

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioner appeals a decision of the City of Medford to
4 widen the street known as Crater Lake Avenue. The particular
5 decision appealed is in the form of an ordinance (Ordinance
6 4982) which provides for the execution of a contract to make
7 the widening. The ordinance is accompanied by findings of fact
8 which address various policies in the city's comprehensive plan.

9 STANDING

10 Standing is an issue in this case. However, Respondent
11 City does not challenge the standing of petitioner if the
12 decision is to be characterized as "legislative." Respondent
13 concedes petitioner has standing to bring a challenge to a
14 legislative proceeding, but argues that petitioner has not made
15 an adequate claim for standing if the decision is to be
16 characterized as quasi-judicial.

17 For reasons discussed herein, the Board considers this
18 decision to be more legislative than quasi-judicial in nature.
19 The Board concludes petitioner has standing to bring this
20 proceeding.¹

21 FACTS

22 In 1981, the Medford City Council received a report
23 entitled "The Medford Area Transportation Study" showing Crater
24 Lake Avenue to be functioning as an arterial street but to be
25 constructed only to collector street standards. The street is
26 projected to carry travel equal to or above its capacity by

1 1987. In October of 1982, the city council approved an
2 arterial street plan which included Crater Lake Avenue as an
3 arterial street. Along with this designation, the city
4 expressed its intent to submit a bond issue to fund certain
5 road projects including the widening of Crater Lake Avenue.
6 The bond issue failed, but the city in the meantime amended its
7 comprehensive plan to include the new arterial streets plan
8 along with the plan's designation of Crater Lake Avenue as an
9 arterial street.

10 When the city adopted its 1983-84 budget, Crater Lake
11 Avenue widening project was funded with revenue sharing funds.
12 The city, pursuant to the availability of such funding, awarded
13 a contract for the widening on October 6, 1983. The ordinance
14 awarding that contract was appealed to this Board.

15 ASSIGNMENT OF ERROR NO. 1

16 "Respondent erred in failing to adopt sufficient
17 findings of fact in support of its land use decision."

18 Petitioner claims the findings attached to Ordinance 4982
19 are not adequate. According to petitioner, the findings were
20 prepared in response to petitioner's law suit in federal court
21 and were not based on testimony or evidence in the record.
22 Petitioner claims that in order to have been adequate, the
23 findings would have had to concern themselves with additional
24 comprehensive plan provisions including Urban Form Goal 2,
25 Housing and Residential Land Use Goal 6 and Policies 2 and 3,
26 Transportation Goal 1, and Noise and Historic Areas and

1 Sites.² Petitioner claims there are competing philosophies
2 in the comprehensive plan which were not addressed and which
3 should have been addressed.

4 The city does not respond exactly to this assignment of
5 error or any other. The city argues the decision is not a land
6 use decision subject to LUBA's review because it is a
7 "ministerial" decision. Ministerial decisions are not land use
8 decisions subject to LUBA review within the meaning of ORS
9 197.015(10)(b).³

10 The Board does not agree that the decision to widen the
11 roadway is a ministerial decision. In this case, the choice to
12 designate Crater Lake Avenue as an arterial street was made
13 some time ago, and this choice is reflected in the city's
14 comprehensive plan. However, the decision to implement that
15 designation, to determine what needs to be done to implement it
16 and the ramifications for landowners nearby, to obligate funds
17 and to contract for the actual widening of the street can
18 hardly be considered decisions involving no discretion or
19 choice on the part of the local governing body. The decision
20 necessarily involves determinations about what needs to be done
21 and an analysis of impacts on the neighborhood. Such analysis
22 is absent in a "ministerial" decision making process. See
23 "ministerial," Blacks Law Dictionary, 4th ed. (1968).

