

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

3
4 BRENT THOMPSON, PORTER LOMBARD
5 and CATHY SHAW,
6 *Petitioners,*

7
8 vs.

9
10 JACKSON COUNTY,
11 *Respondent.*

12 LUBA No. 2006-183

13
14 CITY OF ASHLAND,
15 *Petitioner,*

16
17 vs.

18
19 JACKSON COUNTY,
20 *Respondent.*

21 LUBA No. 2006-185

22
23 FINAL OPINION
24 AND ORDER

25
26
27 Appeal from Jackson County.

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29 Brent Thompson, Cathy Shaw, Ashland, Porter Lombard, Medford, represented
30 themselves.

31
32 Richard Appicello, Assistant City Attorney, Ashland, filed the petition for review and
33 argued on behalf of petitioner City of Ashland. With him on the brief was Michael Franell.

34
35 Douglas M. McGeary, County Counsel, Medford, filed the response brief and argued
36 on behalf of respondent.

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38 RYAN, Board Member; HOLSTUN, Board Member, participated in the decision.

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40 BASSHAM, Board Chair, did not participate in the decision.

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42 LUBA NO. 2006-183 DISMISSED 02/05/2007
43 LUBA NO. 2006-185 REMANDED 02/05/2007
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1 You are entitled to judicial review of this Order. Judicial review is governed by the
2 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a county decision approving comprehensive plan and land development ordinance amendments.

FACTS

In 2005, the county initiated a process to amend its comprehensive plan and land development ordinance to implement a Rural Use (RU) plan designation and a Rural Use zoning designation for nonresource lands. Following two planning commission work sessions, the planning commission and board of county commissioners (BCC) conducted a joint public hearing on May 11, 2006. At that public hearing, the record was left open for 30 days and deliberations were continued for the BCC to await a written recommendation from the planning commission. After the planning commission completed their recommendation, the BCC reconvened for a public hearing on August 2, 2006. At the August 2, 2006 public hearing, the BCC considered a proposal by Commissioner Walker (Walker Amendment) to reduce the minimum lot size in RU areas to 10 acres rather than the 20-acre minimum in the planning commission recommendation. According to the county, the BCC approved the amendment and directed staff to prepare findings to support that amendment. Under county regulations, adoption of a new ordinance requires a first public reading and a second public reading, with the second public reading including a public hearing. The second public reading and public hearing for the challenged decision occurred on September 20, 2006. At the September 20, 2006 public hearing, the BCC apparently modified its normal procedure for public readings and allowed numerous people, including petitioner City of Ashland, to submit written materials and testify orally regarding the merits of the proposed comprehensive plan and land development ordinance amendment. That day, the BCC adopted the ordinance, which approved the new RU designation with a 10-acre minimum lot size. This appeal followed.

1 **LUBA NO. 2006-183**

2 In LUBA No. 2006-183, three individual petitioners appeal the comprehensive plan
3 and land development ordinance amendment. In LUBA No. 2006-185 the City of Ashland
4 also appeals the comprehensive plan and land development ordinance amendment. The city
5 filed a petition for review and we address its assignment of error later, but the individual
6 petitioners did not file a petition for review.

7 OAR 661-010-0030(1) provides, in relevant part:

8 “* * * The petition for review together with four copies shall be filed with the
9 Board within 21 days after the date the record is received or settled by the
10 Board. * * * Failure to file a petition for review within the time required by
11 this section, and any extensions of that time under * * * OAR 661-010-
12 0067(2), shall result in dismissal of the appeal * * *.”

13 OAR 661-010-0067(2) provides that the time limit for filing the petition for review may be
14 extended only by written consent of all the parties.

15 The deadline for filing the petition for review is strictly enforced. *Terrace Lakes*
16 *Homeowners Assoc. v. City of Salem*, 29 Or LUBA 532, 535, *aff'd* 138 Or App 188, 906 P2d
17 871 (1995); *Hutmacher v. Marion County*, 15 Or LUBA 514, 515 (1987). Because a petition
18 for review was not filed within the time required by our rules, and the individual petitioners
19 in LUBA No. 2006-183 did not obtain written consent to extend the time for filing the
20 petition for review under OAR-661-010-0067(2), ORS 197.830(11) and OAR
21 661-010-0030(1) require that we dismiss their appeal.

