

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

3
4 ANUNZIATA GOULD,
5 *Petitioner,*

6
7 vs.

8
9 DESCHUTES COUNTY,
10 *Respondent,*

11
12 and

13
14 20925 HARPER ROAD, LLC,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2022-007

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Deschutes County.

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

26
27 No appearance by Deschutes County.

28
29 J. Kenneth Katzaroff filed the intervenor-respondent's brief and argued on
30 behalf of intervenor-respondent. Also on the brief were Andrew J. Lee and
31 Schwabe, Williamson & Wyatt, P.C.

32
33 RYAN, Board Member; ZAMUDIO, Board Chair; RUDD, Board
34 Member, participated in the decision.

35
36 REMANDED

06/08/2022

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

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision by the county approving a personal use airport
4 on land zoned exclusive farm use.

5 **MOTION TO STRIKE**

6 ORS 197.835(2)(a) limits LUBA's evidentiary review to the local record.
7 Petitioner moves to strike footnote 14 of the intervenor-respondent's brief, and
8 the arguments in the intervenor-respondent's brief that rely on footnote 14, on
9 the basis that footnote 14 seeks to introduce evidence that is not part of the record
10 of the proceeding to establish compliance with an applicable criterion. Footnote
11 14 contains a hyperlink to a Federal Aviation Administration (FAA) document
12 relating to ownership of an aircraft. Intervenor does not argue that the evidence
13 included in the hyperlink or document is included in the record. Accordingly, the
14 motion to strike footnote 14 is granted. We will not consider the hyperlink or
15 document referenced in footnote 14 or the allegation of fact in footnote 14.¹

16 However, where a brief filed at LUBA includes allegations that are not
17 supported by the record, we do not strike such allegations from the brief. Rather,
18 we disregard such allegations. *Hammack & Associates, Inc. v. Washington*
19 *County*, 16 Or LUBA 75, 78, *aff'd*, 89 Or App 40, 747 P2d 373 (1987).

¹ We have also held, in the context of record objections, that we will not click on a website link to obtain a document. *Oregon Shores Conservation Coalition v. Coos County*, 75 Or LUBA 534, 540-41 (2017).

1 Accordingly, we deny petitioner's motion to strike the arguments that rely on
2 footnote 14.

3 **FACTS**

4 The approximately 122-acre subject property is zoned exclusive farm use
5 (EFU) and, due to its location approximately five miles southwest of the Bend-
6 Redmond Airport, is subject to an Airport Safety Combining (AS) overlay zone.
7 The subject property contains class VI, VII, and VIII soils, largely without
8 irrigation rights. The subject property is currently in use for alpaca farming and
9 has been used in the past for grazing purposes. Record 2282. The subject property
10 receives a property tax deferral under ORS 308A.062. Record 664.

11 The subject property includes rock faces and steep slopes leading down to
12 its eastern boundary, which is adjacent to the Deschutes River. To the north of
13 the subject property is the Cline Buttes Recreation Area, which is managed by
14 the federal Bureau of Land Management (BLM), and which includes a subarea
15 known as the Maston Area. The Maston Area in turn includes in its northeast
16 portion a wildlife conservation area that is closed to all uses from February 1 to
17 August 31 to protect birds of prey during sensitive nesting seasons. Record 1337.
18 To the south of the subject property is also BLM land.

19 Intervenor applied for a conditional use permit to site a 2,000-foot-long-
20 by-75-foot-wide personal use airport on a portion of the subject property that
21 contains class VI soils. Intervenor proposed a maximum of six flight operations
22 per week and identified two airplanes that would be used at the airport: a Cessna

1 and a De Havilland. The county planning director approved the application, and
2 petitioner and others appealed the decision to the hearings officer. The hearings
3 officer held a hearing on the application and, at the conclusion, adopted a decision
4 approving the application. Petitioner sought review by the board of county
5 commissioners, which declined review. This appeal followed.

