

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

3
4 MARY ELIZBETH MCANDREW,
5 *Petitioner,*

6
7 vs.

8
9 WASHINGTON COUNTY,
10 *Respondent,*

07/12/18 AM 9:27 LUBA

11
12 and

13
14 LOOK CONSTRUCTION, LLC
15 and MICHAEL TROJAN,
16 *Intervenors-Respondents.*

17
18 LUBA No. 2018-005

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Washington County.

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25 William K. Kabeiseman, Portland, filed the petition for review and
26 argued on behalf of petitioner. With him on the brief were Carrie A. Richter
27 and Bateman Seidel, P.C.

28
29 No appearance by Washington County.

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31 D. Chris Burdett, Hillsboro, filed the response brief and argued on behalf
32 of intervenors-respondents. With him on the brief was Marron Law, LLC.

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

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37 ZAMUDIO, Board Member, did not participate in the decision.
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AFFIRMED

07/12/2018

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

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NATURE OF THE DECISION

Petitioner appeals a county hearings officer decision approving a drainage hazard area alteration and tree removal permit allowing construction of a single-family residence with conditions.

REPLY BRIEF

Petitioner moves to file a reply brief to respond to new issues raised in the response brief. The motion is granted.

FACTS

Intervenor-respondent Look Construction, LLC applied for a Drainage Hazard Area Alteration and Tree Removal Permit to construct a new 2,800-square-foot single-family residence on a parcel owned by intervenor-respondent Michael Trojan (collectively, intervenors). The proposed house is two stories, with a 1,294-square-foot footprint and two bedrooms located above the garage. The site on which intervenors planned to construct the house is a .24-acre parcel of undeveloped land in the Metzger/Progress area of unincorporated Washington County. The subject property is located on the south side of SW Elmwood Street, between SW 80th Avenue and SW 82nd Avenue. Ash Creek flows from east to west through the southern portion of the site.

According to the Metzger-Progress Community Plan, all but the northern 45 feet of the subject property is designated as a Statewide Planning Goal 5

1 resource. The proposed house will impact two Goal 5 Resources, or
2 “Significant Natural Resources”: (1) “Water Area & Wetland and Fish and
3 Wildlife Habitat,” and (2) “Wildlife Habitat.” The Washington County
4 Comprehensive Plan identifies the southern two-thirds of the property as
5 “wildlife habitat,” and the entire property as “vegetated corridor.”¹ Record 47.
6 The subject property is zoned R-5 (residential, 5 units per acre).

7 The county planning staff issued a written decision approving
8 intervenors’ application, subject to conditions. Petitioner filed a written appeal
9 of the county’s decision. On November 16, 2017, county staff recommended
10 that the hearings officer deny petitioner’s appeal and approve the application

¹ The Metzger – Progress Community Plan is one of several planning elements which in total comprise the Washington County Comprehensive Plan.

Washington County Development Code (CDC) 422-2.2 defines “Water Areas and Wetlands and Fish and Wildlife Habitat” as “Water areas and wetlands that are also fish and wildlife habitat.”

CDC 422-2.3 defines “Wildlife Habitat” as “Sensitive habitats identified by the Oregon Department of Fish and Wildlife, the Audubon Society Urban Wildlife Habitat Map, and forested areas coincidental with water areas and wetlands.”

CDC 106-215 defines “vegetated corridor” as:

“Lands that are located within the [CWS] Clean Water Services boundary and are defined in the ‘Design and Construction Standards for Sanitary Sewer and Surface Water Management’ or its successor. Vegetated corridors are generally preserved and maintained lands intended to protect the water quality functions of water quality sensitive areas.”

1 subject to the conditions included in the staff report to the hearings officer. On
2 December 15, 2017, the hearings officer denied petitioner’s appeal and
3 approved intervenors’ application, subject to conditions of approval. This
4 appeal followed.

5 **FIRST ASSIGNMENT OF ERROR**

6 In her first assignment of error, petitioner argues that the hearings officer
7 erred in failing to apply Washington County Development Code (CDC) 421-
8 7.8 to intervenors’ project application. Petitioner also contends the hearings
9 officer’s decision is not supported by substantial evidence in the whole record.
10 ORS 197.835(9)(a)(C).

11 CDC 421-7.8 requires a finding:

12 “That the environmental impact of the disturbance or alteration of
13 riparian wildlife and vegetation has been minimized to the extent
14 practicable *as required by Section 422*. Enhancement of riparian
15 habitats through planting or other such improvements may be
16 required to mitigate adverse effects. Significant features such as
17 natural ponds, large trees and endangered vegetation within the
18 flood area shall be protected when practicable.” (Emphasis added.)

