

1 BEFORE THE LAND USE BOARD OF APPEALS  
2 OF THE STATE OF OREGON  
3

4 WALLACE MEKKERS, LYNN MEKKERS, RUTH  
5 CURYEA, JAMES HEISER, CARLENE HEISER,  
6 DAVID ROOT, DONNA ROOT, DONALD GILL,  
7 BARBARA GILL, CHARLOTTE BORGAN, DON  
8 OLIVER, JEAN OLIVER, FRED LEVANGER,  
9 JOAN LEVANGER, DAVID KERNAN, JERILYNN  
10 KERNAN, CRAIG HAMER and KATRINA HAMER,  
11 *Petitioners,*

12  
13 vs.

14  
15 YAMHILL COUNTY,  
16 *Respondent,*

17  
18 and

19  
20 RAY KAUER and HOWARD ASTER,  
21 *Intervenors-Respondent.*

22  
23 LUBA No. 2000-067

24  
25 FINAL OPINION  
26 AND ORDER

27  
28 Appeal from Yamhill County.

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30 George B. Heilig, Corvallis, filed the petition for review and argued on behalf of  
31 petitioners. With him on the brief was Cable, Huston, Benedict, Haagensen and Lloyd, LLP.

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33 No appearance by Yamhill County.

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35 Michael C. Robinson, Portland, filed the response brief and argued on behalf of  
36 intervenors-respondent. With him on the brief were Ellen P. Hawes and Stoel Rives LLP.

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38 BASSHAM, Board Chair; BRIGGS, Board Member; HOLSTUN, Board Member,  
39 participated in the decision.

40  
41 REMANDED

01/26/2001

42  
43 You are entitled to judicial review of this Order. Judicial review is governed by the  
44 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioners appeal a county decision to vacate a portion of a county road.

**MOTION TO INTERVENE**

Ray Kauer and Howard Aster (intervenors), the applicants below, move to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

**FACTS**

On October 19, 1999, the City of McMinnville approved intervenors' application to subdivide property located just within the southern boundaries of the city limits. Intervenors' property is bordered on the south by the city limits and Redmond Hill Road, a county local road that currently provides access to several rural properties that are located in the county and owned by petitioners. Intervenors' property is bordered on the east by Hill Road, which is designated a minor arterial within the city. Redmond Hill Road joins Hill Road at the southeastern corner of intervenors' property.

In response to city concerns that required access connecting the subdivision to Hill Road would conflict with the existing Redmond Hill Road/Hill Road intersection, intervenors proposed to vacate Redmond Hill Road and to create a city street within the subdivision. The new city street would run westward from Hill Road approximately 100 feet north of and parallel to the current location of Redmond Hill Road, and then curve south to join with Redmond Hill Road after approximately one-third of a mile. The city approved the subdivision with a condition that intervenors obtain county approval to vacate the portion of Redmond Hill Road that parallels the proposed new city street.

On February 16, 2000, intervenors requested that the county vacate the eastern one-third mile of Redmond Hill Road. The county board of commissioners conducted a public hearing on the application April 6, 2000. Petitioners appeared and opposed the request. On

1 April 25, 2000, the board of commissioners issued its order approving the proposed road  
2 vacation. This appeal followed.

3 **WAIVER**

4 Intervenor argue that petitioners waived the issues set forth in the first, second, third  
5 and fourth assignments of error by failing to raise those issues before the county in the  
6 proceedings below, as required by ORS 197.763(1) and 197.835(3).<sup>1</sup> Intervenor contend  
7 that the county conducted a hearing as required by ORS 368.346, and therefore petitioners  
8 have waived the right to raise before LUBA any issues they failed to raise in the hearing  
9 before the county.

10 The predicate to application of the “raise it or waive it” principle under  
11 ORS 197.835(3) is a proceeding pursuant to ORS 197.195 or 197.763. The hearing in this  
12 case was not conducted pursuant to ORS 197.195 or 197.763; it was conducted pursuant to  
13 ORS 368.346. Intervenor do not explain why the statutory “raise it or waive it” principle is  
14 applicable to proceedings conducted pursuant to statutes other than ORS 197.195 or 197.763.  
15 *See Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670, 678-79 (1995) (ORS

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<sup>1</sup>ORS 197.763 provides in relevant part:

“The following procedures shall govern the conduct of quasi-judicial land use hearings conducted before a local governing body, planning commission, hearings body or hearings officer on application for a land use decision and shall be incorporated into the comprehensive plan and land use regulations:

“(1) An issue which may be the basis for an appeal to the Land Use Board of Appeals 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.”

