BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BAEK K. OH and SUNG C. OH,
Petitioners,

and

MONROE GLASS, WADE W. ABKE
and DONALD E. SWAN,
Intervenors-Petitioners,

vs.

CITY OF GOLD BEACH,
Respondent,

and

GOLD BEACH 15, LLC,
Intervenor-Respondent.

LUBA No. 2009-066

FINAL OPINION
AND ORDER

Appeal from City of Gold Beach.

E. Michael Connors, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Davis Wright Tremaine LLP.

Monroe Glass, Wade W. Abke and Donald E. Swan, Gold Beach, represented themselves.

No appearance by City of Gold Beach.

David R. Koch, North Bend, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Stebbins & Coffey.

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

REMANDED 01/26/2010

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a city decision that removes a condition of approval that was imposed as part of an earlier tentative subdivision approval decision.

REPLY BRIEF

Petitioners move to file a reply brief to respond to new matters raised in intervenor-respondent's (intervenor's) brief. Intervenor objected at oral argument to the reply brief. An oral objection at oral argument to a reply brief that was filed more than three weeks earlier is untimely, and will not be considered. The motion to file a reply brief is granted.

FACTS

In 2006, the city granted tentative subdivision approval for intervenor's property, a 1.2-acre parcel located between Highway 101 and the Pacific Ocean. Petitioners own and operate a motel, the Gold Beach Resort, on the adjacent property to the north of the proposed subdivision. The city's 2006 tentative subdivision approval decision included conditions of approval. All of those conditions of approval, except Condition 7, have been satisfied. Access to the disputed subdivision from Highway 101 is provided by Panorama Drive, a road that is located on an easement that crosses petitioners' property. The Panorama Drive entrance onto Highway 101 is on petitioners' property. The roadway immediately turns south and travels parallel with Highway 101 for a short distance across the easement on petitioners' property and then crosses intervenor's property and continues on to provide access to an existing condominium development south of the proposed subdivision. Condition 7 requires that the roadway pavement be widened and that petitioners' motel sign, which apparently is located within that easement, be removed.

Petitioners' and intervenor's predecessors-in-interest were apparently unable to reach agreement on the steps to be taken to comply with Condition 7. Petitioners and intervenor have not been able to do so either. More than two years after the original approval,

intervenor filed a request to remove Condition 7. The planning commission denied the request, and intervenor appealed to the city council. The city council reversed the planning commission and removed the condition of approval over petitioners' objections. This appeal followed.

FIRST, SECOND, AND THIRD ASSIGNMENTS OF ERROR

In the first assignment of error, petitioners argue that the city cannot remove Condition 7 because under Gold Beach Land Division Ordinance (LDO) 3.0300(7), the 2006 tentative subdivision approval decision has expired and is void as a matter of law.[1] According to petitioners, because the LDO 3.0300(7) deadline for filing the final plat with the county clerk has expired, there is no longer an effective tentative subdivision approval decision to modify. In the second assignment of error, petitioners argue that the city erred in approving a modification of the tentative subdivision approval decision more than 365 days after the application for that modification was deemed complete, in violation of ORS 227.178(5).[2] Petitioners contend the application in this matter was deemed complete sometime before the April 21, 2008 planning commission hearing on the application. The city council issued its final decision on May 11, 2009. Petitioners contend the application therefore expired before May 11, 2009, under ORS 227.178(5). Petitioners contend the "City Council's decision is void as a matter of law * * *." Petition for Review 12. In the third

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[1] LDO 3.0300(7) provides as follows:

> "Approval of the tentative plat is null and void if the final plat is not filed with the County Clerk within twelve (12) months of the date of the letter of approval. The applicant may request an extension of the deadline for filing the final plat by written request to the Commission prior to the expiration date. The request should clearly state the circumstances which necessitate the extension. If the deadline has expired or the Commission does not give an extension the applicant will have to reapply for approval of the tentative plat."

[2] ORS 227.178(1) provides that a city must make a decision within 120 days on an application once it has been deemed complete unless an extension is granted. ORS 227.178(5) further provides:

> "The 120-day period set in subsection (1) of this section may be extended for a specified period of time at the written request of the applicant. The total of all extensions * * * may not exceed 245 days."

assignment of error, petitioners argue that the city erred in modifying Condition 7, because the city's land use regulations do not include a procedure for amending conditions of approval.

