BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NEIGHBORS AGAINST APPLE VALLEY EXPANSION, ELLEN SAUNDERS, DAVID BRATTON and RENEE MILLS,
Petitioners,

vs.

WASHINGTON COUNTY,
Respondent,

and

MICHAEL APPLEBEE and JENNIE APPLEBEE,
Intervenors-Respondents.

LUBA No. 2009-019

FINAL OPINION
AND ORDER

Appeal from Washington County.

Edward J. Sullivan, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief were Carrie A. Richter and Garvey Schubert Barer PC.

No appearance by Washington County.

Stark Ackerman, Portland, filed the response brief and argued on behalf of intervenors-respondents. With him on the brief were Caroline E.K. MacLaren and Black Helterline LLP.

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

REMANDED 06/16/2009

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a hearings officer's decision approving an application for a flood plain alteration permit and development review to expand an existing personal airport to include a new hangar.

MOTION TO INTERVENE

Michael Applebee and Jennie Applebee (intervenors), the applicants below, move to intervene on the side of the respondent in this appeal. There is no opposition to the motion and it is granted.

MOTION TO FILE REPLY BRIEF

Petitioners move to file a reply brief. In part A of the reply brief petitioners respond to an argument that they waived two issues by failing to raise them below. Intervenors do not object to part A of the reply brief. However, intervenors object to part B of the reply brief, arguing that part B does not respond to a "new matter" raised in the response brief. OAR 661-010-0039 ("[a] reply brief shall be confined solely to new matters raised in the respondent's brief"). We agree with intervenors.

In the petition for review petitioners argued that a 2006 county decision conclusively determined what airport related uses occurred on the subject property in 1996. According to petitioners, that 2006 decision is "law of the case," with the consequence that the permissible uses of the subject property are limited to those the 2006 decision found were existing in 1996, which petitioners argue did not include commercial agricultural aviation uses. Intervenors dispute petitioners' understanding of the scope and effect of the 2006 decision, arguing that it did not have the effect of limiting the permissible uses of the property to those found to exist in 1996, or preclude intervenors from seeking land use approvals for improvements related to commercial agricultural aviation uses. In part B of the reply brief,

petitioners respond to those arguments largely by embellishing the argument and legal theory set out in the petition for review.

Intervenors' response appears to be a direct response to the merits of an issue raised in the petition for review, rather than a "new matter" within the meaning of OAR 661-010-0039. *See Sequoia Park Condo. Assoc. v. City of Beaverton*, 36 Or LUBA 317 (1999) (responses warranting a reply brief tend to be arguments that an assignment of error should fail regardless of its merits, based on facts or authority extrinsic to those merits). Intervenors merely disagree with petitioners' characterization of the 2006 decision and petitioners' theory as to why that decision has the legal or practical effect of precluding approval of improvements related to commercial agricultural aviation uses. Accordingly, only part A of the reply brief is allowed.

MOTION TO STRIKE

Intervenors move to strike portions of petitioners' oral argument, in which intervenors allege petitioners raised a "new issue" not presented in the petition for review. OAR 661-010-0040(1) (the Board shall not consider issues raised for the first time at oral argument). The three-page motion is accompanied by six pages of additional written argument that intervenors wish to submit in response to the alleged new issue, in case LUBA chooses to consider it, along with appendices. Petitioners submitted a six-page response arguing that their oral argument presented no issue not raised in the petition for review, and further objecting to LUBA's consideration of intervenors' additional written argument.

Disputes regarding whether new issues were raised at oral argument are often difficult and time-consuming to brief and resolve, and can threaten to delay resolution of an appeal beyond the statutory deadline. Rather than submit a formal motion to strike and responses to the motion, the better practice in our view is for the party who believes a new issue was raised at oral argument to either briefly object at oral argument or submit a concise written objection. The purpose of that concise objection is not to convince the Board that a

new issue was raised, but simply to alert the Board that the party *believes* a new issue was raised, so that in preparing the Board's final opinion and order the Board will focus its attention on the issues presented in the briefs and oral argument that discuss those issues.

Intervenors' motion to strike accomplishes the limited task of alerting the Board to their objection, and further it appears that resolving the parties' dispute regarding whether a new issue was raised at oral argument would delay issuance of this opinion. Accordingly, the motion to strike is denied, and we do not consider either intervenors' additional written argument or any responses thereto.

FACTS

The subject property is developed with a dwelling, a personal use airport, and a barn used as a hangar. Zoning is exclusive farm use (AF-20) and exclusive forest use (EFC), with a Private Use Airport Overlay district over the portion of the parcel that includes the existing dwelling, runway and barn/hangar. The entire parcel is located within a 100-year floodplain.

The county approved the personal airport in 1989, subject to conditions, including a condition that restricted commercial activities to commercial agricultural aviation (*e.g.* cropdusting). In a separate approval that same year, the county approved the dwelling and a barn accessory to the dwelling.

