

1 BEFORE THE LAND USE BOARD OF APPEALS  
2 OF THE STATE OF OREGON  
3

4 PATTY BROCKMAN, JOHN BURNS,  
5 LEE DUVALL, ADELIN DUVALL  
6 DAVID FIFE, WENDY FIFE, HEATHER HINES,  
7 TONY KRAUSE, LEONARD SCHMIDLIN,  
8 BETTY SCHMIDLIN, TIM SOOK, TAMMY SOOK  
9 and PAT ZIMMERMAN,  
10 *Petitioners,*  
11

12 vs.  
13

14 COLUMBIA COUNTY,  
15 *Respondent,*  
16

17 and  
18

19 TIM BERO and MICHELLE BERO,  
20 *Intervenors-Respondents.*  
21

22 LUBA No. 2010-090  
23

24 FINAL OPINION  
25 AND ORDER  
26

27 Appeal from Columbia County.  
28

29 Michael F. Sheehan, Scappoose, filed the petition for review and argued on behalf of  
30 petitioners. With him on the brief was Sheehan and Sheehan LLC.  
31

32 No appearance by Columbia County.  
33

34 Mark J. Greenfield, Portland, filed the response brief and argued on behalf of  
35 intervenors-respondents.  
36

37 RYAN, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member,  
38 participated in the decision.  
39

40 AFFIRMED

01/19/2011

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

**NATURE OF THE DECISION**

Petitioners appeal the county’s adoption of Ordinance 2010-4, which amends Ordinance 2009-1. Ordinance 2009-1 approved a Statewide Planning Goal 4 (Forest Lands) exception and comprehensive plan map and zoning map amendments for a 27.8-acre portion of a 70.8-acre parcel.

**MOTION TO INTERVENE**

Tim and Michelle Bero, the applicants below, move to intervene on the side of the county. There is no opposition to the motion and it is allowed.

**FACTS**

The challenged decision is the county’s decision on remand from *Brockman v. Columbia County*, 59 Or LUBA 302 (2009) (*Brockman I*). We set out the relevant facts in *Brockman I*:

“The Vernonia Airport was constructed during the 1930s by the Civilian Conservation Corps. It has a relatively short grass runway and few improvements. The airport is located outside the Vernonia city limits and urban growth boundary (UGB), but within three miles of the city’s UGB. Access to the airport is via Airport Way, a private unpaved roadway.

“Intervenors submitted the application in February 2008. \* \* \*

“The application \* \* \* sought a Goal 4 exception for a proposed 27.8-acre parcel to allow airport and airport related uses. The application sought a change in the comprehensive plan map designation from Forest Resource to Rural Industrial and a change in the zoning map designation from PF-76 to Airport Industrial (AI). \* \* \* A smaller part of the 27.8-acre parcel (approximately 6 acres) was to be used for ‘airport industrial buildings and/or hangars. \* \* \*’” *Brockman I* at 303-04.

One activity planned for the proposed airport industrial buildings and/or hangars for which intervenors sought an exception is a 20,000 square foot manufacturing facility for manufacturing and testing light service aircraft (LSA). One of the four factors that is required to be considered to grant an exception under Goal 2, Part II(c) is whether the

1 proposed uses will be compatible with adjacent uses.<sup>1</sup> There are several residences adjacent  
2 to the airport.

3 In *Brockman I*, we sustained a portion of the third assignment of error because we  
4 concluded that intervenors had not identified any evidence in the record regarding how much  
5 additional air traffic might be expected at the expanded airport, and that as a result, the  
6 county could not make a determination that that increased air traffic would be “compatible”  
7 with adjoining uses.<sup>2</sup> We emphasized that “\* \* \* under OAR 660-004-0020(d), the county is  
8 obligated to ensure the uses authorized by the exception will be compatible with adjoining  
9 uses, but the county is not obligated to ensure that those uses will cause ‘no interference or  
10 adverse impacts of any type with adjacent uses.’” *Id.* at 318.

11 During the proceedings on remand, intervenors submitted evidence that the increased  
12 air traffic from the proposed use of the property would be compatible with existing  
13 residential uses because the noise levels at the airport even with the increased air traffic

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<sup>1</sup> OAR 660-004-0020(d) provides in relevant part that the county must determine that:

“‘The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts’. The exception shall describe how the proposed use will be rendered compatible with adjacent land uses. The exception shall demonstrate that the proposed use is situated in such a manner as to be compatible with surrounding natural resources and resource management or production practices. ‘Compatible’ is not intended as an absolute term meaning no interference or adverse impacts of any type with adjacent uses.”

