

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

JOHN CARLSON,)
)
 Petitioner,)
) LUBA Nos. 94-069 and 94-146
 vs.)
) FINAL OPINION
 CITY OF DUNES CITY,) AND ORDER
)
 Respondent.)

Appeal from City of Dunes City.

John Carlson, Westlake, represented himself.

D. Ronald Gerber, City Attorney, Florence, represented respondent.

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

REMANDED (LUBA No. 94-069) 12/14/94
DISMISSED (LUBA No. 94-146)

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

1 Opinion by Kellington.

2 **NATURE OF THE DECISIONS**

3 In LUBA No. 94-069, petitioner challenges a decision
4 authorizing the paving of an unimproved city street right of
5 way. In LUBA No. 94-146, petitioner challenges a settlement
6 agreement between the city and third parties concerning the
7 paving of the unimproved street right of way.

8 **FACTS**

9 The challenged decisions involve the paving of a
10 230-foot section of unimproved right of way for Ocean
11 Boulevard. The decision challenged in LUBA No. 94-069 is
12 reflected in the minutes of the April 14, 1994 city council
13 meeting and authorizes the paving of the right of way. The
14 decision challenged in LUBA No. 94-169 is reflected in a
15 July 18, 1994 settlement agreement between certain third
16 parties and the city.¹

17 **DECISION**

18 **A. LUBA No. 94-069**

19 In a previous order in this appeal, we determined a
20 final city decision to pave the disputed unimproved street
21 right of way was made on April 14, 1994. The only remaining
22 jurisdictional question is whether that final decision is a

¹Apparently, the third parties were responsible for some improvements which encroached onto the unimproved right of way.

1 "land use decision" subject to our review authority.²
2 ORS 197.825(1). The city's decision is a "land use
3 decision" if it meets either (1) the statutory definition of
4 land use decision in ORS 197.015(10); or (2) the significant
5 impact test established by City of Pendleton v. Kerns, 294
6 Or 126, 133-34, 653 P2d 996 (1982). Billington v. Polk
7 County, 299 Or 471, 479, 703 P2d 232 (1985); City of
8 Portland v. Multnomah County, 19 Or LUBA 468, 471 (1990).³

9 The city contests our jurisdiction over the challenged
10 decision. The city contends the decision satisfies neither
11 the statutory definition of "land use decision" nor the
12 significant impact test and, therefore, is not subject to
13 review by this Board.

14 **1. Statutory Test**

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

17 "A final decision or determination by a local
18 government * * * that concerns the * * *
19 application of:

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

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

²LUBA'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.

³While we question the continued viability of the significant impact test in view of the fact that all cities and counties within the state now have acknowledged comprehensive plans and land use regulations, until the Oregon Supreme Court overturns its decisions creating the significant impact test, we are bound to apply it.

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

2 "* * * * *"

3 Petitioner contends the challenged decision satisfies
4 the above statutory definition of "land use decision"
5 because it concerns the application of City of Dunes City
6 Zoning Ordinance (DCZO) requirements relating to
7 "shorelands." Petitioner argues streets are not permitted
8 in shorelands areas.⁴ According to petitioner, even though
9 the city did not in fact apply the DCZO shorelands
10 regulations in authorizing the paving of the disputed right
11 of way, the city was required to do so because the subject
12 unimproved right of way is within the area the DCZO defines
13 as "shorelands." Therefore, petitioner contends the
14 challenged decision "concerns" the application of a land use
15 regulation. See Bradbury v. City of Independence, 18 Or
16 LUBA 552 (1989), aff'd 100 Or App 749 (1990).

17 As we understand it, under the DCZO, areas within 50
18 feet of the high water mark of Siltcoos Lake are considered
19 "shorelands" subject to special DCZO regulations. The
20 parties dispute whether the challenged paving of the
21 unimproved right of way is subject to DCZO shorelands
22 regulations. If the proposed street is located within a

⁴DCZO III(A) lists the following permitted uses in shorelands areas:

"Low intensity uses such as parks, playgrounds, walking trails
and similar uses are allowed."

1 shorelands area, the city must determine whether a street is
2 a permitted use under DCZO III(A) and whether any other
3 shorelands regulations are applicable.

4 The challenged decision, adopted by the city council in
5 its minutes, includes no findings determining whether the
6 DCZO shorelands regulations apply to the proposal and, if
7 applicable, whether a street is allowed in a shorelands area
8 and whether any other shorelands regulations are applicable
9 to the proposal. It is well settled that this Board cannot
10 interpret city ordinances in the first instance. Weeks v.
11 City of Tillamook, 117 Or App 449, 454, 844 P2d 914 (1992).
12 Rather, this Board may only review the city council's
13 interpretation of its own code. See Gage v. City of
14 Portland, 319 Or 308, ___ P2d ___ (1994). In the absence of
15 an interpretation of the applicability of the DCZO
16 shorelands regulations to the challenged decision, we cannot
17 determine whether the decision is a statutory land use
18 decision.

