

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioners appeal both a decision of the county
4 planning director allowing the modification of a condition
5 to an earlier approval of a conditional use permit and site
6 plan for a department store; and a decision of the county
7 hearings officer concluding she had no jurisdiction to
8 overturn the planning director's determination that, under
9 the county's zoning ordinance, the modification of the
10 condition is a "development action," rather than a "land use
11 action."

12 **MOTION TO INTERVENE**

13 Wal-Mart Stores, Inc. (Wal-Mart) moves to intervene on
14 the side of respondent county in this proceeding. There is
15 no opposition to the motion, and it is allowed.

16 **MOTION TO FILE REPLY BRIEF**

17 Petitioners request permission to file a reply brief.
18 Wal-Mart objects that petitioners have failed to support
19 their contention that the reply brief addresses "new
20 matters," as required by OAR 661-10-039.¹ Beyond a general
21 statement that the reply brief "responds to new matters
22 raised in the [respondents'] briefs," petitioners do not
23 explain why a reply brief should be allowed.

¹OAR 661-10-039 states that a "reply brief shall be confined solely to new matters raised in the respondent's brief."

1 The reply brief is divided into five sections.
2 Wal-Mart objects specifically to sections C and D. Section
3 C replies to a statement in Wal-Mart's response brief that
4 under local zoning ordinance provisions, petitioners neither
5 were entitled to notice of the planning director's decision
6 nor were entitled to appeal that decision. While it is
7 true, as Wal-Mart maintains, that petitioners raised the
8 issue of notice in their petition for review, Wal-Mart's
9 responding interpretation of the local zoning ordinance is
10 so new that petitioners could not reasonably have
11 anticipated it. A reply is therefore justified. See Caine
12 v. Tillamook County, 24 Or LUBA 627 (1993).

13 Section D replies to a contention in the county's brief
14 that petitioners failed to assign error to specific findings
15 in the planning director's decision. Petitioners assert
16 they have raised their assignments of error with sufficient
17 specificity and then proceed to specify further to which
18 findings of the planning director they assign error.
19 Petitioners cannot use a reply brief as a vehicle to refine
20 arguments made in their petition for review.

21 Neither Wal-Mart nor the county raises specific
22 objections to our consideration of sections A, B, and E of
23 the reply brief. Petitioners' request to file a reply brief
24 is allowed as to sections A, B, C, and E, but denied as to
25 section D.

1 **FACTS**

2 On March 9, 1993, a county hearings officer approved
3 Wal-Mart's request for a conditional use permit and site
4 plan approval (hereafter 1993 CUP) for a department store.
5 The 1993 CUP included the following conditions (conditions
6 A, D and F):

7 "1. [Wal-Mart] shall complete all of the
8 following road improvements and right of way
9 dedications:

10 "A. Improve Badger Road to a standard of 48
11 feet of paved surface with curbs on both
12 sides * * *. The County Public Works
13 Department must inspect and approve all
14 improvements.

15 "* * * * *

16 "D. Install a traffic signal at the Badger
17 Road/Highway 97 intersection, subject to
18 ODOT approval, and make improvements to
19 the Badger Road/Highway 97 intersection
20 as necessary to accommodate the traffic
21 signal.

22 "* * * * *

23 "F. [Wal-Mart] shall dedicate without
24 reservation all right of way necessary
25 for the above improvements as specified
26 by the County Public Works Department
27 and the State Highway Division to either
28 Deschutes County or the State of Oregon.

29 "All road improvements and all
30 dedications shall be completed prior to
31 the opening of the proposed store.
32 [Wal-Mart] shall meet all requirements
33 of the County Public Works Department
34 for access to any County road. The
35 entrance into the store on Pinebrook
36 shall be directly across from the

1 entrance into Pinebrook Plaza."
2 Record 855-56. (Emphasis added.)

