

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

3
4 CEDAR MILL CREEK CORRIDOR COMMITTEE,
5 DAVID KEYES, MAUREEN HAVENNER,
6 and GAIL PARKER,
7 *Petitioners,*

8
9 vs.

10
11 WASHINGTON COUNTY,
12 *Respondent.*

13
14 LUBA No. 99-138

15 ORDER

16 Before the Board are respondent's motion to dismiss and respondent's motion to
17 strike petitioners' response to respondent's reply.

18 **FACTS**

19 Some background is necessary to address the parties' arguments. Morgan Lane is a
20 residential street generally running north and south. The northern segment of Morgan Lane is
21 located within the city limits of Portland, and the southern segment is located within
22 unincorporated Washington County. The two segments are separated by a one-foot strip of
23 land owned by the city, located within city limits, and by a gate located in Washington
24 County. NW 102nd Avenue also runs north and south, parallel to the southern segment of
25 Morgan Lane. It is located within Washington County, and intersects with Cornell Road
26 approximately one-half mile south of the City of Portland/Washington County line.

27 In 1983, the City of Portland approved the Forest Heights PUD. The PUD is large,
28 containing approximately 2,000 residential units. The primary south-bound vehicular access
29 for Forest Heights residents is via Miller Road to Cornell Road. Miller Road lies to the east
30 of NW 102nd Avenue, and is circuitous. Residents of Forest Heights have lobbied both the
31 city and the county for additional access from the southern boundary of Forest Heights to

1 Cornell Road to allow for faster travel and more convenient connections. Various accesses
2 have been proposed and, for one reason or another, have not materialized.

3 The 1983 Washington County Comprehensive Plan included a proposal to connect
4 NW 102nd Avenue at its northern terminus with an unspecified road within the Forest Heights
5 PUD. Development in the area since that time has been planned to establish the connection,
6 although the particular route changed over time. The connection concept was incorporated
7 into the Cedar Hills Cedar Mill Community Plan as a “Design Element.”¹

8 In 1997, Washington County approved an application for the Mill Woods PUD. The
9 permit allowed the applicant to develop 48 single-family and 33 attached residential housing
10 units on property located just south of the City of Portland/Washington County line. As part
11 of the approval, the developer was required to construct a road (South Morgan Lane) to
12 minor collector standards. South Morgan Lane would connect with the Forest Heights
13 segment of Morgan Lane inside the City of Portland to the north, and terminate at NW 102nd
14 Avenue to the southeast. The approval also incorporated the community plan design element
15 requirement that the city and the county enter into a memorandum of understanding
16 regarding the functional classification of the street, and the financing of improvements. The
17 Mill Woods PUD approval also required a subsequent public hearing to discuss a proposed
18 memorandum of understanding with the city. The proposed memorandum of understanding
19 was prepared by county staff and discussed at a public hearing. The hearings officer found
20 that the county-proposed memorandum of understanding met the requirements of the Mill

¹The “Design Element” provides:

- “1. Extension of NW 102nd northward into the City of Portland (and Forest Park Estates) will be permitted only after the County and the City sign a Memorandum of Understanding regarding:
 - “a) the functional classification of the street; and
 - “b) financing of any improvements to the County road system made necessary by projected traffic entering Washington County from the north on NW 102nd.”

1 Woods PUD decision and the Design Element. The county then sent the proposed
2 memorandum of understanding to the city. The city did not sign the memorandum of
3 understanding; instead, on May 28, 1999, the city’s transportation director sent a letter
4 outlining the city’s concern with a new connection between Forest Heights and roads to the
5 south in the absence of a plan to develop a network of streets to disperse traffic. The
6 transportation director recommended that the gate remain closed until multiple connections
7 were available.²

8 On August 3, 1999, the Washington County Board of Commissioners
9 (commissioners) adopted a “minute order” whereby the commissioners accepted the
10 transportation director’s May 28, 1999 letter as satisfying both the Design Element and the
11 Mill Woods PUD condition of approval.

12 The commissioners appealed the transportation director’s May 28, 1999 letter to
13 LUBA on June 18, 1999. *Washington County v. City of Portland*, LUBA No. 99-101.³ In this

²The City of Portland’s May 28, 1999 letter states:

“As we have discussed, the Washington County Hearings Officer’s decision for Case File No. 97-192-S/P/D(R)/DHATREE/V does not address the City’s desire to keep NW Morgan Lane closed to through traffic until alternative roadway locations are available to disperse traffic over a network of streets rather than a single street. We feel bound to our commitment to the Forest Heights neighborhood that the street remain gated until there is an apparent change in the transportation circulation system. Such changes would include the eminent opening of an additional connection between Forest Heights and NW Cornell Road. The future opening of NW 102nd and Morgan Lane would require working closely with the affected residents to insure that the necessary traffic calming and mitigation measures required by the Washington County Hearings Officer are provided.

“We agree to help you forge an agreement with the Forest Heights Management that would allow you to continue with improvements at NW 102nd and NW Cornell Road that fulfill your need to complete engineering and construction of a signal and pedestrian improvements at that intersection. I would suggest that we jointly meet with representatives of the Marshall/Grimberg Group to facilitate reaching such an agreement.

“It is our understanding that the Hearings Officer’s decision was not binding on either Washington County or the City. We recognize that Washington County retains the right to appeal this matter to the Land Use Board of Appeals but are hopeful that an agreement as I have outlined can avoid the necessity of such an action. * * *” Record 47.

³In a separate order issued on this date, we deny petitioners’ motion to consolidate LUBA Nos. 99-101 and 99-138.

1 appeal, petitioners challenge the commissioners' "minute order" accepting the letter as
2 satisfaction of the plan element and the condition of approval on August 24, 1999.

