

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

KATHRYN JANE PHILLIPS,
Petitioner,

vs.

POLK COUNTY,
Respondent,

and

DAVID HARRIS,
Intervenor-Respondent.

LUBA No. 2023-014

FINAL OPINION
AND ORDER

Appeal from Polk County.

Kathryn Jane Phillips represented themselves.

Morgan B. Smith represented respondent.

David Harris represented themselves.

RYAN, Board Chair; RUDD, Board Member; ZAMUDIO, Board
Member, participated in the decision.

DISMISSED

04/13/2023

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

Opinion by Ryan.

NATURE OF THE DECISION

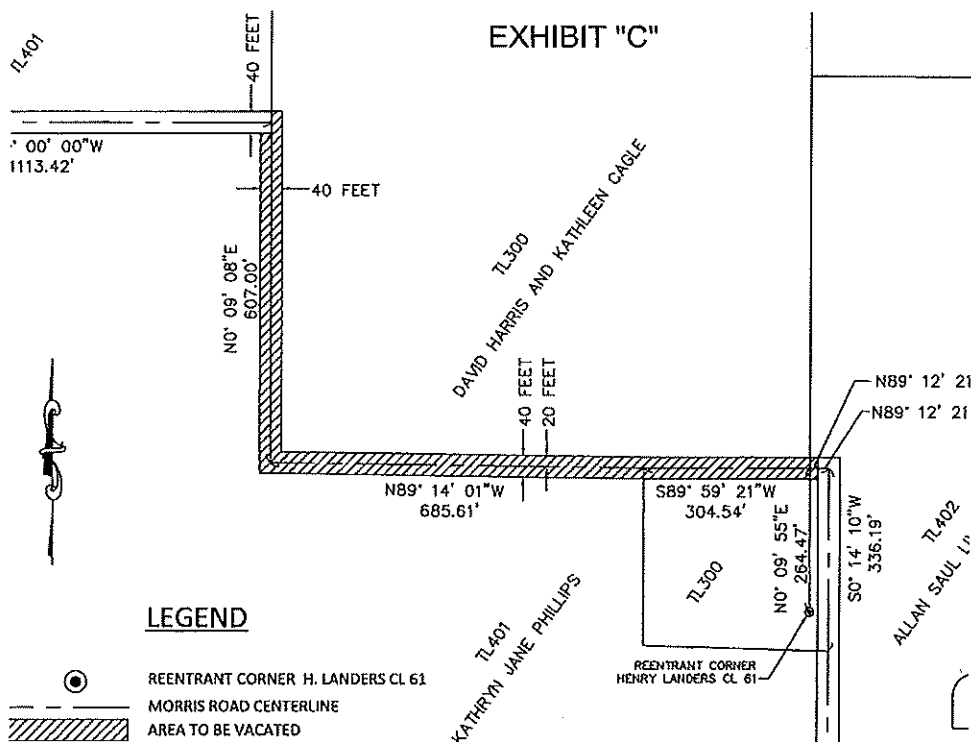
Petitioner appeals a board of county commissioners decision vacating an unimproved portion of a right-of-way pursuant to ORS 368.326 to 368.366.

