

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

GENE R. OSTER,
Petitioner,

vs.

CITY OF SILVERTON,
Respondent,

and

MARY ROSE BRANDT,
Intervenor-Respondent.

LUBA No. 2018-103

FINAL OPINION
AND ORDER

Appeal from City of Silverton.

Alan M. Sorem, Salem, filed the petition for review and argued on behalf of petitioner. With him on the brief was Saalfeld Griggs PC.

Spencer Q. Parsons, Portland, filed a response brief and argued on behalf of respondent. With him on the brief was Beery, Elsner & Hammond, LLP.

David E. Coulombe, Corvallis, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Fewel, Brewer & Coulombe.

ZAMUDIO, Board Member; RYAN, Board Chair; RUDD, Board Member, participated in the decision.

REVERSED

05/07/2019

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

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NATURE OF THE DECISION

Petitioner challenges a city council limited land use decision denying a tentative subdivision plan.

REPLY BRIEF

On January 15, 2019, petitioner filed a motion to file a reply brief. On January 29, 2019, the city filed an objection to petitioner’s motion to file a reply brief. Petitioner’s appeal was filed in 2018 and is subject to OAR 661-010-0039 (2017), which confines reply briefs “solely to new matters raised in the respondent’s brief.”¹ “Generally, responses warranting a reply brief tend to be arguments that assignments of error should fail regardless of their stated merits, based on facts or authority not involved in those assignments.” *Wal-mart Stores, Inc. v. City of Gresham*, 54 Or LUBA 16, 19 (2007). Where arguments in a reply brief respond to arguments raised in the response brief that could not have been

¹ OAR 661-010-0039 (2017) provided:

“A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief together with four copies within seven days of the date the respondent’s brief is filed. A reply brief shall be confined solely to new matters raised in the respondent’s brief, state agency brief, or amicus brief. A reply brief shall not exceed five pages, exclusive of appendices, unless permission for a longer reply brief is given by the Board. A reply brief shall have gray front and back covers.”

1 reasonably anticipated in the petition for review, we will generally allow the reply
2 brief. *Id.* at 20.

3 In the petition for review, petitioner argued that the city’s decision violated
4 the Takings Clause of the Fifth Amendment of the United States Constitution,
5 relying on *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 US 595, 133 S Ct
6 2586 (2013). Petitioner also argued that ORS 197.522 is immaterial to the city’s
7 constitutional obligations. The city responded, arguing that the *Koontz* case is
8 distinguishable, citing ORS 197.522(4). City’s Response Brief 17–18.

9 In his reply brief, petitioner argues that ORS 197.522(4) is inapposite to
10 his arguments and responds to the city’s argument that *Koontz* is distinguishable.
11 The two “matters” petitioner seeks to address in his reply brief are not “new
12 matters” within the meaning of OAR 661-010-0039 (2017). In his petition for
13 review, petitioner relied heavily on *Koontz* and argued that ORS 197.522 was
14 immaterial. Petitioner could have anticipated that the city would attempt to
15 distinguish *Koontz* and would rely on ORS 197.522. Petitioner’s reply brief seeks
16 to introduce surrebuttal arguments to the city’s arguments in the response brief,
17 and to elaborate upon arguments already set out in the petition for review. A reply
18 brief making surrebuttal to argument in the response brief is not allowed.
19 *Willamette Oaks, LLC v. City of Eugene*, 67 Or LUBA 351, 353, *aff’d*, 258 Or
20 App 534, 311 P3d 527 (2013).

21 The motion to file a reply brief is denied.

1 **FACTS**

2 The subject property is comprised of approximately 9.5 acres and is zoned
3 single-family residential (R-1). The city annexed the subject property in 2016.
4 On May 11, 2018, petitioner submitted an application for tentative plat approval
5 to subdivide the property into 40 lots, at sizes permitted in the zone, and to
6 develop those lots with housing at densities permitted in the R-1 zone under clear
7 and objective standards. *See* ORS 197.307(4).²

8 The planning commission denied the application because the proposal
9 would not result in improved performance of two off-site intersections to a level
10 of service (LOS) that would satisfy the city, based on a level of service standard
11 contained in the city’s transportation system plan document (the LOS D
12 standard). Petitioner’s engineer estimated that improvements to comply with the
13 LOS D standard would cost \$2,118,550.

² ORS 197.307(4) provides:

“Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing, including needed housing. The standards, conditions and procedures:

“(a) May include, but are not limited to, one or more provisions regulating the density or height of a development.

