

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 REGENCY CENTERS, L.P.,
5 *Petitioner,*

6
7 vs.

8
9 WASHINGTON COUNTY,
10 *Respondent.*

11
12 LUBA No. 2013-091

13
14 TAKFAL PROPERTIES, LLC,
15 *Petitioner,*

16
17 vs.

18
19 WASHINGTON COUNTY,
20 *Respondent.*

21
22 LUBA No. 2013-093

23
24 MGP X PROPERTIES, LLC,
25 *Petitioner,*

26
27 vs.

28
29 WASHINGTON COUNTY,
30 *Respondent.*

31
32 LUBA No. 2013-094

33
34 FINAL OPINION
35 AND ORDER

36
37 Appeal from Washington County.

38
39 Ty K. Wyman, Portland, filed a petition for review on behalf of petitioners Regency
40 Centers, L.P. and MGP X Properties, LLC and argued on behalf of MGP X Properties, LLC.
41 With him on the brief was Dunn Carney Allen Higgins and Tongue, LLP.

42
43 Phillip E. Grillo, Portland, filed a petition for review and argued on behalf of
44 petitioner TakFal Properties, LLC. With him on the brief was Davis Wright Tremaine, LLP.
45

1 Jacquilyn Saito-Moore, Senior Assistant County Counsel, Hillsboro, filed the
2 response brief and argued on behalf of respondent. With her on the brief was Alan A.
3 Rappleyea, County Counsel.

4
5 RYAN, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member,
6 participated in the decision.

7
8 2013-091 DISMISSED 03/05/2014
9 2013-093/094 REMANDED 03/05/2014

10
11 You are entitled to judicial review of this Order. Judicial review is governed by the
12 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a decision by the county’s director of land use and transportation services authorizing the county to remove a traffic light in the City of Sherwood at the intersection of Tualatin Sherwood Road and S.W. Langer Drive, and eliminate two left turn lanes from eastbound Tualatin Sherwood Road onto S.W. Langer Drive.

LUBA NO. 2013-091

After its petition for review was filed, Regency Centers, L.P. moved to dismiss its appeal of the decision. The motion is granted. LUBA No. 2013-091 is dismissed.

REPLY BRIEFS

Petitioners each move for permission to file a reply brief to respond to alleged new matters raised in the county’s response brief. The county moves to strike an appendix to MGP X Properties reply brief that the county alleges contains extra record evidence. We agree with the county that the reply brief impermissibly includes extra record evidence and we do not consider Appendix A to the MGP X Properties, LLC reply brief. The reply briefs are otherwise allowed.

FACTS

Petitioner TakFal Properties, LLC (Cinema) owns the Sherwood Cinema Center located north of Tualatin Sherwood Road and east of Highway 99W in the City of Sherwood (City). Petitioner MGP X Properties, LLC (Market Center) owns the Sherwood Market Center located south of Tualatin Sherwood Road and east of Highway 99W in the City. Where Cinema and Market Center make overlapping arguments in these consolidated appeals, we refer to them collectively as petitioners.

Tualatin Sherwood Road is a facility that is owned, operated and maintained by the county. The portion of Tualatin Sherwood Road that is subject to the challenged decision is located entirely within the incorporated City of Sherwood. The four-way intersection of

1 Tualatin Sherwood Road and S.W. Langer Drive is located approximately 500 feet east of the
2 intersection of Tualatin Sherwood Road and Highway 99W. A traffic signal at Tualatin
3 Sherwood Road/S.W. Langer Drive intersection regulates traffic flow at the intersection and
4 the intersection includes two left turn lanes from east bound Tualatin Sherwood Road north
5 onto S.W. Langer Drive into Cinema's property. The traffic signal was installed sometime
6 between 1995 and 1997 in order to satisfy a condition of approval of the City's 1994 decision
7 approving Market Center's site plan. Market Center Petition for Review Appendix C at 19.
8 The east bound left turn lanes from Tualatin Sherwood Road onto S.W. Langer Drive were
9 installed later by Cinema in order to satisfy a condition of approval of the City's 1998
10 decision approving a site plan for a theater on the Cinema's property. Cinema Petition for
11 Review Attachment 6, page 3.

12 In 2005, the county identified improvement of Tualatin Sherwood Road from its
13 intersection with Adams Road (now known as Langer Parkway), located approximately 1500
14 feet east of the subject intersection, to its intersection with Borchers Road, located
15 approximately 1500 feet west of the subject intersection and west of Highway 99W, as a
16 Major Streets Transportation Improvement Program (MSTIP) project (the Borchers to Langer
17 Parkway Project).¹ In 2012, the Borchers to Langer Parkway Project received county funding.

18 In 2012 and 2013, the county formed a project team that included the county, the City,
19 a design consultant, a traffic engineer, and a geotechnical engineer to consider four possible
20 alternatives for implementing the Borchers to Langer Parkway Project.² Record 1. Alternative
21 1 proposed removing the traffic signal at the intersection of Tualatin Sherwood Road and

¹ According to the county's adopted Transportation Systems Plan (County TSP) the MSTIP is a program that provides "[a] coordinated approach to improving the transportation system[.]" TSP Plan Implementation and Monitoring Element 71. MSTIP projects are funded through property taxes. TSP System Funding and Financing Element 62.

² The project team mailed notice of the project to property owners and businesses and held more than six public meetings with property and business owners, and the meetings resulted in the addition of two more alternatives for a total of six alternatives for consideration. Record 1-3.

1 S.W. Langer Drive and eliminating the two left turn lanes from eastbound Tualatin Sherwood
2 Road north onto S.W. Langer Drive, thereby changing petitioners’ access to and egress from
3 Tualatin Sherwood Road at S.W. Langer Drive to right-in and right-out only.³ The county
4 engineer recommended Alternative 1 to the county’s director of land use and transportation.
5 In September, 2013, the county’s director of land use and transportation approved the
6 recommendation, and these appeals followed.

