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. 2024-031

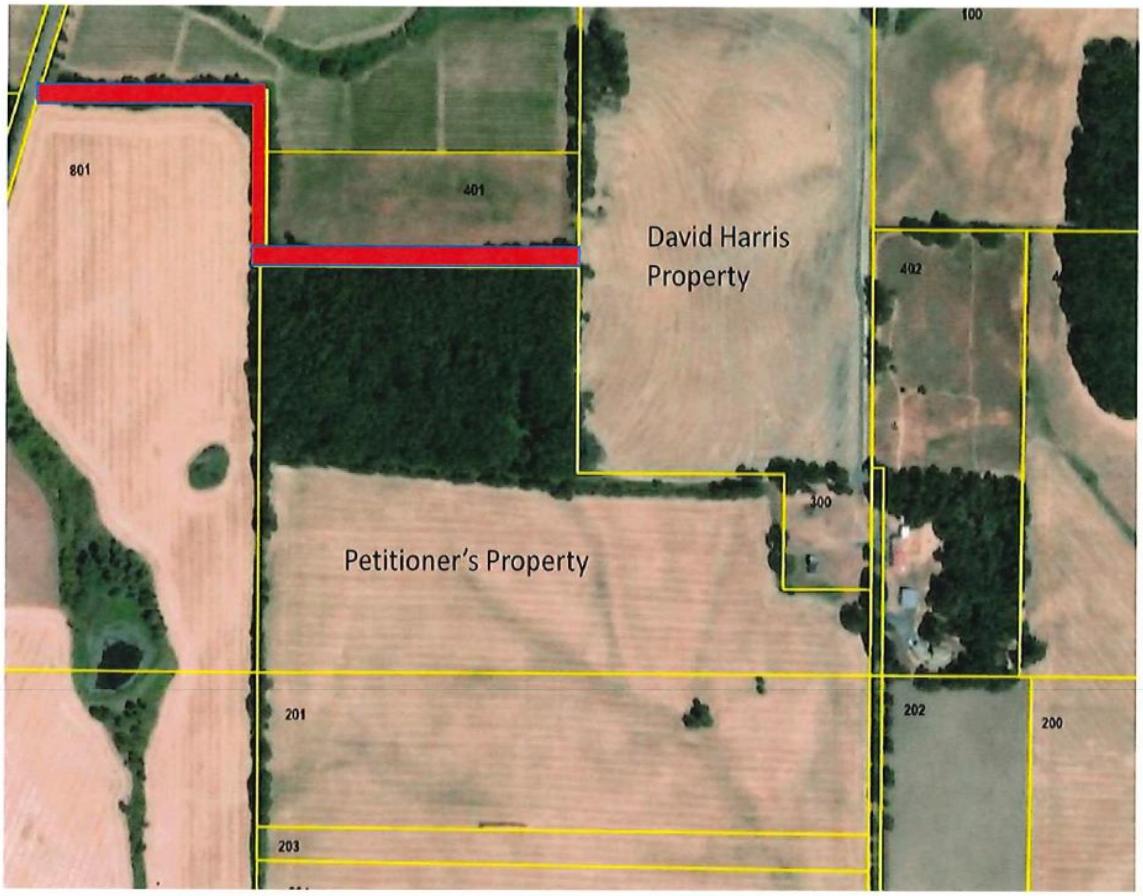
ORDER

INTRODUCTION

On May 8, 2024, petitioner filed a notice of intent to appeal Order 24-03 (Order), a board of commissioners' decision vacating an unimproved right-of-way that bisects a portion of petitioner's property and other property. On May 24, 2024, the county filed a motion to dismiss the appeal. In a June 11, 2024, order, we suspended all deadlines in the appeal except the deadline for petitioner to respond to the motion to dismiss. On June 14, 2024, LUBA received petitioner's response to the motion to dismiss (Response). We set out the facts and then resolve the motion to dismiss.

FACTS

The photo below is reproduced from Exhibit C to the county's motion to dismiss.



Petitioner's property is zoned exclusive farm use (EFU) and is used for farming. Petitioner's property is accessed from Morris Road, an improved public road.

The red line shows the unimproved county right-of-way proposed for vacation. As illustrated, the unimproved right-of-way bisects a portion of petitioner's property before turning north along the western property line of the property, then turning again and continuing west between other properties before

terminating on the west at Perrydale Road, an improved county road. On its eastern terminus the unimproved county right-of-way dead ends where it previously connected to a now-vacated portion of Morris Road, which was vacated by the county in 2023.[1]

Pursuant to ORS 368.326 to 368.366, the board of commissioners initiated proceedings to vacate the unimproved right-of-way, held a hearing on the vacation of the right-of-way, and adopted the Order. Thereafter, petitioner appealed the Order to LUBA.

