

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

3
4 FRIENDS OF YAMHILL COUNTY,
5 *Petitioner,*

6
7 vs.

8
9 YAMHILL COUNTY,
10 *Respondent,*

11
12 and

13
14 PAUL JAHNKE, MARTHA JAHNKE,
15 CHARLES DOLENCE, SCOTTY DOLENCE,
16 and CYCLOPS PROPERTIES LLC,
17 *Intervenors-Respondents.*

18
19 LUBA No. 2021-074

20
21 FINAL OPINION
22 AND ORDER

23
24 Appeal from Yamhill County.

25
26 Dan Lawler filed the petition for review and reply brief and argued on
27 behalf of petitioner.

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29 No appearance by Yamhill County.

30
31 Andrew H. Stamp filed the response brief and argued on behalf of
32 intervenors-respondent.

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

36
37 AFFIRMED

04/08/2022

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

NATURE OF THE DECISION

Petitioner appeals the county’s approval of a conditional use permit to construct a public road on land zoned Exclusive Farm Use (EFU).

FACTS

The 30.9-acre subject property is located southwest of NW Willis Road and northwest of the city of McMinnville and is zoned Exclusive Farm Use (EF-40), a zone that implements Statewide Planning Goal 3 (Agricultural Lands).¹ Intervenors applied for a conditional use permit (CUP) to construct a public road, named Jahnke Road, to access the property. The planning commission approved the CUP. Petitioner appealed. After a *de novo* hearing, the board of county commissioners approved the CUP. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Yamhill County Zoning Ordinance (YCZO) 402.04(N) allows a road as a conditional use in exclusive farm use zones, “subject to compliance with OAR 660-12.” Petitioner argues that the county’s approval violates OAR 660-012-0065(3), a Land Conservation and Development Department administrative rule that provides that certain transportation improvements are consistent with Goal 3. Petitioner specifically argues that Jahnke Road was approved under, but is inconsistent with, OAR 660-012-0065(3)(o), which provides:

¹ Goal 3 is “[t]o preserve and maintain agricultural lands.”

1 “Transportation facilities, services and improvements other than
2 those listed in this rule that serve local travel needs. The travel
3 capacity and performance standards of facilities and improvements
4 serving local travel needs shall be limited to that necessary to
5 support rural land uses identified in the acknowledged
6 comprehensive plan or to provide adequate emergency access.”

7 Petitioner argues that the county’s conclusion that the application for
8 Jahnke Road satisfies YCZO 402.04(N) is not supported by adequate findings or
9 substantial evidence. Petitioner argues that the county failed to find that Jahnke
10 Road will “serve local travel needs” and be “limited to that necessary to support
11 rural land uses identified in the acknowledged comprehensive plan.” Petition for
12 Review 6. Relatedly, petitioner argues that no evidence in the record
13 demonstrates that Jahnke Road is needed for local travel. *Id.* at 8.

14 Intervenors sought approval of Jahnke Road to provide county approved
15 access to two parcels that intervenors own—the subject property (Tax Lot 1292)
16 and an adjacent parcel (Tax Lot 1293).² A private driveway currently exists on
17 the subject property and provides access to dwellings on adjacent parcels.
18 However, Tax Lot 1292 may not be served by the existing private driveway due
19 to a county code limitation on the number of parcels that may be served by a
20 private driveway.

² The county found that it is possible that a future application may seek to extend Jahnke Road to access another property owned by intervenors that could potentially be subdivided into eight to ten lots. Record 18.

1 Petitioner argues that, while intervenors may intend to eventually develop
2 Tax Lots 1292 and 1293 with dwellings, the record does not contain any evidence
3 that the subject property qualifies for a dwelling allowed on EFU land and, thus,
4 intervenors have not established any need for the road to “serve local travel
5 needs” and “support rural land uses identified in the acknowledged
6 comprehensive plan.” OAR 660-012-0065(3)(o). According to petitioner,
7 intervenors must obtain a dwelling approval on a parcel that will be served by
8 Jahnke Road before intervenors can demonstrate, and the county can find, that
9 there is a local need for Jahnke Road.