7 **JURISDICTION**

8 **A. Introduction**

9 The issue of whether the county or the City or both local governments possess
10 planning and permitting authority over development of Tualatin Sherwood Road is not well
11 addressed in the decision or by the parties. We are unsure whether there is an
12 intergovernmental agreement or other agreement between the City and the county that
13 explains the relationship in detail. The record does not include such an agreement. The
14 county’s decision does not explain why the county’s Transportation System Plan (County
15 TSP) and the Washington County Community Development Code (CDC) apply to proposed
16 development of a road that is owned, operated and maintained by the county but located

³ The decision describes Alternatives 2, 3, and 4 as follows:

“Alternative 2: Maintain all the traffic signals and widen Tualatin-Sherwood Road at the Regency/Sherwood Market Center-Tak Fal/Sherwood Cinemas traffic signal to eight lanes. Widening Tualatin-Sherwood Road will require significant right of way, development and construction impacts.

“Alternative 3: Regulate and remove the traffic signal located at Baler Way and construct a new local access improvement between the Tak Fal/Sherwood Cinemas and the Les Schwab site. Alternative 3 also requires Tualatin-Sherwood Road to be widened at the Regency/Sherwood Market Center-Tak Fal/Sherwood Cinemas traffic signal to eight lanes with similar right of way, development and construction impacts as Alternative 2.

“Alternative 4: Regulate and remove both the Baler Way and Shopping Center-Theater traffic signals and construct a new traffic signal midway between the two locations with additional local access improvements. Alternative 4 allows for the narrower six lane cross section at the Regency/Sherwood Market Center-Tak Fal/Sherwood Cinemas traffic signal but impacts Bank of America, by removing a corner of the building and bank drive thru, and impacts Burger King by requiring a total purchase of the building.” Record 2.

1 within the City limits, and does not explain or otherwise address why the City's
2 Transportation System Plan (City TSP) and development standards and regulations do not
3 apply to development of portions of Tualatin Sherwood Road located within the City.

4 Cinema takes the position that:

5 "[i]n this case, both the city and county have planning and permitting authority
6 for development along Tualatin Sherwood Road. Washington County has
7 planning and permitting authority for Tualatin Sherwood Road itself, and the
8 City of Sherwood has land use, transportation planning, and permitting
9 authority for all development within its municipal boundaries, including
10 development on and along Tualatin Sherwood Road. As a result, City land
11 use regulations, comprehensive plan provisions and applicable land use
12 decisions * * * apply to the challenged decision." Cinema Petition for Review
13 12.

14 We understand Cinema to take the position that the City and the county have dual "planning
15 and permitting authority" over development on the road. However, Cinema does not cite the
16 authority it relies on for its position.

17 The county takes the position that City comprehensive plan and land use regulations
18 do not apply to the county's decision to remove the traffic signal and left turn lanes located in
19 the road. As we explain below, the statutes that the county cites, ORS 368.016 and ORS
20 810.010(2) and (3), provide no support for the county's position, and the county does not
21 identify any other authority to support its position. Based on the parties' arguments and the
22 present record, LUBA is unable to resolve the parties' dispute regarding whether the decision
23 is subject to the City's planning authority.

24 We sustain some of petitioners' assignments of error and remand the decision to the
25 county. On remand, the county and petitioners will have the opportunity to better address and
26 explain their understanding of the relationship between City and county planning and
27 permitting of development of Tualatin Sherwood Road within the City of Sherwood.

1 **B. LUBA’s Jurisdiction**

2 LUBA’s jurisdiction is limited to “land use decisions” as defined at ORS
3 197.015(10)(a), which includes a local government decision that concerns the application of a
4 comprehensive plan provision or a land use regulation. But among the exceptions to that
5 definition is ORS 197.015(10)(b)(D), which provides that “land use decision” does not
6 include a decision of a local government that “determines final engineering design,
7 construction, operation, maintenance, repair or preservation of a transportation facility that is
8 otherwise authorized by and consistent with the comprehensive plan and land use
9 regulations[.]” And ORS 197.015(10)(b)(A) provides that “land use decision” does not
10 include a decision of a local government “made under land use standards that do not require
11 interpretation or the exercise of policy or legal judgment[.]” If an exception to the definition
12 of “land use decision” applies, then the challenged decision is not a “land use decision” as
13 defined in ORS 197.015(10)(a) and LUBA does not have jurisdiction to review it. We
14 therefore first address the county’s arguments that at least one of the two exceptions apply.
15 Our resolution of the jurisdictional issue will also resolve many of the merits of the appeal, as
16 we explain in more detail below.

17 **C. ORS 197.015(10)(b)(D)**

18 The county argues that the challenged decision falls within the ORS
19 197.015(10)(b)(D) exception to the definition of “land use decision” for a decision of a local
20 government that “determines final engineering design, construction, operation, maintenance,
21 repair or preservation of a transportation facility that is otherwise authorized by and
22 consistent with the comprehensive plan and land use regulations[.]” According to the county,
23 the County TSP adopted as part of the Washington County Comprehensive Plan (WCCP)
24 identifies Tualatin Sherwood Road as a “capacity enhancement project.” Therefore,
25 according to the county, the challenged decision to remove the traffic signal and the two left

1 turn lanes “determines” the “operation * * * of a transportation facility that is otherwise
2 authorized by and consistent with” the County TSP.

