

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

3
4 CENTRAL OREGON LANDWATCH,
5 *Petitioner,*

6
7 vs.

8
9 DESCHUTES COUNTY,
10 *Respondent,*

11
12 and

13
14 THREE SISTERS IRRIGATION DISTRICT,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2021-059

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Deschutes County.

23
24 Rory Isbell filed the petition for review and reply brief and argued on
25 behalf of petitioner.

26
27 Keenan Ordon-Bakalian and D. Adam Smith filed the joint response brief
28 and argued on behalf of intervenor-respondent and respondent. Also on the brief
29 was Jordan Ramis PC.

30
31 RYAN, Board Member; ZAMUDIO, Board Chair; RUDD, Board
32 Member, participated in the decision.

33
34 AFFIRMED

02/28/2022

35
36 You are entitled to judicial review of this Order. Judicial review is
37 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a board of county commissioners decision approving a conditional use permit and site plan for a hydroelectric facility on land zoned Exclusive Farm Use, Multiple Use Agricultural, and Flood Plain.

FACTS

The subject property is located approximately five miles northeast of the city of Sisters, and it is split zoned Exclusive Farm Use, Multiple Use Agricultural, and Flood Plain. Intervenor-respondent Three Sisters Irrigation District (intervenor) applied for a conditional use permit and site plan review to establish a hydroelectric facility in conjunction with an existing irrigation system located on the property. We take the description of the project from the decision:

“The subject 97.60-acre property is developed with two (2) high-density polyethylene (HDPE) irrigation pipelines, 42” and 18” in respective diameters, which serve approximately 2,000 irrigated acres of farmland within the boundaries of [intervenor’s jurisdiction]. The property contains dirt and gravel driveways, and parking areas associated with access to the site and maintenance of the Subject Property. The property contains an approximately 12-acre manmade water body referred to as the McKenzie Regulating Reservoir (McKenzie Reservoir). The McKenzie Reservoir is mapped as wetlands and Special Floodplain Hazard Area (‘SFHA’). The proposed hydroelectric facility is a single 300 kW turbine, approximately 140 square-feet in size to be located within a hydroelectric station building approximately 1,170 square feet in size. The proposed hydroelectric facility will receive existing pressurized piped irrigation water through the southern end of the facility, and release the water back to the McKenzie Regulating Reservoir through a tailrace structure to the north of the proposed

1 hydroelectric station building.” Record 23.

2 Intervenor holds water rights to divert water for irrigation purposes from
3 Whychus Creek. Intervenor’s point of diversion of irrigation water from the creek
4 is approximately 10 miles from the point of entry of water onto the property.
5 Intervenor also holds secondary water rights to divert existing water from its
6 pressurized pipelines through a powerhouse with a 300-kilowatt turbine, which
7 will generate electricity that will feed into a transmission line connected to the
8 powerhouse, after which the water will be discharged into the McKenzie
9 Reservoir on intervenor’s property. We and the parties sometimes refer to
10 intervenor’s facility as a “conduit hydroelectric facility.”

11 The hearings officer denied the conditional use permit and site plan review
12 applications. The hearings officer’s decision was appealed to the board of county
13 commissioners, which held a *de novo* hearing. At the conclusion, two
14 commissioners voted to reverse the hearings officer’s decision and approve the
15 applications after concluding that all of the applicable approval criteria were
16 satisfied.¹ The board of county commissioners then adopted and incorporated the
17 hearings officer’s findings and adopted its own findings regarding some
18 Deschutes County Code (DCC) provisions. Record 26. This appeal followed.

¹ The third commissioner recused themselves.

1 **MOTION TO TAKE OFFICIAL NOTICE**

2 The petition for review includes a motion to take official notice of various
3 provisions of the Deschutes County Comprehensive Plan (DCCP), which are
4 included in the appendix that is attached to the petition for review and which
5 petitioner cites and relies on in the petition for review. ORS 40.090(7) provides,
6 in part, that official notice may be taken of “[a]n ordinance, comprehensive plan
7 or enactment of any county or incorporated city in this state, or a right derived
8 therefrom.” Intervenor objects to the motion and argues that it improperly seeks
9 to establish adjudicative facts. However, we understand the motion to seek to
10 provide LUBA with the text of the DCCP provisions that petitioner cites in the
11 petition for review to support petitioner’s argument that the board of county
12 commissioners’ interpretation of the applicable DCC provisions is not required
13 to be affirmed. We take official notice of the provisions of the DCCP that are
14 attached to the petition for review.

