BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JENNIFER HARDING, and EAST SIDE ATHLETIC CLUB, Petitioners, vs. CLACKAMAS COUNTY, Respondent, and SCHURGIN DEVELOPMENT CORPORATION, Participant.	LUBA No. 87-058 FINAL OPINION AND ORDER

Appeal from Clackamas County.

Corinne C. Sherton, Salem, filed a petition for review and argued on behalf of petitioners. With her on the brief was Mitchell, Lang & Smith.

Ken Elliott, Portland, filed a response brief and argued on behalf of respondent-participant, Schurgin Development Corporation. With him on the brief was O'Donnell, Ramis, Elliott & Crew.

BAGG, Referee; DuBAY, Chief Referee; HOLSTUN, Referee, participated in the decision.

REVERSED 10/30/87

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

Opinion by Bagg.

NATURE OF THE DECISION

Petitioners appeal Clackamas County Board of Commissioners Order No. 87-736 entitled "In the matter of the vacation of S.E. 90th Avenue, a County road #12097, #2604." The decision became final on June 25, 1987, and vacates a portion of S.E. 90th Avenue between S.E. Sunnybrook Road and S.E. Sunnyside Road.

STANDING

Standing is an issue in this case. Petitioners allege they filed a notice of intent to appeal the county's decision with this Board on July 16, 1987. ORS 197.830(1). Petitioners claim they are aggrieved by the respondent's decision and that they appeared before the county commissioners, asserted a position on the merits, and the county board made a decision contrary to that assertion. ORS 197.830(3)(b); Jefferson Landfill v. Marion County, 297 Or 280, 686 P2d 310 (1984).

In addition, petitioners argue that petitioner Harding's property interest is affected by this decision. Petitioner Harding owns the East Side Athletic Club and is the grantee of an 18 foot wide easement for ingress to, and egress from the athletic club site across property directly to the west, to S.E. 90th Avenue. Petitioners constructed a roadway on this easement, and athletic club customers use it to go to and from the athletic club on S.E. 90th Avenue. Petitioners claim that without the easement, customers would not be able to enter the

site from S.E. Sunnyside Road while driving west on Sunnyside Road and would not be able to exit from the athletic club site and proceed west on Sunnyside Road. The result, according to petitioners, is that petitioners ability to attract business and serve customers at the athletic club is limited. Petitioners argue this limitation constitutes an adverse affect. ORS 197.837(3)(c)(B).

Respondent Schurgin Development Corporation recites that under ORS 197.830(3), petitioners must either demonstrate that they are entitled to notice prior to the decision or must show adverse affect or aggrievement. Respondent claims petitioners were not entitled to notice and hearing prior to this vacation decision because the county board exercised its authority to vacate the street pursuant to ORS 368.351. Road vacation proceedings under ORS 368.351 do not require notice or hearing.

Respondent goes on to explain that petitioners are not adversely affected or aggrieved by the street vacation because petitioners make no claim they were recognized by the county as having an interest in the decision. Under Jefferson Landfill, supra, respondent argues the Supreme Court established a three part test to determine whether a person is aggrieved by a local decision maker. The test is as follows:

"1. The person's interest in the decision was recognized by the local land use decision-making body;

"2. The person asserted position on the merits; and

"3. The local land use decision-making body reached

> a decision contrary to the decision asserted by the person." Jefferson Landfill, 297 Or at 284.

Respondent claims petitioners' interest was not recognized by the county. Also, respondent alleges the petitioners were not adversely affected or aggrieved by the decision because petitioners failed to demonstrate the decision impinges upon their use and enjoyment of their property. According to respondent, the county granted petitioners direct access from their property onto Sunnyside Road, and the county guaranteed petitioners would retain street access in the event S.E. 90th was vacated. The county design review committee expressly conditioned its approval of the construction project, known as the Schurgin Project, on Schurgin reaching agreement with other property owners, including petitioners, about accesss. Therefore, according to respondent, the county has assured adequate access to petitioners' property, and the vacation of S.E. 90th Avenue has no adverse affect upon petitioners. Respondent concludes petitioners lack standing to bring this review proceeding.