JURISDICTION

The county moved to dismiss this appeal for lack of jurisdiction. Petitioner then filed a lengthy and difficult to understand response (the Response).[2] As the party seeking LUBA's review, the burden is on petitioner to establish that the appealed decision is subject to LUBA's jurisdiction. *Billington v. Polk County*, 299 Or 471, 475, 703 P2d 232 (1985).

A. Statutory Land Use Decision

LUBA has exclusive jurisdiction to review "any land use decision * * * of a local government, special district or a state agency." ORS 197.825(1). ORS

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[1] That vacation was appealed to LUBA in *Phillips v. Polk County*, ___ Or LUBA ___ (LUBA No 2023-014, Apr 13, 2023), *aff'd*, 328 Or App 543 (2023) (nonprecedential memorandum appeal), *rev den*, ___ Or ___ (2024).

[2] The Response includes "assignments of error," which are premature at this stage. OAR 661-010-0030(4)(d) requires the petition for review to include assignments of error.

197.015(10)(a)(A) provides that the definition of a "[l]and use decision" includes a local government decision 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[.]"

The Supreme Court, Court of Appeals, and LUBA have held that the fact that a road vacation touches on land use in the surrounding area does not mean that the provisions of the county's comprehensive plan apply as approval standards. *See Billington*, 299 Or at 475 (a decision that "merely touches some aspects of a comprehensive plan[]" is not a statutory land use decision); *Knee Deep Cattle Company v. Lane County*, 28 Or LUBA 288, 297-98 (1994), *aff'd*, 133 Or App 120, 890 P2d 449 (1995) (that LUBA may consider a statewide planning goal that is implemented by a particular plan provision in determining whether a local government's interpretation should be affirmed does not make that goal an approval standard); *Bohnenkamp v. Clackamas County*, 56 Or LUBA 17, 21-22 (2008) (a decision vacating a 30-by-100-foot section of a public right-of-way is not a statutory land use decision that "concerns" the application of local land use regulations, even if, in the course of addressing the statutory "public interest" road vacation standard, the county considers the zoning map or zoning regulations that govern the surrounding area).

Petitioner cites and quotes several provisions of the Polk County Comprehensive Plan (PCCP) to establish that the Order is a statutory land use decision. We address those arguments below.

1. PCCP Section 2(D) Natural Resources, Policies 8.1-8.3

Petitioner cites and quotes provisions of the PCCP, Section 2(D), Natural Resources, Policies 8.1, 8.2, and 8.3.[3] Response 2-1, 2-2. Petitioner argues that

[3] These sections provide:

> "8. Historical, Archaeological and Cultural Resources
>
> "8.1 Polk County will work with the Polk County Museum Commission, the Polk County Historical Society, the State Historic Preservation Office (SHPO) and other interested groups and individuals to encourage the preservation of identified sites of cultural, historic and archaeological significance (Amended by Ord. 89-18, dated Dec. 20, 1989).
>
> "8.2 Polk County will protect significant historic, archaeological and cultural resources by:
>
> "a. Encouraging programs that make preservation economically possible;
>
> "b. Maintaining an inventory of significant historic, archaeological and cultural resources in the [c]ounty; and
>
> "c. Developing and implementing a program to review and regulate activities which may impact historic, archaeological and cultural resources per Statewide [Planning] Goal 5 [(Natural Resources, Scenic and Historic Areas, Open Spaces)] and OAR 660-16 (Amended by Ord. 89-18, dated Dec. 20, 1989).

these PCCP provisions required the county to evaluate the potential historical significance of the vacated right-of-way in determining whether to vacate the right-of-way. However, petitioner does not establish that the right-of-way is an "identified" cultural, historic or archaeologically significant site, that it is included on the county's inventory of significant sites, or that the county was required to revisit an existing inventory for potential additions prior to approving the vacation. The county was not required to apply PCCP 2(D), Policies 8.1-8.3.

2. PCCP 2(G) Recreational Needs, Policy 4.3

Petitioner cites and quotes PCCP 2(G), Recreational Needs, Policy 4.3, which provides in part that "Polk [County] will also review all pieces of public property proposed for vacation, abandonment or sale for possible recreational usage." Response 2-2 and 2-3. Petitioner argues that "[t]his provision requires a thorough review to assess whether the vacated land can serve recreational purposes, ensuring compliance with local land use planning goals and policies." Response 2-3. We understand petitioner to argue that because the subject of the Order is "public property proposed for vacation," PCCP 2(G), Policy 4.3, applies and required the county to review the right-of-way for possible recreational usage.

