

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  
16                                  FINAL OPINION  
17                                  AND ORDER

18  
19                                  Appeal from Washington County.

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21                                  William K. Kabeiseman, Portland, and Edward J. Sullivan, Portland, filed the petition  
22 for review. With them on the brief was Preston Gates and Ellis, LLP.

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24                                  Alan R. Rappleyea, Senior Assistant County Counsel, Hillsboro, filed the response  
25 brief.

26  
27                                  BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,  
28 participated in the decision.

29  
30                                  REVERSED

06/26/2000

31  
32                                  You are entitled to judicial review of this Order. Judicial review is governed by the  
33 provisions of ORS 197.850.  
34

**NATURE OF THE DECISION**

Petitioners appeal a decision by the board of county commissioners determining that a letter from a city transportation director satisfies (1) a community plan “design element” and (2) a condition of approval for a subdivision development.

**FACTS**

We set out the relevant facts in *Cedar Mill Creek Corridor Committee v. Washington County*, \_\_\_ Or LUBA \_\_\_ (LUBA No. 99-138, Order, January 25, 2000).

“Morgan Lane is a residential street generally running north and south. The northern segment of Morgan Lane is located within the city limits of Portland, and the southern segment is located within unincorporated Washington County. The two segments are separated by a one-foot strip of land owned by the city, located within city limits, and by a gate located in Washington County. NW 102nd Avenue also runs north and south, parallel to the southern segment of Morgan Lane. It is located within Washington County, and intersects with Cornell Road approximately one-half mile south of the City of Portland/Washington County line.

“In 1983, the City of Portland approved the Forest Heights PUD. The PUD is large, containing approximately 2,000 residential units. The primary south-bound vehicular access for Forest Heights residents is via Miller Road to Cornell Road. Miller Road lies to the east of NW 102nd Avenue, and is circuitous. Residents of Forest Heights have lobbied both the city and the county for additional access from the southern boundary of Forest Heights to Cornell Road to allow for faster travel and more convenient connections. Various accesses have been proposed and, for one reason or another, have not materialized.

“The 1983 Washington County Comprehensive Plan included a proposal to connect NW 102nd Avenue at its northern terminus with an unspecified road within the Forest Heights PUD. Development in the area since that time has been planned to establish the connection, although the particular route changed over time. The connection concept was incorporated into the Cedar Hills Cedar Mill Community Plan [(community plan)] as a ‘Design Element.’<sup>1</sup>

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<sup>1</sup>The “Design Element” provides:

1 “In 1997, Washington County approved an application for the Mill Woods  
2 PUD. The permit allowed the applicant to develop 48 single-family and 33  
3 attached residential housing units on property located just south of the City of  
4 Portland/Washington County line. As part of the approval, the developer was  
5 required to construct a road (South Morgan Lane) to minor collector  
6 standards. South Morgan Lane would connect with the Forest Heights  
7 segment of Morgan Lane inside the City of Portland to the north, and  
8 terminate at NW 102nd Avenue to the southeast. The approval also  
9 incorporated the community plan design element requirement that the city and  
10 the county enter into a memorandum of understanding regarding the  
11 functional classification of the street, and the financing of improvements. The  
12 Mill Woods PUD approval also required a subsequent public hearing to  
13 discuss a proposed memorandum of understanding with the city. The  
14 proposed memorandum of understanding was prepared by county staff and  
15 discussed at a public hearing. The hearings officer found that the county-  
16 proposed memorandum of understanding met the requirements of the Mill  
17 Woods PUD decision and the Design Element. The county then sent the  
18 proposed memorandum of understanding to the city. The city did not sign the  
19 memorandum of understanding; instead, on May 28, 1999, the city’s  
20 transportation director sent a letter outlining the city’s concern with a new  
21 connection between Forest Heights and roads to the south in the absence of a  
22 plan to develop a network of streets to disperse traffic. The transportation  
23 director recommended that the gate remain closed until multiple connections  
24 were available.<sup>[2]</sup>

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“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.”