24 What exists here is a decision which clearly follows a
25 policy set down in the comprehensive plan. There were no
26 competing choices available to the city in terms of what it

1 would do with the street should it choose to improve it. See
2 Lima v Jackson County, 3 Or LUBA 78 (1981). The comprehensive
3 plan established to what standards and criteria the street
4 would be constructed, and the city apparently simply followed
5 that directive. But the decision to improve the street to the
6 standards set in the arterial street plan was made in an arena
7 of alternatives. No doubt consideration was given not only to
8 financing methods, but to actual traffic flows, other street
9 needs of the city and the impact of this improvement at this
10 time on the community. In addition, and most importantly, an
11 examination was made of the effects the improvement would have
12 on aspects either regulated or protected by the plan.

13 Respondent does not argue that this decision does not
14 otherwise qualify under the definition of "land use decision"
15 found in ORS 197.015(10).⁴ The Board concludes the decision
16 is a land use decision.⁵ The fact that the act under review
17 is not ministerial does not end the question of how to
18 characterize the decision because it required application of
19 comprehensive plan provisions regarding streets and protection
20 of historical sites.

21 Having found the ordinance is a "land use decision," then,
22 we may turn to whether or not the decision is adequately
23 supported by findings.

24 The findings in this case recite the decision is governed
25 by the following policies in the Medford Comprehensive Plan:

26 "Transportation Policy No. 1

1 "Arterial Street Plan Goal 3 Policy 3

2 "Arterial Street Plan, Characteristics of Arterial
3 Streets

4 "Historical Areas and Sites Goal 1"

5 The city makes findings on each of these policies. Under the
6 transportation policy, the city recites that it has a new
7 arterial street plan. Under the arterial street plan, the city
8 finds that the Crater Lake Avenue has been designated as an
9 arterial street. Further, the findings recite that the minimum
10 performance of an arterial street during peak travel periods
11 should be at a particular service level. The findings recite
12 that Crater Lake Avenue is presently at that particular service
13 level. If the improvements are not made, the street will not
14 meet minimum arterial performance standards. The findings go
15 on to discuss the characteristics of arterial streets, that is,
16 their design capacity and other characteristics, and recite how
17 it is that the improvements to Crater Lake Avenue will meet
18 these particular characteristics. Lastly, the findings mention
19 the city's historic areas and sites section in the plan and
20 note that the goal requires encouragement of preservation of
21 Medford's historical heritage for future generations. The
22 findings say that while some buildings in the vicinity of the
23 project have historical significance, none have been nominated
24 for national register of historic places. The findings say
25 that no historic places will be adversely affected by the
26 project.

1 The city's findings on its historic areas and sites goal
2 are conclusional. However, the policy is so broadly written
3 that the Board does not believe the city has committed a
4 violation of the policy as alleged. The policy simply calls
5 for the city to encourage and facilitate preservation of
6 historical areas. In this case, the city recognized that some
7 of the buildings have potential historic significance, but
8 concluded that there would be adverse affect on these
9 "potential" historical sites because the street widening will
10 be contained within the existing right-of-way and no private
11 property will be taken for the widening. Any trees that had to
12 be removed would be replaced with new plantings. While these
13 findings do not appear to be strictly responsive to the
14 question of historic preservation, the city has not made a
15 clear finding which states that this area is a historic area
16 which is to be preserved. Neither the city nor the petitioner
17 cite us to any such historic areas or sites. We note the plan
18 does not identify sites along Crater Lake Avenue to be of any
19 historical significance. See Medford Comprehensive Plan, pp.
20 108-110. Further, since the policy simply encourages the city
21 to preserve historic areas and does not mandate it, the city
22 appears to have broad discretion to decide what acts are
23 sufficient to fulfill this policy. In this case, the city
24 found the planting of trees and improving the traffic pattern
25 met the policy.

26 In sum, the findings simply set out the applicable plan

1 policies that control this particular street and show that the
2 improvement project follows the plan. See Lima, supra. The
3 Board does not believe more is required. The decision of
4 whether or not to designate Crater Lake Avenue as an arterial
5 street was made some time ago and was not appealed. We note
6 also that the matter of whether placement of an arterial street
7 designation on Crater Lake Avenue is offensive to the city's
8 historic areas policies is a proper subject for review at the
9 time the designation was made. In this regard, the findings to
10 support this decision need only show that the street will be
11 improved as called for in the plan. That is, the findings
12 necessary at this stage need only show that the street is being
13 constructed to arterial standards. The findings do so. To the
14 extent the findings may go beyond this requirement they may be
15 considered surplusage.

