BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROBERT LOWERY and MARILYN LOWERY,
Petitioners,

vs.

CITY OF KEIZER,
Respondent.

LUBA No. 2004-121

FINAL OPINION
AND ORDER

Appeal from City of Keizer.

Ross Day, Tigard, filed the petition for review and argued on behalf of petitioners. With him on the brief was Oregonians In Action Legal Center.

E. Shannon Johnson, Keizer, filed the response brief and argued on behalf of respondent. With him on the brief was Lien and Johnson.

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

REMANDED 02/17/2005

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

Opinion by Davies.

NATURE OF THE DECISION

Petitioner challenges the city's approval of a master plan application for a mixed use development on approximately 96 acres.[1]

FACTS

On February 3, 2003, the city adopted the Keizer Station Plan (KSP) for a 225-acre area located at the interchange of Interstate 5 and Chemawa Road.[2] The KSP divided the 225 acres into five sub-areas: Area A (Village Center), Area A (Sports), Area B (Retail Service), Area C (Keizer Station) and Area D (Commerce Center). Petitioners' property is located in the southwest corner of Area A.

Following approval of the KSP, Northwest National LLC (Northwest) submitted an application for approval of the Keizer Station Master Plan, a master plan for development of land located in Areas A and B. The proposed master plan includes petitioners' property. On June 21, 2004, the city council conducted a hearing on the master plan application, at which petitioners objected because their property was included in Area A and they had not signed the application. The city council approved the master plan on July 9, 2004. This appeal followed.

MOTION TO STRIKE

The city moves to strike Appendix D to the petition for review. Appendix D is a site plan of Area A, similar to a site plan in the record, but a hand-drawn outline purporting to show the boundaries of petitioners' property has been added by petitioners. The city argues that the depiction of petitioners' property is not accurate and, in any event, is not included in the record. *See Friends of Clean Living v. Polk County*, 36 Or LUBA 544, 548-49 (1999) (documents

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[1] The challenged decision also approves a preliminary subdivision plat, a major variance for building setbacks and a sign variance. Those approvals, although part of the same order, are not challenged in this appeal.

[2] The city simultaneously adopted code amendments implementing the KSP.

included in party's brief that are not part of the record and of which LUBA may not take official notice will be stricken). Petitioners respond that Appendix D is offered not for its evidentiary value, but rather as a visual aid to understanding the evidence that is in the record. Petitioners' Response to Respondent's Motion to Strike 1 (citing *Root v. City of Medford*, 36 Or LUBA 778, 781 (1999) (denial of motion to strike a map that was not part of the record attached to brief, where map offered as visual aid and where LUBA would not consider it for its evidentiary value)).

We have recognized that we might allow minor additions to maps in the record, at least where accuracy is not in dispute, where such additions would enable the Board to identify the subject property. *Carver v. City of Salem*, 42 Or LUBA 305, 309 (2002). Here, however, the city *does* dispute the accuracy of Appendix D. Petitioners concede the outline depicted on the map is not in the record, and they do not argue that we are entitled to take official notice of Appendix D. Accordingly, the city's motion to strike is granted.

ASSIGNMENT OF ERROR

Petitioners assign error to the city's approval of the Keizer Station Master Plan "because the Plan includes the [petitioners'] property without [their] permission." Petition for Review 3. They provide three arguments in support of their assignment of error: (1) the KSP and Keizer Development Code (KDC) amendments do not grant Northwest the authority to submit a master plan for property owned by the Lowerys, (2) the KDC permits only the Lowerys or their designated agent to submit a master plan application for their property, and (3) allowing a third party to submit an application is contrary to ORS 227.175 and sound public policy.

A. Keizer Development Code and Comprehensive Plan Provisions

KDC 3.201.04 provides:

"An application for a land use action or permit may be filed by one or more of the following persons:

"1. Owner of subject property;

"2. Purchaser of subject property under a duly executed written contract when the application is accompanied by proof of the purchaser's status and the seller consents in writing to such application;

"3. A lessee in possession of the property, when the owner consents in writing to such application;

"4. The agent for any of the foregoing, when duly authorized in writing to such application is accompanied by proof of authority."

