

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 MGP X PROPERTIES LLC,

5 *Petitioner,*

6
7 vs.

8
9 WASHINGTON COUNTY

10 and CITY OF SHERWOOD,

11 *Respondents.*

12
13 LUBA Nos. 2016-036 and 2016-037

14
15 FINAL OPINION

16 AND ORDER

17
18 Appeal from Washington County and City of Sherwood.

19
20 Lauren J. Russell and Ty K. Wyman, Portland, filed the petition for
21 review and Ty K. Wyman argued on behalf of petitioner. With them on the
22 brief was Dunn Carney Allen Higgins & Tongue LLP.

23
24 Jacquilyn Saito-Moore, County Counsel, Hillsboro, filed a joint response
25 brief and argued on behalf of respondent Washington County.

26
27 Carrie Richter, Portland, filed a joint response brief and argued on behalf
28 of respondent City of Sherwood. With her on the brief was Garvey Schubert
29 Barer.

30
31 RYAN, Board Member; HOLSTUN, Board Chair; BASSHAM, Board
32 Member, participated in the decision.

33
34 DISMISSED 09/29/2016

35
36 You are entitled to judicial review of this Order. Judicial review is
37 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

In these consolidated appeals, petitioner appeals an intergovernmental agreement between the city and the county that sets out the procedure for obtaining approval of a proposed project involving transportation improvements for Tualatin-Sherwood Road.

INTRODUCTORY MATTERS

A. Motion to Strike Amended Response Brief

On August 3, 2016, the city and the county (together, respondents) filed a joint response brief that responded to the petition for review. Two days later, on August 5, 2016, respondents filed an amended response brief. That amended response brief was accompanied by a letter to LUBA’s “clerk,” copied to petitioner’s attorney, that set out the changes that respondents made in the amended response brief. On August 10, 2016, petitioner moved to strike the amended response brief. According to petitioner, respondents’ filing of the amended response brief fails to comply with the time limits set out in OAR 661-010-0035(1), and respondents have not sought permission to amend their brief under OAR 661-010-0035(5).

We agree with petitioner that respondents’ filing of an amended response brief outside the time for filing the response brief, and without permission from the Board to file an amended brief, is a violation of OAR 661-010-0035(1) and (5). However, OAR 661-010-0005 provides that “[t]echnical violations not

1 affecting the substantial rights of parties shall not interfere with the review of a
2 land use decision[.]” Petitioner argues that petitioner’s attorney spent time
3 reviewing the original response brief before receiving the amended response
4 brief. However, that argument fails to establish that petitioner’s substantial
5 rights were prejudiced by the filing of the amended response brief two days
6 after the original brief was filed. The amended response brief was also
7 accompanied by a letter of explanation that accurately described the differences
8 between the two briefs. Although respondents’ failure to seek permission from
9 the Board to file an amended response brief is a violation of our rules, we
10 conclude that that failure, and the filing of the amended response brief two days
11 after the filing of the original response brief, and fourteen days before oral
12 argument was scheduled, did not prejudice petitioner’s rights in these
13 circumstances. The amended response brief is allowed.

14 **B. Reply Brief**

15 Petitioner moves for permission to file a reply brief to respond to
16 respondents’ jurisdictional challenges contained in the response brief.¹ The
17 reply brief is allowed.

¹ Petitioner’s reply brief responds to the original response brief. At oral argument, the Board allowed petitioner leave to file a second, separate reply brief to respond to the amended response brief if it chose to do so. Petitioner then confirmed by letter that it did not intend to file a second reply brief.

1 **C. Motion to Take Evidence**

2 Petitioner moves to take evidence not in the record in order to establish
3 “standing” in response to respondents’ jurisdictional challenge that we describe
4 in more detail below. The motion is allowed.

5 **D. Motion to Strike Appendices from the Petition for Review**

6 Respondents move to strike Appendices B, E, F and G to the petition for
7 review because, according to respondents, those appendices include material
8 that is not included in the record.² Because setting out and resolving the
9 various arguments regarding the motion to strike is unnecessary in order to
10 resolve these appeal, we deny the motion to strike.

11 **FACTS**

12 The intergovernmental agreement (IGA) between the city and the county
13 that is the subject of these appeals arises out of the county’s intent to make
14 changes to Tualatin-Sherwood Road, Baler Way, and State Highway 99W.³

² Appendix B is a declaration of petitioner’s property manager that is offered to demonstrate petitioner’s standing, and Appendix E is a separate declaration that is offered to establish that the appeals were timely filed pursuant to ORS 197.830(3).