3 Part of the land required for the Badger Road
4 improvements belongs to petitioners. To satisfy condition
5 A, therefore, Wal-Mart had to acquire the land from
6 petitioners. Rather than negotiating directly with
7 petitioners, however, Wal-Mart allowed the county to do so.
8 The county, the Oregon Department of Transportation (ODOT)
9 and Wal-Mart reached a "Cooperative Improvement Agreement"
10 which, although it was not actually signed by all parties
11 until October 6, 1994, existed in draft form as early as
12 June 3, 1993. One of the county's obligations under the
13 agreement is stated as follows:

14 "4. County shall acquire the necessary right of
15 way and easements for required roadway work at
16 Company expense." Record 745.²

17 In August, 1993, the county entered into negotiations
18 with petitioners to acquire the right-of-way. Negotiations
19 proved unsuccessful, and on March 17, 1994, Wal-Mart asked
20 the county to initiate condemnation proceedings. On May 18,
21 1994, the county board of commissioners approved a
22 resolution authorizing the county counsel to institute a
23 proceeding in eminent domain to acquire the right-of-way.

²In Franklin v. Deschutes County, 29 Or LUBA ____ (LUBA No. 94-175, March 15, 1995) (Franklin I) petitioners appealed to this Board the county's decision to enter into the agreement. We dismissed Franklin I for lack of jurisdiction, on the basis that the decision to enter into the agreement was not a land use decision.

1 However, under pressure from petitioners, the county
2 ultimately abandoned the eminent domain proceeding.

3 On October 5, 1994, the county planning director
4 modified condition A of the 1993 CUP to defer for two years
5 the requirement, contained in condition A prior to
6 modification, that Badger Road be improved to a standard of
7 48 feet of paved surface. The planning director modified
8 condition F by deleting the requirement that Wal-Mart
9 dedicate the required right-of-way and substituting a
10 requirement that all "improvements be transferred without
11 reservation."

12 To authorize his actions, taken without notice to
13 adversely affected parties and without a hearing, the
14 planning director relied on an April 15, 1980 order adopted
15 by the county commissioners, which states, in full:

16 "WHEREAS, a need exists to establish a mechanism
17 whereby the holder of a land use permit may apply
18 for a minor modification of the conditions of such
19 permit; and

20 "WHEREAS, such minor modification does not require
21 a re-examination of the original application in
22 its entirety; and

23 "WHEREAS, under these circumstances the staff
24 resources required for the modification will be
25 limited to analysis of the modification being
26 requested,

27 "NOW, THEREFORE, IT IS HEREBY ORDERED that the
28 Planning Director and Hearings institute a policy
29 of accepting and hearing applications for minor
30 modifications of conditions attached to previously
31 approved land use permits for a fee of \$50.00.
32 The Planning Director, with advice as needed from

1 the Hearings Officer, shall determine whether an
2 application may be considered a minor modification
3 based upon staff resources required to analyze and
4 hear the application."

5 The planning director justified the modification decision by
6 making findings reciting the history of the 1993 CUP and
7 continuing:

8 "8. As a result of delays due to the legal
9 actions filed in the Deschutes County Circuit
10 Court by the owners of property on the
11 northwest corner of Badger Road and Highway
12 97, the property required for completion of
13 the specified road improvements has not yet
14 been obtained.

15 "9. It is impossible to improve Badger Road to a
16 standard of 48 feet of paved surface without
17 first obtaining that property.

18 "10. Because [petitioners] have created a
19 situation making it impossible to satisfy the
20 existing condition of approval, modification
21 is necessary.

22 "11. [Petitioners] interpret Condition #1 to
23 impose an obligation on Wal-Mart to acquire
24 right-of-way. Wal-Mart does not control
25 [petitioners] property. Therefore,
26 [petitioners'] interpretation makes the
27 condition unlawful. The Planning Director
28 has an obligation to construe conditions in a
29 manner that favors their lawful completion
30 and to make conditions possible to achieve.

