

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 KURAHASHI PARTNERS,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF BEAVERTON,
10 *Respondent,*

11
12 and

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14 POLYGON NORTHWEST COMPANY,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2003-208

18
19 FINAL OPINION
20 AND ORDER

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22 Appeal from City of Beaverton.

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24 William C. Cox and Gary P. Shepherd, Portland, filed the petition for review. Gary P.
25 Shepherd argued on behalf of petitioner.

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27 Alan A. Rapplelea, City Attorney, filed a response brief and argued on behalf of
28 respondent.

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30 Dana L. Krawczuk, Portland, filed a response brief. With her on the brief was Ball Janik
31 LLP. Jack Orchard argued on behalf of intervenor-respondent.

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

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36 AFFIRMED

04/30/2004

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

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NATURE OF THE DECISION

Petitioner appeals a city planning commission decision approving a modification to a previously approved preliminary subdivision plat.

REPLY BRIEF

Petitioner moves to file a five-page reply brief to address respondents’ arguments that (1) petitioner waived the issue that forms the basis for petitioner’s appeal, and (2) the city did not err in accepting and approving intervenor’s application without petitioner’s consent. The city concedes that petitioner may file a reply brief to respond to waiver arguments, but contends that in the remainder of the reply brief petitioner merely expands upon arguments set out in the petition for review. The city argues that petitioner may not submit a reply brief to expand the arguments made in the petition for review.

OAR 661-010-0039 provides, in relevant part that “[a] reply brief shall be confined solely to new matters raised in the [response] brief[s].” We agree with the city that the portion of petitioner’s reply brief that addresses respondents’ waiver arguments is the proper subject of a reply brief, and that the remainder of the reply brief inappropriately expands on arguments presented in the petition for review. Accordingly, we shall consider only that portion of the reply brief that addresses respondents’ waiver arguments.

FACTS

In 2002, intervenor-respondent (intervenor) applied for, and received, preliminary subdivision plat approval. The approved preliminary subdivision plat inadvertently included a portion of petitioner’s property and, as a result, a proposed road included in the preliminary plat approval (Barrows Road) encroached on a .07-acre segment of petitioner’s property. In 2003, the mistake was discovered, and intervenor initiated a process to modify its preliminary subdivision plat approval to remove petitioner’s property from its subdivision plat. Petitioner proposed two alternative street alignments to remedy the Barrows Road encroachment; intervenor proposed

1 another alternative alignment. In response to staff comments that indicated the three proposed
2 alignments were less optimal than the alignment approved in the 2002 preliminary plat, the planning
3 director approved an alignment that crosses petitioner's property in essentially the same
4 configuration that was approved in 2002. In addition, the planning director adopted a condition of
5 approval that recommended that the city initiate proceedings to acquire petitioner's property
6 through eminent domain if intervenor and petitioner could not reach an agreement regarding
7 intervenor's purchase of petitioner's property. Record 32, 37, 47.

8 Petitioner appealed the planning director's decision to the city planning commission. In the
9 proceedings before the planning commission, petitioner again argued in favor of its proposed
10 alignments. The planning commission affirmed the planning director's decision, and adopted a
11 condition of approval requiring that intervenor obtain the requisite land for right-of-way
12 improvements and, if necessary, allowing the use of the city's eminent domain powers to acquire the
13 necessary portion of petitioner's property. Record 6.

14 This appeal followed.

15 **ASSIGNMENT OF ERROR**

16 Petitioner argues that Beaverton Development Code (BDC) 40.45.15.3.D provides that the
17 city will accept an application only if the "owner" signs the appropriate application and files that
18 application with the planning director. Petitioner contends that the city may not approve an
19 application that requires improvements over property not owned by the applicant, when the owner
20 of the property where the improvements will be located does not join in the application or consent
21 to the improvements. The city first argues that the issue is waived because petitioner did not raise
22 the issue regarding compliance with the city's application requirements during the proceedings
23 before the planning commission.

24 **A. Waiver**

25 ORS 197.763(1) provides

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

7 ORS 197.835(3) provides that LUBA may review only those issues that were “raised by any
8 participant before the local hearings body as provided by ORS * * * 197.763 * * *.”

9 According to the city, there is no dispute that petitioner argued that its proposed alignments
10 were adequate to satisfy city street design standards and that petitioner opposed any decision that
11 resulted in the taking of its property. However, the city contends that petitioner never alleged the
12 sole error that petitioner now argues requires reversal of the city’s decision. The city argues that
13 ORS 197.763(1) and 197.835(3) require that LUBA affirm the city’s decision, because petitioner
14 failed to raise before the city the only issue that supports petitioner’s contention that the city’s
15 decision should be reversed.

