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

LIVING STRONG, LLC, EUGENE MOVING FORWARD, LLC, ROBERT STEIN, and PATRICIA BARAJAS,
Petitioners,

vs.

CITY OF EUGENE,
Respondent,

and

WINCO FOODS, LLC,
Intervenor-Respondent.

LUBA Nos. 2021-005/006

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Bill Kloos filed a petition for review and two reply briefs and argued on behalf of petitioner Living Strong, LLC.

Sean T. Malone filed a petition for review and two reply briefs and argued on behalf of petitioners Eugene Moving Forward, LLC, Robert Stein and Patricia Barajas.

Lauren A. Sommers filed a response brief and argued on behalf of respondent.

Kelly S. Hossaini and Steven G. Liday filed a response brief and argued on behalf of intervenor-respondent. Also on the brief was Miller Nash Graham & Dunn LLP.

RYAN, Board Member; RUDD, Board Chair; ZAMUDIO, Board Member, participated in the decision.

AFFIRMED 04/30/2021

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 appeal a hearings officer decision approving an application for modification of a 1988 site review decision and site plan.

MOTION TO INTERVENE

WinCo Foods, LLC (intervenor), the applicant below, moves to intervene on the side of the city. The motion is granted.

REPLY BRIEF

Living Strong LLC (Living Strong) is the petitioner in LUBA No. 2021-005. Petitioners Eugene Moving Forward, LLC *et al* (EMF) are the petitioners in LUBA No. 2021-006. Living Strong and EMF (together, petitioners) each filed a petition for review. The city filed a single response brief that responded to the assignments of error in each petition for review. Intervenor also filed a single response brief that responded to the assignments of error in each petition for review. Living Strong filed a reply brief to reply to arguments in the city's response brief, and a reply brief to respond to arguments in intervenor's response brief. EMF did the same, resulting in a total of four reply briefs.

OAR 661-010-0039 provides in relevant part:

> "A reply brief shall be permitted. A reply brief shall be filed together with four copies within seven days of the date the respondent's brief is filed. A reply brief shall be confined to responses to arguments in the respondent's brief, state agency brief, or amicus brief, but shall not include new assignments of error or advance new bases for reversal or remand."

Intervenor objects that OAR 661-010-0039 does not permit each petitioner to file a separate reply brief to respond to each response brief, and moves for LUBA to strike one of the reply briefs filed by each petitioner. Living Strong and EMF each respond to the motion and argue that the reply briefs are allowed under OAR 661-010-0039.

We agree with petitioners. While OAR 661-010-0039 is somewhat ambiguous, OAR 661-010-0039 allows a petitioner to file "a reply brief" that is confined to responses to arguments in "the respondent's brief." Where there is more than one "respondent's brief" filed, we interpret OAR 661-010-0039 to allow any petitioner who filed a separate petition for review to file a reply brief to respond to arguments in each respondent's brief that is filed in response to that petition for review.

The reply briefs are allowed.

FACTS

The subject approximately seven-acre property is located within a 15-acre shopping center, and is zoned Community Commercial (C-2) with a Site Review (SR) Overlay. The C-2 zone allows "General Merchandise (includes supermarket and department store)" as an outright permitted use. Eugene Code (EC) Table 9.2160. The subject property, and the shopping center, are located east of Coburg Road, south of Crescent Avenue, and north of Chad Drive. To the east of the subject property is a medical office building that shares a driveway with the subject property. To the north of the shopping center, north of Crescent Avenue,

is an apartment complex. To the west of that development is residential single-family development.

In 1988, the city approved a site plan review application and a site plan (1988 Site Plan) for an approximately 100,000 square foot ShopKo department store on the subject property. We discuss the 1988 Site Plan in more detail below in our resolution of the assignments of error.

The ShopKo store ceased operations in 2019. In 2020 intervenor, a supermarket operator, applied to the city to modify the 1988 Site Plan to alter the existing building in two ways. First, intervenor proposed to replace an existing greenhouse area with a 266 square foot bottle redemption center. Second, intervenor proposed to demolish the northeast corner of the building to reconfigure and reconstruct a rear loading dock and waste storage area. Both changes would result in a smaller building square footage of approximately 95,000 square feet.

