



1 Member, participated in the decision.

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REMANDED

11/20/2017

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You are entitled to judicial review of this Order. Judicial review is

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governed by the provisions of ORS 197.850.

**NATURE OF THE DECISION**

The challenged decision is a county resolution approving an application to vacate a 12-foot wide public pedestrian and bicycle easement (Easement) that encumbers Lot 13 of the Westhaven Subdivision.

**MOTION TO FILE REPLY BRIEF**

Petitioners move to file a reply brief to respond to arguments in the joint response brief regarding a motion to dismiss and waiver arguments raised in the response brief. In an order dated September 25, 2017, we denied the motion to dismiss. *Neighbors for Smart Growth v. Washington County*, \_\_ Or LUBA \_\_ (LUBA No. 2016-122, Order, September 25, 2017). The jurisdictional issues are, as far as we can tell, now moot and a reply brief is a proper vehicle to respond to waiver arguments. The reply brief is allowed.

**FACTS**

Westhaven subdivision was originally approved by the county in 2008. The Easement was not included on the subdivision plat, or required as a condition of subdivision approval. In April 2014, the original subdivision developer entered into a private agreement with a local resident group and petitioner Jake Mintz (Mintz) to dedicate the Easement on the east side of Lot 13, which was dedicated by recording a revised plat in 2015. Record 48, 461. The Easement connects Tract D, an open space tract, and Tract C, a pedestrian path. Tract D is part of a planning process to establish a future community trail

1 in the area. The Easement provides the only public access from the Westhaven  
2 subdivision to Tract D.

3 Intervenor-respondent Lennar Northwest, Inc. (intervenor) purchased  
4 some of the lots from the original developer after the subdivision had been  
5 approved. Record 34, 226. In June 2016, intervenor submitted an application to  
6 the county to vacate the Easement from the east side of Lot 13, and in the  
7 application proposed to dedicate a replacement 12-foot wide easement on the  
8 west side of Lot 13. Record 454-92. Like the Easement, the replacement  
9 easement connects Tract D to Tract C, but includes a curved portion that runs  
10 across the private driveway of the house built on Lot 13.

11 Intervenor submitted the requisite signatures for the vacation under ORS  
12 368.346 to allow the application to be scheduled for a public hearing. The  
13 county engineer prepared a written report to the board of county  
14 commissioners. The county board of commissioners (the "Board") provided  
15 public notice and two public hearings on the application, at which petitioners  
16 appeared in opposition. On November 22, 2016, the Board voted to adopt  
17 Resolution and Order 16-155 vacating the Easement, supported by findings in a  
18 staff report drafted by the county engineer.

19 **FIRST ASSIGNMENT OF ERROR**

20 Under the first assignment of error, petitioners argue that the county  
21 erred in failing to apply provisions of the Washington County Community  
22 Development Code (CDC) instead of, or in addition to, the adopted county

1 standards for vacating a public right of way, which are embodied in Resolution  
2 and Ordinance (R&O) 84-261. R&O 84-261, adopted in 1984, implements  
3 ORS 368.326 *et seq.*, which establishes standards and procedures for counties  
4 to vacate public rights of way.

5 **A. R&O 84-261 Applies to Vacations of Public Easements**

6 First, petitioners argue that the county erred in applying R&O 84-261 at  
7 all to intervenor's easement vacation application. According to petitioners,  
8 R&O 84-261 applies only to vacations of *roads*, not the vacation of *easements*.

9 ORS 368.326 states that the purpose of ORS 368.326 *et seq.* is to

10 “establish vacation procedures by which a county governing body  
11 may vacate a subdivision, part of a subdivision, a public road, a  
12 trail, *a public easement*, public square or any other public property  
13 or public interest in property under the jurisdiction of the county  
14 governing body. \* \* \*” (Emphasis added.)

15 The county adopted R&O 84-261 to implement ORS 368.326 *et seq.* R&O 84-  
16 261 refers to vacations of “roads” and “rights-of-way,” but it does not expressly  
17 refer to vacations of “easements.” Nonetheless, because ORS 368.326 requires  
18 the county to establish vacation procedures for “public easement[s],” and the  
19 county adopted R&O 84-26 to implement the statute, it is reasonable for the  
20 county to interpret the term “rights-of-way” in the resolution to include  
21 vacation of a public easement. Accordingly, we agree with respondents that  
22 R&O 84-261 applies to a proposal to vacate a public easement.

23 Second, we understand petitioners to argue that because the CDC was  
24 adopted after R&O 84-261, the CDC supersedes any conflicting provisions of

1 R&O 84-261. However, petitioners do not identify any CDC provisions that  
2 conflict with R&O 84-261 or purport to supersede its requirements. Absent a  
3 more developed argument, petitioners have not demonstrated that the county  
4 erred in applying R&O 84-261 to intervenor's application to vacate the  
5 Easement.

