BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RICHARD W. MARTUCCI
and CYNTHIA GIBSON,
Petitioners,

vs.

JACKSON COUNTY,
Respondent,

and

RH HOLDINGS, LLC,
Intervenor-Respondent.

LUBA No. 2017-121

FINAL OPINION
AND ORDER

Appeal from Jackson County.

H. M. Zamudio, Medford, filed a petition for review and a cross response brief and argued on behalf of Richard Martucci and Cynthia Gibson. With her on the briefs was Huycke O'Connor Jarvis, LLP.

No appearance by Jackson County.

Souvanny Miller, Medford, filed a cross petition for review and a response brief and argued on behalf of RH Holdings, LLC. With her on the briefs were Mark S. Bartholomew and Hornecker Cowling, LLP.

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

REMANDED 03/20/2018

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners Richard Martucci and Cynthia Gibson (petitioners) appeal a decision by a county hearings officer approving a conditional use permit for aggregate removal on land zoned Forest Resource (FR).[1]

MOTION TO INTERVENE

RH Holdings, LLC (intervenor), the applicant below, moves to intervene in the above-referenced appeal. The motion is granted.

REPLY BRIEF

Petitioners move for permission to file a reply brief to respond to alleged new matters raised in the response brief. Intervenor objects to the reply brief, arguing that petitioners have not identified any new matters raised in the response brief, and that the reply brief merely provides surrebuttal in rebuttal to the response brief.

We agree with intervenor. Petitioners' motion to file a reply brief does not identify any new matters raised in the response brief that warrant a reply. OAR 661-010-0039. *Willamette Oaks, LLC v. City of Eugene*, 67 Or LUBA 351, 352-53 (2013). The motion to file a reply brief is denied.

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[1] LUBA No. 2017-121 was previously consolidated with LUBA No. 2017-124, because both appealed the same decision. In a final opinion and order issued this date, we bifurcate the consolidated appeals and dismiss *Martucci v. Jackson County*, __ Or LUBA __ (LUBA No. 2017-124, March 20, 2018) for the reasons explained in that opinion.

FACTS

Intervenor applied for a conditional use permit for aggregate extraction and processing on an approximately 120-acre property located near Oregon State Highway 62, a state-designated scenic resources corridor known as Crater Lake Highway. The subject property is zoned Forest Resource and is subject to Wildfire Hazard, Deer and Elk Winter Range, Scenic Resource, and Natural Area overlays. The subject property is an L-shaped parcel that has been logged in the past. The subject property has access directly onto an existing gravel one-lane haul road that is approximately 12 to 15 feet wide, known as Haul Road 192. Haul Road 192 in turn intersects with Gingko Road, a former logging road that is now paved. Gingko Road intersects directly with Highway 62.

The application proposed to mine 23.5 acres of the property for pumice, with no more than five acres being mined at one time. As proposed, the mined material will be processed on-site and loaded onto haul trucks, and transported from the subject property approximately 12 times per day to Medford, six days a week during the operating season, which runs from March 15 to April 30, and from July 1 through October 14. Petitioner Martucci (Martucci) owns a 40-acre parcel adjacent to the subject property that contains a dwelling that is his permanent residence. The application proposed to construct an eight-foot high berm between Haul Road 192 and Martucci's property, approximately 500 feet from Martucci's dwelling.

The county planning staff approved the application, and Martucci appealed the decision to the hearings officer. The hearings officer held a hearing on the application, and at the conclusion of the hearing, held the record open for submittal of additional material. We discuss the open record period in more detail in our resolution of the sixth assignment of error. At the conclusion of the open record period, the hearings officer issued a decision approving intervenor's application, with conditions.

Petitioners then filed this appeal.

SIXTH ASSIGNMENT OF ERROR (PETITIONERS)/CONTINGENT CROSS-ASSIGNMENT OF ERROR (INTERVENOR)

Petitioners' sixth assignment of error alleges that the hearings officer committed a procedural error that prejudiced petitioners' substantial rights. ORS 197.835(9)(a)(B).[2] We first set out the procedure that the hearings officer followed at the conclusion of the August 7, 2017 hearing.

At the conclusion of the hearing, the hearings officer left the record open for three periods. First, the hearings officer left the record open for ten days, during which any participant was entitled to submit additional evidence or comments in writing. We refer to that period as the First Open Record Period. The hearings officer then left the record open for an additional seven days:

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[2] ORS 197.835(9)(a) provides that LUBA shall reverse or remand a land use decision if LUBA finds the local government "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]"

> "for participants to submit additional evidence or written comments only in response to the evidence and comments submitted during the first seven [10] day period. So, again, no one can raise new issues during the second open record period. It is effectively a rebuttal time for the first open record period." Record 8-9.

We refer to that period as the Second Open Record Period. Finally, the hearings officer left the record open for fourteen days for intervenor to submit final written argument, but no new evidence. Petitioners' sixth assignment of error and intervenor's contingent cross-assignment of error assign error to the hearings officer's decision to exclude some materials and include other materials that were submitted during the Second Open Record Period.