The planning director approved the modification application with conditions, and petitioners appealed the decision to the hearings officer. The hearings officer held a hearing on the appeal and affirmed the planning director's decision with the same conditions. This appeal followed.

STANDARD OF REVIEW

The challenged decision is a limited land use decision. ORS 197.015(12)(a).[1] ORS 197.828 provides LUBA's standard of review of a limited land use decision:

> "(1) The Land Use Board of Appeals shall either reverse, remand or affirm a limited land use decision on review.
>
> "(2) The board shall reverse or remand a limited land use decision if:
>
> > "(a) The decision is not supported by substantial evidence in the record. The existence of evidence in the record supporting a different decision shall not be grounds for reversal or remand if there is evidence in the record to support the final decision;
> >
> > "(b) The decision does not comply with applicable provisions of the land use regulations;

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[1] ORS 197.015(12)(a)(B) provides:

"'Limited land use decision':

> "(a) Means a final decision or determination made by a local government pertaining to a site within an urban growth boundary that concerns:
>
> "* * * * *
>
> > "(B) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review."

"(c) The decision is:

"(A) Outside the scope of authority of the decision maker; or

"(B) Unconstitutional; or

"(d) The local government committed a procedural error which prejudiced the substantial rights of the petitioner."

LIVING STRONG THIRD ASSIGNMENT OF ERROR/EMF FOURTH ASSIGNMENT OF ERROR

These assignments of error present nearly identical arguments and we address them together here. In EMF's fourth assignment of error and in Living Strong's third assignment of error, we understand petitioners to argue that the decision "does not comply with EC 9.1220." ORS 197.828(2)(b). EC 9.1220, "Legal Nonconforming Uses," describes a nonconforming use as "[a] use that was legally established on a particular development site but that no longer complies with the allowed uses or the standards for those uses in this land use code is considered a legal nonconforming use." EC 9.1220(1) provides that if a legal nonconforming use is discontinued for more than 365 days, it loses its legal nonconforming use status and must conform to the applicable provisions of the EC.

Petitioners argue that (1) the 1988 Site Plan approved ShopKo's use of the subject property for a department store; (2) the ShopKo use became a nonconforming use in 2001 when the city amended the provisions of the EC that applied to site review, now at EC 9.4400 to 9.4410; and (3) ShopKo's

nonconforming use of the subject property was discontinued for more than one year after ShopKo ceased operations in 2019. Accordingly, petitioners argue, the nonconforming use and the 1988 Site Plan terminated, and WinCo's use of the property must satisfy the site review criteria through a new site review application.

The hearings officer found that the use of the subject property for a ShopKo department store was an allowed use in the C-2 zone when the city approved the 1988 Site Plan, and that the 1988 Site Plan did not approve that allowed use:

> "Both EMF and [Living Strong] repeatedly assert that the /SR overlay 'approved' the Shopko use. It did not. The /SR overlay does [not] approve any use; it neither authorizes nor restricts which uses are allowed in the underlying zone. Rather, by its terms, the /SR overlay addresses how that allowed development occurs. Changes to the /SR overlay zone do not and cannot make uses allowed in the underlying zone non-conforming." Record 11.

The hearings officer also rejected petitioners' argument that the ShopKo use became nonconforming when the city amended the site review provisions of the EC in 2001, or when the city amended other unnamed provisions of the EC:

> "Appellants also appear to argue that changes to the C-2 zone itself over time somehow made the use allowed in the C-2 zone in 1988 a non-conforming use in the current C-2 zone. While acknowledging that as a 'department store' Shopko was allowed in the C-2 zone in 1988 and continued to be allowed as a 'department store' until its closing in 2019, appellants appear to argue that because of changes to 'standards for the use' it became nonconforming.
>
> "Appellants do not establish (or even argue) that any C-2 zone *use*

> standards have changed over time to render Shopko a nonconforming use. Rather, throughout their arguments, appellants reference changes to the development standards. Changes in development standards, however, are not equivalent to changes in use standards, and changes to development standards do not render a permitted use non-conforming. * * *
>
> "Appellants have not identified any C-2 zone use standards that have changed since Shopko originally established a C-2 retail store at this site. In fact, no changes in the C-2 zone use standards rendered the store nonconforming. Shopko was not a nonconforming use when it discontinued its operations in 2019. Thus, EC 9.1220(1) does not apply to the property and does not preclude WinCo from seeking a Modification to the /SR Overlay that was approved for the Shopko C-2 allowed use." Record 11 (emphasis in original; footnote omitted).

