BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LESLIE HABER and WENDY HABER,
Petitioners, Cross-Respondents,

vs.

CITY OF GATES,
Respondent,

and

TIM BAUGHMAN, CAROL BAUGHMAN and
DON DENNING HOMES MUTUAL CONSTRUCTION, INC.,
Intervenors-Respondent, Cross-Petitioners.

LUBA No. 2000-106

FINAL OPINION
AND ORDER

Appeal from City of Gates.

Donald M. Kelly, Silverton, filed the briefs and argued on behalf of petitioners, cross-respondents. With him on the briefs were, Patrick E. Doyle, Silverton, and Kelly & Kelly.

No appearance by City of Gates.

Mark C. Hoyt, Salem, filed the briefs and argued on behalf of interveners-respondent, cross-petitioners.

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

REVERSED 11/21/2000

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 granting approval for a subdivision replat.

MOTION TO INTERVENE

Tim Baughman, Carol Baughman and Don Denning Homes Mutual Construction, Inc., the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.[1]

FACTS

Thistledown Estates Subdivision is a previously approved and recorded 16-lot subdivision. Lot 16 includes 12.36 acres. The other 15 lots in the subdivision are smaller, ranging in size from .55 acres to 2.27 acres. As originally approved, lot 16 included a block of five private septic drainage field easements (hereafter easements) for lots 3, 9 and 11-13.[2] After the subdivision was approved and recorded, lot 9 was sold with the westernmost easement that is shown on the original subdivision plat as serving lot 3. Lot 9 has been developed.

Intervenors own lots 3, 11-13 and 16. The challenged replat reflects the easement swap between lots 3 and 9 but does not change the dimensions of the easement that was shown on the original subdivision plat for lot 3 and that now serves lot 9. The replat also approves new, smaller easements for four lots (lots 3 and 11-13) in approximately the same area that was formerly subject to easements for three lots (lots 9, 11 and 12). As a result of the replat, all of the area formerly subject to an easement for lot 13 and a small portion of the area formerly subject to an easement for lot 12 are no longer subject to a sewer septic

[1]Although intervenors also filed a cross-petition for review, we refer to them as intervenors throughout this opinion. Although petitioners filed a cross-respondents' brief, we refer to them as petitioners throughout this opinion.

[2]Lot 16 also includes private septic drainage field easements for lots 14 and 15, but they are not affected by the challenged decision.

drainage easement.[3]

Intervenors filed a cross-petition for review, in which they challenge the city's decision to require that they submit an application to replat lot 16. Intervenors contend that private easements may be modified by the owners of the dominant and servient estates without any requirement for city approval of a replat. Petitioners agree with the city that a replat is required, but challenge the city's decision approving the replat. We consider intervenors' cross-petition first.

JURISDICTION

Intervenors move to dismiss this appeal. Intervenors' jurisdictional argument is as follows:

> "Because the City did not have the authority to require the re-plat application be filed, it was without authority to adopt a decision. Therefore, the City did not reach a final and appealable land use decision and LUBA has no jurisdiction to review this matter." Intervenor/Respondents' Motion to Dismiss for Lack of Jurisdiction and Cross Petition for Review 5 (citation omitted).

The city clearly has authority to review and approve subdivision replats. ORS 92.040; 92.180. Intervenors confuse the question of whether the city correctly interpreted the relevant statutes to require that a replat application be filed with the question of whether the city had authority to do so. *Jentzsch v. City of Sherwood*, 20 Or LUBA 575, 579 (1991). The challenged decision is clearly a "final" decision by the city that applies the city's land use regulations to approve a subdivision replat. As such, it is either a land use decision or a limited land use decision. ORS 197.015(10); 197.015(12). LUBA has exclusive jurisdiction to review land use decisions and limited land use decisions. ORS 197.835(1).

Intervenors' motion to dismiss is denied.

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[3]The revised easements for lots 3 and 11-13 range in area from .3141 acre to .4058 acre.

DECISION

A. Deference

Intervenors argue the city's decision to require that they file an application to replat lot 16, rather than simply record revised easements, is based entirely on the city's interpretation of relevant state statutes. Therefore, intervenors argue, the city's interpretation of those relevant statutes is not entitled to any deference under ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992) and its progeny. *Carlson v. City of Dunes City*, 139 Or App 343, 347, 911 P2d 1279 (1996).

Petitioners argue that the city also based its decision to require a replat in this matter on City of Gates Zoning Code (GZC) 19.070.[4] Therefore, petitioners argue, the city's interpretation of its code to require a replat can only be upset on appeal if it is "clearly wrong." *Huntzicker v. Washington County*, 141 Or App 257, 261, 917 P2d 1051, *rev den* 324 Or 322 (1996); *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 217, 843 P2d 992 (1992).