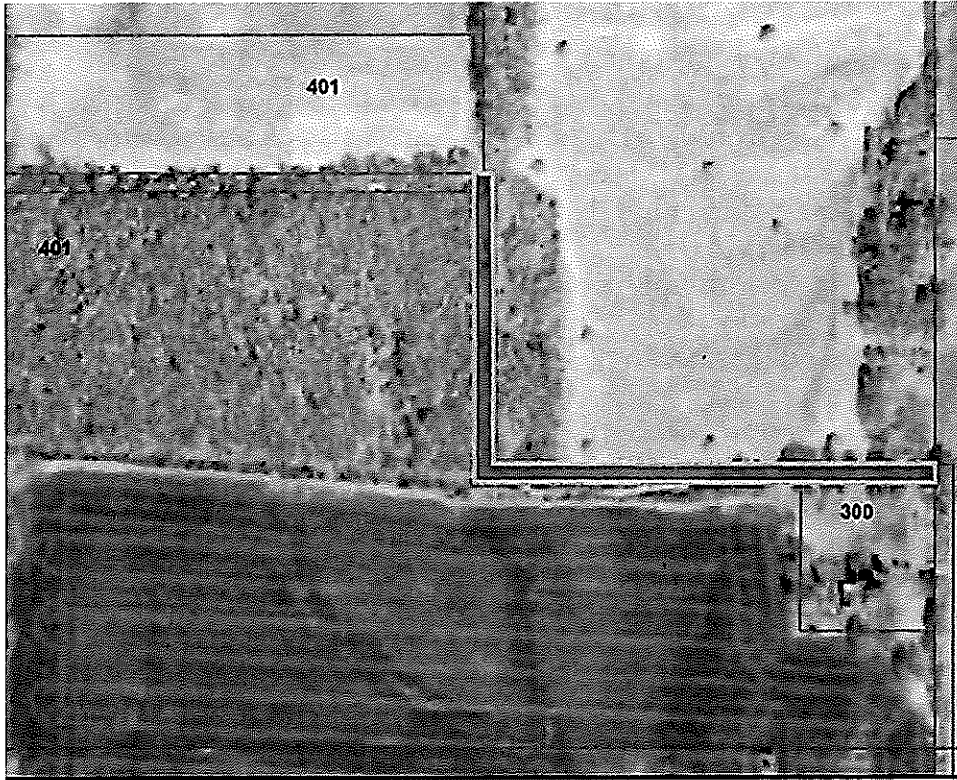
MOTION TO INTERVENE

David Harris (intervenor) moves to intervene on the side of the county. The motion is allowed.

FACTS

The graphic and photo and below are reproduced from the challenged decision.





Record 4.

Petitioner owns Tax Lot 401, seen primarily on the left side of the above graphic and photo. Intervenor owns Tax Lot 300, seen on the right side of the above graphic and photo. The majority of Tax Lot 401 is currently used for grass farming, and the northernmost approximately three acres of Tax Lot 401 are planted with a vineyard. Record 11, 34. Between the grass field and the vineyard are approximately 20 acres of trees. Tax Lot 300 is currently in farm use and includes a dwelling. Tax Lot 402 is east of both Tax Lots 401 and 300.

Both Tax Lots 300 and 401 have land on each side of Morris Road, a county road. The portion of Morris Road that runs south to north between Tax Lot 402 on its east and Tax Lot 401 and then Tax Lot 300 on its west is improved

1 with gravel and maintained by the county. At approximately 264 feet north of the
2 southeast corner of Tax Lot 300, Morris Road jogs west at a 90-degree angle,
3 crosses Tax Lot 300 for approximately 304 feet, and then continues west for
4 approximately 685 more feet along the boundary between Tax Lots 300 and 401.
5 At that point, Morris Road jogs north at a 90-degree angle for approximately 607
6 feet along the boundary between Tax Lots 300 and 401, where it jogs west again
7 at a 90-degree angle through Tax Lot 401, petitioner's property. The portion of
8 Morris Road that runs along the boundary between Tax Lots 300 and 401 is 40
9 feet wide, unimproved, and not maintained by the county. Record 3, 34.

10 Intervenor submitted an application to vacate the unimproved portion of
11 Morris Road pursuant to ORS 386.326 to 368.366. The board of county
12 commissioners held a hearing on the application and adopted an order vacating
13 the portion of Morris Road marked in the above graphic and photo. This appeal
14 followed.

15 **JURISDICTION**

16 The county moves to dismiss the appeal. The county argues that the
17 challenged decision is neither a statutory "land use decision," as that term is
18 defined at ORS 197.015(10), nor a "significant impacts" land use decision, as
19 described in *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 992 (1982), and
20 that LUBA therefore lacks jurisdiction over the appeal.

21 As the party seeking LUBA review, the burden is on petitioner to establish
22 that the appealed decision is a land use decision. *Billington v. Polk County*, 299

1 Or 471, 475, 703 P2d 232 (1985). After the county moved to dismiss the appeal,
2 petitioner filed a response to the county's motion to dismiss. For the following
3 reasons, we agree with the county that we lack jurisdiction over the appeal.

4 **A. ORS 197.015(10)**

5 "Land use decision" includes a local government decision that concerns
6 the adoption, amendment, or application of:

7 "(i) The goals;

8 "(ii) A comprehensive plan provision;

9 "(iii) A land use regulation; or

10 "(iv) A new land use regulation[.]" ORS 197.015(10)(a)(A).