> "8.3 When adequate information becomes available, Polk County shall evaluate its 1-B historic resources for inclusion on the inventory or designation as a significant (1-C) resource and, where appropriate, provide protection under the [c]ounty's Historic Resources Chapter of the Zoning Ordinance."

While we disagree with petitioner that the language of Policy 4.3 requires a "thorough" review, the language of PCCP 2(G), Policy 4.3, is specific. It is phrased in mandatory terms, and directs the county to review proposed vacations of public property for possible recreational usage. Therefore, the decision whether to vacate the right-of-way does more than merely "touch on" an aspect of the comprehensive plan. Absent any response or explanation from the county explaining why the county is not required to apply that provision when public property is proposed for vacation, we conclude that it is.

3. PCCP 2(B), Agricultural Lands, Goals 1 through 3

Finally, in a portion of the Response, petitioner cites and quotes PCCP B, Agricultural Lands, Goals 1 through 3.[4] Response 2-19, 2-20. Petitioner argues that vacating the right-of-way "prevents petitioner from accessing her land to exercise her property rights, specifically the right to farm." Response 2-21. However, petitioner does not develop any argument regarding why the right-of-way vacation does more than merely touch on an aspect of the PCCP. Absent any

[4] PCCP 2(B), Goals 1 through 3, are:

> "1. To preserve and protect agricultural lands within Polk County.
>
> "2. To diversify agriculture within Polk County.
>
> "3. To preserve and protect those resources considered essential for the continued stability of agriculture within Polk County."

argument establishing that they apply, we conclude that Goals 1 through 3 do not apply.

4. Conclusion

As explained above, PCCP 2(G), Policy 4.3 applies to the county's decision to vacate the road, and therefore the decision is a "land use decision" as defined in ORS 197.015(10)(a).

B. Significant Impacts Decision

The significant impacts doctrine vests LUBA with jurisdiction over certain decisions that are not statutory land use decisions.[5] The significant impacts doctrine was first articulated in 1977 in *Petersen v. Klamath Falls*, 279 Or 249, 566 P2d 1193 (1977), two years before LUBA was created by the legislature in 1979, and before the first definition of "land use decision" was enacted at the same time that LUBA was created. Or Laws 1979, ch 772, §§ 3-4. *Petersen* involved *circuit court* review in a writ of review proceeding of a City of Klamath

[5] The Court of Appeals has explained:

> "The 'significant impact test' was devised to *supplement the legislative grant of jurisdiction to LUBA*, by making some land use actions reviewable that do not meet the statutory definition of a 'land use decision.' *See Wagner v. Marion County*, 79 Or App 233, 719 P 2d 31, rev den, 302 Or 86, 726 P 2d 1185 (1987)." *Oregonians in Action v. LCDC*, 103 Or App 35, 38, 795 P2d 1098 (1990) (emphases added).

Falls ordinance annexing into the city 141 acres of land in agricultural use. At that time, ORS 197.175 (1973) provided in relevant part:

> "(1) Cities and counties shall exercise *their planning and zoning responsibilities* in accordance with ORS 197.005 to 197.430, 215.055, 215.510, 215.515, 215.535 and 469.350 and the state-wide planning goals and guidelines approved under ORS 197.005 to 197.430, 215.055, 215.510, 215.515, 215.535 and 469.350.
>
> "(2) "Pursuant to ORS 197.005 to 197.430, 215.055, 215.510, 215.515, 215.535 and 469.350, each city and county in this state shall:
>
> > "(a) Prepare and adopt comprehensive plans consistent with state-wide planning goals and guidelines approved by the commission; and
> >
> > "(b) Enact zoning, subdivision and other ordinances or regulations to implement their comprehensive plans." *Petersen*, 279 Or at 251, 253 n 3 (emphasis added.)[6]

In the ordinance annexing the property, the city did not adopt any findings addressing the statewide goals. The petitioners filed a writ of review in circuit court, and the circuit court upheld the ordinance. The Court of Appeals upheld the circuit court's decision, concluding that the annexation of land did not qualify

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[6] ORS 215.515 (1969) adopted the statewide interim goals and included an urbanization goal and an agricultural lands goal. ORS 197.225 directed the LCDC to adopt the goals, and the LCDC goals were adopted by the LCDC in late 1974. *Petersen*, 279 Or at 257 n 7. At the time the challenged annexation ordinance was adopted, the city had adopted a comprehensive plan but that plan had not yet been acknowledged by the LCDC.

as an exercise of the city's responsibilities under ORS 197.175(1) because the zoning of the property was unchanged after the annexation.

