BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CHARLES McGOVERN,
Petitioner,

vs.

CROOK COUNTY,
Respondent.

LUBA No. 2009-069

FINAL OPINION
AND ORDER

Appeal from Crook County.

Jannett Wilson, Eugene, filed the petition for review and argued on behalf of petitioner. With her on the brief was the Western Environmental Law Center.

Heidi T.D. Bauer, County Counsel, Prineville, filed the response brief and argued on behalf of respondent. With her on the brief was David M. Gordon.

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

HOLSTUN, Board Member, did not participate in the decision.

AFFIRMED 12/09/2009

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 a county decision on remand approving a partition and two non-farm dwellings on land zoned for exclusive farm use.

FACTS

The challenged decision is on remand. *McGovern v. Crook County*, 57 Or LUBA 443 (2008). As noted in that opinion, the subject property is tax lot 1200, a 163.08-acre parcel zoned Exclusive Farm Use (EFU-2). On July 16, 2007, the landowner applied for a partition to divide the parent parcel into three parcels, two new non-farm parcels each 11 acres in size, along with associated conditional use permits and a remainder parcel of 141.08 acres with an existing dwelling. The county approved the application.

ORS 215.263(5) authorizes creation of a non-farm parcel and placement of a non-farm dwelling if the original parcel from which the non-farm parcel is created was "lawfully created" prior to July 1, 2001. In its approval, the county relied upon a 2006 administrative determination that concluded that the parent parcel was created in a 1999 partition, to conclude that the parent parcel was lawfully created prior to July 1, 2001. That administrative determination also discussed two actions after 1999 that affected the size and configuration of the parent parcel: (1) a 2000 boundary line adjustment and (2) a 2005 "correction." On appeal to LUBA, petitioners argued that the 2005 "correction" may have had the effect of "creating" the parent property and, if so, the county erred in concluding that the parent parcel was created prior to July 1, 2001.

After reviewing the record we agreed with petitioner that the nature and effect of the 2005 "correction" was unclear, and remand was necessary to determine "what actions if any occurred after July 1, 2001, that affected the size and configuration of tax lot 1200 and whether those actions may have resulted in a new date of creation for tax lot 1200." *Id.* at

446-47. We noted that it is possible that, depending on how tax lot 1200 achieved its current size and configuration, it may have been created after July 1, 2001. *Id*. at 447.

On remand, the county conducted an evidentiary hearing limited to the issue of how tax lot 1200 achieved its current size and configuration and if that action or actions affected the date it was lawfully created for purposes of ORS 215.263(5). The county concluded that the 2006 administrative determination incorrectly recited the actions affecting tax lot 1200 and in fact there was no action after July 1, 2001 that changed the size or configuration of the subject property. The county concluded that tax lot 1200 was lawfully created in the 1999 partition and achieved its current size and configuration in 2000, based on the 2000 boundary line adjustment. The county then rejected petitioner's challenges to the validity of the 2000 boundary line adjustment, finding that the legality of the 2000 action had not been raised as an issue in the first appeal and was therefore waived.[1] In the alternative, the county found that the 2000 action was valid and did not create any parcel.

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[1] The county court found:

> "**G. Waiver of Arguments**
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> "The County Court observes that the opposition attempted to raise new issues during the remand hearing[.]
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> "* * * * *
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> "* * * [T]he opposition now appears to attempt to challenge the validity of the Boundary Line Adjustment of December 2000. The County Court * * * rejects this attempt to raise this new issue. While the Boundary Line Adjustment of 2000 has some bearing upon the issue of how the property achieved its current size and configuration, the opposition specifically waived this issue when the Petition for Review at LUBA stated that 'Petitioner does not in any way dispute the legality of the December 5, 2000 boundary line adjustment.' In addition the Boundary Line Adjustment was never appealed at the local level and has been in place since December 2000. The opposition unequivocally stated they did not dispute the legality of the Boundary Line Adjustment. To allow the opposition to now challenge the legality of the Boundary Line Adjustment would substantially prejudice the applicant and allow the opposition to raise an issue that could have been, but was not raised in the earlier appeal.
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> "In the alternative the County Court finds that the record indicates the December 2000 Boundary Line Adjustment was lawful. The April 9, 2009 letter from the applicant's agent * * * details the history of the December 2000 Boundary Line Adjustment. The opposition has not cited to any credible or convincing evidence that the December 2000 Boundary Line

This appeal followed.