16 Also, the Board does not find the provisions about Crater
17 Lake Avenue to be in conflict with the other listed portions of
18 the comprehensive plan. There is nothing in the additional
19 comprehensive plan provisions either prohibiting or limiting
20 street widening. Petitioner does not explain how it is these
21 policies would be useful to prohibit the street widening.

22 Assignment of Error No. 1 is denied.

23 ASSIGNMENT OF ERROR No. 2

24 "Respondent erred by not calling for a public hearing
25 on the proposed ordinance."

26 Under this assignment of error, petitioner argues that the

1 decision is quasi-judicial because not only is the decision
2 dictated by pre-existing criteria in the plan, but there will
3 be an impact on the few property owners along the street.
4 Petitioner appears to be arguing that there are also unanswered
5 questions to be considered such as whether the city can afford
6 to pay for the project and what priority does the project have
7 among other projects. In addition, petitioner believes the
8 city should answer whether the project will adversely affect
9 anyone, how many lanes should be used, what traffic signals
10 should be added. Petitioner asserts there are other options
11 which petitioner believes a public hearing would bring into the
12 light for scrutiny. Petitioner argues that the due process
13 clause of the Fourteenth Amendment to the United States
14 Constitution requires a hearing in this case.

15 Petitioner may be asking for the kind of hearing which the
16 city may have held in order to decide whether or not Crater
17 Lake Avenue should be an arterial street. Petitioner does not
18 argue that under the city code, a decision to award a contract
19 requires the kind of notice and hearing which petitioner
20 appears to believe is necessary here.

21 Petitioner makes an argument that the city has some how
22 violated Chapter IX, §36(3) of its charter. Section 36 is
23 included in a chapter on public improvements. This section
24 controls the procedure whereby the city may seek funding for
25 improvements by levying special assessments. The Board does
26 not read Chapter IX, §36 of the charter to control the city's

1 procedure or to require hearings where the city utilizes funds
2 other than those obtained by levy or special assessment to
3 initiate or complete a road project.

4 No street assessment proceeding was undertaken here, at
5 least as we understand the procedure used by the city.
6 Therefore, we were unable to agree with petitioner's claim that
7 the city owed petitioner a hearing under a section of the
8 charter which controls special assessments. This section of
9 the charter is simply inapplicable. The Board is not aware
10 that the city violated any of its procedural ordinances in the
11 course of awarding the contract. Without an allegation that
12 the city violated the applicable procedure, the Board must deny
13 this assignment of error.

14 ASSIGNMENT OF ERROR No. 3

15 "Respondent erred in not allowing affected property
16 owners and others to present evidence at a public
hearing, denying them equal protection under the law."

17 Under this assignment of error, petitioner echos an
18 argument made at the end of the Assignment of Error No. 2.
19 Petitioner appears to be saying that because the city charter
20 includes procedures for defeating a request for a special levy
21 to improve an arterial street, local citizens should have been
22 allowed the opportunity to disallow the widening project. The
23 Board simply does not agree. The provisions referred to are
24 provisions controlling remonstrates on assessments. They are
25 not provisions controlling the simple improvement of streets
26 without assessments against benefited owners. This assignment

1 of error is denied.

2 ASSIGNMENT OF ERROR No. 4

3 "Respondent erred in not giving notice to affected
4 property owners."

5 Petitioner's complaint echos the earlier complaints about
6 the Medford City Charter requiring notice in assessment
7 proceedings, and we reject the argument for the same reasons as
8 discussed earlier.

9 ASSIGNMENT OF ERROR No. 5

10 "Respondent erred in not basing its decision upon
11 substantial evidence."