Intervenors acquired the property in 2004, and in 2006 applied to the county for (1) review of the 1989 permit conditions, (2) determination of the uses of the airport that existed in 1996, pursuant to the Airport Protection Act (APA), at ORS 836.600 *et seq*., and (3) approval of a several new aviation-related uses. A county hearings officer re-adopted the 1989 permit conditions without changes, determined the type of airport related activities that existed in 1996 and therefore were allowed to continue and grow under the APA, but denied the request for the proposed new airport-related uses (hereafter, the 2006 decision). Intervenors appealed that 2006 decision to LUBA. In *Applebee v. Washington County*, 54 Or LUBA 364 (2007), we remanded the decision to the county to correct several errors, but in

relevant part affirmed the hearings officer's conclusion that the proposed new aviation-related uses were not "expansions" of existing uses for purposes of the APA, but rather were new uses that required approval under the criteria applicable to new uses. On remand, the hearings officer denied intervenors' request for approval of the proposed new uses, and no appeal of that decision on remand was filed with LUBA.

In 2008, intervenors filed a new application requesting development approval for (1) construction of a 17,000-square foot aircraft hangar, (2) a 36,500-square foot concrete helicopter landing pad, and (3) an 18,500-square foot gravel vehicle and aircraft parking/staging area. The location of the proposed new hangar, landing pad and staging area is on a portion of intervenors' property on higher ground, outside the existing boundaries of the Private Use Airport Overlay district. Intervenors plan to move their existing helicopter-based commercial agricultural operation from the barn and its environs to the new location, and discontinue use of the barn for aviation purposes.

A county hearings officer conducted a hearing on the application, and on January 5, 2009, issued a decision denying the requested helicopter landing pad and staging area, but approving the requested aircraft hangar, with conditions. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the hearings officer erred in implicitly approving a new use of the airport, commercial agricultural aviation activities, without subjecting that new use to applicable criteria.

According to petitioners, intervenors presented the application as a request to re-locate facilities for an existing commercial agricultural aviation use. Petitioners argued below that any existing commercial agricultural aviation use of the airport lacks a lawful basis, because the county's 2006 decision did not find that commercial agricultural aviation activities occurred at the airport during 1996, and therefore such activities are not shielded by

the first sentence of ORS 836.608(3)(a).[1] Because the 2006 decision did not find that commercial agricultural aviation uses occurred at the airport in 1996, we understand petitioners to argue, intervenors must therefore establish commercial agricultural aviation as a new use, subject to applicable criteria, before seeking approval for a new hanger to support those commercial agricultural aviation activities.

The hearings officer rejected that argument, relying on the third sentence of ORS 836.608(3)(a), which provides that "[a] local government shall not impose additional limitations on a use approved by the local government prior to January 1, 1997" at a personal use airport. *See* n 1. The hearings officer reasoned that the statute "appears to make a distinction between 'continued operation' (protecting it if it was occurring at any time in 1996) and 'approved uses' whether or not they were operating [in 1996]." Record 58.

On appeal, petitioners argue that ORS 836.608(3)(a) generally limits the permissible uses at personal use airports to those that existed at the airport in 1996. According to petitioners, the third sentence does not require the county to recognize aviation uses that were authorized in the 1989 permit, such as commercial agricultural aviation uses, if those authorized uses did not actually occur at the airport in 1996. Petitioners contend that the third sentence of ORS 836.608(3)(a) simply prohibits local governments from imposing additional limitations on uses that were approved prior to January 1, 1997; the third sentence

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[1] ORS 836.608(3)(a) provides:

> "A local government shall not impose limitations on the continued operation of uses described in ORS 836.616(2) that existed at any time during 1996 at an airport described in subsection (2) of this section. A local government shall allow for the growth of uses described in ORS 836.616(2) that existed at any time during 1996 at an airport described in subsection (2) of this section. A local government shall not impose additional limitations on a use approved by the local government prior to January 1, 1997, for an airport described in subsection (2) of this section. Notwithstanding subsection (4) of this section, the construction of additional hangars or tie-downs by the owner of an airport described in subsection (2) of this section, basing additional aircraft and increases in flight activity shall be permitted at an airport described in subsection (2) of this section."

does not say that such previously approved uses may continue if the use did not actually exist at the airport in 1996.

Intervenors argue, and we agree, that the hearings officer correctly construed ORS 836.608(3)(a). Petitioners' interpretation of ORS 836.608(3)(a) gives little or no independent meaning to the third sentence of the statute. When the first and third sentences are read together, it is reasonably clear that those sentences authorize different sets of uses at airports subject to the APA. The statute prohibits local governments from imposing additional limitations on, and implicitly requires local governments to recognize and allow, both (1) aviation uses that were authorized by permit prior to January 1, 1997, and (2) aviation uses that existed at a personal use airport in 1996, regardless of whether a prior permit authorized those existing uses. There is no explicit or implicit requirement in the statute that uses authorized by permit must also have existed at the airport during 1996, or vice versa.

Relatedly, petitioners argue that county's 2006 decision determining which aviation uses occurred at the airport in 1996 is the "law of the case," and therefore intervenors' failure to establish the existence of commercial agricultural aviation uses at the airport during the 2006 proceedings precludes intervenor from requesting approvals based on uses not identified in the 2006 decision. Petition for Review 9, *citing Beck v. Tillamook County*, 313 Or 148, 153 n2, 831 P2d 678 (1992). The hearings officer rejected that argument as well, reasoning that the "law of the case" doctrine described in *Beck* does not apply to a new land use application, and further that intervenors were not required during the 2006 proceedings to establish all permissible uses of the airport. Record 59.