Petitioners' central argument is that the city was not authorized to accept or process the application because the Lowerys, owners of a portion of the property subject to the master plan, did not sign the application. The proposal, therefore, did not satisfy KDC 3.201.04.

The city argues that the KSP specifically "envisions that a master plan may be considered even if the applicant does not own all the property in the master plan boundary[.]" Respondent's Brief 6.[3] The regulations implementing the KSP provide similar language that controls the submittal

[3] As relevant, the KSP provides:

> "This Plan calls for the development of Master Plans for Area A – Village Center, Area A – Sports Center, Area B, and Area D. In Area C, a Master Plan is only required for development of two or more lots/parcels. The Master Plans are to be reviewed and approved by the City Council through a Type II-B review process in accordance with the Keizer Station Plan guidelines. These Master Plans are to be publicly or privately prepared representing the development proposal for a given area. *It is recognized that the applicant of a Master Plan for an area may not own or control all the land within the Master Plan boundary. All property owners in each area are encouraged to join together as co-applicants. However to properly plan development and provision of public facilities and services, the master plan shall still cover all the area in appropriate detail based on ownership. For those portions not owned or controlled by an applicant, the Master Plan shall focus on a cohesive interconnected system of planned public facilities and shall set general design guidelines to be used throughout the Master Plan area*. Amendments to an approved Master Plan shall require City Council approval. Subdivision approval shall be based upon the applicable zone and applicable KDC Section 3.108 requirements.
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> "The Master Plans will be developed and considered in accordance with the requirements of the Activity Center Overlay provisions (KDC Section 2.125 of the Keizer Development Code). Individual areas may require a detailed transportation system design plan as a requirement of Master Plan Approval. Once a Master Plan is adopted, individual buildings and uses must receive building permit approval. As part of the building permit process, the proposal will be evaluated for compliance with the adopted Master Plan, zone standards, and applicable design standards as referenced in the Keizer Development Code. *In case of conflicts between the Keizer Station Plan and the Keizer Development Code, the Keizer Station Plan standards will apply*." Record 23-24. (Emphasis added).

of the master plan application in this case. KDC 2.119.08(B).[4] The city argues that the language of the KSP and KDC 2.119.08(B) clearly provide that an application for a master plan may be submitted without the signature of all of the owners of the property involved, notwithstanding the requirement of KDC 3.201.04. First, the city argues that the specific provisions of the KSP and implementing code language control over the more general requirement in KDC 3.201.04. Second, the KSP specifically provides that where there is a conflict between the KSP provisions and the development code, the KSP language controls. Finally, the city council's interpretation, according to the city, is entitled to deference. *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003); *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992).[5]

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[4] KDC 2.119.08(B) provides:

> "Master Plan Required. A master plan must be reviewed and approved by the City Council prior to subdivision platting or development. The Master Plan shall be reviewed through a Type II-B review process in accordance with this Section. It is recognized that the applicant of the master plan for the area may not own or control all the land within the master plan boundary. The master plan shall still cover the entire EG zone. For those portions not owned or controlled by the applicant, the Master Plan shall focus on a cohesive interconnected system of planned public facilities and shall set general guidelines to be used throughout the Master Plan area. Subdivision approval shall be based upon the zone and Section 3.108 as applicable.
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> "1. The Master Plan will be developed and considered in accordance with the requirements of the Activity Center Overlay provisions (Section 2.125 of the Keizer Development Code). Once a Master Plan is adopted, the proposed development of each use shall be reviewed through Development Review as required in Section 2.315 of the Keizer Development Code. In the case of conflicts between the Keizer Station Plan and the Keizer Development Code, the Keizer Station Plan standards will apply.
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> "2. The Master Plan shall include a detailed transportation system design plan for the EG zone. The location of transit facilities shall conform to Section 2.305 of the Code."

[5] The city council adopted the following interpretation:

> "Master planning of the KSP area was determined by the City Council to be necessary for cohesive development of the area and to achieve the economic development purposes of the KSP. As is clear from the above quoted provisions, master planning includes public facilities planning as well as subdivision or partition approval. No one has contended otherwise. Moreover, it is also clear from the above quoted provisions that any conflict between the KSP provisions and the development code are resolved in favor of the KSP.

