BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TIMOTHY CULLIGAN,
*Petitioner,*

vs.

WASHINGTON COUNTY,
*Respondent,*

and

TOUCHMARK HEIGHTS, LLC,
*Intervenor-Respondent.*

LUBA No. 2008-038

FINAL OPINION
AND ORDER

Appeal from Washington County.

Gary P. Shepherd, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Oregon Land Law.

No appearance by Washington County.

Timothy V. Ramis, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief were William A. Monahan and Jordan Schrader Ramis PC.

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

REMANDED 09/05/2008

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

Opinion by Bassham.

**NATURE OF THE DECISION**

Petitioner appeals the county's approval of applications for a 63-lot single family subdivision and development review approval for 99 attached units within a planned unit development.

**FACTS**

The challenged decision concerns two different aspects of the greater Touchmark Heights development. The decision approves phase II, which is a 63-lot single family subdivision and 96 attached units for a total of 159 dwelling units on 24 acres. The decision also approves modifications to phase I, which approved a planned unit development that will include 628 dwelling units over approximately 53 acres. The proposed developments are for an active adult community to be occupied by senior citizens. The proposed access to the development includes a new private road that connects to a public right of way by crossing a portion of an existing private road, Briar Lane, pursuant to an easement over Briar Lane. Intervenor has permission to construct the new private road from most of the affected property owners. The hearings officer approved the applications over petitioner's objections. This appeal followed.

**MOTION TO FILE REPLY BRIEF**

Petitioner moves to file a reply brief to address intervenor-respondent's (intervenor) argument that petitioner waived his first assignment of error by not preserving the argument below. Waiver is an appropriate basis for filing a reply brief. *Caine v. Tillamook County*, 24 Or LUBA 627 (1993). The motion to file a reply brief is granted.

**FIRST ASSIGNMENT OF ERROR**

The parties do not spend a great deal of time discussing why the proposed development must have access at Briar Lane or what Washington County Community Development Code (CDC) provisions the access is designed to satisfy. There does not,

however, appear to be any dispute between the parties that access at Briar Lane is necessary to obtain approval of the development, and we assume that to be the case.

The proposed private road to access the development crosses a small portion of Briar Lane, which is an existing private road that serves less than 20 acres of land based on reciprocal easements. While intervenor has secured ownership or consent from the owners of property on much of Briar Lane to use the easement to access the development, it is undisputed that intervenor has not obtained ownership or consent from the owners of tax lot 4700, which must be crossed to connect the proposed private road to the public right of way. Petitioner argues that without consent from the owners of tax lot 4700, the proposed private road cannot be built. Intervenor argues that the scope of the easement allows it use Briar Lane with or without the consent of the owners of tax lot 4700.

In addition to responding on the merits, intervenor argues that petitioner may not raise this argument at LUBA because he failed to preserve the issue by raising it below before the hearings officer.[1] In *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991), the Court of Appeals stated that to preserve an issue for appeal under ORS 197.763(1) "requires no more than fair notice to adjudicators and opponents, rather than the particularity that inheres in judicial preservation concepts." Petitioner cites: (1) Record 79 where opponents below argued that intervenor could not use the easement without the

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[1] 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:

> "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."

consent of all owners; (2) Record 201 where opponents below argued that intervenor did not own property to allow it to reconfigure the private road; and (3) Record 17 where the hearings officer lists applicable issues as including "[a]dequacy and safety of access from Leahy Road and Leahy/Briar intersection" and "[o]wnership of Tax lots through which Briar Lane will be extended."

While intervenor is correct that petitioner's precise legal theory that the scope of the existing easement does not allow intervenor to use the easement for such a large development was not clearly articulated below, we believe the issue of the adequacy of the easement was sufficiently raised below to give fair notice to the hearings officer and the parties that the issue should be considered. Furthermore, the hearings officer did address the issue of adequate access by way of the easement in her findings, as we quote later. Petitioner did not waive the right to raise the issue that is presented in the first assignment of error.

The hearings officer's finding regarding the scope of the easement states:

> "According to the applicant's attorney, the Briar Lane easement is a non-exclusive easement and the applicant has an express right to use it to develop the land. Any dispute over that right would have to be resolved in the courts rather than through this proceeding. *The approval of the proposed development assumes the applicant's right to use the easement*." Record 33 (emphasis added).

