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

THE CONFEDERATED TRIBES OF THE WARM
SPRINGS RESERVATION OF OREGON,
Petitioner,

vs.

WHEELER COUNTY,
Respondent,

and

MICHAEL KELLEY and WEST LINN
CORPORATE PARK II, LLC,
Intervenors-Respondents.

LUBA No. 2008-131

FINAL OPINION
AND ORDER

Appeal from Wheeler County.

Josh Newton and Lauren J. Lester, Bend, represented petitioner.

Thomas W. Cutsforth, Fossil, represented respondent.

Donald Joe Willis and Myles Conway, Bend, represented intervenors-respondents.

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

TRANSFERRED 10/14/2008

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

NATURE OF THE DECISION

This appeal concerns a county permit that authorizes maintenance of an existing road.

MOTION TO INTERVENE

Michael Kelly (Kelly) and West Linn Corporate Park II, LLC (West Linn) move to intervene on the side of respondent. Petitioner concedes that Kelly has standing to intervene but objects that West Linn does not have standing.

The applicant for the road maintenance permit and persons who appeared before the county in this matter have standing to intervene in this appeal. ORS 197.830(7).¹ Kelly is the only person who signed the application. Petitioner contends that West Linn is neither the applicant nor a person who “appeared” before the county below.

Kelly and West Linn respond that Kelly is one of the owners of West Linn and that Kelly “acted as both the ‘applicant’ and an agent of West Linn in obtaining the permit that is the subject of [this] appeal.” Response in Support of Intervention 1. Therefore, Kelly and West Linn argue, West Linn is both an applicant and a person who appeared below. In support of that argument, Kelly and West Linn attach a September 2, 2008 affidavit signed by Kelly in which he asserts the application that led to the decision in this matter was

¹ ORS 197.830(7) provides:

“(a) Within 21 days after a notice of intent to appeal has been filed with [LUBA] under subsection (1) of this section, any person may intervene in and be made a party to the review proceeding upon a showing of compliance with subsection (2) of this section.

“(b) Notwithstanding the provisions of paragraph (a) of this subsection, persons who may intervene in and be made a party to the review proceedings, as set forth in subsection (1) of this section, are:

“(A) *The applicant* who initiated the action before the local government, special district or state agency; or

“(B) *Persons who appeared* before the local government, special district or state agency, orally or in writing.” (Emphases added.)

1 submitted on behalf of West Linn, which is the owner of the property that is served by the
2 road that is at issue in this appeal. Given that uncontradicted assertion, we conclude that
3 West Linn has standing to intervene. Although neither the application nor the decision itself
4 identifies West Linn as the applicant, we are aware of no legal requirement that either
5 document must do so. West Linn has standing as one of the applicants and as a person who
6 appeared below.

7 Kelly's and West Linn's motion to intervene is allowed.

8 **JURISDICTION**

9 **A. Introduction**

10 As relevant here, LUBA has exclusive jurisdiction to review land use decisions, and
11 LUBA's jurisdiction is limited to land use decisions. ORS 197.825(1); *Billington v. Polk*
12 *County*, 299 Or 471, 479, 703 P2d 232 (1985). As defined by ORS 197.015(10), a final
13 county decision that "concerns the application of" "a land use regulation" is a land use
14 decision, as ORS 197.015(10)(a) defines that term, unless one of the statutory exceptions set
15 out in ORS 197.015(10)(b) applies.² Intervenors move to dismiss this appeal, arguing that

² ORS 197.015(10) provides, in relevant part:

"Land use decision":

"(a) Includes:

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

"(i) The [statewide planning] goals;

"(ii) A comprehensive plan provision;

"(iii) A land use regulation; or

"(iv) A new land use regulation;

"* * * * *";

"(b) Does not include a decision of a local government:

1 the challenged permit is not a “land use decision,” as ORS 197.015(10) defines that term,
2 because the exception set out at ORS 197.015(10)(b)(A) applies. Intervenor also argue that
3 the challenged permit decision does not qualify as a “significant impacts test” land use
4 decision under *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 992 (1982).