We agree with the city that the KSP specifically allows the submittal of a master plan application without the signature of all of the owners of property subject to the application. Although KDC 3.201.04, when read in isolation, would appear to prohibit the application that was submitted in this case, the city anticipated this exact issue and clearly addressed it in the KSP, providing that an applicant for a master plan need not own all of the land within the plan boundary. Petitioners cannot now collaterally attack that determination made by the city when it adopted the KSP in February, 2003. We conclude that the city's interpretation that the KSP and KDC allow submittal of a master plan application, even if the applicant does not own or control all of the property, is supportable under the deferential standard of review required by *Clark* and *Church*. *See also* ORS 197.829(1).

B. ORS 227.175(1)

Petitioners also argue that the city's interpretation violates ORS 227.175(1).[6] They assert that this statute allows only the owner of a piece of property to file an application affecting the use of

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> "The Council finds that KDC 3.201.04 does not apply to the KSP Master Plan application. The council finds that the approval contemplated in this proceeding is the approval of the contemplated KSP Master Plan including all of its elements to realize the objectives of the KSP.
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> "Master Plans are subject to the Type II-B process and the Type II-B process as quoted above expressly contemplates that all owners may not submit or approve of the master plan application. Nevertheless, a master plan is required by the KSP. Further, in the Master Plan approval process, the City expressly required that all property be included to ensure the KSP area is developed as a cohesive whole. It is axiomatic that the master plan approval process specified in the KSP is not subject to collateral attack here.
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> "As the KSP provisions explain, the specific provisions of the KSP prevail over the more general provisions of the city code. Here, the master plan application includes all of the contemplated elements, including streets, public facilities, open space, parking, subdivision and variances. At the time of actual KSP development under the Master Plan provisions, the property must be owned by the developer, or it must be acquired by the city or Urban Renewal agency. The City Council finds it is feasible for the city to exercise its authority of eminent domain to acquire any property necessary to allow the implementation of the KSP approved Master Plan." Record 24-25.

[6] ORS 227.175(1) provides:

> "When required or authorized by a city, an *owner* of land may apply in writing to the hearings officer, or other such person as the city council designates, for a permit or zone change, upon such forms and in such a manner as the city council prescribes. The governing body shall

land. Petition for Review 9. Because the master plan application included petitioners' property and petitioners did not sign or consent to the application, petitioners argue, the city was not authorized to accept or process the subject application. According to petitioners, the statute furthers a state policy not to allow individuals or entities to apply for land use approvals on property that they do not own. *Id*.

The city argues that this argument regarding ORS 227.175 was waived because it was not raised before the city council. ORS 197.763(1); ORS 197.835(3). Petitioners do not directly address this waiver argument. However, we have held that the waiver doctrine does not preclude a party from raising new *arguments* that were not discussed below as long as the *issue* was adequately raised below. *DLCD v. Curry County*, 33 Or LUBA 728, 733 (1997). While the distinction between "issues" and "arguments" is seldom obvious, in this case it is relatively clear that petitioners' discussion of ORS 227.175(1) merely adds an additional *argument* in support of the *issue* raised below; *i.e.*, whether the city properly accepted and processed the master plan application for the entire KSP area, regardless of ownership. We, therefore, will consider that argument.

In response to petitioners' argument that ORS 227.175(1) prohibits a non-owner from filing a land use application, the city points out that the language of the statute is permissive, providing: "[w]hen required or authorized by a city, an owner of land *may* apply" for a permit or zone change. The city also points out that the statute is primarily concerned with the procedural safeguards of notice and hearing and has never been read to limit applications in the way now proposed by petitioners. Respondent's Brief 12.

We do not necessarily agree with the city's analysis. For instance, we do not see that the legislature's use of the word "may" provides any guidance one way or the other whether the statute limits the pool of land use applicants to owners of property. However, we also do not agree with

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establish fees charged for processing permits at an amount no more than the actual or average cost of providing that service." (Underscoring added by the city; italics added by petitioners).

petitioners that ORS 227.175(1) expounds the policy they suggest. Under petitioners' reading of the statute, nobody other than the owner of the subject property could submit a land use application. Petitioners' argument proves too much. Even the local code provision that petitioners argue applies, KDC 3.201.04, provides that an application may be submitted not only by the owner, but also by a prospective purchaser of the property, a lessee of the property with written consent of the owner, or an authorized agent of an owner, purchaser or lessee. Petitioners' reading of ORS 227.175(1) would invalidate KDC 3.201.04, and quite possibly hundreds of other similar code provisions. We do not believe the legislature intended to limit land use applicants as petitioners suggest.