The Supreme Court reversed, holding that a city's decision to annex land outside its existing borders is an exercise of the city's "planning * * * responsibilities" within the meaning of ORS 197.175(1) (1973), even if the land's zoning remained the same after annexation. *Petersen*, 279 Or at 255. The Supreme Court held:

> "In other words, the exercise of 'planning and zoning responsibilities' [under ORS 197.175(1)] must be read to refer not only to the preparation of comprehensive plans and the enactment of zoning and other ordinances to implement those plans but also to other local planning activities which will have a significant impact on present or future land uses, such as the decision to extend city boundaries by annexation." *Id.* at 253-54.

The Supreme Court reversed and remanded the decision to the city council to apply the goals. And thus, in the context of interpreting the meaning of the phrase "planning and zoning responsibilities" in ORS 197.175(1) as it applied to a city council ordinance annexing property, the significant impacts test was born.[7]

In 1979, two years after *Petersen* was decided, the legislature created LUBA and gave LUBA exclusive jurisdiction to review "land use decisions" as

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[7] The Court also held that, pursuant to ORS 197.300(1)(d) (1973), the LCDC had "the authority to review local ordinances which relate to activities designated in the statewide planning goals and to determine if such ordinances are in violation of those goals." *Petersen*, 279 Or at 255. LCDC's jurisdiction over future review of the ordinance was not further discussed.

the legislature defined that term in the same legislation. Or Laws 1977, chap 772, §§ 3-4.[8] In *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 992 (1982), the

[8] Oregon Laws 1979, chapter 772, section 3 provided that:

> "(1) 'Land use decision' *means*:
>
> "(a) A final decision or determination made by a city, county or special district governing body that concerns the adoption, amendment or application of:
>
> (A) The state-wide planning goals;
>
> (B) A comprehensive plan provision; or
>
> (C) A zoning, subdivision or other ordinance that implements a comprehensive plan; or
>
> "(b) A final decision or determination of a state agency other than the [LCDC], with respect to which the agency is required to apply the state-wide planning goals." (Emphasis added.)

In Oregon Laws 1983, chapter 827, section 1, the legislature amended the definition of "land use decision" to use the word "includes" instead of "means" to describe the same decisions previously described in Oregon Laws 1979, chapter 772, section 3. The legislation added subsection (b), which described, for the first time, decisions that the definition of "land use decision" "does not include" – ministerial decisions. *See Madrona Park, LLC v. City of Portland*, 80 Or LUBA 26, 30-31, *aff'd*, 300 Or App 403, 450 P3d 1050 (2019) (explaining the legislative history of ORS 197.015(10)(b) (1983) and that ORS 197.015(10)(b) now includes nearly a dozen exclusions from the definition of land use decision).

We do not view the legislature's 1983 change from the word "means" to define "land use decision" to using the words "includes" and "does not include" to have any significance, or to convert the definition of land use decision into a non-exhaustive one. Rather, we view it as comparing and contrasting the universe

Supreme Court affirmed LUBA's and the Court of Appeals' conclusion that a city ordinance that authorized the improvement of an already dedicated street and set up a local improvement district to finance the construction was an exercise of the city's "planning and zoning responsibilities" under ORS 197.175(1) (1977), and thus that statute required the city to apply the statewide planning goals and the city's comprehensive plan. Because of the requirement to apply the goals and the comprehensive plan, the ordinance was a "land use decision" within the meaning of Oregon Laws 1979, chapter 772, section 3.

In *Billington v. Polk County*, 10 Or LUBA 135, *rev'd and rem'd*, 68 Or App 914, 683 P2d 568 (1984), *rem'd*, 299 Or 471, 703 P2d 232 (1985), the petitioners appealed a county ordinance vacating the west 20 feet of a 40-foot-wide road abutting the petitioners' property for 1400 feet pursuant to ORS chapter 368. The county argued that the ordinance was reviewable through a writ of review proceeding in circuit court and not by appeal to LUBA because the ordinance did not apply any provisions of the county's acknowledged comprehensive plan or zoning ordinance, and thus did not meet the definition of "land use decision."

A majority of LUBA Referees concluded that the decision to vacate the road was a land use decision as defined in ORS 197.015(10) because the decision

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of decisions that are land use decisions (decisions that concern the goals, the comprehensive plan, or the land use regulations) with the universe of decisions that are not land use decisions (ministerial decisions and presently nearly a dozen others).

concerned three policies in the county's acknowledged comprehensive plan. *Billington*, 10 Or LUBA at 138. One LUBA Referee dissented on the basis that the decision to vacate the road was not a statutory land use decision merely because it touched on some abstract aspects of some county comprehensive plan provisions, and was not a significant impacts decision because it did not change the land use status quo of the area. The Court of Appeals disagreed with LUBA, and agreed with the dissenting LUBA Referee.

