

1                                   BEFORE THE LAND USE BOARD OF APPEALS

2                                   OF THE STATE OF OREGON

3  
4                                   NEIGHBORS FOR SMART GROWTH,  
5                                   and JAKE MINTZ,  
6                                   *Petitioners,*

7  
8                                   vs.

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10                                  WASHINGTON COUNTY,  
11                                  *Respondent,*

12  
13                                  and

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15                                  LENNAR NORTHWEST, INC.,  
16                                  *Intervenor-Respondent.*

17  
18                                  LUBA No. 2016-122

19  
20                                  ORDER

21                    The challenged decision is the county’s resolution approving intervenor-  
22 respondent’s application to vacate a 12-foot wide public pedestrian and bicycle  
23 easement (Easement) that encumbers Lot 13 of the Westhaven Subdivision.

24                    **BACKGROUND**

25                    Westhaven Subdivision was originally approved by the county in 2008.  
26 The Easement was not included on the subdivision plat, or required as a  
27 condition of subdivision approval. In April 2014, the original subdivision  
28 developer entered into a private agreement with a local resident group and  
29 petitioner Mintz (Record 338-40) to dedicate the Easement on the east side of

1 Lot 13, which was dedicated by recording a revised plat in 2015. Record 48,  
2 461.

3 Intervenor purchased some of the lots from the original developer after  
4 the subdivision had been approved. Record 34, 226. In June 2016 intervenor  
5 submitted an application to the county to vacate the Easement from the east  
6 side of Lot 13, and in the application proposed future dedication of a 12-foot  
7 wide easement on the west side of Lot 13. Record 454-92. Intervenor submitted  
8 the requisite signatures for the vacation under ORS 368.346 to allow the  
9 application to be scheduled for a public hearing. The county engineer prepared  
10 a written report to the board of county commissioners. After notice and public  
11 hearing, on November 22, 2016, the Board voted to adopt Resolution and  
12 Order 16-155 vacating the Easement.

13 **MOTION TO DISMISS**

14 After the petition for review was filed, respondent and intervenor-  
15 respondent (together, respondents) filed a joint response brief that includes a  
16 motion to dismiss. Before turning to the motion, we set out the relevant statutes  
17 and local provisions and then address the parties' arguments.

18 **A. Vacation Procedures and Criteria**

19 ORS 368.326, *et seq.*, applies to the vacation of county property,  
20 including the Easement. ORS 368.346 provides as relevant here:

21 “(1) When a vacation proceeding has been initiated under ORS  
22 368.341, the county governing body shall direct the county  
23 road official to prepare and file with the county governing  
24 body a written report containing the following:



1 assessment of “Use of the Right-of-Way,” and includes five bullet points, the  
2 fourth of which is “[t]he approval of the proposed vacation does not create an  
3 access configuration which violates present development standards.” Petition  
4 for Review, App B.

5 **B. Jurisdiction**

6 LUBA has exclusive jurisdiction to review land use decisions. ORS  
7 197.825(1). ORS 197.015(10) defines the term “[l]and use decision” to include  
8 “[a] final decision” “by a local government” “that concerns the \* \* \*  
9 application of” “[a] comprehensive plan provision” or “[a] land use  
10 regulation[.]” A local government decision “concerns” the application of a  
11 statewide planning goal, comprehensive plan provision, or land use regulation  
12 only if the decision maker (1) was required by law to apply a goal, plan  
13 provision, or land use regulation as an approval standard, but did not, or (2) in  
14 fact applied a goal, plan provision, or land use regulation. *Angius v. Clean*  
15 *Water Services District*, 50 Or LUBA 154, 156 (2005) (citing *Jaqua v. City of*  
16 *Springfield*, 46 Or LUBA 566, 574, *rev’d on other grounds* 193 Or App 573,  
17 91 P3d 817 (2004)).

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- “The existing right-of-way proposed for vacation is not necessary for traffic or pedestrian circulation in the immediate area.
  - “There have been changes in land use, traffic patterns, or road improvements subsequent to the establishment of the right-of-way proposed for vacation which have eliminated the need to retain this right-of-way for public use[.]”