22 LUBA No. 2006-183 is dismissed.

23 **ASSIGNMENT OF ERROR (LUBA No. 2006-185)**

24 The city argues that the county violated the Goal 2 (Land Use Planning) coordination
25 requirement by failing to coordinate with the city regarding the city’s objections to the 10-
26 acre minimum lot size. Those objections were raised at the September 20, 2006 public
27 hearing. According to the city, because the county’s decision does not even recognize, let
28 alone respond to the city’s concerns, the decision violates the Goal 2 coordination

1 requirement. The county responds that it was not required to respond to the city's concerns
2 because the city did not object until long after the record had been closed. According to the
3 county, the final decision on the merits was made at the August 2, 2006 public hearing, and
4 the subsequent readings and public hearing were merely to determine whether the findings
5 drafted by staff conformed to the BCC's earlier decision.

6 The Goal 2 coordination requirement generally encompasses a two-step process
7 wherein (1) information is exchanged between the planning jurisdiction and the affected
8 local governments, and (2) the planning jurisdiction uses the information gathered to balance
9 the needs of the affected governmental units as much as possible. The planning jurisdiction
10 must adopt findings to address legitimate concerns raised by the affected governmental units.
11 *DLCD v. Douglas County*, 33 Or LUBA 216, 221 (1997) (citing *Brown v. Coos County*, 31
12 Or LUBA 142, 145 (1996)). If the city timely raised its objections to the proposed
13 amendment, then the county violated the Goal 2 coordination requirement.

14 There is no question that the city's concerns were not addressed in the findings,
15 because the county did not believe it needed to address them. If the county was required to
16 address the city's concerns then the failure to do so requires remand. *Id.* at 221-22. In order
17 to determine whether the county was required to respond to the city's concerns we must try
18 to determine exactly what the county did. We begin with the county's September 20, 2006
19 decision that states:

20 "The [BCC] concluded their public hearing on August 2, 2006, closing the
21 oral and written record, and deliberated to a decision. At that time, by motion
22 and majority vote, and based on substantial evidence in the whole record of
23 the proceedings, the Board; (1) accepted all exhibits into the record and, (2)
24 APPROVED amendments to the Comprehensive Plan Map Designations
25 Element and Land Development Ordinance related to the Rural Use Plan
26 Category and Zoning District. * * *

27 "On August 2, 2006, the [BCC] further directed staff to prepare additional
28 written findings reflecting their deliberation * * * and to prepare an adopting
29 ordinance for first reading on August 30, 2006." Record 6.

1 The county's position is that the final public hearing on *whether to adopt the*
2 *challenged ordinance* occurred on August 2, 2006. According to the county, at the
3 conclusion of the August 2, 2006 public hearing, the BCC voted to approve the proposed
4 ordinance and directed staff to prepare findings to that effect. The county also argues that
5 under its charter it must conduct two public readings of the proposed ordinance and the
6 second public reading also requires a public hearing. County counsel explained at oral
7 argument that when so many people attended the second reading the BCC decided to reopen
8 the record to allow written materials and oral testimony regarding the proposed ordinance in
9 order to avoid offending county citizens who attended the public hearing. The county
10 maintains that the record was reopened for the limited purpose of considering *whether the*
11 *proposed ordinance conformed to the BCC decision* made at the August 2, 2006 public
12 hearing. The county argues that the issues raised by the city did not address the limited
13 scope of the public hearing and therefore the county was not obligated to respond to those
14 concerns.