A. Petitioners' Sixth Assignment of Error

During the Second Open Record Period, Martucci submitted a document entitled "Appellant's Opposition Argument." As relevant here, that document includes a section that lists a combination of 23 state statutes (ORS), Oregon Administrative Rules (OAR), Jackson County Comprehensive Plan (JCCP) provisions, and Jackson County Land Development Ordinance (LDO) provisions that Martucci argued (1) apply to the aggregate removal application and (2) intervenor was therefore required to demonstrate were satisfied. We

refer to that section of Appellant's Opposition Argument as the Additional Approval Criteria. Record 190-91.[3]

The hearings officer excluded the Additional Approval Criteria that is located at Record 190-91 and excluded arguments that related to the Additional Approval Criteria. Record 15-16. But the hearings officer allowed arguments that were included in the Appellant's Opposition Argument that the hearings officer characterized as "comprehensive closing arguments," as long as the arguments related to approval criteria that were identified before the close of the First Open Record Period. Record 16. The hearings officer also found that "to the extent there *is* any new evidence or comments set forth in [Appellant's Opposition Argument] that is not in response to evidence and/or issues presented during the first open record period, those submissions * * * should not be included as part of the Record and should be disregarded." Record 17 (emphasis in original).

Petitioners' sixth assignment of error is difficult to understand, in part because the assignment of error is labeled as a procedural assignment of error but conflates the issue of whether the hearings officer committed procedural error–n rejecting the Additional Approval Criteria and arguments under it--with the issue of whether petitioners adequately raised an issue that is the basis for

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[3] Martucci also submitted an Overlay Report from the county's online interactive mapping site and screen prints from the "Jackson County Scenic GIS Features." Record 219-23.

an appeal to LUBA. Petition for Review 58. In their sixth assignment of error, we understand petitioners to argue that the hearings officer committed a procedural error that prejudiced their substantial rights when he refused to consider the Additional Approval Criteria identified at Record 180-81 and arguments under those criteria. We understand petitioners to argue that ORS 197.763(1) required the hearings officer to consider Martucci's argument that intervenor's application was required to satisfy the Additional Approval Criteria identified at Record 180-81, because the argument was raised at a time when the record remained open for submittals. Petition for Review 59. Petitioners argue that the hearings officer's exclusion of that argument prejudiced their substantial right to participate in a full and fair hearing.

Intervenor responds that the hearings officer correctly excluded Martucci's arguments regarding the Additional Approval Criteria. Intervenor argues that Martucci's argument that 23 additional approval criteria applied was not in response to any evidence or argument submitted during the First Open Record Period, and the hearings officer properly excluded it because the Second Open Record Period was limited to materials responsive to arguments and evidence submitted by participants during the First Open Record Period.

In order to prevail on a claim of procedural error, a petitioner must identify the procedure allegedly violated. *Stoloff v. City of Portland*, 51 Or LUBA 560, 563 (2006). Petitioners cite ORS 197.763 in support of their argument that the hearings officer committed a procedural error in excluding

some of the arguments that Martucci presented during the Second Open Record Period. ORS 197.763 includes nine subsections, each of which are detailed and apply to specific circumstances that arise before, during, and after a quasi-judicial proceeding.[4] Accordingly, an argument that merely cites "ORS 197.763," without citing to or explaining which, if any, of the nine subsections the hearings officer violated, is arguably insufficiently developed for our review.

In a section on "preservation of issues" that is included to comply with OAR 661-010-0030(2), petitioners cite ORS 197.763(1).[5] Petition for Review 58. ORS 197.763(1) is the "raise it or waive it" statute, and allows a party to raise issues *before LUBA* as long as the issues were raised "not later than the close of the record at or following the final evidentiary hearing on the proposal [.]" Although it is barely developed, we understand petitioners to argue that

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[4] ORS 197.763 requires local governments to incorporate certain procedures into their quasi-judicial land use hearings as well as their comprehensive plans and land use regulations.

[5] ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

ORS 197.763(1) required the hearings officer to consider the Additional Approval Criteria because raising the Additional Approval Criteria during the Second Open Record Period was sufficient to raise issues concerning those criteria "not later than the close of the record," within the meaning of ORS 197.763(1).

If that is petitioners' argument, we reject it. ORS 197.763(1) must be construed in context with another related statute, ORS 197.835(3).[6] Together, those two statutes address and limit the scope of *LUBA's* review of issues in an appeal of a decision to LUBA. ORS 197.763(1) is not properly understood as requiring a decision maker to accept all evidence and argument submitted as long as that evidence and argument is submitted while the record is open.

That is even more so because other subsections of ORS 197.763, namely ORS 197.763(6) and (7), directly address the minimum procedures that apply to post-hearing submittals into the record.[7] Under ORS 197.763(6)(a), a party may request at the initial evidentiary hearing an opportunity to present additional evidence, arguments or testimony regarding the application. If that

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[6] ORS 197.835(3) provides:

> "Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

[7] The statutes set out minimum procedural requirements, and the hearings authority may elect to provide more procedure than the minimum required. The county has incorporated the provisions of ORS 197.763(6) at LDO 2.8.3(D) through (H).

request is made, the hearings authority must either (1) continue the hearing, subject to ORS 197.763(6)(b), or (2) leave the record open for at least seven days, subject to ORS 197.763(6)(c). Under either option, the continued hearing or open record period provides the parties an opportunity to submit any additional evidence, arguments and testimony. The scope of additional evidence, arguments and testimony submitted during the open record period under ORS 197.763(6)(c) is unrestricted, so it includes both (1) entirely new evidence, arguments and testimony, as well as (2) responses to evidence, arguments and testimony that were submitted at or prior to the initial hearing.

