

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 FREVACH LAND COMPANY,

5 *Petitioner,*

6
7 vs.

8
9 MULTNOMAH COUNTY,

10 *Respondent.*

11
12 LUBA No. 2000-109

13
14 FINAL OPINION

15 AND ORDER

16
17 Appeal from Multnomah County.

18
19 D. Daniel Chandler, Vancouver, Washington, represented petitioner.

20
21 Sandra N. Duffy, Chief Assistant County Counsel, Portland, represented respondent.

22
23 HOLSTUN, Board Member; BASSHAM, Board Chair; BRIGGS, Board Member,
24 participated in the decision.

25
26 DISMISSED

09/25/2000

27
28 You are entitled to judicial review of this Order. Judicial review is governed by the
29 provisions of ORS 197.850.

30

INTRODUCTION

Petitioner placed fill on its property before securing required county permits. On July 1, 1997, the county issued petitioner a Grading and Erosion Control (GEC) permit. The dispute that led to this appeal concerns condition 4 in that GEC permit which, as relevant, provides:

“[The spoils disposal area] is only authorized as an area ‘primarily for material resulting from maintenance dredging at [Fred’s] marina’ as stated in the application.” Motion to Dismiss Appendix 013.

Petitioner and the county interpret condition 4 differently. That disagreement has led to a number of meetings between county staff and petitioner’s representatives, a writ of review proceeding in circuit court, a federal district court action and this LUBA appeal.

Petitioner interprets condition 4 to allow upland fill to be placed in the spoils disposal area, so long as fill from maintenance dredging at Fred’s Marina is the primary source of fill. At least one county staff member also appears to have interpreted condition 4 in this manner, and the Motion to Dismiss includes an affidavit in which the responsible county planning staff person concludes petitioner’s interpretation is possible. Motion to Dismiss Appendix 024-26. However, the county takes the position that its official interpretation of condition 4 has always been that it limits permissible fill in this area to dredge fill exclusively and that the dredge fill must be “primarily” from dredge associated with Fred’s Marina. Under the county’s interpretation, no upland fill is permissible. To clarify the county’s interpretation of condition 4, the county sent petitioner a letter dated June 20, 2000. That letter is the subject of this appeal.

The county moves to dismiss, arguing the challenged letter is not a land use decision that is subject to our jurisdiction.

1 **PETITIONER’S MOTION TO STRIKE**

2 As relevant here, our jurisdiction is limited to land use decisions. ORS 197.825(1).
3 As defined by ORS 197.015(10)(a), a “final” county decision that applies a “land use
4 regulation” is a land use decision.¹ In its Motion to Dismiss, the county argues that the
5 challenged letter interprets and applies a permit condition rather than a land use regulation.
6 For that reason, the county argues the challenged decision is not a land use decision. For
7 purposes of the Motion to Dismiss, the county does not dispute that the letter is a “final”
8 county decision. Neither does the Motion to Dismiss dispute that the GEC permit criteria
9 that governed the July 1, 1997 conditional use permit constitute “land use regulations.”²

10 After petitioner filed its Response to Motion to Dismiss (hereafter Petitioner’s
11 Response), the county filed a four-part, 22-page Reply to Petitioner’s Response to Motion to

¹As relevant, ORS 197.015(10) provides:

- “Land use decision”:
 - “(a) Includes:
 - “(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
 - “(i) The goals;
 - “(ii) A comprehensive plan provision;
 - “(iii) A land use regulation[.]”
 - ****
 - “(b) Does not include a decision of a local government:
 - (A) Which is made under land use standards which do not require interpretation or the exercise of policy or legal judgment[.]”

²The county also argues the challenged decision falls within the exception to the statutory definition of land use decision provided by ORS 197.015(10)(b)(A) for decisions made under “land use standards which do not require interpretation or the exercise of policy or legal judgment.” We need not and do not consider that argument.

1 Dismiss (hereafter County Reply).³ Petitioner analogizes the County Reply to a “reply
2 brief,” which under our rules must be “confined solely to new matters raised in the
3 respondent’s brief.” OAR 661-010-0039. Petitioner argues the County Reply is not limited
4 to new matters raised in Petitioner’s Response and, for that reason, moves to strike the
5 County Reply.

6 Petitioner’s Response is expressly authorized by our rules. OAR 661-010-0065(2).
7 Our rules do not expressly authorize a reply to such a response. However, our practice is to
8 allow such reply memoranda, where they are limited to new issues raised in a response
9 memorandum. *Fechtig v. City of Albany*, 31 Or LUBA 441, 442 (1996).

10 The first part of the County Reply is a “Clarification of Facts Recited by Petitioner.”
11 County Reply 4-12. That portion of the reply is irrelevant to the legal issue presented by the
12 Motion to Dismiss, and for that reason we do not consider it in reaching our decision.

13 The second part of the County Reply is entitled “The GEC Provisions are Non-Land
14 Use Code Provisions.” County Reply 12-18. With two exceptions, this part of the County
15 Reply (1) simply embellishes arguments the county makes in its Motion to Dismiss or (2)
16 raises a new issue that was not raised in the Motion to Dismiss.⁴ The first exception is the
17 first two full paragraphs on page 16 of the County Reply, where the county responds to
18 petitioner’s argument that the letter “necessarily involves the application of County land use
19 regulations.” The second exception is the last three paragraphs in this part of the County
20 Reply, where the county responds to petitioner’s arguments based on *Terraces Condo. Assn.*
21 *v. City of Portland*, 110 Or App 471, 823 P2d 1004 (1992). County Reply 17-18. With these
22 two exceptions, we do not consider the second part of the County Reply.

