

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

4 MATT FREEDMAN, ROBBIN FREEDMAN,  
5 AL PHILLIPS and PAT PHILLIPS,  
6 *Petitioners,*  
7

8 vs.  
9

10 LANE COUNTY,  
11 *Respondent.*  
12

13 LUBA No. 2011-055  
14

15 FINAL OPINION  
16 AND ORDER  
17

18 Appeal from Lane County.  
19

20 Gregory S. Hathaway, Portland, filed a joint petition for review and argued on behalf  
21 of petitioners. With him on the brief were Hathaway Koback Connors LLP, Michael J.  
22 Gelardi, and Davis Wright Tremaine LLP.  
23

24 Michael J. Gelardi, Portland, filed a joint petition for review and argued on behalf of  
25 petitioners. With him on the brief were Davis Wright Termaine LLP, Gregory S. Hathaway,  
26 and Hathaway Koback Connors LLP.  
27

28 Stephen L. Vorhes, Assistant County Counsel, Eugene, filed the response brief and  
29 argued on behalf of respondent.  
30

31 HOLSTUN, Board Member; RYAN, Board Chair; BASSHAM, Board Member,  
32 participated in the decision.  
33

34 REMANDED

11/30/2011  
35

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

**NATURE OF THE DECISION**

Petitioners appeal a board of county commissioners’ decision that affirms a hearings official’s decision granting a special use permit for a group care home.

**INTRODUCTION**

Teen Challenge International Pacific Northwest Centers (Teen Challenge) operates residential facilities to assist young people recovering from various addictions, including drug and alcohol addictions. The proposed facility at issue in this appeal is called Hanna House. Hanna House was the subject of an earlier LUBA appeal. *Phillips v. Lane County*, 62 Or LUBA 92 (2010).<sup>1</sup> Under the proposal, as many as 20 individuals (women and dependent children) would be housed in an expanded existing single family residence on the property. In addition there would be as many as seven staff, three of which would remain on-site over night. Hanna House conducts on-site special events from time to time, and those events draw other visitors.

One of the issues in *Phillips* was whether the proposal complies with a county standard that requires that the site be adequate for on-site sewage disposal. Lane Code (LC) 16.290(5)(c).<sup>2</sup> We remanded because the hearings official’s findings were inadequate to establish that the existing on-site sewage disposal facilities could be expanded to serve the proposed use and that there is adequate appropriate area to site a replacement septic drainage

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<sup>1</sup> The record in this appeal includes the record in *Phillips*. Citations to the Record in this opinion are to the record compiled by the county on remand. Citations to Original Record are to the incorporated record from *Phillips*.

<sup>2</sup> LC 16.290(5)(c) provides:

“The proposed use and development shall not exceed the carrying capacity of the soil or of the existing water supply resources and sewer service. To address this requirement, factual information shall be provided about any existing or proposed sewer or water systems for the site and the site’s ability to provide on-site sewage disposal and water supply if a community water or sewer system is not available[.]”

1 field, as required by state law. *Phillips*, 62 Or LUBA at 113-14. On remand the primary  
2 issue was whether the proposed on-site sewerage disposal system for Hanna House complies  
3 with applicable Oregon Department of Environmental Quality (DEQ) regulations.

#### 4 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

5 OAR 340-071-0120 authorizes DEQ to contract with local governments to have the  
6 local governments act as DEQ's agent for permitting smaller on-site septic systems that do  
7 not require Water Pollution Control System (WPCS) permits. Lane County has entered into  
8 such an agreement with DEQ, and under the disputed decision, final approval of the septic  
9 system for Hanna House will be given by the Lane County Sanitarian. Petitioners contend  
10 the septic system for Hanna House requires a WPCS permit from DEQ and that the county  
11 erred by not requiring that the applicant seek and receive a WPCS permit from DEQ.  
12 Petitioners' position regarding the need for a WPCS permit is twofold. A WPCS permit is  
13 required for facilities "having a total sewage flow design capacity greater than 2,500" gallons  
14 per day (gpd) and for "[a] system of any size, if the septic tank effluent produced is greater  
15 than residential strength wastewater as defined in OAR 340-071-0100." Petitioners argue in  
16 their first assignment of error that the wastewater from Hanna House will exceed residential  
17 strength and argue in their second assignment of error that the wastewater that will be  
18 produced by Hanna House will exceed 2,500 gallons per day.

#### 19 **A. Residential Strength Wastewater**

20 OAR 340-071-0100 sets out 178 definitions for use in DEQ's onsite wastewater  
21 treatment systems rules. One of those definitions is "Residential Strength Wastewater:"

22 "(126) 'Residential Strength Wastewater' means septic tank effluent that does  
23 not typically exceed five-day biochemical oxygen demand (BOD5) of  
24 300 mg/L; total suspended solids (TSS) of 150 mg/L; total Kjeldahl  
25 nitrogen (TKN) of 150 mg/L; oil & grease of 25 mg/L; or  
26 concentrations or quantities of other contaminants normally found in  
27 residential sewage."

