BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SARAH BOHNENKAMP,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent,

and

LAINE ZORNES and JENNIFER ZORNES,
Intervenor-Respondents.

LUBA No. 2007-157

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Edward J. Sullivan and Carrie Richter, Portland, filed the petition for review. Carrie Richter argued on behalf of petitioners. With them on the brief was Garvey Schubert Barer.

Michael E. Judd, Assistant County Counsel, Oregon City, filed the response brief and argued on behalf of respondent.

Laine Zornes, and Jennifer Zornes, Milwaukie, represented themselves.

BASSHAM, Board Member; HOLSTUN, Board Chair; RYAN, Board Member participated in the decision.

TRANSFERRED 02/08/2008

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a decision that vacates an unimproved 30-foot by 100-foot section of public right of way.

MOTION TO FILE REPLY BRIEF

Petitioner moves to file a reply brief, to respond to challenges in the response brief to petitioner's standing and the Board's jurisdiction over this appeal, and to an argument that LUBA should overrule one of its prior decisions. The county objects that the petition for review discusses standing and the Board's jurisdiction at length, and the county's responses to those arguments are not "new matters" that warrant allowing petitioner to file a reply brief under OAR 661-010-0039.

While the petition for review is required to include sections addressing the petitioner's standing and the Board's jurisdiction, petitioner is not generally required to anticipate all of the various arguments that can be advanced against standing and jurisdiction. As long as the reply brief is not merely reiterating or embellishing arguments already made in the petition for review's jurisdictional section, a reply brief is warranted to respond to a jurisdictional challenge in the response brief. *Sievers v. Hood River County*, 46 Or LUBA 635, 637 (2004); *Boom v. Columbia County*, 31 Or LUBA 318, 319 (1996); *Shaffer v. City of Salem*, 29 Or LUBA 592, 594 (1995). The county does not allege, and it does not appear to be the case, that the reply brief merely reiterates or embellishes arguments already made in the petition for review. In addition, it is appropriate to allow a reply brief to respond to an argument that a LUBA decision petitioner cites and relies on should be overruled. Accordingly, the reply brief is allowed.

FACTS

Dohn Court is a public road with a 30 foot right of way, running approximately 534 feet west from Fairoaks Avenue. The last 100 feet of Dohn Court is unimproved, and

consists of a steep slope covered with trees and brush. The last 100 feet of Dohn Court is steep and wooded, and has never been improved or open for traffic. The surrounding area is generally zoned for residential uses and developed with single-family dwellings.

Intervenor owns tax lot 900, a property that abuts the last 100 feet of Dohn Court to the north. Petitioner owns tax lot 500, a lot north of tax lot 900. Tax lot 500 does not abut any portion of Dohn Court. In 2000, the owner of tax lot 900 granted petitioner an easement for sewer access over tax lot 900, which connects petitioner's property with the public sewer in the Dohn Court right-of-way.

Intervenor applied to the county to vacate the unimproved 30-feet by 100-feet western end of Dohn Court. The main effect of the road vacation will be to add 1,500 square feet to tax lot 900, which is 9,600 square feet in size. The minimum lot size in the applicable residential zone is 10,000 square feet. Thus, the road vacation will allow tax lot 900 to be developed with a single family dwelling.

ORS 368.351 provides that a county may vacate public property without following statutory procedures that require a hearing, if the vacation is initiated by a petition that includes the acknowledged signatures of 100 percent of property abutting the public property proposed to be vacated.[1] Intervenor's road vacation petition was accompanied by the

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[1] ORS 368.351 provides:

> "A county governing body may make a determination about a vacation of property under ORS 368.326 to 368.366 without complying with ORS 368.346 if the proceedings for vacation were initiated by a petition under ORS 368.341 that indicates the owners' approval of the proposed vacation and that contains the acknowledged signatures of owners of 100 percent of private property proposed to be vacated and acknowledged signatures of owners of 100 percent of property abutting public property proposed to be vacated and either:
>
> "(1) The county road official files with the county governing body a written report that contains the county road official's assessment that any vacation of public property is in the public interest; or
>
> "(2) The planning director of the county files a written report with the county governing body in which the planning director, upon review, finds that an interior lot line vacation affecting private property complies with applicable land use regulations and facilitates development of the property subject to interior lot line vacation."

signatures of all owners of the lots that abut the vacated portion of Dohn Court, but did not include petitioner's signature. One of the disputed issues in the present appeal is whether petitioner is an owner of property abutting the vacated portion of Dohn Court, within the meaning of ORS 368.351.

On November 9, 2006, the board of county commissioners approved the petition as part of a consent agenda. No notice of the decision was provided to petitioner. On July 31, 2007, petitioner learned of the decision and filed this appeal.

JURISDICTION

The county argues that the challenged decision is neither a statutory "land use decision" as that term is defined at ORS 197.015(11), nor a "significant impacts" land use decision as described in *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 992 (1982), and therefore LUBA lacks jurisdiction over this appeal. For the following reasons, we agree with the county that we lack jurisdiction over this appeal.

