

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 BUTTE CONSERVANCY and ERIK NIELSEN,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF GRESHAM,
10 *Respondent,*

11 and

12
13
14 PERSIMMON DEVELOPMENT,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2005-150

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from City of Gresham.

23
24 Gary P. Shepherd, Portland, filed the petition for review and argued on behalf of petitioners.

25
26 David R. Ris, Senior Assistant City Attorney, Gresham, filed a joint response brief and
27 argued on behalf of respondent. With him on the brief were John M. Junkin and Bullivant Houser
28 Bailey, PC.

29
30 John M. Junkin, Portland, filed a joint response brief and argued on behalf of intervenor-
31 respondent. With him on the brief were David R. Ris and Bullivant Houser Bailey, PC.

32
33 BASSHAM, Board Member; DAVIES, Board Chair; HOLSTUN, Board Member,
34 participated in the decision.

35
36 REMANDED

01/26/2005

37
38 You are entitled to judicial review of this Order. Judicial review is governed by the
39 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a city decision approving a planned unit development.

MOTION TO INTERVENE

Persimmon Development (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is granted.

MOTION TO FILE REPLY BRIEF

Petitioners move to file a reply brief to address new matters raised in the response brief. The reply brief responds to a waiver argument in the response brief, which is a proper subject of a reply brief. The motion is granted.

FACTS

The challenged decision approves an 86-lot planned unit development on 69.5 acres in the City of Gresham near unincorporated areas of Clackamas and Multnomah Counties. The proposed development is phases 6, 7 and 9 of a larger development that includes adjoining property. Much of the subject property is steeply sloped and heavily wooded. The property's zoning is Low Density Residential District (LDR) with a Hillside Physical Constraint Overlay District (HPCD).

Among other things, the approval includes a major variance to allow two cul-de-sacs of over 200 feet in length, a tree removal permit to log approximately 1800 regulated trees, and the relocation of a future street connection through an existing residential lot. Petitioners opposed the development before the planning commission, which approved the application. Petitioners appealed the planning commission's decision to the city council, which denied the appeal and approved the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

The decision grants a major variance for two cul-de-sacs that exceed the city's maximum length. The proposed Street A cul-de-sac is 390 feet in length. The proposed Street C cul-de-sac

1 is 620 feet in length. To obtain a major variance, City of Gresham Community Development Code
2 (CDC) requires a demonstration that all four criteria of CDC 10.150 be satisfied and one of the two
3 criteria of CDC 10.1530 be satisfied. Petitioners challenge the city’s findings of compliance for
4 each of the five approval criteria.

5 **A. CDC 10.1530(A)**

6 The city approved the variance under CDC 10.1530(A), which provides:

7 “The circumstances that apply to the site or to the present or permitted use of the
8 site do not typically apply to other properties in the same vicinity or land use district
9 and are unique or unusual[.]”

10 The city’s findings state:

11 “The circumstance that applies to the site, namely topographic constraints that do
12 not permit better connectivity of the local street system, do not typically apply to
13 other properties in the same land use district.” Record 54.

14 Petitioners argue that this finding is conclusory and fails to fully address both elements of
15 CDC 10.1530(A). According to petitioners, CDC 10.1530(A) requires a finding that the
16 circumstances justifying the variance are both (1) atypical and (2) unique or unusual. We agree with
17 respondents that the two alleged elements are essentially two ways of saying the same thing: the
18 circumstances must be unique or unusual rather than typical.

19 Petitioners next argue that there are no findings addressing other properties in the HPCD.
20 According to petitioners, the HPCD includes all areas of the city with slopes 15 percent or greater,
21 and the subject property is bordered by property to the north and west subject to the district.
22 Steep slopes are a common topographical limitation in the area, petitioners argue, and thus steep
23 slopes cannot justify a variance under CDC 10.1530(A).