16 Petitioner responds that it is entitled to raise the issue regarding the ownership requirement
17 before LUBA because (1) BDC 40.45.15.3.D was not listed as an applicable approval criterion for
18 the application, and (2) the notice of the planning commission’s hearing did not reasonably describe
19 the decision that was ultimately adopted by that body.

20 ORS 197.835(4) provides that a petitioner may raise new issues in a petition for review
21 before LUBA if:

22 “(a) The local government failed to list the applicable criteria for a decision under
23 ORS * * * 197.763 (3)(b), in which case a petitioner may raise new issues
24 based upon applicable criteria that were omitted from the notice. However,
25 the board may refuse to allow new issues to be raised if it finds that the
26 issue could have been raised before the local government; or

27 “(b) The local government made a land use decision or limited land use decision
28 which is different from the proposal described in the notice to such a degree
29 that the notice of the proposed action did not reasonably describe the local
30 government’s final action.”

1 The city argues that petitioner could have raised the issue before the local government,
2 because petitioner appealed the planning director’s decision to the planning commission and
3 therefore was put on notice that the city was contemplating reapproval of the original tentative
4 subdivision plat.¹ Because the city was considering reapproval of the original subdivision plat and
5 petitioner was aware of that fact, the city contends that petitioner should have presented its
6 argument regarding the application signature requirements to the planning commission, rather than
7 wait to raise that issue for the first time before LUBA.

8 The fact that the city was considering the action it ultimately took does not mean that
9 petitioner was put on notice of a criterion that might require petitioner’s signature on the application
10 and thereby prevent that action. Here, if petitioner is correct, petitioner’s refusal to agree to join in
11 the application would preclude the city from approving the modification. In that circumstance,
12 petitioner need not have raised an issue with respect to BDC 40.45.15.3.D in order to raise an
13 issue regarding compliance with that criterion for the first time before LUBA.

14 **B. BDC 40.45.15.3.D**

15 BDC 40.45.15.3.D(1) provides in relevant part that

16 “[a]n application for a Preliminary Subdivision shall be made by the *owner* of the
17 subject property, or the owner’s authorized agent, on a form provided by the
18 Director * * *.” (Emphasis added.)

19 BDC Chapter 90 defines “owner” as

20 “[t]he owner of record of real property as shown in the records of Washington
21 County Department of Records and Elections, or a person purchasing a piece of
22 property under contract, or a public body or public agency with authority to
23 exercise the power of eminent domain which has formally enacted a resolution of its
24 intent to acquire the property described in the application.”

25 As we stated above, petitioner argues that the city may not modify a subdivision application
26 to require improvements over property not owned by the applicant, when the owner of the property

¹ The city does not argue that BDC 40.45.15.3.D is not an approval criterion within the meaning of ORS 197.763(4)(a).

1 where the improvements will be located does not join in the application or consent to the
2 improvements. In support of this argument, petitioner cites to *Baker v. Washington County*, ___ Or
3 LUBA ___ (LUBA No. 2003-177, March 11, 2004), where we held that, under the Washington
4 County Community Development Code, the county could not approve an application for a
5 modification to a partition plat approval and development permits that had not been joined in by all
6 of the property owners.

7 The city and intervenor (respondents) argue that *Baker* is inapposite, because in this case, it
8 is undisputed that intervenor’s modification application included only intervenor’s property.
9 Respondents argue that the planning director imposed a condition of approval that requires use of
10 petitioner’s property and the planning commission affirmed the planning director’s decision.
11 Respondents argue that the city is not precluded from approving an application, with conditions, that
12 require the acquisition and improvement of other property in the future in order to fully develop the
13 property in a manner that satisfies city standards.

14 We agree with respondents that *Baker* is distinguishable. *Baker* involved a county decision
15 that approved road improvements over an easement. Petitioners, the owners of the underlying fee,
16 did not join in the application that resulted in the challenged approvals. In that case, the applicant-
17 easement holders applied for permits to develop the easement, without the petitioners’ consent. In
18 those circumstances, where the county code required that *all* owners of property that was subject
19 to a development permit join in the application, we concluded that the county could not consider the
20 application where it was clear that not all of the owners joined in the application.

21 Here, petitioner does not dispute that intervenor applied for and advocated for a
22 modification to its subdivision plan approval that would remove the Barrows Road alignment from
23 petitioner’s property. It was the city that imposed conditions of approval that require acquisition of
24 petitioner’s property to ensure that applicable development standards are met. We agree with
25 respondents that BDC 40.45.15.3.D(1) does not require petitioner’s signature on intervenor’s

1 modification application, because intervenor's application did not propose acquisition of petitioner's
2 property. Petitioner advances no other basis to reverse or remand the challenged decision.

3 Petitioner's assignment of error is denied.

4 The city's decision is affirmed.