3 **MOTION TO DISMISS**

4 In the August 3, 1999 "minute order," the commissioners decided to:

5 "1. [Accept] the May 28, 1999 letter from the City of Portland Office of
6 Transportation as meeting the Hearings Officer condition [of approval
7 for the Mill Woods PUD] and meeting the requirement of the Cedar
8 Hills Cedar Mill Community Plan for a Memorandum with the City of
9 Portland.

10 "2. Authorize the Department of Land Use and Transportation to complete
11 the improvements required by the Hearings Officer for the opening of
12 102nd Avenue.

13 "3. Direct the Department of Land Use and Transportation to remove the
14 gate on Morgan Lane upon completion of the improvements to 102nd
15 Avenue and Cornell Road. It is estimated that this action would occur
16 no later than September 30, 2000." Record 13.

17 Respondent moves to dismiss this appeal, arguing that LUBA does not have jurisdiction to
18 review the county's decision because it is not a "land use decision."⁴

19 ORS 197.015(10)(b) establishes the following exceptions to the ORS 197.015(10)(a)
20 definition of "land use decision":

21 "(A) [A decision of a local government w]hich is made under land use
22 standards which do not require interpretation or the exercise of policy
23 or legal judgment;

24 "* * * * *

⁴LUBA has exclusive jurisdiction to review "land use decisions." ORS 197.825(1). ORS 197.015(10)(a)(A) provides in relevant part that the definition of "land use decision" includes:

"A final decision or determination made by a local government * * * that concerns the adoption, amendment or application of:

"(i) The goals;

"(ii) A comprehensive plan provision; or

"(iii) A land use regulation; * * *"

1 “(D) [A decision of a local government w]hich determines final engineering
2 design, construction, operation, maintenance, repair or preservation of
3 a transportation facility which is otherwise authorized by and
4 consistent with the comprehensive plan and land use regulations[.]”

5 The county argues that the commissioners’ decision falls under one or both of these
6 exceptions. According to the county, the decision merely permits the county to remove a gate
7 separating two segments of Morgan Lane. The county contends that the actual decision to
8 connect the two road segments was made during the approval of the Mill Woods PUD
9 application, and that the hearings officer’s decision regarding the subdivision application
10 may not be collaterally attacked in this appeal. In the alternative, the county argues that
11 LUBA does not have jurisdiction to review nonbinding memoranda of understandings
12 between local governments.

13 Petitioners respond that the commissioners’ decision is a land use decision because it
14 determines that the letter written by the city transportation director satisfies a relevant
15 community plan policy, and also satisfies a condition of approval imposed by the hearings
16 officer. Petitioners contend that the hearings officer did not determine that the letter satisfied
17 the condition of approval. Therefore, petitioners argue that the hearings officer’s decision is
18 not a final decision, and petitioners’ appeal is not a collateral attack on that decision.
19 According to petitioners, prior to the commissioners’ minute order, there was no
20 memorandum of understanding signed by the city and the county, and no indication that
21 anything less than the proposed memorandum of understanding approved by the hearings
22 officer would be sufficient to satisfy either the Design Element or the condition of approval.
23 Therefore, petitioners contend their appeal is appropriate because the commissioners’
24 decision is the final decision of the local government regarding whether a particular plan
25 policy is satisfied. Until the county made its decision that the letter satisfied the Design
26 Element and the condition of approval, petitioners contend, the county could not authorize
27 the road improvements or the removal of the gate because those actions would not be

1 “authorized by and consistent with the comprehensive plan” as required by ORS
2 197.015(10)(b)(D).

3 We agree with petitioners that the commissioners’ minute order is a land use decision
4 subject to our review. The decision does more than authorize the opening of a gate. It
5 determines that the letter from the city transportation director satisfies both the condition of
6 approval for the Mill Woods PUD, and the Cedar Hills Cedar Mill Community Plan
7 requirement that the city and county enter into a memorandum of understanding regarding
8 the functional classification of the road and the financing of road improvements. This aspect
9 of the decision requires more than the application of standards that do not require
10 interpretation or the exercise of policy or legal judgment pursuant to ORS 197.015(10)(b)(A).
11 The decision is also more than a road construction or engineering design decision authorized
12 by and consistent with the comprehensive plan pursuant to ORS 197.015(10)(b)(D).

13 The county’s motion to dismiss is denied.

14 **MOTION TO STRIKE**

15 The county moves to strike petitioners’ response to the county’s reply to petitioners’
16 response to the county’s motion to dismiss. The county argues that our rules do not permit
17 petitioners to continue to present their arguments *ad infinitum*, and therefore, we should
18 strike petitioners’ latest response.

19 OAR 661-010-0065 permits parties to file motions for relief, and provides that
20 responses may be filed within 14 days of the motion. While not obliged to do so, LUBA will
21 consider replies and responses to replies where appropriate and where such consideration will
22 not unduly delay the appeal process. *See Dominey v. City of Astoria*, 31 Or LUBA 523, 526
23 (1996) (where LUBA requested that the parties not file further motions or responses to
24 motions except in response to a specific request by the Board.)

1 Here, the parties have stipulated to an extension of deadlines for the filing of briefs
2 pending resolution of the county’s motion to dismiss. Consideration of the parties’ responses
3 and replies in this case has not unduly delayed the appeal.

4 The county’s motion to strike is denied.

5 **CONCLUSION**

6 Per the stipulation of the parties, the proceedings in this appeal are resumed as of the
7 date of this order. The petitions for review shall be due 21 days from the date of this order,
8 and the response briefs shall be due 42 days from the date of this order.

9 Dated this 25th day of January, 2000.

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Anne Corcoran Briggs
Board Member