We believe petitioners have standing. Petitioners appeared before the county governing body and expressed a position on the merits which was not adopted by respondent county.[1] We are cited to nothing in the record to suggest the petitioners were denied the opportunity to address the issues or were otherwise considered not interested in the proceedings.

FACTS

Petitioner Harding obtained an easement from Pacific Western Bank. The easement grants petitioner an 18 foot wide access from the athletic club site to S.E. 90th Avenue. The easement also provides for installation and maintenance of an underground storm drainage system. Petitioner Harding has the right to improve the easement property with a graded gravel or paved roadway not more than 18 feet wide. Such a roadway exists and is used by customers of the East Side Athletic Club. Without the easement, athletic club customers would not be able to enter and leave the site from S.E. Sunnyside Road.

Schurgin Development applied for vacation of S.E. 90th Avenue between S.E. Sunnybrook Road and S.E. Sunnyside Road on May 29, 1987. As part of the vacation proceeding, the director of the county Department of Transportation and Development filed a report stating that an issue of shared access between the proposed Clackamas Promenade development, the Schurgin Project, and the athletic club remained unsettled.

The county board considered the proposed vacation under ORS 368.351, the procedure allowing the governing body to make a determination about the vacation without complying with the report, notice and hearing requirements found in ORS 368.346. The summary proceeding is available only if (1) the county road official files a written report concluding the vacation is in the public interest; and (2) the proceedings are intiated by petition with the acknowledged signatures of owners of 100 percent of any private property proposed to be vacated and of

owners of 100 percent of property abutting any property to be vacated. Petitioners attorney appeared before the board at the June 25 proceeding and requested that a hearing be held and notice given as required by ORS 368.346. This request was rejected, and the county board adopted the order vacating the street.

This appeal followed.

JURISDICTION

Respondent argues LUBA lacks jurisdiction to consider this case. Respondent cites Strawberry Hill Four Wheelers v. Board of Commissioners for the County of Benton, 287 Or 591, 601 P2d 769 (1979) for the proposition that the proper method to test vacation of the road is through writ of review. Respondent argues petitioners are challenging the county's use of the road vacation procedures, and their appeal should be filed in Circuit Court. ORS 34.020.

As a further argument, respondent claims the county decision does not fall within the definition of "land use decision" in ORS 197.015(10). The statute provides

> "A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
>
> (i) The goals;
>
> (ii) A comprehensive plan provison;
>
> (iii) A land use regulation; or
>
> (iv) A new land use regulation; * * *."

The vacation does not concern adoption, amendment or application of the goals or of a comprehensive plan provision, according to respondent. The only mention of road vacations is found in the county zoning and development ordinance, Sec. 1300. That section gives information on the administrative process for action on land use development applications generally. As the county's land use regulations do not provide standards for road vacations, there is no land use decision for LUBA to review, according to this argument.

Respondent further argues the decision is not a land use decision under the "significant impact" test. Local decisions may be land use decisions if they have a "significant impact on present or future land uses in the area." City of Pendleton v. Kerns, 294 Or 126, 653 P2d 996 (1982). Respondent argues there is no significant impact on present or future land uses by the vacation of S.E. 90th Avenue. While the street will revert to private ownership, it will not disappear, according to respondent. It will become an access point for the development to be located south of Sunnyside Road. Respondent states

> "S.E. 90th Avenue will become an access point for the development which will be located south of Sunnyside Road. The current signalized intersection of Sunnyside Road and S.E. 90th Avenue will remain intact. In fact, the vacated S.E. 90th Avenue will continue to function in many ways as at present.
>
> "Nor will vacation of S.E. 90th Avenue have a significant impact on access to Petitioners' property. Prior to vacating S.E. 90th Avenue, the County approved direct access from Petitioners' property onto Sunnyside Road, thereby guaranteeing street access to the health club. Record 4. Further,

> the Clackamas County Design Review Board has guaranteed Petitioners that it will maintain street access to their property. Record 4, 5, 7, 16, 46. Schurgin and the County have made several proposals for alternative access points in addition to the Sunnyside Road curb cut." Respondent's Brief at 10.

Respondent claims while petitioners rejected the alternatives for access, petitioners nevertheless enjoy alternative access to their property by another route.