<sup>2</sup>The 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.

1           “On August 3, 1999, the Washington County Board of Commissioners  
2           (commissioners) adopted a ‘minute order’ whereby the commissioners  
3           accepted the transportation director’s May 28, 1999 letter as satisfying both  
4           the Design Element and the Mill Woods PUD condition of approval.” Slip op  
5           1-3 (footnotes omitted).

6           This appeal followed.

7           **PRELIMINARY MATTERS**

8           In its response brief, the county reiterates the arguments it made in its motion to  
9           dismiss. There, the county contended that the subject decision is not a land use decision  
10          subject to LUBA jurisdiction for two reasons. First, the county argued that the  
11          commissioners’ decision was “made under land use standards which [did] not require  
12          interpretation or the exercise of policy or legal judgment.” ORS 197.015(10)(b)(A). Second,  
13          the county argued that the commissioners’ decision merely “determine[d] final engineering  
14          design [and] construction \* \* \* of a transportation facility which is otherwise authorized by  
15          and consistent with the comprehensive plan and land use regulations.” ORS  
16          197.015(10)(b)(D).

17          We adhere to our conclusion that the board of commissioners’ decision is a land use  
18          decision for the reasons stated in our January 25, 2000 order.

19          The county also argues that the subject decision is not a land use decision because a  
20          memorandum of understanding (MOU) is not a land use decision; it is an “understanding”  
21          between local governments, and not a formal binding agreement. According to the county,

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“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.

1 binding agreements between local governments, such as intergovernmental agreements or  
2 urban service agreements, are subject to their own review procedures or to review by Metro.<sup>3</sup>

3 However, the county does not argue that the challenged decision *is* an  
4 intergovernmental agreement entered into pursuant to ORS chapter 190 or an urban services  
5 agreement entered into pursuant to ORS 195.060 through ORS 197.085. The county does not  
6 explain why the challenged decision, if it is not an intergovernmental agreement or an urban  
7 services agreement, falls outside of our jurisdiction. In our order denying the county’s  
8 motion to dismiss, we held that the county’s determination that the city’s letter constitutes  
9 the MOU that is required by the Cedar Hills-Cedar Mill community plan design element and  
10 the condition of approval for the Mill Woods subdivision is a land use decision.

11 In any event, even if the county is correct that our jurisdiction rises and falls on  
12 whether the county’s decision addresses an MOU, the county does not prevail. For the  
13 reasons stated below, we conclude that the city transportation director’s letter, and the board  
14 of commissioners’ action in response to the letter, do not constitute an MOU.

15 **ASSIGNMENT OF ERROR**

16 Petitioners argue that the county erred as a matter of law when it determined that the  
17 city transportation director’s letter satisfied (1) the community plan design element and (2)  
18 the relevant condition of approval for the Mill Woods subdivision. Petitioners further argue  
19 that the error warrants reversal rather than remand. We address each of these arguments  
20 separately.

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<sup>3</sup>ORS chapter 190 authorizes agreements between local governments, districts, or other public entities or corporations for the performance of “any or all functions and activities that a party to the agreement” has authority to perform. ORS 190.010. Agreements entered into pursuant to this chapter may establish review procedures, including a requirement for arbitration as provided in ORS 190.710 through 197.800.

ORS 195.060 through 195.085 authorize the establishment of urban services agreements between service providers for the provision of specified public services within a designated area. ORS 195.065 provides that such agreements are not “land use decisions” as that term is defined in ORS 197.015.

