1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3

4 CHARLES WIPER, INC,

5 *Petitioner,*

6

7 vs.

8

9 CITY OF EUGENE,

10 *Respondent.*

11

12 LUBA No. 2016-094

13

14 FINAL OPINION

15 AND ORDER

16

17 Appeal from City of Eugene.

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19 Bill Kloos, Eugene, filed the petition for review and argued on behalf of
20 petitioner. With him on the brief were the Law Office of Bill Kloos P.C.,
21 Micheal M. Reeder, Aaron J. Noteboom and Arnold Gallagher P.C.

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23 Anne C. Davies, City Attorney's Office, Eugene, filed the response brief
24 and argued on behalf of respondent.

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

28

29 REMANDED 02/01/2017

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a decision by the city approving a conditional use permit for a 172-unit housing development.

REPLY BRIEF

Petitioner moves for permission to file a reply brief. The city objects to the reply brief, arguing that it does not respond to "new matters" raised in the response brief. We agree with the city that Section 1 does not respond to a new matter but merely expands on petitioner's arguments in the first assignment of error. With the exception of Section 1, the remainder of the reply brief is allowed.

FACTS

The subject property is an undeveloped 15.8-acre portion of a larger 72-acre property that includes a cemetery, Rest Haven Memorial Park Cemetery, located on approximately 22 acres of the northern part of the larger 72-acre property. Braeburn Creek crosses a portion of the southwest corner of the property for approximately 340 feet. Approximately 15 years ago, in April 2002, petitioner applied for a conditional use permit (CUP) to develop the subject 15.8 acres of the property with 172 units of Controlled Income Rent (CIR) housing, including "12 studio units, 36 one-bedroom flats, 92 two-

1 bedroom flats, 20 two-bedroom townhouses, 12 three-bedroom townhouses,
2 and one community building."[1] Record 292.

3 In a letter to petitioner, the city's planning director rejected the
4 application, and petitioner appealed that letter to LUBA. LUBA remanded.
5 *Wiper v. City of Eugene*, 44 Or LUBA 127, 140 (2003) (*Wiper I*). Nearly
6 thirteen years later, in May 2016, petitioner requested that the city commence
7 proceedings on remand.[2]

8 The hearings officer held a hearing on the application and approved it
9 with conditions. Petitioner and others separately appealed the hearings officer's
10 decision to the planning commission. The planning commission approved the
11 application, but rejected a condition of approval imposed by the hearings

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[1] At the time the application was filed, the subject property was zoned RA-Suburban Residential, and its designation in the Eugene Springfield Metropolitan Area General Plan (Metro Plan) was Parks and Open Space. The subject property is now designated and zoned R-1-Low Density Residential with a Water Resources Conservation overlay.

[2] Petitioner explains that his request to commence remand proceedings was prompted by the legislature's 2015 enactment of ORS 227.181(2)(a), which provides:

> "In addition to the requirements of subsection (1) of this section, the 120-day period established under subsection (1) of this section shall not begin until the applicant requests in writing that the city proceed with the application on remand, but if the city does not receive the request within 180 days of the effective date of the final order or the final resolution of the judicial review, the city shall deem the application terminated."

Petition for Review 9.

officer relating to petitioner's proposal to pipe all 340 feet of Braeburn Creek and use collected surface and storm water for irrigation of the cemetery. The planning commission instead imposed a new condition of approval that prohibited piping Braeburn Creek. This appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Petitioner's first and second assignments of error invoke ORS 227.178(3)(a), commonly referred to as the Goal Post Rule. We set out the Goal Post Rule and background that led to the challenged decision and then consider petitioner's first and second assignments of error.

A. The Goal Post Rule

ORS 227.178(3) provides in relevant part that:

> "[i]f 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 * * * 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."

The "application" that ORS 227.180(3) is referring to is an application for a "permit, limited land use decision or zone change." ORS 227.178(1). After the CUP application was filed, changes to the Eugene Code (EC) (New Code) took effect that require proposed development of CIR housing to obtain approval through either the city's planned development review process or through review for compliance with the city's multi-family housing standards. Petitioner and the city agree that the version of the EC that applies to

petitioner's CUP application is the pre-2002 version of the EC, at EC 9.724(2)(2002), which we sometimes refer to herein as the Old Code.

During the proceedings before the hearings officer, petitioner argued that the Goal Post Rule prohibits the city from applying provisions of the New Code to future building permit applications for development of the proposed CIR housing. The hearings officer declined to address petitioner's argument:

> "While I understand the applicant's desire to decide the issue (the uncertainty regarding having to comply with provisions that are impossible to comply with could drive away potential developers), I think any decision on this issue would be speculative and advisory. [Petitioner] and the City identify a number of potential EC provisions that they think could apply to any future building permits, but even if such provisions are likely to arise they have not yet arisen and there is no guarantee exactly which provisions may be at issue. The present application is for a conditional use permit to construct controlled income and rent housing, this application is not for building permits. Any speculation about what standards and criteria would apply to future building permits would be just that – speculation." Record 300.