5 **B. Facts**

6 West Linn’s and petitioner’s properties are zoned for exclusive farm use (EFU).
7 State Highway 218 travels south and then west from the City of Fossil. Petitioner owns
8 property that adjoins the north side of Highway 218 approximately 15 miles west of Fossil.
9 An existing road (Road 3036) travels north from Highway 218, across petitioner’s property a
10 distance of approximately 2.9 miles and provides access from Highway 218 to intervenor’s
11 property. The parties dispute whether Road 3036 is a public road.

12 Road 3036 is in poor repair. Kelly sought a county permit to “maintain Rd. 3036 for
13 2.9 [miles].” Record 45. The staff report in this matter is quite short and is set out in part
14 below:

15 “Request: Application to maintain public road #3036.

16 “Location: * * * Wheeler County.

17 “Zoning: Exclusive Farm use, Wheeler county Zoning Ordinance No.
18 2001-03, Article 3.1 (3)(g) (i) (p) and (q).

19 “Basic Facts: To maintain, repair and preserve public road #3036 from Hwy
20 218 north 2.9 miles to the ranch.” Record 44.

21 The county’s notices of permit decision indicate that the permit was issued to
22 authorize a permitted use under Wheeler County Zoning Ordinance (WCZO) Article
23 3.1(3)(g), (i), (p) and (q). Record 42, 43.

24 As relevant, WCZO Article 3.1(3) provides as follows:

“(A) That is made under land use standards *that do not require interpretation or the exercise of policy or legal judgment[.]*” (Emphasis added.)

1 “Permitted Uses. In the EFU Zone, the following uses and their accessory
2 uses are permitted using an Administrative Review as set forth in Section
3 9.1(3)(a), unless otherwise noted:³

4 “* * * * *

5 “(g) Reconstruction or modification of *public roads* and highways, not
6 including the addition of travel lanes, where no removal or
7 displacement of buildings will occur, or land parcels result.

8 “* * * * *

9 “(i) Minor betterment of existing *public roads* and highway related
10 facilities such as maintenance yards, weigh stations and rest areas,
11 within right of way existing as of July 1, 1987, and contiguous public-
12 owned property utilized to support the operation and maintenance of
13 public roads and highways.

14 “* * * * *

15 “(p) Normal operation, maintenance, repair, and preservation activities of
16 existing transportation facilities.

17 “(q) Installation of culverts, pathways, medians, fencing, guardrails,
18 lighting, and similar types of improvements within the existing right-
19 of-way.

20 “* * * * *”⁴ (Emphases added.)

21 To summarize, Kelly sought a county permit to “maintain public road #3036.” The
22 precise scope of the activities that might qualify as maintenance is not clear from the
23 application or the decision. The county staff report that supports the permit decision

³ WCZO 9.1(3) provides in relevant part:

“Types of Planning Director Decisions.

“(a) Administrative Review. The Planning Director may be required to make a review or take an action. Authorization of such uses does not require notice to adjacent property owners, and *does not constitute a land use decision pursuant to ORS 197.015(10)*.” (Emphasis added.)

⁴ WCZO 3.1(3) presumably was adopted to implement ORS 215.283(1), which sets out the uses that counties may allow as permitted uses in the EFU zone. WCZO 3.1(3)(g) is very similar to ORS 215.283(1)(L). WCZO 3.1(3)(i) is very similar to ORS 215.283(1)(n). WCZO 3.1(3)(p) and (q) do not appear to have similarly-worded analogues in ORS 215.283(1).

1 describes the requested and authorized activity as “maintain, repair and preserve public road
2 #3036.” Record 44. The notices that accompanied and followed the disputed permit
3 decision seem to identify WCZO 3.1(3)(g), (i), (p) and (q) as the legal authority for the
4 county’s decision to approve Kelly’s permit application.

5 **C. Intervenor’s Motion to Dismiss**

6 In their motion to dismiss, intervenors do not appear to dispute that the county
7 applied the WCZO in approving the disputed permit, which potentially makes that permit a
8 statutory land use decision under ORS 197.015(10)(a), because the WCZO is a land use
9 regulation. ORS 197.015(10)(a)(A)(iii). See n 2. We understand intervenors to argue that
10 the challenged permit is not a land use decision because it qualifies for the ORS
11 197.015(10)(b)(A) exception to the ORS 197.015(10)(a) definition of land use decision.
12 Under the ORS 197.015(10)(b)(A) exception, a decision “[t]hat is made under land use
13 standards that do not require interpretation or the exercise of policy or legal judgment” is not
14 a land use decision. Intervenor’s contend the challenged permit is such a decision.