ORS 197.835(3) provides:

“Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.”

1 197.763(1) and 197.835(3) do not limit the issues which may be raised before LUBA in an  
2 appeal of a legislative land use decision). We reject intervenors’ waiver argument.

3 **FIRST, FOURTH AND FIFTH ASSIGNMENTS OF ERROR**

4 In the first assignment of error, petitioners argue that the county erred in failing to  
5 address policies in the county’s comprehensive plan (YCCP) that, according to petitioners,  
6 are applicable to the challenged road vacation. In the fourth assignment of error, petitioners  
7 contend that the county erred in failing to address a provision of its transportation system  
8 plan (TSP). In the fifth assignment of error, petitioners argue that the county failed to  
9 address issues raised below regarding the safety of the proposed new street and the impact of  
10 vacating Redmond Hill Road on nearby land uses.

11 **A. YCCP III.A.1(b) and TSP 5.2.1, Policy 4.**

12 YCCP III.A.1(b) is a policy statement in the Transportation Element of the county’s  
13 comprehensive plan, and provides that:

14 “All transportation-related decisions will be made in consideration of land use  
15 impacts including but not limited to adjacent land use patterns, both existing  
16 and planned, and their designated uses and densities.”

17 Petitioners argue that, pursuant to ORS 197.175(2)(d), the county’s land use decisions must  
18 be in compliance with its acknowledged comprehensive plan.<sup>2</sup> Petitioners contend that  
19 YCCP III.A.1(b) is stated in mandatory terms and applies to the proposed road vacation,  
20 because the road vacation is clearly a “transportation-related decision.” Consequently,  
21 petitioners argue, the county was required to apply YCCP III.A.1(b) and consider the land  
22 use impacts of the proposed road vacation.

23 Intervenors respond, correctly, that the fact that a land use decision must comply with

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<sup>2</sup>In a previous order in this case, we concluded that petitioners established that the challenged decision was a land use decision under the “significant impacts” test set forth in *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 992 (1982). *Mekkers v. Yamhill County*, 38 Or LUBA 928 (2000). Petitioners did not attempt to establish, and we did not consider in that order, whether any comprehensive plan provisions applied to the disputed road vacation and thus whether the county’s decision might constitute a statutory land use decision as defined by ORS 197.015(10)(a)(A).

1 the county’s comprehensive plan does not mean that all plan provisions necessarily apply  
2 directly to a specific development application. *Shelter Resources, Inc. v. City of Cannon*  
3 *Beach*, 27 Or LUBA 229, 235, *aff’d* 129 Or App 433, 879 P2d 1313 (1994). It is not  
4 sufficient that a decision touches on the subject matter of a comprehensive plan provision;  
5 instead, the comprehensive plan must contain provisions that are intended to be applied as  
6 standards or criteria to the challenged decision. *Portland Oil Service Co. v. City of*  
7 *Beaverton*, 16 Or LUBA 255, 260 (1987). In the present case, intervenors contend that  
8 YCCP III.A.1(b) is phrased in general terms and does not expressly refer to road vacations.  
9 Therefore, intervenors argue, it is not applicable to the instant road vacation decision.

10 Although YCCP III.A.1(b) does not specifically refer to road vacations as such, that  
11 level of specificity is not essential in order to conclude that a comprehensive plan policy is  
12 intended to apply to individual decisions of a type that includes road vacations. *See Jebousek*  
13 *v. City of Newport*, 155 Or App 365, 367, 963 P2d 116 (1998) (plan policy requiring site-  
14 specific geologic investigation “prior to development” is an approval criterion potentially  
15 applicable to a lot-line adjustment). YCCP III.A.1(b) refers to a broad category of county  
16 decisions (“all transportation-related decisions”), and appears to require that such decisions  
17 include consideration of specified and unspecified land use impacts. Intervenors neither  
18 dispute that road vacations are transportation-related decisions, nor contend that road  
19 vacations cannot have land use impacts of the type described in YCCP III.A.1(b).<sup>3</sup>

20 The county has not addressed YCCP III.A.1(b). Pursuant to ORS 197.829(2), we  
21 may interpret YCCP III.A.1(b), or we may remand the decision to the county so that it may

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<sup>3</sup>Intervenors do argue that, even assuming that YCCP III.A.1(b) is an approval criterion applicable to the instant road vacation, the county’s decision in fact considers the land use impacts of the proposed road vacation, and thus demonstrates compliance with YCCP III.A.1(b). We disagree. In the course of addressing the “public interest” standard of ORS 368.346, the challenged decision finds that “the Applicants’ proposed vacation is the most effective way to safely accommodate increased traffic due to future growth in the western section of the city and potential growth in the unincorporated area west of the city.” Record 18. Those findings are insufficient to consider the impacts, if any, on “adjacent land use patterns, both existing and planned, and their designated uses and densities.”