15 **FIRST ASSIGNMENT OF ERROR**

16 DCC 18.128.260 includes the county’s conditional use provisions
17 regarding hydroelectric facilities. DCC 18.128.260(A) includes the approval
18 criteria for hydroelectric facilities, and we set out that provision in its entirety in
19 our resolution of the second assignment of error.² DCC 18.128.260(B) includes

² Petitioner challenges the county’s conclusion that DCC 18.128.260(A) is satisfied in its second assignment of error.

1 provisions that we set out below and is the subject of petitioner’s first assignment
2 of error.³

3 **A. DCC 18.128.260(B) and the County’s Decision**

4 DCC 18.128.260(B) provides:

5 “The applicant for a conditional use permit for a hydroelectric
6 facility, in addition to all other requirements, shall submit the
7 following for approval:

8 “1. Detailed construction plans and profiles of all facility features
9 including building elevations of the powerhouse and other
10 structures, excavation plans, a narrative describing where
11 blasting will occur and where excess material will be
12 deposited, and landscaping and reclamation plans.

13 “2. Detailed plans for meeting the criteria set forth in DCC
14 18.128.260(B)(1).

15 “3. Detailed plans for *river enhancement* documenting both on-
16 site and off-site enhancement plans consistent with adopted

³ DCC 18.04.030 defines “hydroelectric facility” to mean

“all aspects of any project or development necessary for or related to the generation of hydroelectric energy, including, but not limited to, conduits, dams, diversions, fish ladders and screens, generators, impoundments, penstocks, turbines, transmission facilities and related buildings, structures, storage areas, access roads, parking areas and surrounding and adjacent lands which are necessary for or related to the facility.”

DCC 18.04.030 in turn defines “impoundment” to mean “any man-made structure which is or may be used to impound water,” and it defines “diversion” to mean “any man made structure which is or may be used to deflect or divert water from a river or stream into a conduit.”

1 river-related goals and policies, such as plans and methods for
2 conserving water and enhancing stream flows. The plan shall
3 identify costs, time schedules and coordination activities with
4 affected persons and agencies for such enhancement plans.

5 “4. A cash deposit, performance bond or other security
6 acceptable to Deschutes County in an amount equal to 100
7 percent of the estimated cost of *river enhancement*.

8 “5. Detailed plans for a water conservation and *stream*
9 *enhancement program* to be funded by a portion of revenues
10 generated by the operation of the proposed facility. The
11 program plans shall contain the following:

12 “a. A program timetable;

13 “b. Projected gross revenues from the proposed facility;

14 “c. Projected program expenditures and the percentage of
15 gross revenues they represent;

16 “d. Projected water savings and the percentage of known
17 current water losses they represent;

18 “e. A declaration by the applicant that at least 50 percent
19 of the conserved water will remain undiverted by the
20 applicant;

21 “f. A declaration by the applicant that water diversion for
22 power generation will not cause water flow in the
23 affected stretch of the river (from the diversion to the
24 tailrace exit) to fall below the minimum streamflow for
25 that stretch as recommended by the Oregon
26 Department of Fish and Wildlife; and

27 “g. A declaration that the applicant will enter into an
28 agreement with the County to fulfill all of the
29 requirements in DCC 18.128.260(B)(1) through (5)
30 before beginning construction.” (Emphases added.)