Under ORS 197.763(6)(c), if a party requests in writing an opportunity to respond to new evidence submitted during the open record period, the hearings authority must allow that opportunity. But the potential second open record period under ORS 197.763(6)(c) is expressly limited to *responses to new evidence* submitted during the continued hearing or during the first open record period. Nothing in the statute requires the hearings authority to expand this second open record period to include submittal of any evidence, arguments and testimony a person desires to submit. The hearings officer in this matter did expand the allowed submittals to include Martucci's "comprehensive closing arguments," which LDO 2.8.3(D) gives the hearings officer the authority to do. Record 15-16. But nothing in ORS 197.763(6)(c) or LDO 2.8.3(D) required the hearings officer to accept submittals that exceeded the defined scope of the Second Open Record Period.

Petitioners have not identified any procedure that the hearings officer violated in rejecting the Additional Approval Criteria and related arguments that were submitted during the Second Open Record Period.

Petitioners' sixth assignment of error is denied.

B. Intervenor's Cross Petition for Review/Contingent Cross Assignment of Error

OAR 661-010-0030(7) expressly authorizes an intervenor-respondent to file a cross petition for review to assign error to aspects of a decision on appeal, whether they agree or disagree with the ultimate disposition in the decision.[8] Intervenor filed a "Cross Petition for Review" that is labeled as such and that includes a single assignment of error identified as "Contingent Cross Assignment of Error."

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[8] OAR 661-010-0030(7) provides:

> "Cross Petition: Any respondent or intervenor-respondent who seeks reversal or remand of an aspect of the decision on appeal regardless of the outcome under the petition for review may file a cross petition for review that includes one or more assignments of error. A respondent or intervenor-respondent who seeks reversal or remand of an aspect of the decision on appeal only if the decision on appeal is reversed or remanded under the petition for review may file a cross petition for review that includes contingent cross-assignments of error, clearly labeled as such. The cover page shall identify the petition as a cross petition and the party filing the cross petition. The cross petition shall be filed within the time required for filing the petition for review and must comply in all respects with the requirements of this rule governing the petition for review, except that a notice of intent to appeal need not have been filed by such party."

In its cross petition for review, intervenor argues that the hearings officer committed a procedural error that prejudiced its substantial rights in accepting what the hearings officer characterized as "comprehensive closing arguments" contained in the Appellant's Opposition Argument. Intervenor argues that the Second Open Record Period was limited to evidence and argument in response to submittals during the First Open Record Period, and the hearings officer's acceptance of arguments that were not in response to submittals during the First Open Record Period prejudiced intervenor. Intervenor argues that it was precluded from responding to petitioners' closing arguments with new evidence, since the Third Open Record Period was limited to intervenor's final argument.

Intervenor requests that "[i]f [Martucci's] Second Open Record Period submittals present a basis for remand or reversal, LUBA should find that those materials should have been stricken, decline to consider them on appeal, and *affirm* the Hearings Officer's approval of the conditional use permit." Intervenor's Cross Petition for Review 8 (emphasis added). We understand intervenor to argue that if LUBA sustains one or more of petitioners' assignments of error, *and* if those assignments of error arise out of the "comprehensive closing arguments" that the hearings officer considered, LUBA should find that the hearings officer erred in accepting those "comprehensive closing arguments," and should affirm the decision. However, intervenor does not identify with any particularity (1) any of petitioners'

assignments of error that arise out of the "comprehensive closing arguments" or (2) any "comprehensive closing arguments" that were not arguments in response to arguments and evidence submitted during the First Open Record Period. Absent any attempt to identify those arguments with particularity, intervenor's contingent cross-assignment of error provides no basis for reversal or remand of the decision.

Intervenor's cross-assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

LDO 3.1.4(B)(1)(a) provides in relevant part:

> "The County may issue Type 3 and 4 Permits only upon finding that the proposed use is in conformance with any applicable development approval criteria and standards contained in the Comprehensive Plan, applicable standards of this Ordinance, and that all the following criteria have been met:
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> "a) The proposed use will cause no significant adverse impact on existing or approved adjacent uses in terms of scale, site design, and operating characteristics (e.g., hours of operation, traffic generation, lighting, noise, odor, dust, and other external impacts). In cases where there is a finding of overriding public interest, this criterion may be deemed met when significant incompatibility resulting from the use will be mitigated or offset to the maximum extent practicable[.]"

In three subassignments of error under their first assignment of error, petitioners argue that the hearings officer's conclusion that LDO 3.1.4(B)(1)(a) is satisfied: (1) improperly construes LDO 3.1.4(B)(1)(a); (2) is not supported by substantial evidence in the record; and (3) fails to impose a condition of approval limiting the mining area to no more than five acres and requiring

intervenor to complete reclamation prior to its expansion of the mining area as required to satisfy LDO 3.1.4(B)(1)(a). We address each subassignment of error below.

A. LDO 3.1.4(B)(1)(a) "Overriding Public Interest"

In their third subassignment of error, petitioners argue that the hearings officer erred, under the second sentence of LDO 3.1.4(B)(1)(a), in failing to adopt a finding that an "overriding public interest" exists and that "significant incompatibility resulting from the use will be mitigated or offset to the maximum extent practicable[.]" According to petitioners, petitioners and others demonstrated that "significant adverse impacts" on adjacent uses from the proposed use will occur, and accordingly the hearings officer could only approve the proposed use based upon a finding of an "overriding public interest."