In their petitions for review, petitioners essentially renew the same arguments that the hearings officer rejected in the decision.

Intervenor and the city (respondents) respond that the hearings officer correctly found that the 1988 Site Plan did not approve use of the subject property as a ShopKo store, that the ShopKo store was not a nonconforming use when it ceased operations, that the EC's site review provisions do not approve uses, and accordingly, changes to the city's site review provisions after the 1988 Site Plan was approved do not render a use nonconforming. The city explains that a department store was a permitted use in the C-2 zone when the city approved the 1988 Site Plan, and is a permitted use in the C-2 zone presently, as is a supermarket. The city argues that site review does not and cannot approve use of a property, but rather approves how a use that is permitted on a property is designed and developed. The city also explains that no use standards for the C-2

zone impose any standards or limitations on the General Merchandise (GM) use in the C-2 zone, and that at the time it ceased operations, the ShopKo store complied with all applicable use standards for the GM use. As the city explains it:

> "a use may become nonconforming if it ceases to comply with the applicable *use standards*; that is, standards regulating the intensity and nature of the use itself. EC 9.1220. A *structure* may become nonconforming if it ceases to comply with applicable *development standards*, that is, the standards that relate to the design and construction of improvements on the site. EC 9.1230. A *structure* that is legally nonconforming because it does not comply with applicable development standards does not make the use of the site nonconforming." Brief of Respondent 9 (emphases in original).

We review the hearings officer's decision to determine whether it was correct. *Gage v. City of Portland*, 319 Or 308, 315, 877 P2d 1187 (1994). We conclude the hearings officer's decision is correct. First, petitioners have not cited to any provision of the EC, or anything in the decision approving the 1988 Site Plan, that supports their argument that the 1988 Site Plan approved use of the subject property for a department store, or that approved something other than the location and design of the department store building.

Petitioners have also not cited to any provision of the EC that supports their arguments that the ShopKo use became a nonconforming use at any time after it was approved and constructed, or that the city's amendment of its site review provisions in 2001 rendered the department store use nonconforming, or that the ShopKo store's alleged noncompliance with development standards for large

commercial facilities in commercial zones means that the use is a nonconforming use. The hearings officer correctly concluded that a change in the development standards that apply to a use does not render that use nonconforming. Absent any citation to any authority to support their arguments, they provide no basis for reversal or remand.

EMF's fourth assignment of error and Living Strong's third assignment of error are denied.

EMF FIRST ASSIGNMENT OF ERROR

EC 9.8455 provides:

> "Modifications of the final approved site review plan may be requested following the Type II process. The planning director shall approve the request if it complies with the following criteria:
>
> "(1) The proposed modification is consistent with the conditions of the original approval.
>
> "(2) The proposed modification will result in insignificant changes in the physical appearance of the development, the use of the site, and the impact on the surrounding properties.
>
> "If the planning director determines that the modification is not consistent with the above criteria, the proposed modification may not occur until a new site review application is submitted and reviewed based on the Type II application procedures in section 9.7200 and the requirements and criteria in sections 9.8425-9.8455. Nothing in this section shall preclude the applicant from initially submitting the requested modification as a new site review application."

EMF does not specify the standard of review LUBA should apply to its first assignment of error. In its first assignment of error, EMF argues that a new site

review application was required because, according to EMF, when ShopKo ceased operations, the 1988 Site Plan expired. We treat the assignment of error as an argument that the "decision does not comply with applicable provisions of the land use regulations," namely, EC 9.8455. ORS 197.828(2)(b).

