land use decision.

13 **A. Statutory Test**

14 Petitioner contends that Cornelius Development and Zoning Code (CDZC)
15 11.10.05(A) generally requires that a person secure a development permit before developing
16 land within the city.⁵ According to petitioner, the only possible exception to the requirement
17 for a permit is set out CDZC 11.06(C).⁶ Moreover, petitioner argues that CDZC 11.10.24(C)

⁴ ORS 35.235(1) provides:

“Subject to ORS 758.015 and 836.050, whenever in the judgment of the condemner it is necessary to acquire property for a purpose for which the condemner is authorized by law to acquire property, the condemner shall, after first declaring by resolution or ordinance such necessity and the purpose for which it is required, attempt to agree with the owner with respect to the compensation to be paid therefor, and the damages, if any, for the taking thereof.”

⁵ CDZC 11.10.05(A) provides:

“Except as excluded by [CDZC] 11.10.06, no person shall engage in or cause to occur a development for which the appropriate permit has not been issued. The building official shall not issue a permit for the construction, reconstruction, or alteration of a structure or a part of a structure for which the appropriate permit has not been issued.”

⁶ CDZC 11.06(C) sets out the following exception to the city requirement for a development permit:

1 requires that an applicant present proof that the applicant owns the land to be developed or
2 has the consent of all owners of affected property.⁷ Petitioner contends the city was required
3 to apply these city land use regulations when it authorized development of the turn lane and
4 other improvements that will require use of her property and that Resolution 1561 is
5 therefore a statutory land use decision.

6 Petitioner’s fundamental error is in her assumption that Resolution 1561 approves
7 *development*. As far as we can tell it does not. It seems unlikely that Resolution 1561 would
8 have been adopted if the planning commission had not granted design review approval for
9 the disputed subdivision and the public works director and applicant had not determined that
10 some of petitioner’s property is needed to achieve required site distances. Those city
11 decisions or other city decisions that have not yet been appealed to LUBA may well
12 constitute land use decisions or limited land use decisions over which LUBA has jurisdiction,
13 if they approve development that is subject to statewide planning goal, comprehensive plan
14 or land use regulation approval standards. However, we are not convinced by petitioner’s
15 attempt to convert Resolution 1561 from what it is (a decision that may ultimately lead to the
16 city taking title to part of petitioner’s property) into something it is not (a decision that
17 approves development of petitioner’s property). Because Resolution 1561 does not authorize
18 development of petitioner’s property, the CDZC provisions that petitioner cites do not apply.

[T]he establishment, construction, or termination of an authorized public facility that directly serves development, including such facilities as a private or public street, sewer, water line, electrical power or gas distribution line, or telephone or television cable system, provided said construction complies with applicable Public Works Standards.

⁷ CDZC 11.10.24(C) requires that an applicant for a development permit submit the following:

“Proof that the property affected by the application is in the exclusive ownership of the applicant or that the applicant has the consent of all individuals or partners in ownership of the, affected property. Legal description of the property affected by the applicant.”

Petitioner contends that intervenor does not have her permission to use her property for improvements to Susbauer Road.

1 Petitioner cites no legal requirement that the city apply the statewide planning goals
2 or the city’s comprehensive plan or land use regulations when it decides to initiate
3 condemnation proceedings. *See E & R Farm Partnership v. City of Gervais*, 39 Or LUBA
4 251, 254 (2000) (appeal of city decision to condemn property before seeking county land use
5 approval from county dismissed by LUBA where petitioner failed to show city was required
6 to apply land use standards in making its decision to condemn the property). Accordingly,
7 Resolution 1561 is not a statutory land use decision.⁸

8 In moving to dismiss LUBA No. 2003-110, the city also cites *Powder Valley Water v.*
9 *Hart Estate Investment Co.*, 146 Or App 327, 332, 932 P2d 101 (1997) and *ODOT v. Schrock*
10 *Farms*, 140 Or App 140, 144, 914 P2d 1116, *rev den* 324 Or 176, 922 P2d 669 (1996) for the
11 principle that the city need not have first secured any land use permits or comprehensive plan
12 or land use regulation changes that might be required to use condemned property the
13 purposes for which the property is being condemned, prior to commencing a condemnation
14 action. In both of those cases the landowner was resisting a public body’s circuit court
15 action to condemn its property. Petitioner in this appeal offers the following attempt to
16 distinguish those cases:

17 “City contends that cases arising from circuit court condemnation actions
18 establish a distinction between this issue of ownership through condemnation
19 and the issue of whether the proposed public use is allowed under land use
20 regulations. But precisely because the cases the city cites deal with attempts

⁸ Petitioner does not argue that Resolution 1561 is a “limited land use decision,” which is defined by ORS 197.015(12) as follows:

“‘Limited land use decision’ is a final decision or determination made by a local government pertaining to a site within an urban growth boundary which concerns:

- “(a) The approval or denial of a subdivision or partition, as described in ORS chapter 92.
- “(b) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review.

It does not appear that Resolution 1561 is a limited land use decision.

1 to defeat condemnation by showing that the proposed use is not allowed by
2 land use regulations, the argument has little bearing on LUBA’s jurisdiction
3 [in this appeal]. To the contrary: because the circuit court is barred from
4 considering whether the public uses for which the property is condemned are
5 allowed under land regulations, this sort of appeal is the only mechanism to
6 assure that city condemnation actions are reviewable for land use
7 compliance.” Petitioner’s Response to Respondent’s Motion to Dismiss 9.

8 We understand petitioner to argue that her LUBA appeal of Resolution 1561 may be
9 the only available “mechanism” for her to question the land use propriety of constructing
10 roadway improvements that will be located in part on property she now owns. We do not
11 understand petitioner’s argument. First, both LUBA No. 2003-109 and LUBA No. 2003-116
12 remain pending before LUBA and may provide a mechanism for determining whether the
13 proposed use of petitioner’s property complies with land use requirements. Other city land
14 use decisions may be needed to authorize use of petitioner’s property for roadway
15 improvements. If so, those decisions may be appealed to LUBA. If the city condemns
16 petitioner’s property and construction of the roadway improvements commences before
17 needed land use permits have been properly issued, presumably a circuit court action to
18 enjoin such action is a mechanism available to assure that improvements are not built without
19 first securing any required land use approvals. There appear to be a number of potential
20 mechanisms to consider the land use propriety of making roadway improvements that will
21 occupy property that petitioner now owns. Resolution 1561 is a first step in condemning
22 petitioner’s property; it does not grant land use approval to construct highway improvements
23 on petitioner’s property, and petitioner’s LUBA appeal of Resolution 1561 is not an available
24 “mechanism” to challenge the land use propriety of constructing those highway
25 improvements.

26 **B. Significant Impacts Test**

27 A decision that does not qualify as a statutory land use decision may nevertheless
28 qualify as a land use decision subject to LUBA review if it will significant impacts on
29 present or future land use. *Anderson Bros. v. City of Portland*, 18 Or LUBA 462, 469

1 (1989). A change of ownership, in and of itself, has no impact on present or future land use.
2 Something more on the part of the city is required to result in a significant impact on present
3 or future land uses. That something more is a final decision by the city to authorize a change
4 of use or itself change the use of property. A city decision to change the use or to authorize
5 others to change the use of property might qualify as a significant impact test land use
6 decision or a statutory land use decision. But Resolution 1561 neither changes the use of
7 petitioner's property nor authorizes others to change the use of petitioner's property.
8 Resolution 1561 is not a significant impacts test land use decision.

9 For the reasons explained above, Resolution 1561 is not a statutory or significant
10 impacts test land use decision. Accordingly this appeal is dismissed.