10 Intervenors respond, initially, that the issue raised in the first assignment
11 of error was not raised below and is therefore waived. The issue raised in the first
12 assignment of error is whether Jahnke Road will “serve local travel needs” and
13 be “limited to that necessary to support rural land uses identified in the
14 acknowledged comprehensive plan” as those phrases are used in OAR 660-012-
15 0065(3)(o).

16 To be preserved for LUBA review, an issue must “be raised and
17 accompanied by statements or evidence sufficient to afford the governing body,
18 planning commission, hearings body or hearings officer, and the parties an
19 adequate opportunity to respond to each issue.” *Former* ORS 197.763(1) (2019),
20 *renumbered as* ORS 197.797(1) (2021). Specific arguments need not have been
21 raised below to preserve an issue for LUBA review, so long as the issue was
22 raised with sufficient specificity. *See Boldt v. Clackamas County*, 21 Or LUBA

1 40, 46, *aff'd*, 107 Or App 619, 813 P2d 1078 (1991) (the “raise it or waive it”
2 principle does not limit the parties on appeal to the exact same arguments made
3 below, but it does require that the issue be raised below with sufficient specificity
4 so as to prevent “unfair surprise” on appeal). When attempting to differentiate
5 between “issues” and “arguments,” there is no “easy or universally applicable
6 formula.” *Reagan v. City of Oregon City*, 39 Or LUBA 672, 690 (2001). While a
7 petitioner is not required to establish that precise argument made on appeal was
8 made below, that does not mean that “*any* argument can be advanced at LUBA
9 so long as it has some bearing on an applicable approval criterion and general
10 references to compliance with the criterion itself were made below.” *Id.*
11 (emphasis in original). A particular issue must be identified in a manner detailed
12 enough to give the governing body and the parties fair notice and an adequate
13 opportunity to respond. *Boldt v. Clackamas County*, 107 Or App 619, 623 (1991);
14 *see also Vanspeybroeck v. Tillamook County*, 221 Or App 677, 691 n 5, 191 P3d
15 712 (2008) (“[I]ssues [must] be preserved at the local government level for board
16 review * * * in sufficient detail to allow a thorough examination by the decision-
17 maker, so as to obviate the need for further review or at least to make that review
18 more efficient and timely.”).

19 Petitioner cites to Record 69 to establish that the issue raised in the first
20 assignment of error is preserved for LUBA review. Record 69 is a letter petitioner
21 submitted on June 15, 2021, to the board of county commissioners and includes
22 the following paragraph:

1 “Next, the applicant and the staff report fail to demonstrate that the
2 proposal complies with OAR 660-012-0065. Subsection (3)(o) does
3 not authorize ‘public roads,’ but instead allows ‘transportation
4 facilities’ that are matched to local travel needs. ‘The travel capacity
5 and performance standards of facilities and improvements serving
6 local travel needs *shall be limited to that necessary to support rural
7 land uses identified in the acknowledged comprehensive plan or to
8 provide adequate emergency access.*’ OAR 660-012-0065(3)(o). In
9 this case, the tax lots for the subject properly already have the
10 transportation facilities needed, namely either direct access to Willis
11 Road or access by means of a private access easement. The easement
12 was approved as part of the M37 waiver to serve all of the parcels.
13 The language in Docket P-36-05 specifically addresses that the
14 private easement is sufficient.” Record 69 (emphasis in original;
15 internal parenthetical omitted).

16 Petitioner contends that the above passage raises the issue of compliance with
17 OAR 660-012-0065(3)(o) and local travel needs, which petitioner argues is
18 sufficient to avoid statutory waiver.

19 Intervenor argue that, while petitioner generally cited OAR 660-012-
20 0065(3)(o) in the above passage, the issue raised in that passage at Record 69 is
21 that Jahnke Road, a public road, is not needed because the subject parcels can be
22 accessed by way of a private easement. Intervenor argues that passage does not
23 provide fair notice of the issue raised in this assignment of error—that intervenor
24 cannot establish that Jahnke Road will serve local travel needs unless and until
25 intervenor obtain county land use approval to develop a dwelling on the parcels
26 served by the road.