19 **2. Significant Impact Test**

20 Petitioner contends the paving of the unimproved right
21 of way will have significant impacts on land use.
22 Petitioner argues the 230-foot street right of way segment
23 to be paved has been used as a beach for 50 years, and that
24 paving it significantly affects the public's recreational
25 use of the area, as well as resort businesses which depend
26 upon the beach. Petitioner also argues that paving the

1 disputed right of way will have significant impacts on the
2 quiet residential nature of the area because the existing
3 street dead ends at the beach and, under the challenged
4 decision, the dead end street will be converted to a busy
5 public thoroughfare.

6 The Oregon Supreme Court's decisions in City of
7 Pendleton v. Kerns, supra, and Billington v. Polk County,
8 supra, make it clear that to qualify as a significant impact
9 test land use decision, and for LUBA to have review
10 jurisdiction, the decision must create an actual,
11 qualitatively or quantitatively significant impact on
12 present or future land uses. Further, the expected impacts
13 must be likely to occur as a result of the decision, and not
14 simply speculative. Fraser v. City of Joseph, ___ Or LUBA
15 ___ (LUBA No. 94-067, November 4, 1994); Keating v. Heceta
16 Water District, 24 Or LUBA 175, 181-82 (1992); Anderson
17 Bros. v. City of Portland, 18 Or LUBA 462, 471 (1989). This
18 case is similar to City of Pendleton v. Kerns, supra.
19 There, the supreme court determined the improvement of some
20 360 feet of unimproved right of way was a significant impact
21 test land use decision. The supreme court stated:

22 "Admittedly, 'significant impact on present or
23 future land uses' is a nebulous standard,
24 particularly in the context of a city's decision
25 to undertake street improvement work. Whereas
26 some decisions, such as to resurface a street or
27 repair a pothole, have only a de minimis impact on
28 land use, and some, such as to construct a major
29 arterial road or bridge have substantial impact, a
30 large number of a city's day-to-day decisions

1 regarding public works and roads fall in between.
2 Public works and road projects are an aspect of a
3 city's 'planning and zoning responsibilities' and
4 as such must be in compliance with the applicable
5 goals and comprehensive plan provisions. A city's
6 final decision authorizing a significant project
7 of this nature is, as a result, reviewable by LUBA
8 for goal and plan compliance. * * * (Footnote
9 omitted.) Id. at 133-34.

10 We believe petitioner has established that the
11 challenged decision to pave the 230-foot right of way
12 segment is a significant impact test land use decision
13 subject to our review, because it authorizes the paving of
14 an area used as a public recreational area for a long period
15 of time and changes the character of the area by opening up
16 a dead end street at a beach and converting the dead end
17 street into a public thoroughfare. These impacts are actual
18 and will have a significant impact on the present and future
19 land uses in the area.

20 As explained in the preceding section, the challenged
21 decision does not interpret the applicability or scope of
22 the DCZO shorelands regulations. Therefore, even though
23 briefs have not been filed in this appeal, in view of the
24 allegations in the motion to dismiss and the responsive
25 memoranda concerning the proposal's compliance with the
26 shorelands regulations, LUBA No. 94-069 must be remanded to
27 the city for an interpretation of the applicability and
28 scope of the DCZO shorelands regulations. See Fraser,
29 supra.

30 The city decision challenged in LUBA No. 94-069 is

1 remanded.

2 **B. LUBA No. 94-146**

3 The decision challenged in LUBA No. 94-146 concerns an
4 agreement between the city and third parties regarding the
5 implementation of the city's decision to develop the
6 230-foot unimproved section of Ocean Boulevard discussed
7 above. The land use decision to develop the right of way is
8 appealed in LUBA No. 94-069. The decision challenged in
9 LUBA No. 94-146 does not concern the adoption, amendment or
10 application of the goals, a land use regulation or a
11 comprehensive plan, and does not of itself have significant
12 impacts on present or future land uses. Therefore, the
13 decision challenged in LUBA No. 94-146 is not a land use
14 decision.⁵

15 LUBA No. 94-146 is dismissed.⁶

16

⁵Additionally, no party contends this decision is a limited land use decision, and we do not see that it is.

⁶Under our disposition of this appeal, we do not consider petitioner's objections to the record.