³The County Reply includes a 140-page appendix.

⁴As noted earlier, the Motion to Dismiss does not include an argument that the GEC permit criteria are not land use regulations.

1 Finally, although the last two parts of the County Reply have no material bearing on
2 our decision, contrary to petitioner’s arguments, we conclude they respond to new issues
3 raised in Petitioner’s Response.

4 Petitioner’s Motion to Strike is granted in part and denied in part, as explained above.

5 **MOTION TO DISMISS**

6 The letter that constitutes the decision challenged in this appeal is as follows:

7 “During conversations with your representatives and in a letter * * *, I
8 misinterpreted the type of fill materials that were allowed by your [GEC] 20-
9 97 permit into the Dredge Material Deposit location (DMD). I made an
10 interpretation that upland fill material was allowed to be deposited as a
11 secondary fill material to dredge spoils within the DMD site. That
12 interpretation is not supported by your narrative statements submitted as part
13 of your GEC application or in the [GEC] permit. At the request of the County
14 Attorney and my supervisors, I am sending you this correction letter to clarify
15 the type of material allowed in the DMD site per your GEC permit.

16 “Based upon your narrative statements and application request and Condition
17 No. 4 of GEC 20-97, the only type of material permitted in the DMD site is
18 dredge spoils material. The source of [that material] shall primarily be from
19 Fred’s Marina. Dredge materials from off-site may be allowed, but only if the
20 amount does not exceed the quantity deposited from the on-site dredge
21 operations. No additional upland fill or construction debris shall be placed in
22 the DMD site without applying for and receiving a new Grading and Erosion
23 Control permit that allows the placement of upland fill materials.

24 “Because of my prior interpretation, the upland fill that has been placed into
25 the DMD area may remain and is not considered to be in violation of your
26 permit. No enforcement action will be taken to remove that fill material. But,
27 any additional placement of non-dredge material will be considered to be
28 outside the scope of your permit.” Motion to Dismiss Appendix 032.

29 As discussed earlier, the county did not take the position in its Motion to Dismiss that
30 the GEC permit criteria are not land use standards. Accordingly, we assume without
31 deciding that they are land use standards. It follows from that assumption that GEC 20-97,
32 the underlying permit, is a land use decision. However, GEC 20-97 was not appealed and is
33 not the decision that is at issue in this appeal. Rather, the challenged decision is a letter that
34 interprets language in that permit.

1 Although *Mar-Dene Corp. v. City of Woodburn*, 33 Or LUBA 245, *aff'd* 149 Or App
2 509, 944 P2d 976 (1997) arose in a different factual context, the critical facts in that case are
3 present here. In *Mar-Dene Corp.*, the challenged decision did not apply the statewide
4 planning goals, a comprehensive plan provision, or a land use regulation. Rather, the
5 challenged decision applied a condition of approval in a land use permit. Because such a
6 decision does not fall within the statutory definition of “land use decision,” we do not have
7 jurisdiction, and this appeal must be dismissed. *Balk v. Multnomah County*, ___ Or LUBA
8 ___ (LUBA No. 2000-017, May 9, 2000), slip op 6-7.

9 Petitioner largely relies on *Terraces Condo. Assn.* to avoid this straightforward
10 reading of the statute. *Terraces Condo. Assn.* involved a city decision that interpreted a
11 previously granted variance. The court first found that the variance interpretation decision
12 “obviously entailed the application of the density provisions in the city land use regulations.”
13 110 Or App at 476-77. The court went on to express a second reason for concluding the
14 challenged decision was a land use decision and explained “that the ‘interpretation’ of a
15 variance necessarily involves the application of the land use regulations under and from
16 which the variance was allowed.” *Id.* at 477. Petitioner relies on this language in *Terraces*
17 *Condo. Assn.* to argue the permit condition must be based on some underlying land use
18 regulation and therefore constitutes an application of that land use regulation.

19 Petitioner reads far too much into the above-quoted language in *Terraces Condo.*
20 *Assn.* and ignores a critical difference between variances and other kinds of land use
21 decisions. Variances involve deviations from land use standards, which may make it
22 necessary to apply those land use standards in a subsequent decision interpreting the variance
23 decision. The Court of Appeals explained:

24 “A variance can only be understood by reference to the legislatively defined
25 uses that it allows an applicant to vary from or to.” 110 Or App at 477.

1 *Terraces Condo. Assn.* does not support petitioner's argument that the challenged letter,
2 which interprets a condition in a land use permit without also applying a land use regulation,
3 is a land use decision.

4 Much of the argument submitted in support of and in opposition to the Motion to
5 Dismiss goes to the merits of the county's interpretation of condition 4. We express no view
6 on the merits of the county's interpretation of that condition. However, we agree with the
7 county that the challenged letter interpreting that condition is not a land use decision subject
8 to our review. Accordingly, the county's Motion to Dismiss is granted.

9 This appeal is dismissed.