15 Intervenor’s also argue that the challenged decision does not qualify as a “significant
16 impacts” test land use decision under the Oregon Supreme Court’s decision in *Kerns*.
17 Intervenor’s rely on the following language in *Kerns*:

18 “We do not believe, however, that the legislature intended the myriad of
19 prosaic administrative decisions regarding routine maintenance and minor
20 public works and road projects be subject to LUBA and judicial review for
21 compliance [with the statewide planning goals and comprehensive plan].”
22 *Kerns*, 294 Or at 133-34.

23 Intervenor’s argue:

24 “Nothing about this approval is inconsistent with the EFU zoning designation
25 for the property upon which Rd. #3036 exists. Wheeler County’s Permit
26 approval is precisely the type of ‘prosaic administrative decision’ that the
27 Supreme Court said is not subject to LUBA and judicial review for
28 compliance. Thus, this appeal should be dismissed.” Intervenor’s-
29 Respondent’s Motion to Dismiss 3.

1 **D. Statutory Land Use Decision**

2 We first consider whether the challenged permit qualifies as a land use decision, as
3 ORS 197.015(10) defines that term.⁵ That question turns on whether the WCZO land use
4 standards that the county applied in issuing the permit “do not require interpretation or the
5 exercise of policy or legal judgment,” within the meaning of ORS 197.015(10)(b)(A). If so,
6 the exception applies, and the challenged permit is not a land use decision.

7 The parties’ arguments focus on WCZO 3.1(3)(g) and (i). Under WCZO 3.1(3)(g)
8 and (i), the authorized reconstruction, modification and minor betterment must be to a
9 “public” road. Petitioner argues that the county was required to exercise significant “policy
10 and legal judgment” to answer two questions that had to be answered in issuing the disputed
11 permit. First, is the disputed roadway a “public” road? Second, without regard to whether
12 the disputed road is a public road, does Kelly have legal authority to maintain a roadway that
13 crosses petitioner’s property?

14 **1. WCZO 3.1(3)(p) and (q)**

15 Although the parties’ arguments focus on WCZO 3.1(3)(g) and (i) and both of those
16 subsections authorize reconstruction, modification and minor betterment of “public roads,”
17 WCZO 3.1(3)(p) authorizes “[n]ormal operation, maintenance, repair, and preservation
18 activities of existing transportation facilities.” WCZO 3.1(3)(p) clearly authorizes
19 “maintenance” of an “existing transportation facility,” without regard to whether the
20 transportation facility is a public road. Road 3036 appears to be a transportation facility. If
21 so, even if the county would be required to determine that Road 3036 is a “public road”
22 before it could authorize Kelly to maintain Road 3036 under WCZO 3.1(3)(g) and (i), the

⁵ WCZO 9.1(3) expressly provides that administrative review by the planning director “does not constitute a land use decision * * *.” See n 3. Petitioner argues, and we agree, that if the challenged permit decision falls within the ORS 197.015(10) definition of “land use decision,” that decision is a land use decision and reviewable by LUBA, notwithstanding WCZO 9.1(3).

1 county would be able to rely on WCZO 3.1(3)(p) without such a determination, because
2 WCZO 3.1(3)(p) is not limited to public roads.⁶

3 With regard to petitioner’s contention that the county was required to determine
4 whether Kelly has legal authority to maintain a roadway that crosses petitioner’s property,
5 petitioner cites no legal authority for that alleged requirement. If, as petitioner argues, Kelly
6 lacks needed legal authority to enter onto petitioner’s property to maintain Road 3036,
7 petitioner may take appropriate legal action to preclude such road maintenance activity. The
8 disputed permit does not purport to grant Kelly legal authority to enter onto petitioner’s
9 property to perform road maintenance; rather the permit simply assumes that Kelly has such
10 authority. Again, petitioner cites no legal authority that the county must find that Kelly has
11 legal authority to enter onto petitioner’s property to perform road maintenance.

