BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HOME BUILDERS ASSOCIATION OF
LANE COUNTY and EUGENE
CHAMBER OF COMMERCE,
Petitioners,

and

REST-HAVEN MEMORIAL PARK
and CHARLES WIPER III,
Intervenors-Petitioner,

vs.

CITY OF EUGENE,
Respondent,

and

KEVIN MATTHEWS, ROBERT ZAKO,
JOHN KLINE and DAVID G. HINKLEY,
Intervenors-Respondent.

LUBA Nos. 2001-059/2001-063

ORDER

Before the Board are motions to intervene, a motion to strike, and the motion of petitioner Home Builders Association of Lane County (petitioner) requesting that LUBA determine whether the decision challenged in this case is currently effective.

MOTIONS TO INTERVENE

Rest-Haven Memorial Park and Charles Wiper III move to intervene on the side of petitioners in these appeals. Kevin Matthews, Robert Zako, John Kline and David G. Hinkley move to intervene on the side of respondent in these appeals. There is no opposition to these motions and they are allowed.

MOTION TO STRIKE

As discussed below, on September 26, 2001, petitioner filed a motion to determine whether the challenged amendments are effective. The city responded on October 19, 2001. On October 24, 2001, petitioner filed a reply to the city's response. On November 5, 2001, the city filed a motion to strike petitioner's reply, arguing that the reply merely reiterates what petitioner argued in the original motion, and therefore should be stricken. *Frevach Land Company. v. Multnomah County*, 38 Or LUBA 729, 732 (2000) (although reply memoranda are not expressly provided for in LUBA's rules, LUBA's practice is to allow reply memoranda where they are limited to new issues raised in a response memorandum).

Frevach involved a 22-page reply memorandum that expanded arguments made in the original motion to dismiss and raised new issues that were not raised in the original motion or the response memorandum. We agreed to strike those portions of the reply memorandum that expanded arguments set forth in the original motion to dismiss and those portions that raised new issues. However, we declined to strike other portions that responded to arguments in the response memorandum. 38 Or LUBA at 732.

In the present case, petitioner's four-page reply is limited to responding to three arguments in the city's response memorandum. In our view, at least one of the city's arguments may be a "new issue" that might warrant a reply. However, even assuming that the city accurately characterizes the entire reply as merely reiterating arguments made in the original motion, *Frevach* does not hold that such a reply *must* be stricken, and we do not believe such a consequence is appropriate in all cases.[1] Resolving a motion to strike involves additional delay in reaching the merits of the underlying dispute. The delay caused by our resolution of the motion to strike is not justified when the disputed memorandum is merely a

[1]A reply memorandum that merely reiterates arguments made in earlier pleadings does the proponent little if any good, but it also does the opponent little harm. In contrast, the reply memorandum at issue in *Frevach* expanded the bases for granting the motion to dismiss and raised new issues not presented in the motion to dismiss. Allowing such a reply would be fundamentally unfair to the opposing party.

reiteration of earlier arguments. The present case provides an apt example. Our rules authorize a response memorandum to the motion to strike, within 14 days of service of the motion. OAR 661-010-0065(2). Petitioner thus has until November 19, 2001, to file a response to the motion to strike. Because the motion to strike raises a question concerning what memoranda we may consider in resolving petitioner's motion to determine whether the challenged amendments are effective, unless we deny the motion to strike, resolution of the underlying dispute will be delayed. We decline to read *Frevach* beyond its facts to require such additional delay in the present case.

For the foregoing reasons, the city's motion to strike is denied.

MOTION TO DETERMINE WHETHER THE AMENDMENTS ARE EFFECTIVE

The challenged decision, Ordinance 20229, adopts a number of amendments to the city's zoning code. Ordinance 20229 was processed as a post-acknowledgment amendment pursuant to the procedures at ORS 197.610 to 197.625. The ordinance provides that some of the adopted amendments are effective August 1, 2001, while others are effective August 26, 2001. Following those dates, the city has applied the amended zoning code in issuing permits and decisions under the city's zoning code.

On September 26, 2001, petitioner filed a motion with the Board seeking a determination that the challenged amendments are not effective. The amendments are not effective, petitioner argues, because the city failed to adopt them "in accordance with ORS 197.615," as required by ORS 197.625(3)(a).[2]

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[2]ORS 197.625(3)(a) provides:

> "Prior to its acknowledgment, the adoption of a new comprehensive plan provision or land use regulation or an amendment to a comprehensive plan or land use regulation is effective at the time specified by local government charter or ordinance and is applicable to land use decisions, expedited land divisions and limited land use decisions if the amendment was adopted in accordance with ORS 197.610 and 197.615 unless a stay is granted under ORS 197.845."

Petitioner explains, and the city does not dispute, that the city did not comply with two of the requirements of ORS 197.615.[3] Specifically, petitioner alleges that the city's post-adoption notice to the Department of Land Conservation and Development (DLCD) was mailed 13 days after adoption rather than the five days specified in ORS 197.615(1). Further, petitioner alleges that the city provided post-adoption notice to persons entitled to notice 14 days after adoption, rather than the five days required by ORS 197.615(2). Petitioner also alleges that the notice was deficient in failing to include the certificate of mailing required by ORS 197.615(2)(b)(C) and in failing to explain the requirements for appealing the ordinance, as required by ORS 197.615(2)(b)(E). Because the challenged amendments were not "adopted in accordance" with these provisions, petitioner argues, they are not effective until acknowledged, by virtue of ORS 197.625(3)(a).