The hearings officer found that the proposed use would not cause significant adverse impact on adjacent uses, due to its design and to conditions of approval that will mitigate any impacts to a level that is not "significant." Record 38-39. The hearings officer interpreted the second sentence of LDO 3.1.4(B)(1)(a) as applying only where there is a finding that the proposed use will result in significant adverse impacts to adjacent uses. Record 43.

We review the hearings officer's interpretation of LDO 3.1.4(B)(1)(a) to determine whether it is correct. *McCoy v. Linn County*, 90 Or App 271, 276, 752 P2d 323 (1988). We think the hearings officer's interpretation of LDO

3.1.4(B)(1)(a) is correct. The second sentence of LDO 3.1.4(B)(1)(a) allows the county to "deem[]" LDO 3.1.4(B)(1)(a) met *in spite of* "significant incompatibility resulting from the [proposed] use," as long as (1) there is an "overriding public interest" in the proposed use and (2) the "significant incompatibility" will be "mitigated or offset to the maximum extent practicable[.]" In other words, under the first sentence, no significant adverse impacts are permitted at all. Under the second sentence, however, "significant incompatibility" is permitted if there is an "overriding public interest" in the use and the impacts are mitigated "to the maximum extent practicable[.]" Because the hearings officer found that there were no significant adverse impacts, he was not required to determine whether an "overriding public interest" exists.

The third subassignment of error is denied.

B. Substantial Evidence (Noise, Vibration, Habitat, and Traffic Safety)

In their first subassignment of error, petitioners argue that the hearings officer's conclusion that the proposed mining use will have no significant adverse impacts on adjacent uses is not supported by substantial evidence in the record. ORS 197.835(9)(a)(C).[9] According to petitioners, noise, vibrations, and heavy truck traffic along the haul road will cause "significant adverse

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[9] ORS 197.835(9)(a)(C) provides that LUBA shall reverse or remand a land use decision under review if LUBA finds the decision is "not supported by substantial evidence in the whole record[.]"

impacts" to Martucci's adjacent existing residential use. Petition for Review 6. In addition, petitioners argue that the proposed mining use will cause significant adverse impacts on wildlife uses on Martucci's adjacent property, and on the subject property itself.

i. Noise

Martucci's residence is approximately 1,500 feet from the extraction area and approximately 500 feet from the haul road. In support of its project application, intervenor submitted a report prepared by an acoustical engineer that estimated noise from the mining activities, and a supplemental report based on actual measurements. Record 246, 845. The hearings officer relied on the reports to conclude that (i) noise from the proposed mining activities would not be audible at Martucci's residence; (ii) noise from the hauling trucks is less than the Department of Environmental Quality (DEQ) noise limits for the use; and (iii) intervenor's construction of the proposed berm between the haul road and Martucci's property would further reduce and possibly eliminate the noise.

Petitioners argue that the noise study is flawed and therefore cannot constitute substantial evidence to support a finding that there will be no significant adverse noise impacts on Martucci's adjacent property. That is so, petitioners argue, because intervenor's noise study used a gas-powered air compressor, and the study does not explain how a gas-powered air compressor replicates the noise produced by mining activities such as earth moving

machinery, aggregate processing, and heavy haul trucks. Additionally, we understand petitioners to argue that Martucci's actual observations of "loud noises and equipment sounds" from existing mining activities on the subject property are evidence that undercuts the noise studies. Petition for Review 16.

Intervenor responds, and we agree, that the hearings officer's decision which relies on intervenor's noise studies and proposed berm is supported by substantial evidence in the whole record. Notwithstanding Martucci's personal observations, intervenor's noise studies, produced by experts, constitute substantial evidence that a reasonable person could rely upon to conclude that noise will not cause a significant adverse impact on Martucci's adjacent property. *Dodd v. Hood River County*, 317 Or 172, 179-80, 855 P2d 608 (1993) (substantial evidence is evidence a reasonable person would rely on in making a decision).

This subassignment of error is denied.

ii. Vibrations

During the proceedings before the hearings officer, Martucci alleged that vibrations from the mining that have already occurred on the property are sometimes strong enough to rattle dishes in Martucci's kitchen, and that the vibrations are frequent and can last for an hour. Record 612-13 is a log of Martucci's observations during a 31-day period, noting 14 days of vibrations and some vibrations lasting up to one hour.

The hearings officer found that "adverse impact from vibrations caused by mining operation[] activities is capable of being sensed, but the impact is minimal and has negligible adverse impact on adjacent properties and uses." Record 38-39. The hearings officer concluded that the evidence Martucci offered was "vague and non-specific regarding the intensity and strength of the vibration energy." Record 38. Intervenor responds that the hearings officer clearly found that Martucci's evidence was "not credible" because it was "self-serving." Intervenor Response Brief 8. Intervenor also responds that the location of Martucci's residence 1,500 feet from the extraction area and 500 feet from the haul road are evidence that vibration from mining activities will not have a significant adverse impact on Martucci's adjacent use. *Id.* at 9.

