

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

3
4 ERIC ARTNER CONSTRUCTION, INC.,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF TALENT,
10 *Respondent,*

11 and

12
13 MARY TSUI, ROSE MARIE DAVIS,
14 VERN DAVIS, FOREST DAVIS,
15 RON LAUPHEIMER and PHOEBE QUILLIAN,
16 *Intervenors-Respondents.*

17
18 LUBA No. 2008-063

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20 FINAL OPINION
21 AND ORDER

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23
24 Appeal from City of Talent.

25
26 Stephen Mountainspring, Roseburg, filed the petition for review and argued on behalf
27 of petitioner. With him on the brief was Dole, Coalwell, Clark, Mountainspring, Mornarich
28 & Aitken, PC.

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30 Kurt H. Knudsen, Ashland, filed a response brief and argued on behalf of respondent.

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32 Sydnee B. Dryer, Medford, filed a response brief and argued on behalf of intervenors-
33 respondents. With her on the brief was Huycke, O'Connor, Jarvis & Lohman.

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

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38 AFFIRMED

09/30/2008

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

NATURE OF THE DECISION

Petitioner appeals from a city’s denial of petitioner’s application for a planned unit development (PUD).

MOTION TO STRIKE PETITION FOR REVIEW

Intervenors-respondents (intervenors) move to strike portions of the petition for review that, intervenors allege, raise issues that were not raised below, and are therefore waived under ORS 197.763(1).

Petitioner responds that all the issues raised in the petition for review were raised below. We do not resolve that dispute here, because even if we conclude that certain issues raised in the petition for review are waived, the remedy is to deny the assignments of error based on those issues, not to “strike” portions of the petition for review. Therefore, the motion to strike portions of the petition for review is denied.

MOTION TO STRIKE CROSS-ASSIGNMENTS OF ERROR

Intervenors’ brief includes two cross-assignments of error, arguing that if the city’s decision denying petitioner’s application is remanded for any reason stated in the petition for review LUBA should require the hearings officer to address two additional errors alleged by intervenors. Specifically, the first cross-assignment of error argues that the hearings officer erred in concluding that the PUD application satisfied code density standards, while the second cross-assignment of error argues that the hearings officer erred in failing to address comprehensive plan criteria regarding agricultural buffers and transportation mitigation.

Petitioner moves to strike the cross-assignments of error, arguing that because the cross-assignments of error, if sustained, would result in remand, the cross-assignments of error can be raised only in a timely filed cross-appeal filed pursuant to OAR 661-010-0030(7). According to petitioner, a cross-assignment of error would be proper only if intervenors were seeking “to preserve the ultimate disposition of the challenged decision,” in

1 this case denial of the PUD application. Motion to Strike 2, *quoting Copeland Sand &*
2 *Gravel, Inc. v. Jackson County*, 46 Or LUBA 653, 661 (2004). Because intervenors’ cross-
3 assignments of error seek remand of the city’s decision, petitioner argues, they can only be
4 brought under a cross-appeal filed pursuant to OAR 661-010-0030(7).

5 Intervenor quote a different passage of *Copeland Sand & Gravel, Inc.*, to the effect
6 that a cross-assignment of error is proper when an intervenor-respondent asserts “a
7 contingent cross-assignment of error arguing that, if the decision is remanded for any reason
8 under the petition for review, LUBA should also order the decision maker to address or
9 correct an erroneous intermediate order or determination.” *Id.* at 666. According to
10 intervenor, because both cross-assignments of error seek remand only if the decision is
11 remanded under the assignment of error, the cross-assignments of error need not be presented
12 in a cross-appeal. Alternatively, intervenors argue that the cross-assignments of error
13 essentially do seek to preserve the ultimate disposition—denial of the PUD application—on
14 different grounds.