1           Petitioners argue that their expert, Smits, testified below that based on his experience  
2 the wastewater from Hanna House will be greater than residential strength. In a February 14,  
3 2011 document entitled “Exhibit A” to “Neighbor’s Response to Teen Challenge Remand  
4 Submittals,” petitioners’ expert Smits testified that a similarly sized group care facility  
5 produced “septic tank effluent with a grease and oil concentration of 56 mg/l – more than 2  
6 times the strength considered residential.” Record 204. In a separate document, also dated  
7 February 14, 2011, petitioners’ attorneys made the same point about what petitioners refer to  
8 as the “similar facility.” In that document, petitioners also made arguments regarding a Teen  
9 Challenge facility in Shedd, Oregon:

10           “The need for a WPCF permit for the Property is particularly apparent  
11 considering that [Teen Challenge’s] facility in Shedd, Oregon has such a  
12 permit. [Teen Challenge] has not explained why its [Hanna House] facility  
13 may rely on a standard residential septic system while its facility in Shedd  
14 requires a WPCF permit.” Record 191.

15 Finally, in its March 7, 2011 rebuttal, petitioners again pointed to Smits’ testimony:

16           “[Teen Challenge] failed to respond to the Neighbors’ specific evidence  
17 regarding the nature of [Teen Challenge’s] wastewater. Mr. Smits’ earlier  
18 written testimony states that the group home he works with produces  
19 wastewater of greater than Residential Strength. This facility is similar in size  
20 and character to Teen Challenge’s and has a significantly more advanced  
21 septic system. \* \* \* In addition, the Neighbor’s demonstrated on February 14<sup>th</sup>  
22 that Teen Challenge’s facility in Shedd, OR has a WPCF permit. [Teen  
23 Challenge] has not offered a substantive response to this evidence.”

24           In his decision, the hearings official adopted the following response to petitioners’  
25 claim that Hanna House wastewater will exceed DEQ limits for Residential Strength  
26 Wastewater:

27           “The opponents’ speculation about the strength of the wastewater from the  
28 group home is again by analogy to the group care facility for men in Shedd,  
29 Oregon. They point out that this facility has 18 beds and 7 staff, similar in  
30 size to the Hanna House capacity and is served by a significantly more  
31 advanced septic system that is subject to a WPCF permit. Missing is a  
32 detailed analysis of comparables between the applicant’s facility in Shedd and  
33 the group care home on the subject property. What is clear, however, is that  
34 onsite wastewater management treatment system must have a design capacity

1 appropriate to the maximum size of the use that it will be serving. The Shedd  
2 facility currently serves 18 clients but Mr. Smits's testimony that the Shedd  
3 group home is of similar size is misleading as the ultimate capacity to be  
4 served by the Shedd facility is for 60 men plus staff, almost three times that of  
5 Hanna House. Sixty clients plus staff will clearly generate in excess of 2,400  
6 gallons of wastewater per day, the loading threshold for requiring a WPCF  
7 permit. Further, the Shedd facility is a training center and the record is silent  
8 about the type of training that it offers and whether its training practices might  
9 contribute a greater than residential strength wastewater to its onsite  
10 wastewater treatment system. For these reasons, I cannot conclude that there  
11 is sufficient evidence in the record to suspect that the applicant's group care  
12 home will produce a greater than residential strength effluent." Record 49  
13 (footnotes omitted).

14 Petitioners fault the hearings official for not recognizing that the Shedd facility and  
15 the unnamed similar facility are different facilities and for not responding directly to expert  
16 Smits' contention that the wastewater at the similar facility was "two times greater than  
17 Residential Strength."<sup>3</sup> Petition for Review 14.

18 It is not clear whether Smits' citation to the Shedd facility for support for his position  
19 that Hanna House requires a WPCS permit was based on the volume of wastewater  
20 exceeding 2,500 gallons per day at the Shedd facility or based on the strength of the Shedd  
21 facility's wastewater. Whatever the case, the hearings official responded and provided an  
22 adequate explanation for why he did not believe Smits' testimony about the Shedd facility  
23 provided substantial evidence for petitioners' position that Hanna House wastewater will  
24 exceed Residential Strength Wastewater. That explanation was based on the hearings  
25 official's conclusion that the few details that Smits gave about the Shedd facility were not  
26 sufficient to establish that the Shedd facility was sufficiently similar to Hanna House to make  
27 the comparison meaningful and the details Smits did supply suggested that it was not.

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<sup>3</sup> It is a bit of an overstatement to say the wastewater at the unnamed similar facility was two times greater than Residential Strength. As defined by OAR 340-071-0100, Residential Strength Wastewater must not exceed any of four specific limits and one general limit. The limit on oil and grease is 25 mg/L, and Smits testified that the wastewater at the unnamed similar facility had "a grease and oil concentration of 56 mg/l," which is two times the grease and oil limit. Smits did not disclose whether the wastewater at the similar facility exceeded any of the other limits set out in the OAR 340-071-0100(126) definition of Residential Strength Wastewater.