The only evidence in the record that we are directed to is the evidence from Martucci regarding his observations of the vibrations that current mining activities at the subject property have caused at his residence. Intervenor does not point to any evidence in the record regarding the level of vibration from the extraction or processing activities, or from trucks using the haul road, other than identifying the distance of the residence from the extraction area and haul road. The hearings officer also does not identify any evidence that he relied on to support his conclusion that, in spite of Martucci's logged observations, vibrations from the mining activities would not cause a significant adverse impact on Martucci's residential use. Absent identification of some evidence to support the hearings officer's conclusion that vibrations from the mining

activities will not have a significant adverse impact on Martucci's residential use, other than the residence's distance from the extraction area and haul road, we agree with petitioners that there is not substantial evidence in the record to support the hearings officer's decision that the potential for significant adverse impact from vibrations is unlikely. On remand, the hearings officer must either identify evidence in the record to support his conclusion that vibrations from the mining use will not have a significant adverse impact on Martucci's adjacent residential use located 500 feet from the haul road and 1,500 feet from the extraction area, or adopt findings to support that the standard found in the last sentence of LDO 3.1.4(B)(1)(a), that the "overriding public interest," as we discuss above, is satisfied.

This subassignment of error is sustained.

iii. Traffic

This subassignment of error acknowledges that it raises the same issues that are raised in the fourth assignment of error, which we address and deny below.

This subassignment of error is denied.

iv. Habitat

This subassignment of error acknowledges that it raises the same issues that are raised in the third assignment of error, which we address and deny below.

This subassignment of error is denied.

C. Five-Acre Limit on the Mining Area/Reclamation

The proposed and approved mining extraction area is 23.5 acres. Intervenor's application states that "not more than [five] acres will be actively mined at any one time. This means that once extraction from the first five acres is completed, reclamation of the mined area will be initiated prior to expanding the extraction area further." Record 28. The hearings officer relied on intervenor's proposal to limit the extraction acre to five acres at one time to find that "the remaining 115-acre property will continue to be managed for wildlife habitat and timber production," and therefore that the mining activities would not have a significant adverse impact on wildlife habitat on adjacent property or the subject property. Record 39; 50.

In their second subassignment of error under the first assignment of error, petitioners argue that the decision fails to include as a condition of approval a limit on the mining use to five acres at any one time, and fails to define the activities that constitute "mining activities." Petition for Review 17. According to petitioners, evidence in the record demonstrates that intervenor plans to conduct some processing activities, including screening, outside of the five-acre mining area if other (non-aggregate) material is encountered during excavation. Petition for Review 19-20. Petitioners further argue that there is not substantial evidence in the record to support the hearings officer's conclusion that after mining is completed, the subject property will be reclaimed and returned to "improved elk habitat" because, we understand

petitioners to argue, the record does not include a reclamation plan and because a forest dwelling has been previously approved for the subject property. *Id.* at 20-22. Petitioners argue that remand is necessary for the hearings officer to include as a condition of approval the five-acre limit on mining activities that is part of intervenor's proposal, and to limit processing activities to the five-acre mining area. Intervenor responds that no condition is necessary because the mining proposal that was approved includes the five-acre limit.

We reject petitioners' argument that previous approval of a forest dwelling on the property has any bearing on the hearings officer's decision that LDO 3.1.4(B)(1)(a) is met. However, we agree with petitioners that the hearings officer erred in failing to condition his approval on the five-acre limit and associated reclamation. In *Culligan v. Washington County*, 57 Or LUBA 395, 401 (2008), we held that an applicant's promise or statement regarding a proposed development is not an adequate substitute for a condition of approval that is necessary to ensure compliance with applicable approval criteria, even if that promise or statement occurs in the application narrative. *See also Protect Grand Island Farms v. Yamhill County*, 66 Or LUBA 291, 304 (2012) (holding that the county erred in failing to condition its approval of mining activities on use of a particular recharge trench method that was included in a proposed operation and reclamation plan submitted to the Department of Geology and Mineral Industries (DOGAMI)). Given the importance of the proposed five-acre limit on mining activities and subsequent reclamation prior to continuing

mining activities to the hearings officer's determination that LDO 3.1.4(B)(1)(a) is satisfied, we agree with petitioners that intervenor's proposal is not an adequate substitute for a condition of approval that (i) limits the mining area to five acres at any one time, (ii) requires reclamation of that area prior to mining the next five-acre area, and (iii) specifies that processing activities will take place in the active mining area only.

This subassignment of error is sustained, in part.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

LDO 3.1.4(B) provides in relevant part that "the county may issue Type 3 and 4 Permits only upon finding that the proposed use is in conformance with any applicable development approval criteria and standards contained in the [JCCP] [and] applicable standards [in the LDO][.]" After refusing to consider the Additional Approval Criteria, the hearings officer listed the JCCP provisions that petitioners identified during the Second Open Record Period as "not applicable criteria" to the application.[10] Record 75.