We agree with intervenors that petitioners have not established that the 2006 decision was intended to have or had the legal effect of determining all permissible uses of the personal use airport, and that the fact that the 2006 decision did not find that commercial agricultural aviation uses occurred at the airport in 1996 does not preclude intervenors from

seeking development approvals based on uses that were authorized by the 1989 permit, even if those uses did not exist in 1996. Further, even if the 2006 decision had the legal effect of determining all permissible uses of the airport, the 2006 hearings officer reviewed and reinstated all conditions of the 1989 permit, including the condition limiting commercial uses to agricultural aviation uses. Petitioners do not dispute that that condition authorizes commercial agricultural aviation at the airport.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

The four sentences of ORS 836.608(3)(a) apply to airports "described in subsection (2) of this section." *See* n 1. Subsection (2) of ORS 836.608 provides:

> "A local government shall recognize in its planning documents the location of private-use airports and privately owned public-use airports not listed under ORS 836.610(3) if the airport was the base for three or more aircraft, as shown in the records of the Department of Transportation, on December 31, 1994. *Local planning documents shall establish a boundary showing areas in airport ownership, or subject to long-term lease, that are developed or committed to airport uses described in ORS 836.616 (2). Areas committed to airport uses shall include those areas identified by the airport owner that the local government determines can be reasonably expected to be devoted to airport uses allowed under ORS 836.616 (2).*" (Emphasis added).

Citing to the emphasized language, petitioners argue that the geographic scope of an "airport described in subsection (2)" of ORS 836.608 is defined by the boundary that local governments apply in their planning documents, which in this case is the Private Use Airport Overlay district that the county applied in 1998 pursuant to ORS 836.608(2). According to petitioners, that boundary includes both areas developed with airport uses and areas committed to airport uses, *i.e.*, areas identified by the airport owner that the local government determines "can be reasonably expected to be devoted to airport uses[.]" Areas outside the airport boundary, petitioners argue, are not planned for airport uses and not protected for airport usage under ORS 836.608(2).

As noted, the boundary of the existing Private Use Airport Overlay district includes the airstrip, dwelling and barn, but does not include the site for the proposed helipad, staging area or new hangar. The hearings officer denied the requested helipad and staging area, because their proposed location is outside the overlay district and airport boundary and would require an amendment to the overlay district.[2] However, the hearings officer approved the location of the new hangar outside the overlay district, apparently because the new hangar is a functional replacement for the barn currently used as a hangar, and not an additional hangar or new use.[3] Petitioners argue that the hearings officer erred in approving the hangar at a location that is outside the overlay district. Petitioners contend that a hangar authorized by the fourth sentence of ORS 836.608(3)(a) may be located only "at an airport"

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[2] The hearings officer found, as relevant:

> "* * * The proposed helipad, parking area and replacement hangar are located south of and outside the Private Use Airport Overlay District. Helipads are limited to locations within the Airport Overlay District. If the parking area is intended to store aircraft, then this use is not allowed outside the Private Use Airport Overlay District boundary either. To authorize a helipad and tie-downs in the location requested in this application, a legislative ordinance enlarging the area designated Overlay District must be approved first. * * *
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> "* * * * *
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> "As mentioned above, despite the proposed location of the new hangar being outside the Private Use Overlay District, this may be allowed because a hangar was associated with this Private Use Airport which was first approved in 1988." Record 62-63.

[3] The hearings officer found, in relevant part:

> "* * * Apple Valley Airport was considered an airport of significance in 1998 by the Oregon Department of Aviation, a division of the Oregon Department of Transportation (ODOT). The County subsequently adopted code provisions creating the Private Use Airport Overlay and Safety Overlay for Apple Valley. A hangar has been associated with Apple Valley Airport since the late 1980s.
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> "ORS 836.608(3)(a) exempts construction of additional hangars or tie-downs by the owner of a listed airport from the analysis otherwise required by ORS 836.608(4)—the standards for review of expansions of existing uses.
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> "Accordingly, a hangar may be replaced anywhere on this airport property * * * even though the proposed hangar is outside the Overlay District. Furthermore, reconstruction of the hangar in a new location is not a new activity, or growth of an existing activity subject to the criteria in Section 385-4.B of the [county code], pursuant to ORS 836.608(3)(a)." Record 60.

described in ORS 836.608(2), meaning within the airport boundary established under that statute. Like the helipad and staging area, petitioners argue, approval of the new hangar at the proposed site will require an amended airport boundary or overlay district.

