

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

3 ALLEN L. HUBENTHAL,  
4 *Petitioner,*

5 vs.

6 CITY OF WOODBURN,  
7 *Respondent,*

8 and

9 EUGENE R. GASCHO, JUDITH A. GASCHO,  
10 WILLIS A. BYERS, RACHEL L. BYERS, RODNEY  
11 LEE BYERS, and MARCIA KATHRYN BYERS,  
12 *Intervenors-Respondent.*

13 LUBA No. 2000-050

14 ORDER ON MOTION TO FILE REPLY BRIEF

15 This matter is before us on petitioner’s motion to file a reply brief. The appealed  
16 decision annexes property into the city, amends the comprehensive plan, grants a zone  
17 change, and approves a site plan review application for an assisted living care facility and  
18 Alzheimer’s facility. Petitioner’s seventh assignment of error asserts that the comprehensive  
19 plan amendment is “not supported by adequate findings.” Petition for Review 15.  
20 Petitioner’s eighth assignment of error asserts that even if the city made adequate findings  
21 regarding the comprehensive plan amendment, the findings are not supported by substantial  
22 evidence. Both assignments of error are based entirely upon the following argument:

23 “WZO [Woodburn Zoning Ordinance] requires [that] the Applicant  
24 demonstrate ‘the proposal complies with the remaining Goals and Policies of  
25 the Comprehensive Plan.’ The decision does not set forth separate findings  
26 under this criterion but instead refers to section ‘VI-A’ for support. There is  
27 no section ‘VI-A’ in the City’s decision and, thus, the City failed to issue a  
28 finding addressing this criterion.” Petition for Review 15.<sup>1</sup>

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<sup>1</sup> Thus, while the seventh and eighth assignments of error nominally allege the county’s findings are “inadequate,” the only argument advanced in support of the assignments of error is that the city failed to adopt findings addressing comprehensive plan goals and policies.

1           Intervenors-respondent respond that the reference to section “VI-A” is a  
2           typographical error. According to intervenors-respondent, the city obviously did not intend  
3           to rely upon a non-existent section of the findings. Rather, the city meant to reference  
4           section “IV-A,” which is clearly entitled “Woodburn Comprehensive Plan – Chapter IX.  
5           Goals and Policies.”

6           The finding at issue states:

7           “FINDING: The application complies with this criteri[on] based on  
8           FINDINGS made within other parts of this staff report (section VI-A).”  
9           Record 23.

10          The referenced findings were originally correctly identified as section “VI-A” of the  
11          first staff report. Record 115. However, the subsequent staff report, which is incorporated  
12          into the city’s decision, eliminated the first two sections of the original staff report  
13          (Application Information and Nature of the Application). *Compare* Record 8 and 112.  
14          Consequently, the reference to the applicable findings, while originally accurate, was not  
15          corrected to reflect the revisions to the staff report.

16          A reply brief may only be filed in response to arguments that were not reasonably  
17          foreseeable in a response brief. *Franklin v. Deschutes County*, 30 Or LUBA 33, 35 (1995).  
18          We have clarified that reply briefs will only be accepted in those circumstances where the  
19          response brief contains arguments that petitioners could not have reasonably anticipated.  
20          *D.S. Parklane, Inc. v. Metro*, 35 Or LUBA 516, 527, *aff’d* 165 Or App 1, 994 P2d 1205  
21          (2000). The disputed finding clearly indicates that the basis for compliance with the  
22          applicable criterion is contained somewhere in the staff report, which is incorporated into the  
23          findings. The misidentified findings upon which compliance is based constitute  
24          approximately seven pages of findings. Record 10-16. The findings are not buried in the  
25          midst of a voluminous document. The findings are clearly identified as “Woodburn  
26          Comprehensive Plan – Chapter IX. Goals and Policies.” Record 23. In fact, the  
27          misidentified findings are the first findings contained in the decision.

1 Under these circumstances, petitioner should have realized the section was  
2 misidentified, located the proper section, and directed his assignment of error to the findings  
3 the city adopted addressing comprehensive plan goals and policies. Intervenors-respondent's  
4 response was reasonably foreseeable, and petitioner should have anticipated the argument  
5 and addressed the issue in the petition for review. We are not prepared to allow petitioner to  
6 expand his argument under the seventh and eighth assignments of error to present new  
7 argument in the reply brief challenging the *adequacy* of the findings the city adopted to  
8 address the comprehensive plan goals and policies. Those arguments could have and should  
9 have been included in the petition for review.

10 Petitioner's motion to file a reply brief is denied.

11 Dated this 21<sup>st</sup> day of September, 2000.  
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18 Michael A. Holstun  
19 Board Member