3 Petitioners argue the ORS 197.015(10)(b)(D) exception does not apply to the county’s
4 decision, for two reasons.

5 **1. County’s Comprehensive Plan and Land Use Regulations**

6 First, according to petitioners, the change in the operation of Tualatin Sherwood Road
7 that is approved in the decision is not “otherwise * * * consistent with” the County TSP and
8 the county’s land use regulations, as required by ORS 197.015(10)(b)(D). Cinema points to
9 the portion of the decision that states that with the removal of the two left turn lanes, Tualatin
10 Sherwood Road will “maintain[] the existing six-lane cross section at the [intersection].”
11 Record 1. Cinema argues that the County TSP Roadway Element Policy 10, Functional
12 Classification Policy, Figure 5 (“Washington County Lane Numbers Map”) identifies
13 Tualatin Sherwood Road as a street with five lanes as the maximum number of lanes
14 allowed.⁴ Cinema Petition for Review Attachment 4. For that reason, Cinema argues, the

⁴ TSP Roadway Element Policy 10, Functional Classification Policy, Table 6 provides:

“The maximum number of travel lanes that can be built without a plan amendment is identified on the ‘Road Lane Numbers’ map in the Transportation Plan. This plan-level decision establishes the transportation system capacity necessary to adequately serve future travel demands identified in the plan. The number of lanes required to accommodate turning movements at intersections and interchanges will be determined through traffic analysis conducted during the transportation project development process. This project-level decision identifies physical improvements necessary at or near intersections and interchanges to safely and efficiently move toward attaining the system capacity identified in the Plan.

“Improvements may include turn lanes and auxiliary lanes adjoining the traveled roadway to accommodate weaving, merging, speed changes, or other purposes supplementary to through traffic movement. Auxiliary lanes to address spot area capacity and safety needs may extend between intersections (including interchanges) and beyond an intersection. Opportunities for public involvement at the transportation project development level are provided as defined in Washington County’s adopted Transportation Project Development Public Involvement Guidelines (R&O 93-124, August 25, 1993). Additional opportunities for public participation are available as provided by Article VII of the Community Development Code.” (Emphasis added.)

The Lane Numbers Map that is attached to Cinema petition for review at Attachment 4 shows Tualatin Sherwood Road as a street with a maximum of “4-5 Lanes.”

1 operation of the transportation facility is not “consistent with” the County TSP where the
2 decision allows a six-lane street.

3 Cinema also argues that beyond the alleged TSP inconsistency, the operation of
4 Tualatin Sherwood Road approved in the decision is not “consistent with” the county’s land
5 use regulations. Cinema argues that the county’s Road Design and Construction Standards
6 specify that the maximum width for an arterial street is a 74-foot wide improvement within a
7 98-foot right of way, and with the removal of the traffic signal and left turn lanes, Tualatin
8 Sherwood Road will be improved to 80 feet with a 101-foot right of way. Cinema Petition
9 for Review Attachment 7.

10 Even if the county is correct that the County TSP identifies Tualatin Sherwood Road
11 as a “capacity enhancement project” and capacity enhancements are “otherwise authorized
12 by” the County TSP, the county has not responded to Cinema’s arguments that the operation
13 of Tualatin Sherwood Road approved in the decision is not “consistent with” the County TSP
14 and the county’s land use regulations. Without a better explanation from the county, it
15 appears to us that Cinema is correct that the Washington County Lane Numbers Map
16 classifies Tualatin Sherwood Road as a four to five lane street and that the county has
17 approved a six-lane street that is not “consistent with” the County TSP, where the County
18 TSP designates Tualatin Sherwood Road as a street that is no more than five lanes wide. *See*
19 *n* 4. Without a better explanation from the county, it also appears to us that Cinema is correct
20 that the county has approved an arterial that is wider than the maximum width specified in
21 the county’s Road Design and Construction Standards for arterials and their rights of way and
22 therefore is not “consistent with” the county’s land use regulations.⁵

⁵ The county does not argue that the county’s Road Design and Construction Standards are not “land use regulations” as defined in ORS 197.015(12), or that the challenged decision need not be consistent with those land use regulations.

1 **2. City’s Transportation System Plan**

2 Next, petitioners argue that removal of the traffic signal is not “authorized by and
3 consistent with” the City TSP. First, according to petitioners, a drawing that is a part of the
4 City TSP shows the traffic signal at its current location. City of Sherwood TSP Traffic
5 Control Master Plan, Figure 8-10. Therefore, petitioners argue, the county’s decision to
6 remove a traffic signal that is shown on Figure 8-10 is not “otherwise authorized by and
7 consistent with” the City’s comprehensive plan. Second, petitioners argue that the county’s
8 decision to eliminate the traffic signal allows a 1,200 foot block length that is not “authorized
9 by and consistent with” the City’s Transportation System Plan, where that plan’s street
10 connection standards require street connections with spacing of no more than 530 feet.

11 We understand the county to respond that the county’s decision to remove the traffic
12 signal and turn lanes was made pursuant to ORS 368.016, and that under ORS 368.016, any
13 conflict between its decision and the City’s comprehensive plan must be resolved in favor of
14 the county. ORS 368.016(1) provides in relevant part that “[e]xcept as provided in this
15 section or as otherwise specifically provided by law, the exercise of governmental powers
16 relating to a road within a county is a matter of county concern.” The remainder of ORS
17 368.016 specifies in relevant part that the county does not have jurisdiction over a state
18 highway and that the county may not take any action involving a local access road within a
19 city unless the city governing body consents to the action.

20 The county also cites ORS 810.010, which “designates the bodies responsible for
21 exercising jurisdiction over certain highways when the vehicle code requires the exercise of
22 jurisdiction by the road authority.” ORS 810.010(2) designates the county governing body as
23 the road authority for “all county roads *outside the boundaries of an incorporated city,*” and
24 ORS 810.010(3) designates the city governing body as the road authority for “all highways,
25 roads, streets and alleys, other than state highways, *within the boundaries of the incorporated*
26 *city.*” (Emphases added.)

