

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

3
4 WALLACE MEKKERS, LYNN MEKKERS, RUTH
5 CURYEA, JAMES HEISER, CARLENE HEISER,
6 DAVID ROOT, DONNA ROOT, DONALD GILL,
7 BARBARA GILL, CHARLOTTE BORGAN, DON
8 OLIVER, JEAN OLIVER, FRED LEVANGER,
9 JOAN LEVANGER, DAVID KERNAN, JERILYNN
10 KERNAN, CRAIG HAMER and KATRINA HAMER,
11 *Petitioners,*

12
13 vs.

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15 YAMHILL COUNTY,
16 *Respondent,*

17
18 and

19
20 RAY KAUER and HOWARD ASTER,
21 *Intervenors-respondent.*

22
23 LUBA No. 2000-067

24 ORDER ON MOTIONS TO DISMISS

25 The decision challenged in this case is the county’s vacation of a portion of Redmond
26 Hill Road. The county and intervenors-respondent move to dismiss this appeal, on the
27 grounds that the challenged decision is not subject to LUBA’s jurisdiction as a land use or
28 limited land use decision as defined at ORS 197.015(10) and (12), or as a “significant
29 impacts” land use decision described in *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 992
30 (1982).

31 We derive the following relevant facts from the parties’ pleadings. Redmond Hill
32 Road is a graveled county road running east-west, with a right-of-way 33 feet in width and an
33 existing gravel lane 21 feet in width. The city limits of McMinnville are adjacent to the
34 north. Intervenors-respondent propose to develop a subdivision within the city limits on
35 property north of and adjacent to the Redmond Hill Road right-of-way. The proposed
36 subdivision development plan calls for creation of a new city street within the subdivision

1 and vacation of the eastern portion of Redmond Hill Road, approximately one-third of a mile
2 in length, to its intersection with South Hill Road. The proposed new city street will have a
3 60-foot right-of-way with a 40-foot paved width. The city street will run westward from
4 South Hill Road approximately 100 feet north of and parallel to Redmond Hill Road, and
5 then curve south to join with Redmond Hill Road after one-third of a mile. The vacated
6 portion of Redmond Hill Road provides access to several residential properties owned by
7 petitioners. After the proposed vacation is effective, the remaining portion of Redmond Hill
8 Road and the new city street will provide access to those properties. The vacation and
9 realignment of Redmond Hill Road is not necessary for intervenors to develop their property
10 north of the road, but it will avoid a safety hazard caused by having two streets access onto
11 South Hill Road in close proximity to each other. Further, vacation of Redmond Hill Road
12 will facilitate development of intervenors' property and property further to the east. To
13 conform with the tentative subdivision plat for the development north of the Redmond Hill
14 Road, the vacated portion of the road will ultimately be annexed into the city. Subsequent
15 phases of intervenors' development may require realignment of the remainder of Redmond
16 Hill Road.

17 No party in this case contends that the challenged decision is a "land use decision" or
18 "limited land use decision" as defined at ORS 197.015(10) and (12). However, petitioners
19 argue that the challenged road vacation qualifies as a "significant impact" land use decision
20 subject to LUBA's jurisdiction.

21 LUBA has jurisdiction over the instant road vacation if that decision will have a
22 "significant impact" on present or future land uses in the area. *Kerns*, 249 Or at 134. That
23 test is met if the decision creates an actual, qualitatively or quantitatively significant impact
24 on present or future land uses. *Carlson v. City of Dunes City*, 28 Or LUBA 411, 414 (1994);
25 *Keating v. Heceta Water District*, 24 Or LUBA 175, 181-82 (1992). Based on the following
26 review of relevant case law, we conclude that the challenged decision significantly impacts

1 present or future land uses in the area and thus is a land use decision subject to our
2 jurisdiction.

3 In *Kerns*, the city proposed to improve a dedicated but unimproved city street that had
4 been used as a *de facto* neighborhood park for some years. The Court held that the city’s
5 decision, which it characterized as turning a neighborhood park in a quiet residential area
6 into a major thoroughfare, “effects a significant change in land use *status quo* of the area and
7 is not simply the *de minimis* street improvement project.” *Kerns* 294 Or at 133; *see also*
8 *Carlson*, 28 Or LUBA at 415 (paving 230-foot portion of an unimproved right-of way
9 leading to the beach has significant impacts on land uses because it converts public
10 recreational space to a thoroughfare).

11 In *Harding v. Clackamas County*, 16 Or LUBA 224, 232 (1987), *aff’d* 89 Or App
12 385, 750 P2d 167 (1988), we found that a decision vacating a road was a significant impact
13 land use decision because the vacation of the road would alter “the existing traffic pattern of
14 nearby property owners having a right of access to the street.” We reached that conclusion
15 notwithstanding that the decision granted the petitioners direct access to other streets to
16 replace that lost through the road vacation.

17 We reached a different conclusion in *Billington v. Polk County*, 14 Or LUBA 173,
18 174-75 (1985), where we held that a vacation of the westerly 20-foot portion of a 40-foot
19 right of way did not have a significant impact on land uses, because the vacated portion of
20 the road had never been used for vehicular travel and was occupied by trees, utility poles and
21 other obstructions. We concluded that, unlike the decision at issue in *Kerns*, the county’s
22 vacation merely maintained the status quo in a rural farming area and did not qualify as a
23 land use decision under the “significant impacts” test.

24 The present case resembles *Harding* and, to a lesser extent, *Kerns* and *Carlson* more
25 than *Billington*. Similar to *Harding*, the road vacation in the present case alters the existing
26 traffic pattern of nearby property owners that have a right of access to the vacated street and,

1 from that street, to the nearby transportation system. As was the case in *Harding*, the fact
2 that the challenged decision offers affected land owners alternate access to replace that lost
3 through the road vacation does not alter the analysis. Finally, although to a lesser degree
4 than the road vacation at issue in *Kerns* or the road improvement in *Carlson*, the road
5 vacation in the present case facilitates and sets the stage for further development that will
6 alter the character of the surrounding land uses. We conclude that the vacating and
7 realigning of Redmond Hill Road “effects a significant change in land use *status quo* of the
8 area” and is therefore a significant impacts land use decision subject to our jurisdiction.
9 *Kerns* 294 Or at 133.

10 The motions to dismiss are denied.

11 In orders dated June 1, 2000 and August 18, 2000, we suspended further review
12 proceedings in this appeal pending, respectively, resolution of these motions to dismiss and a
13 circuit court action in a related case. The parties inform us that the circuit court has stayed its
14 proceedings pending our resolution of these motions to dismiss. Our resolution of these
15 motions to dismiss therefore removes all impediments to continuation of these proceedings.
16 Accordingly, the record in this case shall be filed within 21 days of the date of this order.

17 Dated this 30th day of August, 2000.

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Tod A. Bassham
Board Chair