“(b) May not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.”

1 Petitioner appealed the planning commission decision to the city council. After
2 an on-the-record hearing, the city council issued a decision adopting and
3 affirming the planning commission’s denial and adopting as findings the staff
4 report in support of the denial. This appeal followed.

5 **SECOND ASSIGNMENT OF ERROR**

6 The city determined that Silverton Municipal Code, Title 18, Development
7 Code and Zoning Map (SDC) incorporated by reference traffic standards in the
8 City of Silverton Transportation System Plan (TSP). The city applied a minimum
9 LOS D standard, derived from the TSP. The city denied the application because
10 petitioner’s traffic study showed that the proposed development would send
11 additional peak hour traffic to two intersections at N 1st Street and Hobart Road,
12 and N 1st Street and Jefferson Street, and the proposal did not include
13 transportation system improvements that would bring those intersections to LOS
14 D. No party disputes that the proposed development would slightly exacerbate
15 traffic; however, even without the proposed development, at existing traffic
16 volumes, those two intersections are failing to meet the LOS D standard and
17 operating at LOS F. Record 13.

18 Under SDC 4.3.130 preliminary plat applicants must “describe the
19 proposed access to and from the site and estimate potential vehicle traffic
20 increases resulting from the project,” and the community development director
21 may require a traffic impact study, in accordance with SDC 4.1.900. Neither SDC

1 4.3.130 or SDC 4.1.900 define traffic standards or include the LOS D standard
2 that we describe above.

3 The city concluded that the LOS D standard was incorporated by reference
4 into the SDC by SDC 4.3.140(A)(1) and (B)(7), which provide:

5 “A. General Review Criteria. The city shall consider the
6 following review criteria and may approve, approve with
7 conditions, or deny a preliminary plat based on the following;
8 the applicant shall bear the burden of proof.

9 “1. The proposed preliminary plat complies with the
10 applicable development code sections and all other
11 applicable ordinances and regulations. At a minimum,
12 the provisions of this article, and the applicable
13 chapters and sections of Article 2, Land Use (Zoning)
14 Districts, and Article 3, Community Design Standards
15 shall apply. * * *

16 “* * * * *

17 “B. Layout and Design of Streets, Blocks and Lots. All proposed
18 blocks (i.e., one or more lots bound by public streets), lots and
19 parcels conform to the specific requirements below:

20 “* * * * *

21 “7. All applicable engineering design standards for streets,
22 utilities, surface water management, and easements
23 shall be met.”

24 The city determined that those criteria incorporate SDC 3.4.010(A), which
25 governs public facilities and provides:

26 “A. Purpose. This chapter provides general development
27 standards and approval criteria for public improvements. The
28 code incorporates by reference the city’s public facility

1 master plans, including plans for domestic water, sanitary
2 sewer, storm drainage, parks, and transportation. The code
3 also incorporates by reference Silverton’s public works
4 design standards. This chapter is intended to provide
5 minimum requirements for public facilities. It is not intended
6 to duplicate or replace the design standards contained in the
7 above documents.”

8 The city found that SDC 3.4.010(A) effectively incorporated the city’s
9 TSP, Chapter 2, Goal 4, Policy (f), which provides, in part:

10 “(f) The City shall implement performance standards for use in
11 evaluating new development proposals.

12 *“Action: City performance standards shall be used to*
13 *evaluate developments impacting City or County facilities.*
14 *The level of service standard shall be LOS D based on the*
15 *Highway Capacity Manual methodology and a [volume to*
16 *capacity] v/c ratio of 0.85 for signalized and all-way stop*
17 *controlled intersections. For unsignalized intersection, the*
18 *level of service standard shall be LOS D based on the*
19 *Highway Capacity Manual and a v/c ratio of 0.90. ODOT v/c*
20 *ratio standards shall apply to ODOT facilities.” (Italics in*
21 *original.)³*

22 In the second assignment of error, petitioner argues that city’s decision
23 violates ORS 197.195(1), which governs limited land use decisions and provides:

24 “A limited land use decision shall be consistent with applicable
25 provisions of city or county comprehensive plans and land use
26 regulations. Such a decision may include conditions authorized by
27 law. Within two years of September 29, 1991, cities and counties

³ In a prior order in this appeal, we granted the city’s motion to take official notice of Chapter 2 of the TSP. *Oster v. City of Silverton*, ___ Or LUBA ___ (LUBA No 2018-103, Order, Apr 5, 2019) (slip op at 9).