1 The ORS 197.015(10)(b)(D) exception applies to a decision that determines the
2 operation of a transportation facility “that is otherwise authorized by and consistent with the
3 comprehensive plan and land use regulations[.]” The county does not explain why either
4 statute it cites makes it unnecessary to determine whether the “operation * * * of the
5 transportation facility” is “otherwise authorized by and consistent with” the *City’s*
6 comprehensive plan and land use regulations in considering whether the ORS
7 197.015(10)(b)(D) exception applies to the county’s decision. In construing the exception,
8 we see no reason to read that phrase as requiring only authorization by and consistency with
9 the *county’s* comprehensive plan and land use regulations where the decision involves a
10 county road that is located within the boundaries (and planning jurisdiction) of an
11 incorporated city. In that circumstance, while it seems clear that the city has planning
12 authority over roads within the city, other than state roads, it is not at all clear that the county
13 has exclusive planning and permitting authority over county-owned and operated roads
14 within the city, unless the city consents to such county authority. *See* ORS 215.130(2)(b)
15 (providing that a county comprehensive plan and land use regulation shall apply to the area
16 within the county also within the boundaries of a city *if* (1) the governing body of such city
17 adopts an ordinance declaring the area within its boundaries subject to the county’s land use
18 planning and regulatory ordinances, officers and procedures and (2) the county governing
19 body consents to the conferral of jurisdiction).

20 However, we disagree in part with petitioners that the decision to remove the traffic
21 signal is inconsistent with the City’s comprehensive plan. Petitioners argue that a figure
22 included in the City TSP Traffic Control Master Plan shows the existing traffic signal and
23 that because that figure shows the existing traffic signal, the county may not remove the
24 signal unless the Traffic Control Master Plan is amended to allow such removal. However,
25 no party cites anything in the text of the Traffic Control Master Plan or elsewhere in the City

1 TSP that *requires* the signal at Tualatin Sherwood Road and S.W. Langer Drive to remain in
2 place.

3 We agree, however, with petitioners that the decision to remove the two left turn lanes
4 appears to be inconsistent with the City TSP street connection standards, where the decision
5 apparently approves creation of a block that exceeds the plan’s maximum block length, at
6 least in the absence of any response from the county that might explain that apparent
7 inconsistency.

8 Accordingly, the exception to the definition of “land use decision” at ORS
9 197.015(10)(b)(D) does not apply to the county’s decision.

10 **D. ORS 197.015(10)(b)(A)**

11 We also understand the county to take the position that the challenged decision falls
12 within the exception in ORS 197.015(10)(b)(A) for decisions “made under land use standards
13 that do not require interpretation or the exercise of policy or legal judgment[.]” We
14 understand the county to argue that the decision did not require interpretation because the
15 project is an “Exempt Project” under CDC 702-3 and CDC 701-2.A provides that “[p]rojects
16 that are exempt from the provisions of this Code * * * are not land use decisions.” CDC 702-
17 3 provides that one class of “exempt projects” are:

18 “Operational improvements within existing right-of-way and ancillary
19 easements including, but not limited to striping, installation of guard rails,
20 widening shoulders, street lighting, signalization, reflectors, buttons, signs,
21 flashing beacons, channelization and median control.”

22 Petitioners respond that in determining that Alternative 1 is an “operational improvement”
23 and an exempt project under CDC 702-3, the director necessarily interpreted provisions of
24 the CDC, including CDC 702-3.⁶

⁶ The decision states:

“Alternative 1 is an operational improvement under the [CDC], Section 702-3 and is thus consistent with the County’s comprehensive plan.” Record 4.

1 We explain in more detail below the provisions of CDC Article 7. CDC 702-3 is a
2 land use regulation as defined in ORS 197.015(12) and the director of land use and
3 transportation applied CDC 702-3 in the decision. Whether CDC 701-2.A states that exempt
4 projects are “not land use decisions” has no bearing on our analysis of whether the exception
5 to LUBA’s jurisdiction at ORS 197.015(10)(b)(A) applies, because that is a question of state
6 law.⁷ We agree with petitioners that in determining that the project is an “operational
7 improvement” and an “exempt project” the director was required to interpret various
8 provisions of the CDC, including CDC 702-3, and therefore the exception at ORS
9 197.015(10)(b)(A) does not apply. *See St. John v. Yachats Planning Commission*, 138 Or
10 App 43, 47, 906 P3d 304 (1995) (city’s determination of which ordinance applied to
11 proposed development requires interpretation and exercise of legal judgment and is thus a
12 land use decision subject to LUBA’s exclusive jurisdiction). The decision is a “land use
13 decision” within the meaning of ORS 197.015(10)(a).⁸

14 **SIXTH ASSIGNMENT OF ERROR (Market Center)**

15 CDC Article VII identifies public transportation improvements that are subject to
16 development review and establishes the standards and procedures for review. CDC 701.
17 CDC 701-2 sets out four categories of public transportation improvement projects: Exempt,
18 Category A, Category B, and Category C. Category A, B, and C projects are “permitted
19 subject to the applicable development standards of this Article.” CDC 703, 704, and 705.⁹
20 CDC 701-5.

⁷ CDC 701-2.B similarly provides that “[d]ecisions authorizing Category A projects are not land use decisions.”

⁸ The parties filed a joint conditional motion to transfer the appeal to circuit court in the event we determine that we do not have jurisdiction. Our resolution of the jurisdictional challenges makes it unnecessary to address that joint motion.

⁹ Category A projects are reviewed and processed as Type I actions according to CDC 204-2. Type I actions are processed with no public notice of review, and a copy of the decision of the Review Authority is provided to the applicant and property owner of record. CDC 204-2.