1           The hearings official appears to have failed to appreciate that the unnamed 18-bed  
2 similar facility is not the same as the Shedd facility. Petitioners must accept at least some of  
3 the blame for that failure, since Smits certainly could have been clearer about the identity and  
4 nature of the similar facility. Nevertheless, although it is a close question, we believe  
5 remand is necessary so that the hearings official can explain why he did not find Smits’  
6 testimony about the strength of the wastewater at the similar facility persuasive evidence  
7 regarding the likely strength of the wastewater at Hanna House. In doing so, the hearings  
8 official will also have an opportunity to explain why he assumed that Hanna House’s  
9 wastewater will qualify as Residential Strength Wastewater, thus allowing the county to  
10 grant septic approval rather than DEQ and obviating the need for Hanna House to secure a  
11 WPCS permit. As Smits pointed out below, Teen Challenge produced no evidence  
12 “regarding the character of its wastewater.” Record 111. Against that complete lack of  
13 evidence, Smits produced at least some evidence that the wastewater at the similar facility  
14 did not qualify as Residential Strength Wastewater. Without some effort on the hearings  
15 official’s part to explain why he assumed Hanna House’s wastewater will qualify as  
16 Residential Strength Wastewater, when there does not appear to be any evidence that it will,  
17 we agree the hearings official’s decision is not supported by adequate findings or substantial  
18 evidence. It may be that the hearings official was simply relying on the fact that it is possible  
19 to characterize Hanna House as a type of residential use to assume it will produce Residential  
20 Strength Wastewater. If so, Smits testimony is sufficient to make that unexplained  
21 assumption unreasonable.

22           The first assignment of error is sustained.

23           **B.     Volume of Wastewater**

24           As relevant, OAR 340-071-0130 provides:

25           “(1) Protection of public waters from public health hazards. An agent may  
26           not authorize installation or use of a system that is likely to pollute  
27           public waters or create a public health hazard. If, in the judgment of

1 the agent, the minimum standards in this division will not adequately  
2 protect public waters or public health on a particular site, the agent  
3 must require a system to meet requirements that are protective. This  
4 may include but is not limited to increasing setbacks, increasing  
5 drainfield sizing, or using an alternative system. The agent must  
6 provide the applicant with a written statement of the specific reasons  
7 why more stringent requirements are necessary.

8 “\* \* \* \* \*

9 “(6) System capacity. Each system must have adequate capacity to  
10 properly treat and disperse the maximum projected daily sewage flow.  
11 The projected quantity of sewage flow must be determined from Table  
12 2 or other information the agent determines to be valid.

13 “\* \* \* \* \*.”

14 Under OAR 340-071-0130(1), the county, as agent for DEQ, is directed not to authorize  
15 septic systems that will pollute or create a public health hazard. If in the county’s judgment  
16 the minimum standards in OAR chapter 340, division 71 are not adequate to protect the  
17 public, the county may require that the septic system meet higher standards. Under OAR  
18 340-071-0130(6) the projected quantity of flow “must be determined from Table 2 or other  
19 information the agent determines to be valid.” That directive bears repeating. The county is  
20 *required* by OAR 340-071-0130(6) to use Table 2 to estimate projected sewage flow at  
21 Hanna House, unless the county instead relies other information it “determines to be valid.”

22 The hearings official relied on Table 2 to estimate Hanna House’s projected  
23 wastewater flow at 1,770 gallons per day. In its second assignment of error, petitioners point  
24 out that Smits testified below that the “similar facility” had an actual flow of 60 gallons per  
25 day per client. Using what Smits referred to as “the Table 2 safety factor of 2 for system  
26 design,” Smits took the position that the septic system for Hanna House should be designed  
27 for 2,400 gpd for the expected number of clients and staff and for an additional 750 gpd for  
28 expected visitors at on-site events. Record 202-03. The 2,400 gpd figure represents a  
29 doubling of the expected wastewater flow based on 60 gallons per day per client. Because  
30 that projected flow plus the wastewater flow Smits attributed to visitors exceeds the 2,500

1 gpd limit for approving septic systems without a WPCS permit, petitioners contend the  
2 hearings official's decision must be remanded. Petitioners contend remand is required  
3 because the hearings official relied on Table 2 and provided no explanation for why he relied  
4 on Table 2 rather than the evidence from the similar facility. Petitioners further contend that  
5 even if the hearings official was entitled to rely on Table 2, he "chose different values from  
6 Table 2 to determine [Hanna House's] required septic capacity, but \* \* \* did not explain why  
7 his choice reflected [Hanna House's] actual proposed use." Petition for Review 18.

