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

3 ARVIS BILLINGTON and                   )  
4 MARY BILLINGTON,                    )

5                   Petitioners,                    )

6                   vs.                                    )

7 POLK COUNTY,                            )

8                   Respondent.                        )

LUBA No. 83-072

FINAL OPINION  
AND ORDER

9  
10           Appeal from Polk County.

11           Scott McArthur, Monmouth, filed a Petition for Review and  
12 argued the cause on behalf of Petitioners.

13           Michael F. Najewicz, Dallas, filed a response brief and  
14 argued the cause on behalf of Respondent.

15           No appearance by Neoma Reynolds and Alice W. Schulze,  
16 Participants.

17           BAGG, Chief Referee; DuBAY, Referee participated in the  
18 decision.

19           KRESSEL, Referee, dissented.

20           REMANDED

02/15/84

21           You are entitled to judicial review of this Order.  
22 Judicial review is governed by the provisions of Oregon Laws  
23 1983, ch 827.  
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1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioners appeal a vacation of the westerly 20 feet of a  
4 40-foot wide roadway abutting their land in Polk County. The  
5 vacation was taken pursuant to provisions of ORS 368.326 to  
6 368.366.

7 FACTS

8 The vacation is of a portion of a dedicated way known as  
9 Clearview Orchards Road. The effect of the vacation is to  
10 narrow the right-of-way by 20 feet. See ORS 368.031. The  
11 portion of the roadway vacated does not consist of a traveled  
12 roadway, but includes fence posts, utility poles and other  
13 obstructions to travel. The affected portion of the roadway is  
14 1406.2 feet long. The roadway is not maintained by Polk  
15 County, and the county has not expended money on the roadway  
16 for maintenance or other purposes.

17 JURISDICTION

18 Respondent Polk County moves to dismiss this proceeding on  
19 the ground that a street vacation under the provisions of ORS  
20 Chapter 368 is not a land use decision reviewable by the Land  
21 Use Board of Appeals.<sup>1</sup> Respondent argues this decision "if  
22 subject to review, is only subject to review through the Writ  
23 of Review Statutes as set forth in ORS 34.020." Brief of  
24 Respondent at 5. See Holmes v. Graham, 159 Or 466, 80 P2d 870  
25 (1938). Respondent argues that this proceeding is unlike that  
26 in City of Pendleton v. Kerns, 294 Or 126, 653 P2d 992, (1982),

1 (hereinafter Kerns,) wherein the Court found a decision to  
2 construct and open for travel a previously dedicated public  
3 roadway was a land use decision. This case is different,  
4 according to respondent, because this decision has no  
5 significant impact on present or future land uses. In the  
6 Kerns case, the opening of the roadway provided access to an  
7 area of the city proposed for development. Also, the Polk  
8 County plan and implementing ordinances have been acknowledged  
9 by LCDC as meeting all statewide land use goal requirements.  
10 Therefore, this decision is not a part of the adoption,  
11 amendment or application of statewide planning goals. The  
12 county goes on to argue this decision does not apply the  
13 county's comprehensive plan or any of its land use ordinances.  
14 See Footnote 1, supra.

15 Petitioner argues the decision is reviewable by this  
16 Board. Petitioner cites Kerns, supra, and argues that while a  
17 decision may include non-land use constituents, that does not  
18 deprive the Board of jurisdiction to review a decision for  
19 compliance with land use criteria.

20 "To the extent the various aspects of an ordinance are  
21 severable, those which fall within the definition of  
22 single 'land use decision' are subject to LUBA review  
23 even though other aspects are not. Accordingly, the  
24 fact that Ordinance No. 3141 authorizing the street  
25 construction work has a concomitant LID financing  
26 provision does not, of itself, operate to divest LUBA  
of jurisdiction to review the decision to undertake  
the street construction." Kerns, 294 Or at 131.