1 shall incorporate all comprehensive plan standards applicable to
2 limited land use decisions into their land use regulations. A decision
3 to incorporate all, some, or none of the applicable comprehensive
4 plan standards into land use regulations shall be undertaken as a
5 post-acknowledgment amendment under ORS 197.610 to 197.625.
6 If a city or county does not incorporate its comprehensive plan
7 provisions into its land use regulations, the comprehensive plan
8 provisions may not be used as a basis for a decision by the city or
9 county or on appeal from that decision.”

10 Petitioner argues that *Paterson v. City of Bend*, 49 Or LUBA 160, *aff'd, in*
11 *part, rev'd and rem'd on other grounds*, 201 Or App 344, 118 P3d 842 (2005),
12 supports his argument and is dispositive. We agree. In *Paterson*, the petitioner
13 appealed a limited land use decision in which the city approved a tentative
14 subdivision plan. The petitioner contended that the city had incorporated all
15 comprehensive plan standards applicable to subdivision approvals within the
16 meaning of ORS 197.195(1), by requiring in Bend Subdivision Ordinance (BSO)
17 3.040(3) that the applicant for a tentative subdivision plan approval demonstrate
18 compliance with the Bend Area General Plan. The petitioner identified several
19 General Plan policies relating to transportation that petitioner argued applied to
20 the proposed subdivision. We rejected that argument and explained:

21 “[I]n our view ORS 197.195(1) contemplates more than a broad
22 injunction to comply with unspecified portions of the
23 comprehensive plan. In order to ‘incorporate’ a comprehensive plan
24 standard into a local government’s land use regulations within the
25 meaning of ORS 197.195(1), the local government must at least
26 amend its land use regulations to make clear what specific policies
27 or other provisions of the comprehensive plan apply to a limited land
28 use decision as approval criteria. Under that standard, BSO 3.040(3)
29 falls far short of incorporating any comprehensive plan provisions.”

1 *Id.* at 167.

2 The city responds that the city adopted the TSP in March 3, 2008, by a
3 comprehensive plan text amendment, Ordinance 08-01.⁴ That ordinance adopted
4 the TSP “as a support document to the 2002 Silverton Comprehensive Plan.”
5 City’s Response Brief, App 2, page 2. It is undisputed that the city adopted the
6 TSP as a support document to the comprehensive plan. The dispute is whether
7 the SDC sections applicable to a limited land use decision application sufficiently
8 incorporated the action items in the TSP as approval criteria. Ordinance 08-01
9 does not support the city’s position that the city has incorporated action items in
10 the TSP as approval criteria. Instead, the findings for Ordinance 08-01 indicate
11 that the city intended further SDC amendments to implement the TSP. The
12 findings attached to Ordinance 08-01 explain that the TSP “goals and policies
13 have been developed to guide the City’s twenty-year vision of transportation
14 system needs. Each goal has a number of policies designed to guide the
15 community in the direction of completing each goal. Some policies are provided
16 with details of potential implementing actions.” City’s Response Brief, App 2,
17 page 5.

⁴ In a prior order in this appeal, we granted the city’s motion to take official notice of Ordinance 08-01. *Oster*, ___ Or LUBA ___ (LUBA No 2018-103, Order, Apr 5, 2019) (slip op at 9).

1 Intervenor argues that the city incorporated the TSP policies into the SDC
2 by Ordinance 08-06, which codified SDC 3.1.100.⁵ SDC 3.1.100 provides:

3 “The purpose of this chapter is to ensure that developments provide
4 safe and efficient access and circulation for pedestrians and vehicles.
5 SDC 3.1.200 provides standards for vehicular access and
6 circulation. SDC 3.1.300 provides standards for pedestrian access
7 and circulation. General street improvement requirements are
8 provided in SDC 3.4.100, *with more specific requirements provided*
9 *in the city of Silverton transportation system plan and the city’s*
10 *public works design standards.”* (Emphasis added.)

11 Intervenor argues that the “more specific requirement,” *i.e.*, the LOS D standard,
12 is incorporated into the SDC by SDC 3.4.100. The city did not rely on SDC
13 3.1.100 in the challenged decision and does not cite to it in defense of its decision
14 on appeal. Nevertheless, intervenor’s argument and the city’s argument rely on
15 the same underlying premise: that the city effectively incorporated the action
16 items of the TSP into the SDC as approval criteria applicable to a limited land
17 use decision by incorporating by reference the entire TSP into sections of the
18 SDC.