1 The board of county commissioners interpreted DCC 18.128.260(B) as
2 application submittal requirements and concluded that intervenor was not
3 required to submit the information described in paragraphs (3) to (5) because the
4 proposed facility is a self-contained hydroelectric facility located remotely from
5 Whychus Creek. Record 39-41. The board of county commissioners relied on the
6 express language of paragraphs (3) to (5), which refer to “river enhancement”
7 and “stream enhancement,” and concluded that the information described in those
8 paragraphs need only be provided when an applicant is proposing “river
9 enhancement” or “stream enhancement.” Because the proposed facility does not
10 have any effects on Whychus Creek, intervenor does not propose any river or
11 stream (*i.e.*, creek) enhancement. The board of county commissioners interpreted
12 DCC 18.128.260(B)(3) to (5) as therefore not applying to the project, and it
13 concluded that intervenor was not required to provide the information included
14 in those paragraphs.⁴

15 As context, the county relied on language in DCC 18.128.260(A), which
16 contains the approval criteria for hydroelectric facilities and is set out below in
17 our resolution of the second assignment of error. Briefly, DCC 18.128.260(A)(3),
18 (4), (6), and (8) provide an applicant for a conditional use permit for a
19 hydroelectric facility the choice to “maintain” or “enhance” the “affected stretch

⁴ The county concluded that intervenor had provided the plans required by DCC 18.128.260(B)(1) and (2). Petitioner does not assign error to that conclusion.

1 of the river.” The county reasoned that the evidence in the record demonstrated
2 that intervenor’s project would have no impacts on Whychus Creek at all, and
3 enhancement and water conservation plans are only required when the project
4 includes “an affected stretch of the river.” Therefore, the board of county
5 commissioners reasoned, intervenor was not proposing or required to propose
6 river or stream enhancement, and DCC 18.128.260(B)(3) to (5) did not require
7 the submittal of river enhancement and stream enhancement plans.⁵

⁵ The board of county commissioners found:

“The Board, as previously stated, interprets the submittal requirements of DCC 18.128.260(B) pertaining to enhancement plans and water conservation to mean they are only applicable when an Applicant has chosen to ‘enhance’ a specific factor within DCC 18.128.260(A). In this case, [intervenor] has elected to ‘maintain’ all applicable factors within DCC 18.128.260(A) and does not propose to undertake further enhancement activities. Therefore, the Board finds that [intervenor] is not required to provide an ‘enhancement plan.’ The Board finds [DCC 18.128.260(B)(3)] is not applicable to [intervenor’s] proposed hydroelectric facility.

“* * * * *

“The Board finds, as supported by sufficient evidence in record, that [intervenor] has demonstrated the riverine characteristics potentially associated with the subject proposal will be maintained. Due to the Board’s finding that the subject proposal does not include enhancement measures, the required cash deposit referenced [in DCC 18.128.260(B)(4)] would effectively be zero. As a result, [DCC 18.128.260(B)(4)] is functionally inapplicable to the proposal as 100% of the estimated costs (zero) would still equal zero dollars. The Board takes note that the subject application is a component of

[the] comprehensive system-wide modernization and conservation effort being undertaken by [intervenor], which will provide real benefits to Whychus Creek. The Board finds that for the purposes of the subject application, [DCC 18.128.260(B)(4)] is not applicable because [intervenor] is not required to incorporate ‘enhancement’ as part of the project. The Board finds that based upon its interpretation of the text of DCC 18.128.260(B) and the facts of this case, [intervenor] is not required to provide an ‘enhancement plan’ or conduct river enhancement activities. Therefore, the Board concludes that [DCC 18.128.260(B)(4)] is not applicable.

“* * * * *

“The criteria outlined in this subsection B(5) relate directly to a ‘program’ for water conservation and stream enhancement. As detailed in previous findings, the Board’s interpretation of the phrase ‘maintain or enhance’ presents the Applicant with a choice of whether to maintain or enhance the riverine factors potentially impacted by the proposal. Based on the context and language of this subsection B(5) and similar to subsections B(3) and B(4) discussed above, the Board interprets this provision as only applying when an Applicant cannot demonstrate that the ‘maintenance’ standard is met, thereby requiring certain ‘enhancements.’ As interpreted by the Board, this provision then includes additional requirements to ensure that such ‘enhancements’ are immediately implemented and effective long-term.