C. Land Not Controlled by Applicant

At oral argument, petitioners focused much of their time on an argument that is included in a footnote in their petition for review.[7] They argued that even if the city had authority to process the application for the master plan, notwithstanding that the applicant did not own all of the property included in the proposed master plan, nothing in the KSP or the code allowed the applicant to

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[7] Petitioners cite the following excerpt from the KSP in their petition for review:

> "*All property owners in each area are encouraged to join together as co-applicants*. However to properly plan development and provision of public facilities and services, the master plan shall still cover all the area in appropriate detail based on ownership. *For those portions not owned or controlled by an applicant, the Master Plan shall focus on a cohesive interconnected system of planned public facilities and shall set general design guidelines to be used throughout the Master Plan area*." Petition for Review 6. (Emphasis added by petitioners).

In a footnote, petitioners state:

> "It is likely the City will ask the Board instead to focus on the second sentence of the cited provision for support of the City's argument that Northwest can submit a master plan application for the Lowerys' property. When read in its proper context, it is easy to see the flaw in the City's argument. The second sentence merely directs an applicant to include all of the property within the master plan area in a master plan application. This provision of the KSP Comp Plan does not allow an applicant to actually plan the area, as Northwest has done in this case, by proposing private development on the Lowerys' property." Petition for Review 7 n 3. (Emphasis in original).

propose new development for the property that it did not own.[8] We understand petitioners to contend that with regard to their property, which is property that is "not owned or controlled by the applicant," the cited KSP language merely directs that their property be included in the master plan for the limited purposes of developing a "cohesive interconnected system of planned facilities" and "general design guidelines [for] the Master Plan area." Petitioners contend that nothing in the cited KSP language or elsewhere in the KSP or the city's land use regulations permits the applicant to propose or the city to approve new development for property that the applicant does not own or control. For ease of reference, in the balance of this opinion we will call this the "development of unowned property issue" or simply "the issue."

Petitioners' attorney was questioned by the Board at oral argument whether the development of unowned property issue was a new issue or whether it was raised in the petition for review. *See* OAR 661-010-0040(1) ("The Board shall not consider issues raised for the first time at oral argument."). Petitioners' attorney responded that the argument was presented in response to respondent's brief. Although the city addressed this issue in some detail at oral argument, it is not obvious to us that respondent's brief raised or discussed that issue.

Because it was unclear whether the development of unowned property issue had been raised in the petition for review and, if so, whether it had been raised below, we invited further briefing from the parties. In a letter dated January 7, 2005, we identified the issue as follows:

> "Assuming the city had the authority to process the master plan application for all of Area A notwithstanding that the Lowerys did not consent, may an applicant provide the level of planning detail that the applicant here proposes for the property that he does not own?"

We then requested additional briefing on the following questions:

> "1. Was the issue raised in the petition for review or was it raised for the first time at oral argument?

[8] The record contains site plans for the entire area covered by the master plan that indicate parking areas, building pads and proposed uses; *i.e.*, commercial or industrial, for the Lowery's property. Record 279.

"2. If the issue was raised in the petition for review, was the issue raised during the local proceedings and thus preserved for appeal?

"3. If we can consider [the issue], may a master plan applicant provide the level of detail provided here, and if so, why?"[9]

The city argues that the development of unowned property issue was not raised below during the local proceedings nor was it raised in the petition for review. We address the second question first because, procedurally, it is the threshold inquiry.

1. Waiver of the "Development of Unowned Property" Issue

In order to raise an issue before LUBA, a party must have raised the issue at the local level with sufficient specificity to afford the parties and decision maker an opportunity to respond. ORS 197.763(1); *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375, 386-87 (2004). The purpose of the ORS 197.763(1) "raise it or waive it" requirement is to prevent unfair surprise. *Central Klamath County CAT v. Klamath County*, 40 Or LUBA 129, 137 (2001). Before a party is obligated to raise an issue at the local level, however, the party generally must be given notice of the applicable criteria. ORS 197.763(3)(b), therefore, requires that a local government list the applicable criteria in the notice of the hearing on a quasi-judicial land use application. Where an applicable criterion is not listed in the pre-hearing notice as required by ORS 197.763(3)(b), a party's failure to raise issues with regard to that omitted criterion is excused. ORS 197.825(4)(a).[10]

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[9] Our order provided an opportunity for both parties to respond to those issues. However, after petitioners' response memorandum, the city filed a motion to file a reply. We grant that motion and consider the city's reply memorandum.