8 Even if OAR 340-071-0130(1) and (6) can be interpreted to require that the county  
9 not use Table 2 and instead use other information if the evidentiary record established that  
10 Table 2 was invalid and the other information was valid, the evidence cited by petitioners  
11 does not establish that the Table 2 values are invalid. As for petitioners' contention that the  
12 hearings official failed to explain why he chose to use Table 2 and why he applied Table 2 in  
13 the way that he did, petitioners neither acknowledge nor challenge the following findings:

14 "If Hanna House were to be treated as a boarding house, for purposes of  
15 establishing sewage effluent loading, then the ten bedrooms would contribute  
16 1,500 gpd of effluent per day. If an additional bedroom was created for the 3  
17 night staff then 1,650 gpd of the effluent would be the estimated wastewater  
18 contribution. Table 2, OAR 340-071-0220 suggests that workers on shifts (at  
19 schools or offices) contribute 15 gallons of effluent per day and therefore the  
20 seven Hanna House staff could reasonably be expected to contribute an  
21 additional 105 gallons of effluent per day for a total of 1,705 gallons when  
22 Hanna House is at capacity. If an additional bedroom was provided for staff  
23 then Table would assume the total effluent loading would be 1, 710 gpd.

24 "A more conservative approach would be to treat Hanna House as a rooming  
25 house and under this characterization the maximum loading would be 1,705  
26 gallons of sewage effluent per day if there were no resident staff. One  
27 resident staff would increase wastewater loading to 1,770 gpd. I believe that  
28 the more conservative approach is warranted as the assumptions that cause  
29 DEQ to treat sewage effluent flows differently for rooming houses and  
30 boarding houses are not known and cannot be used for comparison purposes  
31 with Hanna House.

32 "Mr. Smits suggests that "DEQ Table 2 should be used for the purpose of  
33 sizing systems to include a minimum safety factor of two." I have found no  
34 support for this statement in Division 71 of Chapter 340 of Oregon



1 Administrative Rules nor is there any evidence that it is an industry custom or  
2 standard to design onsite wastewater treatment systems at double the  
3 anticipated wastewater loading. \* \* \*” Record 20 (footnotes omitted).

4 It may be that the above-quoted findings are inadequate in some way to explain the  
5 hearings official’s choice to use Table 2 and to explain why he applied Table 2 in the way  
6 that he did, since Hanna House does not fit neatly into any of the Table 2 categories of  
7 residential use. But it is simply inaccurate for petitioners to claim the hearings official failed  
8 to explain his choice to use Table 2 or why he applied Table 2 in the way that he did.  
9 Petitioners may not ignore the hearings official’s findings and simply claim the hearings  
10 official failed to adopt any findings explaining why and how he applied Table 2.

11 Finally, petitioners fault the hearings official for failing to account for needed sewage  
12 treatment capacity for visitors. The hearings officer imposed the following condition of  
13 approval to account for visitors:

14 “The applicant shall provide a minimum of one portable toilet for special  
15 events where the daily sewage loading would exceed the capacity of the onsite  
16 wastewater treatment system’s drain fields. \* \* \*” Record 44.

17 Petitioners’ entire argument challenging the above condition is set out below:

18 “\* \* \* This condition is ambiguous, unenforceable and contrary to extensive  
19 evidence in the Record indicating that there are many regular daily visitors to  
20 the Property in addition to special event attendees.” Petition for Review 19.

21 Respondent contends that petitioners raised no issue below regarding sewage capacity  
22 for regular daily visitors, as opposed to visitors that might be expected to attend special  
23 events. Petitioners did not respond to respondent’s waiver argument, and we limit our  
24 consideration in this appeal to special event visitors and the condition the hearings official  
25 imposed to address the potential impact of those special event visitors. *Williamson v. City of*  
26 *Salem*, 52 Or LUBA 615, 618-19 (2006); *Davenport v. Tigard*, 27 Or LUBA 243, 247  
27 (1994). With regard to petitioners’ challenge to the efficacy of the above-quoted condition,  
28 petitioners must do more than assert, without any elaboration, that the condition is  
29 “ambiguous, unenforceable and contrary” to the evidence.

1           At oral argument, petitioners also argued that using a portable toilet to provide for  
2 special event visitors is impermissible under LC 16.290(5)(c), since LC 16.290(5)(c)  
3 envisions that sewage treatment needs will be met on-site, and portable toilets simply provide  
4 a way to meet sewage treatment needs off-site by collecting and removing effluent from the  
5 site for treatment elsewhere. Based on the text of LC 16.290(5)(c), which requires evidence  
6 of “the site’s ability to provide on-site sewage disposal,” that is a pretty good argument. *See*  
7 n 2. But that argument does not appear in the petition for review and was presented for the  
8 first time at oral argument. LUBA does not consider arguments that are presented for the  
9 first time at oral argument. *See* OAR 661-010-0040(1) (“The Board shall not consider issues  
10 raised for the first time at oral argument”); *DLCD v. Douglas County*, 28 Or LUBA 242, 252  
11 (1994) (declining to consider argument that was presented for the first time at oral  
12 argument).