MOTION TO FILE REPLY BRIEF

Petitioner moves for permission to file a reply brief, to address three alleged "new matters" in the county's brief. OAR 661-010-0039 (a reply brief shall be confined solely to new matters raised in the respondent's brief). The first alleged new matter is an argument in the county's response brief that petitioner did not assign error to the county's finding that the issue of the validity of the 2000 boundary line adjustment was waived on remand, and that failure precludes petitioner from challenging the county's alternative finding on the merits of that waived issue. The second alleged new matter is an argument in the county's response brief that the county correctly concluded that petitioner failed to raise during the initial appeal to LUBA, and in fact affirmatively waived, the issue of the legality of the 2000 boundary line adjustment. *See* n 1. The third alleged new matter is an argument in the response brief that petitioner's arguments regarding the 2000 boundary line adjustment are impermissible collateral attacks on that 2000 decision.

The county moves to strike page two and page three, lines 1-6 of the reply brief, a portion that addresses the second alleged new matter, that the county correctly concluded that petitioner waived or affirmatively waived the issue of the legality of the 2000 boundary line adjustment. The county argues that the county's responses on this issue cannot possibly be a "new matter" raised for the first time in the response brief, because the issue is the subject of dispositive findings adopted in the challenged decision, findings that petitioner challenges for the first time in the reply brief. The county attaches to its motion to strike an e-mail from petitioner's attorney that the county argues demonstrates that petitioner's attorney was well

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Adjustment was improper. Further, the County Court finds that no new parcel was created by the December 2000 Boundary Line Adjustment despite the assertions of the opposition. Rather, the opposition cites an outdated LUBA case and attempts to confuse lawfully created parcels with tax lot numbers created for tax assessment purposes." Record 567-68.

aware of the findings regarding waiver, and could have challenged those findings in the petition for review.[2]

The county is certainly correct that petitioner cannot use the reply brief as a vehicle to challenge or assign error to a finding that he did not challenge in the petition for review. *Porter v. Marion County*, 56 Or LUBA 635, 641 (2008). The reply brief is an appropriate vehicle to respond to an argument in the response brief that an assignment of error challenging one portion of the decision on appeal should be denied because the petitioner failed to assign error to a different finding or portion of the decision. *VanSpeybroeck v. Tillamook County*, 56 Or LUBA 184, 187-88, *aff'd* 221 Or App 677, 191 P3d 712 (2008). Such a response, however, would be limited to arguments as to why it was *unnecessary* to assign error to that finding or why failure to do so does not otherwise preclude reaching an assignment of error in the petition for review. *Id.* Petitioner cannot use the reply brief to attack the unchallenged finding on the merits.

In the present case, the bulk of the argument at page two to page three, line six, of the reply brief is most accurately characterized as an argument that the county erred in concluding that the issue of the legality of the 2000 boundary line adjustment was waived, as indicated by the heading to that section of the reply brief: "Petitioner did not waive his challenge in the previous LUBA appeal." Reply Brief 2. That is a direct challenge to the county's finding that the issue was waived. Therefore, we agree with the county that the argument in page two to page three, line six, of the reply brief is not properly included in a reply brief, and the Board will not consider that portion of the reply brief. The motion to strike is granted. The reply brief is otherwise allowed.

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[2] The county's motion to strike is accompanied by a contingent motion to take evidence outside the record under OAR 661-010-0045, requesting that if petitioner objects to LUBA's consideration of the e-mail as not part of the local record LUBA should consider the e-mail under OAR 661-010-0045. Because petitioner does not object to LUBA's consideration of the e-mail attached to the motion to strike, and we do not need to consider that e-mail in any event, the contingent motion to take evidence is denied as moot.

