

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 EMMILIESE VON CLEMM,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF PORTLAND,
10 *Respondent,*

11
12 and

13
14 JOHN FERGISON,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2012-045

18
19 JOHN FERGISON,
20 *Petitioner,*

21
22 vs.

23
24 MULTNOMAH COUNTY,
25 *Respondent.*

26
27 LUBA No. 2012-046

28
29 FINAL OPINION
30 AND ORDER

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32 Appeal from City of Portland and Multnomah County.

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34 Emmiliese Von Clemm, Portland, filed the petition for review and argued on her own
35 behalf.

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37 Linly F. Rees, Deputy City Attorney and Kathryn S. Beaumont, Senior Deputy City
38 Attorney, Portland, filed a joint response brief and Kathryn S. Beaumont argued on behalf of
39 respondent. With them on the brief were Timothy V. Ramis, Damien R. Hall and Jordan
40 Ramis PC.

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42 Damien R. Hall, Lake Oswego, filed a joint response brief and argued on behalf of
43 intervenor-respondent. With him on the brief were Timothy V. Ramis, Linly F. Rees,
44 Kathryn S. Beaumont, and Jordan Ramis PC.

1 RYAN, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,
2 participated in the decision.

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4 LUBA No. 2012-045 AFFIRMED 11/09/2012

5 LUBA No. 2012-046 DISMISSED 11/09/2012

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

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NATURE OF THE DECISION

The challenged decision is the city’s decision to approve a single family dwelling in the city’s environmental conservation (C) overlay zone.

MOTION TO DISMISS (LUBA No. 2012-046)

The petitioner in LUBA No. 2012-046, the applicant below, moves to dismiss the appeal. The appeal is dismissed.

MOTION TO INTERVENE

John Ferguson (intervenor), the applicant below, moves to intervene on the side of the city in LUBA No. 2012-045. There is no opposition to the motion and it is granted.

FACTS

Intervenor filed an application for environmental review of his proposal to build a single family dwelling on a 22,000 square foot lot zoned R-20 that is also within the city’s environmental conservation (C) zone. As part of that application, intervenor sought to reduce the sideyard setback on the north side of the lot from 10 feet to 5 feet. Petitioner appealed the planning department’s decision to approve the environmental review application and the side setback modification to the hearings officer. The hearings officer approved the environmental review application with conditions of approval and approved the side setback modification. This appeal followed.

INTRODUCTION

A. Full Environmental Review

The regulations governing development in the C zone are found at Portland City Code (PCC) 33.430 (Environmental Zoning). PCC 33.430.140 through 190 set out General Development Standards that apply to development of property that is partially or wholly located within the C zone. If a development proposal complies with all applicable General

1 Development Standards, environmental review is not required. PCC 33.430.220.¹ If any
2 aspect of a development proposal does not comply with applicable PCC 33.430.140 to .190
3 General Development Standards, then an applicant is subject to environmental review and
4 must demonstrate that the environmental review Approval Criteria set out in PCC 33.430.250
5 are satisfied with respect to the aspect of the proposal that does not comply with the General
6 Development Standards. PCC 33.430.250.² In general the General Development Standards
7 are objective and the environmental review Approval Criteria are subjective. Like the
8 hearings officer and the parties, in this opinion we refer to environmental review that applies
9 the environmental review Approval Criteria as “full” environmental review, to distinguish it
10 from the more limited environmental review that the city required in this case. Petitioner
11 contends that full environmental review, *i.e.* application of the more subjective environmental
12 review Approval Criteria, should have been required in this case.

13 **B. Limited Environmental Review**

14 In its application in this case, the applicant sought environmental review because the
15 application as submitted did not comply with all the General Development Standards.
16 However, the hearings officer imposed conditions of approval that led him to conclude that
17 all General Development Standards were satisfied, making full environmental review

¹ PCC 33.430.220 provides, in part:

“33.430.220 When Environmental Review is Required

“Environmental review is required for all development in an environmental zone that does not meet the development standards of Sections 33.430.140 through .190 * * *.”

