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

ANNUNZIATA GOULD,
Petitioner,

and

CENTRAL OREGON LANDWATCH,
Intervenor-Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

CENTRAL LAND AND CATTLE COMPANY, LLC and
KAMERON DELASHMUTT,
Intervenors-Respondents.

LUBA No. 2022-026

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Jeffrey L. Kleinman filed a petition for review and argued on behalf of petitioner. Jennifer Bragar filed a reply brief. Also on the reply brief was Stephen Thorpe.

No appearance by Deschutes County.

Carol E. Macbeth filed the intervenor-petitioner's brief and a reply brief and argued on behalf of intervenor-petitioner.

J. Kenneth Katzaroff filed the intervenors-respondents' brief and argued on behalf of intervenors-respondents.

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

ZAMUDIO, Board Chair, did not participate in the decision.

AFFIRMED 07/28/2022

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

Petitioner appeals a decision by the county approving a site plan as part of a phased destination resort.

FACTS

Intervenors-respondents (intervenors) applied for site plan review of a welcome center, gate house, golf clubhouse, and community hall as part of Phase A-1 of the approximately 1,980-acre Thornburg Destination Resort (Resort).[1]

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[1] As described in the application:

> "Gatehouse. The destination resort is a private community. The gatehouse will house staff who will control access to the resort. A small parking area is proposed for use by staff.
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> "Welcome Center. The Welcome Center will serve the dual function of a reservation and check-in and office facility. Initially, the offices will used by sales staff. The Center will also include a large lounge area for with a model of the resort.
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> "Golf Clubhouse. The golf clubhouse includes a 100-seat restaurant and a pro shop that will provide services for golfers and management of the golf course.
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> "Community Hall. The Community Hall is a multi-purpose building. It includes the 100-person meeting/event room required by Condition 31 of the FMP. It also includes restrooms for persons attending meetings. The meeting/event room is designed to host meetings of 100 persons. The rest of the building is designed for golf cart storage. This area may also be used for dining and dancing by persons attending meetings and events at the Community Hall." Record 4103-04 (boldface omitted).

The Resort has a long history most recently summarized in *Gould v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2021-112, June 9, 2022), *appeal pending* (CA178963). We recite only the facts that are germane to resolving this appeal.

Under Deschutes County Code (DCC) 18.113.040, destination resorts are subject to a three-step approval process. The first step is Conceptual Master Plan (CMP) review. DCC 18.113.040(A). The second step is Final Master Plan (FMP) review. DCC 18.113.040(B). The county approved the FMP in 2008. The final step in the county's three-step approval process is land division or site plan review (third-stage review). DCC 18.113.040(C). In addition to finding that that the application satisfies the site plan review criteria in DCC 18.124 or the subdivision criteria in DCC Title 17, the county must find at the third-stage review that the specific development proposal complies with the standards and criteria of DCC 18.113 and with the FMP.[2] DCC 18.113.040(C).

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[2] DCC 18.124.020 provides:

> "The elements of a site plan are: The layout and design of all existing and proposed improvements, including, but not limited to, buildings, structures, parking, circulation areas, outdoor storage areas, bicycle parking, landscape areas, service and delivery areas, outdoor recreation areas, retaining walls, signs and graphics, cut and fill actions, accessways, pedestrian walkways, buffering and screening measures and street furniture."

DCC 17.16.030 sets out the informational requirements for tentative subdivision plans including existing conditions, the proposed physical layout, and the "[s]ource, method and preliminary plans for domestic and other water

The FMP includes two conditions that are relevant to this appeal. First, the FMP includes Condition 10, which provides:

> "[Intervenors] shall provide, at the time of tentative plat/site plan review for each individual phase of the resort development, updated documentation for the state water right permit and an accounting of the full amount of mitigation, as required under the water right, for that individual phase." Record 60.

The second relevant condition is Condition 38, which requires some background explanation. DCC 18.113.070(D) requires that, for the development of a destination resort, "[a]ny negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource." We refer to that standard as the "no net loss" standard. The FMP provides for phased development and includes approval of a fish and wildlife habitat mitigation plan (FWMP) to satisfy the no net loss standard and offset development impacts through mitigation. The component relevant to this appeal addresses off-site fish habitat and requires intervenor to secure water rights for fish habitat mitigation from Big Falls Ranch (BFR) and Central Oregon Irrigation District (COID).[3] FMP Condition 38 requires intervenors to "abide by" the FWMP and to provide annual reporting:

> "[Intervenors] shall abide by the April 2008 Wildlife Mitigation Plan, the August 2008 Supplement, and agreements with the BLM

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supplies, sewage disposal, solid waste disposal and all utilities[.]" DCC 17.16.030(C)(8).

[3] The first component addresses terrestrial wildlife and is not at issue here.

> and ODFW for management of offsite mitigation efforts. Consistent with the plan, [intervenors] shall submit an annual report to the county detailing mitigation activities that have occurred over the previous year. The mitigation measures include removal of existing wells on the subject property, and coordination with ODFW to model stream temperatures in Whychus Creek." Record 78.