25 Also, petitioner argues the effect of this decision will  
26

1 preclude petitioners from dividing their property. Petitioners  
2 say the county ordinances require a 50 foot right-of-way in  
3 order to partition land, and because this street vacation will  
4 reduce the available right-of-way below that minimum,  
5 petitioners will be precluded from dividing their land.<sup>2</sup>

6 Finally, petitioners point to the Polk County Comprehensive  
7 Plan and its transportation goals, which provide as follows:

8 "1. To provide and encourage a balanced energy efficient  
9 transportation system giving due consideration to all modes  
10 of travel consistent with the Polk County Comprehensive  
11 Land Use Plan.

12 "2. To develop and assist in the development of a safe,  
13 convenient and economic transportation system available to  
14 all persons." Polk County Comprehensive Plan  
15 "Transportation."

16 Petitioners also cite the Polk County Zoning Ordinance which  
17 includes provisions on how the county may establish, vary,  
18 modify, alter or eliminate rights-of-way. This inclusion,  
19 claim petitioners, shows the drafters of the plan and the  
20 zoning ordinance viewed the matter of street vacations as well  
21 as street openings to be matters of land use planning.

22 This decision is a land use decision reviewable by this  
23 Board for compliance with provisions of the Polk County plan  
24 and other Polk County land use ordinances. ORS 197.175 2(d).  
25 We recognize that road vacation proceedings are governed by the  
26 provisions of ORS Chapter 368. We note, however, that ORS  
368.356 sets a general approval standard for road vacations -  
vacation must be in the "public interest." It is our view that  
under the language of the Polk County Comprehensive Plan, the

1 measure of "public interest" in the context of a road vacation  
2 is defined or refined in the comprehensive plan. Specifically,  
3 we find three policies in the comprehensive plan which can be  
4 read to refine the public interest standard. The first is the  
5 plan's transportation element quoted in part above. A  
6 reduction in the width of right-of-way has an affect on  
7 transportation in the area. Whether or not a right-of-way is  
8 wide enough to accommodate an adequate road surface concerns  
9 safety, and convenience - two considerations reflected in the  
10 plan policy. It also directly affects the "availability" of an  
11 adequate transportation system with respect to the citizens in  
12 the area. Because of the vacation's potential impact on that  
13 transportation system, the vacation must be tested against the  
14 transportation element in the county plan.

15 The plan's public facilities and services element is also  
16 an applicable standard. This element calls for

17 "...a timely, orderly and efficient arrangement of  
18 public facilities and services to serve as a framework  
19 for urban and rural development.

19 "Polk County will establish standards for the minimum  
20 adequate level of public services in the  
21 unincorporated portions of the county. Such services  
22 will include, but no [sic] necessarily be limited to  
23 educational facilities, police and fire protection,  
24 domestic water supplies, sewage disposal and roadways."

23 Because of this plan provision, the county was under an  
24 obligation to determine whether the vacation would affect the  
25 "timely, orderly and efficient arrangement of public facilities  
26 and services."

1 Similarly, because the vacation affects access, the  
2 vacation is measurable against a housing policy which requires:

3 "Sufficient public facilities and services, including  
4 police and fire protection, health services, schools,  
5 and transportation facilities, exist or will be  
6 provided to accomodate [sic] the additional population  
7 resulting from the development." (emphasis added)

8 Under this plan policy, the county needed to determine  
9 whether this act would have any impact on the ability of the  
10 county's transportation system to serve expected development in  
11 the area.

12 The Board concludes the plan's policies with reference to  
13 transportation serve as guidelines or standards for the  
14 decision on whether this road vacation proposal is in the  
15 public interest.<sup>3</sup>

16 FIRST ASSIGNMENT OF ERROR

17 "The Board of Commissioners' Order violates ORS  
18 368.331 because it deprives Petitioners, owners of the  
19 recorded property interest, a right of access  
20 necessary for the exercise of that property right."

21 SECOND ASSIGNMENT OF ERROR

22 "The Board of Commissioners' Order violates the Polk  
23 County Comprehensive Plan, Goals 1, 2, and 3, Public  
24 Facilities and Service Section (SR-8-9), for the  
25 following reasons:

26 "(a) Polk County has established a pattern of  
27 permitting division of lands within this area.  
28 (R-16, R-29, R-50).

29 "(b) Such partial vacation prohibits transportation  
30 service necessary to sustain rural uses in the  
31 area affected."