24 As we understand the city’s findings, the “topographic constraint” that constitutes the unique
25 or unusual circumstance is not steep slopes *per se*, but the fact that the flatter, buildable (<15%)
26 portions of the property are scattered along a ridge, and those buildable portions can be accessed
27 only by cul-de-sacs that exceed the maximum length normally allowed. Without the variance, the
28 city found, “development of significant portions of the property with slopes less than 15% would not

1 be possible.” Record 54. Petitioners cite to nothing in the record indicating that that circumstance
2 is typical on other lands in the vicinity or subject to the HPCD. However, respondents cite us to
3 nothing in the record establishing the contrary. We agree with petitioners that the city’s finding
4 under CDC 10.1530(A) is conclusory and inadequate. CDC 10.1530(A) requires at least a
5 general description of the “other properties in the same vicinity or land use district” and some
6 explanation for why the particular circumstances that apply to the subject site are atypical, unique or
7 unusual, compared to other properties in the same vicinity or district. That description and
8 explanation are missing.

9 This subassignment of error is sustained, in part.

10 **B. CDC 10.1510(A)**

11 CDC 10.1510(A) requires a showing that:

12 “The need for the variance does not result from prior actions of the applicant or
13 owner, or from personal circumstances of the applicant or owner, such as financial
14 circumstances.”

15 The city’s findings state:

16 “The proposed variance does not result from any prior actions of the applicant, nor
17 does it result from financial or other personal circumstances of the applicant. * * *
18 Due to the steep topography of the development site, connecting these cul-de-sacs
19 to other streets (thus eliminating the ‘dead end’ nature of the streets) is impractical.
20 * * * these dead-end streets are the only means to access land that is less than 15%
21 slope.” Record 53.

22 Petitioners argue that the city’s findings fail to address the prior actions of the applicant in
23 developing earlier phases of the larger subdivision, which dictated the land use pattern for the
24 subject property. In addition, petitioners argue that the applicant was well aware of the
25 topographical constraints when it purchased the subject property, and that knowledge should be a
26 basis to deny a variance under CDC 10.1510(A). With respect to personal and financial
27 circumstances, petitioners contend that the variances essentially allow the applicant to develop 11

1 lots more than could be developed without a variance, and thus the purpose of the variance is
2 simply to increase the applicant’s profits.¹

3 Respondents argue, and we agree, that the topographic constraints—the inaccessibility of
4 some of the flatter, buildable portions of the property without cul-de-sacs—is not a function of the
5 applicant’s prior development. We also agree that the applicant’s prior awareness of the property’s
6 topography is not a basis to deny a variance under CDC 10.1510(A). In any case, as respondents
7 point out, when the applicant purchased the property the maximum length of a cul-de-sac under the
8 city code was 600 feet, later changed to 200 feet. Finally, we agree with respondents that the
9 topographic constraints that limit development of the subject property are not “personal
10 circumstances of the applicant or owner, such as financial circumstances,” within the meaning of
11 CDC 10.1510(A). The cited topographic constraints would apply to any developer or landowner,
12 regardless of personal or financial circumstances.

13 This subassignment of error is denied.

14 **C. CDC 10.1510(B)**

15 CDC 10.1510(B) requires a showing that:

16 “To meet the need, the request is the minimum necessary variation from the [CDC]
17 requirement.”

18 The city’s findings state:

19 “The proposed dead-end streets extend only as far as necessary to access
20 developable portions of the property, including significant sections of the property
21 that are under 15% slope.” Record 53

¹ Petitioners also argue that the city’s findings are inconsistent with respect to topographic constraints, citing to a finding that “topographic constraints are not a reason to allow a variance” with respect to SE Yellowhammer Road. Record 50 (quoted more fully at n 2, below). We do not understand the argument. As far as we can tell, the cited finding simply states that SE Yellowhammer Road is necessary to meet the connectivity requirements of CDC 9.0710(A), there is no request for a variance to avoid constructing SE Yellowhammer Road and, in any case, topographic constraints would not be a basis to allow such a variance, if one were requested, apparently because the grade is only eight percent where the road connects with the existing public street. We do not see the findings with respect to SE Yellowhammer Road and the two disputed cul-de-sacs are inconsistent.

1 Petitioners argue that in a prior variance decision a city hearings officer interpreted
2 CDC 10.1510(B) to require a demonstration that a variance is needed to meet the minimum
3 residential requirements. According to petitioners, the minimum residential density for the subject
4 property is 75 lots. Petitioners cite to evidence that the applicant could develop 75 lots without
5 either of the two requested variances. Therefore, petitioners argue, the city cannot find that the
6 variance to the cul-de-sac length requirement is the “minimum necessary variation.”