² PCC 33.430.250 provides in part:

“33.430.250 Approval Criteria

“An environmental review application will be approved if the review body finds that the applicant has shown that all of the applicable approval criteria are met. When environmental review is required because a proposal does not meet one or more of the development standards of Section 33.430.140 through .190, then the approval criteria will only be applied to the aspect of the proposal that does not meet the development standard or standards.”

1 unnecessary under PCC 33.430.220. Where a proposed development complies with all
2 applicable General Development Standards, even though full environmental review is not
3 required under PCC 33.430.220, PCC 33.430.100 gives an applicant the option of choosing
4 to go through environmental review. The city allowed the applicant to continue with
5 environmental review, even though the city found the proposed development complied with
6 all General Development Standards and therefore was not subject to the Approval Criteria, to
7 allow the applicant to take advantage of PCC 33.430.280, which allows an applicant to seek
8 “modifications for lot dimension standards or site-related development standards as part of
9 the environmental review process.” For convenience, we will refer to the procedure the city
10 followed in this case as “limited” environmental review. Through this limited environmental
11 review the city modified the sideyard setback requirement in the R20 zone from 10 feet to 5
12 feet. Through this limited environmental review, the applicant avoided having to go through
13 the adjustment process and avoided having to apply the adjustment criteria at PCC 33.805.
14 Instead, the applicant was subject to the limited environmental review process and the criteria
15 for modification set out in PCC 33.430.280. Petitioner challenges the city’s finding that the
16 application complies with all General Development Standards, arguing full environmental
17 review should have been required. Petitioner also challenges the city’s decision to allow
18 limited environmental review solely for the purpose of modifying the side yard setback and
19 argues that the application does not comply with the PCC 33.430.280 modification criteria in
20 any event.

21 With that introduction, we turn to petitioner’s assignments of error.

22 **FIRST AND SEVENTH ASSIGNMENTS OF ERROR**

23 The hearings officer approved the applications with conditions and found that, with
24 the conditions of approval, the proposal complies with all of the applicable General
25 Development Standards in PCC 33.430.140 through .190. In a portion of her first assignment
26 of error, we understand petitioner to argue that the hearings officer misconstrued the

1 applicable law when he relied on conditions of approval that he imposed to conclude that, as
2 conditioned, the proposal satisfies all of the applicable General Development Standards.³
3 According to petitioner, the hearings officer should have concluded that the application does
4 not comply with PCC 33.430.140(A) and (C) and PCC 33.430.180(F).⁴ Because the proposal
5 does not comply with those General Development Standards, petitioner argues the city should
6 have required intervenor to comply with the relevant Approval Criteria at PCC 33.430.250
7 for the portions of the proposal that do not comply with PCC 33.430.140(A) and (C) and
8 PCC 33.430.180(F).

9 The city and intervenor (respondents) respond that PCC 33.800.070 specifically
10 allows the city to impose conditions of approval to ensure that a proposal conforms to
11 applicable PCC requirements and that nothing cited by petitioner prohibits the hearings
12 officer from approving an application subject to conditions of approval or relying on those

³ LUBA is authorized to reverse or remand a decision if the local government “(C) [m]ade a decision not supported by substantial evidence in the whole record; [or] (D) [i]mproperly construed the applicable law[.]” ORS 197.835(9)(a)(C)-(D).

⁴ PCC 33.430.140 provides in relevant part:

“A. The maximum disturbance area allowed within the resource area on the site is determined by subtracting all portions of the site outside the resource area from the number listed in Table 430-1.

“ * * * * *

“C. The disturbance area must be set back at least:

1. Fifty feet from the edge of any identified wetland, from the top of bank of any identified water body within the Columbia Corridor, or any identified water body within a protection zone on lots zoned R10, R20, or RF. * * *

PCC 33.430.180 provides in relevant part:

“F. Only one outfall pipe may be used on a site. The outfall pipe size may not exceed 4 inches in diameter[.] * * *

1 conditions to find that proposal, as conditioned, complies with applicable General
2 Development Standards.⁵

3 We agree with respondents. The hearings officer imposed conditions of approval that
4 led him to conclude that the proposal complies with PCC 33.430.140(A) and (F). PCC
5 33.800.070 expressly authorizes the city to impose conditions of approval for the purpose of
6 ensuring “that the proposal will conform to the applicable approval criteria for the review.”