15 As our discussion in *Copeland Sand & Gravel, Inc* indicates, the issues that may be
16 raised and remedies sought in a cross-petition for review and in a cross-assignment of error
17 overlap considerably, and the differences between a cross-appeal and a cross-assignment of
18 error are subtle. We cautioned that “[i]n view of the many legal and factual variables that are
19 possible in a LUBA appeal, we do not attempt to * * * comprehensively address the
20 differences between cross petitions and cross-assignments of error in this opinion.” *Id.* at n
21 12. In the present case, we have no occasion to amplify our discussion in *Copeland Sand &*
22 *Gravel, Inc.*, because for the reasons discussed below we affirm the challenged decision and
23 therefore would not address intervenors’ cross-assignments of error in any event. The
24 motion to strike the cross-assignments of error is denied, as moot.

1 **MOTION TO FILE REPLY BRIEF**

2 Petitioner moves for permission to file a reply brief to respond to intervenors’ two
3 cross-assignments of error. The reply brief is allowed.

4 **FACTS**

5 Petitioner owns two contiguous tax lots, 1001 and 900, comprising roughly 39 acres.
6 Tax lot 1001 lies within the city of Talent. Lot 900 lies outside city limits. A railroad line
7 forms the northern boundary of tax lot 1001 and most of tax lot 900. North of the railroad
8 line is Talent Avenue, otherwise known as Old Pacific Highway. Tax lot 1001 has access
9 from Belmont Road, which runs south from Talent Avenue over a grade-level crossing of the
10 railroad along the west side of Tax lot 1001. Tax lot 900 is developed with a single family
11 dwelling, and for 87 years has had access at its northeast corner, crossing a portion of tax lot
12 500, and then over the railroad line to Talent Avenue. The southern boundary of tax lot 500
13 is aligned along the route of the Oregon-California Stage Road (Stage Road), which in the
14 1920s was relocated north of the railroad tracks to its current location along Talent Avenue, a
15 relocation intended to eliminate two railroad crossings. The current access for tax lot 900
16 runs along a short portion of the old Stage Road right of way then turns north and crosses tax
17 lot 500 and over the railroad at a grade-level crossing. The nature and scope of that access is
18 a disputed issue in this appeal.

19 On March 27, 2007, petitioner filed two applications with the city. The first
20 application sought to annex tax lot 900 into the city and rezone it from county Rural
21 Residential (RR-5) to city Residential-Single Family (RS-5). The second application sought
22 approval for a 152-lot PUD on tax lots 1001 and 900, later amended to 143 lots. The city
23 processed the applications separately, and on August 15, 2007, adopted Ordinance 07-834-O,
24 which declares the annexation and rezoning of tax lot 900. Section 5 of Ordinance 07-834-O
25 provides that the ordinance becomes effective “upon final approval” of petitioner’s PUD

1 “and upon provision of two legal access points accessible to the public.” Petition for
2 Review, Appendix A29.

3 Meanwhile, the city continued processing the PUD application. For primary access
4 to the PUD, petitioner proposed using Belmont Road and replacing the at-grade railroad
5 crossing at Belmont Road with an underpass. For a second access point, petitioner proposed
6 using the existing access route for tax lot 900 across tax lot 500 and over a grade-level
7 crossing of the railroad. However, because the Oregon Department of Transportation
8 (ODOT) would not permit that at-grade railroad crossing to be used for public access,
9 petitioner proposed that the second access point would be gated and locked, and available
10 only for emergency access.

11 On January 10, 2008, the planning commission denied the proposed PUD for failure
12 to provide two access points accessible to the public, and for noncompliance with certain
13 density bonuses. Petitioner appealed the planning commission denial to the city hearings
14 officer, who found that the PUD application complied with the applicable density bonuses,
15 but denied the application for failure to provide two public access points, which the hearings
16 officer found were required by both the annexation ordinance and city comprehensive plan
17 and code provisions. This appeal followed.

18 **FIRST ASSIGNMENT OF ERROR**

19 As discussed below, the city’s comprehensive plan requires that the proposed PUD
20 have two access points. The principle issue in this appeal is whether the city’s
21 comprehensive plan, land use regulations or other city legislation require petitioner to
22 provide two unrestricted public access points to the proposed PUD, or whether the applicable
23 regulations are satisfied by one unrestricted access point and one emergency-only access
24 point.