Petitioner argues that the above-quoted finding is not supported by substantial evidence because the hearings officer merely assumes that the approval criteria that require access by way of Briar Lane are satisfied. According to petitioner, opponents argued below that access through Briar Lane was not legally possible and that the applications should be denied for that reason. Petitioner cites *Meyer v. City of Portland*, 67 Or App 274, 280 n5, P2d (1984) for the proposition that intervenor must "demonstrate it is likely and reasonably certain that the applicant has the right to construct an access road" across Briar Lane. Petition for Review 6.

Intervenor responds that it would have been inappropriate for the hearings officer to address the issue because the scope of the easement can only be legally determined in circuit court. Intervenor also responds that even if such a finding is required, it is supported by substantial evidence.

We recently addressed a similar situation in *Butte Conservancy v. City of Gresham*, 51 Or LUBA 194 (2006) (*Butte I*), and *Butte Conservancy v. City of Gresham*, 52 Or LUBA 550 (2006) (*Butte II*). In *Butte I*, the petitioners argued that proposed access to a subdivision through a lot in an adjoining subdivision was precluded because the adjoining subdivision's covenants, conditions, and restrictions (CC&Rs) prohibited the use of lots for access. The respondents argued, much as intervenor does here, that any dispute regarding CC&Rs could only be resolved in circuit court. We held that the respondents mischaracterized the issue as compliance with the CC&Rs rather than compliance with the applicable approval standards regarding, in that case, secondary access to the subdivision. We stated:

> "It is well established that a local government may find compliance with applicable criteria by either (1) finding that an applicable approval criterion is satisfied, or (2) finding that it is feasible to satisfy an applicable approval criterion and imposing conditions necessary to ensure that the criterion will be satisfied. *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447 (1992). The city attempted to find compliance * * * by imposing Condition 7.
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> "* * * * *
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> "Neither Condition 7 nor any of the city findings cited to us discuss whether it is feasible to obtain the required access. Petitioners raised the issue of the feasibility of providing secondary access below, and presented evidence suggesting that such access may not be feasible. The city made no effort to address those arguments. When an issue is raised regarding the feasibility of conditions of approval to ensure compliance with approval criteria, the local government cannot simply ignore the issue. Nor can the local government simply impose the disputed condition as a performance standard and rely on a later staff review that does not provide notice and opportunity for hearing to ensure compliance with approval criteria." *Butte I*, 51 Or LUBA at 204-05.

On remand, the city addressed the issue and again approved the subdivision, finding that the CC&Rs could be reasonably interpreted to allow access and in any event the city

could condemn the lot if necessary. In affirming the city's decision, we elaborated on the city's obligations when an issue is raised regarding the feasibility of compliance that involves a legal question where the courts, rather than the local government, have jurisdiction to resolve the issue:

> "In such circumstances, where neither the local government nor LUBA have jurisdiction to resolve the legal question, and that legal question must be resolved in a particular way to allow the condition to be fulfilled so that an applicable approval standard will be satisfied, neither the local government nor LUBA need engage in a detailed or definitive legal analysis. In our view, it is sufficient for the local government in such circumstances to (1) adopt findings that establish that fulfillment of the condition of approval is not precluded as a matter of law, and (2) ensure, in imposing the condition of approval, that the condition will be fulfilled prior to final development approvals or actual development." *Butte II*, 52 Or LUBA at 556.

Our analysis in *Butte II* appears to apply and control the present case. We disagree with petitioners that the county was required, under *Meyer*, to evaluate the scope of the easement and find that it is "possible, likely, and reasonably certain" that the easement allows intervenor to construct the access road. *Meyer* involved issues raised regarding the technical or engineering feasibility of constructing facilities required by the applicable land use regulations, not with legal uncertainties that were beyond the city's jurisdiction to resolve. In the present circumstances, we believe it is sufficient for the city to find that the access road is not precluded as a matter of law and to impose any conditions of approval necessary to ensure that legal uncertainty over the access road is resolved prior to final development approvals or actual development.

