

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision by the board of county commissioners approving a
4 conditional use permit for a personal use airport.

5 **MOTION TO INTERVENE**

6 Merle Mitchell, the applicant below (intervenor), moves to intervene on the side of
7 the county. The motion is granted.

8 **REPLY BRIEF**

9 Petitioner moves for permission to file a reply brief to respond to an alleged new
10 matter raised in the response brief. Under our rules, a reply brief must be “confined solely to
11 new matters raised in the respondent’s brief.” OAR 661-010-0039. As we explained in *Wal-*
12 *mart Stores, Inc. v. City of Gresham*, 54 Or LUBA 16, 19-20 (2007):

13 “Generally, responses warranting a reply brief tend to be arguments that
14 assignments of error should fail regardless of their stated merits, based on
15 facts or authority not involved in those assignments. *Cove at Brookings*
16 *Homeowners Assoc. v. City of Brookings*, 47 Or LUBA 1, 4 (2004); *Sequoia*
17 *Park Condo. Assoc. v. City of Beaverton*, 36 Or LUBA 317, 321, *aff’d* 163 Or
18 App 592, 988 P2d 422 (1999). In other words, ‘new matters’ within the
19 meaning of OAR 661-010-0039 generally are something like affirmative
20 defenses, responses that an assignment of error should fail regardless of its
21 stated merits, due to some extrinsic principle (for example, waiver).”

22 In the response brief, intervenor took the position that when the county determined to
23 allow a personal use airport as a conditional use in the Rural Residential Five Acre Minimum
24 (RR-5) zone under the Linn County Land Development Code (LCC), the county necessarily
25 took into consideration the possibility of and risks from allowing such a use in a rural
26 residential zone and determined that a personal use airport in a rural residential zone is not
27 inherently a safety risk. Response Brief 12, 14. Petitioner argues that intervenor’s defense
28 of the county’s decision is a “new matter” under OAR 661-010-0039 that warrants a
29 response. Intervenor objects that his argument is not a “new matter.”

1 We agree with petitioner that intervenor’s defense is a “new matter” and the reply
2 brief is allowed.

3 **FACTS**

4 Intervenor owns the subject property, a 9-acre parcel zoned RR-5. The eastern
5 boundary of the property borders the Santiam River and agricultural lands are located on the
6 other side of the river. The western boundary of the property and the area generally west of
7 the river and west of the property are bordered by rural residential parcels mostly developed
8 with dwellings. The property is developed with a house and two accessory buildings.

9 Intervenor applied for a conditional use permit to operate a personal use airport on a
10 900-foot long by 65-foot wide grass airstrip on the property that runs north/south
11 perpendicular to the river. The county planning commission approved the application after
12 intervenor appealed the county planning director’s initial denial of the application.
13 Opponents of the proposal appealed the planning commission’s decision to the board of
14 county commissioners, which approved the application with conditions. This appeal
15 followed.

16 **FIRST ASSIGNMENT OF ERROR**

17 LCC 933.220(C) contains the criteria for conditional uses in the RR zone. LCC
18 933.220(C)(2) requires the county to determine that:

19 “The location, size, design and operating characteristics of the proposed
20 development will be made reasonably compatible with and have minimal
21 impact on the livability and appropriate development of abutting properties
22 and the surrounding neighborhood, with consideration given to:

23 “(a) scale, bulk, coverage and density;

24 “(b) availability of public facilities and utilities;

25 “(c) traffic generation and the capacity of the surrounding road network;
26 and

27 “(d) *other related impacts of the development.*” (Emphasis added.)

1 In her first assignment of error, petitioner argues that the county’s findings misconstrue LCC
2 933.220(C)(2)(d) because the decision fails to consider “other related impacts of the
3 development” on the livability of abutting properties and the surrounding neighborhood.
4 Specifically, petitioner argues that the county’s decision fails to consider impacts of the
5 airport on the safety of the abutting properties and the surrounding neighborhood. Petitioner
6 points to testimony from neighbors that expressed concern about possible crashes on take off
7 or landing, and argues that the county’s findings are inadequate to show that the county
8 considered potential safety impacts from the proposed airport because the findings do not
9 address any of the issues raised regarding risks to the safety of the neighborhood from
10 possible crashes.

11 Intervenor responds that the county’s findings are adequate to explain that the county
12 considered “other impacts of” the proposed airport that opponents raised, and in particular
13 considered safety risks and imposed conditions to ensure that the proposed airport is operated
14 safely. Regarding impacts to the neighborhood from the risk of crash, intervenor responds
15 that the county considered the testimony from neighbors regarding the risk of crash, and
16 imposed conditions of approval that require that (1) only a Piper Super Cub or smaller
17 airplane can use the airport; and (2) the airplane must take off to the west (towards the
18 Santiam River) and land from the east so that planes taking off and landing will not pass over
19 any dwellings at low altitudes. According to intervenor, the conditions of approval address
20 neighbors’ concerns about safety and were imposed specifically to ensure that the airport is
21 “reasonably compatible with and ha[s] minimal impact on the livability and appropriate
22 development of abutting properties and the surrounding neighborhood” under LCC
23 933.220(C)(2).

