BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CITIZENS FOR RESPONSIBLE DEVELOPMENT
IN THE DALLES, LUISE LANGHEINRICH,
JOHN NELSON and MICHAEL LEASH,
Petitioners,

vs.

CITY OF THE DALLES,
Respondent,

and

WAL-MART STORES, INC. and WM3 INC.,
Intervenors-Respondents.

LUBA No. 2009-040

FINAL OPINION
AND ORDER

Appeal from City of The Dalles.

Kenneth D. Helm, Beaverton, filed the petition for review and argued on behalf of petitioners.

Gene E. Parker, City Attorney, The Dalles, filed a response brief and argued on behalf of respondent.

Gregory S. Hathaway, Portland, filed a response brief and argued on behalf of intervenor-respondent Wal-Mart Stores, Inc. With him on the brief were Jeff N. Evans and Davis Wright Tremaine LLP.

James Foster, The Dalles, represented intervenor-respondent WM3 Inc.

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

BASSHAM, Board Chair, did not participate in the decision.

AFFIRMED 08/11/2009

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal a decision by the city approving a subdivision.

REPLY BRIEF

Petitioners move for permission to file a reply brief "responding to the city and Wal-mart's waiver arguments." Motion to File A Reply Brief 1. The reply brief was filed on July 14, 2009. The city objects to the reply brief in part because it was not filed "as soon as possible" after the response briefs were filed as required by OAR 660-010-0039.[1] The response briefs were filed on June 25, 2009 (city) and June 29, 2009 (intervenor-respondent Wal-Mart) and oral argument was held on July 23, 2009. Petitioners' motion explains that petitioners' attorney was on vacation and the earliest the reply brief could be filed was on July 13, 2009. We do not think that filing a reply brief approximately 10 days before oral argument is scheduled is a violation of our rules.

Turning to the reply brief itself, the city council adopted findings in which it purported to adopt "a comprehensive list of the issues considered on appeal." Record 10. Petitioners did not assign error to those findings in their petition for review. We therefore do not consider petitioners' arguments in the reply brief concerning whether the city correctly limited the issues it considered on appeal. In response to petitioners' first assignment of error, respondent and intervenor-respondent (respondents) argue that petitioners waived the issue presented in that assignment of error by failing to raise the issue before the planning commission, as required by ORS 197.763(1). We deny the first assignment of error on the

[1] OAR 661-010-0039 provides in relevant part:

> "* * * A request to file a reply brief shall be filed with the proposed reply brief together with four copies as soon as possible after respondent's brief is filed. A reply brief shall be confined solely to new matters raised in the respondent's brief. * * *"

merits, and do not consider respondents' waiver argument. Because the reply brief has no bearing on the dispositive issues in this appeal, we do not consider the reply brief further.

The motion to allow a reply brief is denied.

MOTION TO CONSOLIDATE

On July 24, 2009, petitioners moved to consolidate the present appeal with LUBA No. 2009-048. LUBA No. 2009-048 is an appeal of the city's decision approving a site plan for a proposed Wal-Mart store on one of the subdivision lots that were approved in the challenged decision.

Consolidation is for the administrative convenience of the parties and the Board. Where consolidation will not facilitate timely resolution of the appeal or will complicate the appeal, consolidation will be denied. Given that petitioners filed their motion to consolidate one day after oral argument was held in LUBA No, 2009-040 and after their petition for review had been filed in LUBA No. 2009-048, we do not think consolidation would facilitate resolution of the appeal. Petitioners' motion to consolidate LUBA Nos. 2008-040 and 2008-048 is denied.

FACTS

Intervenor-respondent Wal-Mart Stores, Inc. (intervenor) applied to subdivide a 67-acre parcel into five lots. The subject property contains wetlands, and is located near Chenowith Creek, a tributary to the Columbia River. The stormwater discharge system for the subdivision is proposed to be piped from on-site locations to a city stormwater system located in River Road, adjacent to the subdivision. The city's stormwater system located in River Road flows into Chenowith Creek.

The planning commission approved the subdivision, and petitioners appealed the approval to the city council. The city council held a hearing on the appeal, and voted to affirm the planning commission's approval. This appeal followed.

THIRD THROUGH SIXTH ASSIGNMENTS OF ERROR

Petitioners' third through sixth assignments of error allege that the city's decision fails to comply with various provisions of The Dalles Land Use and Development Ordinance (LUDO) and the city's comprehensive plan relating to erosion control measures, traffic, and protection of archaeological sites.[2] Respondents respond to those assignments of error by first arguing that petitioners are precluded from raising the issues presented in those assignments of error on appeal to LUBA. A brief explanation of relevant LUDO criteria governing appeals and the events leading up to the challenged decision is necessary before we resolve these assignments of error.