The Supreme Court reversed LUBA's conclusion that the county comprehensive plan provisions should have been applied in considering whether to vacate the road, and concluded that there was no basis under ORS 197.015(10)(a) (1983) for LUBA to review the challenged county ordinance because it was not a "land use decision" as defined in that statute. 299 Or at 479. The Court then held:

> "In conclusion, there are two tests to determine whether a decision is a land use decision: (1) The statutory test defined by ORS 197.015(10), and (2) The significant impact test as referred to *Petersen* and *Kerns* for decisions not expressly covered in *a land use norm*. * * *
>
> "In the absence of a direct statutory mandate to apply a comprehensive plan provision or ordinance, the next step is to determine whether the decision will have significant impact on present or future land uses. If the decision will have significant impact, it is a land use decision and LUBA has jurisdiction over the land use matters." *Id*. at 479-80 (emphasis added).

Here, for the first time, the Supreme Court applied the significant impacts test to a local government decision with no requirement for linkage to the county's

planning and zoning responsibilities under ORS 197.175(1), the statewide goals, the county's comprehensive plan, or its zoning ordinance.

LUBA is bound by both judicial precedent and the greatest respect for the rule of law that is the foundation of the entire justice system in this country. In our view, *Billington* impermissibly created common law subject matter jurisdiction over some local government decisions that do not qualify as statutory land use decisions. In our view, judicially created subject matter jurisdiction that has no basis in the statutes governing LUBA review cannot be a basis for LUBA jurisdiction. LUBA is a state agency, a creation of statute, and the scope of its power is set forth in and confined by its enabling statute. *PNW Metal Recycling v. Dept. of Environmental Quality*, 371 Or 673, 676, 540 P3d 523 (2023), *adh'd to as modified on recons*, 372 Or 158, 546 P3d 286 (2024); *SAIF v. Shipley*, 326 Or 557, 561, 955 P2d 244 (1998) ("an agency has only those powers that the legislature grants and cannot exercise authority that it does not have"); *Diack v. City of Portland*, 306 Or 287, 293, 759 P2d 1070 (1988) (an agency's "'[j]urisdiction' depends on whether the matter is one that the legislature has authorized the agency to decide"). LUBA's enabling legislation at ORS 197.825(1) provides that LUBA has exclusive jurisdiction to review "any land use decision * * * of a local government, special district or a state agency." It does not use the phrase "land use norm," as used in *Billington*, or "land use

actions," as used in *Oregonians in Action*.[9] *Billington*, 299 Or at 479; *Oregonians in Action*, 103 Or App at 38.

However, as we recognize above, we are required to and therefore evaluate whether the Order is a significant impacts decision. In *Billington*, the Supreme Court held that a decision is a land use decision over which LUBA has jurisdiction if the "decision will have significant impact on present or future land uses." 299 Or at 480. To be a significant impacts land use decision, the challenged decision must create "an actual, qualitatively or quantitatively significant impact on present or future land uses." *Carlson v. City of Dunes City*, 28 Or LUBA 411, 414 (1994). Petitioner does not develop any argument establishing that the Order is a "decision that will have a significant impact on present or future land uses." *Billington*, 299 Or at 480. The closest they come is to argue that they will be unable to easily access the portion of their farm located closer to Perrydale Road than Morris Road. Response 2-21. Absent any argument regarding why the decision is a significant impacts decision, we conclude that it is not.

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[9] As a practical matter, as more than 40 years of LUBA and Court of Appeals' decisions demonstrate, the significant impacts test is an unworkable test for local governments, participants in local government processes, LUBA, and the courts. The test is always applied *post hoc* and in a way that delays resolution of the dispute, because by the time a local government learns from a reviewing body that it made a significant impacts decision that is subject to procedural safeguards for land use decisions without applying those procedural safeguards, much time has elapsed between the initial local government decision and the time when the local government essentially starts over, applying the procedural safeguards.

The county's motion to dismiss is denied.

BRIEFING SCHEDULE

Petitioner shall have 14 days from the date of this order to file any objections to the record in accordance and compliance with OAR 661-010-0026. If petitioner does not file objections to the record, the petition for review shall be due within 21 days of the date of this order; the respondent's and intervenor-respondent's briefs shall be due within 42 days of the date of this order; and the Board's final opinion and order shall be due within 77 days of the date of this order.

Dated this 16th day of August 2024.

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Melissa M. Ryan
Board Chair