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

"A petitioner may raise new issues to [LUBA] 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, [LUBA] may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government[.]

"* * *."

According to the city, petitioners' testimony at the local level consisted of a letter and oral testimony. Record 325, 298. The city summarizes the letter as addressing two issues, only one of which is relevant here. The letter alleges that "the application is not properly before the City because the Lowerys have not consented to have the application submitted." We will refer to this issue as the "consent" issue. Respondent's Memorandum 5. Petitioners' oral testimony presented at the June 21, 2004 hearing parallels the issues raised in the letter. The city argues that the development of unowned property issue was not raised at the local level.

Petitioners concede that the issue was not raised below. However, they argue that they are not precluded from raising that issue now because they were never given the opportunity to raise the issue below. According to petitioners, at the end of the June 21, 2004 hearing, a member of the city council questioned whether petitioners' property could be removed from the application. Record 304. The city attorney responded that he did not know the answer and would have to get back to the council at a later date. *Id*. On July 6, 2004, the city held a work session and adopted the interpretation discussed previously in this opinion. *See* n 5.

According to petitioners, the city adopted findings "and applied new criteria," allowing someone other than the property owner to submit a master plan application. Response to the City of Keizer's Memorandum Regarding the Board's January 7, 2005 Letter 7-8. Petitioners contend that they were never given an opportunity to "raise objections to the new findings." *Id*. at 7.[11] They argue that where a local government does not provide a hearing where a party can raise issues, a petitioner can raise those issues for the first time at LUBA. *Id*. (citing *Dead Indian Memorial Rd. Neigh. v. Jackson County*, 43 Or LUBA 511 (2003), and *Ashley Manor Care Centers v. City of Grants Pass*, 38 Or LUBA 308 (2000)).

The city offers several responses. First, the city argues, the "new criterion" that petitioners allege was omitted from the notice relates to the consent issue, not the issue on which we requested

[11] Petitioners do not identify what findings they are is referring to. We assume "the findings" to which they refer are the findings in which the city adopts its interpretation of the consent issue. *See* n 5.

additional briefing; *i.e.*, the development of unowned property issue. Second, the city argues that submittal requirements are not approval criteria, and the city was not required under ORS 197.835(4)(a) to list in its notice such procedural standards. Finally, the city argues that KDC 3.113, which includes the submittal requirements, was in fact listed in the hearing notice. Record 494.

We agree with the city that petitioners continue to confuse, or at least fail to distinguish between, the consent issue and the development of unowned property issue on which we have requested additional briefing. The consent issue was raised, and we disposed of that issue in the city's favor earlier in this opinion. The development of unowned property issue, which petitioners concede was not raised below, is the issue on which we requested additional briefing.

We first address the city's argument that the relevant language does not constitute approval criteria.[12] We addressed a similar issue in *Wicks-Snodgrass v. City of Reedsport*, 32 Or LUBA 292 (1997). The hearing notice in that case did not reference several plan provisions that the petitioners claimed were approval criteria. The respondent argued that ORS 197.835(4)(a) did not apply because the cited provisions were not approval criteria and that the city's failure to list them did not excuse the petitioners' failure to raise new issues before LUBA. We noted that the city had not made an interpretation below whether the provision was an applicable approval criterion. However, we cited ORS 197.829(2) and made that interpretation in the first instance.[13]

In this case, the city did not address whether the language at issue is an approval criterion, because petitioner did not raise the issue. As we did in *Wicks-Snodgrass*, we exercise our discretion to make that determination in the first instance. The language cited at n 7 provides

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[12] We view the relevant language from the KSP to be the excerpt cited by petitioners in their petition for review. *See* n 7.