6 **B. Lot 13 Public Easement was Not a Condition of Approval**

7 Petitioners next argue that the Easement was a condition of approval of  
8 the prior development permit for the original Westhaven Subdivision and that  
9 the vacation of that Easement is effectively a modification of a condition of  
10 approval. Petitioners argue that CDC 207-5.2 provides that a modification of a  
11 condition of approval must be "modified by the Review Authority," which  
12 petitioners contend means that the county must follow the same land use  
13 process used to impose the original condition in determining whether to vacate  
14 the Easement.<sup>1</sup> Accordingly, petitioners argue that the county erred in failing

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<sup>1</sup> CDC 207-5.2 provides:

"In addition to conditions imposed pursuant to Section 207-5.1, a condition is valid and enforceable when the applicant has:

- "A. Requested the condition;
- "B. Consented to the condition in writing or on the record; or
- "C. Established or commenced the development or use (other than a valid nonconforming use) prior to approval; or
- "D. Submitted graphics or other application materials that were reviewed and approved by the Review Authority; the

1 to process the proposed vacation as a proposal to modify a condition of  
2 approval, pursuant to the applicable CDC provisions.

3 Respondents argue that the original 2008 subdivision development was  
4 not conditioned to provide the Easement, but instead the Easement was the  
5 result of a private agreement between the original developer and petitioner  
6 Mintz six years later, in 2014. Because the Easement was not a condition of  
7 approval, respondents argue, vacating it does not constitute a modification of a  
8 condition of approval under CDC 207-5.2.

9 We agree with respondents. Petitioners cite nothing in the 2008  
10 subdivision approval that represents a condition of approval requiring an  
11 easement across Lot 13. Instead, the record shows that in 2014 the original  
12 developer filed a petition to vacate SW Spring Crest Drive. Record 338-40.  
13 Petitioner Mintz agreed to withdraw his objection to the road vacation in  
14 exchange for the developer's agreement to provide a public pedestrian  
15 easement along Lot 13's eastern property line. *Id.* In other words, the  
16 Easement sprang from a private agreement, not a condition of approval  
17 imposed by the county. Because the proposed easement vacation does not  
18 require the modification of a condition of approval, CDC 207-5.2 does not  
19 apply, and the county did not err in failing to process the application as a  
20 modification of a condition of approval.

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application must substantially comply with the application  
materials except as modified by the Review Authority.”

1           **C. Vacating a Public Easement is Development**

2           Finally, petitioners argue that termination of a public easement is  
3 “development” as defined at CDC 106-57, because it involves the termination  
4 of a “right of access.”<sup>2</sup> Because the application proposed “development,”  
5 petitioners argue that CDC 201-1 requires that intervenor obtain a  
6 “development permit” through the applicable CDC procedures.<sup>3</sup> Thus,  
7 petitioners argue, the county committed procedural error in failing to require  
8 intervenor to obtain a development permit, processed under the applicable  
9 CDC procedures.

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<sup>2</sup> CDC 106-57 defines “development” as:

“Any man-made change to improved or unimproved real estate or its use, including but not limited to construction, installation or change of land or a building or other structure, change in use of land or a building or structure, land division, *establishment, or termination of right of access*, storage on the land tree cutting, drilling, and site alteration such as that due to land surface mining, dredging, grading, construction of earthen berms, paving, improvements for use as parking, excavation or clearing.” (Emphasis added).

<sup>3</sup> CDC 201-1 provides:

“[N]o person shall engage in or cause a development to occur, as defined in Section 106-57, without first obtaining a development permit through the procedures set forth in this Code. The Director shall not issue any permit for the construction, reconstruction or alteration of a structure or a part thereof without first verifying that a valid development permit has been issued. Development authorized by a development permit shall occur only as approved.”

1 Respondents argue that the subject public easement does not provide  
2 “right of access” for purposes of the definition of “development” at CDC 106-  
3 57. Respondents note that CDC 106-3 defines “access” as the “right to cross  
4 between public and private property.”<sup>4</sup> According to respondents, “right of  
5 access” does not refer to a linear public easement that connects one public  
6 property to another public property, but rather to the establishment or  
7 termination of the right to access public property from adjoining private  
8 property, for example driveway access to a public street. Respondents argue  
9 that the subject easement is more accurately labeled as an “easement for public  
10 travel” as defined at CDC 106-71.1, the establishment or termination of which  
11 does not fall within the CDC 106-5.7 definition of “development.”<sup>5</sup>

12 We need not decide whether petitioners are correct that termination of  
13 the subject easement constitutes the termination of a “right of access” within  
14 the meaning of CDEC 106-5.7, because even if petitioners are correct on that  
15 point, and the county should have processed the application as one for a  
16 “development permit,” the failure to process the application under the

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<sup>4</sup> CDC 106-3 defines “access” as “[t]he right to cross between public and private property, allowing pedestrians and vehicles to leave or enter property.”