12 Petitioner argues that respondent had no hearing and
13 therefore had no facts on which to base a decision. Petitioner
14 acknowledges that there was testimony by the city engineer, by
15 William Dames and a letter from a neighborhood organization,
16 but petitioner says that is not enough to carry the
17 respondent's burden.

18 The record in this case consists not only of the
19 proceedings leading to the adoption of the ordinance
20 authorizing the contract, but also the city's comprehensive
21 plan and various traffic plans. The Board believes there is
22 sufficient evidence in the record to support the decision. The
23 decision, after all, was the award of a contract for widening
24 the street to arterial standards. The record clearly shows
25 sufficient evidence to support that limited decision.

26 This assignment of error is denied.

Page The decision of the City of Medford is affirmed.

1 Kressel, dissenting.

2 I, dissent in this case, as I did in Billington v. Polk
3 County _ OR LUBA ____ (LUBA No. 83-072, Slip Op 2/15/84),
4 because I do not believe petitioners have demonstrated the
5 challenged action by the city constitutes a "land use
6 decision." Under ORS 197.825 our jurisdiction extends only to
7 the review of such decisions. Accordingly, the proper
8 disposition of this case is dismissal.

9 At issue is an ordinance of the City of Medford entitled
10 "an ordinance providing for the execution of a contract with
11 M.C. Lininger and Sons for the construction of Crater Lake
12 Avenue from Jackson Street to East Main Street." The ordinance
13 simply recites that (1) the city manager had advertised for
14 bids for the project, (2) M.C. Lininger and Sons was the low
15 bidder and therefore (3) the bid was accepted.

16 The history of this municipal project helps explain my
17 conclusion that the contract award is not reviewable by this
18 Board. The record indicates that in 1981 Crater Lake Avenue
19 was found to be operating close to capacity. According to the
20 Medford Area Transportation Study (1981), the avenue was
21 functioning as an arterial but was constructed only up to
22 collector street standards. Record at 163. In 1982, these
23 circumstances caused the city to change the designation of the
24 avenue from "collector" to "arterial." The redesignation was
25 included in a document known as the arterial streets plan.
26 That document was adopted as an amendment to the city's

1 comprehensive plan in April, 1983.

2 Significantly, no appeal of that plan amendment, which
3 clearly involved a "land use decision" as the term is defined
4 in ORS 197.015(10), was filed.

5 Two other events took place before the challenged ordinance
6 was adopted in October 1983. First, in May 1983 a bond issue
7 to finance improvement of the street in accordance with the
8 plan designation was defeated by the voters. Second, the city
9 council allocated funds in its 1983-84 budget to construct the
10 improvement.⁶

11 Municipal decisions affecting land use, such as the
12 decision to expand Crater Lake Avenue, are carried out in many
13 stages. As a project proceeds from planning to completion, the
14 range of policy choices narrows. The history of this decision
15 indicates that the land use policy questions concerning the
16 appropriate designation of Crater Lake Avenue were decided in
17 April 1983, when the arterial streets plan was adopted from
18 that point on no land use issues were before the council.⁷
19 The time to challenge the policy choices (e.g., for compliance
20 with applicable statewide goals or other land use requirements)
21 was where the plan was amended, not when a contractor was
22 selected to pave the avenue.

23 Subsequent to the designation of Crater Lake Avenue as an
24 arterial in the plan, the only remaining questions concerned
25 essentially fiscal issues, i.e., how and when to finance the
26 improvement in accordance with the plan. After the bond levy

1 failed, the fiscal questions were resolved in the form of an
2 allocation in the 1983-84 Medford city budget. All that then
3 remained was a determination of who would physically get the
4 job done.⁸ This determination, and no other, was made on
5 October 26, 1983, when the low bid submitted by M.C. Lininger
6 and Sons was accepted.