1 interpret that policy in the first instance.<sup>4</sup> We conclude for the following reasons that the  
2 latter disposition is appropriate. The fourth assignment of error challenges the county’s  
3 failure to address a provision of the county’s TSP that mirrors, almost word for word, the text  
4 of YCCP III.A.1(b).<sup>5</sup> The only difference is that the TSP provision is set forth in a section of  
5 the TSP that governs collector and arterial streets. One of intervenors’ responses to the  
6 fourth assignment of error is that the cited TSP provision applies only to transportation  
7 decisions affecting collector and arterial streets and, because Redmond Hill Road is a local  
8 road, the TSP provision does not apply in this case. For that reason, we agree with  
9 intervenors that petitioners have not demonstrated that the cited TSP section, read in context,  
10 is applicable to a transportation decision affecting a local road. Although YCCP III.A.1(b)  
11 contains no language that can be read to confine that provision to collectors and arterials, we  
12 are uncertain whether a similar contextual basis or other reason exists to limit application of  
13 YCCP III.A.1(b). Remand is appropriate for the county to determine the meaning and  
14 applicability of YCCP III.A.1(b).

15 **B. YCCP III.A.1(n)**

16 YCCP III.A.1(n) provides that “Yamhill County will utilize existing facilities and  
17 rights-of-way to the fullest extent possible provided that such use is consistent with the  
18 county comprehensive plan.” Petitioners argue that YCCP III.A.1(n) applies by its terms to  
19 the proposed road vacation. According to petitioners, application of YCCP III.A.1(n) in the

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<sup>4</sup>ORS 197.829(2) provides:

“If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct.”

<sup>5</sup>TSP section 5.2.1, policy 4 provides:

“It is the policy of Yamhill County that all transportation decisions will be made in consideration of land use impacts including but not limited to adjacent land use patterns, both existing and planned, and their designated uses and densities.”

1 present case would have required the county, at a minimum, to consider alternatives to the  
2 proposed vacation that would use the existing right-of-way. Because the county did not  
3 address this plan provision, petitioners argue, such alternatives were not considered.

4 Intervenor respond that YCCP III.A.1(n) merely encourages the county to use  
5 existing roads and is phrased so generally that it cannot be construed to apply to road  
6 vacation decisions. Intervenor argue that LUBA reached a similar conclusion with respect  
7 to a similar provision in *Harding v. Clackamas County*, 16 Or LUBA 224 (1987). In  
8 *Harding*, the plan provision required the county to “[e]mphasize use of existing rights-of-  
9 way” and to “[e]mphasize maintenance of existing roadways[.]” We concluded that the plan  
10 provision’s emphasis on the use and maintenance of existing rights-of-way was not intended  
11 to be an approval standard to be applied to street vacations. 16 Or LUBA at 230-31.  
12 Intervenor contend that, like the provision at issue in *Harding*, YCCP III.A.1(n) merely  
13 emphasizes use of existing rights-of-way. We disagree. A mandate to “emphasize” some  
14 policy objective is no mandate at all; it is analogous to plan directives to “encourage” a  
15 policy objective. LUBA has repeatedly held that plan policies that are written in such  
16 hortatory language do not constitute mandatory approval criteria applicable to quasi-judicial  
17 land use decisions. *McGowan v. City of Eugene*, 24 Or LUBA 540, 548 (1993); *Bennett v.*  
18 *City of Dallas*, 17 Or LUBA 450, 456-57, *aff’d* 96 Or App 645, 773 P2d 1340 (1989). In the  
19 present case, YCCP III.A.1(n) is phrased in terms that are fairly read to impose a mandatory  
20 duty on the part of the county.