7 **A. Disturbance Area**

8 In a portion of her first assignment of error, we understand petitioner to argue that the
9 hearings officer misconstrued the applicable law in finding that the proposal satisfies PCC
10 33.430.140(A) because he relied on a condition of approval to reach that conclusion. PCC
11 33.430.140(A) limits the amount of the subject property that can be disturbed by
12 development and Figure 430-1 effectively limits the maximum disturbance area in the
13 resource area of the subject property to zero.⁶ Intervenor proposed a temporary disturbance
14 area within the resource area of 235 square feet, but the hearings officer found that PCC
15 33.430.140(A) and Figure 430-1 prohibit any disturbance area, even a temporary disturbance
16 area, within the resource area on the subject property. The hearings officer imposed a
17 condition of approval, Condition H, that provides that “[n]o temporary or permanent
18 disturbance area shall be permitted within the * * * resource area.” Record 30. The hearings
19 officer concluded that, as conditioned, the proposal satisfies PCC 33.430.140(A).

⁵ PCC 33.800.070 provides:

“The City may attach conditions to the approval of all discretionary reviews. However, conditions may be applied only to ensure that the proposal will conform to the applicable approval criteria for the review or to ensure the enforcement of other City regulations.”

⁶ The city’s environmental zone consists of a transition area, which is the first 25 feet inward from the overlay zone boundary, and the resource area, which is the remaining area within the overlay zone. PCC 33.430.050.

1 As explained above, PCC 33.800.070 allows the city to impose conditions of approval
2 “to ensure that the proposal will conform to the applicable approval criteria for the review
3 * * *.” Petitioner does not explain why the hearings officer’s conclusion that the proposal
4 satisfies PCC 33.430.140(A) with the imposition of Condition H misconstrues PCC
5 33.800.070, and we do not think that it does.

6 **B. Outfall Pipes**

7 PCC 33.430.180(F) allows only one outfall pipe to be used on a development site. In
8 another portion of her first assignment of error, we understand petitioner to argue that the
9 hearings officer misconstrued the applicable law and made a decision not supported by
10 substantial evidence in the record when he concluded that intervenor’s proposal satisfies PCC
11 33.430.140(F). The hearings officer concluded that there are two outfall pipes on the subject
12 property, and imposed a condition of approval, Condition I, that requires that the outfall pipe
13 the hearings officer identified as “pipe 4” be decommissioned and/or removed so that only
14 one outfall pipe will be located on the subject property. The hearings officer concluded that,
15 as conditioned, the proposal satisfies PCC 33.430.180(F). Record 15.

16 Petitioner argues that intervenor will not be able to satisfy Condition I because the
17 outfall pipe that Condition I requires be decommissioned or removed is used by other users.
18 However, if it turns out that Condition I cannot be satisfied, then intervenor will be unable to
19 build the proposed dwelling as approved and a modified application will be required to either
20 comply with PCC 33.430.180(F) or seek environmental review under the Approval Criteria
21 for a proposal that does not comply with PCC 33.430.180(F). But that uncertainty does not
22 provide a basis to conclude that the hearings officer erred in finding that, as conditioned,
23 PCC 33.430.180(F) is met.

24 **C. Setback from Identified Wetlands**

25 PCC 33.430.140(C)(1) requires that any allowed disturbance area is set back at least
26 50 feet from the edge of any “identified wetland.” The prior version of PCC 33.910

1 applicable to the application in this case defined “identified wetland” as “those streams,
2 wetlands, and waterbodies that are identified in the resource protection inventory *and maps*
3 as being significant and in need of protection.” (Emphasis added.) The hearings officer
4 found that PCC 33.430.140(C)(1) does not apply to the proposal because there are no
5 “identified wetlands” on the property, that is, that are identified on the applicable city
6 resource maps. Record 12. In her seventh assignment of error, we understand petitioner to
7 argue that the hearings officer misconstrued the applicable law and made a decision that is
8 not supported by substantial evidence in the record when he concluded that PCC
9 33.430.140(C)(1) does not apply, where a site plan in the record shows a wetland on the
10 property. *See* n 4.