15 We agree with the county that if it had merely admitted materials into the record at
16 the September 20, 2006 public hearing for the express purpose of considering whether the
17 ordinance and findings drafted by staff conformed to the verbal decision made by the BCC at
18 the conclusion of the August 2, 2006 hearing, then the city's comments would have been
19 submitted too late for the county to be obligated under Goal 2 to respond and make an
20 attempt to accommodate those concerns. The portion of the decision quoted earlier would
21 appear to support the county's position. The entire record, however, is not so clear. The
22 notice for the August 2, 2006 public hearing is a standard public hearing notice that, among
23 other things, states that the BCC will consider an amendment to the comprehensive plan and
24 that testimony must be directed towards the approval criteria or other applicable criteria,
25 failure to raise an issue with sufficient specificity to allow the BCC to respond precludes an
26 appeal to LUBA on that issue, and that the staff report will be available for review at least

1 seven days before the hearing.¹ Record 348. The county maintains that at the conclusion of
2 the August 2, 2006 public hearing the BCC voted to approve the proposed amendment and
3 directed staff to prepare findings to support that decision. However, there are no minutes of
4 the August 2, 2006 public hearing in the record and the county has not prepared a transcript
5 of the hearing or directed us to audio or visual recordings establishing that fact.

6 The notice for the September 20, 2006 public hearing is very similar to the notice of
7 the August 2, 2006 public hearing. Like the earlier hearing it states that the BCC will
8 consider an amendment to the comprehensive plan and that testimony must be directed
9 towards the approval criteria or other applicable criteria, failure to raise an issue with
10 sufficient specificity to allow the BCC to respond precludes an appeal to LUBA on that
11 issue, and that the staff report will be available for review at least seven days before the
12 hearing. Record 61. As with the August 2, 2006 public hearing, there are no minutes from
13 the September 20, 2006 public hearing, and the county has not provided a transcript or
14 directed us to audio or visual recordings to establish precisely what occurred at that hearing.

15 If the county had refused to reopen the evidentiary record at the September 20, 2006
16 hearing and limited its activities to determining whether the proposed ordinance and findings
17 conformed to an earlier oral decision, then the county would not have been obligated under
18 Goal 2 to coordinate regarding issues raised after the record had closed. We are inclined to
19 agree with the county that it should not be punished for essentially letting citizens “vent or
20 blow off steam” by submitting written materials and oral testimony, provided the county
21 makes it clear that the evidentiary record is not being reopened or that the scope of the
22 hearing is limited to determining whether the findings are sufficient to support their oral

¹ The city appears to give great weight to the fact that the Walker Amendment was submitted on August 1, 2006, the day before the public hearing. The city, however, has only asserted a Goal 2 coordination requirement challenge. We do not see that the timing of the Walker Amendment has any effect upon the city’s Goal 2 challenge, and the city has not assigned error to challenge the merits of the decision or the county’s procedures in adopting the decision. The city only argues that the county did not coordinate with the city.

1 decision that was rendered on August 2, 2006. While the county may have done that, there is
2 nothing cited to us in the record by the county that establishes that fact. The record cited to
3 us merely shows: (1) the county conducted a public hearing with a notice that would lead,
4 and apparently did lead, many people to believe they could testify as to the merits of the
5 proposed ordinance; (2) the record includes numerous comments regarding the merits of the
6 proposed amendment, including those from the city, that were submitted at the September
7 20, 2006 public hearing; (3) the record includes no minutes of either the August 2, 2006 or
8 the September 20, 2006 public hearings to support the county's position; (4) the adopted
9 findings neither address the issues raised at the September 20, 2006 hearing nor explain why
10 those issues are not addressed. The brief finding that the record was closed on August 2,
11 2006 explains none of these inconsistencies.

12 In conclusion, the decision before us in this appeal comes to us with city concerns
13 that were expressed at a public hearing that were neither acknowledged nor responded to by
14 the county. In general, such a decision must be remanded so that the county could perform
15 its Goal 2 obligation to coordinate and accommodate those concerns, if possible or explain
16 why it cannot accommodate those concerns. In order for the county to avoid that conclusion
17 it must demonstrate that it was not required in this case to consider or respond to those
18 comments. While it is not entirely clear to us what the county actually did at its August 2,
19 2006 and September 20, 2006 public hearings, the county has not established that it limited
20 the scope of the September 20, 2006 hearing such that it was appropriate for the county to
21 ignore the city's objections that were submitted at the September 20, 2006 public hearing.
22 Therefore, the county did not satisfy its Goal 2 coordination requirement with the city.

23 The county's decision in LUBA No. 2006-185 is remanded.