

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

3
4 TRACIE TOLBERT,
5 *Petitioner,*

6
7 vs.

8
9 CLACKAMAS COUNTY
10 *Respondent,*

11
12 and

13
14 S & H LOGGING, LLC,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2014-043

18
19 ROB FALLOW and STAFFORD TUALATIN
20 COMMUNITY PLANNING ORGANIZATION,
21 *Petitioners,*

22
23 vs.

24
25 CLACKAMAS COUNTY,
26 *Respondent,*

27
28 and

29
30 S & H LOGGING, LLC,
31 *Intervenor-Respondent.*

32
33 LUBA No. 2014-065

34
35 FINAL OPINION
36 AND ORDER

37
38 Appeal from Clackamas County.
39

1 Elizabeth Zultoski, Portland, filed the petitions for review and argued on
2 behalf of petitioners. With her on the briefs was Smith and Lowney, PLLC.

3
4 Nathan K. Boderman, Oregon City, filed joint response briefs and argued
5 on behalf of respondent. With him on the briefs was Stephen L. Madkour.

6
7 Elaine R. Albrich, Portland, filed joint response briefs and argued on
8 behalf of intervenor-respondent. With her on the briefs were Steven W. Abel
9 and Stoel Rives LLP.

10
11 HOLSTUN, Board Member; RYAN, Board Chair; BASSHAM, Board
12 Member, participated in the decision.

13
14 AFFIRMED (LUBA No. 2014-065)
15 REMANDED (LUBA No. 2014-043) 12/05/2014

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

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NATURE OF THE DECISIONS

This appeal concerns two county decisions regarding a previously approved conditional use permit (CUP). One decision extends the expiration date for that CUP; one decision modifies the CUP.

MOTION TO INTERVENE

S&H Logging, LLC (S&H), the applicant below, separately moves to intervene on the side of respondent in each of these consolidated appeals. The motions are granted.

FACTS

Intervenor-respondent S&H was granted a CUP on February 7, 2012. That CUP authorized S&H to conduct a composting and topsoil mining operation on a 25-acre property located at the southwest corner of the intersection of Borland Road and Stafford Road, south of the City of Lake Oswego.¹ The property is located a short distance north of Interstate I-205 and

¹ Separate records were filed in LUBA No. 2014-043 and LUBA No. 2014-043 and LUBA No. 2014-065. Our citations to the record in our discussion of the assignments of error are to the applicable record, unless noted otherwise. The record in LUBA No. 2014-043 includes the following description of the use approved by the 2012 CUP:

“1) [C]onstruct and operate a whole sale [sic] yard composting facility processing yard debris, vegetative food scraps, and manure into compost. The compost will be sold at urban retail yards. 2) Homeowners and landscapers will continue to take yard debris to the existing S&H Logging drop off yard, across Stafford Road from this site. 3) Soil from surface mining will be used in S&H soil products or sold as clean fill. 4) This application includes phase one and two of a three phase project. Phase one will include both the construction and operation of the compost facility (south

1 across Borland Road from Wankers Country Store, which is located at the
2 northwest corner of the Borland/Stafford intersection. S&H operates an
3 existing yard debris drop off site across Stafford Road, east of the subject
4 property.

5 The property is also located within 1500 feet of two schools located
6 north of Borland Road. The proximity of the site to the schools is significant,
7 because legislation was passed and took effect on June 26, 2013, which
8 prohibits Oregon Department of Environmental Quality (DEQ) or Metropolitan
9 Service District (Metro) approval of composting facilities within 1500 feet of
10 schools in certain circumstances.

11 **A. The CUP Extension**

12 It appears to be undisputed that under the applicable version of
13 Clackamas County Zoning and Development Ordinance (ZDO) 1203, without
14 some further action by the county, the 2012 CUP would have expired on
15 February 7, 2014, two years after the CUP was approved, because all required
16 development permits for the approved conditional use were not secured before
17 that date. However S&H filed an application for an extension of that two-year
18 deadline on February 5, 2014. The planning director approved that requested
19 extension on March 18, 2014, and following a local appeal the county hearings

side of the site) and mining operation (north side of the site). Phase two will included moving the compost facility to the reclaimed north side of the site and the mining operation to the south side. Phase three would include final reclamation and redevelopment of the site.” Record 432 (Original strike-through omitted).

1 officer affirmed the planning director’s decision and approved the extension on
2 June 20, 2014.² Petitioners appeal that decision in LUBA No. 2014-065.

3 **B. The CUP Modification**

4 In late 2013, before the 2012 CUP was set to expire on February 7, 2014,
5 S&H sought county approval for a modification of the 2012 CUP to authorize
6 topsoil mining, eliminate the prior approval for the composting operation,
7 revise and eliminate some of the 2012 CUP conditions of approval and make
8 other changes noted later in this opinion.³ That application to modify the 2012
9 CUP was submitted on September 19, 2013, and the planning director
10 approved the requested modification on January 30, 2014. Following a local
11 appeal, the hearings officer approved the CUP modification on April 21,
12 2014—after the planning director approved the CUP extension on March 18,
13 2014, but before the hearings officer affirmed the CUP extension decision on
14 June 20, 2014. Petitioners appeal the CUP modification in 2014-043. These
15 appeals have been consolidated for LUBA review.

² As approved by the planning director and the hearings officer, the extended CUP only authorizes topsoil mining and does not approve the composting operation that had been part of the original proposal.

³ The record includes the following description of the modified proposal:

“[1] Construct and operate a soil surface mining operation the footprint of which will be 18.7 acres of the 25.1 acre property. 2) Soil from surface mining will be used in S&H soil products or sold [as] clean fill. * * * Access is proposed from a proposed driveway on Stafford Road approximately 0.18 miles southwest of [the] intersection of Stafford Road and Borland Road.” Record 432-33 (underlining omitted).

1 **ASSIGNMENT OF ERROR (LUBA No. 2014-065)**

2 In LUBA No. 2014-065, petitioners Fallow and Stafford Community
3 Planning Organization assign error to the county’s final order approving the
4 CUP extension, asserting that the county misconstrued provisions of the ZDO
5 and Senate Bill 462 (SB 462) as codified in part at ORS 268.318(3)(b) and
6 ORS 459.243(2).⁴ In addition, petitioners assert that the county adopted
7 inadequate findings as related to those laws. We understand petitioners to
8 present a fairly complex legal argument in this assignment of error that was not
9 presented to the hearings officer in the same way it is presented in the petition
10 for review in this appeal. That may explain why the hearings officer fails to
11 identify and answer the dispositive legal question under this assignment of

⁴ ORS 268.318(3)(b) provides:

“The metropolitan service district may not approve the establishment of a commercial disposal site for composting if the property line of the proposed disposal site for composting is located within 1,500 feet of a property line of a school that is within an exception area for rural residential uses.”

ORS 459.243(2) provides:

“(2) The Department of Environmental Quality may not issue a disposal site permit under ORS 459.245 to establish a commercial disposal site for composting if:

“(a) The property line of the proposed disposal site for composting is located within 1,500 feet of a property line of a school that is within an exception area for rural residential uses; and

“(b) The proposed disposal site for composting requires approval from a metropolitan service district under ORS 268.318.”

1 error. We therefore do not fault the hearings officer for failing to recognize
2 and address that question. Since that question is a question of local law
3 interpretation, for which we would owe no deference to the hearings officer,
4 remand would serve no purpose. We therefore resolve that legal question, deny
5 this assignment of error and affirm the county’s CUP extension decision.