<sup>2</sup> We explained:

“No party has identified any evidence in the record regarding how much additional air traffic might be expected at the airport, as a result of the uses authorized by the disputed exception. Until that is known, the county is simply not in a position to know if that increased air traffic will be incompatible with adjoining uses. If the increased air traffic will not be incompatible with adjoining uses, the proposal complies with OAR 660-004-0020(2)(d). Even if increased air traffic might be incompatible with adjoining uses, the county is required under OAR 660-004-0020(d) and 660-013-0040(6) to consider ‘measures designed to reduce adverse impacts’ and take ‘reasonable steps to eliminate or minimize the incompatibility through location, design, or conditions.’ Those measures and reasonable steps may be sufficient to conclude that the proposed uses will be compatible notwithstanding the additional air traffic impacts.” *Id.* at 318.

1 would not exceed the Oregon Department of Aviation’s identified thresholds for noise levels  
2 that are compatible with residential uses. That evidence included (1) the Oregon Department  
3 of Aviation (ODA) airport report for the Vernonia Airport that addressed current and  
4 projected levels of aircraft activity at the airport, (2) evidence and testimony from the  
5 operator of the LSA manufacturing facility regarding the projected number of annual aircraft  
6 take offs and landings that that facility would generate, and (3) a noise contour study (NCS)  
7 prepared by intervenors’ expert in accordance with the Federal Aviation Administration’s  
8 (FAA’s) Integrated Noise Model (INM) software program that models projected noise levels  
9 in decibels of Day-Night Average Sound Levels (DNL) at the airport, as identified by noise  
10 contours.<sup>3</sup> Based on intervenors’ submissions the county concluded that the noise impacts  
11 associated with the increased activity at the airport as a result of intervenors’ use of the  
12 property are compatible with adjoining residences and that no mitigation was required.  
13 Petitioners appealed that decision to LUBA.

14 **FIRST ASSIGNMENT OF ERROR**

15 Petitioners’ single assignment of error is:

16 “The County’s findings of fact with respect to aircraft related noise arising  
17 from the proposed exception activities and its impact on neighboring  
18 residential properties were not based on substantial evidence in light of all the  
19 evidence in the record.” Petition for Review 8.

20 Petitioners’ brief is difficult to follow because, other than the quoted statement, petitioners  
21 make no attempt to tie their single assignment of error to LUBA’s standard of review.  
22 However, based on the quoted language and the arguments set forth in the petition for  
23 review, we understand petitioners to argue that the county erred in relying on certain  
24 evidence described below to support its finding that the proposed use would be compatible

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<sup>3</sup> The NCS explains that “[n]oise levels are measured in decibels of Day-Night Average Sound Levels or DNL. The measurement is then translated into contours which depict the areas within various DNL levels. DNL is the [FAA’s] standard metric for determining the cumulative exposure of individuals to noise.” Record 88.

1 with the adjoining residential uses of property. We understand petitioners to argue that other  
2 evidence in the record calls that evidence into doubt, so that evidence is not substantial  
3 evidence that the proposed use will be compatible with adjoining residential uses. In  
4 particular, petitioners challenge the county's reliance on the following evidence:

5 1. Testimony provided by Andrew Glomb (Glomb) estimating future aircraft  
6 activity from his LSA manufacturing operation on the subject property; and

7 2. Various aspects of the NCS prepared by intervenors' expert, including: (a) the  
8 mix of aircraft used in the NCS; (b) the NCS's failure to take into account noise from  
9 helicopter operations on the airport property; (c) the NCS's failure to account for  
10 possible future lengthening of the runway; (d) the NCS's failure to account for  
11 increased air traffic in summer weather because adverse weather conditions in winter  
12 make flying unsafe or impracticable; (e) the NCS's failure to take into account  
13 normal growth of airport operations that would increase noise levels; and (f) the  
14 NCS's failure to project data more than 15 years into the future.

15 **A. Waiver**

16 Intervenors respond that several of the issues that are raised in the petition for review  
17 were not raised below and under ORS 197.835(3) may not be raised for the first time at  
18 LUBA. In particular, intervenors maintain that petitioners failed to raise any issue below  
19 challenging (1) the accuracy of Glomb's estimate of the number of future aircraft activity  
20 associated with his business operations on the property (item 1 above); (2) whether the NCS  
21 considered the impact of possible future extension of the runway on air traffic (item 2(c)  
22 above); (3) whether the NCS considered the impacts of additional flights during summer  
23 months to make up for adverse winter weather conditions (item 2(d) above); (4) whether the  
24 NCS assumed normal growth in airport operations (item 2(e) above); and (5) a challenge to  
25 the 15-year planning period (item 2(f) above).

1           ORS 197.835(3) limits the issues that may be raised in a LUBA appeal (the “raise it  
2 or waive it” principle), and provides:

3           “Issues shall be limited to those raised by any participant before the local  
4 hearings body as provided by ORS 197.195 or 197.763, whichever is  
5 applicable.”