Petitioner appealed only that aspect of the hearings officer's decision to the planning commission. Record 243. The planning commission concluded that the hearings officer "was correct in declining to decide this issue," incorporated by reference his finding set out above, and affirmed his decision with regard to that issue. Record 7. The planning commission also found:

> "That said, the [planning commission] also emphasizes another point made in the City Attorney's June 29, 2016 memo regarding the 'goal post rule' and related case law in *Gagnier v. City of Gladstone*, [38 Or LUBA 858, 865 (2000)] that the City may not apply development standards at the building permit stage where doing so would result in denial of a project that was previously

> approved in the processing of a land use application, such as the CUP for controlled income and rent housing in this case." Record 7.

B. First and Second Assignments of Error

ORS 197.835(9)(a) sets out LUBA's standard of review of land use decisions such as the challenged decision, and authorizes LUBA to reverse or remand a land use decision where the local government "improperly construed the applicable law." Petitioner's first assignment of error is that the city erred in failing to address his argument that the Goal Post Rule prohibits the city from applying the standards and criteria of the New Code to approve or deny future applications for building permits related to the conditional use housing that is approved in the decision. Petitioner's second assignment of error targets the portion of the planning commission decision quoted above, and argues that the planning commission erred in determining that the New Code applies to future applications for building permits to develop the CIR housing approved in the decision unless application of the New Code would result in a denial of the building permit applications.

The city does not really respond to petitioner's first assignment of error except to disagree with petitioner's assertion that the city attorney took the position below that the hearings officer must address petitioner's Goal Post Rule argument. We understand the city to respond to petitioner's second assignment of error by taking the position that the city did not make the decision that petitioner alleges that it made in the second assignment of error,

and by questioning whether the issue is "ripe for review, either by the City or by LUBA."[3] Response Brief 7.

First, we disagree with petitioner that the city erred in failing to address his Goal Post Rule argument. ORS 227.173(3) requires "approval or denial of a permit application * * * shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth." Petitioner points to no requirement in the EC, or any statute or rule that required the hearings officer or the planning commission to address petitioner's argument regarding the standards and criteria that might apply to a hypothetical future building permit application for the approved CIR housing. The city's decision complies with ORS 227.173(3), and the city was not required to address in the decision approving the subject conditional use permit whether future building permits would be required to comply with the Old Code or with the New Code.

We also disagree with petitioner that the planning commission, in the portion of its decision quoted above, made a determination on the issue or that it determined that the New Code will apply to future building permit

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[3] The city also responds that the Goal Post Rule applies only to the initial application for a conditional use permit and does not require the city to apply the standards and criteria in the Old Code to subsequent applications for a building permit.

applications. The quoted portion of the planning commission's decision beginning with the words "that said" is not necessary to the decision and does not change the planning commission's ultimate conclusion that affirmed the hearings officer's decision that declined to address the argument. At best, it is dicta.

In a similar vein, to the extent petitioner urges LUBA to address the argument, we decline to do so. A condition of approval that implements EC 9.718(2002) requires the applicant to apply for development permits needed to implement the approved use "within 7 years of the effective date of approval[,]" and thereafter "each subsequent phase must be applied for not later than 7 years after completion of construction of the preceding phase."[4] Record 302. No building permits have been applied for, and given the nearly 13 years that passed between our 2003 remand in *Wiper I* and petitioner's 2016 request that the city commence proceedings on remand, it is at least possible that no building permits will be applied for in the near future.[5] Record 302. Because

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[4] The condition defines "effective date of approval" to mean "the date of all appeals, challenges, and/or suits related to the approval or denial of this CIR CUP and to the cemetery CUP required under these conditions of approval." Record 302.

[5] In addition, circumstances could change before building permits are applied for. For example, when petitioner applies for building permits, the city could agree with petitioner's position and apply only Old Code provisions. Or the legislature could amend provisions of the Goal Post Rule or repeal it entirely, or the city could amend provisions of the New Code that petitioner believes pose problems for petitioner's development.

ORS 197.805 directs that LUBA is to perform its review function "consistently with sound principles governing judicial review[,]" and courts do not issue advisory opinions, LUBA typically declines to issue what are in essence advisory opinions. Accordingly, we decline to address the argument.

The first and second assignments of error are denied.