6 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

7 A personal use airport is permitted in the EFU zone as a conditional use
8 under ORS 215.283(2)(h) and Deschutes County Code (DCC) 18.16.030(L).
9 Pursuant to *Brentmar v. Jackson County*, counties may subject the uses allowed
10 under ORS 215.283(2) to local criteria that are more stringent than those set forth
11 by statute. 321 Or 481, 496, 900 P2d 1030 (1995). The county has done so here,
12 in applying the criteria in DCC 18.16.040(A) and DCC 18.128.015 to conditional
13 uses in the EFU zone.² We set out and discuss those criteria below.

14 Petitioner's first and a portion of their second assignments of error argue
15 that the hearings officer's interpretation of DCC 18.16.040(A)(3) improperly
16 construes that provision and that the hearings officer's findings that DCC
17 18.16.040(A)(3) is met are inadequate to explain their conclusion and to respond
18 to issues raised by petitioner and others during the proceedings before the
19 hearings officer. The remaining portions of petitioner's second assignment of

² The airport must satisfy ORS 215.296(1) and (2), which are often referred to as the Farm Impacts Test. DCC 18.16.040(A)(1) and (2) are the county's implementation of ORS 215.296(1) and (2).

1 error allege that the hearings officer’s findings that DCC 18.128.015(A) and (B)
2 are met are inadequate and unsupported by substantial evidence in the whole
3 record with respect to golden eagles, proposed tree removal, noise from takeoff
4 and landing, and overflight safety. Finally, in the second assignment of error,
5 petitioner argues that the hearings officer erred in failing to address compliance
6 with DCC 18.80.056(F).³ Because the arguments overlap, we address the first
7 and second assignments of error together.

8 **A. DCC 18.16.040(A)(3)**

9 DCC 18.16.040(A)(3) requires a finding “[t]hat the actual site on which
10 the use is to be located is the least suitable for the production of farm crops or
11 livestock.” We refer to that provision as the “least suitable” standard.

12 The hearings officer observed that intervenor provided an analysis of an
13 alternative location on the subject property on which the airport could be located,
14 but the hearings officer found that the proposed site was “less suitable for
15 agriculture” than the alternative site. Record 44, 2536. The hearings officer

³ DCC 18.80.056 applies when development is proposed in the AS overlay zone as follows:

“As a condition of approval of any conditional use proposed within any AS Zone, the Planning Director or Hearings Body may require:

“* * * * *

“F. Other conditions considered necessary to achieve compliance and policies of the comprehensive plan.”

1 concluded that the entire property, including the proposed site for the airport, was
2 “generally unsuitable for farm crops or livestock.” Record 44. The hearings
3 officer relied on a previous interpretation of the least suitable standard by the
4 board of county commissioners, under which the least suitable standard is
5 satisfied when the property is “generally unsuitable” for farm use.

6 In their first assignment of error, petitioner argues that the hearings officer
7 improperly construed DCC 18.16.040(A)(3) when they determined that the
8 proposed site is “generally unsuitable” for agriculture. According to petitioner,
9 the least suitable standard requires the county to find that the site on which the
10 airport is proposed to be located is the worst place on the subject property for the
11 production of farm crops or livestock, not that the site, or even the entire property,
12 is “generally unsuitable” for the production of farms crops or livestock.
13 Intervenor responds that the hearings officer’s interpretation of the least suitable
14 standard is consistent with the previous interpretation of the standard by the board
15 of county commissioners and that, therefore, the hearings officer’s interpretation
16 should be affirmed under ORS 197.829(1).⁴

⁴ Intervenor also responds that petitioner is precluded from raising the issue raised in the first assignment of error under ORS 197.825(2)(a) and the exhaustion waiver principle articulated in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), *rev den*, 336 Or 615 (2004), because petitioner failed to identify the issue in their local appeal statement. We reject intervenor’s argument. The issue was raised in petitioner’s local appeal statement at Record 30.

1 Intervenor’s response requires us to address the standard of review of a
2 hearings officer’s interpretation of the DCC. As noted, petitioner sought review
3 of the hearings officer’s decision by the board of county commissioners, and the
4 board declined to review the decision. Contrary to intervenor’s argument, we do
5 not review the hearings officer’s interpretation of the DCC under the deferential
6 standard of review in ORS 197.829(1). *Gutoski v Lane County*, 141 Or App 265,
7 268, 917 P2d 1048, *rev den*, 324 Or 18 (1996) (where the governing body’s
8 decision is to decline to review the underlying decision, making the underlying
9 decision the county’s final decision, there is no basis to impute the lower body’s
10 interpretations to the governing body). That is so even if the hearings officer’s
11 interpretation derives from and is consistent with a previous interpretation by the
12 county governing body in a different permit proceeding.