Appendices F and G are copies of pages from two petitions for review that petitioner filed in *Regency Centers, L.P. v. Washington County*, 69 Or LUBA 135 (2014).

³ The IGA describes the improvements as:

“The County road project improvements are currently proposed to include: widening of Tualatin-Sherwood Road to include two

1 Tualatin-Sherwood Road is a public road that is owned by the county and
2 located in the City of Sherwood. Baler Way is a public road located in the city.
3 Petitioner owns the Sherwood Market Center, a shopping center located to the
4 south of and fronting Tualatin-Sherwood Road. A signalized intersection on
5 Tualatin-Sherwood Road at petitioner’s property provides controlled but
6 unrestricted access to and from the property.⁴ The county’s proposal for
7 Tualatin-Sherwood Road includes removing that signal and restricting access
8 to and from Tualatin-Sherwood Road and petitioner’s property to right-in,
9 right-out only.

10 In the IGA, the city and the county agree to cooperate in the planning,
11 design, and construction of the improvements to the affected roads.⁵ The IGA
12 includes an agreement that the city and county will rely on the county land use

westbound thru lanes between SW Langer Farms Parkway and Borchers; widening east of SW Langer Farms Parkway to carry a second eastbound thru lane beyond the SW Langer Farms Parkway intersection; improvements to Highway 99W intersection to allow signal function efficiency; conversion of signalized intersection of Tualatin-Sherwood Road/Regal Cinemas and Sherwood Market [Center] to right-in, right-out access; extension of Baler Way; and addition of bicycle facilities on both sides of Tualatin-Sherwood Road within the project boundaries[.]” County Record 4.

⁴ As we understand it, petitioner’s predecessor-in-interest paid for some or all of the cost of installation of the traffic signal as a condition of the city’s approval of its site plan for the property. Petition for Review 31.

⁵ ORS 190.110 authorizes the city and the county to enter into intergovernmental agreements for the performance of any and all functions and activities that a party to the agreement has the authority to perform.

1 process to determine whether the improvements comply with all applicable city
2 and county standards and criteria. County Record 4. The IGA sets out
3 obligations of the city and the county in the county land use process. County
4 Record 5.

5 The city council and the county board of commissioners each approved
6 the IGA without holding a hearing.⁶ Petitioner appealed the decision to LUBA.

7 **JURISDICTION**

8 Respondents argue that LUBA lacks jurisdiction over the appeals for
9 reasons that we describe in more detail below.

10 **A. The IGA is a Land Use Decision**

11 LUBA has exclusive jurisdiction to review land use decisions of a local
12 government. ORS 197.825(1). “Land use decision” includes “[a] final decision
13 or determination made by a local government or special district that concerns
14 the * * * application of a * * * comprehensive plan provision [or] [a] land use
15 regulation[.]” ORS 197.015(10)(a)(A). Respondents first argue that the IGA is
16 not a land use decision because the IGA did not apply the comprehensive plan
17 or land use regulation of the city or county. Respondents also argue that the
18 IGA is not a “final” decision within the meaning of ORS 197.015(10)(a)(A)

⁶ The city council approved a resolution authorizing the city manager to execute the IGA. City Record 8. The board of commissioners authorized execution of the IGA as part of its consent agenda during a regularly scheduled meeting. County Record 1.

1 because the IGA merely initiates a proceeding that will lead to an eventual land
2 use decision.

3 In the IGA, the city and the county determined that “[the city] has no
4 land use process established for road improvement projects that are listed in the
5 Transportation System Plan (TSP) or permitted with development, and the SW
6 Tualatin-Sherwood Road project is included in the TSP * * * [.]” County
7 Record 3. That determination required the city and county to consider and
8 apply the city’s land use regulations and the city’s comprehensive plan/TSP in
9 order to conclude that the “city has no land use process established” for the
10 proposed road improvement project.