24 We agree with intervenor that the decision and conditions of approval are adequate to
25 show that the county considered the impacts to the surrounding neighborhood from the risk
26 of air crash, particularly given the generalized nature of the safety concerns expressed.

1 Petitioner does not challenge the conditions of approval or otherwise explain why the
2 conditions of approval are inadequate to demonstrate that the county considered the concerns
3 expressed by neighbors and attempted to minimize the safety concerns through the
4 conditions.

5 Petitioner also argues that the county failed to consider impacts on the watershed,
6 wildlife and riparian habitat. In response, intervenor points to the county’s findings regarding
7 LCC 933.220(C)(4), which requires the county to find that the proposed airport “will not
8 have a significant adverse impact on sensitive fish or wildlife habitat.” In those findings, the
9 county concludes that the proposed airport is not located in a sensitive fish or wildlife habitat.
10 Intervenor argues those findings are adequate to address any issues raised under LCC
11 933.220(C)(2) regarding “other impacts of the development” on fish and wildlife habitat or
12 the riparian area. Record 8-9. Intervenor also points out that the county imposed conditions
13 of approval that are intended to prevent conflicts with the watershed. Record 7. We agree
14 that to the extent that the county was even required to consider impacts on fish and wildlife
15 habitat and the riparian area under the LCC 933.220(C)(2) “other related impacts” prong, the
16 findings at Record 8-9 are adequate to explain that the county considered impacts on
17 sensitive fish and wildlife habitat and the riparian area.

18 Finally, petitioner also argues that the county’s conclusion that as conditioned the
19 airport is compatible with and will have minimal impact on the neighborhood is not
20 supported by substantial evidence in the record. We understand petitioner’s argument to be
21 derivative of her argument that the county misconstrued LCC 933.220(C)(2) and that the
22 findings are inadequate to show that it considered all of the impacts that were required to be
23 considered under LCC 933.220(C)(2). Because we reject petitioner’s other challenges, we
24 reject her substantial evidence challenge as well.

25 The first assignment of error is denied.

1 **SECOND ASSIGNMENT OF ERROR**

2 In her second assignment of error, petitioner raises additional challenges to the
3 county’s findings that the proposed airport, as conditioned, will have minimal impact on the
4 surrounding neighborhood as required by LCC 933.220(C)(2). First, petitioner argues that
5 the decision fails to identify the extent of the “surrounding neighborhood” that the county
6 considered for purposes of determining whether the proposed airport will “have minimal
7 impact on” the livability of the surrounding neighborhood.

8 Intervenor responds that the findings include descriptions of the current zoning in the
9 area, location of dwellings, uses that generate noise in the area, and a description of the area
10 topography. Intervenor points out that the evidence in the record also includes a description
11 of other airports in the area. Record 390. Intervenor argues that the county’s decision shows
12 that the county considered testimony and evidence from neighbors about the use of property
13 in an area that extends, in some cases, a mile away from the subject property in determining
14 whether the proposed airport would have a minimal impact on the livability of the
15 neighborhood, and concluded that it would have only a minimal impact on the surrounding
16 neighborhood.¹

¹ The decision includes the following:

“There is a dwelling located approximately 300 feet from the proposed airport and there are eight dwellings within 800-feet of the subject property.

“ * * * * *

“The Board reviewed the record and considered the oral and written testimony of several surrounding property owners who testified in opposition to the proposed personal-use airport. Testimony states that the proximity to the airport runway to existing residential dwellings would not be compatible with the rural character of the neighborhood, and that the noise levels resulting from [an] airplane landing and taking off over nearby dwellings would have a significant impact on residential uses in the area.

“Evidence and testimony submitted into the record shows that tractors, large lawn mowers, and other types of power equipment are commonly used in the area and on other rural residential properties for maintenance and small-scale farm use. Crop dusting airplanes are commonly used for farming purposes in the area. Evidence has been submitted into the record that the noise generated by a Piper Super Cub airplane is similar in decibel levels and impacts

1 Petitioner is correct that the findings do not specifically identify a discrete area for
2 consideration of impacts to the “surrounding neighborhood.” However, when read as a
3 whole, the decision makes reasonably clear that the county considered impacts from the
4 proposed airport on other residential properties that could be impacted by noise generated
5 from the proposed airport or by the risk of air crash on take off or landing from the airport.
6 Petitioner does not point to any property or area that the county failed to consider as part of
7 the “surrounding neighborhood.” Absent any argument that the county failed to consider an
8 area as part of the “surrounding neighborhood,” we think the decision is adequate to explain
9 why the county concluded that the proposed airport will have “minimal impact” on “the
10 surrounding neighborhood.”