1 THIRD ASSIGNMENT OF ERROR

2 "The Board of Commissioners' Order made no findings of  
3 fact but treated the matter as other than a land use  
4 matter."

4 FOURTH ASSIGNMENT OF ERROR

5 "The Board of Commissioners failed to follow  
6 procedures of ORS 368.326 et seq and ORS 368.346."

7 FIFTH ASSIGNMENT OF ERROR

8 "The Board of Commissioners' Order violates Goal 12,  
9 LCDC Statewide Planning Goals and Guidelines because  
10 partial vacation deprives Petitioners' property of  
11 transportation service necessary to sustain rural uses  
12 in the area affected."

11 The petitioners have included claims of violations of  
12 provisions of ORS Chapter 368. The Board is not certain as to  
13 whether it has the authority to review this decision for  
14 compliance with the vacation provisions in ORS Chapter 368, as  
15 contrasted to provisions in the county plan and ordinances  
16 which render this a "land use decision." However, the Board  
17 believes it may comment on these allegations. The decision is  
18 to be remanded, and our views on petitioners' claims under ORS  
19 Chapter 368 may give some guidance to the parties.

20 In the First Assignment of Error, petitioners claim their  
21 access is being cut off by this decision. The county made a  
22 finding that access was not eliminated. See Record Exhibit  
23 4.<sup>4</sup> The Board has not been cited to any legal authority  
24 explaining what is meant by "right of access" as that term  
25 appears in ORS 368.331.<sup>5</sup> It is clear from the record that  
26 all access is not eliminated to petitioners' property, and the

1 reduction in width of the right-of-way does not, in our view,  
2 deprive petitioners of a right of access.

3       However, the prohibition in ORS 368.331 extends to  
4 deprivation of a right of access "necessary for the exercise of  
5 a recorded property right." There are no findings on the  
6 question of whether or not the access enjoyed before the  
7 vacation fits within the property right referred to in ORS  
8 368.331. Indeed, petitioners complain that the vacation will  
9 prevent them from partitioning the property. This prohibition  
10 results, in petitioners' view, because the county requires a 50  
11 foot right-of-way. This 50 foot right-of-way requirement is  
12 disputed by respondent. However, the Board notes that §110.800  
13 of the Polk County Zoning Ordinance requires that a dwelling be  
14 situated on a lot having access to a public street or private  
15 driveway of width not less than 30 feet. This provision would  
16 appear to make it impossible for petitioners to construct a  
17 dwelling without securing a private driveway. At a minimum, we  
18 believe the county should give some consideration to  
19 petitioners' claim of deprivation of this property right. No  
20 such discussion appears in the findings.

21       Under the Fourth Assignment of Error, petitioners allege  
22 violations of procedural requirements in ORS 368.346.  
23 Petitioners' specific complaints are that a surveyor's report  
24 required by ORS 368.346 does not describe the ownership of the  
25 property to be vacated. Petitioners also claim that ORS  
26 368.326 is violated in that the commissioners established the

1 time of hearing on the vacation before receiving the surveyor's  
2 report.

3 We do not believe these errors, even if true, constitute  
4 errors requiring us to remand or reverse the decision. There  
5 is no allegation of prejudice arising from these alleged  
6 errors.<sup>6</sup> Also, the provisions appear to be directory at  
7 least insofar as the timing of the reports and hearing. There  
8 is no claim petitioners received no notice or that the  
9 surveyor's report was not done or was not available to them.  
10 Under these circumstances, we find no error.

11 Petitioners' Fifth Assignment of Error alleges violation of  
12 LCDC's Goal 12. The Polk County Comprehensive Plan and  
13 implementing ordinances have been acknowledged as being in  
14 compliance with all applicable land use goals. The Board,  
15 therefore, is without authority to review this decision for  
16 compliance with the goals. Fujimoto v Land Use Board of  
17 Appeals, 52 Or App 875, 630 P2d 264, rev den (1980). Our  
18 review is confined to compliance with applicable county  
19 ordinances.