1 CDC 702 describes projects that are “exempt from the provisions of [Article VII]
2 * * * unless otherwise specified[.]” CDC 702-3 provides that one class of exempt project is:

3 “Operational improvements *within existing right-of-way and ancillary*
4 *easements* including, but not limited to striping, installation of guard rails,
5 widening shoulders, street lighting, signalization, reflectors, buttons, signs,
6 flashing beacons, channelization and median control.” (Emphasis added.)

7 In the sixth assignment of error, Market Center argues that the county improperly
8 construed CDC 702-3 in concluding that the project is an exempt project under CDC 702-3,
9 because the project requires additional right of way from Market Center’s land and is
10 therefore not an “operational improvement within existing right of way[.]” Market Center
11 argues that because the project is not an exempt project, CDC 703, 704 and 705 require the
12 county to review the project for compliance with the applicable additional development
13 standards.¹⁰

14 The county agrees that Alternative 1 will require additional right of way. Response
15 Brief 9. Therefore, we agree with Market Center that the county erred in concluding that the
16 project is an “exempt project” under CDC 702-3, where the county agrees that additional
17 right of way will be required. The decision and record contain no findings regarding the
18 amount of additional right of way to be acquired. On remand the county must determine

Category B projects are reviewed and processed as Type II actions under CDC 204-3. For Type II actions, notice of a pending review is provided to the parties specified in CDC 204-3 and opportunity for comment is provided. Notice of the decision is provided to the applicant and persons who submitted written comment and persons entitled to notice of pending review. An opportunity for a local appeal is provided.

Category C projects are reviewed and processed as Type III actions under CDC 204-4. Public hearings are held on Type III actions and the decision may be appealed locally.

¹⁰ As potentially relevant here, CDC 707 requires an alternatives analysis review for certain Category A, B, and C projects. CDC 708 requires a site analysis that includes submission of plans and documentation showing compliance with the development standards. CDC 712 requires pedestrian facilities to be provided along the sides of roads that are constructed as ultimate improvements except where an exemption is granted. CDC 714 provides additional standards for Category A, B, and C projects.

1 whether the project is a Category A, B, or C project and review and process it according to
2 the procedures and development standards that it determines apply to each type of project.¹¹

3 Market Center's sixth assignment of error is sustained.

4 **FIRST, SECOND, AND FIFTH ASSIGNMENTS OF ERROR (Petitioners)**

5 In their first and fifth assignments of error, petitioners argue that the county's decision
6 conflicts with various provisions of the City TSP and its land use regulations. In their second
7 assignment of error petitioners argue that the decision improperly conflicts with conditions of
8 approval of previous City decisions to approve Market Center's site plan in 1994 and
9 Cinema's site plan in 1998.

10 **A. City Comprehensive Plan and Land Use Regulations**

11 In its first assignment of error, Cinema argues that the City's Traffic Control Master
12 Plan applies to the county's decision and the county's decision to remove the traffic signal
13 conflicts with the City's Traffic Control Master Plan. In its first assignment of error, Market
14 Center argues that the county's decision to remove the traffic signal violates Statewide
15 Planning Goal 2 (Land Use Planning) because the removal of the traffic signal is inconsistent
16 with the City's Traffic Control Master Plan.

¹¹ CDC 703-1.1 describes one type of Category A projects:

"Projects listed as exempt but which require the acquisition of right of way, provided that the acquisition is no greater than the maximum specified for the road classification in the Transportation Plan."

Another type of Category A projects that is potentially relevant here is described in CDC 703-1.2 as:

"Widening or modification of an existing transportation facility, provided that:

- "A. The project is consistent with the Transportation Plan;
- "B. The right of way width and dimensional standards do not exceed the right of way width and dimensional standards set forth in the Transportation Plan;
- "C. The new centerline of the road does not extend more than 6 feet in either direction from the existing centerline."

1 As we concluded above in our resolution of the jurisdictional challenges, even if a
2 figure in the City's Traffic Control Master Plan shows existing traffic signals within the city,
3 Cinema points to nothing in the Traffic Control Master Plan that *requires* the signal or
4 prohibits the removal of a traffic signal that is shown in the Traffic Control Master Plan.
5 Accordingly, even assuming that the City's Traffic Control Master Plan applies to the
6 county's decision, Cinema's first assignment of error provides no basis for reversal or
7 remand.

8 We additionally reject Market Center's first assignment of error because Market
9 Center has not demonstrated that Goal 2 applies to the county's decision, where the county
10 has an adopted and acknowledged comprehensive plan and land use regulations. *See* ORS
11 197.175(2)(d) (if a local government's comprehensive plan and land use regulations have
12 been acknowledged, the local government must make land use decisions and limited land use
13 decisions in compliance with the acknowledged plan and land use regulations).

14 In the fifth assignment of error, petitioners argue that the county erred in failing to
15 consider various provisions of the City's comprehensive plan and land use regulations that
16 Cinema argues apply to the county's decision. Cinema cites City's comprehensive plan
17 Economic Development Policy 1 and Policy 3, and Strategy 3.4, and argues that the county's
18 decision conflicts with those policies and strategies. Cinema also argues that the county erred
19 in failing to apply Sherwood Development Code 16.90.030(A)(1), Major Modifications to
20 Approved Site Plans, to the county's decision.

21 As we explain above, the planning and permitting relationship for development on a
22 county owned, operated, and maintained road located entirely within the City is not clearly
23 explained by the parties and is not addressed in the challenged decision. The county does
24 not respond to petitioners' fifth assignment of error. Given that lack of response, and the fact
25 that the decision must be remanded in any event under Market Center's sixth assignment of
26 error, we deem it appropriate to remand under petitioners' fifth assignment of error, and

1 require the county, on remand, to consider the issue of the applicability of the city’s planning
2 legislation in the first instance. On remand, petitioners will have the opportunity to argue to
3 the county that the cited provisions of the City’s comprehensive plan and land use regulations
4 apply to the county’s decision, and the county will have the opportunity to consider whether
5 they apply, and if it determines that they apply, review Alternative 1 for compliance with
6 those provisions.