Petitioner responds the Clackamas County Comprehensive Plan does control the street vacation; and, therefore, the decision meets the statutory test found in ORS 197.015(10). Petitioner says the comprehensive plan provides a goal for property designated as commercial. The goal is to

> "insure that siting, design, and access of commercial developments are suitable for the type of commercial activity." Clackamas County Comprehensive Plan at 60.

Petitioner argues the road vacation within such a commercially designated area is an action which has a direct affect on the siting, design and access of neighboring commercial developments.

In addition, petitioner states policy 1.0 of the Roadways and Parking section of the plan makes direct reference to "existing rights of way." The plan requires the county to

> "1.0 Emphasize use of existing rights of way.
>
> "2.0 Emphasize maintenance of existing roadways, with improvements where appropriate, to improve traffic flow and safety at a reasonable cost.
>
> * * *
>
> "5.0 Develop a parking and circulation plan for activity centers which eases traffic flow,

reduces pollution and aids transit."

Respondent argues these policies are not applicable to street vacations. The comprehensive plan does not mention street vacations, and the emphasis placed on rights of way and circulation plans for activity centers are issues to be raised in the course of permit applications, not in the course of street vacations. In oral argument before us, respondent claimed the issue of a parking and circulation plan for the activity center is an issue which was properly considered at the conditional use design review phase.[2] The conditional use and design review phase for the Schurgin Development Corporation Project was not appealed.

We agree with petitioner that the plan emphasizes existing rights of way. However, we do not interpret these policies as approval standards to be applied to street vacations. The plan's emphasis on maintenance of existing rights of way does not necessarily mean that a street vacation must be measured against this standard. As the court noted in Billington v. Polk County, 299 Or 471, 479-80, 703 P2d 332 (1985):

> "In conclusion, there are two tests to determine whether a decision is a land use decision: (1) The statutory test defined by ORS 197/015(10), and (2) The significant impact test as referred to in Peterson and Kerns for decisions not expressly covered in a land use norm. The county's comprehensive plan is silent as to its function in the context of road vacations. Neither the plan nor the ordinances have provisions to be employed as governing standards in the decision making process in road vacation decision; there are only procedural requirements. ORS Chapter 368 does not call for direct application of the comprehensive plan. The absence of any clear legislative

> requirement that plan provisions be applied as standards in this road vacation proceeding means there is no statutory basis under ORS 197.015(10)(a)(A)(ii), [sic] application of a comprehensive plan provision.
>
> "In the absence of a direct statutory mandate to apply a comprehensive plan provision or ordinance, the next step is to determine whether the decision will have significant impact on present or future land uses. If the decision will have significant impacts, it is a land use decision and LUBA has jurisdiction over the land use matter."

Petitioner also cites Section 706.04.A controlling activity centers. The code provides in part that

> "[a]ll new developments and expansion of existing developments shall comply with the adopted design plan for the activity center."

Petitioner argues this zoning ordinance provision clearly controls a street vacation.

We do not believe the zoning ordinance directly applies to street vacations. The quoted language appears to be an enforcement standard requiring compliance with an adopted design plan. That is, this ordinance provision mandates that new activity centers and expansion of existing activity centers must comply with the adopted plan for the activity center. This provision does not appear to be a separate approval standard.

We conclude the street vacation does not meet the statutory test for a land use decision.

With respect to the "significant impact test" we note this decision is the vacation of an improved right of way. Such was not the case in Billington v. Polk County, 14 Or LUBA 173 (1985)

wherein we found a street vacation had no significant impact on land uses because it simply maintained "the status quo in this rural farming area." Billington, 14 Or LUBA at 175.[3] In contrast, vacation of this right of way alters the existing traffic pattern of nearby property owners having a right of access to the street.

Because the street vacation alters access to the property, we believe it has a significant impact on land use and is therefore a land use decision under the significant impact test as announced in Kerns, supra.

FIRST ASSINGMENT OF ERROR

> "Respondent exceeded its jurisdiction, improperly construed the applicable law, and failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of petitioners by failing to provide the notice and hearing required by ORS 368.346 and by approving the vacation without the consent of petitioner Harding."