Anticipating an objection from the city, petitioner argues that LUBA has authority to make the requested determination. Petitioner explains that if the challenged amendments are

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[3]ORS 197.615(1) and (2) provide, in relevant part:

> "(1) A local government that amends an acknowledged comprehensive plan or land use regulation or adopts a new land use regulation shall mail or otherwise submit to the Director of the Department of Land Conservation and Development a copy of the adopted text of the comprehensive plan provision or land use regulation together with the findings adopted by the local government. The text and findings must be mailed or otherwise submitted not later than five working days after the final decision by the governing body. * * *
>
> "(2)(a) On the same day that the text and findings are mailed or delivered, the local government also shall mail or otherwise submit notice to persons who [participated in the proceedings and requested notice.]
>
> "(b) The notice required by this subsection shall:
>
> "* * * * *
>
> "(C) If delivered by mail, include a certificate of mailing containing a statement signed by the person mailing it indicating the date the notice was deposited in the mail;
>
> "* * * * *
>
> "(E) Explain the requirements for appealing the action of the local government under ORS 197.830 to 197.845."

effective, petitioner intends to file a motion seeking a stay pursuant to ORS 197.845.[4] However, if the challenged amendments are not effective, petitioner contends, there is nothing to stay. Before LUBA can act on a motion to stay, petitioner argues, it must implicitly or explicitly conduct a threshold inquiry into whether the decision sought to be stayed is effective. Such an inquiry is thus within LUBA's authority. In the present case, petitioner contends, it is simply asking LUBA to conduct that inquiry and provide an explicit answer prior to the parties undertaking a full briefing on a motion to stay. According to petitioner, conducting such a separate preliminary inquiry is consistent with principles of judicial efficiency, because it potentially obviates additional demands on the Board's time and the parties' financial resources.

The city responds that LUBA lacks authority to decide whether the challenged amendments are effective, in the manner petitioner requests. According to the city, such a

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[4]ORS 197.845 provides in relevant part:

> "(1) Upon application of the petitioner, the board may grant a stay of a land use decision or limited land use decision under review if the petitioner demonstrates:
>
> > "(a) A colorable claim of error in the land use decision or limited land use decision under review; and
> >
> > "(b) That the petitioner will suffer irreparable injury if the stay is not granted.
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> "(2) If the board grants a stay of a quasi-judicial land use decision or limited land use decision approving a specific development of land, it shall require the petitioner requesting the stay to give an undertaking in the amount of $5,000. The undertaking shall be in addition to the filing fee and deposit for costs required under ORS 197.830 (9). The board may impose other reasonable conditions such as requiring the petitioner to file all documents necessary to bring the matter to issue within specified reasonable periods of time.
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> "* * * * *
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> "(4) The board shall limit the effect of a stay of a legislative land use decision to the geographic area or to particular provisions of the legislative decision for which the petitioner has demonstrated a colorable claim of error and irreparable injury under subsection (1) of this section. The board may impose reasonable conditions on a stay of a legislative decision, such as the giving of a bond or other undertaking or a requirement that the petitioner file all documents necessary to bring the matter to issue within a specified reasonable time period."

determination would constitute an advisory opinion or declaratory ruling. The city argues that LUBA's authority is limited to that granted in the statutes governing LUBA, and that those statutes do not provide authority for the Board to issue advisory or declaratory rulings regarding the effectiveness of ordinances. In the alternative, the city argues that should LUBA grant the motion and determine whether the amendments are effective, we should conclude that the amendments became effective on the dates provided in Ordinance 20229.

We generally agree with the city that we lack statutory authority to make the determination petitioner requests of us. As relevant here, LUBA's powers with respect to land use and limited land use decisions are defined by the provisions of ORS 197.805 to 197.845. In ORS 197.845, the legislature set forth a specific procedure under which LUBA may stay a land use or limited land use decision, pending the Board's final decision in an appeal. Whatever authority LUBA has to impact the effectiveness of the amendments adopted in Ordinance 20229, pending issuance of our final decision on the appeal, can only be exercised in the context of a motion for stay under ORS 197.845.[5]

Petitioner's motion to determine whether the challenged amendments are effective is denied.

Dated this 8th day of November, 2001.

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Tod A. Bassham
Board Member

[5]It might be that in considering a motion for stay, LUBA could consider an argument that a stay is unnecessary because the ordinance is ineffective for the reasons petitioner alleges. It might also be that if we agreed with petitioner that the ordinance is not effective, we could issue an order denying a motion for stay on that basis alone. We need not and do not decide these questions here. We note, however, that petitioner's apparent assumption that the city would be legally bound to cease its application of the challenged ordinance altogether, based on such an order denying a motion for stay, is at least open to question.