27 We agree with intervenor that the above passage and citation are not
28 sufficient to alert intervenor and the county to the issue raised in the first

1 assignment of error, concerning OAR 660-012-0065(3)(o), and thereby provide
2 them an adequate opportunity to respond. *ODOT v. Clackamas County*, 23 Or
3 LUBA 370, 375 (1992). In the quoted passage, petitioner focused their argument
4 on the absence of a demonstrated need for a public road due to alternative access.
5 Earlier in petitioner’s letter, petitioner asserted that “The subject property does
6 not qualify for or need a public roadway access. * * * Tax lot 1293 abuts Willis
7 Road, and is served by the easement on the recorded plat. Tax lots 1290 is land
8 locked but has access to Willis Road by a private access easement that runs across
9 tax lot 1293.” Record 68. In the passage petitioner relies on for preservation,
10 petitioner argues that the requirements for OAR 660-012-0065(3)(o) are not met
11 because “the subject properly already have the transportation facilities needed,
12 namely either direct access to Willis Road or access by means of a private access
13 easement.” Record 69.

14 Petitioner replies that the board of commissioners adopted findings at
15 Record 45 and 81 addressing the issue of “local travel needs” and, therefore, the
16 issue “was raised below with sufficient specificity that the governing body and
17 the parties have an adequate opportunity to respond to the issue.” Reply Brief 3.
18 The findings that are cited by petitioner are an almost verbatim recitation of a
19 letter that intervenors submitted to the board of county commissioners explaining
20 why, in intervenors’ view, existing private access is inadequate. Record 45, 81.
21 These findings establish that intervenors and the board understood the issue to be
22 whether the road was “needed” if the parcel had existing access. Contrary to

1 petitioner's position, the findings and written testimony at Record 45 and Record
2 81 demonstrate that the issue that petitioner wishes to raise on appeal was not
3 presented with sufficient specificity to allow intervenors and the board to
4 adequately respond to the issue. The letter submitted by petitioner makes only a
5 passing mention of local needs and instead focuses the bulk of its attention on
6 existing access. A passing mention is not enough to give the county or respondent
7 a reasonable opportunity to respond. *DLCD v. Coos County*, 25 Or LUBA 158,
8 167-68 (1993).

9 We conclude that the issue raised in the first assignment of error was not
10 raised during the local proceeding and is waived under ORS 197.797(1).

11 The first assignment of error is denied.

12 **SECOND ASSIGNMENT OF ERROR**

13 Petitioner's second assignment of error is that the county's approval of
14 Jahnke Road fails to satisfy a conditional use criterion that requires the applicant
15 to demonstrate that "[t]he parcel is suitable for the proposed use considering its
16 size, shape, location, topography, existence of improvements and natural
17 features" because a portion of the road exceeds the maximum grade set out in the
18 county's Transportation System Plan (TSP) Exhibit A Roadway Standards.
19 YCZP 1202.02(C). Petitioner argues that the TSP Exhibit A Roadway Standards
20 limits local roads to a maximum 10 percent grade. The challenged decision
21 approves a local road with 200 feet at 15 percent grade. According to petitioner,
22 this means that the location and topography make the parcel unsuitable for the

1 proposed road use and the county erred by finding that the application satisfies
2 CUP criterion YCZO 1202.02(C).

3 Intervenor respond that this issue was not raised before the local
4 government and thus was waived. We agree.

5 Petitioner cites a letter that was submitted to the planning commission to
6 establish that this issue was preserved. Petition for Review 16, Reply Brief 3.
7 That letter mentions many different concerns regarding the application, with a
8 section devoted to “Conditional use Criteria (C) The Location, Topography, and
9 Existing Improvements of the Parcel are not Suitable for the Proposed Use.”
10 Record 442. The letter describes concerns regarding topography and grade in the
11 following two paragraphs:

12 “The topography is not suitable because it only allows connection
13 to Willis Rd on a sharp curve where sightlines are obscured by trees
14 and other vegetation on property not controlled by the applicant.