Petitioner argues that ORS 368.351 allows a governing body to make a determination on a street vacation without notice and hearing to affected property owners only if

> "(1) The county road official files with the county's governing body a written report that contains the county road official's assessment that any vacation of public property is in the public interest; and
>
> "(2) The proceedings for vacation under ORS 368.326 to 368.366 were initiated by a petition under ORS 368.341 that contains the acknowledged signatures of owners of 100 percent of any private property proposed to be vacated and acknowledged signatures of owners of 100 percent of property abutting any public property proposed to be vacated. The petition must indicate the owner's approval of the proposed vacation." ORS 368.346(1)(2)

Petitioner alleges the county board did not comply with the two requirements just cited in that the county made no finding the proposed vacation of S.E. 90th Avenue was in the public interest. Further, the issue of resolution of shared access between Clackamas Promenade and East Side Athletic Club was not settled, and was specifically noted as not being settled in the county road official's report. Record 38. Petitioners argue, therefore, that the county road official's recommendation for approval was contingent upon resolution of this issue. According to petitioner, without resolution of the issue, the report does not provide the required assessment that the vacation is in the public interest.

Respondent argues that the county complied with the requirements of ORS 368.351(1) by acting upon a report filed by the director of the Department of Planning and Development. The report provided that the vacation of S.E. 90th Avenue is a necessary phase in redevelopment of the property. Access to petitioner's property is guaranteed, according to respondent, by the Clackamas County Design Review Committee. The review committee expressly conditions approval of the entire Schurgin Project on reaching agreement on access and other related issues. Therefore, according to respondent, the director's comment about access is answered by the design review committee's guarantee and conditional approval. Respondent concludes the first requirement in ORS 368.351 is satisfied.

The county's decision is based upon the county road

official's report. The county road officials report provides something less than a statement that the vacation is in the public interest. The report states

> "With the resolution of shared access between the Clackamas Promenade project and the Eastside Athletic Club, the Department of Transportation and Development supports the necessary vacation of S.E. Creek Court, S.E. 86th Avenue, S.E. 88th Avenue, S.E. 89th Avenue and S.E. 90th Avenue and recommends that the Board rule favorably on the vacation as five (5) separate vacation orders are being submitted with this recommendation." Record 38.

We are cited to nothing in the record which indicates the road access issue has been resolved. The statute, allowing a street vacation without a hearing, is clear in its requirement that the county road official's assessment must include a declaration the vacation is in the public interest. An equivocal recommendation, based upon a contingency, does not satisfy ORS 368.351(1)(c). We conclude the petitioner is correct that the county was not entitled to proceed without a hearing under ORS 368.351(1).

In the second part of this assignment of error, petitioner notes ORS 368.351(2) requires signatures of owners of 100 percent of the property abutting any public property proposed to be vacated. The petition contains the signature of Schurgin Development Corporation, but no other persons or interests. Petitioner argues

> "* * * it appears from the record that the County accepted authorization by the holder of an agreement to purchase property abutting the roadways proposed to be vacated, rather than requiring consent by the present property owner. Record 42. In fact, the

> Board made the vacation 'contingent upon the fulfillment of purchase agreements held by Schurgin Development Corporation for the acquisition of fee simple title to all abutting property.' Record 2. Proceeding in such a manner does not fulfill the requirements of ORS 368.351(2) for dispensing with the notice and hearing otherwise required by ORS 368.346." Petitioner's Brief at 8.

Lastly, petitioner argues the vacation does not comply with ORS 368.351(2) because the county did not obtain the signature of petitioner Harding, the owner of the recorded easement abutting the roadway. Petitioner notes the Oregon courts have recognized an easement is an interest in land and not a personal privilege; and, therefore, an easement is a form of property. See, Scott v. State Highway Commission, 23 Or App 99, 541 P2d 516 (1975). Failure to obtain petitioner Harding's signature, renders the decision invalid, according to this argument.

