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

DAVID BERGMANN, SHARON BERGMANN, SHANNON CHRISTOPHER, DEWAYNE CONNOR, BRENDA COX, SANDRA GEIGER, DEBRA GLEASON, RON GRISWOLD, AARON HORTON, ROBERT HUNTOON, JEFFREY JACOBS, EVA KLAAS, GERALD KLAAS, GLENN MILLER, KAREN O'REAR, KEVIN O'REAR, DENISE ORTEGA, VICTOR ORTEGA, LOREN RINGS, GEORGEANN RUDICEL, MARCO THORSON, BOB TOWNE, SARA TOWNE, and DENNIS TRIGLIA,
Petitioners,

vs.

CITY OF BROOKINGS,
Respondent,

and

BRETT KEMP, AGA KEMP, and B K QUALITY CONSTRUCTION, LLC,
Intervenors-Respondents.

LUBA No. 2020-096

ORDER

Petitioners appeal the city council's approval of a conditional use permit (CUP) authorizing development of a 14-unit residential care facility on property zoned Single-Family Residential 6,000-Square-Foot Minimum (R-1-6).

MOTION TO INTERVENE

Brett Kemp, Aga Kemp, and B K Quality Construction, LLC (intervenors), the applicants below, move to intervene on the side of the city. The motion is unopposed and is granted.

MOTION TO STRIKE AND ALTERNATIVE MOTION FOR ADDITIONAL BRIEFING

On October 30, 2020, petitioners filed their petition for review, asserting five assignments of error. The first assignment of error maintains that the city committed procedural error because one of the city councilors did not disclose that they had discussed intervenors' application with a planning commissioner until after the close of the public hearing and because the same city councilor relied upon documents not in the record in reaching their decision. The second through fifth assignments of error challenge the city's application of the CUP criteria in Brookings Municipal Code (BMC) 17.136.050(C)(2) and (3), which provide that, in order to grant a CUP, the decision maker must find that

> "2. The site for the proposed use relates to streets and highways adequate in width and degree of improvement to handle the quantity and kind of vehicular traffic that would be generated by the proposed use; [and]
>
> "3. The proposed use will have minimal adverse impact upon adjoining properties. In making this determination, the commission shall consider, but not be limited to, the proposed location of the improvements on the site, vehicular egress/ingress and internal circulation, pedestrian access, setbacks, height and bulk of buildings, walls and fences, landscaping, screening, exterior lighting and signing[.]"

The second and third assignments of error assert that the city's conclusion that nearby streets and a proposed driveway will provide the development with adequate access is not supported by substantial evidence. The fourth assignment of error is that the city failed to make required findings that the driveway provides sufficient vision clearance. The fifth assignment of error is that the city's conclusion that the development will not have an adverse impact on surrounding properties is not supported by substantial evidence.

OAR 661-010-0035(3)(c) provides that "[a] response brief shall not include an assignment of error or a cross-assignment of error." OAR 661-010-0030(7) provides that an intervenor-respondent may file a cross petition for review.[1] On November 20, 2020, intervenors filed their response brief.

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[1] OAR 661-010-0030(7) provides:

> "Any respondent or intervenor-respondent who seeks reversal or remand of an aspect of the decision on appeal regardless of the outcome under the petition for review may file a cross petition for review that includes one or more assignments of error. A respondent or intervenor-respondent who seeks reversal or remand of an aspect of the decision on appeal only if the decision on appeal is reversed or remanded under the petition for review may file a cross petition for review that includes contingent cross-assignments of error, clearly labeled as such. The cover page shall identify the petition as a cross petition and the party filing the cross petition. The cross petition shall be filed within the time required for filing the petition for review and must comply in all aspects with the requirements of this rule governing the petition for review, except that a notice of intent to appeal need not have been filed by such party."

Intervenors' response brief includes responses to petitioners' assignments of error. However, intervenors' response brief also includes (1) arguments that the city lacked authority to require intervenors to apply for and secure a CUP; (2) a request that LUBA "grant reasonable accommodation to determine the issue of whether a [CUP] is required" for the proposed development; and (3) arguments that LUBA should conclude that the federal Fair Housing Amendments Act (FHAA) prohibits the city from applying the CUP standards set out in BMC 17.136.050 to intervenors' application.[2] Response Brief 1-8.

On November 25, 2020, petitioners Ortega filed a reply brief. On November 25, 2020, the Ortegas also filed a motion to strike portions of the response brief that the Ortegas contend improperly assert cross-assignments of error. Those portions are found at Response Brief 1:16 to 8:22, 9:6 to 9:7, 24:18 to 24:24, 26:24 to 26:26, and 28:17 to 29:6. The Ortegas filed an alternative

[2] Intervenors argue in their response brief that

> "the proposed use is an outright permitted use pursuant to the BMC, or, in the alternative, the FHAA requires the City to treat the proposed use as an outright permitted use subject only to clear and objective design standards imposed on other single-family dwellings, such as setbacks and height restrictions. [Intervenors] respectfully request that the Board so hold, in addition to affirming the City's approval of the [CUP] for the reasons discussed below." Response Brief 8.

motion to permit additional briefing if LUBA does not strike those portions of the response brief.[3]

As we explained in *Parkview Terrace Development LLC v. City of Grants Pass*, 70 Or LUBA 37 (2014), our rules expressly provide the manner in which an intervenor-respondent may assign error to aspects of a decision on appeal. The subject property in *Parkview Terrace* had previously received approval for a planned unit development (PUD).