13           The second assignment of error is denied.

14           **THIRD ASSIGNMENT OF ERROR**

15           The existing septic system on the subject property is made up of two septic tanks, a  
16 1,500-gallon tank and a 1,000-gallon tank. Liquid effluent flows from the septic tanks to a  
17 manual diverter valve that diverts the flow of effluent into two separate distribution or drop  
18 boxes. From those drop boxes, the effluent flows to two separate 750-lineal-foot drain fields.  
19 The loading capacity for this type of system is one lineal foot of absorption line for each  
20 gallon of effluent per day. The existing system drainage field therefore has a capacity of  
21 1,500 gallons per day.

22           The hearings official concluded that using a conservative estimate, the proposed use  
23 will increase wastewater loading on the system to 1,770 gallons per day. Hanna House  
24 identified three areas where drain field capacity could be expanded, areas D1, D2 and D3.  
25 The hearings official concluded that proposed drain field expansion areas D1 and D2 could  
26 provide an additional 909 lineal feet of absorption trench, a sufficient length to accommodate

1 the expansion needed to accommodate the 1,770 gallons per day Hanna House will produce,  
2 along with area for a replacement drain field of approximately 600 lineal feet. However, that  
3 smaller replacement drain field would only be adequate if Teen Challenge is allowed to  
4 replace the existing septic tanks with a pressurized sand filtration system that would allow  
5 the drain field requirement to be reduced from one lineal foot of absorption line for each  
6 gallon of effluent to one lineal foot of absorption line for each three gallons of effluent.<sup>4</sup>

7 Petitioners contend the hearings official erred in concluding that the existing drain  
8 field and areas D1 and D2 are sufficient to provide the additional drain field space needed for  
9 Hanna House and the space required for a replacement drain field. Petitioners offer three  
10 separate bases for their argument under the third assignment of error and we address each in  
11 turn.

12 **A. Wastewater Quantity**

13 Petitioners repeat their argument under the second assignment of error that the  
14 hearing official should have relied on petitioners' evidence concerning the "similar facility"  
15 and should have concluded that Hanna House will generate wastewater in excess of 2,500  
16 gpd making it ineligible for county approval of a pressurized sand filter system. Without that  
17 pressurized sand filter system, expansion areas D1 and D2 will not provide adequate area for  
18 a replacement drainage field.

19 We have already rejected petitioners' argument that the hearing official erred in  
20 relying on Table 2 to estimate the amount of wastewater Hanna House will generate, rather

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<sup>4</sup> The hearings official's math is hard to follow in places, due to his use of 1,705 gallons as his estimate of the expected wastewater loading of Hanna House in some places and his use of the 1,770 gallon estimate in other places. The critical point is that the estimated wastewater loading for Hanna House and the replacement drain field can be accommodated by the existing drain field and expansion areas D1 and D2 if the system is converted to a pressurized sand filtration system (which only requires one foot of drain for every three gallons per day of wastewater), but the existing drain field and expansion areas D1 and D2 are not of sufficient size if the system is not converted to a pressurized sand filtration system and thus continues to require one foot of drain for each one gallon of wastewater per day.

1 than petitioners' argument based on quantities generated at the similar facility. We reject  
2 that argument here as well.

3 **B. Wastewater Strength**

4 Petitioners repeat their argument under the first assignment of error that the  
5 wastewater that can be expected from Hanna House will exceed one of the five limits for  
6 Residential Strength Wastewater specified in OAR 340-071-0100(126). If that is the case,  
7 Teen Challenge may not use the pressurized sand filtration system that it proposes to use,  
8 because DEQ limits use of such systems to Residential Strength Wastewater. Record 193-  
9 94, 213. Unless Teen Challenge is allowed to replace the septic tanks with a pressurized  
10 sand filtration system, it does not have adequate area for a replacement drain field.

11 We have already agreed with petitioners that the hearings official's decision must be  
12 remanded for the hearings official to explain why he concluded that the Hanna House's  
13 wastewater will qualify as Residential Strength Wastewater. If the hearings official is unable  
14 to provide that explanation, it appears that Hanna House will not have sufficient area for a  
15 replacement drain field for a conventional septic system. If the hearings official is unable to  
16 establish that Hanna House is eligible for a pressurized sand filter system, he will need to  
17 reconsider whether the subject property has sufficient area for the required replacement drain  
18 field.

19 **C. Other Factors**

20 Petitioners cite other factors that they contend show the site has insufficient area for  
21 required drain field expansion. We address each of those factors below.

22 **1. The Proposed Two-Way Splitter Valve**

23 One of the essential features of Teen Challenge's proposal is to replace the existing  
24 manual diverter that currently prevents concurrent use of the two existing 750-foot drainage  
25 fields with an automatic two-way splitter valve that would permit concurrent use of those  
26 750 foot drainage fields. Teen Challenge's expert explained:

1           “\* \* \* A simple solution to [the existing manual splitter] is to remove it  
2 entirely. A two-way splitter valve would be installed instead, which will  
3 evenly split the flow automatically to the two drain field cells. This will allow  
4 the system to function as I feel it was originally intended to function, without  
5 the need for human involvement.