1 Talent Zoning Code (TZC) 8-3L.372(A) requires that a proposed PUD concept plan
2 meet all relevant provisions of the City of Talent Comprehensive Plan (TCP), as defined by
3 the city.¹

4 TCP Public Facilities Strategy Policy 10 provides:

5 “The real costs of new development are primarily the responsibility of the
6 benefited parties. The long-term costs of operations and maintenance of new
7 public facilities and emergency access needs must be considered when
8 designing and constructing new public facilities.”

9 Objective 10.2 is one of the objectives under Policy 10, and provides:

10 “Objective 10.2: Timely, safe and economical provision of all public facilities
11 at service levels that anticipate future facility needs and long-term public
12 costs.

13 Under Objective 10.2 are several implementation strategies, including Implementation
14 Strategy 10.2.1:

15 “10.2.1 All new development shall include street access that provides, at a
16 minimum, *two outlets sufficiently separated for fire-life-safety factors*,
17 including but not limited to railroad crossings, wildfire risk area, and
18 floodplains and floodways unless 1) access can be achieved by a cul-de-sac or
19 dead end street, which while discouraged, are defined and limited in the
20 Talent Land Division Ordinance and 2) the Fire District is satisfied that
21 emergency access is adequate.” (Emphasis added).

22 Based on the text and context of Implementation Strategy 10.2.1, petitioner argues
23 that the comprehensive plan requires a minimum of two access points for new development,

¹ (TZC) 8-3L.372 provides, in relevant part:

“The Planning Commission shall make findings of fact that all of the following criteria are satisfied when approving or approving with conditions, a PUD Concept Plan. The Planning Commission shall make findings that one or more of the criteria are not satisfied when denying an application:

“A. Comprehensive Plan. All relevant provisions, as defined by the City, of the Comprehensive Plan are met;

“B. Land Use Ordinances. All of the applicable land use and design requirements for land divisions, shall be met[.]”

1 but the second access is only required to ensure emergency access and need not provide
2 unrestricted public access. According to petitioner, nothing in the comprehensive plan or
3 any land use regulation specifically requires two or more access points that are both open to
4 public use. Petitioner contends that the only city legislation specifically requiring that at
5 least two access points be open to the public is the annexation ordinance. However, petitioner
6 argues, the annexation ordinance post-dates the PUD application, and therefore the “goal-
7 post” statute, at ORS 227.178(3)(a), prohibits the city from applying any “standards and
8 criteria” in the annexation ordinance to the PUD application.²

9 The hearings officer denied the proposed PUD on two independent grounds: failure
10 to comply with (1) the TCP Implementation Strategy 10.1.2 requirement for “two outlets,”
11 which the hearings officer interpreted in context to require two public access points, and (2)
12 the annexation ordinance requirement for “two legal access points accessible to the public.”
13 We need not address petitioner’s arguments under the goal-post statute directed at the
14 annexation ordinance requirement, because we agree with the city and intervenors-
15 respondents (intervenors) that the hearings officer correctly found that the relevant TCP and
16 TZC provisions read together permit the city to require that the PUD be served by two public
17 access points.³

18 Petitioner is correct that nothing cited to our attention in the TSP or TZC explicitly
19 requires that the proposed PUD provide two public access points. On the other hand, we

² ORS 227.178(3)(a) provides:

“If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the city has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted.”

³ Because we do not address petitioner’s challenges to application of the annexation ordinance under the goal-post statute, we also need not address intervenors’ argument that petitioner failed to raise any issue under the goal-post statute below, and thus that issue is waived, under the raise-it-or-waive-it provisions of ORS 197.763(1).

