BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

7TH STREET STATION, LLC,
Petitioner,

vs.

CITY OF CORVALLIS,
Respondent,

and

SAMUEL HOSKINSON, LESLIE BISHOP,
and MATTHEW BOLDUC,
Intervenors-Respondents.

LUBA No. 2008-069

FINAL OPINION
AND ORDER

Appeal from City of Corvallis.

Bill Kloos, Eugene, represented petitioner.

David E. Coulombe, Corvallis, represented respondent.

Samuel Hoskinson, Leslie Bishop and Matthew Bolduc, Corvallis, represented themselves.

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

RYAN, Board Member, did not participate in the decision.

DISMISSED 12/31/2008

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 city council decision, reflected in the minutes of a city council meeting, to close SW D Avenue to vehicular traffic.

MOTION TO INTERVENE

Samuel Hoskinson, Leslie Bishop and Matthew Bolduc move to intervene on the side of respondent. No party opposes the motion, and it is allowed.

JURISDICTION

The present appeal is apparently part of a long-standing history of disagreement between petitioner and the city regarding the development of petitioner's parcel. For additional history, see *7th Street Station, LLC v. City of Corvallis*, 55 Or LUBA 321 (2007) (remanding two ordinances that remove a planned development overlay from petitioner's property and rezone the property). Petitioner owns a long, narrow parcel that is currently zoned for residential use. Vehicular access to petitioner's property is currently limited to several streets to the west, due to a bordering highway on the south and a railroad track on the east. A north-south street, 7th Street, borders the long western boundary of petitioner's property. D Avenue intersects 7th Street from the west, connecting to 10th Street. D Avenue is a local street, which under the city's transportation system plan (TSP) has the primary function of providing access to immediately adjacent properties. D Avenue is not currently improved to city standards.

Following remand in *7th Street Station*, the city contemplated rezoning petitioner's property for commercial use. Apparently in an attempt to forestall those efforts, on April 1, 2008, petitioner filed preliminary applications to develop a residential use under the existing residential zoning. At an April 7, 2008 city council meeting, the city council directed staff to abandon efforts to rezone petitioner's property, and instead to present a proposal to close D Avenue to vehicular traffic with the apparent intent of reducing traffic impacts on the

neighborhood from petitioner's proposed development. Record 7-8. At an April 21, 2008 meeting, the city council voted unanimously to close D Avenue to vehicular traffic, leaving it open to pedestrian and bicycle access.[1] Record 4. That decision is reflected in the minutes of the April 21 meeting, which the city council adopted at its May 5, 2008 meeting. On May 6, 2008, petitioner appealed to LUBA the city's decision to close D Avenue.

Following appeal to LUBA, petitioner filed a motion to determine whether LUBA has jurisdiction over the appeal. Petitioner argues that city's decision is subject to LUBA's jurisdiction because it is either (1) a statutory land use decision as defined at ORS 197.015(10) or (2) a "significant impacts" land use decision as described in *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 992 (1982). The city disputes that the street closure decision is a statutory or significant impacts land use decision, and requests that we dismiss this appeal. For the reasons that follow, we agree with the city that the city's action is not subject to our jurisdiction.

A. Statutory Land Use Decision

For present purposes, a decision is a statutory "land use decision" subject to LUBA's jurisdiction if it is a final local government decision that "concerns * * * the application" of a comprehensive plan provision or land use regulation. ORS 197.015(10)(a)(A).[2] Among the

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[1] The parties dispute whether that closure is intended to be temporary or permanent. We need not resolve that dispute.

[2] ORS 197.015(10)(a)(A) defines "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:
>
> "(i) The goals;
>
> "(ii) A comprehensive plan provision;
>
> "(iii) A land use regulation; or
>
> "(iv) A new land use regulation[.]"

exceptions to that definition is ORS 197.015(10)(b)(D), which provides that "land use decision" does not include a decision of a local government that "determines final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility that is otherwise authorized by and consistent with the comprehensive plan and land use regulations."[3]

Petitioner argues that the city's action "concerns * * * the application" of a number of city comprehensive plan policies and land use regulations that govern use of local streets. The city advances a number of responses to that argument, but we consider only its dispositive argument that to the extent the city's action falls within the definition of "land use decision" at ORS 197.015(10)(a)(A), it nonetheless falls within the exception to that definition at ORS 197.015(10)(b)(D) and is therefore not a land use decision.