13 In *Central Oregon Landwatch v. Deschutes County*, we affirmed the
14 hearings officer’s explanation of the least suitable standard, which we quoted
15 with approval in our decision, and which we quote again here:

16 “Use of the word ‘least’ indicates that there is only one site on a
17 subject parcel that can meet the criterion. * * * The plain meaning
18 of this criterion requires that the proposed conditional use be located
19 on the single site on the subject property that is least suitable. On the
20 other hand, the term ‘generally unsuitable’ is broader and may
21 encompass large swaths of land if it is all generally unsuitable for
22 farm land.

23 “Since, by definition, every property will have a site that is the least
24 suitable for farm production, the question is whether other sites on
25 the subject property are less suitable than the proposed site.” 78 Or
26 LUBA 136, 147, *aff’d*, 295 Or App 451, 438 P3d 855 (2018)

1 (brackets omitted).

2 We agreed with the applicant in that case that other factors such as irrigation
3 rights, existing development patterns, and the location of roads and other
4 development may have some bearing on determining the least suitable location
5 for farm use and thereby identifying a potential conditional use site.

6 We agree with petitioner that the hearings officer improperly construed the
7 least suitable standard. The hearings officer's interpretation of the least suitable
8 standard improperly inserts the phrase "generally unsuitable" into the standard
9 and relies on that inserted phrase to find that the least suitable standard is met
10 because, according to the hearings officer, the entire property is "generally
11 unsuitable" for the production of crops or livestock. ORS 174.010 prohibits
12 interpretations that insert words that have been omitted. Whether the entire
13 property is generally unsuitable for the production of crops or livestock is not the
14 applicable inquiry for determining the least suitable portion of the property for
15 farm use.

16 Relatedly, in a portion of their second assignment of error, petitioner
17 argues that the findings are inadequate to explain why other sites identified by
18 petitioner and others are less suitable for agriculture than intervenor's proposed
19 site. Petitioner argues that other sites with lower-quality soils are less suitable for
20 agriculture than intervenor's proposed site and that the hearings officer was
21 obligated but failed to consider whether any of those sites are the least suitable
22 for farm use.

1 We also agree with petitioner that the hearings officer's findings are
2 inadequate to address issues raised by petitioner and others that other sites on the
3 subject property are the least suitable for the production of crops or livestock.
4 *Norvell v. Portland Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979)
5 (findings must address and respond to specific issues relevant to compliance with
6 applicable approval standards that were raised in the proceedings below). The
7 hearings officer found that an alternative location on the subject property could
8 accommodate the airstrip but that intervenor's proposed site is "less suitable" for
9 the production of crops or livestock. However, the findings do not address the
10 arguments or evidence in the record that identified additional sites on the property
11 that may also be less suitable for the production of crops or livestock than the
12 proposed site.

13 On remand, the hearings officer should consider other sites on the property
14 identified during the proceedings below and determine the location of the least
15 suitable site on the property for the production of crops or livestock, considering
16 other factors such as, but not limited to, soil capability; the location of roads,
17 dwellings, and farm operations; as well as any requirements necessary for the
18 airport to function as intended. 78 Or LUBA at 147.

19 Finally, in a portion of the second assignment of error, petitioner argues
20 that the hearings officer's conclusion that the proposed site satisfies DCC
21 18.16.040(A)(3) is not supported by substantial evidence in the whole record and
22 that other sites identified during the proceedings below are less suitable than the

1 proposed site for agriculture. Because we remand the decision to the hearings
2 officer for consideration of the evidence in the first instance, we do not reach this
3 portion of the second assignment of error.