15 “The proposed road is in the bottom of a draw with steep climbs to
16 Willis Road above. Applicant acknowledges it is somewhat steep
17 near Willis but levels out at the bottom. What this fails to address is
18 the extent of change in elevation between top and bottom. Lines on
19 paper fail to meaningfully convey the topography. Users of the
20 existing easement struggle with the grade and report that gravel is a
21 better road surface than pavement in these conditions.” Record 442.

22 The letter does not mention the TSP Roadway Standards or raise the issue that
23 the proposed road grade cannot meet the Roadway Standards. The statements
24 regarding topography and grade did not provide intervenors and the county “fair

1 notice” of the issue presented in the second assignment of error on appeal.
2 *McAndrew v. Washington County*, 78 Or LUBA 21, 30-31 (2018).

3 Petitioner replies that the issue was adequately raised because the board of
4 county commissioners made specific findings regarding topography and grade.
5 Those findings are as follows:

6 “[T]he Board finds the topography of the parcel is somewhat steep
7 near NW Willis Road, but the terrain evens out as the proposed road
8 travels west and south. The topography does not present an
9 impediment to the siting of a public road. Preliminary drawings and
10 studies submitted by [intervenors] indicate this road alignment is
11 both viable and safe. Most of the road can be built at a 10% grade
12 or less, but a short 200-foot-long section will need to be set at 15%
13 grade. The Public Works Department stated that [intervenors’]
14 solution acceptable as did the McMinnville Fire District. The Board
15 notes that the Deputy Fire Marshal specifically commented on a
16 previous design, and [intervenors] redesigned the road to make it
17 less steep in certain areas to address the concerns of the Deputy Fire
18 Marshal.

19 “[Petitioner] argues that the ‘topography’ of the parcel is not suitable
20 for a road serving ‘up to 16 lots.’ [Petitioner] argues that the
21 approach road onto Willis Road would need to be sited ‘on a sharp
22 curve where sightlines are obscured by trees and other vegetation on
23 property not controlled by the applicant.’ [Petitioner] ignores the
24 fact that the topography has been historically sufficient to be used
25 as a private road serving three lots, and has in fact been used in that
26 capacity for years. [Petitioner] also does not explain what
27 specifically about the topography make this site suitable for a
28 *private* road but not suitable for a *public* road. There are no different
29 safety-related standards for private and public roads: the approach
30 road location is either too steep or it isn’t. In fact, the proposed
31 public road will be less steep than the existing private road. Also,
32 the only expert evidence is the record concludes that the proposed
33 intersection site distance is more than adequate.

1 “* * * * *

2 “[Petitioner] states that ‘existing users * * * struggle with the grade,’
3 and that ‘users report that gravel is a better road surface than
4 pavement in those conditions.’ The Board finds that the opponents’
5 testimony that they ‘struggle’ with the grade is overstated, because
6 the opponents have used that access for over 40 years and made no
7 effort to improve it. The Board finds that the opponents who
8 currently use the graveled portion of the private driveway will
9 continue to be able to use that easement for access to NW Willis
10 Road if they so desire. The proposed new road will not replace that
11 aspect of the existing private easement access. So whatever
12 ‘struggles’ that may exist will not be altered or made worse.” Record
13 9-10 (internal citations omitted; emphases in original).

14 Those findings demonstrate that the issue presented to the board is distinct
15 from the issue raised on appeal. Those findings address the issues that petitioner
16 raised regarding topography and grade. Generalized concerns about the current
17 and potential struggles due to grade are insufficient to support the technical TSP-
18 based issue raised in the second assignment of error. *Slepack v. City of*
19 *Manzanita*, 44 Or LUBA 301, 306 (2003). The issue raised in the second
20 assignment of error is waived. ORS 197.797(1).

21 The second assignment of error is denied.

22 The county’s decision is affirmed.