BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

THE COVE AT BROOKINGS
HOMEOWNERS ASSOCIATION, INC.,
R.J. RICH, DANIEL WATROUS
and CHRISTINE VOELZ,
Petitioners,

vs.

CITY OF BROOKINGS,
Respondent,

and

BRUCE BROTHERS, LLC, JOSHUA
BRUCE and NOAH BRUCE,
Intervenors-Respondent.

LUBA No. 2003-203

FINAL OPINION
AND ORDER

Appeal from City of Brookings.

Gary M. Georgeff, Brookings, filed the petition for review and argued on behalf of petitioners.

John B. Trew, Coquille, filed a response brief and argued on behalf of respondent. With him on the brief was Trew, Cyphers & Meynink.

John C. Babin, Brookings, filed a response brief and argued on behalf of intervenors-respondent. With him on the brief was Babin & Keusink, P.C.

BASSHAM, Board Member; HOLSTUN, Board Chair; BRIGGS, Board Member, participated in the decision.

AFFIRMED 05/03/2004

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a modification of a condition of preliminary subdivision plat approval that permits reconfiguration of a berm.

FACTS

We stated the relevant facts of this appeal in a prior order:

> "In the early 1990s, the city [granted preliminary plat approval for] a multi-phase subdivision located on a 30-acre parcel. The property abuts the eastern boundary of the city's sewage treatment plant (treatment plant). The city was concerned about potential liability relating to their operation of the treatment plant and therefore imposed conditions of approval to address that concern. One of those conditions required that the developer construct a landscaped berm near the boundary of the property and the treatment plant in order to provide an odor and visual screen between the properties. A berm was constructed in 1991 that substantially conformed to the 1991 condition of approval. During the 1990s, the developer [recorded final plats for Phases I and II and] constructed Phases I and II of the subdivision on the eastern portion of the subject property. Petitioners own property within Phases I and II.
>
> In 2002, intervenors, successors-in-interest to the developer, received [preliminary] subdivision [plat] approval for a 16-lot subdivision on the western portion of the 30 acres, on a 7.34-acre parcel located between Phases I and II and the treatment plant. The 7.34-acre parcel includes the berm. In 2003, intervenor Bruce Brothers LLC applied for a modification to conditions of approval for the 16-lot subdivision that would prevent intervenors from encroaching into the berm. The decision challenged in this appeal is the city's approval of that modification application." *The Cove at Brookings v. City of Brookings*, __ Or LUBA __ (LUBA No. 2003-203, Order, February 24, 2004) slip op 1-2.

REPLY BRIEF

Petitioners move to file a five-page reply brief pursuant to OAR 660-010-0039 to address arguments made in intervenors' response brief that (1) the 1991 preliminary plat approval, and hence the 1991 conditions of approval, had expired; (2) petitioners waived certain issues because

1 they did not raise them below; and (3) LUBA lacks authority to review certain assignments of
2 error.[1]

3 Intervenors-respondent (intervenors) agree that a reply brief is warranted to address issues
4 (2) and (3), but object that the first issue, whether condition 13 of the 1991 preliminary plat
5 approval has expired, is not a "new matter" warranting a reply brief under OAR 661-010-0039.
6 According to intervenors, petitioners should have anticipated that issue, given that condition 2 of the
7 1991 preliminary plat approval expressly provided that the plat approval would expire in five years
8 unless final approval was obtained.

9 Generally, responses warranting a reply brief tend to be arguments that assignments of error
10 should fail regardless of their stated merits, based on facts or authority not involved in those
11 assignments. *Sequoia Park Condo. Assoc. v. City of Beaverton*, 36 Or LUBA 317, 321, *aff'd*
12 163 Or App 592, 988 P2d 422 (1999). Here, petitioners' first assignment of error argues that the
13 challenged decision is inconsistent with, and implicitly modifies, condition 13 of the 1991 approval.
14 Intervenors' response avoids the stated merits of that argument, and instead contends that the
15 assignment of error should fail for a reason other than those merits. That argument is a new matter
16 that warrants a reply brief. The reply brief is allowed.

17 **FIRST ASSIGNMENT OF ERROR**

18 Petitioners argue that the city lacks authority under its development code to modify
19 condition 13 of the 1991 preliminary plat approval. As a result, petitioners contend the city does
20 not have the authority to consider or approve intervenors' application to modify the conditions of

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[1] OAR 661-010-0039 provides, in relevant part:

> "A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief together with four copies as soon as possible after respondent's brief is filed. A reply brief shall be confined solely to new matters raised in the respondent's brief. A reply brief shall not exceed five pages, exclusive of appendices, unless permission for a longer reply brief is given by the Board. * * *"

1 the 2002 preliminary plat approval, which petitioners contend had the effect of implicitly modifying
2 condition 13 of the 1991 preliminary plat approval.