31 "12. The proposed modification changes only the
32 timing for satisfaction of the condition and
33 does not impact any substantive requirement
34 of the site plan approval or approval of the
35 conditional use permit.

36 "13. This minor modification is required because
37 of unforeseen delays and does not require a
38 re-examination of the original application in
39 its entirety." Record 313.

1 The county provided written notice of the planning
2 director's decision only to Wal-Mart's attorney and the
3 county counsel. Petitioners appealed the decision both to
4 this Board (LUBA No. 94-208) and to the county hearings
5 officer. After a hearing on December 22, 1994, the hearings
6 officer issued a decision on December 30, 1994, in which she
7 concluded she had no jurisdiction to overrule the planning
8 director's determination that his modification of the 1993
9 CUP was a "development action," rather than a "land use
10 action."³ This conclusion was based on two findings:

³The Deschutes County Development Procedures Ordinance (DCC) 22.04.020(1) defines "development action" as

"* * * the review of any permit, authorization or determination that the Deschutes County Community Development Department is requested to issue, give or make that either:

"A. involves the application of a County zoning ordinance or the County subdivision and partition ordinance and is not a land use action as defined below; or

"B. involves the application of standards other than those referred to in subsection (a), such as the sign ordinance.

"For illustrative purposes, the term "development action" includes review of any condominium plat, permit extension, lot line adjustment, road name change, sidewalk permit, sign permit, verification of legal lot, setback determination, and lot coverage determination."

DCC 22.04.020(2) defines "land use action" as

"any consideration for approval of a quasi-judicial plan amendment or zone change and any consideration for approval of a land use permit.

DCC 22.04.020(3) defines "land use permit" as

1 first, that petitioners had no standing to appeal, since
2 under the DCC, "[a]ppeals of development actions are limited
3 to parties and persons entitled to notice"; and second, that
4 the county itself had lost jurisdiction of the case, since
5 it was already on appeal to LUBA.⁴ Record 133.

6 After the board of county commissioners declined to
7 hear their appeal from the hearings officer's decision,
8 petitioners appealed to LUBA. The appeals from the October

"any approval of a proposed development of land under the standards in the County zoning ordinances or subdivision or partition ordinances involving the exercise of significant discretion in applying those standards.

"By way of illustration, 'land use permit' includes review of conditional use permits, landscape management plans, farm or non-farm dwellings, forest management plans, partition, master plan, river setback exception, site plan, site plan change of use, modification of condition, solar access, solar shade exception, subdivision, and subdivision variance." (Emphasis added.)

DCC 22.08.060 states, in relevant part:

"CONFLICTING PROCEDURES. * * * [W]here other provisions of the Deschutes County Code or Deschutes County ordinances specify procedures with greater opportunity for public notice and comment, those procedures shall apply."

⁴The hearings officer's decision states, tellingly:

"Deschutes County Legal Counsel * * * stated that the role of the Hearings Officer is to make a new decision for Deschutes County on the applicant's application to modify. [The counsel] stated the County's procedures ordinance lists modification of conditions decisions as an example of a land use decision. [The counsel] apparently believes that if the development action decision was actually a land use decision, that [petitioners] were entitled to a hearing before the Hearings Officer on December 22, 1994 and to a decision whether the development action should have been processed as a land use decision." (Footnote omitted.)

1 5, 1994 county planning director's decision to modify the
2 1993 CUP and the December 30, 1994 hearings officer's
3 decision have been consolidated.

4 **ISSUE PRECLUSION**

5 Wal-Mart contends that the issues raised by petitioners
6 in this appeal were resolved by this Board in Franklin I.
7 Wal-Mart characterizes petitioners' appeal as yet another
8 effort to thwart the county's power of eminent domain and
9 force Wal-Mart, under the 1993 CUP, to purchase petitioners'
10 property at "whatever price they set." Intervenor-
11 Respondent's Brief 2.