20 Petitioners' Third Assignment of Error complains the county  
21 made no findings showing compliance with applicable criteria.  
22 The county's order declares the road vacation is not a land use  
23 decision requiring application of the comprehensive plan and  
24 implementing ordinances. However, the order provides that if  
25 the decision is found to be a land use decision, then the  
26 county board adopts the findings and conclusions made in the

1 Polk County Planning Staff Report. The staff report discusses  
2 provisions in the zoning ordinance, the subdivision ordinance  
3 and the comprehensive plan but does not discuss how this  
4 vacation complies or does not comply with the cited ordinance  
5 provisions. That is, while the findings address which policies  
6 "affect either the creation or vacation of roads," there are no  
7 findings of fact or conclusions of law about compliance with  
8 the listed plan and ordinance provisions.

9 Without findings explaining the decision, this Board is  
10 unable to perform its review function. Hoffman v. City of  
11 Dupont, 49 Or 699, 621 P2d 63, rev den, (1981). The  
12 alternative findings in the staff report include nothing that  
13 applies the plan criteria to the facts of this case. We have  
14 no means of testing the county's decision against the  
15 provisions in its plan, and should the county wish to proceed  
16 with the vacation, findings must be developed.

17 This opinion is remanded for development of findings  
18 addressing the applicable provisions of the Polk County plan  
19 and other ordinances as may be applicable.

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1 Kressel, Dissent.

2 I dissent in this case because I do not believe petitioners  
3 have demonstrated that the challenged action constitutes a  
4 "land use decision" as that term is defined in ORS  
5 197.015(10). Since something other than a "land use decision"  
6 is involved, the Board has no jurisdiction over this appeal.  
7 Dismissal is the proper course of action.

8 At issue is the vacation of one half of the width of part  
9 of Clearview Orchards Road, a 40 foot wide unimproved rural  
10 road in Polk County. The record indicates that the land in  
11 question has never been used for road purposes, but has been  
12 treated as part of the abutting farm land. Historically,  
13 vehicular traffic, including traffic by farm equipment, has  
14 been confined to the portion of Clearview Orchards Road which  
15 is not subject to the county's vacation decision. All the  
16 surrounding lands are zoned for exclusive farm use. The sole  
17 access to the road in question is by Rural Road Number 208, a  
18 road which itself is 20 feet in width.

19 Petitioners own land on the opposite side of the vacated  
20 portion of Clearview Orchards Road. At one time, the principal  
21 access to their land was via Red Prairie Road. However, by  
22 virtue of partitioning, a part of their land now relies on  
23 Clearview Orchards Road for access. They wish to sell their  
24 land.

25 According to petitioners, the reduction in width of  
26 Clearview Orchards Road would have the following adverse

1 consequences: (1) the road would be impassable by farm  
2 equipment and emergency vehicles, (2) the reduced width would  
3 prohibit or make more difficult the further partitioning of  
4 their land, and (3) the reduced width will discourage others  
5 from buying their land. Petition at 5.

6 Respondent takes the position that the challenged decision  
7 is not a "land use decision" under ORS 197.015(10). In  
8 pertinent part, the statute defines land use decision as  
9 follows:

10 "(10) 'Land use decision':

11 "(a) Includes:

12 "(A) A final decision or determination made by a  
13 local government or special district that  
14 concerns the adoption, amendment or application  
15 of:

16 "(i) The goals;

17 "(ii) A comprehensive plan provision;

18 "(iii) A land use regulation; or

19 "(iv) A new land use regulation..." ORS 197.015(10).

20 For the reasons stated below I concur with respondent.

21 The Polk County plan and implementing ordinances have been  
22 acknowledged by LCDC. Accordingly the challenged decision  
23 cannot be reviewed for compliance with the statewide planning  
24 goals. Byrd v. Stringer, 295 Or 311, \_\_\_ P2d \_\_\_ (1983).

25 Thus, subpart (i) of ORS 197.015(10)(a) is not applicable. It  
26 is also undisputed in this case that the road vacation does not  
entail the adoption of an amendment of a comprehensive plan

1 provision or land use regulation. With respect to our  
2 jurisdiction, this leaves only the question of whether the  
3 action at issue concerns the "application" of a comprehensive  
4 plan provision or a land use regulation.