Few cases have interpreted or applied the ORS 197.015(10)(b)(D) exception for decisions that determine "final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility that is otherwise authorized by and consistent with the comprehensive plan and land use regulations." The county relies on *Leathers v. Washington County*, 31 Or LUBA 43 (1996), in which LUBA dismissed an appeal of a county decision that authorized removal of two gates restricting access to a public

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[3] ORS 197.015(10)(b) provides, in relevant part, that "land use decision"

> "Does not include a decision of a local government:
>
> "(A) That is made under land use standards that do not require interpretation or the exercise of policy or legal judgment;
>
> "(B) That approves or denies a building permit issued under clear and objective land use standards;
>
> "* * * * *
>
> "(D) That determines final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility that is otherwise authorized by and consistent with the comprehensive plan and land use regulations[.]"

right of way, effectively eliminating what the neighbors regarded as a *de facto* public park. We concluded, albeit without much analysis, that the challenged decision fell within the ORS 197.015(10)(b)(D) exemption for decisions determining design, construction, and operation of roads. *Id*. at 46. We understand the city to argue in the present case that if *removal* of gates to allow vehicular access to a right of way falls within the ORS 197.015(10)(b)(D) exception, then the converse—*placing* barricades to restrict vehicular access—also falls within the exception.

Petitioner first responds that the city's decision to partially restrict access to D Avenue does not relate to "final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility[.]" According to petitioner, the decision does not determine the "operation" of D Avenue, within the meaning of ORS 197.015(10)(b)(D), but rather determines that it will not "operate" at all. We disagree. The decision restricts vehicular access, while still allowing pedestrian and bicycle access. The decision clearly determines how D Avenue will "operate" and thus determines its "operation" for purposes of ORS 197.015(10)(b)(D).

Petitioner comes closer in arguing that the city's decision does not fall within the exception at ORS 197.015(10)(b)(D) because the city's action to close the street to vehicular traffic is not "otherwise authorized by and consistent with the comprehensive plan and land use regulations." According to petitioner, ORS 197.015(10)(b)(D) applies only when the city's comprehensive plan and land use regulations specifically authorize the "final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility," and the local government's action is simply a ministerial implementation of that plan or code provision. Petitioner argues that nothing in the city's TSP or elsewhere authorizes closure of D Avenue to vehicular traffic. In addition, petitioner argues that the city's action is inconsistent with Corvallis Comprehensive Plan (CCP) Policy 11.3.13 and an identical provision in the TSP, both of which provide:

> "In existing neighborhoods, changes in traffic control, such as the use of diverters and traffic circles for local streets, shall be considered through use of a neighborhood traffic management corridor plan. The area affected by the change in traffic control shall be determined by traffic engineering studies."

Petitioner contends that placing barricades to close D Avenue to vehicular traffic is a "change[] in traffic control" in an existing neighborhood, that can therefore be accomplished only through development of a neighborhood traffic management corridor plan, which the city did not do in the present case. According to petitioner, if the city had such a traffic management corridor plan in hand, then the city's action would be a simple implementation of that plan, and thus would be both "authorized by and consistent with" the city's comprehensive plan and land use regulations. Without such a plan, petitioner argues, the city's action is neither authorized by nor consistent with the city's plan and code.

We disagree with petitioner's understanding of ORS 197.015(10)(b)(D). The first level of analysis in determining the meaning of a statute is to examine its text and context. *PGE* v. *Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993). In our view, the sentence structure of ORS 197.015(10)(b)(D) is ambiguous. Petitioner apparently reads ORS 197.015(10)(b)(D) so that the modifying clause "that is otherwise authorized by and consistent with the comprehensive plan and land use regulations" modifies the entire preceding clause, such that it is the "final engineering design, construction, operation, maintenance, repair or preservation" of the transportation facility that must be authorized by and consistent with the plan and regulations. However, the modifying clause "that is otherwise authorized by and consistent with the comprehensive plan and land use regulations" immediately follows the noun phrase "transportation facility," and can be read to modify only that phrase, as the last antecedent. Under that reading, it is the *transportation facility* that must be "authorized by and consistent with" the plan and land use regulations.