7 Petitioners’ first assignments of error are denied.

8 Petitioners’ fifth assignments of error are sustained, in part.

9 **B. 1994 and 1998 City Decisions’ Conditions of Approval**

10 In the second assignment of error petitioners argue that the decision improperly
11 conflicts with conditions of approval of two City decisions, to approve Market Center’s site
12 plan in 1994 (requiring the traffic signal) and Cinema’s site plan in 1998 (requiring the left
13 turn lanes). In support of their argument, petitioners cite Sherwood Development Code
14 16.02.030, which provides that “[t]he use of all land, as well as the construction,
15 reconstruction, enlargement, structural alteration, movement use or occupation of any
16 structure within the city shall conform to the requirements of this code * * *[,]” and
17 Sherwood Development Code 16.02.080, which allows the City to institute enforcement
18 proceedings for failure to comply with conditions imposed under any provision of the
19 Sherwood Development Code.

20 In response, the county takes the position that the City’s 1998 decision approving
21 Cinema’s site plan contemplates removal of the left turn lanes when traffic patterns warrant
22 their removal.¹² The county does not respond to petitioners’ contention that removal of the
23 traffic signal is inconsistent with the site plan conditions of approval.

¹² Condition 11B(3) of the City’s 1998 decision approving Cinema’s site plan provides:

“A second eastbound left turn lane into the subject site (at the Albertson’s traffic signal) will be provided by the applicant. Should this left turn lane into the site subsequently impede

1 The county's response is not particularly helpful, and does not address the traffic
2 signal removal at all. It also does not address petitioners' argument that Sherwood
3 Development Code 16.02.040 prohibits removal of the traffic signal and left turn lanes.

4 As with the fifth assignment of error, we cannot fully resolve this assignment of error
5 based on the record and the parties' arguments. Because the decision must be remanded in
6 any event, we deem it appropriate to also remand under this assignment of error for the
7 county to address the issue in the first instance. On remand, petitioners will have the
8 opportunity to identify the source of legal authority for application of Sherwood
9 Development Code 16.02.040 to the county's decision, and the county will have the option to
10 consider whether Sherwood Development Code 16.02.040 applies to the county's decision
11 and if it applies, whether it is satisfied.

12 Petitioners' second assignments of error are sustained, in part.

13 **SIXTH ASSIGNMENT OF ERROR (Cinema)**

14 In its sixth assignment of error, Cinema argues that the county's decision conflicts
15 with various provisions of the County TSP. In particular, Cinema argues that the county
16 erred in failing to consider County TSP Strategies 3.1, 3.3, 3.4, 3.5, 3.6 and 19.12. Cinema

traffic on westbound Tualatin-Sherwood from moving through the 99W intersection, a traffic study commissioned by the City and paid for by [the applicant] will be undertaken.

"Should the study determine that traffic movement in Tualatin-Sherwood through the 99 W intersection is significantly impaired by the existence of this left turn lane, the City may, after consultation with [the applicant] eliminate all left turn access into the site at this location. In so doing, a loop road or other adequate access from Tualatin-Sherwood to the site must be available. While these decisions will be undertaken with the advice of [the applicant], the final determinations will remain solely with the City." Cinema Petition for Review Attachment 6, page 3-4.

Condition 17 of the decision also provides:

"The applicant is required to obtain the necessary permits from Washington County for any modification to Tualatin-Sherwood Road. Condition 11B applies to the extent that it complies with Washington County standards. In the county's review of the permit, it will attempt to implement Condition 11B(1-3) but if there is a conflict between this condition and the Washington County standards the Washington County standards shall supersede the conditions." Cinema Petition for Review Attachment 6, page 4.

1 argues that the county was required to consider those strategies because the County TSP
2 provides that “[County TSP] policies and their strategies and system maps are regulatory
3 requirements.”¹³

4 The county has not provided any meaningful response to Cinema’s sixth assignment
5 of error. As with the second and fifth assignments of error, we deem it appropriate to remand
6 under the sixth assignment of error and allow the county to address the issue in the first
7 instance. On remand, the county will have the opportunity to consider whether the County
8 TSP strategies that petitioners identify apply to the county’s decision, and if they apply,
9 determine whether the county’s decision complies with those strategies.

10 Cinema’s sixth assignment of error is sustained, in part.

11 **FOURTH ASSIGNMENT OF ERROR (Petitioners)**

12 OAR 660-012-0050(3) is part of the Land Conservation and Development
13 Commission’s (LCDC’s) Transportation Planning Rule:

14 “Project development addresses how a transportation facility or improvement
15 authorized in a TSP is designed and constructed. This may or may not require
16 land use decision-making. The focus of project development is project
17 implementation, e.g. alignment, preliminary design and mitigation of impacts.
18 During project development, projects authorized in an acknowledged TSP
19 shall not be subject to further justification with regard to their need, mode,
20 function, or general location. For purposes of this section, a project is
21 authorized in a TSP where the TSP makes decisions about transportation need,
22 mode, function and general location for the facility or improvement as
23 required by this division.

24 “(a) Project development does not involve land use decision-making to the
25 extent that it involves transportation facilities, services or
26 improvements identified in OAR 660-012-0045(1)(a); the application
27 of uniform road improvement design standards and other uniformly
28 accepted engineering design standards and practices that are applied
29 during project implementation; procedures and standards for right-of-
30 way acquisition as set forth in the Oregon Revised Statutes; or the

¹³ The County TSP further provides that “[t]he strategies and system maps that are applicable to private and public development are identified in the [CDC].”

1 application of local, state or federal rules and regulations that are not a
2 part of the local government's land use regulations.