7 Respondents argue that cited hearings officer’s decision involved a city policy that is no
8 longer in place and does not apply to the subject development. In any case, respondents contend, a
9 hearings officer’s interpretation in an unrelated decision does not control the present decision. We
10 agree with respondents. The findings adopted by the city council in the present case treat
11 compliance with CDC 10.1510(B) as a matter of whether the variance—here, the length of the cul-
12 de-sac—is the minimum necessary to access the developable areas of the property, not whether the
13 variance is the minimum necessary to meet residential density requirements. Petitioners do not
14 dispute the city council’s finding that the proposed “streets extend only as far as necessary to access
15 developable portions of the property[.]” That finding is sufficient to establish compliance with
16 CDC 10.1510(B).

17 This subassignment of error is denied.

18 **D. CDC 10.1510(C)**

19 CDC 10.1510(C) requires a showing that:

20 “There are development constraints associated with the property, or the present use
21 or permitted use of the property, which make development of a permitted use
22 impractical; or the variance is needed to allow the applicant to enjoy a substantial
23 property right possessed by a majority of property owners in the same vicinity.”

24 The city’s findings state:

25 “ * * * there are severe topographic constraints associated with the property that
26 do not allow connection of the proposed dead-end streets with another street.
27 Thus, without the variance for the dead-end street lengths, development of
28 significant portions of the property with slopes less than 15% would not be
29 possible.” Record 53-54.

1 Again, the city’s findings state that development of the flatter portions of the property would
2 not be possible without the variance for longer cul-de-sacs because of topographical circumstances.
3 Those circumstances are “constraints associated with the property” that make “development of a
4 permitted use impractical[.]” Petitioners repeat their argument that 75 lots could be developed
5 without a variance, and argue that “development of the permitted use” is thus not impractical.
6 However, the city council obviously views CDC 10.1510(C) as allowing a variance where the
7 variance is necessary to develop a “significant portion” of the property. Petitioners have not
8 established that that view of CDC 10.1510(C) is inconsistent with the language, purpose or
9 underlying policy of that code provision.

10 This subassignment of error is denied.

11 **E. CDC 10.1510(D)**

12 CDC 10.1510(D) requires a showing that:

13 “The purposes of the [CDC] and the applicable policies of the Community
14 Development Plan would be equally met or advanced by a variation from the
15 development requirement.”

16 The city’s findings state:

17 “[CDC] 2.002 sets forth broad purpose statements addressing issues such as the
18 general public welfare, the character and stability of the City, adequate public
19 facilities, orderly future growth and development, etc. There is also policy language
20 advocating the compatibility of new development with existing patterns of
21 development. Purpose statement (G) is the most pertinent to the standard in
22 question:

23 ““To provide the most beneficial relationship between the uses of land and
24 buildings and the circulation of traffic throughout the City by promoting a
25 variety of transportation choices including walking, bicycling, transit and
26 automobile and be reducing parking space requirements, with particular
27 regard to the avoidance of congestion in the streets and highways as well as
28 pedestrian traffic movements appropriate to the various uses of land and
29 buildings, and to provide for the proper location and width of streets and
30 building lines.’

31 “This provides some of the background for the maximum permanent dead-end
32 street standard of 200 feet. However, the standard did not expressly take into

1 consideration physical constraints such as steep topography. The findings of this
2 staff report indicate that the development, with dead-end streets in excess of 200
3 feet, will have adequate public facilities service. Further the allowance of the
4 variance will permit the remainder of the development to meet the required minimum
5 density while providing lots that are comparable in size to the approved lots to the
6 north.

7 “Taken as a whole, the purposes of the [CDC] and the applicable policies of the
8 Community Development Plan are equally met or advanced by the variation from
9 the development requirement restricting land division to permanent dead-end streets
10 200 feet or less in length.” Record 54.