A. ORS 197.015(11)

A local government decision is a "land use decision" as defined at ORS 197.015(11)(a) if, in relevant part, the decision concerns the application of a comprehensive plan provision or land use regulation.[2] The criteria the county applied to the challenged road vacation decision are found at Clackamas County Code (CCC) 7.03.095(A), which implements statutory road vacation provisions at ORS 368.326 *et seq*. Petitioner does

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[2] ORS 197.015(11)(a)(A) defines a "land use decision" to include:

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

not argue that the road vacation standards at CCC 7.03.095 in themselves are "land use regulations" as that term is defined at ORS 197.015(12). However, petitioner argues that two of the county road vacation standards, CCC 7.03.095(4)(e) and (g), require the county to consider the impacts of vacating the road on future development in the surrounding area.[3] According to petitioners, determining whether the proposed road vacation complies with

[3] As noted above, ORS 368.351(1) requires an assessment that any vacation of public property is in the public interest. CCC 7.03.095 implements that "public interest" standard, providing in relevant part:

> "4. In determining whether vacation of public property is in the public interest, the Board shall consider the following criteria:
>
> "a. Whether the vacation would inhibit or preclude access to an abutting property, and whether an access reservation would be adequate to protect that access;
>
> "b. Whether it is physically possible to build a road that meets contemporary standards over the existing terrain or right of way;
>
> "c. Whether it is economically feasible to build a road that meets contemporary standards over the existing terrain or right of way;
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> "d. Whether there is another nearby road that can effectively provide the same access as the right-of-way to be vacated;
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> "e. *Whether the right-of-way to be vacated has present or future value in terms of development potential*, use in transportation linkages, or use in road replacements;
>
> "f. Whether there are present and future likely benefits of the right-of-way to the traveling public;
>
> "g. *Whether anticipated growth or changes in use of the surrounding area* are likely to impact the future use of the right-of-way proposed to be vacated;
>
> "h. Whether the right-of-way proposed to be vacated leads to a creek, river, or other waterway that can be used for public recreation; and
>
> "i. Whether the right-of-way proposed to be vacated leads to federal, state or local public lands that can be used for public recreation.
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> "5. The Order issued pursuant to ORS 368.356 at the conclusion of any Vacation Proceeding shall not be a land use decision, but may be appealed by Writ of Review under ORS Chapter 34." (Emphasis added).

CCC 7.03.095(4)(e) and (g) necessarily requires considering the comprehensive plan provisions and land use regulations that govern surrounding land.

The county responds that a local government decision "concerns" the application of a statewide planning goal, comprehensive plan provision, or land use regulation only if the decision maker (1) was required by law to apply a goal, plan provision, or land use regulation as an approval standard, but did not, or (2) in fact applied a goal, plan provision, or land use regulation. *Angius v. Clean Water Services*, 50 Or LUBA 154, 156 (2005), *citing Jaqua v. City of Springfield*, 46 Or LUBA 566, 574, *rev'd on other grounds* 193 Or App 573, 91 P3d 817 (2004). The county argues that petitioner identifies no comprehensive plan provision or land use regulation that applies to the disputed road vacation as an approval standard. According to the county, the fact that CCC 7.03.095(4)(e) and (g) may require the county to consider matters that touch on land use or development potential in the surrounding area does not mean that unspecified portions of the county's comprehensive plan or land use regulations apply as approval standards, or that CCC 7.03.095(4)(e) and (g) are themselves land use regulations. *See Billington v. Polk County*, 299 Or 471, 475, 703 P2d 232 (1985) (a decision that "merely touches on" aspects of a comprehensive plan is not a statutory land use decision); *Knee Deep Cattle Co. v. Lane County*, 28 Or LUBA 288 (1994), *aff'd* 133 Or App 120, 890 P2d 449 (1995) (same).

Further, the county notes that CCC 7.03.095(5) states that a road vacation decision under CCC 7.03.095 is not a "land use decision," but that such decisions may be appealed by filing a writ of review with circuit court under ORS Chapter 34. While conceding that CCC 7.03.095(5) does not definitively establish that decisions made under CCC 7.03.095 are not statutory land use decisions subject to LUBA's jurisdiction, the county argues that CCC 7.03.095(5) reflects the county board of commissioners' intent that land use regulations do not apply to road vacation decisions, and thus those decisions are not land use decisions as defined at ORS 197.015(11).