[13] ORS 197.829(2) provides:

> "If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct."

mandatory language that the decision maker must consider when reviewing a master plan application. The city council's decision whether to approve the master plan must address (1) whether the master plan covers all the area "in appropriate detail based on ownership" and (2) whether the master plan focuses on "a cohesive interconnected system of planned public facilities" and sets "general design guidelines to be used throughout the Master Plan area." Under this language, the city could deny or require modification of an application that did not master plan the area in "appropriate detail based on ownership."

The city appears to argue that, even if the language is a mandatory approval criterion, petitioners have still waived the issue because they could have raised the issue at the June 21, 2004 hearing. *See* ORS 197.835(4)(a), n 10; *see also Burke v. Crook County,* ___ Or LUBA ___ (LUBA No. 2004-081, October 6, 2004) (where mandatory approval criterion is not listed in the notice, but it is cross-referenced in a provision that is listed, issues related to that unlisted provision could have been raised and, because not raised, are waived). We now address the city's arguments to that effect.

The city claims that KDC 3.113 was listed in the pre-hearing notice, and was sufficient to apprise petitioners of the issue they now seek to raise. It is correct that the pre-hearing notice listed KDC 3.113. Record 494. KDC 3.113 is entitled "Keizer Station Master Plan Review." It includes, among other things, review procedures, KDC 3.113.02; submittal requirements for master plans for each of the sub-areas covered by the KSP, KDC 3.113.03; and review criteria, KDC 3.113.04.[14] KDC 3.113.03 includes a detailed list of the items required for submittal of a master

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[14] KDC 3.113.02 provides that Area A "may develop with Type II-B Keizer Station Master Plan Review approval by the City Council."

KDC 3.113.03 provides separate submittal requirements for the different areas of the KSP. Among the submittal requirements for Area A are the following:

> "1. Infrastructure engineering and architectural site plans showing all structures in relation to projected final topography of the project, all proposed connections to existing or proposed roads * * *.

plan application. KDC 3.113.04 lists the applicable approval criteria for reviewing a master plan. The city argues that petitioners never made an argument that the application did not comply with KDC 3.113.04, the applicable approval criteria, and therefore cannot now complain about the "merits of the master plan itself." Respondent's Reply Memorandum 5.

The city seems to miss the point. Petitioners are not arguing that the master plan does not comply with the approval criteria already listed in KDC 3.113.04. Although petitioners mix their argument up with the consent issue, we read their argument to be that the notice of hearing did not include the KSP language at n 7, upon which the development of unowned property issue is based. Accordingly, under ORS 197.835(4)(a), they are allowed to raise the issue for the first time here.

The reference in the notice to KDC 3.113 does not help the city. KDC 3.113 does not provide notice of the KSP language that petitioners rely on to raise the development of unowned property issue. The city seems to be taking the position that KDC 3.113.01 makes clear that the KSP includes provisions that are mandatory approval criteria and that petitioners were therefore on notice to look to the KSP. We disagree. KDC 3.113.01 provides:

> "The Keizer Station Plan requires the development of Master Plans for each of the five sub-areas. This process provides the City Council with an opportunity to review development proposals in conformance with the Keizer Development Code and the adopted Keizer Station Plan. * * *."

> "* * * * *
>
> "3. Building elevations, typical cross-sections and typical wall sections of all building areas.
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> "* * * * *
>
> "10. Calculation of gross building, parking and open space.
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> "* * *."

KDC 3.113.04 provides the review criteria for approval of a master plan for an area of the KSP. It includes criteria regarding pedestrian access, safety and comfort; vehicular movement; crime prevention and security; parking; and public spaces.

KDC 3.113.01 does not provide for review "in compliance with the Keizer Station Plan," as the city contends. Rather, it seems to suggest that the procedures outlined in KDC 3.113 create a process that *implements* the KSP.[15] Consequently, the reference to KDC 3.113 in the notice did not provide petitioners with the requisite notice of the KSP language at issue.