11 Respondents respond that the hearings officer’s decision correctly construes PCC
12 33.430.140(C)(1) and the applicable PCC 33.910 definition of “identified wetland” and that
13 the site plan to which petitioner cites is not a copy of or depiction of the city’s resource
14 protection inventory map of the property. Respondents contend that because the wetlands
15 that petitioners have identified are not “identified in the resource protection inventory * * *
16 maps” they are not “identified wetlands” as that term was defined by PCC 33.910 at the time
17 the application was accepted. We agree with respondents.

18 The first and seventh assignments of error are denied.

19 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

20 PCC 33.430.280 allows modifications to “lot dimension standards or site-related
21 development standards” during the environmental review process and provides that such
22 modifications “are not required to go through the adjustment process.” PCC 33.430.280
23 provides:

24 “The review body may consider modifications for lot dimension standards or
25 site-related development standards as part of the environmental review
26 process. These modifications are done as part of the environmental review
27 process and are not required to go through the adjustment process.
28 Adjustments to use-related development standards (such as floor-area ratios,

1 intensity of use, size of the use, number of units, or concentration of uses) are
2 subject to the adjustment process of Chapter 33.805. In order to approve these
3 modifications, the review body must find that the development will result in
4 greater protection of the resources and functional values identified on the site
5 and will, on balance, be consistent with the purpose of the applicable
6 regulations. For modifications to lot dimension standards, the review body
7 must also find that the development will not significantly detract from the
8 livability or appearance of the area.”

9 The hearings officer found that modification of the side setback is, on balance, consistent
10 with the purposes of the setbacks for the R-20 zone that are set out in PCC 33.110.220, and
11 that the modification would result in greater protection of the resources and functional values
12 of the site because modifying the setback would result in less disturbance of the resources on
13 the site.⁷ Record 25-26.

14 In her second assignment of error, we understand petitioner to argue that the hearings
15 officer misconstrued PCC 33.430.280 in approving intervenor’s request for a reduced side
16 setback, and that the city should have applied the criteria for adjustments found at PCC

⁷ PCC 33.110.220(A) provides the purposes for setback regulations:

“**Purpose.** The setback regulations for buildings and garage entrances serve several purposes:

- They maintain light, air, separation for fire protection, and access for fire fighting;
- They reflect the general building scale and placement of houses in the city’s neighborhoods;
- They promote a reasonable physical relationship between residences;
- They promote options for privacy for neighboring properties;
- They require larger front setbacks than side and rear setbacks to promote open, visually pleasing front yards;
- They provide adequate flexibility to site a building so that it may be compatible with the neighborhood, fit the topography of the site, allow for required outdoor areas, and allow for architectural diversity; and
- They provide room for a car to park in front of a garage door without overhanging the street or sidewalk, and they enhance driver visibility when backing onto the street.”

1 33.805 to the request. As we understand the argument, petitioner takes the position that
2 because the city ultimately found that intervenor’s proposal satisfies all of the General
3 Development Standards at PCC 33.430.140 to .190 and intervenor was not required to apply
4 the Approval Criteria, the environmental review modification process set out in PCC
5 33.430.280 for modifications to lot dimension standards should not have been available to
6 reduce the side setback. We do not agree.

7 First, PCC 33.430.100 provides in relevant part that “[w]here a proposal can meet all
8 of the [development] standards, the applicant may choose to go through the discretionary
9 environmental review process, or to meet the objective standards of this chapter.” PCC
10 33.430.120 similarly provides in relevant part that “[c]ompliance with [the General
11 Development Standards] is determined as part of the building permit *or* development permit
12 application process. * * *.” (Emphasis added.) While PCC 33.430.220 sets out the
13 circumstances when environmental review is *required*, it does not foreclose an applicant
14 from voluntarily seeking environmental review through the city’s Type II process,
15 particularly in situations where an applicant and the city are unsure whether all General
16 Development Standards are or can be met, or whether an applicant will be required to apply
17 the Approval Criteria in environmental review.⁸ In that circumstance, PCC 33.430.280
18 allows the applicant to seek modifications of R-20 base zone sideyard setback in the same
19 environmental review process, which is more efficient than undergoing multiple reviews of
20 the same development proposal. The hearings officer did not err in applying PCC 33.430.280
21 to intervenor’s request for a side setback reduction, simply because he ultimately applied

⁸ PCC 33.430.220 provides in relevant part:

“Environmental review is required for all development in an environmental zone that does not meet the development standards of Sections 33.430.140 through .190 and for violations of this chapter. Environmental review is also required when an applicant wishes to fine-tune the zone boundary location based on a detailed environmental study. * * *”

1 conditions of approval that made full environmental review and application of the Approval
2 Criteria unnecessary.