It is not clear to us why the hearings officer believed that ORS 836.608(3)(a) authorizes location of the proposed hangar outside the overlay district and existing airport boundary. Nothing cited to us in the statute suggests that existing airport uses or structures may be relocated outside the established airport boundaries without first amending those boundaries. The fourth sentence of ORS 836.608(3)(a) does exempt additional hangars and tie-downs from the review criteria in ORS 836.608(4) that would otherwise apply to new or expanded uses, but exempting such airport uses from those criteria does not necessarily mean an additional hangar may be sited outside the established airport boundary. To the contrary, as petitioners point out, such hangars are permitted only "at an airport described in" ORS 836.608(2), which appears to restrict the location of the hangar to a geographic area that fits that description. The fourth sentence operates only if the proposed location can accurately be described as "at an airport" described in ORS 836.608(2), as that phrase is used in ORS 836.608(3)(a).

Intervenors argue that the reference to an "airport described in subsection (2) of this section" merely clarifies that the fourth sentence applies to certain small personal use airports identified in ODOT records, as opposed to other types of airports, and is not intended to suggest that the additional hangars authorized under the fourth sentence must be located within the airport boundaries determined under subsection (2).[4] Intervenors note that at various places in ORS Chapter 836 the legislature refers both to "airports" and to locations "within an airport boundary," and argue that if the legislature intended the fourth sentence of

[4] As discussed below, intervenors also advance, under a "cross-assignment of error," an alternative rationale under which intervenors argue the hearings officer could have lawfully approved the hangar at a location outside the established airport boundary.

ORS 836.608(3)(a) to authorize additional hangars only "within an airport boundary described in subsection (2)" it could have said so.[5] Instead, intervenors argue, the legislature simply provided that additional hangars "shall be permitted *at an airport* described in subsection (2)," without referring to airport boundaries or otherwise limiting the geographic scope of "airport." Intervenors emphasize the use of the preposition "at" in the fourth sentence of ORS 836.608(3)(a), rather than the preposition "within." According to intervenors, the dictionary definition of the preposition "at" can mean both "in" and "near."

We agree with petitioners that ORS 836.608(2) requires the local government to establish an airport "boundary" that has the effect of determining the geographic extent of the "airport," based on areas that are developed or committed to airport uses. Committed areas include areas "identified by the airport owner that the local government determines can be reasonably expected to be devoted to airport uses allowed under ORS 836.616(2)." By implication, areas outside the boundary are those that are not reasonably expected to be devoted to airport uses allowed under ORS 836.616(2). ORS 836.616(2)(a) lists "aircraft

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[5] Intervenors cite to ORS 836.616, which provides in relevant part:

> "(1) Following consultation with the Oregon Department of Aviation, the Land Conservation and Development Commission shall adopt rules for uses and activities allowed within the boundaries of airports identified in ORS 836.610 (1) and airports described in ORS 836.608 (2).
>
> "(2) Within airport boundaries established pursuant to commission rules, local government land use regulations shall authorize the following uses and activities: [listing uses].
>
> "(3) All land uses and activities permitted within airport boundaries, other than the uses and activities established under subsection (2) of this section, shall comply with applicable land use laws and regulations. A local government may authorize commercial, industrial and other uses in addition to those listed in subsection (2) of this section within an airport boundary where such uses are consistent with applicable provisions of the acknowledged comprehensive plan, statewide land use planning goals and commission rules and where the uses do not create a safety hazard or limit approved airport uses.
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> "(4) The provisions of this section do not apply to airports with an existing or approved control tower on June 5, 1995."

hangars" as an airport use that is allowed "within airport boundaries." That strongly suggests that the boundary of an "airport" is intended to include areas developed with or reasonably expected to be devoted to airport uses, including hangars, and conversely that airport uses including hangars are intended to be located within airport boundaries.

Moreover, that view is consistent with ORS 836.605(2), which defines "airports" as used in ORS 836.600 to 836.630 to mean "the strip of land used for taking off and landing aircraft, together with all adjacent land used in 1994 in connection with the aircraft landing or taking off from the strip of land, including but not limited to land used for the existing commercial and recreational airport uses and activities as of December 31, 1994." Intervenors do not contend that the site of the proposed hangar was used in 1994 or at any other time in connection with landing or takeoff, or any other airport use. That site is therefore not part of the "airport" as that term is defined at ORS 836.605(2).

Intervenors' contrary view of the relevant statutory text and context is unpersuasive. We are cited to nothing in ORS Chapter 836 suggesting that the phrase "airport described in subsection 2" as used in all four sentences of ORS 836.608(3)(a) refers to some undefined geographic area that is larger than or different from the airport boundaries determined under ORS 836.608(2). The context cited by intervenors at ORS 836.616 provides little assistance. As relevant here, the general thrust of ORS 836.616 is that uses associated with an airport, including hangars, may be approved within airport boundaries. Nothing cited to us in ORS 836.616 suggests that any airport use can be located outside airport boundaries. Viewed against this context, intervenors' emphasis on the prepositional phrase "at an airport" in the fourth sentence of ORS 836.608(3)(a) is not a particularly compelling indication that the legislature intended to permit hangars to be located outside airport boundaries.