6           “Elimination of [the existing manual splitter] then eliminates the concern for  
7 unequal flows to each drain field, eliminates the speculation regarding a max  
8 design flow of 750 gpd, and maximizes the existing 1,500 LF of drain field.  
9 The end result provides an adequate drain field footage to support a design  
10 flow of 1,500 gpd. \* \* \*” Record 142.

11       Petitioners’ expert took the position below that a gravity-driven splitter valve would not  
12 function properly due to insufficient slope on the property. The hearings official responded  
13 that “pumps can be employed to push effluent or water in directions that it would not  
14 naturally flow.” Record 18. Petitioners contend that response is not supported by substantial  
15 evidence in the record.

16           Teen Challenge’s expert did not appear to have any concerns about the property’s  
17 slope rendering the automatic two-way splitter ineffective. Even if a pump is required,  
18 absent some reason to suspect that a pump could not be employed if necessary to overcome  
19 the property’s slope, we do not believe the hearings official was obligated to cite evidence to  
20 support its response that pumps could be employed if necessary. Petitioners provide no  
21 reason to suspect that pumps could not be employed if they are made necessary by the  
22 property’s slope.

## 23                               **2.       Historic Well in the Drain Field**

24           OAR 340-071-0220 Table 1 requires that septic drain fields be set back at least 100  
25 feet from groundwater supplies and wells. The proposed drain field expansion and  
26 replacement drain field must be set back at least 100 feet from any well that has not been  
27 properly decommissioned, and petitioner contends there is an old well located in the area of  
28 the existing drain field. As evidence of this historic well, petitioners cite testimony by a  
29 prior owner of the property that a “shed that is near the current drainfield on the southwest  
30 corner of the property housed a wellhead and spigot.” Record 216. In addition the record

1 includes photographs of a shed and spigot and water line. A 1994 decision approving a day  
2 care operation on the subject property makes reference to both a “West Pump House” and an  
3 “East Pump House.” Original Record 1997. We understand petitioners to contend the East  
4 Pump House houses the well that currently serves the property and the West Pump House  
5 housed the historic well in the existing drain field. One of Teen Challenge’s site plans shows  
6 a shed located in the existing drain field. Original Record 822. Based on the historic well,  
7 petitioners contend the OAR 340-071-0220 Table 1 100-foot setback requirement precludes  
8 use of much of the existing drain field and replacement drain field.

9 Teen Challenge’s expert testified that the shed had formerly been used as a chicken  
10 coop, and that he found no evidence that it ever housed a well. The expert confirmed the  
11 presence of an abandoned water line, stand pipe and spigot in the existing drain field. The  
12 hearings official found that the evidence did not support petitioners’ position regarding the  
13 well. The hearings officer required that the abandoned water line be traced to its source and  
14 capped at that location. Record 23.

15 In this case we have conflicting believable evidence regarding the possible existence  
16 of a historic well on the property. The evidence that there is no well is at least as believable  
17 as the evidence that there is a historic well in the drain field. In that circumstance we defer to  
18 the county. *Angel v. City of Portland*, 22 Or LUBA 649, 659, *aff’d* 113 Or App 169, 831 P2d  
19 77 (1992); *Wissusik v. Yamhill County*, 20 Or LUBA 246, 260 (1990).

### 20 3. Inadquate Site Plan

21 Under DEQ rules, a site evaluation report is the first step in securing “a construction-  
22 installation permit for an onsite [septic] system.” OAR 340-071-0150(1). OAR 340-071-  
23 0150(3) requires that a site evaluation report must include a diagram that shows, among other  
24 things, slopes, escarpments, cuts and wells. Petitioners’ expert below identified features that  
25 are not shown on Teen Challenge’s site plans, including “a pit in the northwest corner of the  
26 Property and a cut bank in the southwest corner of the Property, as well as the well shed.”

1 Petition for Review 25. Petitioners contend these features all require setbacks under DEQ  
2 rules and the hearings official erred by finding that the proposed drain field expansion and  
3 replacement drain field are of adequate size without taking these setbacks into consideration.

4 Respondent first responds that OAR 340-071-0150 applies only to applications for  
5 DEQ construction-installation permits and that Teen Challenge's application for a special use  
6 permit is not such an application. That is true, but the hearings officer was required to  
7 determine whether the LC 16.290(5)(c) carrying capacity standard is met with regard to the  
8 proposed drain field expansion and replacement drain field. *See* n 2. If some of the area that  
9 is included in the proposal cannot be included when Teen Challenge seeks a construction  
10 permit from DEQ those areas may not be included to secure approval of the special use  
11 permit, which requires compliance with the LC 16.290(5)(c) carrying capacity standard.