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[4]GZC 19.070 provides:

> "APPROVAL CRITERIA FOR CONVENTIONAL SUBDIVISIONS AND PARTITIONS. Approval of the preliminary partition or subdivision plan shall require compliance with the following criteria and standards:
>
> "A) It is generally compatible with the surrounding area and the proposed parcels, lots, or roads are compatible with the existing pattern of development in the area.
>
> "B) Adequate services are available to serve the site or can be made available prior to the time of development.
>
> "C) The proposal is consistent with the design standards in [GZC] 19.110.
>
> "D) The proposal is consistent with the City Comprehensive Plan and the applicable zoning district standards, and other special purpose standards of [the GZC].
>
> "E) The conditions identified in [GZC] 5.060 (B) * * * will be placed on any approved subdivision or partitioning request."

Petitioners are mistaken. The city clearly based its decision to *require* a replat solely on relevant provisions of ORS chapter 92.[5] Record 12. Once the city reached the conclusion that a replat application was required by statute, it applied GZC 19.070 to determine the relevant approval criteria for the replat and how those approval criteria should be applied.[6] However, it is clear from the decision that, in the city's view, the source of the *requirement* for a replat to modify the private easements shown on the previously approved and recorded subdivision plat is statutory. Moreover, even if the city did intend to rely on GZC 19.070 as additional authority to require a replat application in this matter, there is no express or implied interpretation of the language of GZC 19.070 to defer to.[7] *Alliance for Responsible Land Use v. Deschutes Cty*, 149 Or App 259, 265, 942 P2d 836 (1997); *rev dismissed* 327 Or 555 (1998); *Weeks v. City of Tillamook*, 117 Or App 449, 452-53 n 3, 844 P2d 914 (1992); *Larson v. Wallowa County*, 116 Or App 96, 840 P2d 1350 (1992).

B. Waiver

Petitioners next argue that intervenors affirmatively waived their right to argue that the relevant statutes do not require a replat to revise the disputed easements. Petitioners argue that intervenors should not be allowed to (1) accept the city's requirement that a replat application be submitted, (2) submit a replat application without expressly doing so under protest, (3) argue the replat meets applicable subdivision criteria, and (4) then argue for the first time in a cross petition for review at LUBA that the city erroneously required the replat application.

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[5]The record includes a letter to intervenors from the city's attorney. Record 220-21. That letter states "it is the city's position that under ORS 92.010(12), 92.050(6) and 92.185, reconfiguration of the easements will require a replat application." *Id*. This position is restated in the challenged decision. Record 12.

[6]The city interpreted the approval criteria in GZC 19.070 to apply "only to those portions of the subdivision which are to be replatted." Record 13.

[7]We also seriously question whether the language of GZC 19.070 could be interpreted to say anything about when replat applications are required, even under the deferential standard of review imposed by ORS 197.829(1), *Clark* and its progeny.

We agree that intervenors could not affirmatively take the position below that a replat application is required, and then later unilaterally reverse that position after the local proceedings are complete and assign error to the city's decision at LUBA based on their changed position. *See Newcomer v. Clackamas County*, 92 Or App 174, 187, 758 P2d 369 (1988) (a party may not lure "another party into an abbreviated presentation at the local level through the pretense of abandoning an issue"). However, we do not agree that intervenors ever expressly or implicitly agreed that a replat is statutorily required to achieve the desired revisions to the easements.

Even though we conclude intervenors did not affirmatively waive the disputed issue, under ORS 197.835(3) parties must raise an issue before the local decision making body to preserve their right to raise the issue on appeal at LUBA.[8] A much closer question is presented with regard to whether intervenors adequately raised the issue below that they now assert in the cross-petition for review. However, a letter to intervenors' attorney from the city's attorney makes it reasonably clear that intervenors had taken the position that a replat was not necessary. Record 220-21. The minutes of the April 20, 2000 city council public hearing in this matter indicate that at the beginning of intervenors' attorney's presentation to the city council, he stated "he would have rather done this through recording with Marion County but would continue with the hearing." Record 24. In a letter submitted by intervenors' attorney before the record was closed, he stated:

> "Before submitting the application, the applicant staked the drainfields and resulting drainlines, and they were approved by Marion County. After obtaining the approval of the County for the reduced easements, the applicants were informed the City would require a re-plat of Lot 16 to reduce the size of the easements. Because the City required a re-plat, the owners of Thistledown Estates [filed] this application, *even though they feel it was unnecessary*." Record 37 (emphasis added).

[8]Under ORS 197.835(3) issues that are raised at LUBA must first have been raised "before the local hearings body." ORS 197.763(1) requires that issues be raised before the local record is closed.