12 To summarize, in granting the disputed permit the county relied on four separate
13 sources of authority to do so. WCZO 3.1(3)(p) and (q) are two of those sources of authority.
14 The authority granted by WCZO 3.1(3)(p) and (q) is not limited to public roads. No
15 authority cited to us required the county to determine whether Kelly has legal authority to
16 enter onto petitioner’s property to perform road maintenance. Applying WCZO 3.1(3)(p)
17 and (q) to issue the disputed permit did not “require interpretation or the exercise of policy or
18 legal judgment.” The ORS 197.015(10)(b)(B) exception therefore applies and the challenged
19 permit is not a land use decision, to the extent to the extent the county relied on WCZO
20 3.1(3)(p) and (q) to issue the disputed permit.

21 **2. WCZO 3.1(3)(g) and (i)**

22 The reconstruction, modification and minor betterment activities that are authorized
23 by WCZO 3.1(3)(g) and (i) are to be performed on public roads. We understand petitioner to
24 argue that the challenged decision relies in part on WCZO 3.1(3)(g) and (i) and that deciding

⁶ Similarly, WCZO 3.1(3)(q) authorizes “improvements within [an] existing right of way.” WCZO 3.1(3)(q) does not appear to be limited to public roads.

1 whether Road 3036 is a public road for the 2.9 miles that it crosses petitioner’s property
2 requires “interpretation or the exercise of policy or legal judgment.” If petitioner is correct
3 about that, the exception provided by ORS 197.015(10)(b)(A) does not apply, and a permit
4 that relies on WCZO 3.1(3)(g) and (i) is a land use decision.

5 Petitioner asks that we consider extra-record evidence to determine whether the
6 challenged decision qualifies for the ORS 197.015(10)(b)(A) exception. We grant that
7 request. *Vanspeybroeck v. Tillamook County*, 51 Or LUBA 546, 548 (2006); *Hemstreet v.*
8 *Seaside Improvement Comm.*, 16 Or LUBA 630, 631-33 (1988). That extra-record evidence
9 shows that there is a circuit court action in Wheeler County Circuit Court between petitioner
10 and intervenors that has been pending since 2006 and that the county was recently made a
11 party to that litigation. One of the issues in that circuit court action is whether the disputed
12 roadway is a public road. Amended Complaint, paragraph 20.⁷

13 We do not agree with petitioner’s apparent position regarding what the county was
14 obligated to do in deciding that Kelly’s request to maintain the disputed 2.9-mile section of
15 Road 3036 is a permitted use or activity under WCZO 3.1(3)(g) and (i). We understand
16 petitioner to contend that the county was required to establish, as a matter of law, that Road
17 3036 is a public road. We further understand petitioner to contend that doing so will entail
18 the exercise of considerable legal judgment, given the parties pending legal dispute about the
19 status of Road 3036.

20 The pending circuit court action between the parties presumably will establish as a
21 matter of law whether the 2.9-mile portion of Road 3036 that crosses petitioner’s property is
22 a public road. The county planner who rendered the decision in this case lacks jurisdiction
23 and the capability to duplicate the role that the Wheeler County Circuit Court will play in
24 providing a final resolution of the legal dispute between petitioner and intervenors regarding

⁷ West Linn also takes the position in that litigation that petitioner granted West Linn a private easement and that the disputed maintenance is within the scope of that private easement.

1 whether Road 3036 is a public road. The county could not establish as a matter of law
2 whether Road 3036 is a public road, and any attempt by the county planner to do so in this
3 case would run the risk that the county's decision on that point might be at odds with the
4 Wheeler County Circuit Court's ultimate resolution of that issue.

5 The county planner's obligation in ruling on Kelly's permit application was much
6 more limited. What the county was required to do in issuing the disputed permit was to
7 decide whether Kelly's request to maintain a road that is located on EFU-zoned property is a
8 permitted use or activity in the EFU zone. The county identified four subsections of WCZO
9 3.1(3) that it believes authorize the requested maintenance. WCZO 3.1(3)(g), (i), (p) and (q).
10 As we have explained, two of those sections authorize reconstruction, modification and
11 minor betterment of "public roads." WCZO 3.1(3)(g) and (i). To rely on those sections of
12 WCZO 3.1(3), the county was required to decide if the 2.9-mile section of Road 3036 is a
13 public road. There does not appear to be any serious dispute that Road 3036 has been in
14 existence for many years and that the county has historically viewed that road as a county
15 road. The county presumably has maps or other documents the county has developed to
16 identify or inventory county roads. While those maps or inventories may incorrectly show
17 this part of Road 3036 as a county road, we do not understand petitioner to argue that the
18 county has no map or inventory that shows county roads. Petitioner neither alleges nor
19 makes any attempt to establish that consulting whatever maps or other documents the county
20 has that inventory county roads will require "interpretation or the exercise of policy or legal
21 judgment," within the meaning of ORS 197.015(10)(b)(A). In issuing the disputed permit,
22 the county was not required to conduct a trial like the Wheeler Circuit Court is going to have
23 conduct to determine if the county maps or other inventory documents are correct about
24 whether the 2.9-mile section of Road 3036 is a county road.