<sup>5</sup> CDC 106-71.1 defines “[e]asement for public travel” as “[a]n area that is reserved for the physical placement of a transportation facility, such as, but not limited to a sidewalk, accessway, greenway, private street, or private drive. When an easement is reserved for multiple uses, such as a sidewalk and a public utility easement, the easement for public travel shall be only that area within the easement reserved for public travel.”

1 procedures for a “development permit” is a procedural error. ORS  
2 197.835(9)(a)(B) authorizes LUBA to reverse or remand a land use decision if  
3 the local government “[f]ailed to follow the procedures applicable to the matter  
4 before it in a manner that prejudiced the substantial rights of the petitioner[.]”  
5 Petitioners do not identify what CDC procedures they believe should have been  
6 applied, or any CDC standards that should have been, but were not, applied in  
7 approving the vacation. Absent some argument regarding what procedures  
8 should apply to a “development permit” approving an application to vacate a  
9 public easement, petitioners have not established that any procedural error  
10 “prejudiced [their] substantial rights[.]” As noted, the county processed  
11 intervenor’s petition for vacation of the subject public easement pursuant to  
12 ORS 368.346, which requires a public hearing. The county in fact held two  
13 public hearings, in which petitioners participated and submitted both oral and  
14 written comment. If there are any procedural requirements affecting  
15 petitioners’ participation that the county failed to satisfy, petitioners do not  
16 identify them. Accordingly, petitioners have not demonstrated a basis under  
17 OAR 197.835(9)(a)(B) to reverse or remand the challenged decision.

18 The first assignment of error is denied.

19 **SECOND ASSIGNMENT OF ERROR**

20 In their second assignment of error, petitioners argue that the county’s  
21 decision is based on inadequate findings and is “not supported by substantial  
22 evidence in the whole record.” ORS 197.835(9)(a)(C). Specifically, petitioners

1 argue the county failed to adopt sufficient findings in support of R&O 84-261,  
2 which in relevant part requires the county to determine that a public easement  
3 vacation is in the “public interest” based on four criteria. Criterion 1 is  
4 “[c]onformance with the County’s Comprehensive Plan,” and includes three  
5 further considerations:

6        “[a] The existing right-of-way proposed for vacation is not  
7            designated as a necessary transportation facility by the  
8            Comprehensive Plan;

9        “[b] The existing right-of-way proposed for vacation is not  
10          necessary for traffic or pedestrian circulation in the  
11          immediate area.

12       “[c] There have been changes in land use, traffic patterns, or  
13          road improvements subsequent to the establishment of the  
14          right-of-way proposed for vacation which have eliminated  
15          the need to retain this right-of-way for public use[.]”  
16          Petition for Review, Appendix B.

17       The county adopted as its findings a revised staff report dated November 22,  
18       2016, which includes a single page of findings addressing Criterion 1. Record  
19       48. The findings state that the Easement is not “explicitly designated as a  
20       necessary transportation facility by the Comprehensive Plan” and is not  
21       required as a subdivision condition of approval. *Id.* The findings then state:

22       “[T]he easement does provide the opportunity for a future  
23          pedestrian access to a future community trail, and will facilitate  
24          pedestrian access from adjacent neighborhoods to the Sunset light  
25          rail station and future development anticipated in the vicinity of  
26          the station. Providing such pedestrian connections is desirable  
27          and is consistent with the intent of the Comprehensive Plan’s  
28          goals for local circulation and bicycle/pedestrian connectivity, the  
29          Transportation Plan’s designation of this area as a Pedestrian

1 District, and the Cedar Hills-Cedar Mill Community Plan's  
2 designation of this area as a Transit Oriented district.

3 “[Intervenor] has proposed the dedication of an alternative public  
4 pedestrian easement on the west line of Lot 13, which preserves  
5 the north-south pedestrian access dedicated in Westhaven Estates.  
6 The proposed alternate easement would require pedestrians to  
7 cross one single-family residential driveway serving the house on  
8 Lot 13.” Record 48.

9 Under their second assignment of error, petitioners argue that these findings  
10 are inadequate to demonstrate that the proposed vacation is in the “public  
11 interest,” considering “conformance with the county comprehensive plan” and  
12 the three considerations listed in Criterion 1.