The issue of waiver could have been avoided if intervenors had expressly submitted the replat application under protest or had more clearly and precisely conveyed their view that the statutes cited by the city's attorney do not require a replat in the circumstances presented in this appeal. *Recovery House VI v. City of Eugene*, 150 Or App 382, 387-88, 946 P2d 342 (1997). However, intervenors argue that after negotiations with the city's attorney made it clear that a replat would be required, they should not be obligated to continue to debate the issue to preserve their right to raise the issue on appeal.

> "Interven[ors] accepted the City at its word, and did not shout into the wind on an issue on which the City made its position clear. As this matter progressed, Interven[ors] simply indicated they disagreed with the City's position, but proceeded with the hearing noting their disagreement with the City's requirement that a re-plat application was required. In doing so, never did Interven[ors] concede, or agree, that the City's requirement of a re-plat application was warranted. As such, Interven[ors] never waived the issue." Intervenors-Respondent's Reply Brief 3.

We agree with intervenors. As the Court of Appeals explained in *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991), ORS 197.763(1) "requires no more than fair notice to adjudicators and opponents, rather than the particularity that inheres in judicial preservation concepts." Although it is a reasonably close question, we conclude intervenors' actions were adequate to preserve the issue for appeal.

Finally, we also note that the issue intervenors attempt to raise in the cross-petition for review is separately set out and addressed in the challenged decision. Record 12. The decision explains intervenors' position and sets out the contrary view that was expressed in the city attorney's December 13, 1999 letter. Although the document that became the city's final decision was prepared by intervenors' attorney and apparently was submitted to the city after the evidentiary record closed, the city approved it as its final decision. If the document submitted by intervenors did not accurately reflect the city's view concerning the issue, it presumably would not have been signed by the city. Therefore, it would appear that the central purpose of the "raise it or waive it" statute was served, since there is no dispute that

the challenged decision addresses the issue and explains the basis for the city's view that a replat is required.

Intervenors did not waive the issue they raise in the cross-petition for review.

C. ORS Chapter 92 Does not Require a Replat to Modify a Private Easement

We begin with an analysis of the text and context of the statutes the city relied on to require that intervenors proceed by way of a replat. ORS chapter 92 distinguishes between private and public easements. The disputed private easements were included on the original subdivision plat because ORS 92.050(6) requires that where public or private easements are proposed, those easements must be shown on the subdivision plat.[9] Under ORS 92.050(6), private easements become effective when the plat is recorded. Under ORS 92.014, local governments must explicitly accept public easements before they become effective.[10]

The question presented in the cross-petition for review is whether *subsequent* changes in the private easements that are shown on the approved subdivision plat require approval of a replat under ORS chapter 92 or whether such private easements may be changed by agreement of the owners of the dominant and servient estates without approval of a replat under the statutes. There is a certain degree of logic to the city's and petitioners' position that if private easements must be shown on, and approved as part of, the initial subdivision

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[9]ORS 92.050(6) provides:

> "The location, dimensions and purpose of all recorded and proposed public and private easements shall be shown on the subdivision or partition plat along with the county clerk's recording reference if the easement has been recorded with the county clerk. Private easements shall become effective upon the recording of the plat."

[10]ORS 92.014(2) provides:

> "Notwithstanding ORS 92.175, no instrument dedicating land to public use shall be accepted for recording in this state unless such instrument bears the approval of the city or county authorized by law to accept such dedication."

plat, they should only be subject to amendment through a replat.[11] However, the question is whether the relevant statutes impose that requirement.

The definition of "replat" at ORS 92.010(12) refers to "easements" without specifying whether the reference is intended to include "public easements," "private easements," or both kinds of easements.[12] As defined by ORS 92.010(12), a replat is required to (1) "achieve a reconfiguration of the existing subdivision * * * plat," or (2) "increase or decrease the number of lots in the subdivision." The amended easements do not increase or decrease the number of lots. Therefore, the amended easements constitute a replat only if they "achieve a reconfiguration of the existing subdivision."

ORS 92.185, which sets out the statutory requirements for replatting, provides as follows:

> "The act of replatting shall allow the reconfiguration of lots or parcels and *public easements* within a recorded plat. Except as provided in subsection (5) of this section, upon approval by the reviewing agency or body as defined in ORS 92.180, replats will act to vacate the platted lots or parcels and easements within the replat area with the following conditions:
>
> "(1) A replat, as defined in ORS 92.010 shall apply only to a recorded plat.
>
> "(2) Notice shall be provided as described in ORS 92.225(4) when the replat is replatting all of an undeveloped subdivision as defined in ORS 92.225.