4 **B. DCC 18.125.015**

5 DCC 18.128.015 provides additional standards for most conditional uses:

6 “Except for those conditional uses permitting individual single-
7 family dwellings, conditional uses shall comply with the following
8 standards in addition to the standards of the zone in which the
9 conditional use is located and any other applicable standards of the
10 chapter:

11 “A. The site under consideration shall be determined to be
12 suitable for the proposed use based on the following factors:

13 “1. Site, design and operating characteristics of the use;

14 “2. Adequacy of transportation access to the site; and

15 “3. The natural and physical features *of the site*, including,
16 but not limited to, general topography, natural hazards
17 and natural resource values.⁵

18 “B. The proposed use shall be compatible with existing and
19 projected uses on surrounding properties based on the factors
20 listed in DCC 18.128.015(A).

21 “C. These standards and any other standards of DCC 18.128 may
22 be met by the imposition of conditions calculated to ensure
23 that the standard will be met.” (Emphasis added.)

⁵ DCC 18.04.030 defines “natural resources” to mean “air, land, water and the elements thereof valued for their existing and potential usefulness to man.”

1 We refer to DCC 18.128.015(A) as the “suitability” standard. We refer to
2 DCC 18.128.015(B) as the “compatibility” standard. In several sections under
3 the second assignment of error, petitioner argues that the hearings officer’s
4 findings that DCC 18.128.015(A) and (B) are met are inadequate and not
5 supported by substantial evidence in the whole record.

6 1. Golden Eagles

7 Golden eagles are identified as wildlife resources in the county’s Statewide
8 Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open
9 Spaces) inventory. Deschutes County Comprehensive Plan (DCCP) Table 5.4.1.
10 The county’s program to achieve Goal 5 with respect to golden eagles is to apply
11 the Sensitive Bird and Mammal Habitat Combining (SBMH) overlay zone to
12 sensitive habitat areas. DCC 18.90.010. Sensitive habitat areas include a one-
13 quarter-mile buffer around each inventoried golden eagle nest. DCC
14 18.90.020(A)(1). Development impacting sensitive habitat areas is subject to site
15 plan review pursuant to DCC 18.90.040, DCC 18.90.050, and DCC 18.90.060.
16 There is no dispute that no portion of the subject property is within a sensitive
17 habitat area.

18 Evidence in the record submitted by intervenor’s expert notes three golden
19 eagle nesting areas—Awbrey Falls, Jaguar Avenue, and Swalley—within two
20 miles of the subject property. Record 3036-37. The closest nest in the Awbrey
21 Falls nesting area is approximately 0.2 miles from the subject property, and the
22 closest nest in the Jaguar Avenue nesting area is approximately 1.7 miles from

1 the subject property. Record 1337. The distance from the subject property to the
2 Swalley nesting area is not included in the record. Similar evidence in the record
3 submitted by petitioner and others identified five nests in the Awbrey Falls and
4 Jaguar Avenue nesting areas that are within two miles of the subject property.⁶
5 Record 1316.

6 The Jaguar Avenue nests are identified in the county's Goal 5 inventory.
7 DCCP Table 5.4.6; Record 380-86, 3037. The Awbrey Falls nests are not
8 identified in the county's Goal 5 inventory.

9 In a portion of the second assignment of error, petitioner argues that the
10 hearings officer erred in failing to adopt findings under the suitability standard at
11 DCC 18.128.015(A)(3) addressing petitioner's argument that the subject

⁶ Petitioner's expert explained:

"After leaving the nest, the fledgling, no longer an eaglet, may wander locally or travel as far as the surrounding western states. At adulthood, four to five years of age, the mature eagle may return to the area near where it was hatched to find a nest that could include an unoccupied nest or establishment of a new territory. * * *

*** The nest is a focal point for the territory of the golden eagle—the area it uses in search of food to support themselves and their eaglets. Most golden eagle territories cover at least a two-mile radius from the nest and many are much larger. Golden eagles make multiple trips from the nest during daylight hours to hunt during the nesting season, January 1 – August 31, when they are incubating eggs and raising young." Record 1314-15.

1 property is not “suitable for the proposed use based on * * * natural resource
2 values.” Petitioner argues that the property is not suitable for the proposed airport
3 use because the property is located within a two-mile radius of golden eagle nests
4 and is located in what petitioner characterizes as golden eagle “territory.” Petition
5 for Review 21.