7 I do not believe the city's decision to accept the
8 contractor's low bid involved the adoption, amendment or
9 application of the Medford Comprehensive Plan or any Medford
10 land use regulation.⁹ Rather, the decision was solely a
11 component of the fiscal decision to widen Crater Lake Avenue in
12 the 1983-84 budget year. As such, it should be considered
13 beyond our jurisdiction. See e.g., State Housing Council v
14 City of Lake Oswego, 48 Or App 525, 617 P2d 655 (1980);
15 Westside Neighborhood Quality Project, Inc. v School Dist. 4J,
16 58 Or App 154, 647 P2d 962, rev den, ___ Or ___ (1982).

17 In concluding we lack jurisdiction to review the city's
18 action, I have not ignored the supreme court's decision in City
19 of Pendleton v. Kerns, 294 Or 126 ___ P2d ___ (1982). In my
20 view that case supports my conclusion that this proceeding
21 should be dismissed.

22 In Kerns, supra, the city adopted an ordinance having two
23 components. First, it authorized the improvement of a
24 dedicated but as yet unimproved street. Second, it set up a
25 Local Improvement District (LID) to finance the project. The
26 court held that the ordinance was, at least in part, a

1 reviewable land use decision. The case is factually
2 distinguishable from the present appeal. The distinctions
3 suggest the supreme court would agree the present appeal should
4 be dismissed.

5 First, the supreme court recognized in Kerns that there
6 were two aspects of the Pendleton ordinance. One was purely
7 fiscal. The other was a "final determination" concerning the
8 use of the dedicated but as yet unimproved street. Only that
9 determination figured in the conclusion that a land use
10 decision was involved.

11 Because the purpose of the improvement in Kerns was to
12 transform an undeveloped street into a "major access route" for
13 future developments nearby, and because it would "turn a
14 neighborhood park in a quiet residential area on the outskirts
15 of town into a major thoroughfare," the court concluded that
16 significant land use impacts were involved. 294 Or at 135. It
17 followed that, under Peterson v Klamath Falls, 279 Or 249, 566
18 P2d 1193 (1977), a reviewable land use decision was presented.

19 The situation in this case is markedly different. The
20 ordinance in question does not consist of two components. Here
21 there is only a fiscal decision to award a construction
22 contract to the low bidder. As noted, the determination of the
23 land use function to be performed by Crater Lake Avenue had
24 previously been made.

25 Even if the award of the contract could somehow be
26 considered a component of the final determination of the use of

1 Crater Lake Avenue, the decision clearly does not fall within
2 the "significant impact" test embraced in Kerns, supra. In
3 Kerns, the street improvement converted land then used as a
4 neighborhood park into a major access route to new development
5 on the outskirts of town. Here, the street in question is
6 already overburdened. The improvement of the street will not
7 cause significant changes in land use. Rather, the improvement
8 responds to the recognized fact that significant changes had
9 already occurred, requiring the street to be upgraded.

10 The legislature has stated that time is of the essence in
11 reaching land use decisions. ORS 197.805. The majority's
12 acceptance of jurisdiction in this case places a substantial
13 obstacle in the path of achieving this goal. Indeed, it paves
14 the way¹⁰ for confusion and delay. For this and the
15 preceding reasons, I dissent.

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FOOTNOTES

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3 1

The original petitioners, William S. Dames and Richard Morgan, have filed motions to withdraw. The Roosevelt Neighborhood Association is an intervenor in this proceeding. Respondent City of Medford has not challenged the intervention, but treats the Roosevelt Neighborhood Association as if it were entitled standing as an individual petitioner.

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8 2

"URBAN FORM

9 "Goal No. 2: To encourage a feeling of community in
10 each urban area and to avoid the lack of commitment
11 and attachment to the living area experienced by
12 residents of larger urban conglomerations.

11 "HOUSING AND RESIDENTIAL LAND USE

12 "Goal No. 6: Improve the efficiency of the programs
13 in all sectors by establishing administrative
14 responsibility for housing within the Department of
15 Community Development.