5 The majority of the Board seems to answer this question in  
6 the affirmative, although it does not discuss the issue in the  
7 precise terms used by our jurisdictional statute. The gist of  
8 the majority's position is that the road vacation is a "land  
9 use decision" because the vacation will have a potential impact  
10 on the subject matter of certain comprehensive plan policies,  
11 notably policies concerning transportation, public facilities  
12 and housing in Polk County. See pages 5-6, infra (majority  
13 opinion). The majority finds no county ordinances to be  
14 applicable to the vacation decision.

15 I do not agree that a decision concerns the  
16 "application...of a comprehensive plan provision" under ORS  
17 197.015(10) where it has only a potential impact on the subject  
18 matter of the plan provision. The test is too abstract. It  
19 threatens to convert every local government decision which has  
20 an impact on land use into a matter reviewable by this Board.  
21 Westside Neighborhood Quality Project, Inc. v School District  
22 4J, 58 Or App 154, 647 P2d 962, rev den \_\_\_ Or \_\_\_ (1982)  
23 (school district's decision to close school not a "land use  
24 decision" reviewable by LUBA).

25 In my view, the statutory test is met only where either (1)  
26 state law, the comprehensive plan itself or a pertinent

1 ordinance clearly requires the plan provision to be employed as  
2 a standard governing approval or denial of the proposal in  
3 question, or (2) the proposal is one which meets the tests set  
4 forth in City of Pendleton v Kerns, 294 Or 126, 134 \_\_\_ P2d \_\_\_  
5 (1982), i.e., does the challenged decision have "a significant  
6 impact on present or future land uses in the area?"

7 Neither test is met in this case. Nothing in ORS Chapter  
8 368 (governing road vacations) or any other statute cited by  
9 the parties calls for directly applying the comprehensive plan  
10 to this road vacation decision. The plan itself is silent as  
11 to its function in the context of road vacation. The zoning  
12 ordinance discusses vacation procedure, but it too is silent on  
13 the question of approval standards. Indeed, the city took note  
14 of these circumstances (i.e., that the plan and ordinance  
15 contained no governing standards) when it characterized the  
16 vacation decision as governed solely by the standards in ORS  
17 Chapter 368.

18 The absence of any clear legislative requirement that plan  
19 provisions be applied as standards in this road vacation  
20 proceeding leaves open the question of whether the "significant  
21 land use impact" test discussed in City of Pendleton v Kerns,  
22 supra, brings this case within the statutory definition of  
23 "land use decision." Although the question is surely debatable  
24 (as are all such questions under the Kerns test) I conclude the  
25 decision before us is not one involving significant land use  
26 impact.

1 As noted in Kerns, supra, the burden is on petitioner to  
2 demonstrate that the challenged action is a land use decision.  
3 294 Or at 134 n. 7. In my view, petitioners in this case did  
4 not carry this burden. They did not demonstrate that the  
5 vacation will effect "...a significant change in the land use  
6 status quo of the area...." Id at 135 (emphasis added).

7 As noted above, the vacated part of Clearview Orchards Road  
8 is not presently and has never been used for vehicular travel.  
9 Indeed the reduction in width to 20 feet will conform this road  
10 to the dimensions of the only other connecting road in the  
11 area, Rural Road 208. Notwithstanding petitioners' contrary  
12 and largely unsupported claim, the 20 foot width of these rural  
13 roads has evidently proved adequate to the demands of a farming  
14 community for many years. As far as future uses and needs are  
15 concerned, the critical fact is the county's zoning designation  
16 of the area for exclusive farm use. This designation clearly  
17 outweighs petitioners' stated interest in improved public  
18 facilities (i.e., wide roads) which would promote greater  
19 residential development.

20 For the above reasons, this case is distinguishable from  
21 the situation in Kerns, supra, wherein a decision to improve a  
22 street had significant land use impacts because it opened a  
23 large area for intensive development. Here, the contrary is  
24 true. The reduction in width of Clearview Orchards Road will  
25 at most, maintain the land use status quo in this rural farming  
26 area. Accordingly, I conclude that petitioners have failed to

1 demonstrate that the decision in question is a reviewable land  
2 use decision. The case is outside our jurisdiction and should  
3 be dismissed.