> "The city's Maple Park PUD approval decision authorized an 88-unit residential development in three phases. Simultaneously, the city also approved a major variance to the street section design, maximum cul-de-sac length, and street separation standards. The Maple Park PUD developer constructed 28 townhouse units in developing Phase I but failed to complete the remaining units that were to be constructed as Phases II and III, apparently due to the recent recession." *Parkview Terrace*, 70 Or LUBA at 42.

The petitioner in *Parkview Terrace* wished "to construct a 50-unit multi-family housing project (Parkview Terrace) in place of Phase II and III of the Maple Park PUD. The 50 units would [have been] multi-family rental units, all owned by [the] petitioner, rather than town houses that would [have been] separately owned." *Id.* The city council denied the petitioner's application but also made

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[3] On December 2, 2020, we issued an order suspending all deadlines in this appeal except the deadline for intervenors' response to the Ortegas' motions. On December 9, 2020, intervenors filed their response to the motion to strike and asked for the opportunity to file a reply if the Ortegas are granted additional briefing.

findings that the city's approval of Phases II and III had been withdrawn or terminated and was no longer active.

In their response brief, one of the intervenors in *Parkview Terrace* argued that the city's approval of Maple Park PUD Phases II and III had not been withdrawn, that that approval remained effective, and that that effectiveness provided an independent basis for the city's decision to deny the petitioner's application. We explained that there were two problems with the intervenor's position. First, the city council adopted the opposite position in its findings. Second, our rules expressly provide the manner in which an intervenor-respondent may assign error to aspects of a decision on appeal. The intervenor asked us to reverse the city's finding that Maple Park PUD Phases II and III were no longer effective but failed to file a cross petition for review with a contingent cross-assignment of error. Instead, the intervenor made their argument in their response brief. We explained:

> "The reason LUBA adopted OAR 661-010-0030(7) is to require that arguments such as the one intervenor-respondent advances in its response brief be set out earlier in a cross petition for review, to avoid the possibility of delay, since response briefs typically are filed shortly before the date set for oral argument. Because intervenor-respondent did not file a cross petition for review in accordance with OAR 661-010-0030(7), we do not consider intervenor-respondent's arguments that the city's prior approval of Maple Park PUD Phases II and III remains effective or that the possible continued existence of city approval for Phases II and III provides an independent basis for affirming the city council's decision to deny petitioner's application for site plan approval." *Id.* at 44-45.

In the present appeal, the portions of the response brief that the Ortegas identify take the position that the city's decision to require intervenors to secure a CUP, rather than to approve intervenors' proposal as an outright permitted use, is prohibited by the FHAA as a matter of law. Under OAR 661-010-0071(1)(c), LUBA is required to *reverse* a decision that is "prohibited as a matter of law." Accordingly, those arguments are most accurately characterized as cross-assignments of error.[4] Rather than file a cross petition for review with a contingent cross-assignment of error, however, intervenors made those arguments in their response brief.

Intervenors do not dispute that the response brief contains a contingent cross-assignment of error that violates OAR 661-010-0035(3)(c). However, intervenors argue in their response to the motion to strike that LUBA is required to accommodate intervenors' non-compliance with LUBA's procedural rules because, according to intervenors, the FHAA requires it.

We reject intervenors' argument. Intervenors quote the definition of "discrimination" at 42 USC § 3604(f)(3)(B) (2018), which includes refusing to make certain "reasonable accommodations," but intervenors fail to quote the definition's context. That context provides that the FHAA applies only to entities, including state agencies, that engage in the sale or rental of dwellings or provide services or facilities in connection with such dwellings:

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[4] However, the response brief also asks LUBA to affirm the city's decision.

"[I]t shall be unlawful--

"(f)

"* * * * *

"(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of--

"(A) that person; or

"(B) a person residing in or intending to reside in that dwelling after it is sold, rented, or made available; or

"(C) any person associated with that person." 42 USC § 3604.

Intervenors have not established that the FHAA's reasonable accommodation provision applies to quasi-judicial decision making bodies, such as LUBA, which do not engage in the sale or rental of dwellings or provide services or facilities in connection with such dwellings. Accordingly, the response brief's inclusion of a cross-assignment of error violates OAR 661-010-0035(3)(c).

The Ortegas' motion to strike Response Brief 1:16 to 8:22, 9:6 to 9:7, 24:18 to 24:24, 26:24 to 26:26, and 28:17 to 29:6 is granted. The Board will not consider the arguments in those portions of the response brief. Because the motion to strike is granted, we do not reach the Ortegas' alternative motion for additional briefing.

ORAL ARGUMENT

This appeal is reactivated. Oral argument is hereby scheduled for June 15, 2021, at 1:45 p.m. and will be conducted by telephonic conference. The details and call-in information will be shared by separate letter.

Dated this 7th day of May 2021

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Michelle Gates Rudd
Board Chair