THIRD ASSIGNMENT OF ERROR

EC 9.724(2)(b)(1)(2002) provides that applications for CIR housing must be "designed to * * * avoid unnecessary removal of attractive natural vegetation." Response Brief 3, n 3. In his application, petitioner proposed to remove vegetation in areas proposed for housing development. Petitioner also proposed removing vegetation in order to pipe all 340 feet of Braeburn Creek, which as noted is located in the southwestern portion of the subject property. The purpose of piping Braeburn Creek was two-fold: to be able to extend sanitary sewer lines under the creek in order to connect the proposed housing to the city's sewer line in the street, and to use collected water from the piped creek to irrigate the adjacent cemetery to the north. Petitioner argued to the hearings officer that it was necessary to remove vegetation in the area of the creek in order to pipe the entire length of creek.

The hearings officer agreed that the proposed vegetation removal for piping the entire creek was "necessary" within the meaning of EC 9.724(2)(b)(1)(2002), as that provision had been interpreted by the city in another decision that the hearings officer refers to as the "Woodleaf decision."

1 Record 296-97. In the Woodleaf decision, the city interpreted EC
2 9.724(2)(b)(1)(2002) to allow vegetation removal in order to locate the CIR
3 housing units, common areas, and infrastructure, as "necessary" for the CIR
4 housing to be developed. The hearings officer imposed Condition 5, which
5 provided that "the applicant may capture, pipe, and pump any surface water
6 and/or storm water flowing on the property to a holding reservoir to be used for
7 irrigation so long as the applicant obtains all required City, state, and/or federal
8 permits as may be necessary." Record 303.

9 On appeal to the planning commission, opponents argued that piping the
10 entire length of Braeburn Creek was not "necessary" to develop the proposed
11 housing. The planning commission found in relevant part:

12 "[I]t is not clear that piping of the entire stream segment is
13 necessary in order to get sanitary lines across the creek, or for
14 stormwater management that would serve the proposed
15 development as asserted by the applicant. Furthermore, the
16 applicant has not sufficiently demonstrated how piping the entire
17 stream segment for purposes of irrigation is *necessary* to serve the
18 proposed CIR housing project." Record 11 (emphasis in original).

19 The planning commission imposed a new Condition 5 to replace the condition
20 imposed by the hearings officer.[6]

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[6] New Condition 5 provides:

"The applicant shall remove from its site plan and development proposal the proposed storm water infrastructure that includes piping of the stream corridor (Braeburn Creek) in the southwest corner of the subject property. Specifically, the applicant shall remove the 'development impact area' as depicted on site plan

1 Petitioner's third assignment of error is difficult to follow but we
2 understand petitioner to argue that the application for CIR development is for
3 "needed housing" as described in ORS 197.303(1)(2001).[7] From that premise,

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sheet CU-1A (dated June 29, 2016) for purposes of piping Braeburn Creek. This does not preclude the applicant's ability to connect wastewater service as proposed, which would require crossing the creek to reach the public wastewater system. The applicant may pipe a portion of the creek only if it can demonstrate the necessity of doing so with a licensed engineering analysis, as the only feasible means to connect wastewater service in this location." Record 11.

[7] ORS 197.303(1)(2001) provided:

"(1) As used in ORS 197.307, until the beginning of the first periodic review of a local government's acknowledged comprehensive plan, 'needed housing' means housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels. On and after the beginning of the first periodic review of a local government's acknowledged comprehensive plan, 'needed housing' also means:

"(a) Housing that includes, but is not limited to, attached and detached single-family housing and multiple family housing for both owner and renter occupancy;

"(b) Government assisted housing;

"(c) Mobile home or manufactured dwelling parks as provided in ORS 197.475 to 197.490; and

"(d) Manufactured homes on individual lots planned and zoned for single-family residential use that are in addition to lots within designated manufactured dwelling subdivisions."

petitioner argues two things. First, we understand petitioner to argue that EC 9.724(2)(b)(2002) is not a "clear and objective standard[]" within the meaning of ORS 197.307(6)(2001), as it must be if it is to be applied to needed housing under ORS 197.307(6)(2001), and the city therefore may not apply it to petitioner's application.[8] Petition for Review 35. Second, we understand petitioner to argue that the planning commission's Condition 5 violates the ORS 197.307(6)(2001) prohibition against applying special conditions that are not "clear and objective" to needed housing.

The city responds initially by arguing that the proposed housing is not "needed housing" as defined in ORS 197.303(1)(2001), because according to the city the subject property is not included on the city's 1999 building lands inventory, and therefore the requirement of ORS 197.307(6)(2001) to apply only clear and objective standards and conditions does not apply. Petitioner appears to agree that the property is not on the city's building lands inventory, but responds that the version of the needed housing statute that applied in 2002, when the application was filed, identified as "needed housing" (1) housing on land that is included on the city's buildable lands inventory, *and* (2)

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[8] ORS 197.307(6)(2001) provided:

> "Any approval standards, special conditions and the procedures for approval adopted by a local government shall be clear and objective and may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

1 housing types listed in ORS 197.303(1)(a) through (e)(2001), which includes
2 "government assisted housing" in (1)(b). *See Montgomery v. City of Dunes*
3 *City*, 236 Or App 194, 236 P3d 750 (2010) (explaining that the 2001 version of
4 ORS 197.303(1) identified two ways that housing can qualify as needed
5 housing). Because the proposed CIR housing is "government assisted housing"
6 as described in ORS 197.303(1)(b)(2001), petitioner maintains, it is "needed
7 housing" within the meaning of ORS 197.303(1)(2001). For the reasons
8 explained by petitioner, we agree with petitioner that the proposed housing is
9 "needed housing" under the applicable version of the needed housing statute,
10 even though it is not included on the city's 1999 buildable lands inventory.