16 "Policy No. 2: Take whatever action necessary to halt
17 the trend toward replacement of older houses with
18 duplexes. Once considered a means for encouraging
19 newer, better condition housing, this development
20 trend has instead encouraged further deterioration by
21 alienating homeowners, who then take little pride in
22 their area. Lack of pride in living environment lends
23 [sic] to lack of maintenance which eventually causes
24 replacement by more duplexes. We need to encourage
25 preservation and improvement of older residential
26 areas -- not gradual decline and replacement.

21 "Policy No. 3: Take steps to upgrade the living
22 environment in general. Such actions will improve
23 attractiveness and livability and help reverse
24 deterioration. These would include social actions
25 like recreation programs, and physical actions like
26 park improvements and a multitude of small things
(like a stop light at a crucial crossing for children)
that make a neighborhood more desirable."

1 "TRANSPORTATION

2 "Goal No. 1: To provide maximum mobility for all
3 Medford residents in the most efficient manner
4 possible.

4 "NOISE

5 "Goal No. 1: To assure that land use activities are
6 planned, located and conducted in a manner which
7 minimizes the potential adverse impacts of noise,
8 consistent with other plan provisions.

8 "HISTORIC AREAS AND SITES

9 "Goal No. 1: To encourage and facilitate the
10 preservation for future generations of those examples
11 of Medford's historical heritage which are determined
12 to be of local, regional, statewide or national
13 historical significance."

12 3

13 "Land use decision:

14 "(a) Includes:

15 "(b) Does not include a ministerial decision of a
16 local government made under clear and objective
17 standards contained in an acknowledged
18 comprehensive plan or land use regulation and for
19 which no right to a hearing is provided by the
20 local government under ORS 215.402 to 215.438 or
21 227.160 to 227.195." ORS 197.015(10).

19 4

20 "(10) 'Land use decision':

21 "(a) Includes:

22 "(A) A final decision or determination made by a
23 local government or special district that
24 concerns the adoption, amendment or application
25 of:

26 "(i) The goals;

 "(ii) A comprehensive plan provision;

 "(iii) A land use regulation; or

1 "(iv) A new land use regulation; or

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

6 "(b) Does not include a ministerial decision of a
7 local government made under clear and objective
8 standards contained in an acknowledged
9 comprehensive plan or land use regulation and
10 for which no right to a hearing is provided by
11 the local government under ORS 215.402 to
12 215.438 or 227.160 to 227.185." ORS
13 197.015(10).

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In this case, the Board tends to believe the decision has more of an administrative quality or a legislative quality than a quasi-judicial quality. The decision includes application of fixed policies and does not involve the making of new policy. In this manner, the decision is rather more like a quasi-judicial decision than a legislative one. However, while the decision may be seen as effecting a relatively small number of people living along the street, the decision has an effect on the whole traffic pattern of the area. The widening thus touches the lives and habitats of a great number of citizens of Medford. Also, there is nothing in this decision which is at all like an application which must be seen to its eventual conclusion. That is, there is no application for a permit in the same manner as an application may be tendered for a conditional use permit. The decision of the city to proceed with the widening project is entirely the city's which the city was free to initiate, not initiate or halt as it saw fit. For these reasons, the Board tends to feel that the decision is more like a legislative or administrative decision, than a quasi-judicial one. See Strawberry Hill Fourwheelers v Benton County Board of Commissioners, 287 Or 591, 601 P2d 769 (1979) and Neuberger v City of Portland, 288 Or 155, 603 P2d 771 (1979).

6

Evidently no land acquisition was necessary to widen Crater Lake Avenue because the right-of-way was already of sufficient width.

7

Indeed, the marjority opinion recognizes this fact. At

1 pages 4-5 of the opinion it is stated that "there were no
2 competing choices available to the city in terms of what it
3 would do with the street should it choose to improve it. The
4 comprehensive plan established to what standards and criteria
5 the street would be constructed, and the city apparently simply
6 followed that directive."

5 8
6 Of course, it remained possible for the city to reconsider
7 the plan designation by conducting hearings for this purpose.
8 However, this did not take place.

8 9
9 ORS 197.015(10) limits reviewable land use decisions to
10 such actions.

10 10
11 Pun intended.