Petitioners point in these arguments is that the county was not entitled to rely on the shortened procedure available to it under ORS 368.351. Petitioner claims that without properly availing itself of the procedure in ORS 368.351, the county was obliged to use the procedure in ORS 368.346. This latter procedure requires notice to parties with various interests in and around the road vacation and a public hearing. Without following this procedure precisely, petitioners argue the county never acquired jurisdiction over the road vacation proceeding. See Rynearson v. Union County, 54 Or 181, 102 P 785 (1909) and Nyman v. City of Eugene, 32 Or App 307, 574 P2d

332 (1978).

Petitioners claim, in the alternative, that even if we construe the county's failure to provide notice and hearing under ORS 368.346(2)(3) to be a procedural error, we must reverse the decision. Petitioners claim the lack of notice prejudiced their substantial rights in the vacation proceeding. See, ORS 197.835(8)(B). Specifically, petitioners say that under ORS 368.346(3), 368.406(6), 368.411(4) and 368.416(2), petitioners were entitled to notice of the street vacation (1) at least 30 days before the proceeding or (2) the notice must be published at least 20 days before the proceeding, or both such notices given. Instead, petitioners received notice only 18 hours prior to the time the hearing was scheduled to begin.

Petitioners argue that had adequate notice been given, petitioners would have presented (1) testimony from a traffic consultant with regard to the effect of proposed vacation, (2) testimony from an architect or design consultant with regard to designing a parking garage for the athletic club site and how the vacation would limit parking and (3) testimony from a market analyst on the needs of the area for increased recreation and exercise facilities.

Failure to provide notice in a road vacation proceeding has been held to deprive a county governing body of jurisdiction to consider a road vacation. However, before we decide whether petitioners' claim the county lacked jurisdiction to proceed is

correct, we must decide whether petitioners were entitled to notice.

ORS 368.346(3) requires that the notice and hearing of a proceeding to vacate a roadway must be provided by publication and by service "on each person with a recorded interest" in the property to be vacated and real property abutting that proposed to be vacated. This statute seems sufficiently broad to include the petitioner's easement interest. However, ORS 368.351 allows a vacation without a hearing providing consent is received by "owners of 100 percent of any private property proposed to be vacated and * * * owners of 100 percent of the property abutting any public property proposed to be vacated." ORS 368.351(2).

Respondent says had the legislature intended that the holder of an interest less than fee be required to consent, the legislature would have said so. However, respondent's interpretation of the statute assumes that the reference to "owners of 100 percent of the property" means 100 percent of the property in fee.

The statute need not be read so restrictively. The reference to the "owners of 100 percent of the property" could also mean the owners of all interests in property, whether fee or lesser interest.

This broader reading of the statute is consistent with the aparent purpose in ORS 368.341. The procedure outlined in this statute requires notice to each person with a recorded interest

in the property to be vacated and property abutting that proposed to be vacated. It would seem odd that a statute requiring notice to persons having various interests in property can be defeated by a companion statute allowing notice to be dispensed with if the holder of one kind of interest in the property consents to the vacation. We believe statutes relating to the same subject should be read consistently, if possible. 2A Sands Sutherland, Statutory Construction Sec. 52.02 (4th ed, 1984)[4]

We believe a more consistent approach is to read ORS 368.351 to allow a short form road vacation, without hearing, only when all owners of all recorded interests consent to the street vacation.

We also disagree with respondent on the requirement to obtain the consent of owners of property abutting the roadway to be vacated. Respondent obtained the consent of Schurgin Development Corporation, but Schurgin Development Corporation is a contract purchaser. Schurgin is not the "owner" of the property abutting the portion of the roadway to be vacated. We are mindful of respondent's argument that because the vacation is contingent upon the purchase by Schurgin Development Corporation, the purpose of the statute arguably is satisfied. However, we do not believe the statute contemplates a scheme wherein the consent of a required owner is effective at the same time the vacation is effective. The statute requires the vacation proceeding be <u>initiated</u> by consenting property

owners. Without this consent, the county's action is without effect. Without the necessary consent, the county was without authority to conduct a summary road vacation proceeding. Because the county's use of ORS 361.351 was in error, we are required to reverse the county's decision.[5]

We now turn to the question of county jurisdiction to proceed with the vacation without having first provided notice to petitioners. We conclude the county's error is not simply a procedural error, but one which deprives the county of jurisdiction to entertain a road vacation. The statute delineates a procedure to which the county must adhere. As the court noted in Nyman v. City of Eugene, supra,

> "[a] county court, when transacting county business such as laying out county roads, is an inferior tribunal of special and limited jurisdiction, and all facts necessary to confer jurisdiction must appear on the face of the record of its proceedings ..."
>
> * * *
>
> ... the filing of the petition to lay out a county road, coupled with the posting notices as required by law, vested jurisdiction in the county court. However, proof of posting must be in the record ...." Nyman, 32 Or App at 314-315. Emphasis added.