3 As noted, PCC 33.110.220 provides that some of the purposes of the side yard
4 setback in the R-20 zone are, as relevant, to “reflect the general building scale and placement
5 of houses in the city’s neighborhoods” and “provide adequate flexibility to site a building so
6 that it may be compatible with the neighborhood, fit the topography of the site, allow for
7 required outdoor areas, and allow for architectural diversity.” *See* n 7. In her third
8 assignment of error, we understand petitioner to argue that the hearings officer’s decision that
9 the proposal complies with PCC 33.430.280 is not supported by substantial evidence in the
10 record and that the hearings officer’s findings are inadequate because the hearings officer
11 failed to consider the alternative of building a smaller house than proposed, so that it could be
12 sited on the developable portion of the site without the side yard setback modification. We
13 also understand petitioner to argue that the hearings officer failed to address the argument
14 presented by opponents of the proposal at Record 653 to 658 that a reduced side setback will
15 result in a dwelling that does not “reflect the general building scale” of other dwellings in the
16 area and is not “compatible with the neighborhood” because the proposed dwelling is larger
17 and taller than other dwellings.

18 Petitioner does not point to anything in the PCC that requires an applicant to reduce
19 the size of the proposed dwelling or that provides that it is legal error for the hearings officer
20 to fail to consider requiring a smaller building footprint. Additionally, the hearings officer
21 adopted findings that reducing the sideyard setback is consistent with all of the purposes of
22 the setback except the “larger front setback,” including in relevant part that the proposed
23 dwelling is “generally consistent with the size of homes in close proximity; particularly
24 homes on SW Hewett Boulevard,” and that reducing the sideyard setback promotes adequate
25 flexibility so that the proposed dwelling is “compatible with the neighborhood * * *, fit[s] the
26 topography of the site, allow[s] for required outdoor areas, and allows for architectural

1 diversity.” Record 26-27. The hearings officer is not required to address every argument
2 submitted during the proceedings below or explain why he chose not to rely on the argument
3 at Record 653-658 that takes the position that the proposed dwelling does not reflect the
4 general building scale of other homes in the neighborhood and that the proposed dwelling is
5 not compatible with the neighborhood. *Knight v. City of Eugene*, 41 Or LUBA 279, 294
6 (2002). The findings are adequate to explain why the hearings officer concluded that PCC
7 33.430.280 is met.

8 The second and third assignments of error are denied.

9 **FOURTH AND FIFTH ASSIGNMENTS OF ERROR**

10 **A. Fourth Assignment of Error**

11 PCC 17.38.030 allows the director of the city’s Bureau of Environmental Services
12 (BES) to adopt rules that provide standards and criteria for imposing drainage reserves
13 “during land use reviews, building permit review or other development process that require
14 * * * BES review.” Those rules are embodied in the city’s Stormwater Management Manual.
15 In her fourth assignment of error, we understand petitioner to argue that the hearings officer
16 misconstrued applicable law when he found that PCC 17.38.030 and the criteria in the
17 Stormwater Management Manual are not approval criteria that apply to the application for
18 environmental review and setback modification.⁹ Petitioner argues that the proposed
19 driveway, retaining wall and fill are within the drainageway reserves setback area and that the
20 proposal does not meet the requirements of the city’s Stormwater Management Manual and
21 argues that PCC 17.38 should apply at the time of environmental review because BES’

⁹ After reviewing relevant provisions of PCC 17.38 and the Stormwater Management Manual, the hearings officer found:

“PCC 17.38.030 is not an Environmental zone [General Development Standard] and not a general development standard applicable to single dwelling zones. PCC 33.800.050(A) states, in part, that the approval criteria ‘set the bounds for the issues that must be addressed by the applicant and which may be raised by the City or affected parties.’ The Hearings Officer finds that BES is the appropriate City bureau to address PCC 17.38.030.” Record 18-19.