6 Petitioners assert that under the terms of ZDO 1305.05 and 834, the
7 county is precluded from approving the CUP extension if one of the approved
8 conditional uses is prohibited by DEQ or Metro regulations. We set out the
9 applicable ZDO sections below, and determine that petitioners misinterpret the
10 obligations imposed on the county by the ZDO when approving a CUP
11 extension.

12 **A. ZDO 1305.05(A)(3)**

13 ZDO 1305.05(A)(3) sets out one of the applicable criteria that must be
14 met for a permit extension, such as the disputed 2012 CUP extension:

15 “The proposed development as originally approved shall be
16 consistent with the relevant provisions of this Ordinance in effect
17 on the date a complete application for a time extension is
18 submitted[.]”

19 The “Ordinance” referred to in ZDO 1305.05(A)(3) is the ZDO. ZDO 101.
20 We agree with petitioners that in applying ZDO 1305.05(A)(3), the county
21 must find that the original proposed development that was approved by the
22 2012 CUP, which included the composting facility, meets all relevant ZDO
23 standards that were in effect at the time the CUP extension application was
24 submitted on February 5, 2014.⁵

⁵ ZDO 1305.05(A)(3) has the effect of requiring the county to determine that the original proposal, which included the composting facility, complies

1 But ZDO 1305.05(A)(3) only requires that the originally approved
2 development must be found to comply with the *ZDO* standards that were in
3 effect on the date the application for the CUP time extension was submitted.
4 Petitioners’ arguments are based almost entirely on parts of SB 462, as now
5 codified at ORS 268.318(3)(b) and 459.243(2). Absent something in the ZDO
6 that has the legal effect of making those *state statutory* standards *county ZDO*
7 standards, we do not see that ZDO 1305.05(A)(3) required the county to
8 consider ORS 268.318(3)(b) and 459.243(2) in approving the CUP extension.

9 **B. ZDO 834.01**

10 We understand petitioners to argue that ZDO 834.01, when read with
11 ZDO 1305.05(A)(3), has the legal effect of requiring the county to find that the
12 originally approved development complies with current DEQ and Metro rules
13 and regulations. More specifically, we understand petitioner to argue that ZDO
14 834.01 operates to make DEQ and Metro rules and regulations “relevant
15 provisions of [the ZDO],” within the meaning of ZDO 1305.05(A)(3).

16 ZDO 834.01 implements the policies of the county’s comprehensive plan
17 and provides in relevant part:

18 “Section 834 is adopted to implement the policies of the * * *
19 Comprehensive Plan. Composting/yard debris processing
20 facilities shall be considered pursuant to the siting, design and
21 operational provisions of this section. Additionally, these
22 facilities shall be subject to:

23 “A. All requirements of the Clackamas County Solid Waste and
24 Waste Management Ordinance.

with existing ZDO requirements. That determination is required even though
the CUP as extended and modified does not authorize a composting facility.

1 “B. All requirements of the Clackamas County Excavating and
2 Grading Ordinance.

3 “C. All rules and regulations of the Oregon State Department of
4 Environmental Quality for all types of composting facilities
5 as codified in ORS 468B.050 and OAR 340, Divisions 93,
6 95, 96 and 97.

7 “D. All composting rules of the Metropolitan Service District
8 (as codified in Metro Code chapter 5.01) and compliance
9 with Metro’s Regional Solid Waste Management Plan
10 (RSWMP) for facilities that are proposed to be sited within
11 the Metro Boundary.

12 “* * * * *”

13 We understand petitioners to read ZDO 1305.05(A)(3) together with
14 ZDO 834.01(C) and (D) to require that the county find that the original
15 proposal, which included the composting facility, continues to comply with
16 DEQ and Metro rules and regulations.⁶ Petitioners argue that after the June 26,
17 2013 effective date of SB 462, the county cannot make that finding and for that
18 reason the county should have denied the requested CUP time extension
19 application.

⁶ It is petitioners’ argument that ZDO 1305.05(A)(3), when read in concert with ZDO 834.01, makes DEQ and Metro rules and regulations ZDO requirements that was not presented to the hearings officer. Petitioners certainly took the position that SB 462 as codified must be applied under ZDO 1305.05(A)(3). But as noted, ZDO 1305.05(A)(3) only requires application of current ZDO standards when granting a permit extension. As far as we can tell, petitioners never mentioned ZDO 834.01(C) and (D). While respondents do not argue petitioners’ reliance in this appeal on ZDO 834.01(C) and (D) was therefore waived, and we therefore consider the argument, petitioners’ failure to develop their argument under ZDO 834.01(C) and (D) to the hearings officer likely explains the hearings officer’s failure to consider ZDO 834.01(C) and (D) in conjunction with ZDO 1305.05(A)(3).

1 As respondents explain, petitioners misread the text of ZDO 834.01, set
2 out above. As an initial point, the apparent lack of any DEQ or Metro rules or
3 regulations prohibiting compost facilities in accordance with SB 462 requires
4 that petitioners’ first assignment of error be denied.⁷ Even if DEQ and Metro
5 had adopted rules and regulations consistent with SB 462, ZDO 834.01 does
6 not require the county to find that a proposed composting facility complies with
7 the four different sets of regulations set out at ZDO 834.01(A) through (D).
8 Rather, ZDO 834.01 states that a composting facility “shall be considered
9 pursuant to the siting, design and operational requirements of this section
10 [ZDO 834].” Those requirements are set out later in section ZDO 834 at
11 subsections ZDO 834.03, 834.04 and 834.05.⁸ The language that petitioners
12 rely on states “[a]dditionally, these facilities shall be subject to” the county
13 “Solid Waste and Waste Management” and “Excavating and Grading”
14 requirements identified in ZDO 834.01(A) and (B) and the DEQ and Metro
15 rules identified in ZDO 834.01(C) and (D). That language simply advises
16 applicants for county approval of composting facilities that there are other legal

⁷ Petitioners do not cite to any DEQ or Metro rules or regulations that have been adopted to preclude approval of composting facilities within 1500 feet of schools since SB 462 became effective June 26, 2013. Neither were petitioners aware at oral argument of any such rules or regulations.

⁸ ZDO 834.03 provides that composting “facilities may be permitted subject to review by the Hearings Officer pursuant to the Conditional Use provisions of Section 1203 in reference to specific zoning districts.” ZDO 834.04 provides that “[t]he development of composting facilities shall be subject to the requirements prescribed in Section 1000 pursuant to the Design Review procedures of Section 1102” as well as the “development and operational standards” set out at ZDO 834.04. ZDO 834.05 sets out “SUBMITTAL REQUIREMENTS.”

1 requirements that must be satisfied before a composting facility can commence
2 operation.

3 The language that petitioners rely on does not make the referenced
4 county solid waste and waste management and excavating and grading
5 requirements or the DEQ and Metro rules and regulations into relevant
6 provisions of the ZDO itself.⁹ That language also does not require the county
7 to anticipate and duplicate the review that DEQ and Metro would have to
8 conduct under the laws identified in ZDO 834.01(C) and (D), if intervenor
9 were to seek approval now for the composting facility that the 2012 CUP
10 approved. That language simply makes it clear that there are other legal
11 standards outside those identified in ZDO 834 that must be met to operate a
12 composting facility.