According to EMF, use of the definite article "the" to describe the original decision approving the 1988 Site Plan means that the city approved a specific proposed development and *use*. From that premise, EMF argues that when ShopKo ceased operations, the 1988 Site Plan expired or terminated, and intervenor must submit a new site plan review application in order to complete the building modifications.

Respondents respond that EC 9.8455's use of the definite article "the" to refer to the specific approved site plan and specific original decision does not demonstrate that the 1988 Site Plan is limited to any specific *use* approved in that site plan. More importantly, they argue, the definite article does not demonstrate that the 1988 Site Plan expired with cessation of the ShopKo store's operation. Respondents argue that nothing in the plain language of EC 9.8455, or the original site plan approval decision, or on the 1988 Site Plan itself provides a time limit on an approved site plan or provides that an approved site plan terminates or expires in any circumstance.

We agree with respondents. EMF has pointed to nothing in the EC that provides that an approved site plan approves a particular use, or that an approved site plan expires or terminates at any time after it is approved. First, EC 9.8430,

which specifies that site review provisions apply when a proposal would result in either new development of vacant sites or an expansion of 20 percent or more of building square footage, does not refer to a site plan approving any uses.[2] Similarly, nothing in EC 9.8455 provides that a site review approval approves

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[2] EC 9.8430 provides:

> "Site review provisions shall be applied when any of the following conditions exist:
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> "(1) Property is zoned with the /SR overlay zone and the proposal would result in either of the following:
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> "(a) New development of vacant sites (excluding partitions and any development that consists only of new or expanded parking areas).
>
> "(b) An expansion of 20 percent or more of the total existing building square footage on the development site.
>
> "(2) The proposed use on the property is identified as a use which requires site review under other provisions of this land use code and the proposal would result in either of the following:
>
> "(a) New development of vacant sites (excluding development that consists only of new or expanded parking areas).
>
> "(b) An expansion of 20 percent or more of the total existing building square footage on the development site.
>
> "In lieu of site review, an application that falls within (1) or (2) above, may obtain approval through the Planned Unit Development process. No development permit shall be issued by the city prior to approval of the site review application, or the final planned unit development application."

uses. Rather, as the hearings officer put it, a site review approval does not "authorize []or restrict which uses are *allowed* in the underlying zone. Rather * * * the [site review overlay] addresses *how* that *allowed* development occurs." Record 11 (emphases in original). Even if EMF is correct that EC 9.8455 refers to the specific site plan reviewed and approved in 1988, it does not mean that the approved site plan terminates when the existing store ceases to operate.

EMF's first assignment of error is denied.

EMF SECOND AND THIRD ASSIGNMENTS OF ERROR

In EMF's second assignment of error, it argues that the decision does not comply with EC 9.8670. ORS 197.828(2)(b). EC 9.8670 provides in relevant part:

> "Traffic Impact Analysis Review is required when one of the conditions in subsections (1) – (4) of this section exist unless the development is within an area (a) shown on Map 9.8670 Downtown Traffic Impact Analysis Exempt Area, or (b) subject to a prior approved Traffic Impact Analysis and is consistent with the impacts analyzed.
>
> "(1) *The development* will generate 100 or more vehicle trips during any peak hour as determined by using the most recent edition of the Institute of Transportation Engineer's Trip Generation. * * *."[3] (Emphasis added).

Relatedly, in EMF's third assignment of error, it argues that the decision does not comply with EC 9.8755(2) because the traffic to be generated by operation of a

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[3] EC 9.0500 defines "development" in relevant part as "the act, process or result of developing."

grocery store "will result in []significant changes in * * * the impact on the surrounding properties."

EMF argues that the phrase "the development" as used in EC 9.8670 includes the unmodified portions of the grocery store that will operate in the existing building. EMF argues that EC 9.8670 requires a traffic impact analysis (TIA) because the traffic that will be generated from the grocery store use, including the traffic that will be generated from proposed modifications, will generate more than 100 vehicle trips during any peak hour.