LUDO 3.020.080(D)(3) requires that in an appeal of a planning commission decision, the notice of appeal must state "[t]he specific grounds why the decision should be reversed or modified, based on the applicable criteria or procedural error." Petitioners' notice of appeal contained the following description of the grounds for appeal:

> "The decision should be reversed for failure to comply or be consistent with the city's comprehensive plan, specifically Goals 5, 6, 8, 9, 10, 11, 12, 13 and 14. The decision fails to comply with the city's land use development ordinance Sections 5, 6, 8, 9 and 10. The Planning Commission's decision is not based on substantial evidence to demonstrate compliance with the above noted provisions of the comprehensive plan and LUDO. The Planning Commission's conditions of approval related to traffic, stormwater management and wetlands are a substitute for evidence of compliance and are legally insufficient to ensure compliance with the LUDO." Record 290.

LUDO 3.020.080(E)(2) provides:

> "The failure to comply with any other provision of [LUDO 3.020.080(D)] shall constitute a jurisdictional defect. A jurisdictional defect means the appeal is invalid and no appeal hearing will be held. Determination of a

[2] In the third assignment of error, petitioners argue that the city improperly deferred identification of required erosion control measures to the site design process. In the fourth assignment of error, petitioners argue that the city erred in concluding that LUDO 8.050.040, which contains standards for cuts, fills and grading, does not apply to a subdivision. In the fifth assignment of error, petitioners argue that the city erred in determining that LUDO 10.060(A), which requires a traffic study for certain developments, does not apply to the subdivision. In the sixth assignment of error, petitioners argue that the city failed to comply with comprehensive plan provisions that require significant archaeological sites to be protected.

> jurisdictional defect shall be made by the Director, with the advice of the City Attorney, after the expiration of the 10 day appeal period described in Subsection (C)(2) above. The Director's determination may be subject to appeal to the State Land Use Board of Appeals (LUBA)."

During the proceedings below, and prior to the city council hearing on February 9, 2009, intervenor challenged petitioners' notice of appeal as being inadequate to comply with LUDO 3.020.080(D)(3) and argued that the city council should dismiss the appeal. Notwithstanding that challenge and the provisions of LUDO 3.020.080(E)(2), the city council declined to dismiss the appeal and proceeded to hold a hearing on the appeal. At the hearing, the city council indicated that it would consider only issues that had been raised before the planning commission and identified at the hearing or in written materials submitted by petitioners on February 5 and 6, 2009. As noted earlier, the city council specifically identified the five issues it considered to have been preserved for appeal. Record 10.

Respondents argue that petitioners are precluded under ORS 197.825(2)(a) from raising the issues identified in the third through sixth assignments of error before LUBA because petitioners failed to specify those issues in their notice of appeal under LUDO 3.020.080(D)(3).[3] *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003) (ORS 197.825(2)(a) requires parties to present their substantive claims to the local appeal body, and their failure to do so is a waiver of those claims). While we might agree with respondents if the city council had proceeded according to LUDO 3.020.080(E) and declined to hold an appeal hearing, the fact that the city council held an appeal hearing and apparently considered issues in addition to those specified in petitioners' notice of appeal makes the

[3] ORS 197.825(2)(a) provides that LUBA's jurisdiction:

> "Is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review[.]"

issue less clearly a violation of ORS 197.825(2)(a) and *Miles*.[4] However, we need not decide whether petitioners failed to exhaust their remedies under ORS 197.825(2)(a) and *Miles*. In the challenged decision, the city adopted findings that included a city decision regarding the five issues that were preserved for review by the city council:

> "**2.2 Issues on Appeal**
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> "* * *City Council recognized that the notice of appeal was extraordinarily broad, but chose not to invalidate the appeal on the basis of a jurisdictional defect. Instead, City staff recommended that the Council consider the merits of those issues presented by [petitioners] that had been adequately presented to the Planning Commission, *and which were specifically identified either at the hearing*,[5] or in the written materials submitted on February 5th and 6th. City Council adopted the recommendation and determined that the following is a comprehensive list of the issues considered on appeal:
>
> 1. The Applicant failed to provide sufficient information regarding wetlands and stormwater for the Planning Commission to have determined compliance with applicable provisions of the Comprehensive Plan.
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> 2. The Planning Commission improperly relied on state and federal agencies to demonstrate compliance with Comprehensive Plan provisions related to the potential impacts on wetlands.
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> 3. The Planning Commission improperly relied on state and federal agencies to demonstrate compliance with the Comprehensive Plan provisions related to the potential impacts on the water quality of Chenowith Creek.
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> 4. The Planning Commission erred in determining that certain provisions of the Comprehensive Plan were aspirational, and thus not applicable approval criteria.
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> 5. The Planning Commission erred in concluding that the Application satisfies Comprehensive Plan Goal #9 – Economic Development.