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[10] The hearings officer found that the following JCCP provisions were "not applicable criteria":

"Comp Plan 5 Existing Land Uses

"Comp Plan 7 Aggregate-Mineral

"Comp Plan 13 Forest Land

"Comp Plan 16 Natural and Historic Resources

In their second assignment of error, petitioners argue that the hearings officer erred in failing to adopt findings that the application conforms to several provisions of the JCCP, pursuant to LDO 3.1.4(B). Intervenor responds that ORS 197.763(1) and ORS 197.835(3) preclude LUBA from considering the issue raised in petitioners' second assignment of error because the issue was not raised prior to the close of the record at or following the initial evidentiary hearing. Intervenor Response Brief 13; *see* nn 5 & 6

Petitioners do not respond to intervenor's waiver argument. Petitioners also do not cross reference any arguments that are included in the sixth assignment of error, which we addressed above.[11] Accordingly, we agree with intervenor that petitioners are precluded under ORS 197.763(1) and ORS

"Comp Plan 17 Natural Hazards (Wildfires)[.]" Record 74-75.

[11] In their sixth assignment of error, petitioners cite ORS 197.835(4)(a), which provides:

> "(4) A petitioner may raise new issues to [LUBA] if:
>
> > "(a) The local government failed to list the applicable criteria for a decision under ORS 197.195(3)(c) or 197.763(3)(b), in which case a petitioner may raise new issues based upon applicable criteria that were omitted from the notice. However, [LUBA] may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government[.]"

Petitioners do not attempt to establish that the qualified right to raise new issues pursuant to ORS 197.835(4)(a) allows them to raise the issues raised in the second assignment of error.

197.835(3) from raising the issues raised in the second assignment of error for the first time before LUBA.

However, even if the issue was not waived, we also agree with intervenor that petitioners have not established that the cited JCCP provisions are "development approval criteria and standards" within the meaning of LDO 3.1.4(B). Petitioners have not identified any mandatory language in the cited provisions or otherwise explained how the cited provisions apply directly to the application as a permit approval standard. *Bennett v. City of Dallas*, 96 Or App 645, 649, 773 P2d 1340 (1989).

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

LDO Chapter 7 includes special criteria that apply to lands subject to environmental overlays, described in the LDO as Areas of Special Concern (ASC).

A. ASC 90-10

In a portion of their third assignment of error, petitioners argue that the subject property is located in ASC 90-10, Ecologically or Scientifically Significant Natural Areas, and that the hearings officer erred in failing to apply LDO 7.1.1(K).[12] LDO 7.1.1(K)(1) provides in relevant part that it applies to

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[12] LDO 7.1.1(K) provides:

"1) Description

ASC 90-10 areas that are "illustrated on a map contained in the Goal 5 background document and the Natural and Historic Resources Element of the [JCCP]." Intervenor responds that petitioners are precluded from raising the issue raised in this subassignment of error pursuant to ORS 197.763(1) and ORS 197.835(3), because no issue–that LDO 7.1.1(K) applies–was raised prior to the close of the record. *See* nn 5 & 6.

> "This area includes all lands on which ecologically or scientifically significant natural areas are located. These sites are illustrated on a map contained in the Goal 5 background document and the Natural and Historic Resources Element of the [JCCP], and are either protected or subject to limitations on conflicting uses where they would affect the features and values associated with each site.
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> "2) Special Regulations
>
> "These identified sites are considered protected under Statewide Planning Goal 5, its related Administrative Rules, and [JCCP] policies, in addition to management plans and objectives established for each site by federal, state and other local jurisdictions. All land use actions, other than forest operations which are governed by the Oregon Forest Practices Act, that are inconsistent with the stated management and objectives for '2A' and '3A' sites will be prohibited. Land use actions proposed on or adjacent to '3C' sites will be evaluated under a Type 2 process pursuant to Section 3.1.3 to ensure that potentially conflicting uses are adequately limited to retain the resource value identified in the [JCCP] and identified in the Goal 5 Resources Background Document."

Petitioners have not responded to intervenor's waiver argument. We agree with intervenor that the issue raised in this portion of the third assignment of error is waived.

The June 20, 2017 staff report at Record 79-81 includes findings that:

> "The subject parcel is located within ASC 90-1 Deer and Elk Winter Range and is addressed below. The parcel is adjacent to ASC 90-3 Scenic Resources and is addressed below. *The subject parcel is partially within a natural area in the northwest portion of the property. The natural area is a [Spotted Owl Habitat Area] SOHA managed by the USFS [United States Forest Service]. The natural area is not specifically identified in the Goal 5 Resources Background Document.*" Record 80-81 (italics and underlining added).

The staff report's position, taken early in the proceedings, was that the natural area that includes the subject property is not identified in the Goal 5 Background Document or the JCCP.[13] It was not until the Second Open Record Period that petitioners argued for the first time that LDO 7.1.1(K) is an Additional Approval Criterion and that the proposed mine violates LDO 7.1.1(K). As explained above in our resolution of the sixth assignment of error, we conclude that the hearings officer properly refused to consider that argument as outside of the limited allowance for submissions during the Second Open Record Period.[14]

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[13] The hearings officer incorporated the factual findings in that staff report. Record 74.

[14] Petitioners have also not established that the issue raised in that portion of the third assignment of error, that LDO 7.1.1(K) applies to the application to

The third subassignment of error is denied.

B. ASC 90-1

It is undisputed that the subject property is located in ASC 90-1, Deer and Elk Habitat. Accordingly, LDO 7.1.1(C) applies to the application. As relevant here, LDO 7.1.1(C)(5) requires the county to find that "the proposed use will have minimal adverse impact on winter deer and elk habitat[.]"[15] LDO 7.1.1(C)(6) provides that:

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mine, could not have been raised during the proceedings below. ORS 197.835(4)(a)(LUBA may refuse to consider an issue based on a notice's failure to list applicable criteria if "it finds that the issue could have been raised before the local government[.]")