“Based on that interpretation, the Board finds that for the purposes of the subject application, the criteria included in DCC 18.128.260(B)(5) are not applicable because [intervenor] is not required or proposing to incorporate ‘enhancement’ as part of the project.

“The Board further finds that based upon its interpretation of the text of DCC 18.128.260(B) and the facts of this case, [intervenor] is not required to provide an ‘enhancement plan’ or program or conduct river enhancement activities. Therefore, the Board concludes that

1 **B. First Through Fifth Subassignments of Error**

2 Intervenor and the county (respondents) argue, initially, that the issues
3 raised in the third and fourth subassignments of error were not raised prior to the
4 close of the initial evidentiary hearing and may not be raised for the first time at
5 LUBA. *Former* ORS 197.763(1) (2019), *renumbered as* ORS 197.797(1) (2021),
6 requires that issues be raised below and accompanied by statements or evidence
7 sufficient to afford the local decision-maker an opportunity to respond. *See Boldt*
8 *v. Clackamas County*, 21 Or LUBA 40, 46, *aff'd*, 107 Or App 619, 813 P2d 1078
9 (1991) (the “raise it or waive it” principle embodied in *former* ORS 197.763(1)
10 does not limit the parties on appeal to the exact same arguments made below, but
11 it does require that the issue be raised below with sufficient specificity so as to
12 prevent “unfair surprise” on appeal). We agree that the issue raised in the fourth
13 subassignment of error was not raised below and may not be raised for the first
14 time at LUBA. As we explain below, we reject respondents’ argument that the
15 third subassignment of error is waived.

16 **1. Fourth Subassignment of Error**

17 In its fourth subassignment of error, petitioner argues that the county’s
18 decision violates ORS 215.416(8)(a), which requires the county to approve or
19 deny a permit application based on standards and criteria set forth in the zoning
20 ordinance or another ordinance or regulation. The first assignment of error

the criteria outlined in DCC 18.128.260(B)(5)(a-g) are not applicable to the subject application.” Record 39-41.

1 includes a general “preservation of error” section, as required by OAR 661-010-
2 0030(4)(d), that cites various record pages to support petitioner’s statement that
3 the issues raised in the first assignment of error were preserved.⁶ In the reply
4 brief, petitioner argues that Record 562 includes petitioner’s argument that the
5 application must comply with DCC 18.128.260(B). That argument, however, is
6 not sufficient to place the county on notice that petitioner was raising an issue
7 that approving the facility without the information described in DCC
8 18.128.260(B) would be inconsistent with ORS 215.416(8)(a). We have
9 reviewed the remaining cited pages, and we agree with respondents that nothing
10 on those record pages raises the issue raised in the fourth subassignment of error.

11 The fourth subassignment of error is denied.

12 **2. First and Second Subassignments of Error**

13 Petitioner’s first and second subassignments of error include overlapping
14 arguments that the board of county commissioners improperly construed DCC
15 18.128.260(B). ORS 197.835(9)(a)(D). We address them here together.

16 In the first subassignment of error, petitioner argues that the express
17 language “shall submit” in the introductory paragraph of DCC 18.128.260(B)
18 unambiguously requires an applicant to submit all items listed in paragraphs (1)

⁶ OAR 661-010-0030(4)(d) provides, in part, “Each assignment of error must demonstrate that the issue raised in the assignment of error was preserved during the proceedings below. Where an assignment raises an issue that is not identified as preserved during the proceedings below, the petition shall state why preservation is not required.”

1 to (5). Accordingly, petitioner argues, the county’s interpretation is inconsistent
2 with the express language of that provision. ORS 197.829(1)(a).