ASSIGNMENT OF ERROR

Petitioner argues that the county erred in approving the nonfarm partitions and dwellings because the parent parcel was not lawfully created prior to July 1, 2001.

According to petitioner, the 2000 "boundary line adjustment" was not a boundary line adjustment at all, but rather a *de facto* replat or partition. Petitioner argues that the 2000 decision made multiple simultaneous property line adjustments in one decision, and therefore the action does not qualify as a "property line adjustment" as that term is defined at ORS 92.010(12), under the reasoning in *Warf v. Coos County*, 43 Or LUBA 460 (2003).[3] Instead, petitioner argues, the 2000 action is properly viewed as either a "replat" as that term is used in ORS 92.010(13) or, if it resulted in the creation of an additional parcel, as a "partition" as defined in ORS 92.010(7).[4] Petitioner note that the reconfiguration approved in the 2000 decision depicts something called "BLA Parcel 2," which could be understood as a separate, new parcel rather than a portion of an existing parcel that is transferred to an adjoining parcel as a property line adjustment. Whether the 2000 action was in essence a replat or partition, petitioner argues, in either case the result of the action is the creation of new units of land with new dates of creation, which means that tax lot 1200 was "created" in its current configuration in December 2000 rather than in 1999. More importantly,

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[3] ORS 92.010(12) currently defines "property line adjustment" as "* * * a relocation or elimination of all or a portion of the common property line between abutting properties that does not create an additional lot or parcel." ORS 92.010(12) has been amended several times since the *Warf* decision cited by petitioner, and those amendments may affect the extent of the holding in *Warf*. *Kipfer v. Jackson County*, 57 Or LUBA 35, 43 (2008).

[4] ORS 92.010(13) defines a "replat" as "the act of platting the lots, parcels and easements in a recorded subdivision or partition plat to achieve a reconfiguration of the existing subdivision or partition plat or to increase or decrease the number of lots in the subdivision."

ORS 92.010(7) defines "partition" in relevant part as the "act of partitioning land." In turn, under ORS 92.010(9) the term "partitioning land" means "dividing land to create not more than three parcels of land within a calendar year," but does not include "[a]n adjustment of a property line by the relocation of a common boundary where an additional unit of land is not created * * *." ORS 92.010(9)(b).

petitioner argues, the 2000 action was "unlawful," because it was processed and approved as a boundary line adjustment rather than a replat or partition. Therefore, petitioner contends, the county erred in concluding that tax lot 1200 was "lawfully" created prior to July 1, 2001.

As noted above, the county responds that LUBA should not reach the merits of petitioner's assignment of error, because (1) petitioner failed to assign error to the county's finding that the issue of the legality of the 2000 boundary line adjustment was waived, and (2) petitioner waived that issue, by failing to raise it (and in fact affirmatively waiving it) during the course of the previous appeal. On the merits, the county argues that the county court correctly concluded that the subject property was lawfully created in 1999, prior to the critical date of July 1, 2001, and that the 2000 decision did not "create" tax lot 1200 or any parcels.

We agree with the county that the issue of the legality of the 2000 boundary line adjustment cannot be raised in this appeal. Where the local government makes an explicit finding that a particular issue has been waived or is otherwise not properly before the local government, but as a precaution adopts alternative findings addressing the merits of the issue, a petitioner cannot invoke LUBA's review authority to challenge the alternative findings on the merits unless the petitioner assigns error to the explicit finding that the issue was waived or otherwise not properly before the local government, and demonstrates that the finding is erroneous. *See Citizens for Responsible Development v. City of The Dalles,* __ Or LUBA __ (2009-048, October 8, 2009), slip op 17 (petitioner's failure to assign error to a city finding that a particular issue was not preserved in the notice of local appeal means that any assignment of error at LUBA raising that unpreserved issue does not provide a basis for reversal or remand).

