

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 PETER NEKETIN, HARRIET NORMAN,
5 ALIESA BOLEY, MICHAEL BOLEY,
6 and GOCE JOSIFOSKI,
7 *Petitioners,*

8
9 vs.

10
11 WASHINGTON COUNTY,
12 *Respondent,*

13
14 and

15
16 RIVERSIDE HOMES, INC.,
17 *Intervenor-Respondent.*

18
19 LUBA No. 2003-075

20
21 FINAL OPINION
22 AND ORDER

23
24 Appeal from Washington County.

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26 Peter Neketin, Portland, filed the petition for review and argued on behalf of
27 petitioners. With him on the brief were Harriet Norman, Aliesa Boley, Michael Boley, and
28 Goce Josifoski.

29
30 No appearance by respondent Washington County.

31
32 D. Daniel Chandler, Vancouver, Washington, filed the response brief and argued on
33 behalf of intervenor-respondent.

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35 BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,
36 participated in the decision.

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38 AFFIRMED

10/09/2003

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

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NATURE OF THE DECISION

Petitioners appeal a county decision that grants preliminary subdivision plan approval.

MOTION TO INTERVENE

Riverside Homes, Inc. (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

FACTS

In 2002, intervenor applied to subdivide an approximately five-acre site consisting of an amalgamation of three ownerships into 23 residential building lots. The property is zoned Low Density Residential (R-5) with a minimum density of four residential units per acre and a maximum density of five residential units per acre. The property is located within the Raleigh Hills-Garden Home Community Plan District. According to the plan district map, a large portion of the site is within a Significant Natural Resource Area (SNRA). Washington County Community Development Code (CDC) 422 sets out additional review criteria for sites within the SNRA designation.¹

¹ CDC 422 provides, in relevant part:

“422-2 Lands Subject to this Section
“Those areas identified in the applicable Community plan * * * as Significant Natural Resources.”
* * * * *
“422-3 Criteria for Development
“422-3.1 The required master plan and site analysis for a site which includes an identified natural resource shall:
“A. Identify the location of the natural resource(s), * * *;

1 The site is forested and slopes steeply downward to the northwest. A large stand of
2 Douglas Fir and Western Cedar is located near the northwest corner of the property.
3 According to testimony and field evaluations prepared for intervenor, that stand of trees
4 provides the most valuable wildlife habitat on the property. The proposed subdivision site
5 plan places a portion of the stand of trees within a buffer area. The county hearings officer
6 conducted a public hearing and approved the application with conditions. The conditions of
7 approval include a reduction in the number of lots in the subdivision to 22, in response to
8 comments that the elimination of one lot would better mitigate the effect of the development
9 on the habitat resource. This appeal followed.

10 **INTRODUCTION**

11 The petition for review includes five assignments of error and 34 subassignments of
12 error.² The arguments in the assignments of error present four major themes: (1) the county
13 erred in accepting an application for the proposed subdivision because the application
14 submitted was not complete; (2) the county improperly interpreted and applied relevant
15 approval criteria; (3) the challenged decision is not supported by adequate findings or

“B. Describe the treatment or proposed alteration, if any. Any alteration proposed * * * shall be consistent with the program decision for the subject natural resource; and

“C. Apply the design elements of the applicable Community Plan[.]”

“* * * * *

“422-3.6 For any proposed use in a Significant Natural Resource Area, there shall be a finding that the proposed use will not seriously interfere with the preservation of fish and wildlife areas and habitat identified in the Washington County Comprehensive Plan, or how the interference can be mitigated.”

² At oral argument, petitioners withdrew their arguments that are based on CDC 422-3.5, conceding that that provision does not apply to the proposed subdivision. Therefore, we do not consider the arguments that are based on the requirements of CDC 422-3.5.

1 substantial evidence; and (4) the challenged decision is unconstitutional.³ We address the
2 themes in order.

3 **APPLICATION REQUIREMENTS**

4 **A. CDC 203-1.1(A)**

5 CDC 203-1.1(A) provides that “development actions” like the proposed subdivision

6 “may be initiated only by * * * [a]pplication by all the owners or all the
7 contract purchasers of the subject property, or any person authorized in
8 writing to act as agent [for] the owners or contract purchasers. * * * ”

9 Petitioners argue that the county should not have accepted intervenor’s application
10 because the application was not signed by all of the owners. According to petitioners, the
11 westernmost property is owned by the Estate of Lee George Hong, while the individual who
12 signed as owner of the parcel is Arnold Lee (Lee). Petitioners argue that none of the evidence
13 in the record is evidence that would satisfy a probate court or other body that may be charged
14 with addressing estate and property related matters that Lee is in fact the owner of the
15 westernmost parcel. Petitioners argue that the evidence is similarly inadequate to establish
16 that Lee is the owner of that parcel in this proceeding.