1 disagree with petitioner’s view that Implementation Strategy 10.2.1 requires only one full
2 public access point, and authorizes additional access points to be emergency access only.
3 As relevant, Implementation Strategy 10.2.1 explicitly requires only that the minimum two
4 outlets be “sufficiently separated for fire-life-safety factors[.]” It says nothing about the
5 character of those minimum two separated outlets, and certainly does not state that one may
6 be emergency access only. While TCP Policy 10 is concerned in part with ensuring adequate
7 emergency access, the text of the policy, its objectives and implementation strategies do not
8 authorize using one of the two minimum access points for emergency use only, nor do they
9 necessarily preclude the city from requiring that the two minimum separated access points
10 both provide full public access.

11 Because the text of the city’s plan and code does not explicitly resolve whether the
12 minimum second access point must provide public access or may be limited to emergency
13 access, the city has some discretion in interpreting the plan and code to answer that question.
14 Petitioner cites contextual provisions in the plan and code to support its preferred
15 interpretation. The city and intervenors cite other contextual provisions to support the
16 hearings officer’s interpretation. The hearings officer cited and found significant Talent
17 Subdivision Code (TSC) 8-2.250(A), which sets out the purpose of the TSC, and states that
18 development must provide “a safe and efficient *public street system* for pedestrians and
19 vehicles, in conformance with the City’s Transportation System Plan and applicable
20 ordinances.” (Emphasis added.) The hearings officer concluded in part that the proposed
21 emergency-only access failed to comply with the TSC 8-2.250(A) requirement for a “public
22 street system.” Record 25. Respondents argue that a “safe and efficient public street
23 system” implies more than single public access point with a secondary access that is gated
24 and used for emergencies only.

25 While there is support for either interpretation in the plan and code, we agree with
26 respondents that the hearings officer’s interpretation is at least as plausible as petitioner’s

1 preferred interpretation. Implementation Strategy 10.2.1 is silent or at best ambiguous on
2 the question of the character of the two minimum required outlets. However, the hearings
3 officer reasonably concluded that the plan and code, read in context, contemplate that new
4 development, particularly a large residential PUD with constrained access such as that
5 proposed, be served by a “safe and efficient public street system,” and that in order to
6 achieve that objective a single public access point with a second emergency-only access
7 point is insufficient.

8 The hearings officer went on to reject petitioner’s arguments that the current access to
9 tax lot 900 across tax 500 and the railroad constitutes a “public road” or otherwise has the
10 nature and scope to satisfy Implementation Strategy 10.2.1 and the TSC 8-2.250(A)
11 requirement for a “public street system.” The hearings officer found that while there is some
12 kind of access easement across tax lot 500, petitioner failed to demonstrate that the “nature of
13 whatever access rights the Applicant may hold” satisfies the plan and code requirements for
14 full public access. Record 19.

15 Petitioner presented several theories supporting its claim that the current access for
16 tax lot 900 is a “public road” or otherwise has the nature and scope to provide the required
17 access for the proposed PUD. According to petitioner, the old Stage Road right of way was
18 never vacated and therefore continues to constitute a “public road.” Petitioner argues that
19 when the old Stage Road railroad crossing was closed, the old Stage Road public right of
20 way shifted or expanded northward to include the access strip leading to and over the current
21 railroad crossing to Talent Avenue. The hearings officer rejected this theory, citing
22 *Verzeano v. Carpenter*, 108 Or App 258, 815 P2d 1275 (1992), which held that “all parts” of
23 the old Stage Road right of way on the same property at issue here, tax lot 500, had been
24 vacated by operation of law when the old highway was moved north of the railroad line. *Id.*
25 at 267.

1 In addition, petitioner argued that there is an implied or prescriptive easement over
2 the access strip and that such an easement is sufficient to satisfy plan and code access
3 requirements. The hearings officer rejected these theories, finding that whatever easement
4 benefits tax lot 900 is for private access for a single family dwelling and not an easement that
5 would permit public access.