Intervenor responds that petitioners waived the issues presented in the first three assignments of error, because the issues raised in those assignments of error were not raised below and cannot be raised for the first time at LUBA. ORS 197.763(1); ORS 197.835(3).[3]

Petitioners were not represented by counsel below, and they do not argue that the issues raised in the first three assignments of error were raised before the planning commission or city council. Instead, petitioners argue that they may raise these issues for the first time at LUBA under ORS 197.835(4)(a) because the applicable approval criteria were not listed in the notices of hearing that the city provided in this matter.[4]

If the city provided notice of the planning commission hearing in this matter, we have been unable to locate a copy of that notice in the record. The notice that preceded the city council hearing does not list LDO 3.0300(7) (the criterion at issue in the first assignment of error) or ORS 227.178(5) (the statute that petitioners rely on in the second assignment of

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[3] 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 the following limit on LUBA's scope of review:

> "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."

[4] ORS 197.835(4)(a) provides that a petitioner may raise new issues at LUBA if:

> "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[.]"

error). However, we do not agree with petitioners that LDO 3.0300(7) or ORS 227.178(5) are properly viewed as "applicable criteria" for tentative subdivision plan decisions or decisions to amend such decisions. LDO 3.0300(7) limits the term of a tentative subdivision plan approval decision, it is not one of the "applicable criteria," within the meaning of ORS 197.835(4)(a), for approving a tentative subdivision plan in the first place or later amending a decision that granted tentative subdivision plan approval. It follows that the city's failure to list LDO 3.0300(7) as an applicable approval criterion does not excuse petitioners' failure to argue below that the challenged decision is precluded by LDO 3.0300(7). Because petitioners did not make that argument below, they may not present the argument at LUBA.

For similar reasons, the city's failure to list ORS 227.178(5) as an applicable approval criterion does not excuse petitioners' failure to argue below that ORS 227.178(5) precludes approval of the requested modification. ORS 227.178(5) is a limit on the number of days an applicant may extend the deadline for the city to take final action on an application. It is not one of the "applicable approval criteria" for modifying tentative subdivision plan approval decisions, within the meaning of ORS 197.835(4)(a). In addition, ORS 197.835(4)(a) and ORS 197.763(3)(b) potentially allow petitioners at LUBA to raise issues that were not raised below where the notice of hearing fails to list applicable criteria from "the ordinance and the plan."[5] Under ORS 197.763(3)(b), the city must list local ordinance and plan criteria; the city is not required to list all potentially applicable *state statutes*. *Rhinhart v. Umatilla County*, 53 Or LUBA 402, 407 (2007); *Van Dyke v. Yamhill County*, 35 Or LUBA 676, 684 (1999).

Finally, the issue presented in the third assignment of error is whether the city erred by eliminating a prior condition of approval because, according to petitioners, the city has no adopted procedure specifically for doing so. We do not see how the city could possibly have

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[5] ORS 197.763(3)(b) provides that a local government's notice of quasi-judicial land use hearing must "[l]ist the applicable criteria *from the ordinance and the plan* that apply to the application at issue[.]" (Emphasis added.)

"failed to list the applicable criteria" for a decision that petitioners contend the city is not authorized to adopt. ORS 197.835(4)(a) does not apply to the issue presented in the third assignment of error, and that issue was waived, because petitioners failed to raise that issue below.

Because petitioners waived their right to raise the issues presented in the first, second and third assignments of error, those assignments of error are denied.[6]

FOURTH, FIFTH, AND SIXTH ASSIGNMENT OF ERRORS

As we explained earlier, Panorama Drive is constructed on an easement that runs north and south directly adjacent and parallel to Highway 101, beginning on the southern portion of petitioners' property and continuing southward past intervenor's property. Although a portion of Panorama Drive is located on petitioners' property, access to petitioners' resort from Highway 101 is provided by a roadway to the north, and Panorama Drive does not provide access to petitioners' property. The portion of the Panorama Drive that runs across the easement on petitioners' property is not improved to full city street standards. South of petitioners' property, Ruby's Way intersects with Panorama Drive and Ruby's Way extends westward to the subject property. Ruby's Way is fully improved to city standards, as is the portion of Panorama Drive that is located on intervenor's property. To access the proposed subdivision, a motorist would turn west from Highway 101 onto Panorama Drive at the southern end of petitioners' property and immediately turn south on Panorama Drive and continue south to where Panorama Drive intersects with Ruby's Way, which proceeds west to intervenor's subdivision.