1           **A.       Satisfaction of the Provisions of the Community Plan Design Element**

2           Petitioners argue that the county erred in accepting the city transportation director’s  
3 letter as satisfying the community plan design element. Petitioners argue that the letter is  
4 clearly not an MOU, and the county’s conclusion that the letter satisfies the requirement for  
5 an MOU fails on several fronts. First, petitioners point out that the letter is signed by only  
6 one party—the city. Second, petitioners contend that the letter does not address the  
7 requirements established by the design element. It does not establish “the functional  
8 classification of the street,” nor does it provide for the “financing of any improvements to the  
9 County road system made necessary by projected traffic entering Washington County.” *See n*  
10 1. Third, the county did not act according to the “agreement” established in the letter. If it  
11 had, petitioners argue, the result would be that the county would keep the road closed to  
12 through traffic. Fourth, petitioners argue that the board of commissioners acknowledged that  
13 the city and the county had failed to reach consensus on this issue, and that the city refused to  
14 sign the draft MOU the county had prepared to address the opening of Morgan Lane as  
15 provided for in the Mill Woods subdivision approval decision. Petitioners argue that all of  
16 these circumstances make it clear that there was no understanding at all about connections  
17 between NW 102nd Avenue, the county segment of Morgan Lane and the city segment of  
18 Morgan Lane.

19           The county argues that even if an MOU is required for “the extension of NW 102nd  
20 \* \* \* into the City of Portland,” the design element does not require an MOU to connect  
21 another road (Morgan Lane) with the city segment of Morgan Lane. According to argument  
22 in the county’s brief, because the decision had nothing to do with NW 102nd Avenue, the  
23 design element clearly does not apply.<sup>4</sup>

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<sup>4</sup>Petitioners argue that the name of the connector street is not determinative. At the time the community plan was adopted, NW 102nd Avenue terminated several hundred feet south of the city limits. No other road in the immediate vicinity existed. Since the adoption of the community plan, two subdivisions have been approved, and as a result, NW 102nd Avenue has been extended northward, but is still several hundred feet

1           It is clear that the board of commissioners did not interpret the design element in the  
2 way the county suggests in its brief. If the board had determined that the design element did  
3 not govern the connection between the two segments of Morgan Lane, the decision to accept  
4 the city transportation director’s letter as “meeting the requirement of the Cedar Hills Cedar  
5 Mill Community Plan for a Memorandum with the City of Portland” would have been  
6 unnecessary. *See* Record 21. The board of commissioners at least implicitly interpreted its  
7 design element as applying to the challenged decision and that implied interpretation is  
8 within the board of commissioner’s discretion. *Alliance for Responsible Land Use v.*  
9 *Deschutes County*, 149 Or App 259, 267-68, 942 P2d 836 (1997) (county’s implicit  
10 interpretation is subject to deference under *Clark v. Jackson County*, 313 Or 508, 836 P2d  
11 710 (1992)).

12           We also agree with petitioners that the challenged decision does not constitute a  
13 memorandum of understanding. The agreement does not set out what the parties mutually  
14 agree to, nor does it address the requirements established in the design element. The letter is  
15 merely an expression of the city’s concern that a connection between the two segments of  
16 Morgan Lane is premature.

17           The first subassignment of error is sustained.

18           **B.       Satisfaction of the Mill Woods Subdivision Condition of Approval**

19           Condition VI.A.7 of the Mill Woods subdivision application provides:

20           “Washington County and the City of Portland shall execute a Memorandum of  
21 Understanding (MOU) that, among other things, identifies the functional  
22 classification of Morgan Lane in Washington County and the City of Portland  
23 and that identifies mitigation measures warranted to address the impacts of  
24 nonemergency vehicular traffic on the vicinity and the timing and  
25 responsibilities for implementing those measures, including traffic-calming  
26 measures.

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south of the city line. If extended directly northward, it would not connect to any road within the Forest Heights subdivision. Petitioners argue the Washington County segment of Morgan Lane accomplishes what is contemplated in the community plan: a connection between Forest Heights and NW 102nd Avenue.