11 As the above-quoted findings indicate, CDC 10.1510(D) is an inherently nebulous
12 standard, which may require balancing what could be a number of broad policy or purpose
13 statements. The gist of the city’s finding of compliance with CDC 10.1510(D) is that the main
14 purpose of the 200-foot cul-de-sac length requirement is to ensure adequate public services, and
15 according to the staff report that purpose is equally met with the variance. Petitioners cite to
16 testimony from opponents that cul-de-sacs slow emergency response times, and that long, steep
17 road grades are dangerous. The challenged variances do not involve road grades, and there is
18 substantial evidence supporting the city’s finding with respect to public services, including
19 emergency response times. Petitioners have not demonstrated that the city erred in finding
20 compliance with CDC 10.1510(D).

21 This subassignment of error is denied.

22 The first assignment of error is sustained, in part.

23 **SECOND ASSIGNMENT OF ERROR**

24 The city required secondary access to the subdivision, as necessary to approve the planned
25 unit development, and the applicant proposed SE Yellowhammer Road as secondary access.² As

² The city’s findings explain the necessity of the SE Yellowhammer Road access:

“Preclusion of the future connection to SE Yellowhammer Road will result in criteria 9.0710(A)(2)-(4) not being met. Further, the lack of connectivity to SE Yellowhammer Road will result in a permanent dead-end street system in excess of 200 feet in length, thereby also not complying with the standards of Section A5.402(F). A Major Variance has not been applied

1 proposed, SE Yellowhammer Road extends south of the subject property through an existing
2 undeveloped residential lot in adjoining Kingswood Heights subdivision. Accordingly, the city
3 imposed Condition of Approval 7 requiring that the applicant submit as part of final plat documents:
4 (1) a 20-foot wide right of way or easement for SE Yellowhammer Road, (2) construction plans for
5 the road, and (3) a street construction permit from Clackamas County, which has jurisdiction over
6 the public street SE Yellowhammer Road would connect to.

7 Petitioners contend, however, that use of lots within Kingswood Heights for secondary
8 access is prohibited by the subdivision restrictions controlling that subdivision, and therefore the
9 city's decision that SE Yellowhammer Road can provide necessary access is not supported by
10 substantial evidence. According to petitioners, the Kingswood Heights subdivision restrictions
11 recorded with Clackamas County prohibit the use of land within the subdivision for anything but
12 single-family dwellings and further restrict tree cutting without prior written consent of the
13 homeowners association.³ Petitioners argue that there is no basis in the record to believe that the
14 homeowners association would approve the tree cutting necessary to construct an access road that
15 is not permitted within the subdivision.

16 Respondents first argue that alleged violations of private covenants, conditions, and
17 restrictions (CC&Rs) cannot serve as a basis for reversal or remand. Respondents are correct that
18 the fact that proposed development may be inconsistent with CC&Rs, in and of itself, provides no
19 basis for reversal or remand. *Long v. Marion County*, 26 Or LUBA 132, 136 (1993). That is

for the full Persimmon Phases 79 development in regards to the standards of Section A5.402(F), which would allow the preclusion of a public road connection to SE Yellowhammer Road. As shown * * *, topographic constraints are not a reason to allow a variance to this standard. Therefore, the future connection to SE Yellowhammer Road is needed to comply with the criteria of Section 9.0710(A)(2)-(4) and Section A5.402(F)." Record 50.

³ The cited restrictions state:

- "3. No building or structure or land shall be used and no building or structure shall hereafter be erected, altered or enlarged in the subdivision except for single-family dwellings and accessory buildings * * *." Record 432.
- "15. No trees shall be cut without the written consent of the Board of Directors of the Kingswood Homeowners Association * * *." Record 434.

1 because CC&Rs generally are not approval criteria. Respondents, however, misunderstand the
2 nature of petitioners' challenge. Petitioners' assignment of error is not that the proposed
3 development violates the CC&Rs; petitioners argue that the proposed development violates CDC
4 9.0710(A)(2)-(4) and A5.402(F). There is no dispute that secondary access by way of SE
5 Yellowhammer Road is required to satisfy the CDC approval criteria. The city conditioned
6 approval upon obtaining secondary access by way of SE Yellowhammer Road. Petitioners argue
7 that, given the Kingswood Heights CC&Rs, there is no finding or evidence that it is feasible to
8 satisfy that condition of approval.

9 Respondents argue next that Condition of Approval 7 acts as a performance standard that
10 ensures that secondary access will be provided prior to final plat approval. According to
11 respondents, if for any reason secondary access is not provided, and the condition is not satisfied,
12 the city will not approve the final plat or allow the subdivision to be developed.