We agree with the county that petitioner has not established that the challenged road vacation decision "concerns" the application of any comprehensive plan provision or land use regulation, within the meaning of ORS 197.015(11)(a)(A). The questions posed by CCC 7.03.095(4)(e) and (g) are intended to help the city determine whether the proposed road vacation is in the public interest, which is the ultimate approval standard. Even assuming that, in providing answers to the questions posed by CCC 7.03.095(4)(e) and (g), the county must consider the zoning map or the zoning districts or regulations that govern the surrounding area, we do not believe that such considerations "concern" the application of the zoning map, zoning district or other land use regulations, within the meaning of ORS 197.015(11)(a). As we held in *Angius* and *Jaqua*, a decision concerns the application of a statewide planning goal, comprehensive plan provision or land use regulation only if the goal, plan provision or land use regulation functions in some meaningful sense as an "approval standard" that the local government is required by law to apply in making the decision. Petitioner does not explain how the zoning map, zoning district or other unspecified land use regulations function as approval criteria with respect to the challenged road vacation, and we do not see that they do. Consequently, petitioner has not met the burden of establishing the Board's jurisdiction under ORS 197.015(11)(a).

B. Significant Impact Land Use Decision

In the alternative, petitioner argues that the challenged decision is a "significant impact" land use decision subject to LUBA's jurisdiction. The significant impact test is a judicially-created doctrine first articulated in *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 992 (1982). In *Kerns*, the Supreme Court held that a local government decision that is not a statutory land use decision may nonetheless be subject to LUBA's review if the decision will have a "significant impact" on present or future land uses in the area. 294 Or at 134.

Several cases have applied that doctrine to road vacation decisions. In *Billington v. Polk County*, 10 Or LUBA 135, *rev'd* 68 Or App 914, 683 P2d 568 (1984), *rem'd* 299 Or 471, 703 P2d 232 (1985), the county vacated 20 feet of a 40-foot right of way 1,400 feet in length. After LUBA's initial decision was remanded, LUBA ultimately concluded that the road vacation did not qualify as a "significant impact" decision, noting that the vacated portion of the right of way had never been used for vehicular travel, and the partial vacation would therefore maintain the status quo in the area. 14 Or LUBA 173, 175 (1985).

In *Harding v. Clackamas County*, 16 Or LUBA 224 (1987), *aff'd* 89 Or App 385, 750 P2d 167 (1988), LUBA concluded that a decision vacating a portion of SE 90th Avenue was a significant impact decision, because it vacated an improved right-of-way and altered the existing traffic pattern of nearby property owners having a right of access to the street.

Similarly, in *Mekkers v. Yamhill County*, 38 Or LUBA 928 (2000), LUBA held that a decision vacating a one-third mile length of graveled county road, with a 33-foot right of way and a 21-foot traveled width, was a significant impact land use decision. That conclusion was based on several considerations, including that the purpose of the road vacation was to facilitate development of a subdivision north of the road and other future development in the area, and thus the decision "facilitates and sets the stage for future development that will alter the character of the surrounding land uses." 38 Or LUBA at 931.

In contrast, in *Pacific Western Co. v. Lincoln County*, 32 Or LUBA 317, *aff'd* 148 Or App 272, 939 P2d 173 (1997), LUBA held that a road vacation of 105 feet at the end of a road that provided access to the petitioner's property was not a significant impacts land use decision. LUBA noted that there was other access to petitioner's property, and the mere fact that the decision might potentially allow future subdivision and development of a single tax lot was not sufficient to pass the significant impacts test.

Petitioner argues, based on language in *Mekkers*, that the present road vacation will cause a significant impact on present and future land uses in the area. By adding 1,500

square feet to tax lot 900, petitioner argues, the decision allows that lot to be developed with a single family dwelling, and thus the decision "facilitates and sets the stage for future development that will alter the character of the surrounding land uses."

The county disagrees, arguing that it is hard to imagine a road vacation decision with more insignificant land use impacts. According to the county, the present case is closer in circumstances to those in *Billington* and *Pacific Western Co.*, in that (1) the vacated right-of-way is short, unimproved and has never been used for vehicular travel, (2) the vacation does not alter existing or future access or traffic patterns, and (3) the only identified land use impacts are to allow a single residentially zoned lot to be developed with a single family dwelling, consistent with the development on surrounding lots.

We agree with the county that petitioner has not established that the challenged road vacation will have a "significant impact" on present or future land uses in the area. Because the right-of-way has never been improved or used for vehicular traffic, there are few or no traffic or access impacts from the decision. Unlike the decision at issue in *Mekkers*, the county's decision does not "set the stage" for significant development of the surrounding area. Based on maps and photographs in the record, it appears that the land use pattern in the surrounding area is already set in place. In our view, adding 1,500 square feet to a 9,600 square foot lot to allow development of a single family dwelling, consistent with development on surrounding lots, does not have "significant impacts" on present or future land uses in the area. Consequently, LUBA does not have jurisdiction over the challenged decision.

Petitioner has moved to transfer this appeal to circuit court, in the event LUBA rules that it does not have jurisdiction. OAR 661-010-0075(11). The county's decision is transferred to Clackamas County Circuit Court.[4]

[4] Our disposition makes it unnecessary to resolve several pending motions, which all relate to the merits of petitioner's assignments of error. Specifically, we do not address or resolve the county's motion to strike

exhibits and statements in the petition for review, petitioner's motion to strike certain statements in the response brief, and petitioner's motion to take evidence not in the record.