12 Wal-Mart is incorrect when it describes our decision in
13 Franklin I as addressing either the county's power of
14 eminent domain or the amount petitioners could obtain in
15 exchange for the property underlying the expanded right-of-
16 way. Our decision simply concluded that because the 1994
17 Cooperative Improvement Agreement is "a decision limited to
18 implementing the 1993 CUP, it does not require application
19 of land use standards and it does not constitute a 'land use
20 decision,' as that term is defined by ORS 197.015(10)."
21 Franklin I, slip op at 9. Petitioners do not challenge in
22 this appeal our conclusion in Franklin I that we have no
23 jurisdiction over the 1994 Cooperative Improvement
24 Agreement. Wal-Mart does not identify any issue raised in
25 this appeal that is precluded by Franklin I.

26 **STANDING**

1 Wal-Mart and the county (respondents) contend
2 petitioners lack standing to appeal to LUBA under ORS
3 197.830(2) or (3).⁵ Respondents are correct petitioners do
4 not have standing under ORS 197.830(2). Since there was no
5 hearing on the planning director's decision, petitioners
6 could not and did not make an appearance before the local
7 government.

8 Respondents maintain that because the county held a
9 hearing before the county hearings officer, it did not "make
10 a land use decision without providing a hearing," and
11 therefore petitioners do not have standing under ORS
12 197.830(3). We disagree, because the hearings officer never
13 reached the planning director's decision. She simply
14 concluded she lacked jurisdiction. Record 133. The board
15 of commissioners chose not to review the hearings officer's

⁵ORS 197.830 states, in relevant part:

"(2) Except as provided in ORS 197.620(1) and (2), a person may petition the board for review of a land use decision or limited land use decision if the person:

"(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section; and

"(b) Appeared before the local government, special district or state agency orally or in writing.

"(3) If a local government makes a land use decision without providing a hearing or the local government makes a land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section * * *"

1 decision. Record 14.

2 Respondents are disingenuous when they argue both that
3 petitioners failed to appear before the local government,
4 because no hearing was provided, and therefore lack standing
5 under ORS 197.830(2), and that petitioners were provided a
6 hearing, at which they appeared, and therefore lack standing
7 under ORS 197.830(3). If they are adversely affected by the
8 planning director's modification of the 1993 CUP,
9 petitioners have standing to appeal to this Board under ORS
10 197.830(3), because the county never provided a hearing at
11 which the actual modification of the 1993 CUP, which is the
12 subject of this appeal, was at issue.

13 Finally, Wal-Mart contends petitioners are not
14 "adversely affected" by the planning director's decision, as
15 the term is used in ORS 197.830(3), for two reasons: first,
16 because the 1993 CUP does not require Wal-Mart to purchase
17 their property; and second, because the modification merely
18 delays the expansion of Badger Road for two years.

19 First, the purchase of petitioners' property is not an
20 issue in this appeal. Second, conditions A and F of the
21 1993 CUP require Wal-Mart to dedicate to the county property
22 that presently belongs to petitioners. When and how their
23 property is to be acquired for the purpose of expanding
24 Badger Road are issues that directly affect petitioners'
25 interests. It is well-established that a person within
26 sight and sound of a development proposal is presumed to be

1 adversely affected by it. Kamppi v. City of Salem, 21 Or
2 LUBA 498, 501 (1991); Stephens v. Josephine County, 14 Or
3 LUBA 133, 135 (1985); Stephens v. Josephine County, 11 Or
4 LUBA 154, 156 (1984); Worcester v. City of Cannon Beach, 9
5 Or LUBA 307, 311-12 (1983). Petitioners certainly qualify.

6 **JURISDICTION**

7 Wal-Mart contends the modification decision is not a
8 land use decision meeting either the statutory definition in
9 ORS 197.015(10) or the significant impact test established
10 in City of Pendleton v. Kerns, 297 Or 126, 133-34, 653 P2d
11 996 (1982). We disagree. The requirement that Badger Road
12 be improved to a standard of 48 feet of paved surface with
13 curbs on both sides originally resulted from the exercise of
14 policy judgment in the application of land use regulations.
15 In modifying that order, the planning director was required
16 to exercise similar policy judgment. His decision is a land
17 use decision under the statutory definition.⁶ This Board
18 has jurisdiction under ORS 197.825.