The statute leaves no room for the county to entertain its own street vacation procedure. We believe the county was, therefore, obliged to follow this procedure. In sum, the county was required to use the vacation proceeding providing for notice and hearing as found in ORS 368.346. Failure to do so deprived the county of jurisdiction to approve the vacation.[6]

Lastly, petitioner argues that ORS 368.331 was violated because the vacation deprives petitioner Harding of access necessary to exercise her property right. ORS 361.331 provides as follows:

> "A county governing body shall not vacate public lands under ORS 368.326 to 368.366 if the vacation would deprive an owner of a recorded property right of access necessary for the exercise of that property right unless the county governing body has the consent of the owner."

Respondent replies the vacation approval did not deprive petitioners of any recorded property right because (1) the county granted direct access from petitioners' property onto Sunnyside Road by an alternate method and (2) the county guaranteed as a condition of the Schurgin Project design review that additional access would be provided by agreement with Schurgin.

ORS 361.331 is not entirely clear. Specifically, the statute is unclear as to what is meant by a property right "necessary for the exercise of that property right." We believe the statue prohibits vacation of a right of way where the owner would be deprived of the use of an access easement connected to the right of way proposed for vacation. In this case, vacation of S.E. 90th Avenue renders petitioners easement useless. The access easement terminates at the boundary of the vacated roadway, and the easement is therefore an easement going nowhere. The easement, or in this case "recorded property right of access" is no longer useful because its

necessary terminus, S.E. 90th Avenue, no longer exists.

We conclude, therefore, that the vacation does deprive the petitioners of a property right in violation of ORS 361.331. The fact petitioner may have alternate access to the property does not alter our conclusion.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

"Respondent improperly construed the applicable law and made a decision not supported by substantial evidence in the whole record in failing to address applicable legal criteria and to adopt adequate findings of fact in making its decision to vacate S.E. 90th Avenue."

Petitioners argue the street vacation was a quasi-judicial decision. The filing of the application was bound to result in some kind of action by the county government body and, therefore, the decision may be characterized as quasi-judicial, according to petitioners. See Neuberger v. City of Portland, 288 Or 155, 603 P2d 771 (1979). Cf. Dennehey v. City of Portland, 87 Or App 33, ___ P2d ___ (1987). Petitioners go on to argue that findings must accompany a quasi-judicial decision, and this county decision is without findings. Specifically, the board's decision fails to identify applicable criteria, fails to state the facts which the board relied upon to reach the decision, and fails to explain how the applicable criteria apply to such facts. See, South of Sunnyside Neighborhood League v. Clackamas County Commission, 280 Or 3, 569 P2d 1063 (1977).

Further, petitioners assert ORS 368.356 requires the county

board to determine whether the vacation is in the public interest. Petitioner argues the county order fails either to explain how the board defines public interest or identify facts in the record showing that the public interest is met by this decision.

Lastly, petitioner argues that certain comprehensive plan provisions and zoning ordinance provisions control this development, and there were no findings addressing such provisions.

Respondent argues that its order fulfills the requirement in ORS 368.356 that the governing body determine whether the vacation is in the public interest. The board found, pursuant to the report of its road official, that the vacation was a "necessary phase in the redevelopment of the property." That finding is, according to respondent, sufficient to satisfy the public interest finding standard.

As discussed under the first assignment of error, the road official's report does not meet the statutory requirement of a finding that the vacation is in the public interest. The report, therefore, does not meet the requirement in ORS 368.351(1). The portion of the second assignment of error challenging the county's application of and findings of compliance with ORS 368.351(1) is sustained.