25 For the reasons explained above, we conclude that the permit that is the subject of
26 this appeal is not a statutory land use decision. The county may be wrong about whether the

1 2.9-mile section of Road 3036 is a public road. If the county is wrong, that error may
2 provide a basis for reversing the county’s permit decision. But petitioner has not
3 demonstrated that approving the disputed permit required “interpretation or the exercise of
4 policy or legal judgment,” within the meaning of ORS 197.015(10)(b)(A). Therefore, the
5 permit is not a statutory land use decision. Unless the permit qualifies as a significant
6 impacts test land use decision, the Wheeler County Circuit Court, not LUBA, has jurisdiction
7 to correct any error the county may have committed in issuing the disputed permit.

8 **E. Significant Impacts Test Land Use Decision**

9 Even though a decision may not fall within the ORS 197.015(10) definition of “land
10 use decision,” that decision may nevertheless be reviewable by LUBA as a land use decision
11 if it “will have [a] significant impact on present or future land uses.” *Billington*, 299 Or at
12 480.

13 The application in this matter requested county permit approval to “maintain Rd.
14 3036 for 2.9 [miles]” and that application was approved by the county. Record 45-46.
15 Although it is somewhat unclear precisely what activities might qualify as maintenance, we
16 do not agree that the disputed permit is a “significant impacts” test land use decision.

17 On its face, the challenged decision does no more than authorize Kelly to perform
18 maintenance on an existing roadway so that it can provide access to West Linn’s property as
19 it presumably has for many years. Petitioner’s suggestion that the improved access that may
20 result from the maintenance might allow additional development on West Linn’s property or
21 interfere with petitioner’s fish and wildlife mitigation project with the Bonneville Power
22 Administration is too speculative to demonstrate that the disputed permit will have a
23 significant impact of present or future land uses. *See Billington*, 299 Or at 479 (significant
24 impact test is not a “would have potential impact” test). In cases where the appellate courts
25 or LUBA have held that a decision would have significant impacts, the impacts included
26 vacations of rights of way or development of undeveloped rights of way rather than mere

1 maintenance of an existing roadway. The impacts in those cases also were more clearly
2 defined, certain and significant. See *Kerns*, 294 Or at 128 (construction of major
3 thoroughfare across a neighborhood park); *Mekkers v. Yamhill County*, 38 Or LUBA 928,
4 931 (2000) (vacation of existing 33-foot wide right of way to be replaced in part with 60-foot
5 right of way that would set “the stage for further development that will alter the character of
6 the surrounding land uses”); *Carlson v. City of Dunes City*, 28 Or LUBA 411, 412 (1994)
7 (paving of 230-foot portion of unimproved right of way that converted public recreational
8 space to a thoroughfare); *Harding v. Clackamas County*, 16 Or LUBA 224, 228 (1987), *aff’d*
9 89 Or App 385, 750 P2d 167 (1988) (vacation of road that would alter traffic pattern of
10 nearby properties).

11 The challenged permit is not a significant impacts test land use decision.

12 **F. Conditional Motion to Transfer**

13 After intervenors filed their motion to dismiss, petitioner filed a conditional motion to
14 transfer this appeal to Wheeler County Circuit Court, pursuant to OAR 661-010-0075(11).⁸
15 We do not understand intervenors to object to petitioner’s motion to transfer. The motion is
16 granted, and this appeal is transferred to Wheeler County Circuit Court.

⁸ OAR 661-010-0075(11)(a) provides:

“Any party may request, pursuant to ORS 34.102, that an appeal be transferred to the circuit court of the county in which the appealed decision was made, in the event the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015(10) or (12).”