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FOOTNOTES

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"'Land use decision':

"(a) Includes:

"(A) 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; or

"(B) A final decision or determination of a state agency other than the commission with respect to which the agency is required to apply the goals.

"(b) Does not include a ministerial decision of a local government made under clear and objective standards contained in an acknowledged comprehensive plan or land use regulation and for which no right to hearing is provided by the local government under ORS 215.402 to 215.438 or 227.160 to 227.185." ORS 197.015(10).

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The county disputes this assertion claiming the 50 foot requirement only exists where "easements are involved."

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The Polk County Zoning Ordinance controls "establishment, alterations, or elimination of future right-of-way lines." Polk County Zoning Ordinance, Section 112.010. The Record includes a report from the planing department to the board of commissioners referencing this section, but it is not clear that the county considered this section to be applicable during the course of its proceedings. The terms of the ordinance simply govern the procedure to use when considering the establishment, alteration or elimination of rights-of-way. The ordinance does not include standards or criteria for such actions. Additionally, the Board is uncertain of the meaning of the word "future" as used in the ordinance. Arguably, the ordinance could be read to control changes in rights-of-way yet to be established, but not control actions affecting rights-of-way now in existence. The Board does not find the

1 presence of this provision in the ordinance to be particularly  
2 helpful in deciding whether or not vacations of rights-of-way  
are land use decisions under the county's zoning structure.

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4 The order appearing in the Record at pages 4 and 5 does not  
5 include a finding that the owner is not deprived of access.  
6 Petitioners attached an order to their Petition for Review  
7 which includes an additional page, shown as Exhibit 4. The  
8 Board will therefore accept the order with the additional  
9 finding as being the correct order.

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11 "Limitation on use of vacation proceedings to  
12 eliminate access. A county governing body shall not  
13 vacate public lands under ORS 368.326 to 368.366 if  
14 the vacation would deprive an owner of a recorded  
15 property right of access necessary for the exercise of  
16 that property right unless the county governing body  
17 has the consent of the owner." ORS 368.331.

18 \_\_\_\_\_  
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19 The Board notes that ORS 197.835(8)(a)(B) allows the Board  
20 to review a local decision for failure

21 "to follow the procedures applicable to the matter  
22 before it in a manner that prejudices the substantial  
23 rights of the petitioner...."



1 Opinion by Kressel.

2 NATURE OF DECISION

3 Petitioners seek review of Polk County's order vacating  
4 half the width of a rural road known as Clearview Orchards  
5 Road. The partial vacation has the effect of reducing the  
6 width of the road to 20 feet. We dismiss the appeal because  
7 the challenged action is not a land use decision.

8 FACTS

9 This appeal is before LUBA on remand by the Supreme Court.  
10 Billington v. Polk County, 299 Or 471, \_\_\_ P2d \_\_\_ (1985). The  
11 remand directs us to determine whether the vacation order "will  
12 have a significant impact on present or future land uses." 299  
13 Or at 480. The inquiry is critical to whether the challenged  
14 order is within our statutory review jurisdiction.<sup>1</sup>

15 The pertinent facts are stated by the Supreme Court as  
16 follows:

17 "In 1911, a subdivision called Clear View Orchards was  
18 established. At the time of recording the subdivision  
19 plat, a 40 foot right of way running north and south  
20 was dedicated 'to the use of the public as highways.'  
21 At that time, the roadway was approximately 5,227 feet  
22 long. In 1960 the southerly 3,821 feet of the roadway  
23 were vacated. Of the remaining 1406 feet of roadway,  
24 only the easterly 20 feet have ever been used for road  
25 purposes. The westerly 20 feet of the right-of-way  
26 have never been used for road purposes and that  
portion of the right-of-way is occupied by fence  
posts, utility poles, trees, gardens and other  
obstructions. The sole access to Clearview Orchards  
Road is by Rural Road 208 which is 890 feet long and  
only 20 feet wide. The traveled portion of Clearview  
Orchards Road is not maintained by the county and the  
county has not and does not expend any money on the  
road for any purpose. The road serves only six  
residences and dead-ends at the Billingtons' north  
property line. All of the property surrounding the

1 roadway is zoned exclusive farm use (EFU)." 299 Or at  
2 473-74.