11 A local government decision "concerns" the application of a statewide planning
12 goal, comprehensive plan provision, or land use regulation only if the decision-
13 maker (1) was required by law to apply the goal, plan provision, or land use
14 regulation as an approval standard, but did not, or (2) in fact applied the goal,
15 plan provision, or land use regulation. *Angius v. Clean Water Services District*,
16 50 Or LUBA 154, 156 (2005) (citing *Jaqua v. City of Springfield*, 46 Or LUBA
17 566, 574, *rev'd on other grounds*, 193 Or App 573, 91 P3d 817 (2004)).

18 We understand petitioner to argue that the decision is a land use decision
19 because the county was required but failed to apply Polk County Comprehensive

1 Plan (PCCP) Agricultural Lands Goals 1 and 3.¹ We understand petitioner to
2 argue that they use the unimproved portion of Morris Road that was vacated to
3 access the northern part of Tax Lot 401 directly from the improved portion of
4 Morris Road.

5 We have held that the fact that a road vacation touches on land use in the
6 surrounding area does not mean that the provisions of the county's
7 comprehensive plan apply as approval standards. *See Billington*, 299 Or at 475
8 (a decision that "merely touches" some aspects of a comprehensive plan is not a
9 statutory land use decision); *Knee Deep Cattle Company v. Lane County*, 28 Or
10 LUBA 288 (1994), *aff'd*, 133 Or App 120, 890 P2d 449 (1995) (same);
11 *Bohnenkamp v. Clackamas County*, 56 Or LUBA 17 (2008) (a decision vacating
12 a 30-by-100-foot section of a public right-of-way is not a statutory land use
13 decision that "concerns" the application of local land use regulations, even if, in
14 the course of addressing the statutory "public interest" road vacation standard,
15 the county considers the zoning map or zoning regulations that govern the
16 surrounding area). Absent any developed argument regarding why PCCP
17 Agricultural Lands Goals 1 and 3 are approval standards that the county was
18 required to apply in making its decision, we conclude that petitioner has not

¹ PCCP Agricultural Lands Goal 1, is "[t]o preserve and protect agricultural lands within Polk County." PCCP Agricultural Lands Goal 3 is "[t]o preserve and protect those resources considered essential for the continued stability of agriculture within Polk County."

1 established that the county was required to apply those provisions or that the
2 challenged decision is a statutory land use decision.

3 **B. Significant Impacts Land Use Decision**

4 The significant impacts test is a judicially created doctrine first articulated
5 in *Kerns*, 294 Or 126. In *Kerns*, the Supreme Court held that a local government
6 decision that is not a statutory land use decision may nonetheless be subject to
7 LUBA's jurisdiction if the decision will have a "significant impact" on present
8 or future land uses in the area. 294 Or at 134. The county also argues that the
9 challenged decision is not a "significant impacts" land use decision subject to
10 LUBA's jurisdiction.

11 Several cases have applied that doctrine to road vacation decisions. In
12 *Billington v. Polk County*, 10 Or LUBA 135, *rev'd and rem'd*, 68 Or App 914,
13 683 P2d 568 (1984), *rem'd*, 299 Or 471, 703 P2d 232 (1985), the county vacated
14 20 feet of a 40-foot-wide right-of-way that was 1,400 feet in length. After
15 LUBA's initial decision was remanded, LUBA concluded that the road vacation
16 did not qualify as a "significant impacts" land use decision, noting that the
17 vacated portion of the right-of-way had never been used for vehicular travel and
18 that the partial vacation would therefore maintain the status quo in the area.
19 *Billington v. Polk Co.*, 14 Or LUBA 173 (1985). In *Pacific Western Co. v. Lincoln*
20 *County*, 32 Or LUBA 317, *aff'd*, 148 Or App 272, 939 P2d 173, *rev den*, 326 Or
21 57 (1997), LUBA held that the vacation of 105 feet at the end of a road that
22 provided access to the petitioner's property was not a significant impacts land

1 use decision.² Of particular importance, LUBA noted that there was other access
2 to the petitioner's property.

3 Here, the county argues that petitioner continues to have access to all of
4 their farm directly from the improved and maintained portion of Morris Road.
5 The county points out that the portion of the right-of-way that was vacated has
6 never been improved or maintained by the county.