The planning director and the hearings officer rejected that argument. The hearings officer concluded that EC 9.8670 is concerned with the traffic to be generated by development that arises from the proposed modifications to the approved site plan, and is not concerned with traffic generated by the grocery store to be operated in the existing building:

> "Appellant EMF * * * argu[es] that the applicant has attempted to 'obviate the requirement for traffic impact analysis based on an extremely narrow view of 'development. * * *''

> "Despite appellants' tortured attempts to conflate the existing development with the proposed modification, the existing development is not at issue in this modification application. EC 9.8760 does not require a TIA for the challenged modification. As an initial point, the Site Review Modification does not constitute any development. More to [Living Strong's] argument, however, while [Living Strong] argues at length about why it believes that the opening of the WinCo store *should* be at issue, it is not. And no amount of parsing over the definitions of 'develop' and 'development' and the operating characteristics of the store, will change the fact the 'existing development' - the WinCo store - is not

at issue in this appeal. The existing development does not render the requested modification subject to the TIA requirements.

"By its terms, EC 9.8670 focuses on the proposed development, not the existing 'traffic generator.' The applicant applied for a Modification to the existing Site Review approval, and the Planning Director did not err in finding that the requested modification to that approved Site Review does not require a TIA." Record 12-13 (emphases in original).[4]

In support of its argument, EMF relies on a definition of the verb "develop," and argues that that definition supports its interpretation of EC 9.8670 as requiring a TIA that evaluates traffic impacts from the proposed modifications to the 1988 Site Plan and from a WinCo store.[5]

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[4] In the decision, the hearings officer incorrectly cited EC 9.2160 in resolving this issue. EMF takes the position that the hearings officer's citations to EC 9.2160 are incorrect. EMF Petition for Review 15. Even assuming for purposes of this opinion that the hearings officer's citations to EC 9.2160 are incorrect, EMF does not assign any legal significance to the incorrect citation.

[5] EMF argues:

"'Develop,' in turn, is defined as

"'[t]o bring about growth or availability; to construct or alter a structure, to conduct a mining operation, to make a physical change in the use or appearance of land, to divide land, or to create or terminate rights to access. 'Develop' includes, but is not limited to, new building, building alterations or additions, site improvements, or a change in use.' *Id.*

" * * * * *

"[W]hat is occurring here is development under several other provisions of the definition of 'develop' including 'to bring about

Respondents respond, and we agree, that the decision complies with EC 9.8670. EMF's argument that relies on the dictionary definition of the verb "develop" is not particularly helpful for resolving the issue, which is the correct interpretation of the phrase "the development" as used in EC 9.8670 when determining whether a TIA is required in connection with the proposed modifications to an approved site plan. We conclude that the hearings officer's understanding of EC 9.8670 to apply to the development that is proposed, *i.e.* the modifications to the 1988 Site Plan to replace the greenhouse with a bottle redemption center and demolish and move the location of the loading dock, and not to the remainder of the unmodified property or the new use proposed for the remainder of the unmodified property, is correct.[6] *Gage*, 319 Or at 315.

EMF's arguments in the third assignment of error are derivative of their arguments in the second assignment of error. Because we agree with the hearings officer that a TIA was not required, the third assignment of error provides no basis for reversal or remand of the decision.[7]

EMF's second and third assignments of error are denied.

> growth or availability,' to 'alter a structure,' 'to make a physical change in the use or appearance of land,' 'building alterations or additions,' and 'site improvements.'" EMF Petition for Review 18.

[6] EMF does not argue that peak hour traffic generated by those modifications will generate 100 or more peak hour trips.

[7] EMF does not argue that traffic from the proposed modifications will significantly impact the surrounding properties.

LIVING STRONG FIRST ASSIGNMENT OF ERROR

As noted, EC 9.8755(1) allows the city to approve a modification to an approved site plan if "[t]he proposed modification is consistent with the conditions of the original approval." In Living Strong's first assignment of error, it argues that the site review modification is inconsistent with condition (c) and condition (g) of the decision approving the 1988 Site Plan. We understand Living Strong to argue that the decision "does not comply with" EC 9.8755(1). ORS 197.828(2)(b).