19 The hearings officer’s decision does not include any findings explicitly
20 addressing CDC 421-7.8 although, as discussed below, the decision includes
21 findings addressing similar standards in CDC 422 and other code and plan
22 provisions. Petitioner argues that failure to adopt findings addressing CDC
23 421-7.8 is itself grounds for remand. Even if that failure is overlooked,
24 petitioner argues that the record and decision fail to demonstrate that, as CDC
25 421-7.8 requires, that “the environmental impact of the disturbance or

1 alteration of riparian wildlife and vegetation has been minimized to the extent
2 practicable[.]” Petitioner contends that the environmental impact of the
3 proposed house derives from its relatively large size, and therefore the most
4 obvious way to “minimize” the impact of the house is to limit the size of the
5 house. Petitioner argues:

6 “[The intervenors] easily could have minimized [the impact of the
7 project] by pursuing [construction of] a smaller home. In
8 particular, the house could be smaller with a smaller garage and no
9 deck to minimize impact and sited to avoid removal of all Douglas
10 Firs. Removing all of a species on a site is not ‘minimizing’
11 impact. No alternative designs were submitted to the County and
12 the house is larger than many others on [the] street, it includes a
13 second story where all but one home is a single story, the lot is
14 much smaller than the other lots in the area and this site has
15 significantly more environmental constraints than other lots.”
16 Petition for Review 10-11.

17 The hearings officer rejected that argument, in findings addressing CDC
18 422 and other provisions:

19 “As noted above, CDC 422-3.3(A)(6) and CDC 421-8 allow the
20 construction of detached dwellings and accessory structures on a
21 lot of record in significant natural resource areas and flood plains.
22 These sections make no reference to the size of the structures.
23 There are no alternative locations for the proposed residence on
24 the site; that is, there is insufficient suitable, existing buildable
25 land area to permit construction outside of the natural areas and
26 flood plain. The proposed 2,800 square foot three bedroom
27 residence is similar to the larger existing homes in the area. (See
28 Figure 2 of Exhibit ORA-1). The applicant located the residence
29 as far north, away from the stream and riparian areas, as feasible.
30 The footprint of the proposed residence will impact 1,294 square
31 feet, or 12 percent of the total site area. Eliminating the garage
32 would reduce the total square footage of the structure, but it would
33 not reduce the building footprint, or its impact on the habitat and

1 floodplain, because two of the three second-floor bedrooms are
2 proposed over the top of the garage. If the garage were removed,
3 these bedrooms would be located on the ground floor within the
4 same footprint as the proposed garage. Eliminating the garage and
5 the second-floor bedrooms, if feasible, would not substantially
6 reduce the impact on the site's habitat resources. The resulting
7 building would be narrower in the east-west direction, providing
8 wider side yard areas, but the structure would extend the same
9 distance south, toward the stream. The wider side yard would
10 provide limited habitat, due to their proximity to structures on this
11 site and on adjacent properties." Record 19 (footnotes omitted).

12 We agree with the hearings officer and intervenors that nothing cited to
13 us in the CDC, including CDC 421-7.8, requires the applicant to propose a
14 smaller sized dwelling, in order to demonstrate that environmental impacts
15 have been "minimized to the extent practicable." In addressing similar code
16 and plan requirements, discussed below, the hearings officer concluded that
17 environmental impacts were minimized to the extent practicable by locating the
18 proposed dwelling as far north on the site as possible, consistent with
19 applicable setbacks. Petitioner has not established that CDC 421-7.8 must be
20 interpreted to require more. Under petitioner's apparent view of CDC 421-7.8,
21 intervenors would have to submit alternative proposals for a range of smaller-
22 sized dwellings, and the hearings officer would presumably pick the alternative
23 that the hearings officer believed was the minimal, or smallest, dwelling size
24 that is "practicable." As the hearings officer noted, the entire property is
25 subject to at least one type of environmental resource protection, so there is no
26 alternative, no matter how small, that can be located entirely outside protected
27 areas. Thus, intervenors' ability to obtain approval of a dwelling, which is a

1 permitted use in this residential zone, would depend upon the hearings officer's
2 apparently uncabined view of what constitutes the smallest size dwelling that is
3 "practicable." We do not believe that the county intended CDC 421-7.8 to
4 grant the hearings officer that much unfettered discretion to approve, deny or
5 modify an application for a permitted residential use. Accordingly, we reject
6 petitioner's preferred interpretation of CDC 421-7.8, because under that
7 interpretation the hearings officer's exercise of discretion to approve or deny a
8 permitted use would be highly problematic.²

9 Nonetheless, petitioner is correct that the hearings officer's failure to
10 adopt any findings explicitly addressing CDC 421-7.8 would warrant remand,
11 unless, as intervenors argue, other findings in the decision suffice to address
12 the substance of CDC 421-7.8. We turn to that question.