Intervenors note, finally, that ORS 836.630(3) provides that "[t]he provisions of ORS 836.600 to 836.630 and any rules established hereunder shall be liberally construed to further the policy established in ORS 836.600." The policy established at ORS 836.600 is "to

encourage and support the continued operation and vitality of Oregon's airports." We understand intervenor to argue that the statute must be broadly construed to allow airport uses such as hangars to be located outside established airport boundaries, rather than more narrowly construed to the contrary, because otherwise airport owners would have to apply to the county to expand the established airport boundary and overlay district to site such structures, which would impose an additional procedural burden on airport owners.

ORS 836.630(3) applies as a "thumb on the scale" that may be used to resolve a choice between two or more textually plausible interpretations in the manner most supportive of the policy to encourage the continued operation and vitality of Oregon's airports. However, in the present case the choice is not between two or more textually plausible interpretations. There is simply nothing in the text or context of the statute that suggests that it is permissible to establish or relocate airport uses such as hangars outside delineated airport boundaries, and several strong textual indications that the legislature intended airport uses, including hangars, to be located within airport boundaries.

In sum, we agree with petitioners that the hearings officer erred in approving the proposed hangar outside the existing airport boundary without requiring a contemporaneous amendment of the overlay district airport boundary to include the new hangar site.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

Under the third assignment of error, petitioners advance several challenges to the hearings officer's findings with respect to vehicle parking, but also include arguments challenging the new hangar.

As noted earlier, the hearings officer denied a proposed 18,500-square foot gravel parking/staging area next to the new hangar, which was apparently intended for use for both aircraft and vehicle parking. However, the hearings officer concluded that denial of the

proposed parking/staging area "does not preclude the applicant from grading a [vehicle] parking area pursuant to [CDC] 421-5.1 and 421-5.4." Record 44.

CDC 421-5.1 provides for a dwelling and up to two accessory structures, with associated off-street parking. CDC 421-5.4 provides for an "accessory structure customarily provided in conjunction with the use set forth in the applicable primary District." In addressing CDC 421-5.1, the hearings officer discussed the existing dwelling and concurred with staff that "the size of the parking lot should be appropriate for the residential [use] as well as the private use airport." Record 33.[6] Based on a CDC code provision that prohibits outdoor parking of five or more vehicles, the hearings officer limited the size of the parking area serving the residence to 1,500 square feet, sufficient for four vehicles.

The hearings officer then turned to CDC 421-5.4, and found that:

> "With respect to the private use airport, previously approved uses and emergency vehicle access in consideration of the appropriate size are allowed. The applicant has indicated the need to provide space for emergency vehicle access and turn-around. Staff believes and the Hearings Officer agrees that emergency vehicle access is appropriate and necessary. The appropriate size to support emergency functions will be determined using Washington County Uniform Road Improvement Design Standards for cul-de-sacs, which is 6,360 square feet. * * *
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> "In conclusion, the appropriate parking area for the [airport] use should be no larger than what is necessary to provide access to emergency vehicles, the occasional guest, the neighbor whose aircraft is being stored, and an infrequent mechanic. A standard cul-de-sac style turn-around, or comparable

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[6] The hearings officer found, in relevant part:

> "Pursuant to [CDC] 421-5.1, off-street parking is a permitted use as being accessory to one detached dwelling and two accessory structures. What is not explicit in [CDC] 421-5.1 is the size appropriate for a parking area to support off-street parking. Staff believes and the Hearings Officer concurs, that the size of the parking lot should be appropriate for the residential as well as the private use airport.
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> "With respect to the appropriate size of off-street parking for residential use, [CDC] 344-6 prohibits the outdoor parking or storage of five (5) or more operable vehicles parked at the site for more than 48 hours. The area required to provide space for up to four automobiles is less than 1,500 square feet. The size of any parking area shall be limited accordingly." Record 33.

> design as discussed above, approved by the Banks Fire Protection District should be more than sufficient to support all of the appropriate uses. A condition of approval to this effect is being added." Record 33-34.

The hearings officer added a condition requiring the site plans to show a parking area no larger than 1,500 square feet. Record 10. Although it is not entirely clear, it *appears* that the hearings officer authorized two parking areas: (1) one serving the dwelling limited to 1,500 feet in size, and (2) a second parking area, a cul-de-sac turnaround near the new hangar limited to 6,360 square feet in size, that provides both emergency access to the hangar and limited parking for authorized airport uses.

A. Existing Vehicle Parking Area

Under the third assignment of error, petitioners first contend that in approving a parking area under CDC 421-5.1 and/or CDC 421-5.4 the hearings officer failed to take into account an existing five-vehicle parking area that currently serves the dwelling and existing barn/hangar. Intervenors respond, initially, that petitioners raised no issues below regarding the existing parking lot and that any such issues are waived, under ORS 197.763(1). In addition, intervenors argue that the findings addressing parking for the dwelling are surplusage, since the application did not propose any changes to the dwelling.

Petitioners reply that they twice raised issues below regarding the lack of clarity in identifying the size and nature of the proposed parking. Record 227-28 and 110. However, the arguments at the cited record pages concern the proposed 18,500-square foot parking/staging area that the hearings officer denied. Nothing cited to us refers to the existing parking area or argues that the hearings officer must take that existing parking area into account in approving a parking area associated with the dwelling or new hangar. In any case, as far as we can tell, the hearings officer *did* address the existing parking area, by limiting the size of any parking area serving the dwelling to 1,500 square feet.