In the fourth through sixth assignments of error, petitioners challenge the city's conclusion that Condition 7 may be removed. The disputed Condition 7 provides as follows:

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[6] Petitioners filed a motion asking that LUBA consider certain extra-record evidence in deciding the first assignment of error. Because we hold that the first assignment of error is waived, it is not necessary to consider that extra-record evidence. Therefore, the motion is denied.

> "The entrance to Ruby's Way off of Hwy 101 shall be paved to 36' and the motel sign shall be removed prior to the final plat approval." Record 9.[7]

In approving intervenor's request to remove Condition 7, the city stated that the "burden of proof is upon the applicant in proving the proposal fully complies with applicable Ordinance criteria, Oregon State Statutes and Oregon Administrative Rules." Record 10. However, the challenged decision does not list or discuss any applicable ordinances, statutes, or administrative rules. The city's findings regarding removal of Condition 7 state:

> "The condition to widen the road and relocate the motel sign required the applicants to make improvements or alterations to property not in their ownership or under their control.
>
> "The road/access in question (Panorama Drive/Ruby's Way) is a private street which can be built and maintained to standards other than those required for city owned streets." Record 10.

In their fourth assignment of error, petitioners argue that the city erred by finding that Condition 7 could be removed simply because it requires intervenor to make improvements or alterations to property not under its control or ownership. In their fifth assignment of error, petitioners argue the city erred by finding Condition 7 could be removed because Panorama Drive is subject to the standards for private streets found at LDO 8.0300 rather than city streets.[8] According to petitioner, LDO 8.0300 requires that the Panorama Drive connection to Highway 101 must be improved to city street standards.[9] In their sixth

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[7] The southernmost sign for petitioners' resort that is located at the Panorama Drive easement apparently causes confusion since petitioners' resort is not accessible via Panorama Drive. A desire to reduce that confusion may have been the reason or at least one of the reasons that the city required that the sign be removed.

[8] Intervenor argues that the issue raised in the fifth assignment of error was waived because it was not raised in the city proceedings below. We agree with petitioners, however, that this issue was raised by other parties below.

[9] LDO 8.0300 provides as follows:

> "It shall be the responsibility of the applicant to ensure that the proposed access road from a publically maintained road to the proposed partition or subdivision meets the standards of the City of Gold Beach Street Standards Ordinance. All roads, streets, and easements within partitions, subdivisions, and planned developments shall meet the standards for street improvements as established in the City of Gold Beach Street Standards."

assignment of error, petitioners argue the city erred by removing Condition 7 without addressing the safety concerns that motivated the city to impose Condition 7 in the first place.

We decline to attempt to sort out and resolve all of the parties' arguments under these assignments of error.[10] If Condition 7 was imposed to ensure that the proposed subdivision will comply with all applicable tentative subdivision approval criteria and any other applicable legal requirements, the city must explain why the condition is no longer needed. If Condition 7 was imposed for some other reason, then we see no reason why the city could not simply explain that Condition 7 was not imposed to ensure compliance with an applicable approval criterion or other legal requirement, and then grant intervenor's request. However, it is not obvious to us that such is the case.

The city appears to take the position in the challenged decision that the condition is not necessary to satisfy an applicable approval criterion because the improvements required by the condition are not required for a private roadway like Panorama Way. Although we do not decide the question here, that position may be inconsistent with LDO 8.0300. *See* n 9. In addition, although we do not decide the question here, if the sign removal and road improvements required by Condition 7 were required to ensure that the proposed subdivision complies with one or more legal standards, it is not legally relevant whether petitioners' ownership of the property that is subject to the easement prevents intervenor from complying with the condition. In that case, Condition 7 may only be removed or modified if the city is able to establish that the condition can be removed or modified without causing the proposed

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[10] Those arguments include whether Condition 7 applies only to Ruby's Way, as intervenor argues, or whether Condition 7 also applies to the portion of Panorama Way that connects Ruby's Way to Highway 101, as petitioners argue. The parties also appear to dispute whether the portion of Panorama Way that connects Ruby's Way to Highway 101 must be improved to full city standards under LDO 8.0300, including a 36-foot wide pavement, and whether Condition 7 was imposed to ensure compliance with this LDO requirement. Finally, we understand the parties to dispute whether the requirement that intervenor remove petitioners' southernmost sign from the easement is necessary to comply with any applicable approval standard or legal requirement.

subdivision to violate applicable legal standards. The challenged decision does not establish that such is the case.

The fourth, fifth and sixth assignments of error are sustained.

The city's decision is remanded.