13 As context, the last subsection in ZDO 834, ZDO 834.06, is consistent
14 with the above view of how ZDO 834.01 operates. ZDO 834.06 requires an
15 applicant for a composting facility approval to provide copies of any required
16 DEQ or Metro permits before commencing operation of any composting
17 facility that may be approved by the county.¹⁰ If, as appears to be the case, SB

⁹ The “Solid Waste and Waste Management” and “Excavating and Grading” requirements referenced in ZDO 834.01(A) and (B) are codified at Clackamas County Code Titles 10.03 and 9.03, respectively, and are not part of the ZDO. DEQ’s and Metro’s rules and regulations obviously are not part of the county’s ZDO.

¹⁰ ZDO 834.06 provides:

“ISSUANCE OF PERMITS

“Prior to commencing any activities authorized by the Hearings Officer pursuant to these provisions, the applicant shall submit

1 462 has the legal effect of precluding DEQ and Metro approval of the
2 composting facility approved by the 2012 CUP, intervenor would not be able to
3 secure the required DEQ and Metro permits and the composting facility
4 originally proposed could not become operational.¹¹ It would make little sense
5 to interpret ZDO 834.01 to require the county to make findings regarding
6 applicable DEQ and Metro composting facility approval standards, when such
7 a county decision would in no way obligate DEQ and Metro to reach similar
8 conclusions about those standards, and under ZDO 834.06 such a decision by
9 the county is unnecessary to ensure the facility complies with DEQ's and
10 Metro's composting facility standards and will be able to obtain required DEQ
11 and Metro permits.

12 **C. Findings**

13 Petitioners challenge a number of findings that the hearings officer
14 adopted regarding the retroactivity of SB 462 and the applicability of that
15 law.¹² If petitioners were correct that ZDO 834.01 has the legal effect of

copies of all operating permits or licenses required by DEQ or
Metro as applicable.”

¹¹ Apparently intervenor is at least concerned that SB 462 has the legal effect that petitioners believe it has, because intervenor sought approval for a modification of that 2012 CUP to eliminate its approval for the composting facility. The legal issue of whether the composting facility could be approved only has significance under petitioners' understanding of what ZDO 1305.05(A)(3) and 834.01(C) and (D) together require to extend the 2012 CUP approval.

¹² These findings include:

“[SB 462] does not purport to be retroactive.” Record 2A.

1 making SB 462, as codified in part at ORS 268.318(3)(b) and ORS 459.243(2),
2 “provisions of” the ZDO, within the meaning of ZDO 1305.05(A)(3), we would
3 agree with petitioners that the hearings officer’s findings are inadequate and
4 misconstrue applicable law. In that circumstance, it would not matter that SB
5 462 is not retroactive, or that SB 462 does not specifically address permit
6 extensions or that ORS 215.427(3)(A) (the goal post rule) requires application
7 of the standards in effect on the date the permit extension request application
8 was submitted. In that circumstance, for the reasons set out in the petition for
9 review, the county would be applying the local standards in effect when the
10 CUP permit extension application was submitted; the county would be
11 applying SB 462 prospectively, not retroactively, and the fact that SB 462 does
12 not address permit extensions specifically would be immaterial.

13 As we have already explained, the reason SB 462 as codified in part at
14 ORS 268.318(3)(b) and ORS 459.243(2) does not require denial of the
15 requested CUP time extension under ZDO 1305.05(A)(3) is that the county is
16 not required to find that the composting facility that was originally proposed
17 complies with those state statutory requirements, and ZDO 834.01 does not
18 make those state statutory requirements “relevant provisions” of the ZDO, with

“[SB 462 did not] eliminate, or even address, whether previously approved composting facilities could receive time extensions * * *.” Record 2A.

“[T]he applicant is entitled to seek a time extension and to have that time extension request reviewed under the ‘standards and criteria that were applicable at the time the application was first submitted.’ ORS 215.427(3)(A).” Record 2A.

1 which the county must show the originally proposed composting facility is
2 consistent.

3 Finally, citing *Scott v. City of Jacksonville*, 60 Or LUBA 307, 310
4 (2010), petitioner contends “the County did not have the authority to approve a
5 time extension for a conditional use that authorizes an activity that is prohibited
6 by state statutes.” *Scott* concerned the potential applicability of a DEQ noise
7 rule that we ultimately concluded the application complied with. To the extent
8 *Scott* can be read to support the principle that petitioners advocate here (that a
9 county must in all cases deny a county permit for a composting facility unless it
10 can find that the composting facility will be able to comply with state standards
11 for all required state permits), we disavow that principle.

12 The assignment of error in LUBA No. 2014-065 is denied.

13 The county’s decision approving the CUP time extension request is
14 affirmed.

15 **FIRST ASSIGNMENT OF ERROR (LUBA No. 2014-043)**

16 **A. Introduction**

17 Petitioner Tolbert challenges the CUP modification decision in LUBA
18 No. 2014-043. The CUP modification that is the subject of this appeal is
19 governed by ZDO 1305.04, the relevant text of which is set out in the margin
20 below.¹³ ZDO 1305.04(A)(1) provides that a “minor modification” must be

¹³ ZDO1305.04 is set out in part below:

“1305.04 MINOR MODIFICATIONS

“A. A minor modification shall be approved if it:

“1. Is consistent with the prior approval;

1 “consistent with the prior approval.” In her first assignment of error, petitioner
2 argues the hearings officer misinterpreted and misapplied ZDO 1305.04(A)(1)
3 and adopted inadequate findings to support his conclusion that the modified

“2. Is consistent with all Ordinance provisions in effect on the date the modification request is submitted; and

“3. Does not result in any of the following:

“a. A change in the type of use (e.g. commercial, industrial, institutional);

“b. An increase of greater than 25 percent of the original approved building floor area;

“c. An increase of greater than 25 percent of the original approved lot coverage;

“d. An increase in the density of development (residential or recreational uses), or intensity of use, as demonstrated by a change in the occupancy rating requiring substantial modifications to structures;

“e. An increase in traffic congestion or use of public facilities;

“f. A reduction of approved open spaces;

“g. A reduction of off-street parking spaces or loading berths, except as provide under Section 1015; or

“h. A reduction in required pavement widths or a change in major access location, except as required by the County[.]”

1 proposal (without the composting operation) is consistent with the original
2 proposal (which included the composting operation).

3 **B. Interpretation of ZDO 1305.04(A)(1)**

4 The hearings officer adopted the following findings to address ZDO
5 1305.04(A)(1):

6 “* * * ZDO 1305.04(A)(1) requires that the proposed minor
7 modification be consistent with the prior approval; in this case the
8 original CUP. Generally, minor modifications seek expansions or
9 an increase in the intensity of the use. *In the present case, the*
10 *minor modification seeks to lessen the intensity of the use by*
11 *eliminating the composting facility, while maintaining the surface*
12 *mining operation. That in itself is consistent with the prior*
13 *approval. As discussed above, the surface mining operation will*
14 *be very similar to that proposed in the CUP. According to the*
15 *applicant, all the conditions imposed in the CUP necessary to*
16 *ensure approval are carried over in the present case or are*
17 *modified slightly to ensure continued compliance. Some*
18 *opponents argue that many of the conditions of approval were not*
19 *specific as to the composting operation or the surface mining*
20 *operation and that the elimination of the conditions renders the*
21 *application inconsistent with the prior approval.*

22 “Opponents are correct that it is possible that the elimination of
23 certain conditions that were directed at the composting operation
24 or both the composting operation and the surface mining operation
25 could render the proposed minor modification inconsistent with
26 the prior approval. The way this would render the minor
27 modification inconsistent with the CUP, however, is that the
28 proposed use would no longer satisfy the ZDO provisions that the
29 conditions of approval were designed to ensure compliance with.
30 I address those contentions below.” Record 5 (emphasis added).