12 Turning to the areas petitioners contend must be removed from the proposal, we have  
13 already rejected petitioners' contention regarding the presence of a historic well. The pit in  
14 the northwest corner of the property is not included in expansion areas D1 or D2, which are  
15 the areas the hearings official relied on to conclude there is sufficient area for the required  
16 drain field expansion and replacement drain field. That leaves the cut bank in the southwest  
17 corner of the property that could potentially require reduction of the proposed drain field.  
18 However, Teen Challenge's expert explained below why the proposal complies with DEQ's  
19 requirements concerning cut banks. Record 147. Absent some challenge to that explanation,  
20 petitioners have not established that Teen Challenge's proposal includes areas that DEQ  
21 would disqualify due to the cut banks.

#### 22 **D. Conclusion**

23 We conclude above that if the hearings official is unable to establish that Hanna  
24 House is eligible for approval of a pressurized sand filter system, he will need to reconsider  
25 whether the subject property has sufficient area for the required replacement drain field.

1 Therefore the third assignment of error is sustained in part. Otherwise, the third assignment  
2 of error is denied.

3 **FOURTH ASSIGNMENT OF ERROR**

4 Petitioners' fourth assignment of error is quoted below:

5 "The [hearings official's] conclusion that the Property has the carrying  
6 capacity to support [Teen Challenge's] proposed use is not supported by  
7 substantial evidence because the [hearings official] failed to acknowledge  
8 un rebutted evidence that [Teen Challenge's] wastewater threatens drinking  
9 water supplies." Petition for Review 26.

10 Petitioners' argument under the fourth assignment of error are divided into two  
11 subassignments of error. In the first subassignment of error, petitioners contend the hearings  
12 official erred by failing to acknowledge or address a study of the subject property that  
13 concluded the property's highly permeable soils make the aquifer that underlies the property  
14 and supplies water to the well on the property and other nearby wells susceptible to  
15 contamination from the septic drain field. The second subassignment of error raises an issue  
16 that is arguably beyond a literal reading of the fourth assignment of error. In that  
17 subassignment of error petitioners argue the hearings officer improperly dismissed other  
18 evidence that the soils on the property are not suitable for use as a septic system drain field.

19 **A. Scope of Review**

20 Respondent first argues that petitioners' first subassignment of error goes beyond the  
21 scope of LUBA's remand in *Phillips* and that LUBA addressed groundwater in *Phillips* "and  
22 LUBA's conclusion that groundwater is not threatened is binding in this case."  
23 Respondent's Brief 21. In *Phillips*, LUBA addressed petitioners' contention that the *quantity*  
24 of ground water available for the proposed use was inadequate. That is a different issue than  
25 the issues presented in the fourth assignments of error. In *Phillips* we remanded because the  
26 county did not adequately respond to petitioners' contentions that the subject property cannot  
27 accommodate needed septic drain field expansion in a manner that complies with the  
28 county's LC 16.290(5)(c) carrying capacity standard. *See* n 2. While petitioners' arguments



1 in *Phillips* were primarily concerned with whether the subject property has sufficient  
2 physical space within its 5.38 acres to accommodate the needed drain field expansion and  
3 replacement drain field, our remand was not so narrow as to preclude petitioners from  
4 questioning the suitability of the soils that Hanna House identified for use as a septic drain  
5 field, once areas for use as a septic drain field were identified. We turn to petitioners’  
6 arguments under the fourth assignment of error.

7 **B. Source Water Assessment Report**

8 The Oregon Department of Human Services, Oregon Health Division prepared a  
9 Source Water Assessment Report for the child development program that formerly occupied  
10 the subject property. That report states that the well on the property is served by a highly  
11 sensitive aquifer. The report identifies the area within 500 feet of the well as the “Outreach  
12 Area.” According to the report, the soils in the Outreach Area are highly permeable and the  
13 Outreach Area is the “most critical to preserving \* \* \* water quality.” Record 136. The  
14 existing septic drain field is identified as a potential source of contamination. The report  
15 includes the following observation:

16 “\* \* \* Given the highly sensitive nature of the aquifer and the proximity of an  
17 on-site sand filter drainfield, the aquifer is considered to be highly susceptible  
18 to contamination from microorganisms and improperly disposed of household  
19 chemicals from the septic drainfield.” Record 126.

20 While the existing drain field and the proposed drain field expansion areas are set back more  
21 than 100 feet from the current well on the property, as required by DEQ rules, the drain  
22 fields appear to be largely or entirely within the 500 foot Outreach Area. Record 303.  
23 Petitioners contend that LUBA remanded in *Phillips* for the county to consider whether the  
24 subject property has the carrying capacity to accommodate the needed septic drain field  
25 expansion and that the Source Water Assessment Report is evidence that Hanna House’s  
26 septic effluent may “seep through the soil into the local drinking water supply.” Petition for

1 Review 27. We conclude that is a relevant issue under the LC 16.290(5)(c) carrying capacity  
2 standard. Petitioners contend the county erred by failing to address that issue.