However, petitioners claim about the county's failure to make findings regarding applicable comprehensive plan and

zoning ordinance policies fails. As discussed under the first assignment of error, the comprehensive plan and zoning ordinance do not include standards for street vacations. Rather, the standards apply to questions of access and particular kinds of developments. The standards are applicable during the approval stage of developments, and it is not clear that the policies apply to other than statutory land use decisions.

The second assignment of error is sustained in part.

The decision is reversed.

FOOTNOTES

[1] ORS 197.830(2)(3) states:

(2)Except as provided in ORS 197.620(1), a person may petition the board for review of a legislative land use decision if the person:

(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section; and

(b) Is aggrieved or has interests adversely affected by the decision.

(3)Except as provided in ORS 197.620(1), a person may petition the board for review of a quasi-judicial land use decision if the person:

(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section;

(b) Appeared before the local government, special district or state agency orally or in writing; and

(c) Meets one of the following criteria:

(A) Was entitled as of right to notice and hearing prior to the decision to be reviewed; or

(B) Is aggrieved or has interests adversely affected by the decision.

We conclude petitioners have standing regardless of whether this decision is considered legislative or quasi-judicial. The requirement of an appearance is not present to appeal a legislative decision, however, aggrievement or adverse affect is a requisite. We believe petitioners have adequately demonstrated aggrievement.

If the decision is considered quasi-judicial, aggrievement or adverse affect is again a requisite along with a requirement that petitioners make an appearance before the local government. Petitioners appeared and were aggrieved.

[2] The record in this case includes the minutes of the design review committee's meeting. However, the record does not include other documents from the planning commission or county

commission giving approval to the shopping center development or to any particular plan for the development. Possibly, an argument could be made that the "land use decision" regarding access was made at the time the project was approved, and this street vacation only implements the land use decision approving the project and access for it. However, without a complete record of the prior approvals, we are unable to make such a determination. We conclude, infra, that this decision does meet the "significant impact test" and is a land use decision subject to our review.

3

In Wagner v. Marion County, 70 Or App 233, 719 P2d 31 (1986), the Court of Appeals noted that whether or not the status quo is maintained is not determinitive of whether a particular action has a significant impact on land use. Indeed, maintenance of the status quo may have a signficant impact on land use.

4

We note the legislature rewrote provisions of ORS Chapter 368, including the provisions at issue here in 1981. ORS 368.346 and ORS 368.351 were adopted by the same legislative act. See 1981 Oregon Laws, Ch. 153.

5

Respondent filed a motion to dismiss based on mootness. Respondent argues that Clackamas Promenade now owns 100 percent of the property adjacent to that property to be vacated. As such, respondent claims a contingency in the county order regarding ownership to all abutting property has been met; and, therefore, there is no longer any question as to whether or not the consent of 100 percent of the adjacent owners is obtained. Respondent claims that the vacation order of June 25, 1987, was premised on the June 30, 1987 closing of Promenade's purchase of all of the abutting property. Respondent claims the order was signed subject to the condition that if Promenade did not obtain fee simple title to the property, the order would be null and void.

We do not read the county's order in quite the same fashion. The order does not provide it is null and void if the June 30 deadline comes and goes. Indeed, there is no mention of a June 30 deadline in the county's order. All that is mentioned in the county's order is that the vacation is

> "contingent upon the fulfillment of purchase agreements held by Schurgin Development Corporation and for the

acquisition of fee simple title to all abutting property." Record 2.

As discussed in the text, it is our conclusion the county is without authority to act on a road vacation petition which is incomplete. In this case, the missing consent renders the road vacation application incomplete.

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6 If we are mistaken on the question of whether the county's error may be considered simply procedural or is indeed jurisdictional, then the result on this issue is different. We may only reverse or remand for a procedural error if the error results in predjudice to petitioners' substantial rights. ORS 197.835(8)(A)(b). In this case, petitioners had 18 hours prior notice the street vacation would occur. They were indeed able to participate in the proceeding though under rather inconvenient circumstances. While the question is a close one, we conclude the inconveniences petitioners articulate do not amount to prejudice to their substantial rights.