31 Although a different conclusion might be required with different facts,
32 we generally agree with the hearings officer’s central thesis that where a
33 previously approved two-part use (A plus B) is being modified to eliminate one

1 of the previously approved parts, while keeping the other previously approved
2 part without material change (A or B only), that modification is properly
3 viewed as “consistent” with the previously approved use.¹⁴ We also agree with
4 the hearings officer that the mining-only operation that is proposed in the
5 modification is “consistent” with the previously approved composting and
6 mining operation, within the meaning of ZDO 1305.04(A)(1). At least
7 petitioner has not shown that the changes in the proposed mining operation are
8 of a nature or magnitude that renders it “inconsistent” with the previously
9 approved composting and mining operation.

10 Petitioner notes that the modification proposes to eliminate parking, a
11 stormwater detention pond, and buildings associated with the composting
12 operation, that the mining will begin in a different area of the property and that
13 the height of required berms appears to have been reduced. Petitioner believes
14 some of those changes may increase off-site impacts of the mining use.
15 Although we do not agree with the hearings officer that the only way the
16 changes in the proposal and conditions could be inconsistent with the original
17 proposal and conditions is if they violate one or more of the approval

¹⁴ *Webster’s Third New International Dictionary* (unabridged ed. 2002) includes the following definition of “consistent:”

“* * * 1. *archaic* : marked by unchanging position or by firmness, stiffness, solidarity, or coherence * * * : stationary, changeless, and enduring * * * **2 a** : marked by harmony, regularity, or steady continuity throughout : showing no significant change, unevenness, or contradiction * * * **b** : marked by agreement and concord * * * : coexisting and showing no noteworthy opposing, conflicting, inharmonious, or contradictory qualities or trends :COMPATIBLE * * *.” *Id.* at 484.

1 standards, petitioner has not shown that the changes are of a nature or degree
2 that renders the modified proposal and conditions *inconsistent* with the original
3 proposal. More specifically, we distinguish between the ZDO 1305.04(A)(1)
4 requirement that a “minor modification” must be “consistent with the prior
5 approval” and the ZDO 1305.04(A)(2) requirement that “minor modification”
6 must be “consistent with” ZDO approval standards. Modifications that may
7 call into question whether the modified proposal complies with applicable ZDO
8 standards do not necessarily result in an inconsistency with the original
9 proposal. ZDO 1305.04(A)(1) and (2) are different inquiries.

10 The original proposal was for a composting and mining operation which
11 was approved with conditions necessary to ensure compliance with all approval
12 standards. The modification proposes a similar mining operation, with
13 conditions the county believes are necessary to ensure the mining-only
14 operation complies with all approval standards, but without the composting
15 operation and without some of the conditions that the hearings officer believed
16 were only necessary to ensure the composting operation complied with
17 approval standards. The hearings officer may or may not have approved
18 changes in the proposal or changes in conditions of approval that render the
19 mining-only operation inconsistent with one or more approval standards. We
20 consider that question under the remaining assignments of error. But petitioner
21 has not established that eliminating the composting operation and modifying
22 the mining operation, in what we view as relatively minor ways, renders the
23 modified proposal “inconsistent” with the original proposal, within the
24 meaning of ZDO 1305.04(A)(1).

25 Petitioner argues for a very narrow meaning for the word “consistent”
26 and would require that each modification of the proposal and each modified

1 condition be “free from variation or contradiction” when compared with the
2 original proposal and conditions. Petition for Review 12. But the dictionary
3 definition of “consistent” does not in all cases call for the narrow
4 understanding that petitioner argues for and does not necessarily require the
5 exacting match between the prior proposal and the modified proposal that
6 petitioner would require. *See* n 14. And when ZDO 1305.04(A)(1) is viewed
7 in context, it is quite clear that the narrow meaning petitioner argues for was
8 not intended. Under ZDO 1305.04(A)(3)(a), while a change in the *type* of use
9 is barred, within given types of uses changes are permissible if the changed use
10 is “consistent” with the previously approved use. *See* n 13. Under petitioner’s
11 interpretation of “consistent,” changes in use would appear to be nearly
12 impossible to approve as a minor modification. And under the remaining
13 subsections of ZDO 1305.04(A)(3), the ZDO’s concern is more with changes
14 that will increase building size, lot coverage, density, intensity and off-site
15 impacts, not absolute consistency for absolute consistency’s sake. And as the
16 hearings officer found, the change from a combined composting/mining
17 operation to a mining-only operation almost certainly will have fewer off-site
18 impacts.

19 In summary, we agree with the hearings officer that the changes that
20 petitioner believes render the proposal inconsistent with the previously
21 approved proposal are more appropriately analyzed under ZDO 1305.04(A)(2),
22 to determine if those changes render the proposal inconsistent with one or more
23 approval standards. The hearings officer’s finding that the changes could *only*
24 be inconsistent with the previously approved proposal and conditions if the
25 changes cause the proposal to no longer comply with one or more approval
26 standards is a *non sequitur*. As noted earlier, we agree with petitioner that in

1 theory a change that does not violate an approval standard could be
2 inconsistent with the prior proposal or its conditions. But petitioner has not
3 established that the changes approved by the disputed modification decision are
4 of a nature or type that render the modified proposal and conditions
5 “inconsistent” with the previously approved proposal as originally conditioned,
6 within the meaning of ZDO 1305.04(A)(1).

7 **C. The Original CUP Evidentiary Record**

8 The record in this appeal does not include the entire record that was
9 compiled in approving the 2012 CUP. Petitioner contends the hearings officer
10 erred by not considering that entire record in determining whether the modified
11 mining-only proposal and conditions will have fewer impacts than the
12 previously approved composting and mining operation.

13 While reviewing the entire record might have allowed the hearings
14 officer to conduct a more thorough and detailed review concerning whether the
15 modified proposal will have fewer off-site impacts than the original proposal,
16 we do not agree with petitioner that the complete evidentiary record of the
17 2012 CUP was necessary to apply ZDO 1305.04(A)(1) and make that
18 determination. We do not agree with petitioner’s narrow understanding of the
19 changes that are permissible under the ZDO 1305.04(A)(1) “consistency”
20 requirement, and petitioner has not shown that the evidentiary record in this
21 appeal is insufficient to allow the hearings officer to determine that the mining-
22 only proposal will have fewer off-site impacts than the previously approved
23 mining proposal with the composting operation.

24 The first assignment of error is denied.

1 **SECOND ASSIGNMENT OF ERROR (LUBA No. 2014-043)**

2 Under ZDO 1305.04(A)(2), “[a] minor modification shall be approved if
3 it * * * [i]s consistent with all [ZDO] provisions in effect on the date the
4 modification request is submitted[.]” In her second assignment of error,
5 petitioner contends the hearings officer improperly construed ZDO
6 1305.04(A)(2) to require only that the proposed *modifications* to the previously
7 approved mining operation be reviewed for consistency with the ZDO
8 requirements in effect on the date the modification application was submitted.
9 Petitioner also contends the hearings officer inadequately responded to issues
10 concerning noise, dust, air quality and water impacts.

11 **A. Misconstruction of ZDO 1305.04(A)(2)**

12 The hearings officer’s findings explaining how he went about applying
13 ZDO 1305.04(A)(2) include the following:

14 “[T]his application involves a request for a minor modification to
15 the original [2012 CUP]. The scope of review is limited to those
16 modification criteria and for that reason cannot constitute an
17 opportunity to reconsider the arguments against the original CUP.
18 To the extent opponents make arguments against the use of the
19 property for the previously approved CUP, those arguments are
20 rejected. The issues before the Hearings Officer are the
21 differences proposed by the minor modification, not the use of the
22 property under the existing CUP.