17 Intervenor responds that there is substantial, uncontroverted evidence in the record to
18 support the county’s findings that Lee either: (1) is the owner of the subject property; or (2)
19 is a person authorized to act as agent for the estate. Intervenor argues that the substantial
20 evidence standard does not require a demonstration of proof that would be needed to satisfy a
21 court in a probate or quiet title action.

³ In ten subassignments of error under the first assignment of error, petitioners argue that the county “exceeded its jurisdiction” in accepting an application that did not adequately address the county’s application criteria and by approving 22 lots rather than the minimum 20 lots allowed in the R-5 zone. With one exception, we do not believe that petitioners’ arguments are properly classified as jurisdictional. Rather, we understand petitioners to argue that the county erred in approving the proposed subdivision, because the subdivision plan did not address all requirements set out in the application and does not satisfy all applicable approval criteria. We address those arguments in our disposition of petitioners’ findings and evidentiary challenges.

1 By signing the application, Lee certified that he was the owner of the property. The
2 record also contains a set of five deeds from various persons to Lee. Record 117-122. In the
3 absence of contrary evidence, that evidence is sufficient to establish that Lee is the owner of
4 the westernmost property. The county did not err in accepting the application for the
5 proposed subdivision.

6 **B. CDC 404-1**

7 CDC 404-1.3 requires, in relevant part:

8 “Where required, an On-Site Analysis including the area within fifty (50) feet
9 of the proposed development and future site, if any, shall contain the
10 requirements as listed in Table I, below:

11 “* * * * *

12	“Vegetation	Sizes, species, location of trees	General groupings
13		6” caliper or greater DBH,	characteristics”
14		General groups other species	

15 Petitioners argue that the county erred in approving the proposed subdivision because
16 the site plan does not individually identify trees with a greater than 6-inch caliper. According
17 to petitioners, that information is necessary to determine which of the trees on the site need
18 to be protected in order to minimize the impact a residential subdivision will have on the
19 resource. Petitioners contend that, without a plan that specifically identifies all larger trees,
20 the county cannot be sure that the proposed mitigation will be the best way to address the
21 anticipated loss of forested areas.

22 Intervenor responds that it submitted evidence that establishes that the predominant
23 tree species on the property are Douglas Fir and Western Cedar; that there are no threatened
24 or endangered plant species on the site; and that the proposed buffer areas are adequate to
25 mitigate the development that will be constructed on the proposed lots.

26 Failure to satisfy all informational requirements will not result in reversal or remand
27 of a decision unless petitioners demonstrate that the missing information is necessary to
28 determine compliance with approval criteria. *Murphy Citizen Advisory Comm. v. Josephine*

1 County, 25 Or LUBA 312, 325 (1993). Even if petitioners make such a demonstration,
2 remand is not appropriate where they missing information is contained elsewhere in the
3 record. *Champion v. City of Portland*, 28 Or LUBA 618, 625 (1995); *Furler v. Curry County*,
4 27 Or LUBA 497, 502 (1994). Petitioners have not demonstrated that the identification of all
5 6-inch or greater caliper trees is necessary to assure compliance with approval criteria in this
6 case. Nor have petitioners identified the hearings officer’s error in relying on the evidence
7 supplied by intervenor regarding the vegetation on the site.

8 The first assignment of error is denied.

9 **INTERPRETATIONAL CHALLENGES**

10 Petitioners challenge several interpretations the hearings officer adopted in approving
11 the application. We review the interpretations of a hearings officer to determine whether they
12 are legally correct. *Gage v. City of Portland*, 133 Or App 346, 349-350, 891 P2d 1331
13 (1995).

14 Many of petitioners’ arguments throughout the petition for review are based on the
15 premise that the county should have limited the subdivision to the minimum density allowed
16 under the R-5 zone, 20 lots, rather than allowing 22 lots. That argument is based on a
17 challenge to the county’s interpretation of CDC 422-3.6, *see* n 1, and Specific Design
18 Element 2 for Subarea 12, which provides in pertinent part:

19 “Because of the importance of trees and other natural vegetation to the slope
20 stability, wildlife habitat, and scenery of the community, development of
21 structures shall be designed to minimize the natural area disturbed.”