19 We firmly reject Wal-Mart's contention that because the
20 county was obliged by the 1994 Cooperative Improvement
21 Agreement to acquire part of petitioners' property, it had
22 no discretion whether or not to grant the modification, and
23 therefore its decision was not a land use decision. A local
24 government's contractual obligations have no bearing on the

⁶Because the decision is a land use decision under the statutory definition, we do not reach the significant impact test.

1 interpretation and application of land use statutes.

2 **FIRST ASSIGNMENT OF ERROR**

3 Petitioners contend that the 1993 CUP was a "land use
4 permit" and that modification of the 1993 CUP was a "land
5 use action," not a "development action," as the terms are
6 used in the DCC. Petitioners contend further that the DCC
7 does not allow the planning director to modify the
8 conditions of a land use permit without proper notice, as
9 such notice is described in DCC 22.20.020, 22.20.030, and
10 22.20.040.⁷

⁷DCC 22.20.020 states:

- "1. Notice of the application shall be sent within ten (10) days of acceptance of the application to persons entitled to notice under Section 22.20.030. Such notice shall include all the information specified under Section 22.24.040 except for those items specified in subsections G. and J.
- "2. Any person may comment in writing on the applications within ten (10) days from the date notice was mailed or a longer period as specified in the notice.
- "3. The Planning Director's decision to approve, deny or send to a hearing shall be made within thirty (30) days after an application is accepted as complete. This time limit may be waived by the written consent of the applicant.
- "4. Notice of the Planning Director's decision and the appeal period shall be sent to all parties and to all members of the planning commission.
- "5. The applicant and all persons commenting as provided in this section constitute parties to the administrative decision. Any party can appeal the decision in accordance with chapter 22.32, 'Appeals,' of this title. On appeal, a de novo hearing shall be held.

DCC 22.20.030 states:

"The procedures for administrative decisions without prior notice shall be the same as those set forth in Section 22.20.020 of this chapter, except that (1) no prior notice shall be given and (2) the notice of decision shall contain the applicable information required by Section 22.24.040 of this title."

DCC 22.20.040 states:

- "1. All mailed notices of land use action hearing or a land use action application subject to administrative decision shall:
 - "A. Describe the nature of the applicant's request and the nature of the proposed uses that could be authorized.
 - "B. List the criteria from the zoning ordinance and the plan applicable to the application at issue.
 - "C. Set forth the street address or easily understood geographical reference to the subject property.
 - "D. State the date, time and location of the hearing or date by which written comments must be received.
 - "E. State that any person may comment in writing and include a general explanation of the requirements for submission of testimony and the procedures for conduct of testimony.
 - "F. If a hearing is to be held, state that any interested person may appear.
 - "G. State that failure to raise an issue in person at a hearing or in writing precludes appeal by that person to the Land Use Board of Appeals (LUBA), and that failure to provide sufficient specificity to afford the decision-maker an opportunity to respond to the issue precludes appeal to LUBA based on that issue.
 - "H. State the name of a county representative to contact and the telephone number where additional information may be obtained.
 - "I. State that a copy of the application, all documents and evidence relied upon the [sic] by the applicant and applicable criteria are available for

1 We agree. DCC 22.04.020(3) expressly states that a
2 modification of a permit condition is a "land use permit."⁸
3 Since it is a land use permit, DCC 22.04.020(2) requires
4 that it be considered through a "land use action." Notice
5 must be given as prescribed by DCC 22.20.020, 22.20.030, and
6 22.20.040.