1 review of intervenor’s proposal “might require the proposed site plans and building footprint
2 to be modified to meet the requirements.” Petition for Review 14. In support of her
3 argument, petitioner cites a statement in the planning department decision at Record 275 that
4 “this proposal is subject to the requirements of the [city’s] Stormwater Management
5 Manual.”

6 Respondents respond that the hearings officer correctly concluded based on PCC
7 17.38.010 and the text of the Stormwater Manual that the standards of PCC 17.38 do not
8 apply in environmental review:

9 “BES and BDS coordinate review when drainageways are identified within an
10 E-zone. When an environmental review is required, BES provides drainage
11 comments on the development proposal along with its other environmental
12 review comments to the development proposal. Drainageway-related
13 regulations are BES’s responsibility and are required as a separate review.”
14 Record 19.

15 Respondents maintain that BES will review intervenor’s building permit application for
16 compliance with drainageway protections prior to issuance of a building permit. We agree
17 with the city that the hearings officer did not err in finding that PCC 17.38 and the criteria
18 applicable to drainageways in the Stormwater Manual do not apply to the application.

19 The fourth assignment of error is denied.

20 **B. Fifth Assignment of Error**

21 PCC 24.70 requires engineering and technical reports for development proposals in
22 landslide hazard areas, and intervenor submitted a geotechnical report to the city. Although
23 it is not particularly clear, in her fifth assignment of error we understand petitioner to argue
24 that intervenor failed to satisfy the submittal requirements of PCC 24.70 and the hearings
25 officer misconstrued applicable law when he found that the geotechnical and engineering
26 information that was submitted was not relevant to PCC 33.430.140 through .170 and PCC
27 33.430.280, the only applicable approval criteria.

1 Respondents respond that geotechnical information is not listed as a site plan or
2 application requirement in PCC 33.430.130 or PCC 33.430.230 and that the hearings officer
3 correctly concluded that the engineering and geotechnical reports, while included in the
4 record, are not relevant to any of the criteria in PCC 33.430. Respondents respond that PCC
5 24.70 is not part of the city's land use code and therefore does not apply to the environmental
6 review application. According to respondents, intervenor will be required to show
7 compliance with PCC 24.70 before the city issues a building permit for the proposal. We
8 agree with respondents that the hearings officer correctly concluded that PCC 24.70 does not
9 apply to the environmental review application and that the geotechnical reports in the record
10 are not necessary to find compliance with the environmental development standards or PCC
11 33.430.280.

12 The fifth assignment of error is denied.

13 **SIXTH ASSIGNMENT OF ERROR**

14 In her sixth assignment of error, petitioner argues that a letter in the record from
15 Clean Water Services (CWS), the sanitary sewer service provider in the area, inaccurately
16 describes the proposal as including a bridge driveway to eliminate the need for fill within the
17 drainageway, but the proposal that the city approved does not including a bridge for the
18 driveway. Petitioner argues that “[a]s the applicant’s proposal has chosen to submit one set
19 of plans to the County and a different set to the City, they have voided the applicability of this
20 service letter and should have been required to request a revised service letter, with consistent
21 submissions, prior to approval and/or review by the City.” Petition for Review 16.
22 Respondents respond by pointing out that even if the CWS letter inaccurately describes the
23 proposed driveway, the hearings officer imposed a condition of approval that requires
24 intervenor to comply with all CWS standards prior to issuance of a building permit, that the
25 condition ensures that final plans for the proposed dwelling will be reviewed and approved
26 by CWS prior to issuance of building permits, and that the CWS letter that petitioner

1 complains about anticipates further review by CWS if the development plans change. Record
2 156.

3 Petitioner’s argument is barely developed sufficiently for review, and does not explain
4 the legal significance of any inaccuracy in the CWS letter or otherwise attempt to link her
5 argument to any applicable approval criterion. Accordingly, petitioner’s sixth assignment of
6 error provides no basis for reversal or remand. *Deschutes Development v. Deschutes County*,
7 5 Or LUBA 218, 220 (1982).

8 The city’s decision is affirmed.