6 The “raise it or waive it” principle serves the purpose of providing fair notice of the issue to  
7 the decision maker and other parties, so they have an adequate opportunity to respond and  
8 address the issue. *Boldt v. Clackamas County*, 107 Or App 619, 813 P2d 1078 (1991).  
9 Petitioners did not respond to intervenors’ argument that the issues described above were  
10 waived. When a respondent argues that an issue raised in an assignment of error was not  
11 raised below and the petitioner does not respond to the argument or identify in the record  
12 where the issue was raised, LUBA will not search the record on the petitioner’s behalf and  
13 will deny the assignment of error. *Williamson v. City of Salem*, 52 Or LUBA 615 (2006).  
14 Accordingly, the issues identified in the preceding paragraph were waived under ORS  
15 197.763(1) and ORS 197.835(3).

## 16           **B. Remaining Arguments**

### 17                   **1. Intervenors’ Evidence**

18           As explained above, intervenors submitted the NCS as evidence that the noise  
19 generated by aircraft using the airport would be compatible with the adjoining residential  
20 uses. As we understand it, the NCS is a study that makes assumptions about the types of  
21 aircraft and the number of aircraft operations and those assumptions are then applied to a  
22 mathematical model, the INM software, version 7.<sup>4</sup> For purposes of the NCS prepared by  
23 intervenors’ consultant, those assumptions were:

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<sup>4</sup> Intervenors point out that they originally submitted a noise study based on the Area Equivalent Method, but based on petitioners’ comments, they prepared the NCS study that is based on the INM Model. Record 97. The Oregon Airport Land Use Compatibility Guidebook describes the INM Model as follows:

“The INM contains a database that relates slant range distance and engine thrust to noise levels related to each specific type of aircraft. On an irregular grid around the airport, the

1           “The existing runway length is 2940’; the future runway length is 3840’ (900’  
2 extension to Runway 9); the mix of aircraft used for the analysis is considered  
3 as general aviation airplanes weighing less than 12,000 pounds gross weight  
4 with the ‘critical aircraft’ (most demanding) used being the Cessna 206; \* \* \*  
5 the current annual airport operations are 1875 according to the Oregon  
6 Department of Aviation and 4000 according to the aircraft manager; the future  
7 (2025) operations are about 4325 using ODA numbers and 6100 using aircraft  
8 manager numbers; \* \* \* [b]ecause the estimate of annual flight operations by  
9 the ODA and by the Vernonia airport manager differs so substantially, WH  
10 Pacific has applied the larger numbers to present a worst case estimate.”  
11 Record 88.

12 Based on those assumptions, the study concluded with current noise levels at the airport, no  
13 adjoining residences fall within the 55 DNL contour. The study concluded that in 2025  
14 under the “worst case estimate” of increase in airport activity, three of the adjacent  
15 residences would fall within the 55 DNL noise contour, but no residences would fall within  
16 the 60 DNL contour. OAR 660-013-0080(1)(b), Exhibit 5 provides that residential uses are  
17 compatible with noise levels at the 55-65 DNL contour level without requirement for noise  
18 mitigation.

19           The county concluded that the noise levels from the airport would be compatible with  
20 adjacent residential uses because the highest DNL contour within which residences would  
21 fall is 55 DNL. Record 23. In reaching its conclusion, the county also considered testimony  
22 from Glomb that flight-testing of the LSAs will produce at take-off 63 decibels (dba) next to  
23 the engine and 55 dba at a distance of 450 feet, far below the 65 DNL contour specified in  
24 OAR 660-013-0080(1), Exhibit 5 as the upper noise limit for compatibility with residential  
25 uses. *Id.*

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Model computes the associated noise exposure level for the specific aircraft and engine thrust used at that point along the aircraft route of flight. The individual noise exposure levels are summed for each grid location. Equal noise levels are then indicated by a series of contour lines superimposed on a map of the airport and its environs. Although lines of a map tend to be viewed as definitive, it should be emphasized that the Model is only a planning tool. By developing a set of noise contours for an airport, a planner can identify areas that are most likely to be impacted by aircraft noise, and plan accordingly. \*\*\*” Record 111.

1                                   **2.     Petitioners’ Challenges**

2                   Under ORS 197.835(9)(a)(C) and OAR 661-010-0071(2)(b), LUBA will remand a  
3 decision that is not supported by substantial evidence in the whole record. LUBA’s role is to  
4 consider all of the evidence in the record and determine whether the evidence would permit a  
5 reasonable person to find that an approval criterion is met. *Devin Oil v. Morrow County*, 236  
6 Or App 164 (2010).