22 The hearings officer adopted the following interpretations:

23 “The hearings officer finds that the Community Plan and CDC 422-3.6 are
24 ambiguous about how much an applicant must minimize and mitigate impacts
25 of a proposed development. The terms ‘minimize’ and ‘mitigate’ make it clear
26 an applicant does not have to eliminate all impacts. But it is not clear from the
27 plain meaning of the words what they do require. The hearings officer must
28 construe the ambiguity, based on its context, legislative history and common
29 rules of statutory construction.

1 “The hearings officer construes ‘minimize’ to mean that the applicant will not
2 remove or significantly adversely affect more of the identified SNRA than
3 necessary to develop the site as approved. To the extent an applicant must
4 remove or significantly adversely affect the identified SNRA, the applicant
5 minimizes those impacts if the applicant does not remove the features of the
6 habitat that are most sensitive or significant to the function of the SNRA. In
7 this case that function is to provide habitat.” Record 22 (footnote omitted.)

8 “The hearings officer finds the applicant is not required to reduce the number
9 of lots to the minimum permitted density to comply with CDC 422-3.6 or
10 Community Plan provisions for the following reasons:

11 “Community Plan Specific Design Element 2 and CDC 422-3.6 are silent
12 about what an applicant must do to minimize impacts and about how much
13 mitigation is enough. Therefore those terms are ambiguous.

14 “If the Board of Commissioners had intended to require an applicant to reduce
15 density to comply with these provisions, it would have said so, because
16 density is such a defining element of a proposed residential development.
17 Instead the measures listed in CDC 422 * * * are more in the nature of
18 mitigation—increasing landscaping or relocating structures or uses. * * *

19 “Community Plan Specific Design Element 2 and CDC 422-3.6 should be
20 read in context (i.e., in light of other provisions of the Community Plan and
21 CDC). Preservation of natural resources is an important goal, as evidenced by
22 those and other provisions of the Comprehensive Plan and CDC. So is
23 meeting the housing needs of the County, as evidenced by minimum density
24 standards and the housing and land use provisions of the Plan. These two
25 goals inherently conflict.

26 “Where a proposed development incorporates open space situated to minimize
27 potential adverse impacts to the most significant and fragile areas of a site—in
28 this case, the fir grove and perched wetland area—it achieves a reasonable
29 balance between those goals, notwithstanding the applicant proposes more
30 than the minimum number of lots permitted.

31 “Community Plan provisions regarding Area of Special Concern S also
32 supports this interpretation, because the Community Plan allows more than 50
33 percent of trees in Area of Special Concern S to be removed ‘to permit
34 development of the site at the planned density * * *.’” Thus the Community
35 Plan does not call for reducing density to comply. In light of that, it would be
36 unreasonable to read such a requirement into the Plan or CDC.” Record 24-25
37 (footnote omitted.)

38 We agree with the hearings officer that terms such as “minimize” and “mitigate” in
39 the CDC and plan are ambiguous. Petitioners argue that “minimize means minimize” and

1 requires the development's density to be reduced as much as possible. Petition for Review
2 33. While that is a possible interpretation, we do not agree with petitioners that it is the only
3 plausible interpretation. As the hearings officer stated, ambiguous terms must be considered
4 in light of the text and context of the CDC and Community Plan provisions in which they
5 appear. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11, 859 P2d 1143 (1993).

6 Specific Design Element 2 clearly allows for some disturbance of the natural area, but
7 requires that the disturbance be "minimized." As the hearings officer explained, such
8 preservation goals are in conflict with goals such as meeting the housing requirements of the
9 county that are advanced by the minimum density standards of the R-5 zone. We agree with
10 the hearings officer that when such goals are in conflict, it is permissible to attempt to
11 interpret them in a manner that balances those goals. The hearings officer attempted to
12 balance these goals by minimizing the disturbance to the most important and significant
13 natural areas on the property, the grove and wetland areas. The hearings officer did not
14 misconstrue Specific Design Element 2.

15 Like Specific Design Element 2, CDC 422-3.6 clearly allows for some interference
16 with habitat areas, but requires that such interference be mitigated. *Plotkin v. Washington*
17 *County*, 36 Or LUBA 378, 389 (1999), *rev'd on other grounds* 165 Or App 246, 997 P2d 226
18 (2000). The hearings officer found that the required mitigation is directed at limiting the
19 impacts of the allowed development rather than limiting the development that produces those
20 impacts in the first place. The CDC definition of mitigation is consistent with this
21 interpretation.⁴ In short, there is nothing in either the text or context of the CDC or

⁴ CDC 106-129 defines "mitigation" as:

"Reducing the impacts of a proposed development and/or offsetting the loss of habitat values resulting from development. In fish, wildlife, and big game range areas, mitigation may include, but is not necessarily limited to, requiring: 1) clustering of structures near each other and roads, controlling location of structures on a parcel to avoid habitat conflicts, minimizing extent of road construction to that required for the proposed use; and 2) replacing unavoidable loss of values by reestablishing resources for those lost, such as: forage for food

1 Community Plan provisions that requires a reduction in density to minimize or mitigate the
2 impacts of development. The hearings officer did not misconstrue the applicable law.