A. Condition (c)

Condition (c) of the decision approving the 1988 Site Plan provided in relevant part that "all driveways need to extend at least 150 feet into the site before intersecting cross aisles." Record 14. The existing building includes a loading dock in the northeast corner of the building. The 1988 Site Plan depicts the loading dock as accessed via an east-west accessway leading to a driveway that is now located on the property immediately to the east of the subject property, that connects to Crescent Avenue approximately seven feet to the north. Record 715. The adjacent property is owned by Cascade Medical LLC and the decision refers to that property as the CML site. Apparently, in or around 2000, after the 1988 Site Plan was approved and after the original developer sold the property that became the CML site, a landscape island was constructed on the property line between the subject property and the CML site, creating a physical barrier between the two properties in the same location where the 1988 Site Plan

provides access. After the landscape island was installed, ShopKo removed the vegetation from the landscape island and ShopKo's delivery trucks drove over the remaining dirt and curb to access the existing ShopKo store from the driveway located on the CML site. Record 759-61.

The hearings officer found that the proposed modifications to the rear loading dock do not propose to modify the original access connection from the loading dock on the subject property to the CML site's driveway access to Crescent Avenue that was shown on the 1988 Site Plan, and accordingly the proposed modifications are consistent with condition (c), because they do not propose any modifications to that access at all. Record 14. Living Strong argues that the existing east-west accessway between the loading dock and the driveway located on the CML site is a "cross aisle" that does not extend 150 feet into the subject property from its intersection with Crescent Avenue. Accordingly, Living Strong argues, the proposed modifications are not consistent with condition (c).

Living Strong's arguments do not challenge the hearings officer's ultimate finding that no modifications are proposed to the original cross-aisles and driveways depicted on the approved 1988 Site Plan. Rather, Living Strong focuses on what is essentially dicta in the hearings officer's decision that explains the history of post-1988 site reviews for the subject property and the adjacent property.[8] Absent any challenge to the hearings officer's relevant finding that the

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[8] The decision provides:

modifications do not propose any changes to the approved access, Living Strong's arguments regarding condition (c) do not provide a basis for reversal or remand.

"As accurately summarized in the Staff Report on appeal,

> "'As discussed in the Director's decision, the access connection from the rear loading dock to the main driveway was plainly shown on the approved site plan in the 1988 site review decision. However, as evidenced by current conditions, the access was never constructed. This main driveway access to Crescent Avenue is currently located on the CML property, a separate parcel that initially was a portion of the original Site Review (SR 88-11) as Phase II of the development. Phase II was never developed, and the property was sold. During the subsequent PetSmart Site Review (SR 93-6) process, this parcel was removed from the original 1988 Site Review approval through City action via a Revocation of Site Review Agreement * * *. The CML property, which includes the driveway access to Crescent Avenue, is now developed as the CML building and is no longer part of the original SR 88-11 approval or the current WinCo modification request. Since the main driveway on the CML property is not located on the WinCo development site and was removed from the original Site Review approval, condition of approval C is not applicable to the CML property. The proposed access connection from the loading dock area to the main driveway is consistent with the original approved site plan.'

"As the applicant further notes, the 1988 Site Review Agreement specifically acknowledged compliance with this condition. The requested modification does not alter the previously approved plan." Record 14-15.

B. Condition (g)

Condition (g) of the decision approving the 1988 Site Plan provided in relevant part that "[a]ll freight loading activities shall occur on-site with no maneuvering needed to require use of the public right of way." At the time of the 1988 Site Plan, the subject property and the CML site were part of the same larger property and the loading docks were accessed via the driveway on what is now the CML site. Living Strong argues that the evidence in the record is that intervenor's delivery trucks entering from westbound Crescent Avenue will be required to swing into the center lane of Crescent Avenue in order to make the turn south into the driveway located on the CML site, and this use of the center lane demonstrates that the application is not consistent with condition (g) of the original decision, because maneuvering is needed that will require use of the public right of way, Crescent Avenue.