3 Respondent answers that it was not necessary for the hearings official to specifically  
4 address the Source Water Report:

5 “[T]he Source Water Report is not substantial evidence upon which a  
6 reasonable person could rely to conclude that the subject property does not  
7 have the carrying capacity to accommodate the septic drainfield and  
8 replacement drainfield for the proposal. The Source Water Report describes  
9 the quality of the soil on the subject property. While the Source Water Report  
10 may describe the subject property’s soils, it certainly does not directly  
11 contradict Teen Challenge’s expert testimony that inspected the ten soils test  
12 pits that the soils were adequate to support the proposal. [Record] 274, 277-  
13 278. Petitioners offer no legal support for why Teen Challenge or the  
14 hearings official must *specifically* rebut the Source Water Report by title. The  
15 evidence in the whole record sufficiently rebuts Petitioners’ argument that the  
16 soils do not support the proposal. It is not necessary for Teen Challenge or  
17 Respondent Lane County to specifically ‘call out’ the Source Water Report.  
18 Considering the substantial record on such a discrete remand issue, it is not  
19 surprising that neither Teen challenge nor the Hearings official did so.”  
20 Respondent’s Brief 22-23 (emphasis in original).

21 We do not agree with respondent. There is nothing in the soil analysis described at  
22 Record 274 and 277-78 that suggests the Source Water Report concerns about siting septic  
23 drainage fields in highly permeable soils within 500 feet of the well over the aquifer that  
24 serves the subject property were considered. There may very well be reasons why those  
25 concerns are not of a nature that implicates or violates the LC 16.290(5)(c) carrying capacity  
26 standard, but we agree with petitioners that an explanation of those reasons is required before  
27 the hearings officer will be able to conclude that the proposed drain fields are consistent with  
28 the LC 16.290(5)(c) carrying capacity standard.

29 **C. Other Evidence Concerning the Soils on the Property**

30 **1. As Built Plan**

31 The existing septic system has a complicated permit history. The record includes an  
32 “as constructed” plan that includes a form with entries for “Sanitarian’s Use Only.” Record  
33 285. That form indicates the existing drain field has 1,500 feet of drainage line. But in one

1 of the spaces for the sanitarian's entries the sanitarian indicated the capacity of the system is  
2 only 450 gallons per day, rather than the 1,500 gallons per day that would normally be  
3 expected where one foot of drain field is sufficient to treat one gallon of effluent each day.  
4 Petitioners speculate that this lower estimate of capacity was intentional, based on the  
5 property's soils. The Hearings official explained that the system has been inspected, that it is  
6 operating satisfactorily, and that the 450 gallon per day entry was likely a scrivener's error.  
7 Petitioners offer no persuasive reason to question the hearings official finding on this point.

## 8 **2. 2009 Drain Field Failure and Historic Well in the Drain Field**

9 Petitioners contended below that a system failure on the site in 2009 shows the soils  
10 are unsuitable for a septic drain field and that the existing drain field includes a historic well.  
11 The hearings official concluded that the 2009 failure was attributable to an isolated failure to  
12 pump the septic tank on schedule and that the failure was not attributable to any other aspect  
13 of the system. Record 46. As we have already explained, the hearings official also found  
14 that there was no historic well in the area petitioners identified, and we agree with  
15 respondent that that finding is supported by substantial evidence.

## 16 **3. Road Debris Fill**

17 Petitioners presented evidence that portions of the property have been filled with road  
18 debris, making them unsuitable for drain field use and contend that the hearings officer failed  
19 to consider that evidence. The area filled with road debris is confined to proposed expansion  
20 area D3. The hearings officer found that there are steps that might be taken to allow area D3  
21 to be used for a drain field expansion area, and petitioners do not assign error to those  
22 findings. In addition, the hearings official found that the proposed expansion areas D1 and  
23 D2 are sufficient to provide the needed area for an expanded and replacement drain fields,  
24 without using expansion area D3. Without more from petitioners, we conclude that  
25 explanation is adequate.

26 The fourth assignment of error is sustained in part.

1           We sustain petitioners' first assignment of error and sustain petitioners' third and  
2 fourth assignments of error in part. On remand, the county must first determine whether  
3 Hanna House's wastewater can be expected to qualify as Residential Strength Wastewater,  
4 which will make it possible for Teen Challenge to install a pressurized sand filtration system,  
5 so that a smaller replacement drain field may be used. If Hanna House's wastewater will not  
6 qualify as Residential Strength Wastewater, the hearings official will have to reconsider  
7 whether Teen Challenge is proposing a sufficient area for the replacement drain field.  
8 Finally, to respond to the portion of the fourth assignment of error that we sustain, the  
9 hearings official will need to consider whether the concerns expressed in the Source Water  
10 Report are sufficient to make the proposal to site the expanded and replacement drain fields  
11 inconsistent with the LC 16.290(5)(c) carrying capacity standard.

12           The county's decision is remanded.