3 The fourth assignment of error is denied.

4 **FINDINGS AND EVIDENTIARY CHALLENGES**

5 **A. Findings Challenges**

6 In the third assignment of error, petitioners argue that the county’s findings, as well
7 as the evidentiary support for those findings, are inadequate to demonstrate that all applicable
8 criteria are satisfied. Petitioners assert that the county’s finding that the tentative plan will
9 comply with the approval criteria is wrong because the application is incomplete and the
10 decision is not supported by substantial evidence. The remainder of petitioners’ “inadequate
11 findings” challenges reiterates that theme. Even if petitioners are correct, the problem with
12 the decision would not be that the findings are inadequate, but that they are not supported by
13 substantial evidence. The county’s findings address the relevant approval criteria and find
14 that they are met, or can be met through the imposition of the conditions of approval.
15 Whether those findings are supported by substantial evidence is another question. The
16 findings themselves, however, are not inadequate.

17 The third assignment of error is denied.

18 **B. Substantial Evidence Challenges**

19 In 16 subassignments of error, petitioners challenge the evidentiary basis for the
20 hearings officer’s conclusion that the proposed subdivision plan minimizes the impact the
21 subdivision will have on the SNRA.

22 As a review body, we are authorized to reverse or remand the challenged decision if it
23 is “not supported by substantial evidence in the whole record.” ORS 197.835(9)(a)(C).

production, escape or thermal shelter. In other areas of significant wildlife value, such as wetlands, riparian vegetation and special bird nesting sites, maintenance and enhancement of remaining habitat, setbacks and restoration of damage and avoiding damage would be appropriate.”

1 Substantial evidence is evidence a reasonable person would rely on in reaching a decision.
2 *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984); *Carsey*
3 *v. Deschutes County*, 21 Or LUBA 118, *aff'd* 108 Or App 339, 815 P2d 233 (1991). In
4 reviewing the evidence, however, we may not substitute our judgment for that of the local
5 decision maker. Rather, we must consider and weigh all the evidence in the record to which
6 we are directed, and determine whether, based on that evidence, the local decision maker's
7 conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346,
8 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584,
9 588, 842 P2d 441 (1992). Where a petitioner demonstrates that a reasonable decision maker
10 would not rely on the evidence that the decision maker relied on, a decision is not supported
11 by substantial evidence. *Reynolds v. Clackamas County*, 24 Or LUBA 14, 19 (1992).

12 The hearings officer found that the fir grove and perched wetland are the most
13 functionally significant elements of the SNRA. Record 22. The decision requires intervenor
14 to eliminate one of the proposed lots to protect these resources. Record 23, 32. Intervenor
15 must also comply with conditions of approval that require (1) the services of an arborist to
16 preserve trees on the periphery of the site; (2) construction of a barrier fence along the
17 boundaries of the areas within the subdivision that are set aside for wildlife habitat; and (3)
18 compliance with intervenor's proposed mitigation plan.

19 Petitioners have not identified the particular findings petitioners contend are not
20 supported by substantial evidence, nor do petitioners identify the evidence that they believe
21 is not sufficient to support the hearings officer's findings. Petitioners' disagreement with the
22 hearings officer's findings, and the evidence he relied upon to reach the conclusion that the
23 proposed subdivision, as conditioned, will adequately mitigate the effect residential
24 development will have on the SNRA does not mean that those findings are not supported by
25 substantial evidence. Petitioners have not established a basis for reversal or remand.

26 The second assignment of error is denied.

1 **CONSTITUTIONAL CHALLENGE**

2 Petitioners argue that the county

3 “made an unconstitutional decision when it approved a development
4 application which did not include a provision for disposal of excavated
5 materials.” Petition for Review 35.

6 LUBA will not consider constitutional challenges that are not supported by legal
7 argument. *Poddar v. City of Cannon Beach*, 26 Or LUBA 429, 432 (1994). Petitioners’ legal
8 argument is not sufficiently developed for to permit review of petitioners’ constitutional
9 challenge.

10 The fifth assignment of error is denied.

11 The county’s decision is affirmed.