

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

3
4 BONNIE BRODERSEN,
5 *Petitioner,*

6
7 vs.

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9 CITY OF ASHLAND,
10 *Respondent,*

11 and

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13 WILLIAM McDONALD and LYNN McDONALD,
14 *Intervenors-Respondents.*

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16 LUBA No. 2010-038, 2010-056 and 2010-058
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19 ORDER

20 **CONSOLIDATION**

21 The notice of intent to appeal (NITA) filed on May 3, 2010 challenges two decisions:
22 (1) Ordinance No 3007, adopted April 2, 2010, and (2) a permit extension decision dated
23 April 8, 2010. In an order dated June 23, 2010, LUBA gave petitioner seven days to file (1)
24 either a written election to appeal only one of the two decisions named in the notice of intent
25 to appeal, or (2) a separate notice of intent to appeal and separate filing fee and deposit for
26 costs for the additional decision.

27 On June 30, 2010, petitioner filed *two* additional notices of intent to appeal, each
28 accompanied by a filing fee and deposit for costs. The first additional NITA challenges the
29 April 8, 2010 permit extension, and has been assigned LUBA No. 2010-056. The second
30 additional NITA again challenges Ordinance No. 3007, and has been assigned LUBA No.
31 2010-058. Although only one additional NITA was necessary for petitioner to challenge
32 both decisions, for some reason petitioner filed two additional NITAs. For purposes of our

1 review, we will treat the original NITA as appealing only Ordinance No. 3007, since that is
2 the first decision named in that notice, and we will consolidate all three appeals.

3 Under OAR 661-010-0055, LUBA:

4 “* * * may consolidate two or more proceedings, provided the proceedings
5 seek review of the same or closely related land use decision(s) or limited land
6 use decision(s).”

7 LUBA Nos. 2010-038 and 2010-58 seek review of the same decision, Ordinance No. 3007,
8 and are consolidated for our review. LUBA No. 2010-056 challenges a closely related
9 decision, the April 8, 2010 permit extension that was issued pursuant to Ordinance No. 3007,
10 and is therefore consolidated for purposes of our review with LUBA Nos. 2010-38 and 2010-
11 58. Pursuant to our June 23, 2010 order, unless intervenors-respondents advise the Board
12 otherwise, the Board will treat intervenors as parties in all three appeals.

13 **MOTION TO STRIKE THE AMENDED MOTION TO DISMISS**

14 As noted in our June 23, 2010 order, the city filed a motion to dismiss the appeal of
15 the April 8, 2010 permit extension decision. That motion included an argument that
16 petitioner had not appealed and therefore could not challenge Ordinance No. 3007. The city
17 initially failed to appreciate that the May 3, 2010 NITA in fact attempts to appeal both
18 decisions, something which was made clear in petitioner’s response to the city’s motion to
19 dismiss. The county subsequently requested leave to file an “amended” motion to dismiss
20 directed at Ordinance No. 3007, which the city alternatively styled as a “reply” to
21 petitioner’s response to the original motion to dismiss. The “amended” motion to dismiss is
22 actually an entirely new motion arguing that the appeal of Ordinance No. 3007 was untimely
23 filed and that petitioner failed to appear during the proceedings below and thus lacks
24 standing to appeal Ordinance No. 3007.

25 Petitioner then moved to strike the reply/amended motion to dismiss, arguing that the
26 city missed its opportunity to move to dismiss the appeal of Ordinance No. 3007. Further,
27 petitioner argues that it would be unfair to allow the city to advance that motion in a “reply,”

1 since LUBA’s rules do not provide for replies or surreplies and petitioner thus would not
2 have an opportunity to respond to the amended motion to dismiss. Notwithstanding the latter
3 argument, petitioner’s motion to strike includes a response to the amended motion to dismiss,
4 arguing that the appeal of Ordinance No. 3007 was timely filed and that petitioner’s failure to
5 appear below does not preclude LUBA from exercising jurisdiction over the appeal of the
6 ordinance.

7 For the following reasons, we deny petitioner’s motion to strike the amended motion
8 to dismiss and grant the city’s request to file the amended motion, but allow petitioner 14
9 days, if she wishes, to file a more complete response to the amended motion to dismiss.

10 Under OAR 661-010-0065(1), the issue of jurisdiction can be raised at any time in an
11 appeal, and there is nothing in our rules that limits a party to a single opportunity to raise a
12 jurisdictional challenge. Further, the city’s initial failure to appreciate that the original NITA
13 challenged both Ordinance No. 3007 and the permit extension decision is excusable, since
14 the city presumably expected petitioner to comply with our rules requiring a separate NITA
15 for each decision challenged. OAR 661-010-0015(1)(c). LUBA also initially failed to note
16 that the original NITA also sought review of Ordinance No. 3007. In these circumstances, it
17 is entirely permissible for the city to file a new or amended motion to dismiss directed at
18 Ordinance No. 3007. Because the amended motion to dismiss is most accurately viewed as a
19 new motion to dismiss, petitioner is entitled to file a response within 14 days of the service of
20 the motion. OAR 661-010-0065(2).¹

21 Although petitioner’s response to the original motion to dismiss includes some

¹ Even if the amended motion to dismiss is properly viewed as a “reply” to petitioner’s response, although our rules neither provide for nor prohibit filing a reply to a response to a motion, and LUBA is not obligated to consider such replies, LUBA will consider them where appropriate and where doing so does not unduly delay the review proceeding. *Cedar Mill Creek Corr. Comm. v. Washington County*, 37 Or LUBA 1011, 1017 (2000). Here, given the initial confusion over which decisions were appealed and the nature of petitioner’s arguments in the response brief regarding Ordinance No. 3007, it would seem appropriate to consider a reply to that response.

1 arguments that bear on LUBA's jurisdiction over the appeal of Ordinance No. 3007, and as
2 noted petitioner's motion to strike includes a direct response to the city's amended motion to
3 dismiss the ordinance, petitioner complains about the lack of opportunity to respond the
4 city's jurisdictional challenge to appeal of the ordinance. Petitioner has the ultimate burden
5 of demonstrating that LUBA has jurisdiction over the appeal of Ordinance No. 3007. To
6 ensure that petitioner has the opportunity to satisfy that burden, petitioner shall have 14 days
7 from the date of this order to file a response, if she wishes, to the county's amended motion
8 to dismiss the appeal of Ordinance No. 3007. After expiration of that period, the Board will
9 resolve both motions to dismiss.

10 Dated this 2nd day of July, 2010.

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Tod A. Bassham
Board Member