3 The city responds that the city council expressly interpreted its Land Development Code
4 (LDC) to authorize the city to consider a "minor change" to intervenors' 2002 preliminary plat
5 approval, specifically a modification to the 2002 condition of approval prohibiting encroachment
6 into the existing berm.[2] With respect to condition 13 of the 1991 preliminary plat approval, the city
7 and intervenors argue that the challenged decision does not modify or affect that condition.

8 To the extent petitioners argue that the city misinterpreted relevant LDC provisions to allow
9 the city to modify intervenors' 2002 preliminary plat approval, petitioners have not established that
10 the city's interpretation is inconsistent with the express language of the LDC or otherwise reversible
11 under the deferential standard of review we must apply to a governing body's interpretation of local
12 provisions. *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003); ORS 197.829(1).[3]
13 LDC 176.060(I) expressly allows "[a] minor change" to an unrecorded subdivision plat map

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[2] The city's decision states, in relevant part:

> "Based upon the facts of this appeal, the City Council interprets [LDC] 176.010-176.030 and [LDC] 176.060(I) as allowing the Planning Commission or City Council to consider a minor change to applicant's recorded subdivision through the procedures set forth in [LDC] 116.010. In this particular case, it is important to preserve the jurisdiction of the Planning Commission and City Council to entertain an application for a minor change to a subdivision where the developer was subject to an enforcement action for violation of one of the conditions. Allowing the City Council to entertain such an application for a minor change allows more flexibility to the planning body in dealing with the enforcement action and is not prohibited by the language of the [LDC]." Record 20.

[3] ORS 197.829(1) provides, in pertinent part:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
>
> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]"

1 pursuant to the procedures set forth in LDC 116.110. Petitioners do not explain why the city erred
2 in viewing modification of the unrecorded 2002 preliminary plat condition of approval to be a
3 "minor change" under LDC 176.060(I).

4 To the extent petitioners challenge the city's interpretation as applied to condition 13 of the
5 1991 preliminary plat approval, the premise for that argument—that the city's action in this decision
6 is inconsistent with and thus implicitly modified condition 13 of the 1991 preliminary plat approval—
7 is not well-taken. Condition 13 of the 1991 plat approval states, in relevant part:

8 "* * * [P]rior to the completion of [phase I], the applicant shall construct a berm
9 adjacent to the City's wastewater treatment plant to provide visual and odor
10 buffering from the subdivision. The berm shall be of sufficient height to visually
11 screen the treatment plant from residences, streets and pathways within the project
12 and planted with landscaping material approved by the city staff. Specific
13 construction standards for the berm will be coordinated with a wind study
14 undertaken by a qualified meteorologist or other qualified expert and shall be
15 approved by the City Engineer. * * *" Record 219.

16 While condition 13 requires a berm of "sufficient height" to perform its intended function, it is
17 otherwise nonspecific as to the shape, size, height and composition of the berm. There is nothing in
18 condition 13 that requires that the berm be constructed to particular standards, or that requires that
19 the berm, once constructed, be maintained in its originally constructed form. Petitioners point out
20 that condition 9 of the 1991 preliminary plat approval provides that the Cove homeowners'
21 association is responsible for upkeep and maintenance of various common features, including the
22 disputed berm.[4] However, condition 9 does not require the homeowners' association to maintain
23 the berm in its original condition and, like condition 13, does not prohibit future changes to the
24 berm; at least it does not prohibit changes that are consistent with the intended function of the berm,
25 to provide a visual and odor barrier.

[4] Condition 9 of 1991 preliminary plat approval states:

"The homeowner association shall be responsible for upkeep and maintenance of all common areas, landscaping, fencing, electronic gates, berming, recreational facilities, RV parking area, and all private streets, water lines, sewer lines and drainage facilities." Record 219.

Here, the city's decision concluded that:

> "The berm was constructed as a condition of approval for the original 'The Cove' Subdivision with the purpose of providing a visual and odor barrier between the project and the city's wastewater treatment plan. The original condition of approval required the berm to be engineered with input from a weather expert. If the applicant can provide plans for the alteration of the berm designed by an engineer and wind flow expert with sufficient evidence to show that the purpose of the berm is not degraded from the existing state, pursuant to the condition of approval below, then alteration of the berm will be allowed." Record 20.

In other words, the city concluded that berm modifications that do not degrade the function of the existing berm are consistent with condition 13. The city then changed the 2002 preliminary plat condition of approval to allow modifications to the berm that do not degrade the function of the existing berm, and imposed particular requirements to achieve that end:

> "Any encroachment or modification to the 'berm' shall first be designed by a certified engineer and include an opinion of an expert in airflow that concludes that the encroachment or modification shall not degrade existing odor control or visual impact of the [wastewater plant]. Engineered design of any proposed encroachment or modification to the 'berm' shall be reviewed by City Engineer and a recommendation made to the Site Plan Committee for consideration. The engineers and developers of the encroachment or modification of the berm shall be liable for any degradation of any existing odor or visual barriers." Record 20-21.