B. Accessory to the Dwelling

Petitioners argue next that if the approved 1,500-square foot parking area serves airport uses rather than the dwelling, it is not authorized under CDC 421-5.1, because airport uses are not "accessory" to the dwelling. That may well be correct. However, as we understand the relevant findings, the hearings officer authorized parking for airport uses under CDC 421-5.4, not CDC 421-5.1.

C. Accessory Structures under CDC 421-5.4

With respect to CDC 421-5.4, petitioners argue the hangar and any parking area serving airport uses are not authorized under CDC 421-5.4 because a personal airport use is not an outright permitted use in the AF-20 zone, but instead is a type of conditional use that may be approved only upon application of discretionary standards at CDC 344-5.3. We understand petitioners to argue that accessory uses such as a hangar and parking area cannot be approved as "accessory structures" to the airport use under CDC 421-5.4, unless approved subject to the conditional use standards at CDC 344-5.3.

As noted, CDC 421-5.4 provides for an "accessory structure customarily provided in conjunction with the use set forth in the applicable primary District." Intervenors observe first that CDC 421-5.4 concerns only "accessory structures," not parking, which does not fall within the CDC definition of "structure." According to intervenors, any parking associated with the hangar does not require approval under CDC 421-5.4, although the hearings officer apparently found it convenient to address the hangar's access and parking in her discussion of that code provision.

CDC 106-205 defines "structure" to include buildings, towers, walls, fences more than six feet in height, billboards, and utilities, but explicitly excludes "paved areas." We agree with intervenors that the turnaround/parking area authorized by the hearings officer's decision to access and provide parking for the hangar is almost certainly not a "structure" as that term is defined by the code, and therefore does not require independent authorization

under CDC 421-5.4. Instead, the turnaround/parking area is a necessary means to provide access to and parking associated with the proposed hangar, which is clearly a "structure."

With respect to the hangar, intervenors argue that a personal use airport is a "use set forth in the applicable primary District" and a hangar is clearly an accessory structure to that use for purposes of CDC 421-5.4, whether the primary airport use is a permitted or conditional use. According to intervenors, in applying CDC 421-5.4 the county is not required to approve the proposed hangar as a new conditional use, under the conditional use standards at CDC 344-5.3.

CDC 344-5.2 includes within the list of uses allowed in the AF-20 zone subject to CDC 344-5.3 "[a]irports (personal use only) including associated hangar, maintenance and service facilities." CDC 344-5.3 sets forth several discretionary criteria that apply to that list of uses, criteria that are evidently intended to protect agricultural uses from the impacts of non-agricultural development allowed in the AF-20 zone.[7] We understand petitioners to argue that an airport use *outside* a Private Use Airport Overlay District must comply with the applicable AF-20 standards, including CDC 344-5.3.

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[7] CDC 344-5.3 requires the following relevant findings:

> "A. The proposed use is compatible with farm uses described in Oregon Revised Statutes, Chapter 215;
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> "B. The proposed use does not interfere seriously with 'accepted farming practices' as defined in ORS 215.203(2)(c) on adjacent lands devoted to farm use;
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> "C. The proposed use does not materially alter the stability of the overall land use pattern of the area; and
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> "D. The proposed use will not:
>
> "(1) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or
>
> "(2) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use."

As we understand the relevant CDC provisions, CDC 344-5.2 generally authorizes personal use airports in the AF-20 zone, directly implementing ORS 215.213(2)(h), which authorizes the county to allow personal use airports, including associated hangars and related facilities, in the county agricultural zones. CDC 385, the Private Use Airport Overlay District, is applied to and governs certain listed personal use airports in the county that existed on a certain date, had certain characteristics, and are recognized under ORS 836.608(2). That list includes the Apple Valley airport. Under the county's scheme, identifying what standards apply to a proposed new hangar that is accessory to a personal use airport would seem to depend on whether the hangar is located within a Private Use Airport Overlay District or not. *See* CDC 430-7 (facilities in areas that are within the Private Use Airport Overlay District are subject to the regulations in CDC 385).[8] We are not cited to any authority suggesting that it is permissible to apply CDC 385 standards to airport development on land outside the overlay district, instead of CDC 344 standards that would otherwise apply.

Nonetheless, we do not resolve this issue because, as explained above, the hearings officer erred in approving the new hangar outside the overlay district without requiring a contemporaneous zoning amendment to expand the overlay district. Approval of the proposed hangar will require either an expansion of the overlay district or an amended

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[8] CDC 430-7 provides, in relevant part:

> "Personal use airport or heliport facilities, including associated hangers, maintenance and service facilities, may be permitted as a special use in certain districts outside of the airport overlay districts, subject to the following standards.
>
> "Facilities in areas that are specifically designated for airport use (i.e., within Public Use Airport Overlay District or Private Use Airport Overlay District) shall be subject to the regulations outlined under those Sections.
>
> "Personal use airports and heliports, in addition to appropriate approval of the Federal Aviation Administration (FAA), Oregon Department of Aviation (DOA) and the Department of Environmental Quality (DEQ), shall be subject to applicable standards of the Community Development Code."

application to locate the proposed hangar within the existing overlay district. In either case, we do not understand petitioners to dispute that the governing regulations in those circumstances will be those in CDC 385 rather than CDC 344. Accordingly, even if petitioners are correct that the standards in CDC 344-5.3 would govern approval of a hangar on AF-20 zoned land outside a Private Use Airport Overlay District, our disposition of the second assignment of error makes it unlikely that that issue will arise on remand. Therefore, we need not resolve the parties' dispute over what standards would apply to a hangar sited outside the overlay district.