3 In the second subassignment of error, petitioner argues that the board of
4 county commissioners’ interpretation is inconsistent with what petitioner argues
5 is the purpose and underlying policy of DCC 18.128.260(B), as demonstrated by
6 the provisions of the DCCP that petitioner cites in and that are attached to the
7 petition for review. ORS 197.829(1)(b) - (c). Petitioner cites DCCP 2.8 and 5.6,
8 and the minutes from a June 1986 board of county commissioners and Bend city
9 council work session that describe a presentation by the county’s legal counsel
10 regarding a draft of the ordinance that enacted DCC 18.128.260.⁷ Petitioner
11 argues that, together, the cited provisions and minutes establish the purpose of
12 DCC 18.128.260(B) and provide context for an interpretation of that provision to
13 require all of the information described in paragraphs (1) to (5) to be submitted.⁸

⁷ DCCP 2.8 describes hydroelectric facilities as one source of additional power generation and refers to “specific regulations for hydroelectric energy generation being adopted into the conditional use section of the Zoning Code in 1991.” DCCP 5.6 incorporates a 1986 “River Study” that refers to “hydroelectric power generation” at “[a]ppropriate sites in existing canals.” Petition for Review App at 123.

⁸ Petitioner also cites a provision of the county’s previous comprehensive plan, the Deschutes County Year 2000 Comprehensive Plan, which was superseded with the adoption of the current version of the DCCP in 2011. Petition for Review 20-22 (citing Petition for Review App at 103-04).

1 We must affirm the board of county commissioners' interpretation of the
2 DCC unless that interpretation is inconsistent with the express language,
3 purposes, or underlying policies of the DCC or the DCCP. ORS 197.829(1)(a) -
4 (c). Our task in this appeal is to determine whether the county's interpretation of
5 DCC 18.128.260(B) is plausible. *Siporen v. City of Medford*, 349 Or 247, 243
6 P3d 776 (2010).

7 Respondents respond, and we agree, that the board of county
8 commissioners' interpretation of the relevant provisions of DCC 18.128.260(B)
9 is not inconsistent with the express language of those provisions. The board of
10 county commissioners recognized and resolved an inconsistency between the
11 more general language of the introductory provision of DCC 18.128.260(B) and
12 the more specific language of each paragraph that refers to "enhancement," and
13 concluded that the language "shall submit," read in context, does not require an
14 applicant to submit detailed plans and deposits for river or stream enhancement
15 where no such enhancement is proposed.

16 Respondents also respond that petitioner has not established that the board
17 of county commissioners' interpretation is inconsistent with the purpose or
18 underlying policy of DCC 18.128.260(B). Respondents dispute that the DCCP
19 provisions or the minutes cited by petitioner establish the purpose or underlying
20 policy of DCC 18.128.260(B), or establish that the board of county
21 commissioners' interpretation is inconsistent with the purpose or underlying
22 policy of the county's regulation of hydroelectric facilities. Respondents respond

1 that, at most, the cited DCCP provisions establish that the DCC requires an
2 applicant for a conditional use permit for a hydroelectric facility to establish that
3 the project will not adversely affect the river system. We agree with respondents
4 that the DCCP provisions and the minutes cited by petitioner do not establish the
5 purpose or underlying policy that provides the basis for the informational
6 requirements in DCC 18.128.260(B).

7 As the Court of Appeals explained in *Kaplowitz v. Lane County*,

8 “the plausibility determination under ORS 197.829(1) is not
9 whether a local government’s code interpretation best comports with
10 principles of statutory construction. Rather, the issue is whether the
11 local government’s interpretation is plausible because it is not
12 expressly *inconsistent* with the text of the code provision or with
13 related policies that ‘provide the basis for’ or that are ‘implemented’
14 by the code provision, including any ordained statement of the
15 specific purpose of the code provision at issue.” 285 Or App 764,
16 775, 398 P3d 478 (2017) (emphasis in original).

17 In interpreting DCC 18.128.260(B), the board of county commissioners resolved
18 an ambiguity within that provision. DCC 18.128.260(B) *generally* provides that
19 an applicant “shall submit” the information described, but it provides exceptions
20 to that general requirement where no such information exists because no
21 enhancement to the river or stream is proposed or required by the applicable
22 approval criteria in DCC 18.128.260(A). The board of county commissioners
23 relied on context provided by the applicable approval criteria in DCC
24 18.128.260(A). Notably, that exercise is similar to what the city did to resolve an
25 inconsistency between competing code sections in *Siporen*. Accordingly, the

1 board of county commissioners' interpretation of DCC 18.128.260(B) is
2 affirmed.