7 Wal-Mart contends that even if the modification
8 decision is a land use decision, notice to petitioners was
9 not required. Wal-Mart relies on DCC 22.20.010(1), which
10 allows the planning director to make an administrative
11 decision on certain land use applications, and on DCC
12 22.20.030, which sets forth the procedures for
13 administrative decisions without prior notice. Wal-Mart
14 argues that since petitioners' property is more than 100
15 feet from the subject property, and since
16 DCC 22.24.030(1)(A) limits individual notice to the
17 applicant and owners of record of property within 100 feet
18 of the property that is the subject of the notice,

inspection at no cost and will be provided at
reasonable cost.

"* * * * *

"2. All mailed and published notices for hearings shall
contain a statement that recipient may request a copy of
the staff report.

"* * * * *"

⁸Wal-Mart argues the modification is a "permit extension," one of the
examples of a "development action" listed in DCC 22.04.020(1). However,
there has been no permit extension. The planning director's modification
decision made it possible for the Wal-Mart store to open.

1 petitioners are precluded from appealing the planning
2 director's decision by DCC 22.32.010(1)(A) and (B).⁹

3 We reject Wal-Mart's argument. The county did not
4 process the modification decision as an administrative land
5 use decision made without prior notice. It cannot
6 recharacterize its actions now. Furthermore, ORS
7 215.416(11)(a) expressly requires that the county provide an
8 opportunity for appeal of a decision to not only those
9 persons entitled to notice, but also to those persons "who
10 are adversely affected or aggrieved by the decision." If
11 the DCC were interpreted to limit appeals in the manner that
12 Wal-Mart suggests, it would violate the statute.

13 It would also violate DCC 22.20.020, as it is applied
14 by DCC 22.20.030. As applied, DCC 22.20.020(2) allows any
15 person to comment in writing on an administrative decision
16 made without prior notice. DCC 22.20.020(5) makes any
17 person who comments into a party, who has a right to an
18 appeal and to a de novo hearing.

19 Wal-Mart also contends petitioners were not

⁹DCC 22.32.010 states, in relevant part:

"1. The following persons may file an appeal:

"A. A party;

"B In the case of an appeal of an administrative
decision without prior notice, a person entitled to
notice; and

"C A person entitled to notice and to whom no notice
was mailed. * * *

1 substantially prejudiced by the county's failure to provide
2 notice and a hearing after the planning director's decision,
3 because petitioners were able to appeal the decision to the
4 local hearings officers. This contention is consistent with
5 respondents' argument with respect to petitioners' standing,
6 and must be rejected for the same reason: the hearings
7 officer treated the planning director's decision as a
8 development decision over which she had no review authority.
9 Since the hearings officer concluded she could not reach the
10 merits of the planning director's decision, petitioners were
11 effectively denied an opportunity to participate in the land
12 use process.¹⁰

13 The county's failure to follow its own ordinance with
14 respect to providing notice and a hearing on the land use
15 action taken by the planning director is a violation of
16 petitioners' substantial rights.¹¹

17 The first assignment of error is sustained.

18 **SECOND THROUGH FOURTH ASSIGNMENTS OF ERROR**

19 The balance of petitioners' assignments of error

¹⁰The county contends that because petitioners do not assign error to the hearings officer's conclusion that she lacked jurisdiction over the planning director's decision, they cannot challenge the planning director's characterization of his decision as a "development decision." Respondent's Brief 4. We disagree. The failure to assign error to the hearings officer's conclusion does not vitiate petitioners' appeal of the planning director's modification decision to this Board in LUBA No. 94-208.

¹¹We need not reach petitioners' argument that they were also entitled to notice under DCC 22.08.060 and DCC Title 17. We note that none of the parties provided a copy of DCC Title 17 to us. That failure does not, however, affect the disposition of this appeal.

1 contain argument concerning which standards should be
2 applied in making the modification decision and a general
3 challenge to the county's findings. These issues may be
4 addressed by the county in the first instance. Petitioners
5 will have an opportunity to raise their concerns during the
6 local proceedings on remand.

7 The county's decision is remanded.