6 Intervenor responds, and we agree, that the hearings officer was not
7 obligated to adopt findings regarding whether the subject property is suitable for
8 the proposed airport use with respect to golden eagle nests because there is no
9 dispute that the subject property is not designated as a sensitive habitat area. An
10 evaluation of whether a particular property is suitable for a proposed use based
11 on the “natural resource values” “*of the site*” is guided by the county’s program
12 to achieve Goal 5 with respect to golden eagles. That program limits uses that
13 conflict with golden eagles by designating a one-quarter-mile buffer around each
14 inventoried nest as sensitive habitat areas and requiring site plan review for those
15 conflicting uses. Here, there is no dispute that the subject property is not within
16 a sensitive habitat area. In addition, while the closest nest may be within one
17 quarter of a mile of the end of the runway, that nest is not identified in the
18 county’s Goal 5 inventory, and, accordingly, it is not a natural resource value *of*
19 *the site* protected under the program. We reject petitioner’s argument that the
20 property fails to meet the suitability standard due to the proximity of golden eagle
21 nests.

1 The hearings officer also addressed golden eagles under the compatibility
2 standard at DCC 18.128.015(B), which requires the county to determine whether
3 the proposed airport use is “compatible with existing and projected uses on
4 surrounding properties based on the factors listed in DCC 18.128.015(A).” The
5 compatibility standard differs from the suitability standard in DCC
6 18.128.015(A) because the compatibility standard focuses on the impacts of the
7 proposed conditional use airport on uses on surrounding properties.

8 The hearings officer found that the proposed airport use is compatible with
9 the golden eagle nests on “nearby properties”:

10 “To the extent that wildlife uses are part of the natural features of
11 the surrounding properties, both [BLM] and the Oregon Department
12 of Fish and Wildlife reviewed the proposal. Neither agency
13 identified or otherwise expressed concern regarding impacts to
14 wildlife that would result from the proposal. Further, the condition
15 of approval preventing overflights of the Maston Wildlife
16 Conservation Area will prevent potential impacts. There is evidence
17 in the record of nearby nesting eagles that are protected under the
18 Bald and Golden Eagle Protection Act. According to the U.S. Fish
19 and Wildlife Service [(USFWS)], activities that include nest
20 disturbance are prohibited under that act without an incidental take
21 permit. The act itself, however, does not prohibit the airstrip. I find
22 that obtaining any required incidental take permit would make the
23 proposed use compatible with this wildlife use, and such a
24 requirement could be imposed as a condition of approval.” Record
25 50.

26 Petitioner argues that the hearings officer’s reliance on the ability to obtain an
27 eagle incidental take permit (Take Permit) from the USFWS pursuant to 50 CFR
28 part 22 is not a substitute for evaluating compliance with the compatibility

1 standard and that, in fact, a “take” of a golden eagle would mean that the bird is
2 damaged or killed, resulting in *per se* incompatibility of the proposed airport with
3 the golden eagle nests on surrounding properties. Petitioner additionally argues
4 that, in any event, the hearings officer failed to impose a condition of approval
5 requiring a Take Permit.

6 Intervenor responds that the properties adjacent to the subject property are
7 not designated as sensitive habitat area, and, therefore, the county may not
8 evaluate the airport for compatibility with the nests identified by petitioner’s
9 consultant and others. We understand intervenor to argue that, absent the
10 sensitive habitat area designation applying to the adjacent properties, the
11 proposed airport is compatible with golden eagle nests identified by petitioner’s
12 expert.⁷

13 Intervenor’s understanding of DCC 18.128.015(B) is not reflected in the
14 hearings officer’s findings. Rather, the hearings officer concluded only that the
15 ability to secure a Take Permit assures the compatibility of the proposed airport
16 use with golden eagle nests on “nearby properties.” However, the ability to secure
17 a Take Permit is not the equivalent of demonstrating compatibility of the
18 proposed airport use with golden eagle nests on surrounding properties because

⁷ We do not understand intervenor to dispute that wildlife habitat conservation can constitute an “existing and projected use[] on surrounding properties” for purposes of the compatibility standard at DCC 18.128.015(B).

1 a Take Permit allows some measure of damage to golden eagles.⁸ That finding
2 also does not use the phrase “surrounding properties” or otherwise explain the
3 meaning of “nearby properties.”