23 “* * * * *

24 “ZDO 1305.04(A)(2) requires that the proposed minor
25 modification be consistent with all the applicable ZDO provisions.
26 The Planning Director’s decision identifies a number of applicable
27 provisions, including Sections 309, 818, 1002, 1006, 1007, 1008,
28 1009, 1010, 1015, and 1203. As discussed earlier, because the
29 minor modification does not propose any new uses or activities
30 and the previously approved CUP found compliance with all of
31 these provisions, the only way the proposed minor modification

1 could be in violation of these provisions is if the minor changes
2 proposed for the surface mining operation violate the provisions.
3 In other words, this section will be violated only if the difference
4 between the proposed surface mining use and the originally
5 approved surface mining use results in a violation of the
6 provisions.” Record 3-5.

7 Petitioner contends the hearings officer’s focus on the proposed modification
8 under ZDO 1305.04(A)(2), to the exclusion of the remaining mining operation
9 that is unaffected by the modification, is erroneous. We understand petitioner
10 to contend that the hearings officer should have considered the modified
11 mining proposal (as a whole) and determined if the proposed modified mining
12 proposal complies with all requirements of the ZDO that were in effect on the
13 date the application for modification was complete. We understand petitioner
14 to contend it was error for the hearings officer to refuse to consider arguments
15 below that aspects of the proposed mining operation that are unaffected by the
16 modifications do not comply with the ZDO, and error for the hearings officer to
17 refuse to accept and consider evidence regarding these unaffected aspects of
18 the originally proposed mining operation.

19 The words “minor modification” in ZDO 1305.04(A) are somewhat
20 ambiguous and could be a reference to the modified mining operation as a
21 whole (petitioner’s position) or it could be a reference to the proposed mining
22 operation modifications only (the hearings officer’s position). *See* n 13. With
23 one clarification, we generally agree with the hearings officer’s interpretation
24 and application of ZDO 1305.04(A)(2).

25 The main difficulty with petitioner’s understanding of ZDO
26 1305.04(A)(2) is that it gives no legal effect whatsoever to the 2012 CUP
27 decision that is being modified. Under petitioner’s view of ZDO
28 1305.04(A)(2), there would be no difference in the county review required for a

1 minor modification for compliance with the ZDO under ZDO 1305.04(A)(2)
2 and the review that would be required if the modified mining proposal were
3 being proposed for the very first time and there had never been a 2012 CUP
4 decision that approved the original mining proposal. It is clear that under ZDO
5 1305.04(A)(3), the concern is with the proposed modification, not the legal
6 sufficiency of the mining operation that was approved by the 2012 CUP.

7 While we generally agree with the hearings officer's understanding of
8 ZDO 1305.04(A)(2), the proposed mining modifications nevertheless must be
9 reviewed in context with the mining operation that is being modified and the
10 existing conditions that are being modified. Therefore, if the issues raised to
11 the hearings officer are relevant issues regarding the modified mining operation
12 that could not have been raised when the original mining operation proposal
13 was approved in 2012, the hearings officer was required to address those
14 issues. Conversely, if the arguably relevant issues petitioner sought to raise
15 before the hearings officer could have been fully raised when the original
16 mining proposal was approved, those issues are not a product of the
17 modification and the hearings officer was not required to consider them under
18 ZDO 1305.04(A)(2).

19 Similarly, where conditions of the 2012 CUP approval are to be modified
20 or eliminated, and the original condition was imposed solely to ensure the
21 composting operation complied with relevant approval standards, no
22 explanation is required to eliminate those conditions of approval along with the
23 composting operation. However, where it is not clear whether the original
24 condition of approval was imposed at least in part to ensure that the originally
25 proposed mining operation complied with one or more relevant approval
26 standards, and an issue was raised below concerning whether the proposed

1 modification or elimination of the condition would cause the modified mining
2 operation to violate one or more applicable ZDO standards, the hearings officer
3 was obligated explain why the condition could be eliminated or modified
4 without causing the modified mining proposal to no longer comply with
5 relevant approval standards. *City of Wood Village v. Portland Metro. Area*
6 *LGBC*, 48 Or App 79, 87, 616 P2d 528 (1980); *Norvell v. Portland Area*
7 *LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979).

8 With the above understanding of how ZDO 1305.04(A)(2) should have
9 been applied in this matter, we deny petitioner’s first subassignment of error
10 and turn to petitioner’s more specific arguments under ZDO 1305.04(A)(2).

11 The first subassignment of error is denied.

12 **B. Petitioner’s Findings Challenge**

13 Petitioner begins with a broad challenge to the county’s findings
14 regarding ZDO 1305.04(A)(2):

15 “[T]he Final Order fails to explain why each condition that was
16 removed, or revised, was not necessary to comply with an
17 approval criterion, or was not imposed to do so. Rather than
18 provide the specific explanation, the County includes conclusory
19 statements about these conditions as unnecessary for the proposed
20 mining facility that do not supply a coherent or individualized
21 explanation for each condition. For this reason alone, the Final
22 Order should be remanded.” Petition for Review 27.

23 We reject petitioner’s broad challenge. The argument is simply not
24 sufficiently developed to support a conclusion that the many pages of single
25 spaced findings are in all cases inadequate. We turn to petitioner’s more
26 specific challenges.

1 **1. Ground and Surface Water**

2 **a. ZDO Standards**

3 ZDO Section 800 sets out “Special Use Requirements” that apply to 38
4 different kinds of uses. ZDO 818, a subsection of ZDO Section 800, sets out
5 special use requirements for “Surface Mining.” ZDO 818.03 sets out “General
6 Application Requirements.” Petitioner cites two subsections of ZDO 818.03;
7 ZDO 818.03(I) requires “characterization of the ground and surface water,”¹⁵
8 and ZDO 818.03(J) requires “[a] surface water management plan.”¹⁶ ZDO
9 818.04 sets out “General Operation Requirements and Standards.” ZDO
10 818.04(E) governs sedimentation and erosion from mining.¹⁷

¹⁵ ZDO 818.03(I) sets out the following application requirement:

“The characterization of the ground and surface water based on available wells, drill logs, springs, and surface drainages within one mile of the proposed mining operation.”

¹⁶ ZDO 818.03(J) sets out the following application requirement:

“A surface water management plan to provide protection against contamination of ground water and discharge of sediments into adjacent waterways. This plan must include provisions for settling ponds, diversion dikes, and channels, or other facilities as may be required.”

¹⁷ ZDO 818.04(E) provides:

“Erosion Control: Sedimentation or erosion resulting from the mining operation shall not adversely affect the quality of any body of water, as determined on the basis of standards established by the State Department of Environmental Quality and the State Department of Geology and Mineral Industries. Erosion resulting from the mining operation shall be contained within the permit area.”

1 composting facility the “retention ponds,” are no longer needed. We assume
2 what petitioners refer to as “detention ponds,” and the hearings officer refers to
3 as “retention ponds,” are the same as what ZDO 818.03(J) refers to as “settling
4 ponds.” See n 16. Petitioner apparently reads ZDO 818.03(J) to require
5 settling ponds whether or not they are “required.” We understand ZDO
6 818.03(J) only to require settling ponds or the other facilities mentioned in that
7 section if they are “required.”