² Further, as the hearings officer observed:

"There is no dispute that the proposed development will have some impacts on wildlife habitat, water areas and wetlands and fish and wildlife habitat, as well as wetlands, and the Drainage Hazard Area [DHA]. Those impacts are unavoidable. The site is a legal lot of record and zoned for residential development. Therefore some form of development must be allowed on the site. To prohibit any development on the site would result in an unconstitutional taking, because it would deny 'all economically beneficial or productive use of land.' *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). Given the existing residential zoning the only reasonable use of the site is for a single-family residence. The [CDC] expressly recognizes this requirement for even the most protected natural resources." Record 15.

1 Intervenors contend that the hearings officer adopted findings addressing
2 compliance with CDC 422 and other standards that ensure that impacts on
3 significant natural resources are minimized. Intervenors note that the first
4 sentence of CDC 421-7.8 expressly requires that the hearings officer determine
5 that “the environmental impact of the disturbance or alteration of riparian
6 wildlife and vegetation has been minimized to the extent practicable” based on
7 the requirements of CDC 422. According to intervenors, the findings quoted
8 above and below in the text addressing CDC 422 and similar requirements
9 adequately establish compliance with the first sentence of CDC 421-7.8.
10 Alternatively, intervenors argue that to the extent the other findings in the
11 record are inadequate to establish compliance with CDC 421-7.8, the decision
12 may be affirmed notwithstanding inadequate findings, because “relevant
13 evidence [exists] in the record which clearly supports the decision or a part of
14 the decision[.]” ORS 197.835(11)(b).

15 We agree with intervenors that the hearings officer’s failure to explicitly
16 address CDC 421-7.8 does not warrant remand. The hearings officer
17 apparently understood the language “as required by [CDC] 422” to mean that
18 addressing the requirements of CDC 422 is sufficient to establish compliance
19 with CDC 421-7.8. In addressing CDC 422-3.3(A)(6), the hearings officer
20 found:

21 “The site is a lot of record and there is insufficient land on the site
22 outside of the Natural Resource Areas to accommodate a dwelling.
23 Therefore the proposed detached dwelling is allowed within the
24 Natural Resource Areas. The applicant proposed to locate the

1 dwelling as far north as feasible, consistent with setback
2 requirements, in order to minimize impacts on the resource areas.

- 3 • “According to site plans, approved by CWS, the Vegetated
4 Corridor extends north from the wetland encompassing the
5 entire northern portion of the site. Consequently, there are
6 no areas of the site, in particular between Ash Creek and the
7 street (front property line) that are not encumbered with
8 Vegetated Corridor. Therefore, the placement of any size
9 house on the site will encroach into the VC.

- 10 • “The northern edge of the wetland is as close as
11 approximately 25 feet from the street (front property line).
12 Upon netting out the minimum 12-foot front yard setback
13 and minimum 20-foot driveway requirements, the resulting
14 buildable area is insufficient to site the proposed dwelling
15 and for that matter almost any practicable building
16 envelope.” Record 50.

17 The hearings officer adopted similar findings, addressing CDC 422-3.1B and
18 the Metzger Progress Community Plan, respectively:

19 “The proposed building envelope, including the elevated rear
20 deck, will impact the Wildlife Habitat and a small portion of the
21 Water Areas and Wetlands and Fish and Wildlife Habitat.
22 However, as discussed above, it is not feasible to avoid these
23 impacts without precluding reasonable development on the site.
24 The applicant proposed to minimize these impacts to the extent
25 feasible by locating the structure as far north on the site as
26 possible, given the setback requirements of the Code.” Record 48.

27 “The proposed development is consistent with the Community
28 Plan. The mature trees and other vegetation in close proximity to
29 Ash Creek provide important wildlife habitat. The proposed
30 development will retain these resources to the extent feasible
31 while allowing development on this existing lot of record. The
32 environmental impacts, including disturbance and alteration of the
33 riparian wildlife and vegetation have been minimized to the extent

1 practicable, while allowing reasonable development on the site.”
2 Record 21.

3 Taken together, the quoted findings appear sufficient to address the substance
4 of the first sentence of CDC 421-7.8, under the hearings officer’s view,
5 affirmed above, that nothing in the CDC, including CDC 421-7.8, requires the
6 applicant to present alternative, smaller house designs, and that environmental
7 impacts are “minimized to the extent practicable” by locating the proposed
8 dwelling as far north on the site as possible, consistent with applicable
9 setbacks.