D. Multiple Accessory Structures

As a final argument under the third assignment of error, petitioners contend that CDC 421-5.4 authorizes only a *single* accessory structure on the property that is customarily provided in conjunction with the use set forth in the AF-20 zone, not multiple accessory structures. According to petitioners, the property already has one accessory structure, the existing barn, and therefore no additional accessory structures are permitted anywhere on the property under CDC 421-5.4.

Intervenors respond that the 1989 dwelling permit approved the barn as accessory to the dwelling, not to the personal airport use, and the new hangar as conditioned will be the only "accessory structure" to the airport use. We agree with intervenors that even if CDC 421-5.4 is understood to prohibit more than one accessory structure per primary use of the property,[9] the subject property appears to have more than one primary use. Petitioners have not established that it is inconsistent with CDC 421-5.4 to approve a hangar on the subject property as an accessory structure to the personal use airport.

The third assignment of error is denied.

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[9] We note that petitioners' view of CDC 421-5.4 would be inconsistent with ORS 836.608(3)(a) as applied to a proposal to site more than one hangar at a personal use airport governed by that statute, which expressly allows *additional* hangars. *See* n 1.

FOURTH ASSIGNMENT OF ERROR

Under the fourth assignment of error, petitioners argue that the hearings officer erred in failing to apply the standards of CDC 421-13 to the parking area serving the airport use.

CDC 421-13 identifies "Criteria for Parking for Multi-Family, Institutional, Commercial and Industrial Developments" that apply within flood areas.[10] As noted, the entire property is within the 100-year floodplain. According to petitioners, because the airport includes a commercial component—commercial agricultural aviation—any parking associated with that commercial use is therefore subject to the CDC 421-13 criteria.

The hearings officer questioned whether CDC 421-13 applied to the proposed development, which the hearings officer did not view to be a "commercial" use, or at least the type or scale of commercial use governed by CDC 421-13:

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[10] CDC 421-13.1 provides:

> "Land within the flood area may be used for parking by Multi-Family, Institutional, Industrial or Commercial Developments, regardless of whether located on the same lot or parcel, if an approval for parking is obtained through the Type III procedure. The parking shall be approved only upon findings that:
>
> "A. The parcel or lot could not develop at the planned density, including any density transfers or bonuses, due to lack of land area to provide ground level parking areas on the same lot or parcel outside the flood plain or drainage hazard area;
>
> "B. Adequate drainage can be provided to minimize the off-site impact of changes in water flow, direction or velocity caused by creation of the parking area;
>
> "C. The applicant will minimize to the extent practicable or as outlined in the appropriate Community Plan or Rural/ Natural Resource Plan, any adverse impacts on the natural integrity of the flood area, including wildlife and riparian vegetation. Significant features such as natural ponds, large trees and endangered vegetation shall be preserved to the extent possible. * * *
>
> "D. The parking area shall be posted to warn users that the area is within the flood area and shall not be used during periods of flood warning; and,
>
> "E. Vehicular access will be provided on a roadway no portion of which is below the flood surface elevation. The parking area shall be located and oriented to minimize to the extent practicable the need to fill to provide such access. All fill shall be structurally sound and designed to avoid erosion."

> "As discussed above, the proposed development for a parking area as part of a private use airport is not consistent with a commercial use. It has been argued by the [appellants] that the commercial agricultural use could conceivably fall under the category of a commercial use * * *.
>
> "Addressing the intent of Section 421-13, Staff posits and the Hearings Officer agrees that the number of vehicles that are permitted on-site (as discussed above) does not warrant a review requiring, for example, posting notification to users warning them that the area is within the flood plain (Section 421-13.1.D). Therefore, Staff believes and the Hearings Officer concurs that Section 421-13 is not applicable. The other aspect of Section 421-13 that is of concern is reducing the impact a parking facility will have on the flood plain and natural environment. Pursuant to the conditions of approval, the applicant will be required to address storm water runoff via a DEQ permit. Moreover, the applicant indicated that they will utilize best management practices for storm water runoff (applicant's testimony at 11/03/2008 hearing). As such, those purposes of Section 421-13 have been met." Record 44-45.

Petitioners argue that while only a limited number of persons, such as employees, pilots, and mechanics, may be using the parking area associated with the commercial component of the airport use, that use is nonetheless a commercial use and therefore the parking must be approved under CDC 421-13.

Intervenors respond that while the phrase "commercial agricultural aviation" includes the word "commercial," that does not mean that the use is necessarily the type or scale of "commercial development" that requires review under CDC 421-13. Intervenors emphasize that the commercial agricultural aviation use is only a component of a limited personal use airport, and not a retail sales outlet or similar commercial use that involves public access or the need to provide public parking.