8 Petitioner’s first bulleted argument concerning the settling pond provides
9 no basis for reversal or remand.

10 We turn next to the second bulleted argument (no surface water
11 management plan). The hearings officer does not address the issue raised in
12 the second bullet, and in their brief respondents simply claim that ZDO 818.03
13 does not apply because the application to modify the 2012 CUP is not “a
14 surface mining permit application,” and for that reason ZDO818.03 does not
15 apply. ZDO 818.03 does not speak in terms of “surface mining permits.”
16 Rather 818.03 applies to applications “for a permit for surface mining.” As far
17 as we can tell, the 2012 application for a CUP to allow composting and mining
18 was at least in part an application “for a permit for surface mining,” and so is
19 the current application to modify that CUP.

20 Regarding petitioner’s second bulleted argument, on remand, the
21 hearings officer will need to require S&H to submit a surface water
22 management plan, or explain why a surface water management plan is not
23 required.

24 Petitioner’s third bulleted argument is that the modifications will cause
25 storm water to drain off-site and create water quality violations. The hearings
26 officer’s short answer to that argument is that “[t]he surface mining is self-

1 contained, so there will be no surface runoff from the mining pit.” Record 8.
2 Respondents do not identify what evidence the hearings officer relied on to
3 make that finding, and petitioner identifies evidence that conflicts with that
4 finding. Therefore, we agree with petitioner that the finding is not supported
5 by substantial evidence. *See Johns v. City of Lincoln City*, 35 Or LUBA 421,
6 428 (1999) (in resolving substantial evidence challenges, LUBA relies on the
7 parties to direct it to relevant evidence).

8 Petitioner’s fourth and fifth assignments of error are closely related and
9 we address them together. We understand petitioner to contend that the water
10 table on the property is not located at 125 feet below the surface, as the
11 applicant contends, but only two feet below the surface. If the mine intrudes
12 into the water table, contamination of groundwater is possible. If that happens
13 the springs and shallow wells on nearby lands that the applicant failed to
14 identify and consider as well as other groundwater off-site may be
15 contaminated. The hearings officer apparently chose to believe the applicant
16 regarding the depth of the water table, but imposed a condition of approval that
17 mining cease as soon as it reaches the water table.

18 The basis for petitioner’s two-foot estimate regarding the depth of the
19 water table is NRCS data. We do not know what the basis for the applicant’s
20 125-foot estimate is, because no one cites us to the pages of the record where
21 we could review that estimate. The difference between two feet and 125 feet is
22 sufficiently great that we believe a remand is required so that the hearings
23 officer can more clearly identify the evidence he is relying on. With regard to
24 the condition of approval that requires cessation of mining if the water table is
25 encountered, petitioner contends the efficacy of that condition is questionable,
26 since the applicant plans to immediately excavate the top ten feet of topsoil.

1 We have sufficient question about the efficacy of that condition that without a
2 better explanation from the hearings officer regarding how that condition
3 would work in practice we do not agree that condition is sufficient to obviate
4 petitioner’s water quality concerns.

5 Remand is required for the hearings officer to address the second
6 through fifth bulleted arguments.¹⁸

7 Petitioner’s Ground and Surface Water subassignment of error is
8 sustained in part.

9 **2. Noise and Screening**

10 **a. ZDO Noise and Screening Standards**

11 In addition to the ZDO 818.04(E) erosion control standard set out above
12 in our discussion of petitioner’s ground and surface water arguments, *see* n 17,
13 ZDO 818.04 authorizes the county to require that a mining site be screened.
14 ZDO 818.04(B).¹⁹ And ZDO 818.04(C) requires that mining operations not
15 exceed DEQ noise standards.²⁰

¹⁸ Here and elsewhere in their joint response brief, respondents attempt to invoke ORS 197.835(11)(b) and argue the record “clearly supports” the county’s decision without regard to the adequacy of findings. ORS 197.835(11)(b) authorizes LUBA to overlook defective findings where “parties identify relevant evidence in the record which clearly supports the decision or a part of the decision.” However, it is not appropriate to invoke ORS 197.835(11)(b) where the evidence is conflicting. *Waugh v. Coos County*, 26 Or LUBA 300, 307-08. In each instance where respondents attempt to invoke ORS 197.835(11)(b), the evidence in the record is conflicting.

¹⁹ ZDO 818.04(B) provides:

“Screening: Screening of the mining site may be required to obscure the view or minimize dust or other annoyance from adjoining property and adjacent public roads. Unless otherwise

1 **b. Petitioner’s Noise and Screening Arguments**

2 Petitioner’s argument regarding noise and screening are not always easy
3 to follow. At one point, petitioner argues the hearings officer improperly
4 ignored issues that were raised regarding the adequacy of the noise study that
5 was relied on in approving the 2012 CUP. The short answer to that complaint
6 is that neither the 2012 CUP that first authorized mining on the property nor
7 the adequacy of the 2012 noise study that the county presumably relied on to
8 approve that 2012 CUP was before the hearings officer in this matter.

9 The hearings officer’s theory in finding the proposed modification will
10 not violate the ZDO 818.04(C) noise standard began with the fact that the 2012
11 CUP was approved and the original composting/mining operation was found to
12 comply with the ZDO 818.04(C) noise standard. From that baseline, the
13 hearings officer reasoned that the proposed modification would not increase the

approved, the screening shall be along the boundary of the property on which the site is located and may be accomplished by one or more of the following:

- “1. A sight-obscuring fence or wall;
- “2. A landscaped berm or preservation of natural slope;
- “3. Use of native vegetation, or plants and trees with demonstrated ability to thrive under the anticipated conditions.”

²⁰ ZDO 818.04(C) provides:

“Noise: Sound created by a mining operation which is audible off the site shall not exceed the maximum permitted by the State Department of Environmental Quality. Various methods of sound control may be required such as installation of earth berms, strategic location of stockpiles and limiting hours of operation.”

1 level of noise already authorized under the 2012 CUP. Those findings are set
2 out below.

3 “Many opponents argued that the proposed use would generate
4 unacceptable levels of noise that would unduly disturb nearby
5 neighborhoods and nearby schools. While the surface mining
6 operation will undoubtedly generate some noise, that was also the
7 case in the previously approved CUP. It is difficult to see how the
8 proposed modification will increase noise impacts. According to
9 the applicant, the composting operation would have generated
10 approximately 80% of the noise, so there will be a significant
11 decrease in noise. Even if that is an overly generous estimate, the
12 surface mining operation will be essentially the same as proposed,
13 so even if the loss of noise from composting were not significant,
14 the noise from surface mining would not increase. Some
15 opponents argued that by not constructing the originally proposed
16 buildings that there would be more noise. While it is possible that
17 the buildings may have blocked some of the noise, the buildings
18 were not proposed to or relied upon to block noise from the
19 operation under the CUP, so the lack of those buildings does not
20 change whether or not noise requirements are met. Some
21 opponents testified that during initial stages of mining, the mining
22 equipment would be above grade and would make too much noise.
23 As the applicant adequately explained, however, at the anticipated
24 mining rate, the mining equipment would be below grade quite
25 quickly. But even it were not, that would still have been the case
26 without a minor modification, therefore I find that the minor
27 modification will not result in a violation of noise standards.”
28 Record 6.