[15] LDO 7.1.1(C)(5) provides:

"General Development Standards

"The following standards apply to all discretionary land use permits subject to review under this Section, unless a condition of approval when the parcel was created required compliance with prior habitat protection standards. The land use decision will include findings that the proposed use will have minimal adverse impact on winter deer and elk habitat based on:

"a) Consistency with maintenance of long-term habitat values of browse and forage, cover, sight obstruction;

"b) Consideration of the cumulative effects of the proposed action and other development in the area on habitat carrying capacity; and

"c) Location of dwellings and other development within 300 feet of an existing public or private road, or driveway that provides access to an existing dwelling as shown on the County 2001 aerials or other competent evidence. When it

"Initial dwellings and other development may be sited in locations that do not conform with subsections (4) and (5) above when the applicant demonstrates at least one (1) of the following:

" * * * * *

"(b) A written authorization approving an alternate siting plan is received from ODFW. Any such authorization must include a statement from ODFW that confirms habitat values and carrying capacity will be afforded equal or greater protection if the dwelling or other development is sited in the alternate location. The written authorization must be made on ODFW letterhead or forms and be signed by an ODFW official with authority to make habitat protection decisions. Authorization of an alternative dwelling location will not release an applicant from compliance with any other applicable standard of this Ordinance."

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can be demonstrated that habitat values and carrying capacity are afforded equal or greater protection through a different development pattern an alternative location may be allowed through the discretionary review process described in subsection (6), below;

"d) Dwellings other than the initial dwelling on a lot or parcel will comply with one (1) of the following, as applicable:

"i) A maximum overall density (within the tract) of one (1) dwelling unit per 160 acres in Especially Sensitive Winter Range units, or one (1) dwelling unit per 40 acres in Sensitive Winter Range units; or

"ii) Clustering of new structures within a 200-foot radius of the existing dwelling to achieve the same development effect as would be achieved under i), above."

i. LDO 7.1.1(C)(6) Alternative Siting Plan

In their second subassignment of error under the third assignment of error, petitioners argue that the hearings officer improperly construed LDO 7.1.1(C)(6) to allow an applicant to satisfy LDO 7.1.1(C)(5) if a written authorization approving an Alternative Siting Plan (ASP) is received from the Oregon Department of Fish and Wildlife (ODFW) and that authorization includes certain statements. The record includes a letter from ODFW approving an ASP for the proposed mining use. Record 874-75. Petitioners argue that an ASP only allows development to deviate from the requirement in LDO 7.1.1(C)(5)(c) that development be located within 300 feet of an existing accessway. *See* n 15. According to petitioners, the allowance for an ASP does not allow the county to approve development that would otherwise fail to satisfy the general requirement in LDO 7.1.1(C)(5) that the proposed development have a minimal adverse impact on deer and elk habitat, and the hearings officer erred in failing to adopt findings that LDO 7.1.1(C)(5)(a) and (b) are met. In support of their argument, petitioners cite the last sentence of LDO 7.1.1(C)(6)(b), which provides that "[a]uthorization *of an alternative dwelling location* will not release an applicant from compliance with any other applicable standard of [the LDO]." (Emphasis added.)

We disagree with petitioners on both counts. First, LDO 7.1.1(C)(6) allows "other development [to] be sited in locations that do not conform with subsection[] * * * (5) above[]" if the county receives an ASP approval from

ODFW. LDO 7.1.1(C)(6) does not list only subsection (5)(c), or otherwise include any language to demonstrate that it only allows development that would deviate from subsection (5)(c). Second, the last sentence of LDO 7.1.1(C)(6) applies only to "[a]uthorization of an alternative dwelling location," and simply does not apply to the circumstances presented here: an application to mine. Finally, the hearings officer found that "considering all of the factors listed in LDO 7.1.1(C)(5)," the proposed use would have minimal adverse effect on winter deer and elk habitat. Record 51. Petitioners fail to acknowledge that finding or assign error to it.

The second subassignment of error under the third assignment of error is denied.

ii. LDO 7.1.1(C)(5) Minimal Adverse Impact

In the first subassignment of error under their third assignment of error, petitioners argue that the hearings officer's finding that the mine will have minimal adverse impact on winter deer and elk habitat is not supported by substantial evidence in the record. ORS 197.835(9)(a)(C). *See* n 9. The hearings officer relied on an ODFW letter from an ODFW wildlife biologist that concludes that the ASP "can provide equal protection to wintering deer and elk that complies with the requirements" of the LDO. Record 874. The ASP prohibits mining from October 15 to March 14 and in May and June, and requires habitat improvement and mitigation. The hearings officer also relied on evidence in the record that the subject property is not a high use area for elk,

the subject property is most important for habitat purposes in May and June, elk habitat has been improved on the property over the last two years, and the property includes high value habitat for elk. Finally, the hearings officer relied on intervenor's proposed mining plan to mine five acres at a time and to reclaim the previously mined area prior to moving to a new area within the extraction area. Record 39.