Given that condition 13 does not impose any particular standards for the disputed berm or require that the existing berm be maintained inviolate, and the city's decision allows only modifications to the berm that are consistent with the intended function of the berm, petitioners' premise that the city's decision is inconsistent with condition 13 and hence implicitly modifies condition 13 is simply incorrect. Stated differently, even if petitioners are correct that the city is powerless to modify condition 13, the city's decision did not modify condition 13.[5]

The first assignment of error is denied.

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[5] Our resolution of the first assignment makes it unnecessary to address the parties' dispute over whether condition 13 has expired.

1 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

2 Petitioners argue that the city's decision (1) interferes with an irrevocable license petitioners
3 allege they possess to use the berm for its intended function; and (2) allows an unconstitutional
4 taking of that license, which petitioners argue is a property right.

5 Intervenors respond that petitioners failed to raise either issue below, and have therefore
6 waived the right to raise those two issues before LUBA. ORS 197.763(1); 197.835(3).[6] The city
7 responds on the merits, and argues that petitioners have failed to establish that they have any license
8 or other property right in the berm that the city could interfere with or take.

9 Petitioners concede that they failed to raise below the issues presented in the second and
10 third assignments of error, but argue that they may nonetheless present those issues to LUBA,
11 pursuant to ORS 197.835(4), which in relevant part allows a petitioner to raise new issues that are
12 based upon applicable criteria that were omitted from the notice provided by the local government.[7]
13 According to petitioners, the notice provided by the city listed the entirety of LDC 176 as the
14 applicable criteria. Record 189. Petitioners argue that among the applicable criteria in LDC 176 is

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[6] ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

ORS 197.835(3) provides:

> "Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

[7] ORS 197.835(4) provides, in relevant part:

> "A petitioner may raise new issues to the board if:
>
> "(a) The local government failed to list the applicable criteria for a decision under ORS 197.195(3)(c) or 197.763(3)(b), in which case a petitioner may raise new issues based upon applicable criteria that were omitted from the notice. However, the board may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government[.]"

LDC 176.060(C)(1), which provides that the planning commission may approve a major partition or subdivision upon finding that the proposal conforms "with the Comprehensive Plan, and applicable development standards of this code, *and state and federal laws.*" (Emphasis added.) Petitioners contend that the city's failure to specifically list LDC 176.060(C)(1) as an approval criterion in the notice allows petitioners to raise new issues regarding compliance with LDC 176.060(C)(1), specifically the above-emphasized portion of the code that requires conformance with state and federal law. Because that code provision requires conformance with state and federal law, petitioners reason, they may therefore raise new issues regarding whether the city's decision interferes with their property rights protected by state common law and state and federal constitutional provisions.

An initial difficulty with petitioners' argument is that the second and third assignments of error do not raise issues of compliance with LDC 176.060(C)(1), or any other code provision. The asserted bases for reversal or remand under the second and third assignments of error are limited to state common law property rights and state and federal constitutional provisions. Only in the reply brief do petitioners cite to LDC 176.060(C)(1) and characterize their arguments as a matter of compliance with that code provision. Petitioner may not assert in a reply brief what is essentially a new basis for remand or a new assignment of error. *Carver v. City of Salem*, 42 Or LUBA 305, 308, 184 Or App 503, 57 P3d 602 (2002); *Scott v. City of Portland*, 17 Or LUBA 197, 204 n 6 (1988).

Even if petitioners' argument under LDC 176.060(C)(1) is not viewed as a new basis for remand, and hence an argument that cannot be raised for the first time in a reply brief, we disagree with petitioners that ORS 197.835(4)(a) permits them to raise new issues regarding compliance with LDC 176.060(C)(1). ORS 197.835(4)(a) provides that LUBA "may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government[.]" The staff report to the planning commission and the planning commission decision both cite and quote LDC 176.060(C)(1) as an approval criterion with respect to intervenors' application for

modification, including the language that requires conformance with "state and federal laws." Record 198, 258. Petitioners participated in the proceedings before the planning commission, were mailed a copy of the planning commission decision, and participated in the subsequent hearing before the city council. Given these circumstances, that LDC 176.060(C)(1) is an approval criterion should not come as a surprise to petitioners. Petitioners offer no reason why, under these circumstances, the issue of compliance with LDC 176.060(C)(1), and the derivative issue of consistency with state or federal laws, could not have been raised before the city during the proceedings below.

Because the issues presented in the second and third assignments were waived, the second and third assignments of error are denied.

The city's decision is affirmed.