We agree with intervenors and the hearings officer that applying CDC 421-13 to the parking area associated with the personal use airport in this case appears to be regulatory overkill. The parking area will be used by very few persons, limited to employees, pilots, mechanics, infrequent guests, etc. Nonetheless, CDC 421-13 includes no language that limits its applicability to large-scale commercial development or development that involves parking by members of the general public. The hearings officer approved an office as part of

the new hangar, presumably in connection with the commercial agricultural aviation use, and nothing in the decision would prohibit customers from visiting the office to arrange for crop-dusting services, in addition to the employees, pilots, etc., who would use the parking area. Absent some stronger basis to conclude that CDC 421-13 does not apply to the parking area serving the hangar and the commercial component of the airport use, we agree with petitioners that remand is necessary for the hearings officer to apply CDC 421-13 to the parking area.

The fourth assignment of error is sustained.

CROSS-ASSIGNMENT OF ERROR

In response to the second assignment of error, which we sustained above, intervenors include arguments denominated a "cross-assignment of error." Specifically, intervenors argue:

> "If the Board finds that ORS 836.608(3)(a) does not authorize the approval of the hangar outside the Airport Overlay District, Intervenors believe that there is an alternate basis for that approval that the Hearings Officer could have used. As Intervenors argued to the Hearings Officer (Supp R at 8, *et seq.*), the 1989 Airport Approval remains in effect as to those portions of the property that are not included within the Overlay District boundaries, and as a result of that continuing approval, the Applicants have the right to use those portions of the property outside the Overlay District for commercial agricultural aviation activities as authorized by the conditions of the 1989 Airport Approval." Response Brief 23.

Based on that argument, intervenors request that the hearings officer's conclusion that the hangar is allowed outside the overlay district be affirmed even if LUBA finds that that conclusion cannot be sustained under ORS 836.608(3)(a).

While LUBA's rules do not expressly authorize cross-assignments of error, in several cases we have considered cross-assignments of error raised in a response brief. *See Copeland Sand & Gravel, Inc. v. Jackson County*, 46 Or LUBA 653, *aff'd* 193 Or App 822, 94 P3d 913 (2004) (holding that cross-assignments of error are consistent with LUBA's rules, and explaining some differences between a cross-appeal and cross-assignment of

error). Generally speaking, a cross-assignment of error is a contingent argument set out in the response brief that the decision-maker erred in some respect and that LUBA should reverse or remand the decision to correct that error. The cross-assignment of error is contingent, because the intervenor-respondent seeks reversal or remand only if the decision would be remanded based on an assignment of error set out in the petition for review. One of the circumstances in which a cross-assignment of error is appropriate is where (1) the applicant requests approval under one legal theory and the decision maker rejects that theory but approves it under a different theory, (2) an opponent appeals the decision to LUBA and challenges the theory adopted by the decision maker, and (3) LUBA sustains the petitioner's challenge. In that circumstance, the applicant/intervenor-respondent might cross-assign error to the decision-maker's rejection of the alternate theory and seek remand to reconsider approval under that alternate theory. If the applicant/intervenor-respondent convinces LUBA that the decision maker erred in rejecting the alternate theory, LUBA would sustain the cross-assignment of error and remand the decision under the cross-assignment of error.

However, an essential element to any cross-assignment of error is an allegation of error. Stated differently, a cross-assignment of error must *assign error* to some ruling or omission in the challenged decision and seek reversal or remand based on that alleged error. *See Krishchenko v. City of Canby*, 52 Or LUBA 290, 299 (2006) (a cross-assignment of error seeks reversal or remand of the challenged decision). In our view, a cross-assignment of error is not a vehicle to request (1) that LUBA address in the first instance an alternative legal theory under which the application could have been approved, but was not, and (2) that LUBA affirm the challenged decision based on that legal theory.

In the present case, intervenors do not assign error to any ruling or omission in the hearings officer's decision and intervenors do not seek reversal or remand of the decision. Instead, intervenors seek to avoid remand under petitioners' second assignment of error by requesting that LUBA affirm the hearings officer's ruling that the hangar may allowed

outside the overlay district, based on an alternative legal theory that the hearings officer did not consider and the merits of which LUBA must resolve in the first instance. That argument does not constitute a cross-assignment of error, and we decline to consider it further.[11]

The county's decision is remanded.

[11] In any case, the merits of that alternative legal theory appear dubious. Intervenors cite nothing in either of the 1989 permits that purports to approve a hangar in the vicinity of the proposed location. At oral argument, intervenor advised us that the 1989 permits approved storage of aircraft under the dwelling. At some point, the barn was apparently converted to use as a hangar, but nothing cited to us in either of the 1989 permits suggests that the county authorized a hangar use somewhere other than under the dwelling or in the barn. Further, even if the 1989 permits approved a hangar on the property without specifying a location, the arguable effect of the 1998 decision imposing the overlay district on the subject property was to demarcate those areas of the property that constitute the personal use airport, at which airport uses are and can be sited.