6 On appeal, petitioner devotes the bulk of the petition for review to challenging the
7 hearings officer's findings regarding the nature and scope of the access to tax lot 900.
8 However, we need not and do not resolve those challenges, for two reasons. First, questions
9 regarding the nature and scope of any easement that provides access to tax lot 900 can be
10 finally resolved only by filing an appropriate action in circuit court. *See Mohler v. Josephine*
11 *County*, 26 Or LUBA 1, 7 (1993) (only the circuit court can provide a final determination
12 concerning the nature and scope of an easement). Generally, LUBA does not have the
13 review authority to finally resolve issues regarding the existence or scope of property rights
14 such as easements. Similarly, the question of whether the portion of the old Stage Road
15 right of way that petitioner relies upon was vacated when the road was relocated north of the
16 railroad, and petitioner's theory that if not vacated the public right of way was expanded
17 northward across tax lot 500, can be finally resolved only in circuit court, presumably in the
18 same manner as the *Verzeano* litigation. Neither the hearings officer nor LUBA can render
19 any but advisory opinions on those questions.⁴ Accordingly, we see no point in resolving
20 whether petitioner's theories regarding the nature or scope of the access to tax lot 900 are
21 correct.

⁴ Given the uncertainty over the nature and scope of the access over tax lot 500 and the railroad, and the hearings officer's inability to finally resolve that dispute, the hearings officer *might* have chosen to approve the PUD application subject to conditions designed to ensure that further PUD approvals or development will not proceed unless that dispute is resolved (presumably in circuit court) in a manner that satisfies the plan and code requirements for public access. There are various pitfalls with that approach, and petitioner does not argue that the hearings officer was compelled to attempt such an approach rather than simply deny the PUD application for failure to satisfy the applicable plan and code access requirements.

1 Second, under the hearings officer’s interpretation, affirmed above, the city’s plan
2 and code require two full public access points. Petitioner’s arguments regarding the nature
3 and scope of the access are based on its preferred interpretation that the city’s plan and code
4 do not require two full public access points. Petitioner has not demonstrated that even if the
5 dispute regarding the nature and scope of the access is resolved in its favor that petitioner can
6 provide a public access crossing over the railroad at that point. As intervenors note, the
7 hearings officer specifically found that ODOT will not allow the existing railroad crossing to
8 be expanded to allow full public access. Record 16. It is true, as petitioner notes, that the
9 hearings officer did not expressly deny the PUD application based on the fact that ODOT
10 would not allow the existing railroad crossing to be expanded to allow full public access.
11 However, we see little point in addressing petitioner’s theories regarding the nature and
12 scope of the access to tax lot 900, even if that issue were properly within our scope of
13 review, when nothing cited to us in the record suggests that ODOT is likely to grant
14 petitioner permission to expand the railroad crossing to provide full public access to the
15 PUD. On the contrary, it is reasonably clear from the record that ODOT’s preference is to
16 close the existing railroad crossing that provides access to tax lot 900, and that at most
17 ODOT would support only gated emergency access to the PUD at that crossing. Record
18 312-13, 319.

19 In sum, because we affirm the hearings officer’s interpretation that the plan and code
20 require two public access points, petitioner’s arguments premised on the view that the plan
21 and code allow the second access point to be emergency-access only do not provide a basis
22 for reversal or remand.

23 The first assignment of error is denied.

24 **SECOND ASSIGNMENT OF ERROR**

25 The second assignment of error alleges that the city made a procedural error in failing
26 to provide to the hearings officer documents received by the planning commission.

1 Petitioner states that the omitted documents have nothing to do with the issues raised in the
2 first assignment of error and that the alleged error is harmless unless “intervenors raise issues
3 for which petitioner’s response would rely in part” on the omitted documents. Petition for
4 Review 32. We understand petitioner to request that LUBA address the second assignment
5 of error only if we address intervenors’ cross-assignments of error. Because we do not
6 address intervenors’ cross-assignments of error, we likewise do not resolve petitioner’s
7 second assignment of error.

8 **CROSS-ASSIGNMENTS OF ERROR**

9 Intervenors’ cross-assignments of error are expressly contingent, that is, intervenors
10 request that we address them only if we remand the decision for any reason under the petition
11 for review. Because we affirm the decision under the petition for review, we do not reach
12 intervenors’ cross-assignments of error.

13 The city’s decision is affirmed.