1           In their joint response brief, respondents move to dismiss the appeal on  
2 the basis that the challenged resolution is not a statutory “land use decision”  
3 within the meaning of ORS 197.015(10)(a), and is not a “significant impacts”  
4 land use decision as described in *City of Pendleton v. Kerns*, 294 Or 126, 653  
5 P2d 992 (1982). Respondents argue that ORS 368.326 is not a goal,  
6 comprehensive plan provision or a land use regulation, and argue that neither  
7 the county’s comprehensive plan nor the Washington County Community  
8 Development Code (CDC) contain provisions that are standards or criteria for  
9 making a decision whether to vacate the Easement. Respondents additionally  
10 argue that the 1984 Resolution is not a comprehensive plan provision or land  
11 use regulation and additionally does not require “application,” within the  
12 meaning of ORS 197.015(10)(a), of the county’s comprehensive plan as an  
13 approval standard in ultimately concluding whether the vacation is “in the  
14 public interest” pursuant to ORS 368.346(2). Finally, respondents argue that  
15 petitioners have not identified any specific comprehensive plan provision or  
16 land use regulation that applies to the Easement vacation by virtue of the first  
17 criterion, and that the first criterion in the 1984 Resolution merely “touches on”  
18 aspects of the comprehensive plan. *See Billington v. Polk County*, 299 Or 471,  
19 475, 703 P2d 232 (1985) (a decision that “merely touches on” aspects of a  
20 comprehensive plan is not a statutory land use decision).

21           The petition for review includes a statement that the challenged decision  
22 both applied, and was required to apply, the county’s comprehensive plan,

1 pursuant to the 1984 Resolution, but does not specifically point to anything in  
2 the decision that applied the comprehensive plan or the CDC. Petitioners then  
3 filed responses to the motion to dismiss that set out additional arguments for  
4 why LUBA has jurisdiction.

5 In those responses, we understand petitioners to argue that the 1984  
6 Resolution is a “land use regulation” because it implements the county’s  
7 original comprehensive plan and community development code. Petitioners  
8 argue that at the time it was adopted, the 1984 Resolution implemented the  
9 county’s “new[ly] enacted Comprehensive Plan and [WC]CDC, and [] link[ed]  
10 it to the then new statutory procedural and conclusionary finding requirement  
11 required by ORS 368.326 to 368.366.” Response to Motion to Dismiss 13.  
12 Petitioners argue that the specific items listed below the “Conformance with  
13 the Comprehensive Plan” criterion are “related for the most part to or derived  
14 from the [Comprehensive] Plan and [WC]CDC.” Response to Motion to  
15 Dismiss 13. Petitioners attach portions of the county’s 1983 comprehensive  
16 plan, 1983 transportation plan, and the 1983 community development code  
17 totaling over 100 pages, but do not point to or make any attempt to identify  
18 anything in those pages to support their argument that the 1984 Resolution was  
19 adopted to implement the county’s original comprehensive plan or the CDC.  
20 As far as we can tell, the 1984 Resolution is not a part of the county’s  
21 comprehensive plan, CDC, or the even the general county code, and was not  
22 adopted to implement any provision of the comprehensive plan or the CDC.

1 Accordingly, we agree with respondents that the 1984 Resolution is not a “land  
2 use regulation.”

3 Petitioners also set out several additional arguments for why the county’s  
4 decision is a land use decision.<sup>4</sup> We agree with one of those arguments, and  
5 therefore do not address the remaining arguments.

6 The second criterion in the 1984 Resolution requires assessment of “Use  
7 of the Right-of-Way,” and includes five bullet points, the fourth of which is  
8 “[t]he approval of the proposed vacation does not create an access  
9 configuration which violates present development standards.” The county  
10 engineer’s report to the board of county commissioners includes the following  
11 conclusion: “Vacation of the existing easement will not create an access  
12 configuration that violates present development standards.” Although the  
13 decision does identify or explain which “present development standards”  
14 govern access, petitioners argue, and we agree, that in order to reach the  
15 conclusion that vacating the easement does not “violate” present development  
16 standards, the county considered and applied “development standards” in the  
17 comprehensive plan and/or the CDC that govern access.

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<sup>4</sup> Specifically, petitioners’ first and third assignments of error take the position that various CDC provisions required intervenor to apply for a development permit in order to vacate the easement because, petitioners argue, the definition of “development” includes “establishment or termination of a right of access.” We do not address that argument in this order.

1           Because we agree with petitioners that the challenged decision applied  
2 development standards that govern access that are contained in either the  
3 comprehensive plan or the CDC, the challenged decision is a “land use  
4 decision” within the meaning of ORS 197.015(10)(a) over which LUBA has  
5 jurisdiction.

6           The next event in these proceedings is oral argument. The Board will  
7 schedule oral argument by separate letter.

8           Dated this 25<sup>th</sup> day of September, 2017.

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Melissa M. Ryan  
Board Chair