3 “(b) Project development involves land use decision-making to the extent
4 that issues of compliance with applicable requirements requiring
5 interpretation or the exercise of policy or legal discretion or judgment
6 remain outstanding at the project development phase. These
7 requirements may include, but are not limited to, regulations protecting
8 or regulating development within floodways and other hazard areas,
9 identified Goal 5 resource areas, estuarine and coastal shoreland areas,
10 and the Willamette River Greenway, and local regulations establishing
11 land use standards or processes for selecting specific alignments. They
12 also may include transportation improvements required to comply with
13 ORS 215.296 or 660-012-0065(5). When project development
14 involves land use decision-making, all unresolved issues of
15 compliance with applicable acknowledged comprehensive plan
16 policies and land use regulations shall be addressed and findings of
17 compliance adopted prior to project approval.

18 “(c) To the extent compliance with local requirements has already been
19 determined during transportation system planning, including adoption
20 of a refinement plan, affected local governments may rely on and
21 reference the earlier findings of compliance with applicable standards.”

22 In sum, OAR 660-012-0050(3) specifies the circumstances in which transportation project
23 development involves “land use decision-making.”¹⁴ Under OAR 660-012-0050(3)(b), a
24 project development decision that involves “land use decision-making,” must comply with all
25 applicable acknowledged comprehensive plan policies and land use regulations, and must be
26 supported by findings.

27 In the fourth assignment of error, petitioners argue that OAR 660-012-0050(3)(b)
28 requires the county to make the challenged decision in accordance with the county’s adopted
29 procedures for making land use decisions, and requires the county to adopt findings that the
30 decision complies with all applicable acknowledged comprehensive plan policies and land
31 use regulations. With that much we agree. However, petitioners’ arguments under the fourth

¹⁴ OAR 660-012-0005(36) defines “[t]ransportation [p]roject [d]evelopment” to mean “implementing the transportation system plan (TSP) by determining the precise location, alignment, and preliminary design of improvements included in the TSP based on site-specific engineering and environmental studies.”

1 assignment of error appear to be entirely derivative of other assignments of error. As
2 explained, we sustained Market Center’s and Cinema’s second, fifth, and sixth assignments
3 of error, and on remand the county must determine whether the project is a Category A, B, or
4 C project and adopt findings that determine which, if any, city or county comprehensive plan
5 policies and land use regulations are “applicable,” and adopt findings addressing whether the
6 project complies with all applicable comprehensive plan policies and land use regulations.
7 Petitioners’ arguments under the fourth assignment of error add nothing to those dispositions,
8 and accordingly are denied.

9 The fourth assignment of error is denied.

10 **THIRD ASSIGNMENT OF ERROR (Petitioners)**

11 As noted above, removing the traffic signal and left turn lanes will result in access to
12 and from Tualatin Sherwood Road and S.W. Langer Drive to petitioners’ properties changing
13 to right-in/right-out only. ORS 374.300 *et seq* governs county control of county roads and
14 approach roads to those county roads. Petitioners advance several arguments that the county
15 erred in failing to comply with several provisions of ORS 374.300 that they argue apply to
16 the county’s decision.

17 **A. ORS 374.305(1)**

18 ORS 374.305(1) provides in relevant part:

19 “A person may not place, build or construct on the right of way of any * * *
20 county road, any approach road, structure, pipeline, ditch, cable or wire, or any
21 other facility, thing or appurtenance, or substantially alter any such facility,
22 thing or appurtenance or change the manner of using any such approach road
23 without first obtaining written permission from the * * * county court or board
24 of county commissioners with respect to county roads.”

25 Thus under ORS 374.305(1) a “person” may not substantially alter the manner of using an
26 approach road without first obtaining permission from the board of county commissioners for
27 the alteration. “Approach road” is defined in ORS 374.302(1) as including “a private road
28 that crosses a * * * a county road.” According to petitioners, the main entrances to Market

1 Center’s and Cinema’s properties from Tualatin Sherwood Road are located on petitioners’
2 properties, cross Tualatin Sherwood Road and therefore constitute an “approach road” under
3 ORS 374.302(1). Market Center argues that the director’s decision to change the manner of
4 using the main entrances to right-in/right-out is a “substantial[] alter[ation] [of]” the manner
5 of using those approach roads. Market Center argues that the county’s director of land use
6 and transportation is a “person” within the meaning of ORS 374.305(1) and that the director
7 erred in failing to obtain permission from the board of county commissioners to alter the
8 manner of using the approach roads into Market Center’s and Cinema’s properties from
9 Tualatin Sherwood Road.

10 The county responds that ORS 374.305(1) is inapplicable to the county’s decision to
11 change the access to right-in/right-out only, because the county director of land use and
12 transportation is not “person” who is required to obtain the board of county commissioners’
13 permission prior to altering the approach road. The term “person” is not defined in the
14 statute. Market Center does not offer any support for its contention that a “person” includes
15 the county director of land use and transportation acting on behalf of the county, and we see
16 no reason to conclude that the term “person” includes the director, given that the department
17 of land use and transportation is frequently delegated with the authority from the county
18 board of commissioners to make the kinds of decisions that ORS 374.302(1) contemplates.

19 **B. ORS 374.305(2)**

20 ORS 374.305(2) provides:

21 “After written notice of not less than 10 days to the permittee and an
22 opportunity for a hearing, the department with respect to crossings over a state
23 highway and the county court or board of county commissioners with respect
24 to crossings over a county road may abolish any crossing at grade by a private
25 road or may alter or change any private road crossing when the public safety,
26 public convenience and the general welfare require the alteration or change.”

27 As relevant here, ORS 374.305(2) allows the county, after providing to a holder of a permit
28 from the county, not less than 10 days written notice and an opportunity for a hearing to

1 “abolish any crossing at grade by a private road * * * when the public safety, public
2 convenience and the general welfare require the alteration or change.” The phrase “crossing
3 at grade by a private road” is not defined in ORS Chapter 374 and the individual words used
4 in that phrase are also not defined, although the definition of “approach road” includes the
5 same term, “private road,” that is used in the phrase “crossing at grade by a private road.”