4 On remand, the hearings officer should interpret DCC 18.128.015(B) to
5 determine the geographic scope of the phrase “surrounding properties” in the
6 compatibility standard and determine whether the proposed airport use is
7 compatible with uses on the surrounding properties for golden eagle nesting,
8 without regard for the ability to obtain a Take Permit and considering whether
9 the county’s program to achieve Goal 5 with respect to golden eagles has any
10 bearing on the determination.

11 **2. Tree Removal**

12 The hearings officer found that the subject property meets the suitability
13 standard because development of the proposed airport “will require minimal
14 grading and clearing of trees.” Record 47. In another portion of the second

⁸ USFWS staff commented:

“Applying for an incidental take permit is voluntary and you do not need a permit to construct or operate. The Bald and Golden Eagle Protection Act does not explicitly prohibit the construction or operation of airstrips (or anything for that matter). However, it DOES prohibit take of eagles, which includes nest disturbance. So if your otherwise lawful activity disturbs eagles, then you have violated the Bald and Golden Eagle Protection Act. Getting a permit is a way to authorize the incidental take/disturbance of eagles, should it occur.” Record 3039.

1 assignment of error, petitioner argues that the evidence in the record, including
2 Oregon Department of Aviation requirements for tree removal, indicates that
3 development could require approximately eight acres of habitat and forage to be
4 removed. Intervenor responds, and we agree, that the evidence in the record
5 supports the hearings officer's conclusion that the suitability standard is met
6 because development will require removal of approximately 10 trees and topping
7 of "a few" at 20 feet. Record 70. Petitioner cites no evidence in the record that
8 undermines that evidence.

9 **3. Noise**

10 In another portion of the second assignment of error, petitioner argues that
11 the hearings officer's findings are inadequate because they fail to address
12 evidence in the record that noise from the De Havilland airplane at takeoff can
13 reach six decibels above the pain threshold of the human ear and argument that
14 the proposed airport use is therefore incompatible with uses on surrounding
15 properties. Record 550, 642-43. The hearings officer did not adopt findings
16 specific to noise, but they found:

17 "[Intervenor], Staff, and other participants, including participants
18 opposed to the Application, all appear to agree that the primary
19 potential for off-site impacts to occur include visual impacts and
20 noise from aircraft using the airstrip.

21 "The Application asserts that any off-site impacts will be minimal
22 in light of the limited use of the airstrip. Other comments supportive
23 or the application describe personal use airports as compatible uses
24 in agricultural areas like those surrounding the Subject Property.
25 Comments submitted in opposition to the Application disagreed

1 with [intervenor] and asserted that noise and visual impacts from
2 planes would impact wildlife and otherwise erode the peacefulness
3 of the area, which they describe as a fundamental part of the
4 recreational experience for users of the surrounding areas.

5 “Similar to the discussion of potential farm impacts, I find that the
6 use of the airstrip for which off-site impacts may occur is limited to
7 the period of time aircraft will be taking off and landing at the
8 airstrip. Following takeoff and prior to landing, aircraft are simply
9 using the airspace that is available regardless of where the flight
10 begins or ends. Some testimony in the record implies that there is
11 very little air traffic in the area and, as such, additional flights are
12 intrusive and not compatible. Other evidence in the record
13 demonstrates that there is a lot of existing air traffic in the area. I
14 find that it is more likely than not that any additional flights resulting
15 from the private airstrip are *de minimis*. I further find no basis to
16 conclude that denying the Application would somehow prevent that
17 activity from occurring in the area. Only takeoffs and landings at the
18 proposed airstrip are specific to the proposal in the Application and
19 provide an incremental difference that can be analyzed.

20 “[Intervenor] has proposed to limit use of the airstrip to six or fewer
21 weekly operations. [Intervenor] also submitted information
22 describing the takeoff and landing process, which is generally
23 described as the period of time the aircraft is climbing to or
24 descending from an altitude of 500 feet, respectively. Based on the
25 location of the airstrip on the Subject Property, the aircraft’s
26 departure path will require it to be over adjacent property for just
27 over seven seconds before it reaches the 500 foot altitude mark. The
28 arrival path over adjacent property is longer, and it requires a time
29 period of less than 11 seconds of descent before the aircraft is over
30 the Subject Property on its way to land. The record demonstrates
31 that aircraft are noisier on takeoff than they are when landing.
32 [Intervenor] has also proposed a condition of approval that would
33 prohibit any overflight of the Maston Wildlife Conservation Area.