Petitioners point to evidence in the record that ten acres of the property is already developed and deforested and we understand petitioners to argue that that evidence undercuts the evidence that the hearings officer relied on. Petitioners also argue that other activities such as equipment delivery are allowed to occur during the months when mining is prohibited.

Substantial evidence is evidence a reasonable person would rely on. *Dodd*, 317 Or at 179. Petitioners have not established that the hearings officer's conclusion that LDO 7.1.1(C)(5) is met, and that the mining activities will have minimal adverse impact on winter deer and elk habitat, is not supported by substantial evidence in the whole record.

The first subassignment of error under the third assignment of error is denied.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

LDO 3.1.4(B)(2)(d) provides in relevant part:

> "(2) In order to ensure that certain land use actions will not result in land uses that are incompatible with public

transportation facilities, compliance with criteria a, b, c and d below must be satisfied through completion of a Transportation Impact Study (TIS) completed by a registered professional engineer with expertise in transportation. * * *

"* * * * *

"d) Regardless of whether adequate capacity exists, changes in land use and new or expanded development proposals will not be approved if they will create, or would worsen, a safety problem on a public transportation system or facility. If a problem would be created or worsened without mitigation, then a mitigation plan that resolves the safety concern must also be approved and included in the proposal in order for the land use change and/or development proposal to be approved. Where a safety concern exists, study by a registered professional engineer with expertise in transportation will be considered to determine if a problem would be created or worsened."

Intervenor submitted a TIA and a supplemental TIA (the TIAs). Petitioners also submitted a TIA. Based on the TIAs submitted by intervenor, the hearings officer concluded that with three conditions of approval, the proposed mining use would not "create or worsen a safety problem on public transportation * * * facility[.]" Record 61.

In their fourth assignment of error, we understand petitioners to argue that the hearings officer's conclusion that the proposed mining use will not "create or worsen" traffic safety is not supported by substantial evidence in the record. In support of their argument, petitioners cite to intervenor's TIAs. The TIAs demonstrate that for the Gingko Road/Highway 62 intersection, the

intersection does not meet the required sight distance of 930 feet for vehicles approaching that intersection on Highway 62 from the north (southbound vehicles), and because of the inadequate sight distance, vehicles approaching from the north will need to decelerate more than 70 percent of the posted speed unless the sight distance can be improved to meet the required standard. Record 858-60. The sight distance is limited by vegetation obstructing the sight distance, by a curve in the road and by elevation differences. Record 614, 859. The hearings officer found that the proposed mining and aggregate use creates "[h]eightened traffic safety concerns at the intersection of Gingko Road and Highway 62," and imposed Condition of Approval 4. Record 38; 76. Condition 4 requires that:

> "**Prior to commercial hauling under this permit**, evidence shall be provided to Development Services: a) that [the Oregon Department of Transportation] ODOT permit requirements have been satisfied; b) that brush and limbs have been trimmed near the intersection of Highway 62 and Gingko Road to provide a minimum of 930 feet of sight distance; and c) that the Highway 62 apron south of the intersection with Gingko Road has been widened and graveled to better accommodate a northbound vehicle executing a turn onto Gingko Road. The extent of widening will be determined following completion of a topographic study and detailed design work for the intersection. All work shall be done in compliance with ODOT specifications and requirements." Record 76 (bold in original).

Petitioners argue that Condition 4 is not sufficient to assure that the proposed mine will not create traffic safety problems because Condition 4 requires trimming vegetation along Highway 62, which is a "designated scenic buffer"

that is along a road that is not controlled by intervenor, but by ODOT. Petition for Review 55.

We conclude that the hearings officer's decision that the proposed mining use will not "create or worsen" traffic safety on a public road is supported by substantial evidence in the whole record, including the TIAs and the condition of approval that the hearings officer imposed to address traffic safety impacts. Condition 4 requires intervenor to trim vegetation, which will necessarily require that intervenor obtain permission from ODOT to do so. If intervenor cannot comply with the condition, then no commercial hauling can occur. Petitioners have not demonstrated that Condition 4 is inadequate to ensure compliance with LDO 3.1.4(B)(2)(d) or otherwise not supported by substantial evidence in the whole record.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

In their fifth assignment of error, we understand petitioners to argue that the hearings officer's decision is not supported by substantial evidence in the whole record, or adequate findings, regarding the adverse impacts from the aggregate processing that was approved as part of the application, because the decision does not separately address impacts from the processing activities, as distinguished from extraction and hauling activities. We also understand petitioners to argue that the hearings officer improperly construed the

applicable law in failing to apply unspecified provisions of the JCCP and the LDO.

Intervenor responds that the proposal includes mining and processing in the 23.5-acre extraction area, and the hearings officer considered the potential impacts of both the proposed mining activity and the proposed processing activities together and concluded that the uses proposed in the application would not have significant adverse impacts on surrounding uses. We agree with intervenor that the hearings officer considered the impacts from the mining activities, including extraction and processing. Record 38-43 (describing several operational limitations in intervenor's proposal and conditions of approval, including that all mining and processing will occur "in the pit," that are mitigating factors that make the adverse impacts from the proposed use not "significant.")

The remainder of petitioners' fifth assignment of error is insufficiently developed for our review. Petitioners' remaining arguments do not cite any specific JCCP or LDO provisions that the hearings officer failed to apply. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

The fifth assignment of error is denied.

The county's decision is remanded.