10 Petitioner advances no arguments regarding the second and third
11 sentences of CDC 421-7.8, which state respectively that “[e]nhancement of
12 riparian habitats through planting or other such improvements may be required
13 to mitigate adverse effects,” and “[s]ignificant features such as natural ponds,
14 large trees and endangered vegetation within the flood area shall be protected
15 when practicable.” To the extent petitioner also challenges the lack of findings
16 expressly addressing the second sentence, we note that the findings discuss the
17 mitigation plans required by other agencies or under other criteria.³ The

³ The hearings officer found, in addressing CDC 422-3.1(B):

“CWS further found that the proposed permanent encroachments will be adequately mitigated for though the agency’s ‘Mitigation Bank or ILF or Payment to Provide.’ The mitigation bank process will replace the values and functions of the wetlands and Vegetated Corridors impacted by the proposed development. It is important to note as an expert on wetland protection and

1 hearings officer also adopted findings addressing petitioner’s arguments below
2 regarding removal of a stand of large Douglas Fir trees on the property. The
3 hearings officer acknowledged that all Douglas Firs on the property are being
4 removed as a result of the proposed development, but the majority of the trees
5 proposed for removal are located within the footprint of the proposed residence
6 and driveway, or are necessary to accommodate required utility trenches, and
7 therefore no alternative exists. Record 18. If there are other significant features
8 within the flood area that are not protected under the proposal, petitioner does
9 not identify them.

10 In sum, the findings addressing CDC 422 and similar code and plan
11 language appear adequate to address the substantive requirements of CDC 421-
12 7.8. Accordingly, we agree with intervenors that the hearings officer’s failure
13 to adopt findings expressly directed at CDC 421-7.8 is harmless error, and that
14 petitioner’s arguments under this assignment of error do not provide a basis for
15 reversal or remand of the decision.

16 The first assignment of error is denied.

17 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

18 In her second assignment of error, petitioner argues the hearings officer
19 erred in his interpretation and application of CDC 421-8.1, which prohibits

preservation, CWS staff concluded that the proposed project (*e.g.*, house placement) was designed in such a manner as to minimize encroachments into the sensitive areas and Vegetated Corridors to the extent practicable.” Record 48-49.

1 construction of new houses in a flood area if there is a suitable buildable site
2 outside the flood area.⁴ In her third assignment of error, petitioner argues the
3 hearings officer erred in his interpretation and application of CDC 422-
4 3.3(A)(6), which prohibits alteration of the vegetation or terrain within a
5 riparian corridor unless there is a suitable building site outside the riparian
6 corridor.⁵ Both the initial staff decision and hearings officer’s decision
7 addressed and found compliance with CDC 421-8.1 and CDC 422-3.3(A)(6),

⁴ CDC 421-8.1 provides:

“No new dwelling shall be constructed in a flood area if:

“A. The lot or parcel contains sufficient, suitable, existing buildable land area that is located outside the flood area so as to permit construction at least one (1) foot above the flood area; and

“B. The buildable land area shall be deemed suitable if it includes a minimum ten (10) foot perimeter setback around the proposed dwelling that is outside the flood area.”

⁵ CDC 422-3.3(A) provides, in relevant part:

“No new or expanded alteration of the vegetation or terrain of the Riparian Corridor (as defined in Section 106) or a significant water area or wetland * * * shall be allowed except for the following:

“* * * * *

“(6) Detached dwellings and accessory structures on a lot of record, provided there is insufficient suitable, existing buildable land area to permit construction outside the riparian corridor * * *.”

1 concluding that the subject property does not include a buildable site located
2 entirely outside the flood area and riparian corridor that meets all required
3 setbacks. Record 43, 50 (after setbacks, there is no suitable building site
4 outside the riparian corridor for “almost any practicable building envelope.”).
5 On appeal, petitioner challenges the hearings officer’s findings, arguing that
6 the subject property in fact includes suitable building sites that are located
7 entirely outside the flood area and riparian corridor, if the dwelling were
8 reduced in size, designed differently or if its orientation were flipped east to
9 west.

10 In response to both assignments of error, intervenors contend that
11 petitioner failed to raise any issue under CDC 421-8.1 and CDC 422-3.3(A)(6)
12 during the proceedings below, and therefore petitioner’s arguments under these
13 assignments of error are waived pursuant to ORS 197.835(3) and ORS
14 197.763(1).⁶ In the petition for review and reply brief, petitioner does not

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.”

ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to [LUBA] 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,

1 contend that she raised any issues under CDC 421-8.1 and CDC 422-3.3(A)(6)
2 during the proceedings below, but argues that the county planning staff report
3 identified CDC 421-8.1 and CDC 422-3.3(A)(6) as applicable criteria, and that
4 general issues were raised below regarding the dwelling's impacts on natural
5 resources, including arguments that reducing the size of the dwelling would
6 reduce impacts on natural resources.

7 We agree with intervenors that relying upon the staff report's citation to
8 CDC 421-8.1 and CDC 422-3.3(A)(6) is insufficient to raise an issue under
9 those code provisions, for purposes of ORS 197.763(1) and 197.835(3). As we
10 held in *Butte Conservancy v. City of Gresham*, 51 Or LUBA 194, 208 (2006):

11 "A finding in a staff report that a criterion is satisfied is
12 insufficient to 'raise' an 'issue' with respect to that criterion, for
13 purposes of ORS 197.763(1) and 197.835(3). No party to the
14 proceedings below would understand from the staff report that an
15 issue has been raised regarding compliance with [the applicable
16 code provisions]."

17 Further, the general arguments made below, that reducing the size of the
18 dwelling at its proposed location would reduce impacts on natural resources,
19 did not give the hearings officer and other parties fair notice that petitioner
20 believed that the subject property includes sufficient buildable land for the
21 proposed dwelling that is located entirely outside the flood area and riparian

planning commission, hearings body or hearings officer, and the
parties an adequate opportunity to respond to each issue."

1 corridor, and consistent with applicable setbacks. Accordingly, the issues
2 raised under these assignments of error were not raised below, and are waived.⁷

3 The second and third assignments of error are denied.

4 **FOURTH ASSIGNMENT OF ERROR**

5 In her fourth assignment of error, petitioner argues that the hearings
6 officer’s decision improperly construed the applicable law in concluding that
7 the proposed project will not seriously interfere with the preservation of fish
8 and wildlife areas and habitat identified in the Washington County
9 Comprehensive Plan pursuant to CDC 422-3.6. ORS 197.835(9)(a)(D).

10 CDC 422-3.6 provides:

11 “For any proposed use in a Significant Natural Resource Area,
12 there shall be a finding that the proposed use will not seriously
13 interfere with the preservation of fish and wildlife areas and
14 habitat identified in the Washington County Comprehensive Plan,
15 or how the interference can be mitigated.”

16 Petitioner’s argument appears to be based upon two premises: First,
17 petitioner argues the hearings officer incorrectly found the proposed project
18 would not “seriously interfere” with “fish and wildlife areas and habitat”
19 because he assumed that “fish and wildlife areas and habitat” only include the
20 southern two-thirds of the subject property. Petition for Review 25. Second,

⁷ We need not address the merits of petitioner’s arguments. However, we note that, as intervenors argue, the county staff report considered flipping the orientation of the proposed dwelling east to west, as petitioner now suggests, and concluded that doing so would increase encroachment into the wetland and vegetation corridor compared to the proposed orientation. Record 66.

1 petitioner argues because the proposed project, in fact, does “seriously
2 interfere” with the preservation of “fish and wildlife areas and habitat,” the
3 hearings officer’s decision is in error because it does not adequately address the
4 required mitigation. *Id.* at 26.

5 In response, intervenors argue that petitioner has conflated the regulated
6 areas of “wildlife habitat” and “vegetated corridor,” which are distinctly
7 defined areas that are not necessarily co-extensive. *See* n 2. According to
8 intervenors, the hearings officer correctly concluded that only the southern
9 two-thirds of the subject property is mapped as wildlife habitat, but that the
10 entire property is designated “vegetated corridor.” Intervenors argue, correctly,
11 that CDC 422-3.6 imposes no requirements regarding vegetated corridors. We
12 agree with intervenors that petitioner has not demonstrated that the hearings
13 officer erred in applying CDC 422-3.6 only to the portion of the subject
14 property designated as wildlife habitat.

15 Finally, petitioner argues the hearings officer’s decision erred in failing
16 to require mitigation under CDC 422-3.6. However, intervenors argue, and we
17 agree, that mitigation is required under CDC 422-3.6 only if the county finds
18 that the development will seriously interfere with wildlife habitat. Because the
19 hearings officer found that the proposed development will *not* seriously
20 interfere with wildlife habitat, and petitioner has demonstrated no error in so
21 finding, no mitigation is required.

22 The fourth assignment of error is denied.

1 The county's decision is affirmed.