19 The city attempts to distinguish *Paterson* by arguing that, unlike general
20 comprehensive plan policies, “the City’s TSP provides specific action items to
21 be implemented under Policies.” City’s Response Brief 21. The city contends that
22 ORS 197.195(1) does not require the city to codify all approval criteria and

⁵ In a prior order in this appeal, we granted intervenor’s motion to take official notice of Ordinance 08-06. *Oster*, ___ Or LUBA ___ (LUBA No 2018-103, Order, Apr 5, 2019) (slip op at 10).

1 standards for limited land use decisions. Instead, the city emphasizes, ORS
2 197.195(1) requires the city to “*incorporate* all comprehensive plan standards
3 applicable to limited land use decisions into their land use regulations.”
4 (Emphasis added.) However, the city’s arguments are directed at the wrong
5 question. The question under ORS 197.195(1) and *Paterson* is not whether the
6 LOS D standard is clear in the TSP or “codified” in the SDC; instead, the question
7 is whether the SDC provisions that the city concluded incorporated the LOS D
8 standard make clear what specific policies or standards in the TSP apply to a
9 limited land use decision as approval criteria.

10 We conclude that the sections of the SDC that the city relied upon to deny
11 the application, SDC 4.3.140(A)(1), (B)(7), and SDC 3.4.010(A), fall far short of
12 incorporating the LOS D traffic performance standard in TSP, Chapter 2, Goal 4,
13 Policy (f), under the “incorporation” standard in ORS 197.195(1), as interpreted
14 in *Paterson*. Those provisions do not make clear what specific policies, action
15 items, or performance standards contained in the TSP apply as approval criteria
16 for a limited land use decision. For example, SDC 4.3.140(A)(1) and (B)(7) do
17 not refer to the TSP at all. Similarly, SDC 3.4.010(A) generally “incorporates by
18 reference the city’s public facility master plans, including plans for domestic
19 water, sanitary sewer, storm drainage, parks, and transportation.” Incorporation
20 by reference of the entirety of each of the city’s public facilities plans falls far
21 short of satisfying the incorporation standard in ORS 197.195(1). We agree with
22 petitioner that by applying the LOS D standard, the city violated ORS 197.195(1).

1 The second assignment of error is sustained.

2 **FIRST AND THIRD ASSIGNMENTS OF ERROR**

3 In the first assignment of error, first subassignment of error, petitioner
4 argues that the city’s decision violated ORS 197.307(4) by applying ambiguous
5 approval standards in a manner that would result in unreasonable cost and
6 unreasonable delay. See n 2. In the first assignment of error, second
7 subassignment of error, petitioner argues that the city’s decision violated his
8 constitutional rights. ORS 197.835(9)(a)(E). Under the third assignment of error,
9 petitioner argues that the city’s decision misconstrued applicable law and lacks
10 adequate findings with respect to the offsite traffic impacts. ORS
11 197.835(9)(a)(D), (C).

12 The city’s denial relied solely on its application of the TSP standards. We
13 conclude under the second assignment of error that, because the city did not
14 incorporate the TSP standards into its subdivision regulations, the TSP does not
15 apply to petitioner’s application and the city may not use the TSP standard as a
16 basis to deny the subdivision. Because we find that the TSP does not provide
17 applicable approval criteria for a limited land use decision, we need not and do
18 not decide whether the city’s application of the TSP standard violates petitioner’s
19 constitutional rights or the requirement in ORS 197.307(4) that the city may
20 apply only clear and objective standards in a manner that would not result in
21 unreasonable cost or delay. Accordingly, we do not reach the first and third
22 assignments of error.

1 **DISPOSITION**

2 Petitioner requests that, if we reverse the city’s decision under the first
3 assignment of error, we instruct the city to approve the application subject only
4 to unappealed conditions of approval. Petition for Review 2. We will reverse a
5 decision and order the local government to grant approval if the decision “is
6 outside the range of discretion allowed the local government under its
7 comprehensive plan and implementing ordinances.” ORS 197.835(10)(a)(A).⁶
8 Petitioner’s request for relief invokes the authority granted to LUBA in ORS
9 197.835(10)(a)(A), notwithstanding petitioner’s failure to specifically cite that
10 statute. *See Stewart v. City of Salem*, 58 Or LUBA 605, 619, *aff’d*, 231 Or App
11 356, 219 P3d 46 (2009), *rev den*, 348 Or 415 (2010) (applying ORS
12 197.835(10)(a)(A), even where petitioner failed to cite that subsection).