29 Petitioner objects that the hearings officer improperly minimized any
30 noise that might have been blocked by the compost operation buildings that
31 now will not be constructed under the modified CUP. However, petitioner
32 does not challenge the hearings officer’s finding that those buildings were not
33 relied on for their possible noise mitigating qualities in approving the 2012
34 CUP. We conclude a reasonable person could conclude that the elimination of

1 the composting operation will reduce rather than increase noise, even if the
2 incidental noise blocking that might have been accomplished by the compost
3 operation buildings is eliminated.²¹ Petitioner suggests that there may be more
4 noise generating truck traffic associated with the modified mining operation,
5 but does not develop that argument and makes no attempt to explain why the
6 reduced traffic from eliminating the composting operation would not more than
7 offset any such increase.

8 With the exception of the proposed change to the berm that was
9 originally required in the 2012 CUP, which we discuss next, we conclude
10 petitioner has not demonstrated that the hearings officer erred in finding the
11 CUP modification complies with the ZDO 818.04(C) noise standard.

12 Petitioner challenges the county's decision to allow the applicant to
13 construct a shorter berm to screen the mining operation from adjoining
14 properties and mitigate noise. The 2012 CUP required that a seven to ten foot
15 high berm be constructed around the perimeter of the subject property.²²
16 Record (LUBA No. 2014-065) 29, (LUBA No. 2014-043) 408. S&H requested
17 that the requirement for a property perimeter berm be eliminated and replaced
18 with a requirement that a seven-foot high berm be constructed around the

²¹ Petitioner objects that the hearings officer uncritically relied on the applicant's representation that 80 percent of the noise from the original proposal could be attributed to the composting operation. The hearings officer recognized that might be an "overly generous estimate," but concluded the now-eliminated composting operation was nevertheless a source of noise that is eliminated and the expected noise from the modified mining operation will not increase. Record 6.

²² To be more precise, the berm was to be constructed along most of the site's frontage on Borland Road and Stafford Road.

1 mining site rather than the property’s perimeter. Record 408. That shorter and
2 smaller berm would move with the mining site as the mining site moved from
3 one part of the property to another. *Id.* The planning director’s decision
4 appears to accept planning staff’s recommendation to reject S&H’s request and
5 require that a six-foot high fence, wall or berm be constructed along the
6 perimeter of the property. Record 342.²³ But later in the planning director’s
7 decision, he appears to give the applicant the option of constructing a site
8 perimeter berm or a landscaping strip. Record 346.²⁴

9 The hearings officer appears to have understood the planning director to
10 have required a berm, and the hearings officer carries that requirement forward
11 and relies on the berm for both noise mitigation and screening.²⁵ The nature,

²³ Planning staff’s recommendation is set out below:

“Staff recommends that for the perimeter screening the applicant shall submit a landscaping plan illustrating the layout, spacing and size/height of all plants/trees in accordance with code requirements along with a plant schedule that details each plant name/size/spacing/corresponding with the plant symbol shown on the plan for all plants/trees used on the site for erosion control, and screening alongside the perimeter of the site including any berms, sight obscuring fences (6-ft tall) and walls, (6-ft. tall) per conditions of approval from files Z0200-11-C and Z0446-12-D and ZDO Sections 818.04 and 1009.05(E)(1) and (2) (below).

²⁴ Although we are not sure, planning staff’s reference to “Z0200-11-C and Z0446-12-D” may be a reference to an earlier composting and mining proposal by S&H that predated the 2012 CUP and was not approved.

²⁵ The hearings officer’s findings include the following:

“First, the berms and screening included as conditions of approval in the Planning Director’s decision are substantially similar to those in the previously approved CUP. Second, the ZDO does not

1 location and height of the berm that the hearings officer required and relied on
2 for screening and noise mitigation is confusing. It is so confusing that
3 respondents contend in their brief that the hearings officer approved the
4 applicant's proposal for a seven-foot high berm around the mine rather than
5 around the perimeter of the site:

6 “* * * In short, the County approved a berm and screening around
7 the perimeter of the mining site rather than the property boundary,
8 which allowed the preservation of a thicker vegetation buffer of
9 Christmas trees and visual screening. * * *” Joint Response Brief
10 15.

11 Respondents are wrong about the required location of the berm. It is
12 reasonably clear a site perimeter berm was required by the planning director
13 and hearings officer, although there is language in the planning director's
14 decision that suggests a six-foot fence or wall or even landscaping may suffice
15 in place of the berm. On remand, the hearings officer must more clearly
16 identify the location, nature and height of the berm, assuming a berm is
17 required. If a shorter berm or other buffer improvements are to be substituted

require that screening completely shield adjoining properties. ZDO 818.04(B) merely provide that screening for surface mining 'may be required to obscure the view or minimize dust or other annoyance from adjoining property and adjacent roads.' Finally, the Planning Director's conditions of approval include a condition, in accordance with ZDO 818.04(C) that the '[s]ound created by mining operation which is audible off the site shall not exceed the maximum permitted by the State Department of Environmental Quality. * * *' Either way, the berms appear to be sufficient to meet their desire[d] purpose, and I find that the record shows that any noise to be generated by the surface mining proposed under the minor modification is unlikely to exceed what would have been generated by the CUP nor is it likely to violate ZDO 818.04(B) or (C).” Record 6-7 (footnotes omitted).

1 for the seven to ten-foot berm that was required under the 2012 CUP, the
2 hearings officer will need to explain why that substitution for the previously
3 required seven to ten-foot high berm will nevertheless allow the modified
4 mining proposal to comply with the ZDO 818.04(B) screening standard and the
5 ZDO 818.04(C) noise standard.

6 Finally, petitioner appears to make a discrete argument in a footnote. In
7 the footnote petitioner argues the county should not be allowed to rely on the
8 berm or landscaping for screening or mitigation because the berm and
9 landscaping may not be fully in place before mining commences. Petition for
10 Review 36 n 9. Petitioner’s legal theory in the body of the petition for review
11 is that the berm is too short. LUBA generally does not consider arguments
12 included solely in footnotes that set out a different legal theory than presented
13 in the body of the petition for review. *Frewing v. City of Tigard*, 59 Or LUBA
14 23, 45 (2009); *David v. City of Hillsboro*, 57 Or LUBA 112, 142 n 19 (2008).
15 We decline to do so here.

16 Petitioner’s Noise and Screening subassignment of error is sustained in
17 part.

18 **3. Parking**

19 ZDO 818.04(H) requires off-street parking “for employees, customers
20 and visitors at the mining site.”²⁶ The hearings officer did not specifically
21 address ZDO 818.04(H), but did address ZDO 1305.04(A)(3)(g), which also

²⁶ The full text of ZDO 818.04(H) is set out below:

“Parking: Vehicular parking off public roads shall be available for employees, customers and visitors at the mining site.”

1 concerns parking. We address petitioner’s parking argument in our discussion
2 of the fourth assignment of error.

3 Petitioner’s second assignment of error is sustained in part.

4 **THIRD ASSIGNMENT OF ERROR (LUBA No. 2014-043)**

5 ZDO 1305.04(A)(3)(e) provides that a minor modification may not result
6 in “[a]n increase in traffic congestion or use of public facilities.” See n 13.