34 “* * * * *

35 “With respect to operating characteristics and natural features of the

1 surrounding properties, the record reveals that there is existing air
2 traffic in this area. The sighting of planes from adjacent properties
3 is therefore already a part of any user's experience while on those
4 properties, whether those users are there for active or passive
5 recreation, or for farming. Based on the minor and temporary
6 addition of noise associated with the proposed airstrip, I find that the
7 use is compatible with other uses on surrounding properties as well.
8 With less than one takeoff and landing per day, each climbing or
9 descending over adjacent properties for 11 seconds or less, it is
10 likely that many users of the surrounding properties will not even
11 observe the operation. The total takeoff and landing time when these
12 impacts exist is less than two hours spread out over the course of
13 entire year. I agree with [intervenor] that this is a *de minimis* impact
14 and, therefore, compatible with those surrounding lands." Record
15 49-50.

16 Intervenor responds that the hearings officer's findings address what the
17 compatibility standard requires, which is a general determination of whether the
18 noise from the proposed airport is compatible with uses on surrounding
19 properties, without regard to a particular model of plane.

20 We agree with petitioner that the findings are inadequate to address
21 petitioner's evidence that the De Havilland airplane noise levels on takeoff are
22 not compatible with uses on surrounding properties. The hearings officer's
23 general finding that the number of flights will be "*de minimis*," and takeoff noise
24 would therefore be minimal, is not sufficient to address petitioner's argument and
25 evidence that noise from takeoff of the De Havilland airplane is very loud and
26 incompatible with surrounding uses.

1 **4. Overflight Safety**

2 In a portion of the second assignment of error, petitioner argues that the
3 hearings officer’s findings are inadequate to address arguments raised below that
4 the proposed airport use is not compatible with uses on surrounding properties
5 due to airspace congestion.⁹ Intervenor responds, and we agree, that airspace
6 congestion is not a “use[] on surrounding properties,” as that phrase is used in
7 DCC 18.128.015(B), and, accordingly, the hearings officer was not required to
8 adopt findings addressing the compatibility of the proposed airport with respect
9 to airspace congestion.

10 **C. DCC 18.80.056(F)**

11 The provisions of DCC chapter 18.80 apply to permitted and conditional
12 uses in the AS overlay zone. DCC 18.80.056 allows the county to adopt
13 conditions of approval for any conditional uses proposed in the AS overlay zone:

14 *“As a condition of approval of any conditional use proposed within*
15 *any AS Zone, the Planning Director or Hearings Body may require:*

- 16 “A. An increase in required setbacks.
- 17 “B. Additional off-street parking and loading facilities and
18 building standards.
- 19 “C. Limitations on signs or lighting, hours of operation, points of
20 ingress and egress and building heights.
- 21 “D. Additional landscaping, screening and other improvements.

⁹ The hearings officer addressed airspace congestion in applying DCC 18.128.050. Record 50-51.

1 “E. Use of glare-resistant materials in construction or other
2 methods likely to reduce operating hazards.

3 “F. Other conditions considered necessary to achieve compliance
4 and policies of the comprehensive plan.” (Emphasis added.)

5 In a portion of their second assignment of error, petitioner argues that the hearings
6 officer’s findings are inadequate to address DCC 18.80.056(F). Petition for
7 Review 26-29. According to petitioner, the hearings officer was required to adopt
8 findings addressing petitioner’s arguments that the airport conflicts with various
9 provisions of the DCCP and the county’s transportation system plan.

10 Intervenor responds, and we agree, that petitioner has failed to establish
11 that the hearings officer erred in failing to adopt findings addressing their
12 arguments. DCC 18.80.056 provides the county with the authority to adopt
13 conditions of approval for uses in the AS overlay zone. Petitioner does not
14 identify any condition of approval that the hearings officer should have adopted
15 under DCC 18.80.056(F) and, accordingly, has not established that DCC
16 18.80.056(F) applies to the application at all.