13 It is well established that a local government may find compliance with applicable criteria by
14 either (1) finding that an applicable approval criterion is satisfied, or (2) finding that it is feasible to
15 satisfy an applicable approval criterion and imposing conditions necessary to ensure that the
16 criterion will be satisfied. *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447 (1992). The city
17 attempted to find compliance with CDC 9.0710(A)(2)-(4) and A5.402(F) by imposing Condition
18 7, which states:

19 "In conjunction with the Phase 7 final plat submittal, the following shall be submitted:

20 "a. Documents for the dedication of the 20-foot wide right-of-way or easement
21 needed for the emergency road connection between the Persimmon
22 property and SE Yellowhammer Road, dedicated to Clackamas County by
23 separate instrument.

24 "b. Construction plans showing that the emergency road construction will have
25 an all-weather surface capable of supporting not less than 12,500 pounds
26 point load (wheel load) and 75,000 pounds live load (gross vehicle weight).

27 "c. A street construction and/or encroachment permit from Clackamas County
28 Engineering in accordance with the standards listed by Clackamas County *
29 * *." Record 131.

1 Neither Condition 7 nor any of the city findings cited to us discuss whether it is feasible to
2 obtain the required access. Petitioners raised the issue of the feasibility of providing secondary
3 access below, and presented evidence suggesting that such access may not be feasible. The city made
4 no effort to address those arguments. When an issue is raised regarding the feasibility of conditions
5 of approval to ensure compliance with approval criteria, the local government cannot simply ignore
6 the issue. Nor can the local government simply impose the disputed condition as a performance
7 standard and rely on a later staff review that does not provide notice and opportunity for hearing to
8 ensure compliance with approval criteria. *Hodge Oregon Properties, LCC v. Lincoln Cty.*, 194
9 Or App 50, 55-56 (2004) (county erred in imposing conditions requiring fire breaks and water
10 supply for a dwelling without finding those conditions feasible or providing notice and opportunity
11 for hearing where the issue of feasibility can be addressed); *Thomas v. Wasco County*, 30 Or
12 LUBA 302, 311 (1996) (imposition of conditions does not excuse the local government from first
13 establishing that the approval criterion can be satisfied). Remand is necessary for the city to address
14 the issue and either establish that providing secondary access is feasible or ensure that a forum with
15 notice and opportunity for hearing is provided to address that issue.

16 The second assignment of error is sustained.

17 **THIRD ASSIGNMENT OF ERROR**

18 CDC 5.0232 provides “[a]ny removal of trees which would result in clear cutting is
19 prohibited on land within the [HPCO].”⁴ CDC 3.0010 defines “clear cutting” as:

20 “Any tree removal which leaves fewer than an average of one tree per 1,000 square
21 feet of lot area, well distributed throughout the entirety of the site. * * *.”

22 In order to determine whether a proposed development meets the requirements of CDC
23 5.0232, the city requires an applicant to submit data regarding its tree removal plan. CDC 9.1011
24 provides:

⁴ CDC 9.1010(F) also provides that “[a]ll tree removal that would result in clear cutting on slopes in excess of 15% is prohibited.”

1 “An applicant for a development permit for tree removal shall provide a detailed
2 tree removal/tree protection plan. * * * The plan shall include the following basic
3 information:

4 “(A) A tree survey of regulated and/or significant trees on site * * *.”

5 CDC 3.0010 defines “tree survey” as:

6 “A drawing that provides the location of *all* trees having an eight inch or greater
7 DBH plotted by accurate techniques and designates the common or botanical name
8 of those trees, and their DBH.” (Emphasis added.)

9 As discussed earlier, the subject property is almost 70 acres. While the city required a tree
10 survey, it accepted a tree survey based on a one-acre sample of the property. Record 548. That
11 sample found 65 regulated trees on one acre, and extrapolated from that number to conclude that
12 there are 4,093 regulated trees on the 70-acre property. The county found, based on that sample,
13 that the proposal would remove 1,802 regulated trees on 20.77 acres, which petitioner asserts
14 leaves barely enough trees to avoid “clear-cutting” as the CDC defines that term.