6 Cinema argues the main entrances from Tualatin Sherwood Road onto petitioners’
7 properties qualify as a “crossing at grade by a private road” as used in ORS 374.305(2), and
8 that the county erred in failing to provide not less than 10 days written notice to petitioners
9 that the county intended to abolish the “crossing at grade by a private road.” We understand
10 Cinema to argue that petitioners are “permittee[s]” within the meaning of ORS 374.305(2)
11 and that the county’s error in failing to provide written notice and an opportunity for a
12 hearing prejudiced the petitioners’ substantial rights. ORS 197.835(9)(a)(B).

13 The county argues that the phrase “crossing at grade by a private road” refers to a road
14 that crosses a railroad, and cites ORS 824.200 *et seq.* Response Brief 17. ORS 824.200 *et*
15 *seq* does not assist the county, because the statute regulates the crossing of railroad tracks
16 over a highway and the crossing of highways over railroad tracks. It simply does not address
17 private roads that cross public roads.

18 Given the county’s response and because in any event we remand the decision under
19 other assignments of error, we deem it appropriate to remand a portion of the third
20 assignment of error to allow the county to address the issue in the first instance.

21 **C. ORS 374.309(1)**

22 ORS 374.309 requires the board of county commissioners to adopt rules and
23 regulations for the use of the rights of way of county roads for the purposes described in ORS
24 374.305. ORS 374.309(3) provides:

25 “The powers granted by this section and ORS 374.315 may not be exercised
26 so as to deny any property abutting the road reasonable access. In determining

1 what is reasonable access, the county court or board of county commissioners
2 shall apply the following criteria:

3 “(a) The access must be sufficient to allow the authorized uses for the
4 property identified in the acknowledged local comprehensive plan.

5 “(b) The type, number, size and location of approaches must be adequate to
6 serve the volume and type of traffic reasonably anticipated to enter and
7 exit the property, based on the planned uses for the property.”

8 Cinema argues that the county’s decision fails to include findings that the decision to change
9 access to petitioners’ properties to right-in/right-out does not deny petitioners “reasonable
10 access” to their properties under ORS 374.309(3)(a) and (b). The county does not respond to
11 Cinema’s argument. We agree with Cinema that on remand, the county must determine
12 whether ORS 374.309(3) applies in the circumstances presented in this appeal and, if it does,
13 apply the criteria at ORS 374.309(3) to determine whether the proposal leaves abutting
14 properties with reasonable access.

15 Petitioners’ third assignments of error are sustained, in part.

16 **SEVENTH ASSIGNMENT OF ERROR (Petitioners)**

17 In their seventh assignment of error, petitioners argue that the challenged decision is a
18 decision to approve a “permit” as defined in ORS 215.402(4), and that the county erred in
19 failing to comply with the requirements applicable to permit decisions in ORS 215.416(3)
20 and (11). ORS 215.402(4) defines “permit” to mean “discretionary approval of a proposed
21 development of land under ORS 215.010 to 215.311, 215.317, 215.327 and 215.402 to
22 215.438 and 215.700 to 215.780 or county legislation or regulation adopted pursuant
23 thereto.” ORS 215.402(4)(c) excludes from the definition of “permit” “[a] decision which
24 determines final engineering design, construction, operation, maintenance, repair or
25 preservation of a transportation facility which is otherwise authorized by and consistent with
26 the comprehensive plan and land use regulations[.]” That language duplicates the language
27 in ORS 197.015(10)(b)(D), one of the exceptions from the definition of “land use decision.”

28 Petitioners argue that because the identically-worded ORS 197.015(10)(b)(D)

1 exception to the definition of land use decision does not exempt the county’s decision from
2 LUBA’s jurisdiction, then the exception to the definition of “permit” in ORS 215.402(4)(c) is
3 also inapplicable, and the decision is necessarily a “permit” under ORS 215.402(4). Market
4 Center Petition for Review 23-24. We reject that conclusion. Merely because the definition
5 of “permit” excludes certain decisions regarding transportation facilities from being classified
6 and processed as permits, it does not necessarily follow that a decision that is not excluded
7 from the definition of permit is necessarily a permit. Stated differently, the inquiry under
8 ORS 215.402(4)(c) asks whether a decision regarding a transportation facility is or is not a
9 decision on a permit that would trigger the right to notice and hearing under ORS 215.416(3)
10 and (11). But even if a decision regarding a transportation facility is not excluded from the
11 definition of “permit” under ORS 215.402(4), petitioners must additionally demonstrate that
12 the decision is in fact the “discretionary approval of a proposed development of land” in
13 order to succeed in assigning error to the county’s decision based on its failure to process the
14 decision as a permit.

15 Here, petitioners assert that the director’s decision involves the “discretionary
16 approval of a proposed development of land,” but do not otherwise support their assertion
17 with any argument as to why the director’s decision involves “discretionary approval” or is
18 the “proposed development of land,” and is a “permit” under ORS 215.402(4). Petitioners’
19 argument is insufficiently developed for review and provides no basis for reversal or remand
20 of the decision. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

21 The seventh assignment of error is denied.

22 **EIGHTH ASSIGNMENT OF ERROR (Petitioners)**

23 In the eighth assignment of error, petitioners argue that the challenged decision
24 approving Alternative 1 is not supported by substantial evidence and that the findings in
25 support of the decision are inadequate. Because we remand the decision to the county for
26 additional proceedings, it is unnecessary for us to resolve the eighth assignment of error.

- 1 We do not reach the eighth assignment of error.
- 2 The county's decision is remanded.