11 Second, petitioner argues that the county’s findings are inadequate to identify the
12 neighborhood characteristics that make the neighborhood “livabl[e]” and that the proposed
13 airport must minimally impact. However, the decision makes reasonably clear that the main
14 characteristic of the surrounding neighborhood is residential use and uses accessory to
15 residential uses, and that the county focused its efforts on ensuring that the residents of the
16 surrounding neighborhood would be minimally impacted by noise and risk of air crash from
17 the proposed airport. Petitioner does not identify a neighborhood characteristic that the

to other power equipment and crop dusting airplanes are commonly used in the area for both rural residential and rural farm use.

“Based on testimony submitted into the record concerning noise impacts from the proposed airplane, and to ensure compatibility with the surrounding land uses, a condition of approval is included in the decision that will limit the ‘personal-use airport’ to a ‘piper super cub,’ or smaller airplane only.

“Additionally, the Board finds that a condition of approval that the airstrip shall be limited to no more than two take-offs and two landings each day and no more than four each week will ensure compatibility with the surrounding land use pattern and residential uses in the area.

“The Board concludes that the proposed operation of a Piper Super Cub taking off and landing on the property, as limited by the permit conditions, does not impact the area in any ways materially different than existing and commonly accepted uses in the residential zone. The Board further concludes that the use, as limited by the permit conditions, will not disrupt the rural character of the affected zoning district or the area. * * *” Record 5-6.

1 county failed to consider or otherwise explain why the county’s focus on ensuring minimal
2 impacts to residences in the surrounding neighborhood from noise or crash risk was error.

3 Petitioner next argues that the county’s findings are inadequate to explain why the
4 impact from the proposed airport will be “minimal.” Petitioner points to the condition of
5 approval that limits airplane take offs and landings to no more than two per day and no more
6 than four each week, and argues that the findings are inadequate to explain why the trip limit
7 ensures that the impacts will be “minimal.” Petitioner argues that the limits on take offs and
8 landings are not “minimal” under the dictionary definition of “minimal.”²

9 Intervenor responds that the county concluded that the limit on take offs and landings
10 would limit noise from the proposed airport to a noise level and frequency similar to the
11 noise level and frequency from other noise-generating residential and accessory uses in the
12 area. *See* n 1 (“[e]vidence has been submitted into the record that the noise generated by a
13 Piper Super Cub airplane is similar in decibel levels and impacts to other power equipment
14 and crop dusting airplanes are commonly used in the area for both rural residential and rural
15 farm use”). Stated differently, we understand the county to have concluded that the airport
16 could have impacts similar in frequency, duration and quality to other impacts caused by
17 residential uses in the area, and as long as the impacts from the airport were conditioned to
18 remain similar in frequency, duration and quality, the impacts from the proposed airport
19 would be “minimal.” The county’s findings are adequate to explain why it concluded that
20 impacts will be “minimal.”

21 Finally, petitioner argues that the county misconstrued the applicable law by
22 concluding that the proposed airport will be compatible with the surrounding neighborhood
23 because the county relied solely on a condition of approval that requires intervenor to obtain

² Webster’s Third New Int’l Dictionary 1438 (unabridged ed. 2002) defines “minimal” as “of, being, or having the character of a minimum: constituting the least possible in size, number or degree: extremely minute[.]”

1 approval from the Oregon Department of Aviation (ODA) for the airport before it can
2 operate. According to petitioner, rather than analyze whether the proposed airport is
3 compatible with and will have minimal impact on the surrounding neighborhood, the county
4 delegated the analysis to the ODA.

5 Intervenor responds, and we agree, that the condition of approval that requires
6 intervenor to obtain approval from the ODA prior to operating the airport merely recognizes
7 that ODA approval is necessary, and is not intended as a substitute for the county’s analysis
8 of whether the airport is “compatible with” “the surrounding neighborhood” under LCC
9 933.220(C)(2), which is found at Record 5-6. *See* n 1.

10 The second assignment of error is denied.

11 **FOURTH ASSIGNMENT OF ERROR³**

12 LCC 933.220(C)(3) requires the county to determine whether “the proposed
13 development site has the physical characteristics needed to support the use *such as, but not*
14 *limited to* the following:

- 15 “(a) access
- 16 “(b) suitability for on-site, subsurface sewage treatment system;
- 17 “(c) an adequate supply of potable water;
- 18 “(d) location outside of a mapped geologic hazard area or of a 100-year
19 flood plain * * * [.]”