Here, the hearings officer merely assumed that intervenor will prevail in any legal proceeding to determine the scope of the easement.[2] More importantly, intervenor does not

[2] Intervenor argues that there is evidence in the record that would support a finding that the access road is not precluded as a matter of law, citing to the deed to the property containing the grant of easement, a letter from county counsel that the easement can be used for access, and a letter provided by intervenor's planner that the access requirements were satisfied by the easement. We generally agree that such evidence is probably sufficient to support a finding that the access road is not precluded as a matter of law, if the hearings officer had addressed the issue and made such a finding. However, for the reasons stated in the text, remand is necessary

cite to any conditions of approval that purport to ensure that any dispute over the scope of the easement is resolved in intervenor's favor prior to final development approvals or actual development. We conclude that remand is necessary for the hearings officer to address the issue, adopt any necessary findings, and impose any necessary conditions of approval, consistent with the foregoing analysis.

The first assignment of error is sustained.

**SECOND ASSIGNMENT OF ERROR**

The proposed development is for senior housing. While the parties do not specifically discuss the applicable CDC provision regarding traffic impacts, the parties do not dispute that using reduced senior housing trip generation rates, the traffic impacts of the proposed development comply with applicable CDC standards, but that if normal residential trip generation rates are used, the traffic impacts of the proposed development would likely not comply with those standards. Petitioner argues that while it may be intervenor's intent to build senior housing, nothing in the decision ensures that the proposed residential units will actually be used for senior housing. According to petitioner, because the decision does not require or impose a condition of approval that limits use for senior housing, the traffic impact approval criteria are not satisfied.

The hearings officer's decision states:

> "Many questions have been raised about the trip generation data used to make the trip generation projections for this development. The ITE manual is the usual source for trip generation rates. In this case, the ITE manual rates for senior adult housing are substantially lower than for standard detached single-family housing.
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> "[T]he traffic projections are consistent with the forecasts of the ITE Manual. [T]he traffic projections show that the surrounding streets will have sufficient capacity at full build out of the proposed development (a 787 unit senior adult living community). [T]he proposed street improvements and circulation system will be safe and meet all requirements." Record 34.

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for other reasons and we therefore do not consider whether we could affirm the decision if the lack of a finding to that effect were the only identified flaw.

Petitioner relies on *Penland v. Josephine County*, 29 Or LUBA 213 (1995) and *Neste Resins Corp. v. City of Eugene*, 23 Or LUBA 55 (1992), for the proposition that nonbinding promises by an applicant to build a particular type of development are not a substitute for conditions of approval to ensure such development. Intervenor responds that *Penland* and *Neste Resins* are not controlling because neither of those cases involved applications that mentioned the specific development being proposed. Intervenor relies upon *NE Medford Neighborhood Coalition v. City of Medford*, 53 Or LUBA 277 (2007), for the proposition that when the application states that the proposed development is for a specific type of development specific, conditions of approval limiting the use to that proposed are not necessary. According to intervenor, because the application states that it is for senior housing, under *NE Medford Neighborhood Coalition* no conditions requiring senior housing are required.

We agree with intervenor that *NE Medford Neighborhood Coalition* is instructive. In that case, the applicant also sought to develop senior housing and relied upon the reduced trip generation for senior housing to meet traffic impact standards that would otherwise not be met. The applicant submitted a preliminary plan that proposed 105 units of senior housing, and the city approved that preliminary plan. The text of the approved preliminary plan itself limited the 105 units to senior housing. We held that a specific condition of approval to that effect was not necessary, particularly given that the final plan must be consistent with the approved preliminary plan. *Id*. at 288-89.

Reading the above cases together, we believe that an applicant's promise or statement regarding the proposed development is not an adequate substitute for a condition of approval that is necessary to ensure compliance with applicable approval criteria, even if that promise or statement occurs in the application narrative. However, where the promise or statement is embodied or found on the face of the plan that the decision approves, and any subsequent

approvals or permits must be consistent with that approved plan, we see no need for a specific condition of approval to that effect.

In the present case, unlike *NE Medford Neighborhood Coalition*, nothing cited to us in the approved subdivision plat or elsewhere in the decision requires intervenor to construct senior housing or imposes any constraint upon the sale or occupancy of the proposed housing units. We agree with petitioner that intervenor's mere intent to provide senior housing is insufficient to ensure that the development complies with the CDC traffic impact criteria.

The second assignment of error is sustained.

The county's decision is remanded.