2 DISCUSSION

3 Petitioners claim the county's decision has the following  
4 significant land use impacts: (1) it decreases the likelihood  
5 that improvements to Clearview Orchards Road will be made (road  
6 widening is allegedly necessary to accommodate emergency and  
7 farm equipment), and (2) the vacation will reduce the value of  
8 petitioners' land by making partitioning more difficult. See  
9 Petition at 5; Supplemental Memorandum of Petitioners at 2-6.

10 As noted in Billington v. Polk County, supra, the burden is  
11 on petitioners to demonstrate that the challenged decision  
12 satisfies the significant impact test. 294 Or at 134.  
13 Petitioners have not carried this burden.

14 The record indicates that the portion of Clearview Orchards  
15 Road vacated by the county's order is not presently and has  
16 never been used for vehicular travel. As the Supreme Court  
17 noted, the land is occupied by fence posts, utility poles,  
18 trees, gardens, and other obstructions. Further, the reduction  
19 in width will conform the road to the dimensions of the only  
20 other connecting road in this farming area, Rural Road 208.

21 Petitioners cite evidence that Clearview Orchards Road is  
22 too narrow to accommodate emergency and farm equipment.  
23 However, other evidence in the record, including the county  
24 road officer's recommendation in favor of the partial  
25 vacation,<sup>2</sup> indicates that the existing road system in the  
26 area has been adequate for the needs of a farming community for

1 a considerable time. Viewing the record as a whole, we cannot  
2 conclude that the partial vacation will have a significant  
3 impact on farm use, the dominant land use in the area.<sup>3</sup>

4 Petitioners' also claim the decision will have significant  
5 impact on their ability to partition and sell their property.  
6 However, as we see it, the area's potential for division and  
7 development is most directly affected by its zoning for  
8 exclusive farm use. See ORS 215.263. The EFU zoning has been  
9 acknowledged by LCDC as in compliance with the statewide  
10 planning goals. The zoning designation commits the area to  
11 farm use, not rural residential development.<sup>4</sup> The partial  
12 road vacation may subject land division application in the area  
13 to greater burdens, but this fact alone does not mean the  
14 decision meets the significant impact test.

15 This case is distinguishable from the situation in Kerns v.  
16 City of Pendleton, supra. In Kerns, a decision to improve a  
17 street had significant land use impact, and was therefore  
18 reviewable for conformity with land use norms, because the  
19 improvement project opened a large area for intensive  
20 development. Here, the contrary is true. The partial vacation  
21 of Clearview Orchards Road will maintain the status quo in this  
22 rural farming area.

23 The vacation order is not a reviewable land use decision.  
24 The appeal is dismissed.

FOOTNOTES

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The Supreme Court recognized two tests for determining whether a decision is a "land use decision" reviewable by LUBA: (1) the statutory test defined by ORS 197.015(10) and (2) the significant impact test referred to in Petersen v. Klamath Falls, 279 Or 249, 566 P2d 1193 (1977) and City of Pendleton v. Kerns, 294 Or 126, 653 P2d 992 (1982). Polk County's decision did not meet the statutory test because the Court found "...no county comprehensive plan provision or local zoning ordinance that contains or requires the employment of standards governing approval or denial of road vacation decisions." 299 Or at 475.

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The report, is quoted in the Supreme Court's opinion, 299 Or at 477, n. 5. It concludes that the vacation is in the public interest.

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Our conclusion that the partial vacation will not have significant land use impacts does not rule out public safety as a concern in the county's proceedings. ORS 368.356 required the county governing body to determine whether the vacation was in the public interest, a term clearly encompassing public safety factors. We hold only that the decision is not of such significant land use impact as to require it to be reviewed for conformity with comprehensive plan and related norms.

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The report of the county's road officer stated "the area served by this right of way is EFU, so development pressure should never become a problem." See Billington v. Polk County, 299 Or at 477 n. 5.