7 The hearings officer’s findings addressing this standard are set out below:

8 “Opponents argued that there would be significant increases in
9 traffic and traffic congestion. As with other arguments made by
10 opponents, much of the argument concerned existing traffic and
11 congestion. The question is not one of existing traffic levels, but
12 whether the changes in traffic due to the proposed minor
13 modification will result in an increase in traffic compared to the
14 previously approved CUP. The applicant provided a trip
15 generation letter from a traffic engineer that shows that the
16 elimination of the composting operation will result in 12 trips per
17 day rather than 96 trips per day. While opponents argued that
18 there would be additional uncalculated trips such as: 1) trips from
19 water trucks, excavator fuel and repair trucks, and 2) trips from the
20 surface mining pit to the property on the east side of Stafford
21 Road, those trips do not even come close to closing the gap
22 between 12 and 96 trips, let alone create an increase in traffic
23 congestion. Opponents also argued that the need to have trucks
24 crossing Stafford Road from the surface mining operation to the
25 yard on the east side of the road would cause traffic congestion. I
26 do not see that trucks crossing the road would create more
27 congestion than the previously approved CUP. In addition,
28 closing the seasonal entrance closer to the traffic circle will help
29 ease traffic in the area and decrease congestion. The proposed
30 minor modification satisfies this provision.” Record 9-10.

31 Petitioner’s challenge to the hearings officer’s findings is largely a
32 challenge to the sufficiency and adequacy of the traffic study that was relied on
33 when the 2012 CUP permit was approved. The county was not required to

1 revisit that traffic study or consider petitioner’s challenges to the adequacy of
2 that transportation study to support the traffic impact findings for the 2012
3 CUP for the combined composting/mining operation. The hearings officer
4 found that the somewhat uncertain number of trips that might be attributed to
5 water trucks necessary for dust mitigation, fuel and repair trucks necessary for
6 mining equipment and unspecified increases in traffic between the existing
7 S&H site across Stafford Road and the mining site would not come close to
8 closing the gap between the 96 trips that were projected for the combined
9 composting/mining operation and the 12 trips that the applicant’s traffic
10 engineer projected from the modified mining operation. We conclude the
11 evidentiary record before the hearings officer was such that a reasonable person
12 could decide that the modified CUP will generate less traffic congestion than
13 the combined operation authorized by the 2012 CUP.

14 The third assignment of error is denied.

15 **FOURTH ASSIGNMENT OF ERROR (LUBA No. 2014-043)**

16 As previously noted, ZDO 818.04(H) requires off-street parking “for
17 employees, customers and visitors at the mining site.” Under ZDO
18 1305.04(A)(3)(g), a minor modification may not be approved if it will result in
19 “[a] reduction of off-street parking spaces or loading berths, except as provided
20 under [ZDO] 1015.” See n13. ZDO 1015 is entitled “Parking and Loading.”
21 Minimum parking spaces for different land use categories are set out in ZDO
22 Table 1015-2. For “Surface Mining,” the minimum number of on-site parking
23 spaces is determined as follows:

24 “On-site vehicular parking for employees, customers and visitors,
25 determined through Conditional Use process.”

1 The hearings officer adopted the following findings to address the ZDO
2 1305.04(A)(3)(g) minor modification standard:

3 “ZDO 1305.04(A)(3)(g) requires that a minor modification not
4 result in a reduction of off-street parking or loading berths. The
5 original CUP approved 22 off-street parking spots for the
6 combined operation. The proposed minor modification eliminates
7 all parking on the subject property. Opponents argued that by
8 eliminating all the parking spots, the application violates ZDO
9 1305.04(A)(3)(g). The applicant responds, and the Planning
10 Director found, that the off-street parking spots were needed for
11 the commercial composting operation, not for the surface mining
12 activities. According to the applicant, all employees will be based
13 out of their yard on the east side of Stafford Road, only vehicles
14 such as excavation equipment and dump trucks will be on the
15 mining site, and the mining site will not be open to the public.
16 While this is a close question, I agree with the applicant and the
17 Planning Director that the proposed minor modification does not
18 violate ZDO 1305.04(A)(3)(g) because with the elimination of the
19 commercial composting operation there will not be a need for
20 public parking for that use, all the parking spaces needed for the
21 surface mining are located directly across the street. Just as
22 important, because the subject property will now be closed to the
23 public there is no need for parking spots on the property. The
24 proposed minor modification meets this provision.” Record 10.²⁷

25 The first clause of ZDO 1305.04(A)(3)(g) can be read in isolation to
26 impose an absolute requirement that a minor modification not reduce the off-

²⁷ The parties dispute whether the hearings officer adopted the planning director’s findings as his own. We agree with petitioner that the hearings officer did not adequately express an intent to adopt the planning director’s findings, if that was his intent. In contrast, the hearings officer did clearly adopt the planning director’s conditions of approval (“I hereby adopt and incorporate the conditions of approval in the Planning Director’s decision.”) The hearings officer makes general references to the planning director’s findings in a number of places in the decision, but nowhere does he express an intent to adopt those findings.

1 street parking that was required in the original permit that is being modified.
2 However, the last clause of ZDO 1305.04(A)(3)(g) provides an exception. The
3 meaning of “except as provided under [ZDO] 1015” is not entirely clear to us.
4 It could be intended as a reference to ZDO 1015.04(F), which is entitled
5 “Exceptions to Parking Requirements.” But if that was the intended meaning,
6 ZDO 1305.04(A)(3)(g) presumably would have referenced ZDO 1015.04(F)
7 rather than referring more generally to ZDO 1015. The broader reference also
8 presents the opportunity to permit a minor modification to reduce the
9 previously required number of parking spaces in a situation where the approved
10 use is being changed, so long as the number of parking spaces required under
11 ZDO 1015 for the modified use are provided. The hearings officer did not
12 expressly adopt this interpretation of the last clause of ZDO 1305.04(A)(3)(g),
13 but he effectively did. We adopt that interpretation as well.

14 For surface mining, under ZDO Table 1015-2, the required number of
15 on-site parking spaces for “employees, customers and visitors [is] determined
16 through [the] Conditional Use process.” The 2012 conditional use process
17 determined 22 spaces were needed for the combined composting/mining
18 operation; the current conditional use process determined no spaces were
19 needed for the mining-only operation. The hearings officer found the modified
20 mining operation will not be open to the public, so no on-site parking spaces
21 are needed for customers or visitors. The hearings officer also determined no
22 on-site parking spaces are needed for employees, since they will be able to park
23 at S&H’s facility across Stafford Road and walk to the mining site. We do not
24 see that the hearings officer’s determination that no on-site parking spaces are
25 needed exceeded his authority to determine the required number of on-site
26 parking spaces for “employees, customers and visitors * * * through the

1 Conditional Use Process.” ZDO Table 1015-2. Petitioner challenges the
2 evidentiary support for the hearings officer’s finding that no on-site parking
3 spaces are needed, however we conclude a reasonable decision maker could
4 reach the conclusion the hearings officer reached based on the record in this
5 appeal.

6 Finally, we return to the ZDO 818.04(H) requirement for off-street
7 parking “for employees, customers and visitors *at the mining site.*” (Emphasis
8 added). We do not believe ZDO 818.04(H) requires off-street parking for
9 customers and visitors of a surface mine, where the county determines through
10 the conditional use process that there will be no customers or visitors. A closer
11 question is presented with regard to whether providing employee parking at the
12 existing S&H site across Stafford Road from the mining site complies with
13 ZDO 818.04(H). While the existing S&H site across Stafford Road from the
14 mining site in general parlance may not be part of the “mining site,” that off-
15 street parking appears to fulfill the same purpose that parking on the mining
16 site itself would provide by eliminating any need for on-street employee
17 parking. We conclude that in the circumstances presented here, that off-street
18 parking qualifies as off-street parking “at the mining site,” even though it is
19 across Stafford Road from the mining site.

20 The fourth assignment of error is denied.

21 The county’s decision in LUBA No. 2014-065 is affirmed.

22 The county’s decision in LUBA No. 2014-043 is remanded.