1           “a.     Before Washington County enters into that MOU, the Director of  
2           [Department of Land Use and Transportation] shall:

3                   “1)     Provide a meaningful opportunity for public involvement  
4                   regarding the potential contents of the MOU as it relates to  
5                   land in Washington County, particularly about traffic calming  
6                   measures. Such opportunity shall include at least one meeting  
7                   consistent with [Washington County Community Development  
8                   Code] 203-3 \* \* \*. Washington County \* \* \* staff shall attend  
9                   the meeting. Washington County shall timely invite relevant  
10                  City of Portland staff to attend the meeting. \* \* \*

11                  “2)     Initiate at least a Type II process to review the substance of the  
12                  draft MOU \* \* \*. The result of the Type II process shall be a  
13                  decision that recommends approval of an MOU with certain  
14                  terms.

15           “b.     The MOU shall be consistent with the Type II decision.” Record 245-  
16           46.

17           Petitioners argue that the board of commissioners’ decision fails to comply with the  
18           condition of approval because the city’s letter does not contain the required elements of the  
19           MOU. Petitioners argue that the process did not provide for meaningful opportunity for  
20           public involvement and is not the result of a Type II procedure. Petitioners concede that the  
21           county’s draft MOU approved by the county hearings officer was the result of a Type II  
22           process and contained the minimum elements necessary to comply with the condition of  
23           approval. However, petitioners contend that the city’s letter in no way resembles the draft  
24           MOU the county approved and presented to the city for consideration and approval.

25           The county responds that it is not necessary for us to decide whether the board of  
26           commissioners’ decision constitutes a memorandum of understanding as contemplated in the  
27           condition of approval. According to the county, the commissioners’ decision regarding  
28           compliance with a condition of approval is not a land use decision. *Mar-Dene Corp. v. City  
29           of Woodburn*, 33 Or LUBA 245, *aff’d* 149 Or App 509, 944 P2d 976 (1997).

30           *Mar-Dene Corp.* concerned a permit condition that required an agreement between  
31           property owners and governmental entities regarding access onto a state highway. The



1 condition of approval required that the agreement between the parties be entered into prior to  
2 the issuance of building permits for the development. However, the city proceeded to issue  
3 building permits without the required agreement once it became clear that the parties would  
4 not be able to reach consensus. In an action demanding enforcement of the condition of  
5 approval, the city council determined that it lacked the authority to enforce the condition. We  
6 concluded that the city's determination was not a land use decision because the city's  
7 decision didn't require the application of land use standards.

8 We agree that, standing alone, that aspect of the board of commissioners' decision  
9 where the commissioners determined that the city's letter satisfies Condition VI.A.7 of the  
10 Mill Woods subdivision application would not constitute a land use decision. However, the  
11 commissioners' decision encompasses more than just a determination that a condition of  
12 approval was satisfied. It also concludes that the city transportation director's letter is the  
13 equivalent of an MOU for the purposes of satisfying a provision of the community plan.  
14 Because the decision applies a relevant provision of the comprehensive plan, it is a land use  
15 decision. Petitioners may assign error to the county's ancillary determination regarding  
16 compliance with the tentative approval of the Mill Woods subdivision, even if that  
17 determination, standing alone, would not constitute a land use decision.

18 The second subassignment of error is sustained.

19 **C. Conclusion**

20 ORS 197.835(8) provides:

21 "[LUBA] shall reverse or remand a decision involving the application of a  
22 plan or land use regulation provision if the decision is not in compliance with  
23 applicable provisions of the comprehensive plan or land use regulations."

24 We reverse a decision that "violates a provision of applicable law and is prohibited as  
25 a matter of law." OAR 661-010-0071(1)(c); *Territorial Neighbors v. Lane County*, 16 Or  
26 LUBA 641, 648 (1988). Here, the May 28, 1999 letter does not constitute an MOU as  
27 required by the community plan design element and the Mill Woods subdivision condition of

1 approval. The board of commissioners' determination that it does is wrong as a matter of  
2 law.  
3           The county's decision is reversed.