15 Petitioners argue that the plain language of the CDC requires that the applicant survey *all*
16 trees on the property, and does not permit extrapolation from a sample of 1/70th of the property.
17 Respondents argue that the city’s routine practice is to allow sample surveys for larger properties,
18 and not require applicants to survey the entire property. In any case, respondents argue, removal of
19 trees necessary to accomplish a “public purpose,” including installation of public facilities and utilities
20 in a right-of-way, is permitted under CDC 9.1012(3).

21 We agree with petitioner that the plain language of the CDC requires a survey of all trees
22 exceeding a certain diameter on the property, not a sample representing 1/70th of the property.
23 That the city’s practice is not in accord with the CDC is not a basis to ignore the code requirements.
24 The city’s desire to avoid what may be in some cases an unnecessary expense to the applicant is
25 understandable. Even if that desire were a basis to vary the code requirement in some cases,
26 however, the present case would not seem an appropriate one. As petitioners point out, the
27 extrapolated sample indicates that, at best, the proposal will barely avoid the prohibition on clear-
28 cutting. There is no evidence in the record, however, as to how that sample was selected, whether

1 it is representative of the property as a whole, or whether the trees that are “eight-inch or greater
2 DBH” are uniformly distributed on the property. Under these circumstances, the city’s confidence
3 in the accuracy of a one-acre sample of a 70-acre parcel seems misplaced.

4 With respect to CDC 9.1012(3), the city did not adopt findings regarding that provision, at
5 least none cited to us, or otherwise adopt the position respondents take on appeal. We understand
6 respondents to argue that CDC 9.1012(3) acts as a limited exception to the CDC 5.0232
7 prohibition on clear-cutting. While that seems an unlikely reading of the code, the city may wish to
8 address that issue on remand.

9 The third assignment of error is sustained.

10 **FOURTH ASSIGNMENT OF ERROR**

11 Petitioners argue that the decision fails to show compliance with CDC 6.0323(B), which
12 requires that:

13 “The following topographic feature, natural resource and other features shall be
14 mapped and identified:

15 “* * * * *

16 “(2) Other natural features.

17 “(a) Trees with a circumference of 25 inches or greater measured at a
18 point 4.5 feet above ground on the upslope side of the tree.”

19 Respondents respond that petitioners waived the issue because they failed to raise it below.
20 ORS 197.763(1); 197.835(3).⁵ As discussed in the third assignment of error, petitioners argue

⁵ ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to [LUBA] 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:

1 that the tree sample survey used by the city was inadequate under CDC 9.1011. Petitioners raised
2 specific issues under CDC 9.1011; however, we are not cited to any place in the record where
3 issues were raised under CDC 6.0323(B)(2)(a).

4 Petitioners argue that because the staff report addressed CDC 6.0323(B)(2)(a), that is
5 sufficient to avoid waiver under ORS 197.763(3) and 197.835(3). We disagree. The staff report
6 did not raise any cognizable “issue” under CDC 6.0323(B)(2)(a), and certainly not the issue that
7 petitioners raise under this assignment of error. To avoid waiver, the issue must be “raised and
8 accompanied by statements or evidence sufficient to afford the governing body, planning
9 commission, hearings body or hearings officer, and the parties an adequate opportunity to respond”
10 to the issue. ORS 197.763(1). A finding in a staff report that a criterion is satisfied is insufficient to
11 “raise” an “issue” with respect to that criterion, for purposes of ORS 197.763(1) and 197.835(3).
12 No party to the proceedings below would understand from the staff report that an issue has been
13 raised regarding compliance with CDC 6.0323(B)(2)(a).

14 We also understand petitioners to argue that raising an issue under CDC 9.1011 is sufficient
15 to raise the same issue under CDC 6.0323(B)(2)(a). Again, we disagree. While CDC 9.1011 and
16 CDC 6.0323(B)(2)(a) impose nearly identical requirements, raising an issue under one code
17 provision does nothing to apprise the decision maker and other parties that petitioners wish to raise
18 the same issue under a separate, unidentified code provision.⁶

19 The fourth assignment of error is denied.

20 The city’s decision is remanded.

“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.”

⁶ As a practical matter, however, the survey that the city must require on remand under CDC 9.1011 will almost certainly include the information required by CDC 6.0323(B)(2)(a).