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[4] *Miles* specifically left open the question of whether a governing body has the authority to reach issues not specified in a notice of appeal as required by the local ordinance. *Id*. at 509 (*citing Johns v. City of Lincoln City*, 146 Or App at 602 n 1).

[5] It is not clear to us whether this is a reference to the planning commission hearing or to the city council hearing.

" * * * * *

"**2.4 Issues Waived**

"The issues considered by the City Council on appeal are limited to those issues that were properly raised before the Planning Commission and which were specifically identified either at the hearing, or in the written materials submitted on February 5th and 6th. The city council is an appellate body designed to review the Planning Commission decision. The Planning Commission must be given an opportunity to undertake an initial review of each issue and reach a decision based on the issues presented. Although an appeal to the City Council is 'de novo' that term is intended to allow new evidence and arguments, but is not intended to allow the introduction of new issues not previously raised before the Planning Commission. As a result, any issue not raised before the Planning Commission cannot be raised for the first time on appeal to the City Council.

"[Petitioners] attempted to raise the following two issues for the first time before the City Council, and thus those issues are waived:

"1. The assertion that the traffic study was flawed[.]* * *" Record 10-11 (Emphasis added.)

Petitioners do not assign error to those findings, or otherwise argue that any of the city's actions constitute a procedural error that prejudiced their substantial rights. Because petitioners do not assign error to the above-quoted findings, those unchallenged findings mean that any assignments of error presented in the petition for review that are outside of the scope of issues that the city found were properly raised or that the city found were waived provide no basis for reversal or remand of the decision. The issues presented in the third, fourth, fifth and sixth assignments of error are unrelated to any of the issues that the city found were properly considered on appeal to the city council. *See* n 2.

Accordingly, the third, fourth, fifth and sixth assignments of error are denied.

FIRST ASSIGNMENT OF ERROR

In the first assignment of error, petitioners argue that the city erred in imposing a condition of approval that requires the applicant to secure approval from other agencies for its stormwater disposal plan. We understand petitioners to argue that the city's deferral to those state and federal agencies resulted in a violation of several provisions of the city's

comprehensive plan.[6] Because stormwater is proposed to be deposited into Chenowith Creek, the Oregon Department of Environmental Quality (DEQ) must issue National Pollutant Discharge Elimination System (NPDES) permits (discharge permits) for construction and for operations. In addition, Chenowith Creek is designated as a "water quality limited" stream under the federal Clean Water Act Section 303(d), because it fails to meet water quality standards. Due to the water quality limited status of the creek, the city has adopted and the DEQ and the federal Environmental Protection Agency have approved Total Maximum Daily Load (TDML) standards for the creek. The next step in the process of protecting the creek's water quality is for the city and other designated management agencies to formulate an Implementation Plan that sets forth timelines and monitoring strategies to ensure that the TMDL standards are met. Because Chenowith Creek is water quality limited, discharge permits cannot be issued until an Implementation Plan has been approved to bring the creek into compliance with the Clean Water Act.

In approving the application, the city found:

> "[T]he city council concludes that the Planning Commission properly determined that criteria related to the protection of Chenowith Creek were satisfied through the imposition of conditions requiring the Applicant to obtain the necessary stormwater permits from the appropriate state and federal agencies. This agency oversight is sufficient to ensure that pollutants are removed from the stormwater prior to discharge into Chenowith Creek. Based on the analysis provided by DEQ in the TMDL, there is no validity to [petitioners'] assertion that stormwater pollution will create thermal pollution in Chenowith Creek. Thus, there is no legal impediment to the Applicant obtaining the necessary discharge permits."[7] Record 16.

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[6] The city disputes that all of the comprehensive plan provisions cited in the petition for review are applicable approval criteria, but generally agrees that Comprehensive Plan Goal 6, Policy 5 requires the city to protect Chenowith Creek.

[7] The city imposed Condition 9, which provides:

> "On site storm water can be retained on site or piped to an approved disposal point. Applicant will need approval from all agencies with jurisdiction for disposing of storm water. Applicant will need to provide written approval from these agencies prior to approval of construction plans or building permits. Applicant will need to safely dispose of storm water

The crux of petitioners' argument is that the city erred in imposing condition 9, requiring the applicant to secure approvals from agencies having jurisdiction over the creek, because an Implementation Plan had not been formulated or approved at the time the subdivision was approved. Petitioners argue that the lack of an Implementation Plan at the time the subdivision was approved precluded issuance of the necessary discharge permits as a matter of law, and that the city's ability to secure the permits in the future is too speculative a basis on which to rely:

> "At the time the city approved [Wal-Mart's] subdivision application DEQ was legally prohibited from issuing the [discharge] permits that the applicant will need to discharge stormwater into Chenowith Creek. Furthermore, it is unreasonable to speculate that obtaining these permits is likely because at least four unknowns exist, each of which will bar any [discharge permit] request. First, will The Dalles develop an Implementation Plan? Second if so, when will it be complete? Third, will DEQ approve the Implementation Plan? Fourth, under the constraints of the Implementation Plan, will DEQ be legally allowed to issue [discharge] permits for the subdivision? It would be pure speculation to assume that at least 'someday' the applicants could comply with condition 9 and obtain their [discharge] permits." Petition for Review 12.

Intervenor responds to petitioners' argument by explaining that there is no legal barrier to intervenor obtaining the necessary permits and that the city correctly imposed the condition requiring the permits before any building permits could issue. In *Bouman v. Jackson County*, 23 Or LUBA 628 (1992), a conceptual plan approval criterion required that the proposed development have an adequate water supply. The county found the approval criterion could be met if required state agency permits were obtained and the county imposed a condition of approval requiring that the state agency permit be secured. We held that such a condition of approval was an appropriate way to ensure compliance with the water supply criterion, unless it was shown that obtaining the required permits is "precluded * * * as a matter of law." 23 Or LUBA at 647; *see also Wal-Mart v. City of Bend*, 52 Or LUBA 261, 286-87 (2006) (so holding). We agree with intervenor that petitioners do not point to any

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from improvements on River Road and coordinate storm water drainage on River Road with City Engineer and County Roadmaster." Record 6.

legal impediment to obtaining the necessary permits, and that the city properly imposed condition 9. Imposition of such a condition did not amount to an unlawful deferral of the city's obligation to determine whether the applicable approval criteria were satisfied.

The first assignment of error is denied.[8]

SECOND ASSIGNMENT OF ERROR

In the second assignment of error, petitioners argue that the city erred in approving the subdivision without a tentative plat showing the exact location of wetlands on the subject property. Petitioners argue that the city could not approve the lot configuration and road and utility locations proposed on the tentative plat in the absence of information regarding the exact location of the wetlands.

In support of their argument, petitioners cite LUDO 9.040.030(B)(2), which identifies the information that must be shown on a tentative subdivision plat. LUDO 9.040.030(B)(2)(k) requires the plat to show "the approximate location of any potential physical and environmental constraints * * *," and LUDO 9.040.030(B)(2)(l) requires the plat to contain "identification of significant natural features," including "riparian areas." Although petitioners agree that the tentative subdivision plat submitted by intervenor shows wetland areas, they argue that the city should have required intervenor to submit a "full wetland delineation." Intervenor responds that the approved tentative plat complies with the application requirements of LUDO 9.040.030(B)(2)(k) because it identifies and shows the "approximate" location of wetlands on the property.

We agree with intervenor. First, LUDO 9.040.030(B)(2) sets forth the requirements for information to be included on a tentative plat. One of those requirements is to show the "approximate" location of wetlands and other physical and environmental constraints. It appears to be undisputed that the tentative plat identifies and shows the approximate

[8] Because we deny the first assignment of error, we need not address intervenor's argument that petitioners are precluded from raising the issue under ORS 197.763(1).

locations of wetlands on the property, and therefore it complies with LUDO 9.040.030(B)(2)(k) and (l). In addition, even if application requirements may not have been satisfied, absent a showing that the failure to satisfy the requirements resulted in noncompliance with at least one mandatory approval criterion, there is no basis for reversal or remand of the decision. Aside from citing LUDO 9.040.030(B)(2)(k) and (l), petitioners do not argue that the application fails to comply with an applicable approval criterion requiring wetlands. Accordingly, petitioners' arguments provide no basis for reversal or remand.

Petitioners also argue that the city impermissibly imposed a condition of approval requiring development of the property to meet the requirements of LUDO 8.050.[9] However, as explained above, petitioners do not point to any approval criterion requiring protection of wetlands that the city impermissibly deferred to a condition of approval, or explain how the decision fails to satisfy any relevant approval criterion regarding wetlands. Absent such an argument, petitioners' argument does not provide a basis for reversal or remand of the decision.

The second assignment of error is denied.

The city's decision is affirmed.

[9] The city imposed condition 11, which provides:

> "All development must meet the provisions of Section 8.050. Cuts and/or fills over 50 cubic yards require a physical constraints permit. Cuts and/or fills over 250 cubic yards require engineered plans. Ground disturbance of one acre or more require a 1200-c permit from DEQ. Disturbed topsoil must be revegetated according to the provisions of 8.050.030A." Record 6.