13 Respondents argue, initially, that no party raised any issues regarding  
14 R&O 84-261, Criterion 1, during the proceedings below. Accordingly,  
15 respondents contend that any issue regarding Criterion 1 has been waived.  
16 ORS 197.763(1).<sup>6</sup>

17 Petitioners reply that issues were raised below regarding the findings  
18 addressing Criterion 1 in the testimony of Hal Bergsma at Record 39  
19 (addressing the original version of the staff report and arguing that “[u]nder the

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<sup>6</sup> ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

1 heading: ‘Conformance with the County’s Comprehensive Plan’ there is  
2 nothing about the comprehensive plan. No text explains how this relates to the  
3 comprehensive plan.”). We agree with petitioners that a party raised issues  
4 below regarding the adequacy of the findings addressing compliance with  
5 Criterion 1. Accordingly, on appeal, petitioners are entitled to challenge the  
6 adequacy of the findings the county ultimately adopted to demonstrate  
7 consistency with Criterion 1. *See Lucier v. City of Medford*, 26 Or LUBA 213,  
8 216 (1993) (to preserve the right to challenge the adequacy of the findings to  
9 address an applicable criterion or evidentiary support for such findings, the  
10 petitioner must challenge the proposal’s compliance with the approval  
11 criterion).

12 On the merits, petitioners first dispute the finding that the Easement is  
13 not *explicitly* designated as a necessary transportation facility, arguing that that  
14 finding suggests that the Easement may be implicitly designated. Respondents  
15 argue, and we agree, that petitioners do not identify any comprehensive plan  
16 language that even implicitly designates the Easement as a necessary  
17 transportation facility, and that the county’s findings are not inadequate for  
18 failing to address that possibility.

19 Next, petitioners argue that even though the challenged decision did not  
20 actually approve the replacement easement proposed by intervenor, or even  
21 condition the vacation of the Easement on its replacement, the findings rely  
22 heavily on the proposed replacement easement to support the conclusion that

1 the vacation complies with the requirements of R&O 84-261 and is consistent  
2 with elements of the comprehensive plan that concern pedestrian connectivity.  
3 However, petitioners argue that the findings do not address at all the issues  
4 raised by petitioners and others over the safety and functionality of the  
5 proposed replacement easement, which turns and crosses over the driveway of  
6 the house built on Lot 13, in order to connect to a pedestrian path on the other  
7 side. Opponents below argued that it is unsafe to direct pedestrians and  
8 bicyclists around a corner across a private driveway. Petitioners contend that  
9 the county has an obligation, under *Norvell v. Portland Metropolitan Area*  
10 *Local Government Boundary Comm.*, 43 Or App 849, 853, 604 P2d 896  
11 (1979), to address issues raised below regarding compliance with applicable  
12 approval criteria.

13 Respondents agree that the opponents submitted “voluminous written  
14 testimony and information in an attempt to persuade the [board of  
15 commissioners] about the dangers of the relocated Public Pedestrian  
16 Easement[,]” but argues that the county “didn’t buy it[.]” Response Brief 33.  
17 That may be, but if so, the county did not adopt any findings addressing the  
18 issues raised below regarding the safety of the replacement easement. The  
19 findings rely heavily on the replacement easement to establish compliance with  
20 two R&O 84-261 criteria, and it is quite possible that, but for the proposed  
21 replacement easement, the county might well have denied the vacation of the  
22 Easement. Given the importance of the replacement easement in the county’s

1 justifications for the vacation of the Easement, the adequacy and safety of the  
2 replacement easement would seem to be a legitimate issue that could be raised  
3 under the R&O 84-261 criteria. However, no findings cited to us address any  
4 of the issues raised about the replacement easement by opponents. We agree  
5 with petitioners that remand is necessary for the county to adopt more adequate  
6 findings addressing the issues raised below regarding the safety of the  
7 replacement easement and the impact, if any, of those issues on compliance  
8 with the R&O 84-261 criteria.

9 The second assignment of error is sustained, in part.

### 10 **THIRD ASSIGNMENT OF ERROR**

11 In its third assignment of error, petitioners argue that the county erred in  
12 making its decision approving the vacation of the Easement based on  
13 “improper interpretations of its comprehensive plan and land use regulations.”  
14 Petition for Review 49. Respondents argue that this assignment of error is  
15 merely duplicative of petitioners’ first and second assignments of error, and on  
16 that basis, should be denied.

17 We agree with respondents that the third assignment of error appears to  
18 be entirely duplicative of the arguments under the first and second assignments  
19 of error, and accordingly, provide no independent basis for reversal or remand.

20 The third assignment of error is denied.

21 The county’s decision is remanded.