21 It is a closer question whether YCCP III.A.1(n) is intended to apply as a decision  
22 criterion to such decisions as road vacations. Unlike YCCP III.A.1(b), YCCP III.A.1(n) does  
23 not refer to a category of decisions that appears to embrace road vacations by requiring the  
24 county to consider certain matters in the course of those decisions. It is not clear in what  
25 context YCCP III.A.1(n) requires the county to “utilize” existing facilities and rights-of-way.  
26 If YCCP III.A.1(n) does apply in the present context, it is not clear to us what the county

1 must do to demonstrate compliance with that provision. Because remand for an  
2 interpretation of YCCP III.A.1(b) is necessary in any case, we conclude it is appropriate to  
3 remand for the county to interpret YCCP III.A.1(n) in the first instance to determine (1)  
4 whether it applies to decisions vacating county roads and (2) if so, whether the challenged  
5 road vacation complies with it.

6 **C. YCCP I.B.1(c)(1)**

7 YCCP I.B.1(c)(1) provides that “[a]ll proposed rural area development and facilities  
8 shall be appropriately, if not uniquely, suited to the area or site proposed for development.”  
9 Petitioners argue that YCCP I.B.1(c)(1) applies in this case because Redmond Hill Road,  
10 when routed through the city, will carry rural traffic through an urban residential area, which  
11 will create various rural-urban conflicts that petitioners argue would be inconsistent with  
12 YCCP I.B.1(c)(1).

13 Intervenor’s respond, and we agree, that the county’s decision merely vacates  
14 Redmond Hill Road and thus does not propose rural development or facilities within the  
15 meaning of YCCP I.B.1(c)(1). Petitioners’ arguments are directed at the city street approved  
16 by the city’s decision, and that decision is not before us.

17 **D. Issues Raised Regarding YCCP III.A.1(b), III.A.1(n) and I.B.1(c)(1)**

18 In the fifth assignment of error, petitioners argue that the county erred in failing to  
19 address certain issues raised below concerning compliance with YCCP III.A.1(b), III.A.1(n)  
20 and I.B.1(c)(1). With respect to the first two plan provisions, petitioners argue that the  
21 county failed to address the feasibility of options other than vacation of Redmond Hill Road.  
22 Petitioners also argue that the county erred in failing to gather or consider evidence regarding  
23 future traffic volumes and patterns. Without that evidence, petitioners argue, the county  
24 cannot determine whether the proposed vacation of Redmond Hill Road will have land use  
25 impacts that must be considered under YCCP III.A.1(b).



1 If the county determines on remand that either YCCP III.A.1(b) or (n) is applicable to  
2 the challenged road vacation, it should consider whether the foregoing issues are relevant to  
3 compliance with those provisions and, if so, address them.

4 With respect to YCCP I.B.1(c)(1), we have already determined that that provision is  
5 not applicable to the challenged decision. Therefore, the county’s failure to address issues  
6 concerning YCCP I.B.1(c)(1) does not provide a basis for reversal or remand.

7 The first and fifth assignments of error are sustained, in part. The fourth assignment  
8 of error is denied.

9 **SECOND ASSIGNMENT OF ERROR**

10 Petitioners argue that the county erred in failing to address the requirements of  
11 OAR 660-012-0060(1), which requires the county to ensure that amendments to its planning  
12 documents and land use regulations that significantly affect transportation facilities are  
13 modified in prescribed ways to mitigate the impact of such amendments.<sup>6</sup>

14 Intervenors respond that OAR 660-012-0060 applies only if the county’s decision  
15 amends one of the county’s functional plans, the comprehensive plan or a land use  
16 regulation. Because the challenged decision does none of those things, OAR 660-012-0060  
17 does not apply. We agree.

18 The second assignment of error is denied.

19 **THIRD ASSIGNMENT OF ERROR**

20 YCCP I.A.2(a) requires that the county “seek full cooperation and coordination” with  
21 the city “in jointly planning and programming all land use, urban services and facilities and  
22 other public improvements having an impact on the rate and direction of urban growth.”

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<sup>6</sup>OAR 660-012-0060(1) provides in relevant part:

“Amendments to functional plans, acknowledged comprehensive plans, and land use regulations which significantly affect a transportation facility shall assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility. \* \* \*”

1 Petitioners argue that the county failed to coordinate with the city in approving the instant  
2 road vacation, and thus violated YCCP I.A.2(a).

3 Intervenor respond, and we agree, that YCCP I.A.2(a) requires that the county  
4 coordinate with the city only with respect to “planning and programming” certain land use  
5 and facilities improvements. Petitioners do not explain how a road vacation constitutes  
6 “planning or programming” within the meaning of YCCP I.A.2(a). Even if it does, the  
7 county provided notice to the city, the city responded and the county considered that  
8 response. Petitioners do not explain why YCCP 1.A.2(a) requires more.

9 The third assignment of error is denied.

10 The county’s decision is remanded.