11 We also conclude that the IGA is a “final” decision because the IGA
12 appears to be the city’s only decision to rely on the county to process and
13 review the proposed road improvement project, notwithstanding that pursuant
14 to the IGA the county will proceed to adopt subsequent land use decisions. *See*
15 *Terra Hydr, Inc. v. Washington County*, 68 Or LUBA 515, 521 (2013) (a city
16 resolution that acknowledges a Metro trail master plan as a “reference
17 document for decision-making purposes,” and directs staff to use the master
18 plan as a “guide” for developing the trail proposed in the master plan and
19 already planned and funded by the city, appears to be the city’s final decision
20 implementing the master plan, and is therefore a final decision subject to

1 LUBA’s jurisdiction). The IGA is therefore a land use decision. ORS
2 197.015(10)(a)(A).⁷

3 **B. Adversely Affected by the IGA**

4 ORS 197.830(3) requires as relevant here that if no hearing is held prior
5 to adopting a land use decision, a petitioner must demonstrate that it is
6 “adversely affected” by the decision.⁸ In the petition for review, petitioner
7 argues that it is adversely affected by the road improvement project that is the
8 subject of the IGA because completing the project may require the city to
9 acquire by eminent domain a portion of petitioner’s property, and because

⁷ ORS 197.015(10)(b) sets out a number of exclusions to the definition of “land use decision” at ORS 197.015(10)(a). No party argues that any of those exclusions apply.

⁸ ORS 197.830(3) provides:

“If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416 (11) or 227.175 (10), or the local government makes a land use decision that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local governments final actions, *a person adversely affected by the decision* may appeal the decision to the board under this section:

“(a) Within 21 days of actual notice where notice is required; or

“(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required.”
(Emphasis added.)

1 removing the traffic signal on Tualatin-Sherwood Road will make access to
2 petitioner's property more difficult for motorists. Petition for Review 6-7.
3 Respondents respond that petitioner's argument might be sufficient to
4 demonstrate that the road improvement project adversely affects petitioner, but
5 it is not sufficient to explain how the city's and county's decisions *to enter into*
6 *the IGA* adversely affects petitioner. According to respondents, the IGA's
7 effect is simply to allocate each local government's responsibility for the
8 planning, design, approval and construction of the road improvements, and that
9 allocation of responsibility does not adversely affect petitioner. In the reply
10 brief and motion to take evidence, petitioner replies that the city's decision to
11 delegate to the county the city's planning function over the road project
12 adversely affects petitioner because the IGA eliminates the ability of petitioner
13 to participate in a city planning process. Petition for Review 7; Reply Brief 4;
14 Motion to Take Evidence 4.

15 Even if we assume for purposes of this opinion that the future road
16 improvement project will adversely affect petitioner, we agree with
17 respondents that petitioner has failed to establish that the challenged decision,
18 the IGA, will adversely affect petitioner. Most of petitioner's arguments seek to
19 establish that the road improvement project, if approved, will adversely affect
20 petitioner. However, the IGA does not approve the road project or any
21 proposed design or construction, and does not apply any city or county
22 approval criteria or standards that may apply to the road project. The IGA

1 allocates responsibility between the city and the county for the planning,
2 design, approval and construction of the road project.

3 We also reject petitioner's argument that it is adversely affected by the
4 city's decision to enter into the IGA because the IGA eliminates what would
5 have been petitioner's ability to participate in a city planning process for the
6 road improvement project. Petitioner does not take the position that the county
7 planning process is an insufficient forum for petitioner to present its arguments
8 against the road improvement project, or explain how the county planning
9 process differs from the city planning process in a way that adversely affects
10 petitioner. Petitioner does not argue that it will be prevented from participating
11 in the county planning process for the road improvement project and as far as
12 we are aware petitioner will be able to present all of its arguments regarding
13 any applicable city and county approval standards and criteria in that county
14 process. Absent any explanation or comparative discussion of the differences
15 between county and city procedures applicable to the road improvement
16 project, petitioner has failed to establish that the city's and county's decision to
17 enter into the IGA adversely affects it.⁹

18 **MOTION TO TRANSFER**

19 Petitioner moves to transfer these appeals to circuit court pursuant to
20 OAR 661-010-0075(11) in the event we conclude the decision is not a land use

⁹ Petitioner makes no attempt to demonstrate how the county's decision to enter into the IGA adversely affects petitioner.

1 decision. However, transfer to circuit court is not appropriate where LUBA
2 concludes that it lacks jurisdiction for other reasons, such as a failure to timely
3 file an appeal. *Mazorol v. City of Bend*, 52 Or LUBA 136, 139 (2006); *Miner v.*
4 *Clatsop County*, 46 Or LUBA 467, 479 (2004); *Hammer v. Clackamas County*,
5 45 Or LUBA 32, 38, *aff'd* 190 Or App 473, 79 P3d 394 (2003). We conclude
6 that transfer to circuit court is not appropriate where LUBA concludes that it
7 lacks jurisdiction because petitioner has failed to establish that it is adversely
8 affected by the decision under ORS 197.830(3). The motion to transfer is
9 denied.