13 ORS 197.835(10)(a) “requires reversal, and precludes remand, of a denial
14 decision when LUBA determines on the basis of the record that the local

⁶ ORS 197.835(10)(a), provides, in part:

“The board shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds:

“(A) Based on the evidence in the record, that the local government decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances[.]”

1 government lacks the discretion to deny the development application.” *Stewart*,
2 231 Or App at 375.

3 In *Parkview Terrace Dev. LLC v. City of Grants Pass*, 70 Or LUBA 37
4 (2014), we reversed a city council decision denying site plan approval and
5 variance for a needed housing development. The city council gave a total of ten
6 reasons why it denied the applications. Seven of the site plan review criteria the
7 city council relied on to support its denial decision could not be applied to the
8 application under ORS 197.307(4), because the application for site plan approval
9 was an application for approval of “needed housing” and we determined those
10 standards are not “clear and objective.” The city council also inappropriately
11 relied on three inapplicable criteria: (1) an “adequate” parking standard that did
12 not exist in the city’s code, (2) an internal circulation standard that did not apply
13 to the proposed residential use, and (3) a variance criterion that did not apply
14 under the circumstances surrounding the development. We concluded that all ten
15 of the reasons that the city council gave for denying petitioner’s applications were
16 “outside the range of discretion allowed the local government under its
17 comprehensive plan and implementing ordinances.” *Id.* at 57–58. Accordingly,
18 we reversed the city council’s decision and ordered the city to approve the
19 petitioner’s applications for variance and site plan approval. We instructed that
20 the city council’s decision to approve the application may include conditions of
21 approval imposed by the urban area planning commission that the petitioner had
22 agreed to. *Id.* at 58 (citing *Stewart*, 58 Or LUBA at 622).

1 In this case, the city council gave only one reason for denial, failure of the
2 development proposal to include improvements to failing intersections to satisfy
3 the LOS D traffic performance standard. We have concluded that the TSP does
4 not provide applicable criteria because the city failed to specifically incorporate
5 TSP traffic standards into its land use regulations with the level of specificity
6 required by ORS 197.195(1). Thus, the only reason that the city council gave for
7 denying petitioner’s application is “outside the range of discretion allowed the
8 local government under its comprehensive plan and implementing ordinances.”
9 Accordingly, we reverse the city council’s decision and order the city to approve
10 the petitioner’s application.

11 On appeal, the city has not identified any applicable standards that would
12 require any further review. Petitioner does not dispute that the city may impose
13 conditions of approval that are “roughly proportional to the impact of the
14 development on public facilities.” SDC 3.4.010(D).⁷ During the city proceedings,

⁷ SDC 3.4.010(D) provides:

“Conditions of Development Approval. Development shall not occur until all required public facilities are in place or guaranteed, in conformance with the provisions of this code and the city’s design standards. Improvements required as a condition of development approval, when not voluntarily accepted by the applicant, must be roughly proportional to the impact of the development on public facilities. Findings in the development approval must indicate how the required improvements are directly related and roughly proportional to the impact of development.”

1 petitioner offered, as a compromise condition of approval, to construct a
2 westbound left turn lane at the Highway 214/Hobart Road intersection to mitigate
3 the impact of the proposed development on public facilities at an estimated cost
4 of over twice the estimated proportionate share. Record 14. Despite denying the
5 application, the city’s decision appears to accept and adopt that condition of
6 approval, subject to terms and conditions. *Id.* Petitioner does not challenge that
7 condition on appeal.⁸ Accordingly, the city council’s decision to approve the
8 application may include that condition of approval.⁹ *Parkview Terrace*, 70 Or
9 LUBA at 58; *Stewart*, 58 Or LUBA at 622.

10 The city’s decision is reversed, and the city is ordered to approve the
11 application.

⁸ In *Stewart*, we explained that the “application” required to be approved under ORS 197.835(10)(a) “refers to the application as proposed at the time of the local government’s denial, including any conditions of approval that the applicant has proposed and the local government has accepted. Such applicant-proposed conditions can be understood to effectively modify or amend the application.” *Stewart*, 58 Or LUBA at 622.

⁹ We do not intend to foreclose the possibility that, at the time that the city grants approval of the application as required by ORS 197.835(10)(a) and this decision, the city and petitioner might agree to include additional or modified conditions of approval.