In the first portion of the reply brief, petitioner argues that it was not necessary to challenge the finding of waiver, because the waiver finding and the county's findings on the merits of the 2000 boundary line adjustment are not accurately viewed as "alternative"

findings for purposes of demonstrating compliance with the lawfully created language of ORS 215.263(5). Because the finding of waiver was not "necessary to the decision," petitioner argues, the decision could not rely upon it as an alternative basis to demonstrate compliance with ORS 215.263(5), and there is no obligation on petitioner's part to challenge non-dispositive findings that are essentially *dicta*. Alternatively, petitioner argues, the finding of waiver is subsumed into the second finding on the merits, and therefore petitioner's challenge to the findings on the merits also suffices to challenge the finding on waiver.

We disagree with both arguments. The county's finding on waiver was obviously intended to be a complete disposition of the issue of the legality of the 2000 boundary line adjustment. If that finding is correct and supported by the evidentiary record, then the issue was not properly before the county (and cannot be raised for the first time at LUBA), and there was, strictly speaking, no necessity to adopt alternative findings addressing the merits of issue (however prudent that might be). Nor do we see that petitioner's challenge to the findings on the merits somehow subsumes or implicitly incorporates a challenge to the waiver finding. Therefore, to challenge the findings on the merits petitioner was obligated to assign error to the waiver finding, and demonstrate in the petition for review that that finding is incorrect or unsupported by the evidentiary record. Petitioner did not assign error in the petition for review or otherwise challenge the county's finding that the issue was waived and, as explained above, petitioner cannot assign error to that finding for the first time in the reply brief.

Even if we were to consider petitioner's belated arguments in the reply brief that the issue was not waived, we agree with the county that petitioner could have raised the issue advanced in his assignment of error in the previous LUBA appeal, but did not, and therefore that issue cannot be raised in the present appeal on remand, under the reasoning in *Beck v. Tillamook County*, 313 Or 148, 831 P2d 678 (1992) (issues resolved in an appeal to LUBA,

or that could have been raised in the appeal, but were not, cannot be raised in an appeal of the decision on remand). As relevant, the issue raised in the previous appeal was whether actions after 2001 had the effect of "creating" tax lot 1200, and LUBA remanded on that issue because the record and findings did not sufficiently resolve that issue. Petitioner raised no issue regarding the legality of the 2000 boundary line adjustment and, as the county points out, petitioner even declared in a footnote to the petition for review that "[p]etitioner does not in any way dispute the legality of the December 5, 2000 boundary line adjustment." We understand petitioner to contend that there was no reasonable opportunity during the previous appeal to raise issues regarding the legality of the December 5, 2000 boundary line adjustment, because the entire 2000 decision was not part of the previous record. Further, petitioner argues that the 2006 administrative determination concluded, misleadingly, that the 2000 boundary line adjustment increased tax lot 1200 from 167.50 acres to 192.50 acres, a point petitioner did not dispute and that was in fact central to petitioner's theory that the 2005 correction may have "created" tax lot 1200, several years after the critical July 1, 2001 date.

We disagree with petitioner that there was no reasonable opportunity to raise issues regarding the legality of the December 2000 boundary line adjustment in the previous appeal. While the entire county decision approving the adjustment was not in the original record, as we noted in our opinion, the approved survey plat of that adjustment *was* in the original record, at Record 70. The theories raised in the present appeal—that the 2000 action was a *de facto* replat or partition—appear to be based on that survey plat. Petitioner identifies nothing in the 2000 county approval itself (which is now in the record on remand, at Record 721-22), or other evidence submitted on remand, that is necessary to give rise to the theories presented in this appeal. We see no reason why petitioner could not, in the previous appeal, have presented the theories advanced in this appeal, based on the survey plat in the original record. For whatever reason, petitioner chose to proceed in the previous appeal exclusively

under the theory that tax lot 1200 was created after the critical July 1, 2001 date, and did not present any challenge to the legality of actions taken prior to that date. In fact, petitioner appeared to disclaim any challenge to the legality of the 2000 action. That choice precludes petitioner from advancing such challenges in the appeal of the county's decision on remand, under the reasoning in *Beck*.

Because the only issue presented in petitioner's assignment of error is waived or otherwise not within our scope of review, the assignment of error does not provide a basis for reversal or remand, and is therefore denied.

The county's decision is affirmed.