11 The city also responds that petitioner failed to raise this issue with
12 sufficient specificity, and prior to the close of the initial evidentiary hearing,
13 and may not argue for the first time to LUBA that the provision is not clear and
14 objective within the meaning of ORS 197.307(6)(2001). For the reasons that
15 follow, we agree with the city.

16 In his reply brief, petitioner responds that he took the position in his
17 application materials that the interpretation of EC 9.724(2)(b)(1)(2002) that the
18 city adopted in the Woodleaf decision allowed the city to apply the standard in
19 a clear and objective manner, and that that position was sufficient to raise the
20 issue advanced in this assignment of error, that the city may not apply EC
21 9.724(2)(b)(1)(2002) at all because it is not clear and objective. According to

petitioner, the hearings officer applied the Woodleaf interpretation, but the planning commission did not. Petition for Review 43.

We disagree with petitioner that the planning commission did not apply the Woodleaf interpretation. The hearings officer, applying the Woodleaf interpretation, concluded that piping the entire creek was part of the infrastructure necessary to develop the proposed CIR housing, or in other words, was a necessary *part of the housing development*. That is the interpretation of "necessary" adopted in Woodleaf. The planning commission applied the same interpretation adopted in Woodleaf, but disagreed with the hearings officer's conclusion that piping the entire creek for purposes of using water from the creek to irrigate the adjacent cemetery was a necessary *part of the housing development*. At all times during the proceedings before the city, the city applied the interpretation from Woodleaf that petitioner urged it to apply. The hearings officer and the planning commission just reached different conclusions based on that interpretation about how much of the creek should be be piped. Given that circumstance, we do not think ORS 197.763(1) and ORS 197.835(3) allow petitioner to now argue that EC 9.724(2)(b)(1)(2002) is not "clear and objective" within the meaning of ORS 197.307(6)(2001) and that the city erred in applying it at all.

Petitioner also responds by citing to his final argument to the hearings officer at Record 307-09. We also do not think petitioner's general final argument to the hearings officer at Record 307-08 is sufficient to raise the issue

1 that he now raises with enough specificity.[9] *Boldt v. Clackamas County*, 107 Or
2 App 619, 623, 813 P2d 1078 (1991) (petitioner's arguments must give the city
3 "fair notice" that it needed to address that issue).

4 Also in the third assignment of error, petitioner argues that the last
5 sentence of Condition 5 is not "clear and objective" as required by ORS
6 197.307(6)(2001). *See* n 6. Condition 5 prohibits the part of the application that
7 proposed piping all of the creek, but the last sentence states that the applicant
8 may pipe the portion of the creek required to extend sanitary sewer lines under
9 the creek "only if it can demonstrate the necessity of doing so with a licensed
10 engineering analysis as the only feasible means to connect wastewater service
11 in this location." Record 11. The city responds that the last sentence of
12 Condition 5 is not a mandatory condition imposed on petitioner, but merely
13 "provides guidance" to petitioner in the event petitioner decides to seek a
14 future approval to pipe a portion of the creek.

15 Contrary to the city's argument, the last sentence of Condition 5 does
16 impose a mandatory "condition" on petitioner for purposes of ORS
17 197.307(6)(2001), effectively imposing the standard of review that will govern
18 any future request from petitioner to pipe a portion of the creek. Moreover, we
19 agree with petitioner that the last sentence of Condition 5 requiring petitioner

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[9] Petitioner's final argument described the function of the needed housing statute and generally urged the hearings officer to "be on the lookout for situations where the dispute between the applicant and the City relates to a discretionary call about subjective or ambiguous standards." Record 308.

1 to demonstrate that piping a portion of the creek is "the only feasible means to
2 connect wastewater service in this location" requires a subjective judgment by
3 the city in order to determine whether it is "the only feasible means" to provide
4 sanitary sewer to the property. The last sentence of Condition 5 is not clear and
5 objective and the city may not impose that requirement. Remand is necessary
6 for the city to either strike the last sentence of Condition 5 (which may also
7 require striking the next to last sentence), or modify the last sentence of
8 Condition 5 to make it clear and objective.
9 A portion of the third assignment of error is sustained.
10 The city's decision is remanded.