3 **3. Third and Fifth Subassignments of Error**

4 In the third and fifth subassignments of error, petitioner argues that the
5 county's findings in support of the decision are inadequate and not supported by
6 substantial evidence because the record does not include any evidence of the
7 information described in DCC 18.128.260(B)(3) to (5) and, in particular, does
8 not include the declaration described in DCC 18.128.260(B)(5)(g). As noted,
9 respondents initially respond that the issue raised in the third subassignment of
10 error is waived. However, the third subassignment of error is a challenge to the
11 adequacy of the county's findings, and petitioner was not required to anticipate
12 the content of the county's ultimate findings in the final decision. *Lucier v. City*
13 *of Medford*, 26 Or LUBA 213, 216 (1993) ("In order to preserve the right to
14 challenge at LUBA the adequacy of the adopted findings to address a relevant
15 criterion or the evidentiary support for such findings, a petitioner must challenge
16 the proposal's compliance with that criterion during the local proceedings. Once
17 that is done, the petitioner may challenge the adequacy of the findings and the
18 supporting evidence to demonstrate the proposal complies with the criterion. The
19 particular findings ultimately adopted or evidence ultimately relied on by the
20 decision-maker need not be anticipated and specifically challenged during the
21 local proceedings.") Accordingly, the issue is not waived.

1 However, the third and fifth subassignments of error are dependent on
2 petitioner’s argument that DCC 18.128.260(B) requires the information
3 described in paragraphs (1) to (5) to be submitted. We affirm the county’s
4 interpretation that that information is not required to be submitted, and,
5 accordingly, these subassignments of error provide no independent basis for
6 reversal or remand of the decision.

7 The first assignment of error is denied.

8 **SECOND ASSIGNMENT OF ERROR**

9 Petitioner’s second assignment of error is that the board of county
10 commissioners’ conclusion that several provisions of DCC 18.128.260(A) do not
11 apply to the proposed facility or, in the alternative, are met, improperly construes
12 those provisions.⁹ ORS 197.835(9)(a)(D). Petitioner’s second assignment of error

⁹ DCC 18.128.260(A) provides, as relevant here:

“The criteria set forth below shall apply to any construction or expansion of, or other modification to, hydroelectric facilities in zones where such facilities are permitted as a conditional use. A conditional use permit may be granted for the construction or expansion of, or other modification to, a hydroelectric facility only upon findings by the Planning Director or Hearings Body that the proposal meets each of the following criteria, where applicable:

- “1. The facility is located at and physically connected to an existing man-made diversion or impoundment.
- “2. The facility will not increase the maximum surface area or capacity of the impoundment created by the existing dam or diversion to which the facility will be connected.

-
- “3. The facility will maintain or enhance to the greatest extent possible the existing scenic, visual, environmental and aesthetic qualities of the affected stretch of the river.
 - “4. The facility will maintain or enhance the existing recreational opportunities on or adjacent to the affected stretch of the river.
 - “5. The facility will maintain or enhance existing fish and wildlife habitat and will have no adverse impact upon any threatened or endangered fish, wildlife or plant species or their habitat.
 - “6. The facility and its operation will maintain or enhance existing water quality in the affected stretch of the river except during construction of the facility when adverse impacts on water quality will be minimized. Specifically, the facility and its operation will not:
 - “a. Deposit or create a zone for the deposit of sediments in the river at or adjacent to the site;
 - “b. Increase the temperature of the river in the affected stretch by any means, including but not limited to removal of vegetation or reduction in streamflow; or
 - “c. Create the potential for or result in spillage, leakage or discharge of oil, waste products, chemicals or other substances which could reach the river.
 - “7. The facility and its operation will not increase soil or bank erosion or destroy bank habitat at or on land adjacent to the site except during construction of the facility, during which time soil or bank erosion and destruction of bank habitat will be minimized.
 - “8. The facility and its operation will maintain existing public access to the affected stretch of the river.”