We do not believe that it is reasonable to expect that, under these circumstances, petitioners could have anticipated the issue prior to the city's announcement of its interpretation on July 6, 2004. Only then did petitioners have any indication that the city was relying on the KSP provisions discussed above, which requires inclusion of all of the property within the area to be master planned and which also includes the language that forms the basis of petitioners' argument regarding the development of unowned property issue. *See* KSP language cited at n 7. However, by the time

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[15] We also do not agree with the city's reliance on the provision in KDC 3.113.04.B., which the city alleges "states that the Keizer Station Plan provisions shall control if it conflicts with the Keizer Development Code." Respondent's Reply Memorandum 5. The city reads the language of KDC 3.113.04.B too broadly. The language the city refers to is found in the section of the review criteria dealing with different standards. KDC 3.113.04.B. provides, in its entirety:

> "The master plan shall meet the following standards as identified in the Keizer Station Plan in addition to standards within applicable zones:
>
> "1. Design standards
>
> "2. Transportation system standards
>
> "3. Utility standards
>
> "4. Parking standards
>
> "5. Landscape standards
>
> "If a conflict exists between *standards* within the Keizer Station Plan and the Keizer Development Code, the Keizer Station Plan *standards* shall be applied." (Emphasis added).

This language, shown here in its appropriate context, seems to apply to specific *standards* provided in the KSP. It does not relate in general to all provisions of the KSP, as the city asserts. It therefore cannot be relied on, as the city seems to be arguing, to provide notice to petitioners of the provision of the KSP that petitioners rely on to argue that a master plan applicant cannot propose new development on property the applicant does not own. There are other provisions in the KSP and the code that could be read more broadly and, if cited in the notice, might have provided petitioners with a roadmap leading to the KSP language at issue here. *See* KDC 2.119.08(B), n 4; *see also* KSP language addressing conflict resolution at n 3. However, those provisions were not cited in the notice either.

that interpretation was announced, the record had already closed and petitioners had no opportunity to address the issue. The language at issue is a mandatory approval criterion that the city was required to list in the pre-hearing notice. No other criteria that were listed could reasonably have given petitioners notice of the development of unowned property issue that is clearly identified only in the KSP language cited in n 7. Consequently, petitioners did not waive the issue by failing to raise it below.

2. Raised in Petition for Review or at Oral Argument

We turn, then, to the next question: whether OAR 661-010-0040(1), which precludes our consideration of issues raised for the first time at oral argument, applies. While LUBA does not generally require strict compliance with its procedural rules, the rationale underlying OAR 661-010-0040(1) is obvious. The requirement that an issue be raised in the briefs prevents LUBA from deciding cases based on issues that the parties have not had an adequate opportunity to respond to. *See Ward v. City of Lake Oswego*, 21 Or LUBA 470, 482 (1991) (consideration of issue raised for first time at oral argument would violate purpose of LUBA's rules to provide reasonable time to prepare and submit case and provide full and fair hearing under OAR 661-010-0005).

Although it is a reasonably close question, we believe the issue was raised in the petition for review. However, even if it wasn't, we have given the parties an opportunity to brief the issue, and the purpose of the rule has been satisfied in this case.

3. The Unowned Property Issue

The city offers numerous reasons that the applicant's proposed development for petitioners' property in the master plan approved by the city was appropriate. For instance, the city suggests that the KSP language quoted at n 7 merely indicates that the "exact nature of the development cannot be imposed for property not owned by the applicant." Respondent's Memorandum 7. The city contends that the applicant does not propose specific development for petitioners' property. For property owned by the applicant, the proposed site plan indicates specific uses; *e.g.*, office building, restaurant, retail and anchor. *Id*., Record 279. However, for petitioners' property, the

proposed site plan does not indicate specific uses, but only shows how the property *could* be used and proposes general uses; *e.g.*, commercial or industrial, to that property. *Id.* at 7-8.

As discussed earlier in this opinion, petitioners did not have an opportunity to raise the unowned property issue. Consequently, the city did not have an opportunity to adopt an express interpretation of the KSP language at n 7 and consider whether that language (1) merely directs an applicant to include unowned property in the master plan for the limited purposes of developing a "cohesive interconnected system of planned facilities" and "general design guidelines [for] the Master Plan area," (2) requires that the applicant include unowned property and propose a development Master Plan as though the applicant owned the unowned property, or (3) include unowned property and treat that unowned property in some other manner. It is therefore necessary to remand the challenged decision to allow the city, in the first instance, to provide an interpretation of the KSP language.

Petitioners' assignment of error is sustained in part.

The city's decision is remanded.