17 **D. Conclusion**

18 In conclusion, remand is required for the hearings officer to (1) evaluate
19 the location of the proposed airport on the subject property under the least
20 suitable standard and (2) adopt more adequate findings addressing the
21 compatibility standard with respect to golden eagle nests on surrounding
22 properties and noise from the De Havilland airplane.

23 The first assignment of error is sustained.

1 The second assignment of error is sustained, in part.

2 **THIRD ASSIGNMENT OF ERROR**

3 As relevant here, ORS 215.283(2)(h) allows to be established on land
4 zoned EFU “[p]ersonal-use airports for airplanes and helicopter pads, including
5 associated hangar, maintenance and service facilities. * * * *No aircraft may be*
6 *based on a personal-use airport other than those owned or controlled by the*
7 *owner of the airstrip.*” (Emphasis added.) The hearings officer found:

8 “[Intervenor] asserts that the same individual, Alexander Polvi,
9 owns the Subject Property and the two aircraft to be based at the
10 proposed private airport. Based on that same ownership,
11 [intervenor] asserts the planes will be owned or controlled by the
12 property owner.

13 “Mr. Polvi does not directly own either the Subject Property or the
14 two aircraft. Instead, each are held by a corporate entity, the sole
15 member of which is a trust, of which Mr. Polvi is ultimately the sole
16 trustee. In support of [its] ownership, [intervenor] submitted two
17 certifications attesting to this corporate ownership structure.

18 “I find that, based on the current corporate structure, this criterion is
19 met. Mr. Polvi is the individual that controls the aircraft and he also
20 owns the airstrip. However, it is possible that the corporate structure
21 could change in the future, or other individuals or entities could
22 become members or trustees, thereby creating an ownership or
23 control that differs between the aircraft and the Subject Property. I
24 will therefore impose a condition of approval requiring [intervenor]
25 to retain this corporate structure or otherwise to base aircraft at the
26 airport only if they are owned or controlled by the owner of the
27 Subject Property.” Record 45.

28 In their third assignment of error, we understand petitioner to argue that
29 the hearings officer improperly construed ORS 215.283(2)(h) in concluding that

1 intervenor demonstrated that the aircraft to be based at the airport are “owned or
2 controlled by the owner of the airstrip” because the evidence in the record is that
3 the limited liability company that owns the subject property is not the same as
4 the limited liability companies that own the aircraft. Petition for Review 42-43.
5 We understand petitioner to argue that the legislature’s use of the word “owner”
6 in the phrase “owner of the airstrip” in ORS 215.283(2)(h) means that a single
7 person or entity must own both the subject property and the aircraft.

8 Intervenor responds, and we agree, that the plain, ordinary meaning of the
9 word “owner” includes “one that owns : one that has the legal or *rightful title*
10 *whether the possessor or not.*” *Webster’s Third New Int’l Dictionary* 1612
11 (unabridged ed 2002) (boldface in original; emphasis added). Accordingly, the
12 hearings officer correctly interpreted ORS 215.283(2)(h) to conclude that the
13 limited liability company “owner of the airstrip” is the same as the limited
14 liability companies that “own[] or control[]” the aircraft because all are owned
15 by the same revocable trust of which Polvi is the sole trustee, as explained by
16 intervenor during the proceedings before the hearings officer. Record 203, 520,
17 2246, 2249-50, 2866.

18 Petitioner also argues that the decision is not supported by substantial
19 evidence in the record because the record does not identify the owner of the De
20 Havilland aircraft. Intervenor responds that the record includes multiple
21 statements addressing ownership of the De Havilland airplane, citing Record 520
22 (letter from attorney stating that Polvi is the sole owner of Willow Trust and that

1 Willow Trust owns DHC-2 481, LLC) and Record 2866 (certification from Polvi
2 that they own both of the airplanes), among other pages. We agree with
3 intervenor that the evidence in the record supports the county's conclusion that
4 the De Havilland airplane is controlled by the same revocable trust that controls
5 the subject property.

6 The third assignment of error is denied.

7 The county's decision is remanded.