Respondents respond that Living Strong failed to demonstrate that this issue was preserved, and may not raise it for the first time on appeal to LUBA. ORS 197.763(1); ORS 197.835(3). In its reply brief, Living Strong responds that the issue was raised at Record 297-299. For the reasons explained below, we agree with respondents that the issue was not raised.

ORS 197.763(1) requires that issues not only be raised, but also be accompanied by statements or evidence sufficient to afford the local decision maker an opportunity to respond. *See Boldt v. Clackamas County*, 21 Or LUBA 40, *aff'd*, 107 Or App 619, 623, 813 P2d 1078 (1991) (the "raise it or waive it"

principle embodied in ORS 197.763(1) does not limit the parties on appeal to the exact same arguments made below, but does require that the issue was raised below with sufficient specificity so as to prevent "unfair surprise" on appeal). What is "sufficient" depends upon whether the governing body, planning commission, hearings body or hearings officer and the parties are afforded an adequate opportunity to respond to each issue. *Id.* The cited pages do not show that fair notice was provided.

Record 297-299 contains written testimony submitted prior to the hearing by Living Strong's attorney that summarizes a turning movement analysis that Living Strong had previously submitted into the record, at Record 1024-25. That testimony clearly raises an issue that alleges that intervenor's trucks will need to use the adjacent CML site to maneuver, and that use of the adjacent CML site for maneuvering violates condition (g). The overwhelming bulk of the testimony at Record 297-299 discusses truck access to and from the southern access point onto Chad Drive, and discusses necessary, and undisputed, maneuvering on the adjacent CML site.

However, the testimony also summarizes two "truck route scenarios" in the Living Strong turning movement analysis that was previously submitted into the record, located at Record 1024-25, and describes one scenario as depicting "delivery trucks entering from the west on Crescent Avenue, swinging out into the center turn lane, turning south into the site[.]" Record 298. We conclude that a reasonable person would not discern from Living Strong's testimony that it

intended to place into controversy an issue regarding whether intervenor's trucks will be able to access the driveway on the CML site without need to enter into the center lane in Crescent Avenue or more importantly, that this truck motion would violate condition (g). Raising that issue for the first time on appeal amounts to an "unfair surprise" to the decision maker and the other parties.[9] Accordingly, we agree with respondents that Living Strong is precluded from raising that issue for the first time on appeal to LUBA.

However, even if the issue was not waived, we fail to understand how condition (g) is implicated by off-site truck movements. Condition (g) only requires "freight loading activities" to occur on site and with no maneuvering. Living Strong has not established that truck turning movements off of the subject property qualify as "freight loading activities" as that term as used in condition (g).

Living Strong's first assignment of error is denied.

LIVING STRONG SECOND ASSIGNMENT OF ERROR

In its second assignment of error, Living Strong argues that the hearings officer's decision does not comply with EC 9.8755(2) because, Living Strong argues, the proposed modifications will result in significant impacts to the adjacent CML site. According to Living Strong, that is so because the

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[9] The hearings officer's decision does not address Living Strong's argument at all.

modification to the loading dock will require that WinCo's trucks use the CML site to maneuver into the loading dock after they enter the driveway on the CML site. According to Living Strong, the subject property and the CML site are currently separated by the landscape island along the property line and therefore, use of the CML site to access Crescent Avenue and for maneuvering is a modification to the 1988 Site Plan.

The hearings officer concluded that the 1988 Site Plan depicts access from the loading dock to the driveway now located on the CML site and then to Crescent Avenue, and that that access required maneuvering on the CML site by ShopKo's trucks. Accordingly, the hearings officer found, intervenor's modifications do not propose to change the access that is depicted on the 1988 Site Plan.

Living Strong does not really challenge those findings except to argue that the existing landscape island prevented access to the loading dock by ShopKo trucks when the store was occupied by ShopKo. Intervenor points to evidence in the record that the through-connection between the subject property and the CML site has existed since 2000, and that ShopKo removed the vegetation from the landscape island and drove over the curb. Record 759-61. Absent any challenge to the hearings officer's relevant findings, Living Strong's second assignment of error provides no basis for reversal or remand of the decision.

Living Strong's second assignment of error is denied.

The city's decision is affirmed.