20 According to petitioner, the county’s decision fails to determine whether the subject property
21 “has the physical characteristics needed to support” the proposed airport. Petitioner argues
22 that the county failed to consider whether the short runway length is adequate for the airport.

23 Intervenor responds that the county considered whether the property has the physical
24 characteristics to support the airport and concluded that, as conditioned, the property can

³ There is no third assignment of error.

1 support the airport. The decision explains that the runway is 850 to 900 feet long and 65 feet
2 wide, and that because the Piper Super Cub can take off and land in as little as 50 feet, the
3 runway length is adequate. Record 6-7. As explained above, the decision limits the airplane
4 to a Piper Super Cub or smaller plane and prohibits take offs and landings over dwellings.
5 The decision adequately considered whether the subject property can support the proposed
6 airport use.

7 The fourth assignment of error is denied.

8 **FIFTH ASSIGNMENT OF ERROR**

9 Condition 5(e) provides “[t]he * * * airplane shall not fly at low altitudes over houses
10 or animals used for domestic or agricultural purposes.” Record 3. Petitioner argues that the
11 condition is impermissibly vague because use of the term “low altitudes” and use of the word
12 “over” does not inform the parties of what must be done to comply with the condition.

13 In *Sisters Forest Planning Committee v. Deschutes County*, 198 Or App 311, 108 P3d
14 1175 (2005), the Court of Appeals held that conditions must be stated clearly enough to allow
15 a reasonable person to understand what is being required. Read in isolation from the other
16 conditions and the decision, condition (5)(e) might not meet that standard. However,
17 condition 5(e) must be read in context with other related conditions, and in particular with
18 condition 5(j), which, as explained above, requires take offs and landings to occur only over
19 the Santiam River and prohibits them from occurring over dwellings. Condition 5(e) appears
20 to simply be a slightly different way to restate and reaffirm what condition 5(j) requires, that
21 the airplane may not fly over the dwellings to the west.

22 The fifth assignment of error is denied.

23 **SIXTH ASSIGNMENT OF ERROR**

24 As relevant here, the county found that noise generated by a Piper Super Cub or
25 smaller airplane using the airport is not significantly greater in decibel level than noise
26 generated from tractors and other power equipment used by residences in the neighborhood

1 and from crop dusters used in farming operations in the neighborhood. Record 5-6. The
2 county based that finding in part on two noise studies submitted into the record by intervenor.
3 One study, the Aerospace Engineering study, evaluated noise discharge from Piper Super
4 Cub airplanes and showed that at full throttle, the Piper Super Cub produced between 90 and
5 95 decibels. Record 102.⁴ Another study, the Duble study, evaluated noise from a nearby
6 airport using larger planes than the Piper Super Cub and concluded that noise levels at that
7 airport comply with applicable Department of Environmental Quality (DEQ) noise standards.
8 Record 112-17.

9 In her sixth assignment of error, petitioner argues that the county's finding is not
10 supported by substantial evidence in the record. Petitioner argues that the Aerospace
11 Engineering study that found that the Piper Super Cub at full throttle produces between 90
12 and 95 decibels did not measure noise levels on the ground that are generated at take off, but
13 rather measured noise levels at full throttle when the airplanes were at an elevation of 290
14 feet and the measuring device was also at 290 feet elevation. Petitioner argues that the study
15 that evaluated noise from a nearby airport does not provide substantial evidence of the noise
16 that will be generated by the Piper Super Cub taking off from the proposed airport.

17 Substantial evidence is evidence that a reasonable person would rely on in reaching a
18 decision. *City of Portland v. Bureau of Labor and Industries*, 298 Or 104, 119, 690 P2d 475
19 (1984). Intervenor responds that the Aerospace Engineering study provides an accurate
20 estimate of the noise produced by a Piper Super Cub at full throttle when the measuring
21 device is at a level even with the airplane. Intervenor also points out that there is no evidence
22 in the record that calls into question the validity of the two studies' estimation of noise or that
23 calls into question the county's reliance on the two studies to conclude that the noise level
24 that will be generated by the Piper Super Cub on take off is not significantly different than

⁴ That decibel level is equal to or slightly greater than a lawn mower and a tractor and less than a chain saw.
Record 82.

1 other noise levels already generated in the surrounding neighborhood. Intervenor argues that
2 a reasonable person would rely on that evidence to conclude that the noise levels will have a
3 minimal impact on the surrounding neighborhood.

4 We agree with intervenor. There is no evidence in the record that calls into question
5 or conflicts with the evidence in the record that the county relied on. A reasonable person
6 could readily conclude, based on the evidence in the record from intervenor, that noise from
7 the Piper Super Cub will have a minimal impact on the surrounding neighborhood.

8 The sixth assignment of error is denied.

9 The county's decision is affirmed.