7                   In challenging the county’s decision, petitioners first argue that there is no evidence  
8 in the record regarding the noise that the two aircraft that are identified by Glomb to be  
9 manufactured at his facility would produce. Petitioners argue that one of the engines  
10 identified to be used on one of the LSAs is shown in the FAA Aircraft Noise Database *when*  
11 *used with a different aircraft* as having a dba of 70.2. Intervenors respond that there is  
12 nothing in the record to contradict Glomb’s testimony that the maximum noise level of the  
13 two LSA at takeoff would be 63 dba, and that the FAA-assigned dba level of an engine when  
14 used on a different aircraft “is not proof that this engine, when used with a lighter weight  
15 aircraft such as LSA aircraft, would produce that same level of noise.” Intervenors-  
16 Respondents’ Brief 17. We agree with intervenors that even if the engine does produce 70.2  
17 dba when used with a different, heavier aircraft, that does not necessarily establish that the  
18 engine will produce 70.2 dba when used with the two LSA aircraft. The county reasonably  
19 concluded, based on Glomb’s testimony, that neither LSA will produce noise that is above  
20 the 65 DNL.

21                   Petitioners also allege that “there is virtually no evidence in the record on the mix of  
22 the aircraft used in the INM model nor their noise characteristics.” Petition for Review 16-  
23 17. In particular, petitioners argue, evidence in the record indicates that the airport is used by  
24 helicopters for helicopter logging training, and there is no evidence that helicopters were  
25 included in the mix of aircraft used to prepare the NCS. As we understand petitioners’ point,  
26 it is that the INM mix of aircraft includes a flawed assumption that the Cessna 206 is the



1 “most demanding” aircraft currently used or to be used at the airport, because helicopters are  
2 used at the airport, are noisier than the Cessna 206, and that the baseline noise level against  
3 which intervenors’ new airport operations were measured to estimate current and future DNL  
4 should include the two helicopters that are in use at the airport. In support of their argument,  
5 petitioners cite to a letter in the record from the city manager for the city of Vernonia to  
6 intervenors that states that “[s]everal lumber companies have been using the \* \* \* [a]irport to  
7 train for helicopter logging uses.” Record 154. Petitioners also cite a letter from some of  
8 the petitioners noting that two helicopters that have been used at the airport (Robinson 44  
9 and Chinook 47) have higher decibel levels than the Cessna 206, which intervenors’  
10 consultant indicated was the critical aircraft used in the INM assumptions. Record 74.

11 Intervenor responded to those arguments below, explaining that for small airports  
12 supporting single-engine, general aviation aircraft, it is appropriate to use a formula that  
13 considers a range of “general aviation single engine, fixed propeller aircraft,” and that their  
14 noise expert accordingly chose a mix of single engine, fixed propeller aircraft, with the  
15 Cessna 206 as the “critical aircraft,” even though the Cessna 206 is a noisier type of aircraft  
16 than is typically expected at the airport. Record 70. Intervenor also responded that the  
17 noise study is not required to assume the loudest possible aircraft, such as a helicopter,  
18 because “that is not how noise studies are done.” *Id.* at 69-70.

19 Implicit in petitioners’ argument is that the noise study must be based on the noisiest  
20 possible type of aircraft that has used the airport in the past or may use the airport in the  
21 future. However, petitioners do not identify the source of that obligation. Intervenor argued  
22 below and on appeal that the noise study properly assumes a mix of aircraft based on a range  
23 of general aviation, single-engine, fixed propeller aircraft. The county found the assumed  
24 mix of aircraft to be appropriate for the airport, which is generally restricted to single-engine,  
25 general aviation aircraft weighing less than 12,000 pounds. Record 23. Petitioners do not  
26 challenge that finding. If we understand it correctly, a noise study under the INM model is

1 based on a somewhat hypothetical mix of aircraft of the type and size that the airport is  
2 designed for, with the noisiest example of that type and size used as the “critical aircraft.”  
3 There may be some reason why under the INM model the noise study is required to consider  
4 the noise impacts of other types of aircraft, or include a broader range of aircraft types in the  
5 mix, but if so petitioners do not identify it. Petitioners simply argue that, given evidence that  
6 logging helicopters have used the airport in the past and may be noisier than the single-  
7 engine general aviation airplanes assumed in the study, no reasonable decision maker could  
8 rely on the noise study to conclude that the proposed use is compatible with adjacent uses.  
9 However, absent some argument as to why the noise study must include helicopters used for  
10 helicopter logging training in the assumed mix of aircraft, petitioners’ evidentiary challenge  
11 does not provide a basis for reversal or remand. The INM model, like all models of future  
12 behavior and events, is imperfect and based on assumptions that may or may not ultimately  
13 prove to be valid. Petitioners’ testimony below that noisy helicopters have used the airport  
14 in the past does not call into question the validity of the INM model assumptions so much  
15 that a reasonable decision maker could not rely on the INM model to predict the likely noise  
16 impacts of the estimated 6100 annual aircraft operations in the future.

17           The assignment of error is denied.

18           The county’s decision is affirmed.