1 includes three subheadings that we treat as subassignments of error, as described
2 below.

3 **A. First and Second Subassignments of Error**

4 In its first subassignment of error under the second assignment of error,
5 petitioner argues that the board of county commissioners' interpretation of DCC
6 18.128.260(A)(1) to not apply to intervenor's project improperly construes that
7 provision and is inconsistent with DCCP 5.6. In its second subassignment of
8 error, petitioner argues that the board of county commissioners' finding that
9 paragraph (A)(2) does not apply improperly construes that provision because
10 there is an "impoundment created by the existing dam or diversion to which the
11 facility will be connected," the McKenzie Reservoir.

12 Respondents respond that petitioner failed to raise the issues raised in the
13 first and second subassignments of error during the proceedings below, and it is
14 precluded from raising those issues for the first time on appeal to LUBA. The
15 petition for review and reply brief cite several record pages in support of the
16 general statement under the second assignment of error that "[petitioner]
17 repeatedly raised the issue below that the criteria at DCC 18.128.260(A) apply to
18 the application and that the application fails to meet these criteria." Petition for
19 Review 43; Reply Brief 2.

20 We have reviewed the cited record pages, and we agree with respondents
21 that nothing in the cited pages raises the issues raised in the first and second
22 subassignments of error—that DCC 18.128.260(A)(1) and (2) apply to the

1 application—with enough specificity to notify the decision-making body that the
2 issue was being raised. *Former* ORS 197.763(1); *Boldt*, 21 Or LUBA at 46. That
3 is particularly so since the hearings officer’s decision adopted detailed findings
4 concluding that paragraphs (A)(1) and (A)(2) did not apply to the application,
5 and the board of county commissioners held a *de novo* hearing at which petitioner
6 could have placed the issue of whether paragraphs (A)(1) and (A)(2) apply in
7 dispute. Accordingly, we agree with respondents that the issues raised in the first
8 and second subassignments of error are waived.

9 **B. Third Subassignment of Error**

10 The board of county commissioners interpreted the criteria in DCC
11 18.128.260(A)(3), (4), (6), and (8) to not apply to the project because, the board
12 concluded, there is no “affected stretch of the river” since the project is self-
13 contained on intervenor’s property miles from Whychus Creek. *See* n 9. As set
14 forth above, those provisions require an applicant to maintain or enhance various
15 aspects of the “affected stretch of the river.” In the alternative, the board of county
16 commissioners found that, if they do apply, DCC 18.128.260(A)(3), (4), (6), and
17 (8) are met.

18 In its third subassignment of error, petitioner argues that the board of
19 county commissioners’ findings that those criteria are met are inadequate and not
20 supported by substantial evidence in the record. Petition for Review 49. However,
21 petitioner does not challenge the board of county commissioners’ alternative
22 findings that those provisions do not apply as approval criteria because there is

1 no “affected stretch of the river.” Accordingly, absent any challenge to those
2 alternative findings, petitioner’s third subassignment of error provides no basis
3 for reversal or remand of the decision. *See Protect Grand Island Farms v. Yamhill*
4 *County*, 66 Or LUBA 291, 295-96 (2012) (to demonstrate that a local government
5 adopted a decision that is not supported by adequate findings, a petitioner should
6 address and as necessary assign error to all independent findings adopted in
7 support of a conclusion that a particular criterion is or is not satisfied).

8 Finally, the board of county commissioners found that DCC
9 18.128.260(A)(5) is met. That provision requires an applicant to maintain or
10 enhance fish and wildlife habitat and demonstrate that the facility will not
11 adversely impact threatened or endangered species or their habitat. The third
12 subassignment of error cites DCC 18.128.260(A)(5) at Petition for Review 48
13 and 50, but petitioner does not develop any argument challenging the board of
14 county commissioners’ conclusion that that provision is met. *Deschutes*
15 *Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982). Accordingly,
16 absent any developed argument regarding DCC 18.128.260(A)(5), petitioner has
17 not provided a basis for reversal or remand.

18 The second assignment of error is denied.

19 The county’s decision is affirmed.