7 Although it is difficult to follow, we understand petitioner to argue that the
8 county's decision will have a significant impact on the present use of their land
9 because petitioner uses the unimproved portion of Morris Road that was vacated
10 to access the northernmost approximately three acres of Tax Lot 401, which are
11 planted with a vineyard, directly from the improved and maintained portion of
12 Morris Road. We understand petitioner to argue that, if the unimproved portion
13 of Morris Road is vacated, petitioner will have to construct new access
14 somewhere on their property in order to access the vineyard, which will remove
15 some of that land from current farm production. Response to Motion to Dismiss
16 4. We also understand petitioner to argue that vacating the unimproved portion
17 of Morris Road will have a significant impact on the future use of their land,
18 namely potential future lot line adjustments and the location of a potential future
19 residence.

² Because the petitioner had filed a motion to transfer, we transferred that appeal to circuit court.

1 For the following reasons, we conclude that petitioner has not established
2 that the decision to vacate the unimproved portion of the right-of-way will have
3 a significant impact on the present or future use of their land. We first note that,
4 presumably, title to the 20-foot-wide portion of Morris Road lying on Tax Lot
5 401 will vest in petitioner, and, as the owner of the property, petitioner will have
6 the ability to use that area for access. Second, the record includes evidence from
7 petitioner's neighbor that petitioner and their contractors have used other roads
8 on the property for vehicular access to the northern part of Tax Lot 401.³

³ The record includes testimony from the owner of Tax Lot 800, which is located directly to the north of Tax Lot 401:

“[Petitioner] has a small 3 acre vineyard that borders our property on the south and west of [intervenor]. She claims she can't get to her vineyard without using the abandoned road. I can testify that is not true. About 7 years ago, she picked me up and took me over there to look at the piece and to give my opinion on whether it would make a good place for grapes. At no time did we drive down the road. It was fairly impassible, so she drove on the north side of her [grass] farm and then cut through the woods coming out on the proposed site. In addition, when she put the vineyard in, neither she nor her labor contractor used the road, And, before all that, Larry Berger didn't use the road when he farmed the piece.

“From what I've been told, the road was abandoned in 1946 and it looks like it. It would be difficult to walk down it or drive a vehicle on it. The brush is impenetrable and the trees growing up in the middle of the road bed adjacent to my farm look to be 75 years old. They are big enough to do considerable damage to about 300' of my fence during the last ice storm even though we are 50 to 60 feet off the right of way.” Record 11.

1 Petitioner does not dispute that they can access their property directly from the
2 improved portion of Morris Road or that they have accessed the northern part of
3 Tax Lot 401 via other parts of Tax Lot 401. Thus, we conclude that petitioner has
4 not established that the road vacation will change the land use status quo.

5 We also understand petitioner to argue that the county's decision will have
6 a significant impact on the future use of their land because it will limit future
7 development opportunities for the property. As we understand the argument, the
8 unimproved portion of Morris Road could, in the future, if improved, provide
9 connectivity to other public roads, and vacating the unimproved portion of the
10 right-of-way will somehow impact future applications for lot line adjustments or
11 a dwelling on Tax Lot 401.

12 To qualify as a significant impacts land use decision, the decision must
13 create an actual, qualitatively or quantitatively significant impact on present or
14 future land uses, and the expected impacts must be likely to occur as a result of
15 the decision, not speculative. *Carlson v. City of Dunes City*, 28 Or LUBA 411,
16 414 (1994). We conclude that petitioner has not established that vacating the
17 unimproved portion of the right-of-way will limit future opportunities for
18 petitioner to develop their exclusive-farm-use-zoned parcel; those impacts are
19 speculative.⁴ Petitioner has not explained why any of the uses that could, in

⁴ Petitioner lists as examples "winery, cidery, agritourism, development of residence(s), equipment storage, solar and wind generation locations, or, product production structures." Response to Motion to Dismiss 8.

1 theory, be developed on their property would be unable to take access from the
2 existing public roads that provide access to the property or why the vacation
3 otherwise necessarily limits development.

4 **C. Conclusion**

5 For the foregoing reasons, petitioner has not established that the decision
6 is either a statutory or a significant impacts land use decision subject to LUBA's
7 limited jurisdiction.

8 Petitioner has not moved for this appeal to be transferred to circuit court
9 pursuant to ORS 34.102 and OAR 661-010-0075(9). Accordingly, this appeal
10 must be dismissed.

11 The appeal is dismissed.