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[11]We note that the same logic would seem also to dictate that approved subdivision lots should not be revised without a replat. However, subdivision lots may be revised by adjusting the lot lines that separate individual lots, so long as no new lots are created and the new lots conform to zoning requirements. ORS 92.010(7) and (11). ORS 92.190(3) specifically provides:

> "The governing body of a city * * * may use procedures other than replatting procedures in ORS 92.180 and 92.185 to adjust property lines as described in ORS 92.010(11), as long as those procedures include the recording, with the county clerk, of conveyances conforming to the approved property line adjustment as surveyed in accordance with ORS 92.060(7)."

[12]ORS 92.010(12) defines "[r]eplat" as follows:

> "'Replat' means the act of platting the lots, parcels and easements in a recorded subdivision or partition plat to achieve a reconfiguration of the existing subdivision or partition plat or to increase or decrease the number of lots in the subdivision."

> "(3) Notice, consistent with the governing body of a city or county approval of a tentative plan of a subdivision plat, shall be provided by the governing body to the owners of property adjacent to the exterior boundaries of the tentative subdivision replat.
>
> "(4) When a utility easement is proposed to be realigned, reduced in width or omitted by a replat, all affected utility companies or public agencies shall be notified, consistent with a governing body's notice to owners of property contiguous to the proposed plat. Any utility company that desires to maintain an easement subject to vacation under this section must notify the governing body in writing within 14 days of the mailing or other service of the notice.
>
> "(5) A replat shall not serve to vacate any public street or road.
>
> "(6) A replat shall comply with all subdivision provisions of this chapter and all applicable ordinances and regulations adopted under this chapter." (Emphasis added.)

In an abstract or general sense, there can be no question that intervenors propose to reconfigure the private easements. However, ORS 92.185 uses "reconfiguration" in a specific and limited sense. ORS 92.185 specifically identifies the things that must be reconfigured by replatting, *viz*., "lots," "parcels" and "public easements." The reference to "public easements" is entirely consistent with the requirements of ORS 92.185(2) through (4), which require public notice to members of the public and public entities that have a legal interest in the public easements. Reading ORS 92.185 as a whole and in context, we conclude that petitioners' argument requires that we ignore the express reference that is included in that statute to "public easements," and ignore the lack of any express reference to "private easements." We may not do so. *See* ORS 174.010 (reviewing body construing statutes is "not to insert what has been omitted, or to omit what has been inserted").[13] We conclude that while reconfiguration of public easements shown on an existing subdivision

[13]We also note that ORS 92.050(6), which expressly references both public and private easements and requires that both kinds of easements be shown on a subdivision plat, suggests that the legislature knew how to refer to both public and private easements when it intended to.

plat requires approval of a replat, reconfiguration of private easements that may be shown on an existing subdivision plat does not require a replat under ORS 92.185.

Petitioners' strongest argument to the contrary is based on ORS 92.185(6), which requires that a replat comply with other "regulations adopted under this chapter." As the argument goes, this would include the requirement of ORS 92.050(6), that proposed private easements be shown on a subdivision plat. *See* n 9. However ORS 92.185(6) does not conflict with intervenors' reading of ORS 92.185 that *existing* private easements may be revised without approving those revisions as a replat. ORS 92.185(6) apparently would require that a proposal to reconfigure previously platted "lots, parcels and public easements" also include *new* proposed private easements, but only if new proposed private easements are proposed as part of such a proposal to reconfigure previously platted lots, parcels or public easements. However, ORS 92.185(6), like the other provisions of ORS 92.185, simply does not apply when the *only* action proposed is a modification of existing private easements, because such actions fall outside the scope of the act of replatting under ORS 92.185.

Petitioners also include argument that it is poor public policy to allow private sewer easements to be revised as a private matter between the private parties having a legal interest in the easements, because designing a subdivision to ensure adequate treatment of domestic sewage is a central concern of subdivision regulations, and a justification for adopting such regulations in the first place. Petitioners' public policy argument is not without merit. However, it provides no basis for reading a requirement into the relevant statutes that is not stated in the language of those statutes.[14]

[14]Although we need not and do not reach the question here, we see no reason why a city or county could not impose a subdivision condition of approval or adopt subdivision regulations that restrict private parties' ability to revise private easements that are shown on a subdivision plat without further review and approval by the city or county. The question presented in this appeal is whether ORS 92.185 and related statutes impose that requirement.

The city erred in relying on ORS chapter 92 to require that intervenors submit an application for approval of a replat to achieve their desired reconfiguration of the easements for lots 3 and 11-13. Because neither the decision nor the parties identify any legal basis for requiring intervenors to seek a replat to amend the private easements, the city's decision is reversed.[15]

[15]Because we reverse on the cross-petition for review, we do not consider the petition for review.