Although both readings are textually plausible, we conclude that the second reading—that the "otherwise authorized by and consistent with" language modifies "transportation facility"—has more textual support and is more consistent with what we

perceive to be the intent of ORS 197.015(10)(b)(D). As noted, that language immediately follows "transportation facility." Modifying clauses are generally presumed to modify the last antecedent, particularly where the last antecedent and the modifying clause are not separated by a comma, as in the present case. *See Concerned Homeowners v. City of Creswell*, 52 Or LUBA 620, 630 (2006), *aff'd* 210 Or App 467, 151 P3d 961 (2007) (applying the "last antecedent" rule).

Further, the text of ORS 197.015(10)(b)(D) appears to describe two distinct classes of transportation-related decisions that are removed from the otherwise broad sweep of the definition of "land use decision." The first class represents "final engineering design" and "construction" approvals for what are presumably new or upgraded transportation facilities. The second class of decisions involve a set of very limited actions (operation, repair, maintenance or preservation) that by their nature apply only to *existing* transportation facilities. The second interpretation—that it is the transportation facility that must be authorized by and consistent with the comprehensive plan and land use regulations—readily accommodates this distinction. With respect to the first class, what is exempted from the definition of land use decision are final engineering design or construction approvals for new or upgraded facilities, where those facilities have been conceptually approved in earlier amendments to the local government's TSP or comprehensive plan. With respect to the second class, what is exempted are relatively routine decisions that relate to existing transportation facilities that are already described and authorized in the TSP.

The interpretation apparently favored by petitioner—that it is the "final engineering design, construction, operation, maintenance, repair or preservation" of the transportation facility that must be authorized by and consistent with the plan and code, rather than or in addition to the transportation facility—is problematic, because it suggests that decisions regarding the operation, repair, maintenance, and preservation of existing transportation facilities are "land use decisions" subject to LUBA's review, unless the TSP or land use code

expressly authorizes those actions. It is highly doubtful that many transportation system plans or land use regulations include express authorization for local governments to "repair" or "maintain" local streets. It is also doubtful that many plans or codes expressly authorize local governments to make routine, but still discretionary, decisions on how existing streets will operate, such as speed limits, lane closures, bridge load capacity, the timing of traffic signals, etc. In the present case, neither petitioner nor the city cites to any express authority in the city's transportation plan to make decisions regarding the operation, repair, maintenance or preservation of city streets, which would mean under that alternative interpretation that such city actions would be "land use decisions" that can be appealed to LUBA. We do not believe that that result would be compatible with the text and apparent purpose of ORS 197.015(10)(b)(D).

For those reasons, we interpret ORS 197.015(10)(b)(D) to provide that it is the *transportation facility* that must be "authorized by and consistent with" the comprehensive plan and land use regulations. That interpretation is consistent with our conclusion in *Leathers* that a decision to open an existing street to vehicular traffic falls within the ORS 197.015(10)(b)(D) exception for decisions affecting the operation of a transportation facility. For the same reason, a decision to close an existing transportation facility to vehicular traffic also falls within the exception. Because the challenged decision is exempt from the definition of "land use decision" at ORS 197.015(10)(a), it is therefore not a decision subject to our jurisdiction under that statute.

B. Significant Impacts Land Use Decision

Because the challenged decision is statutorily excluded from the definition of "land use decision" at ORS 197.015(10)(a), LUBA cannot exercise jurisdiction over it, even if it would otherwise fall within the ambit of a "significant impacts" land use decision as described in *City of Pendleton v. Kerns*, 294 Or 126, 134, 653 P2d 992 (1982). *Oregonians in Action v. LCDC*, 103 Or App 35, 38, 795 P2d 1098 (1990); *Leathers*, 31 Or LUBA at 46.

RECORD OBJECTION; MOTION TO STRIKE

Pending before the Board are petitioner's objections to the record and the city's motion to strike portions of petitioner's objections. Because we have determined we do not have jurisdiction over this appeal, we do not resolve the objection or the motion.

Petitioner has not filed a motion to transfer this appeal to circuit court, pursuant to OAR 661-010-0075(11). Therefore, the appeal is dismissed.