

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

3 GORDON R. MARTIN and)
4 GORDON S. MARTIN,)
5 Petitioners,)
6 vs.)
7 CITY OF TIGARD,)
8 Respondent.)
 LUBA No. 88-034
 ORDER ALLOWING REPLY BRIEF
 AND DENYING REQUEST FOR DELAY
 IN PROCEEDING

9 INTRODUCTION

10 On August 17, 1988, we denied petitioners' August 4, 1988
11 motion seeking permission to file a reply brief. Petitioners'
12 August 4, 1988 request was filed before the respondent's brief
13 was filed. We concluded petitioners failed to demonstrate a
14 need for a reply brief.

15 On August 15, 1988, the respondent's brief was filed by
16 mail. The respondent's brief was received by LUBA on
17 August 17, 1988. On August 18, 1988, during a conference with
18 the parties, petitioners renewed their request for permission
19 to file a reply brief and requested an extension of the
20 deadline established under ORS 197.830(12) for our final
21 opinion.

22 REQUEST FOR REPLY BRIEF

23 The decision at issue in this case is Ordinance 88-08,
24 dated May 9, 1988. That ordinance is entitled

25 "AN ORDINANCE CURING DEFECTS IN THE PLANS FOR THE
26 DARTMOUTH STREET LOCAL IMPROVEMENT DISTRICT, AMENDING
 ORDINANCE 84-17, ADOPTING FINAL PLANS AND

1 SPECIFICATIONS AND A REVISED PRELIMINARY ENGINEER'S
2 REPORT, AND ESTABLISHING A FINAL ASSESSMENT
3 PROCEDURE." Record Ex. 2 P. 28.

4 In their petition for review, petitioners note Section 9 of
5 Ordinance 88-08 states as follows:

6 "The designated city officials are authorized and
7 shall enter an agreement with the Oregon Department of
8 Transportation." Record Ex. 2 P. 30.

9 On June 1, 1988, the city adopted Resolution 88-45 which
10 "authorizes the Mayor and the City Recorder to sign,
11 on behalf of the City, the Cooperative Improvement
12 Agreement/Traffic Signal Project with the Oregon
13 Department of Transportation, providing for the design
14 and construction of intersection revisions at the
15 intersection of Pacific Highway West and S.W. 78th
16 Avenue." Record Ex. 1 P. 4.

17 Also, on June 1, 1988, a "Cooperative Improvement
18 Agreement" was signed by the mayor and city recorder. Record
19 Ex. 1 pp. 5-9. That agreement includes a listing of state
20 obligations and city obligations. The first of the city's
21 obligations provides in part that under certain circumstances
22 the city will suspend additional development in an area
23 including the Dartmouth LID until additional street
24 improvements are completed.

25 The petition for review contains three assignments of
26 error. The aforementioned city obligation under the June 1,
1988 "Cooperative Improvement Agreement" is a central concern
in petitioners' arguments under each assignment of error.

Respondent's brief, in large part, takes the position that
LUBA lacks jurisdiction to review this matter. Respondent
notes that both Resolution 88-45, authorizing the city to sign

1 the agreement with the Oregon Department of Transportation
2 (ODOT), and the agreement itself, are dated June 1, 1988,
3 "thirteen days after petitioners filed their notice of
4 appeal." Respondent's Brief 1. In addition, respondent argues
5 the June 1 agreement between the city and ODOT was a draft and
6 a subsequent revised agreement dated August 15, 1988 has been
7 executed by the parties.¹ Respondent further notes that the
8 August 15, 1988 agreement does not contain the previously
9 discussed city obligation that is central to the arguments in
10 the petition for review.

11 In determining whether to allow a reply brief, we are
12 guided by OAR 661-10-039.² Our rule does not expressly state
13 what circumstances justify a reply brief.³ While we express
14 no opinion on the merits of the arguments made in the parties'
15 briefs, we conclude respondent's brief raises significant
16 questions about our jurisdiction in this matter. While
17 OAR 661-10-039 does not specifically guarantee a right to a
18 reply brief in such circumstances, considering the questions
19 raised concerning our jurisdiction, we agree with petitioners
20 that a reply brief is warranted.

21 The petition for review did not contain the jurisdictional
22 statement required by OAR 661-10-030(3)(c). However, we do not
23 consider that defect in the petition for review a sufficient
24 basis upon which to deny the request for a reply brief in the
25 circumstances now presented to the Board. There is no way
26 petitioner could have anticipated the adoption on August 15,

1 1988 of an agreement materially different than the one they
2 assumed was in affect. That development followed the filing of
3 the petition for review, and is sufficient justification in and
4 of itself to permit a reply brief. Because we are allowing a
5 reply brief to address the impact of the August 15, 1988
6 agreement on our jurisidiction, we will allow petitioners the
7 opportunity to respond in their reply brief to all of
8 respondent's arguments that we lack jurisdiction to review the
9 city's decision or specific aspects of that decision.⁴

10 REQUEST TO DELAY PROCEEDING

11 Our final decision in this matter is required to be issued
12 by September 19, 1988. ORS 197.830(12). Petitioners request
13 that our proceeding be delayed for 30 days pursuant to
14 ORS 197.840(1)(b) which provides that the time period within
15 which the Board must make its final decision does not include
16 periods of delay resulting from a motion disputing "procedural
17 irregularities not shown in the record." ORS 197.840(1)(b)
18 does not provide a basis for delaying our proceedings to
19 consider "procedural irregularities not shown in the record"
20 absent a motion for an evidentiary hearing to consider such
21 irregularties. ORS 197.830(11)(c); OAR 661-10-045. Such a
22 motion automatically suspends the time limits for all events in
23 our proceedings. OAR 661-10-045(7). We do not understand
24 petitioners to be moving for an evidentiary hearing under ORS
25 197.830(11)(c) and OAR 661-10-045. Rather petitioners are
26 concerned procedural irregularties may surround the August 15,

1 1988 agreement or that the argeement may moot this appeal.

2 We have no basis for delaying our final opinion at this
3 time. As indicated to the parties during our conference on
4 August 18, 1988, if one or both of the parties conclude the
5 August 15, 1988 agreement moots or otherwise renders this
6 appeal unnecessary or provides a basis for an evidentiary
7 hearing to consider procedural irregularities, an appropriate
8 motion can be filed with the Board before September 19, 1988.⁵

9 Dated this 22nd day of August, 1988.

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12 Michael A. Holstun
13 Referee
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FOOTNOTES

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Respondent's Brief was filed with LUBA on August 15, 1988.
A copy of the August 15, 1988 agreement between the city and
ODOT was attached to Respondent's Brief.

2
OAR 661-10-039 provides as follows:

"A reply brief may not be filed unless permission is
first obtained from the Board. A reply brief shall be
confined solely to new matters raised in the
respondent's brief. A reply brief shall have a grey
cover."

3
Until it was amended on January 1, 1988, OAR
661-10-075(4) allowed a reply brief "as a matter of right"
if our jurisdiction was questioned in respondent's brief.

4
Petitioner may also respond to respondent's argument
that petitioner seeks relief LUBA is not empowered to
grant, i.e., financial compensation and attorney's fees
under ORS 20.085.

5
Oral argument in this case was scheduled for August
22, 1988. We rescheduled oral argument to August 24, 1988
to allow time for petitioner to prepare and file a reply
brief and allow the Board and respondent time to review
the reply brief before oral argument. That rescheduling
of oral argument shall have no affect on the date our
final opinion is due.