See Gould v. Deschutes County, 59 Or LUBA 435 (2009), *aff'd*, 233 Or App 623, 227 P3d 758 (2010) (affirming the county's decision approving the FMP, including FMP Condition 38).

The hearings officer concluded that the applications satisfied all applicable DCC criteria and satisfied the applicable FMP conditions, including Condition 10 and Condition 38. This appeal followed.

PETITIONER'S ASSIGNMENT OF ERROR

Petitioner's first assignment of error qualifies as a "blunderbuss attack" on the hearings officer's decision. *Tillamook County v. LCDC*, 56 Or App 459, 461, 642 P2d 691 (1982). The first assignment of error includes several arguments that challenge the hearings officer's decision. We address the first assignment of error to the extent it presents a cognizable assignment of error.

A. Effect of Prior Appeals

The hearings officer adopted findings concluding that many if not all of petitioner's challenges to the applications were addressed and resolved by prior LUBA and Court of Appeals' decisions regarding development of the Resort and applying those prior resolutions to the applications. Record 73-78. We understand petitioner to argue that the hearings officer improperly construed the

applicable law in determining that petitioner's challenges to the applications were previously resolved, and in applying those resolutions to the applications.

The hearings officer also adopted alternative, independent findings that intervenor satisfied its burden to demonstrate compliance with all applicable approval standards, including Conditions 10 and 38. Because we conclude that the hearings officer's alternative, independent findings are adequate to explain why they concluded the applications should be approved, we need not address petitioner's challenge to the hearings officer's conclusion that petitioner's challenges to the applications were addressed and resolved by prior decisions.

We address petitioner's challenges to those independent findings below.

B. FMP Condition 10

We repeat Condition 10 here:

> "[Intervenors] shall provide, at the time of tentative plat/site plan review for each individual phase of the resort development, updated documentation for the state water right permit and an accounting of the full amount of mitigation, as required under the water right, for that individual phase." Record 60.

The parties agree that intervenors must establish compliance with FMP Condition 10 at each site plan review phase.[4] Intervenors possess a water rights permit

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[4] In *Gould v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2020-095, June 11, 2021) (*Gould Golf*), *aff'd*, 314 Or App 636, 494 P3d 357 (2021), *rev den*, 369 Or 211, 503 P3d 446 (2022), we explained that FMP Condition 10 is imposed to ensure compliance with DCC 18.113.070(K), which is concerned with the availability of water for resort use and mitigation for the resort's

(Water Permit) that was extended by the Oregon Water Resources Department (OWRD). That extension was subsequently withdrawn, and the continued validity of intervenors' Water Permit is subject to a pending challenge by petitioner in a contested case proceeding.[5] The hearings officer concluded that intervenors satisfied the requirements of Condition 10 by providing documentation that intervenors' Water Permit is not cancelled.[6]

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consumptive use of water. *Gould Golf*, ___ Or LUBA at ___ (slip op at 13-14) (citations omitted).

[5] On April 3, 2013, OWRD issued intervenors a state water right permit, Permit G-17036, for a quasi-municipal use of groundwater, which authorized intervenor to drill six wells and pump groundwater for resort use. Intervenors' Water Permit specified that completion of construction of the resort water system and application of the water must be accomplished within five years, by April 3, 2018. On April 2, 2018, intervenors requested an extension of its Water Rights Permit from OWRD. On June 5, 2018, ORWD issued a proposed final order approving the extension. On July 20, 2018, petitioner filed a protest of the proposed final order and requested a contested case hearing. On October 26, 2018, OWRD issued a final order allowing the permit extension without holding a contested case hearing. On January 31, 2019, OWRD withdrew the October 26, 2018 final order and referred petitioner's protest to the Office of Administrative Hearings for a contested case hearing. We understand that that contested case hearing is pending. *See* Record 3753-54.

[6] Intervenors argued in *Gould v. Deschutes County*, 79 Or LUBA 561 (2019) (*Gould VIII*), *aff'd*, 310 Or App 868, 484 P3d 1073 (2021) that petitioner's protest of the permit extension before OWRD did not render the permit void. We concluded that the hearings officer did not err in construing FMP Condition 10 to require documentation of the water right and that intervenors had sufficiently documented its water right, notwithstanding petitioner's protest. Our decision was upheld by the Court of Appeals. *Gould,* 310 Or App 868.

Evidence in the record demonstrates that intervenors are also seeking OWRD approval to use water under water rights different from the Water Permit for some resort purposes. Record 1981-86, 2000-09. Petitioner argues that the evidence that intervenors are seeking OWRD approval to use other water rights calls into question the evidence that intervenors submitted regarding the Water Permit. Petitioner argues that it is "very much in question" whether intervenors' Water Permit will be extended at the conclusion of the contested case proceeding. Petition for Review 16. Accordingly, petitioner argues, petitioner has demonstrated that as a matter of law, intervenors cannot obtain the water rights necessary to satisfy Condition 10. *Bouman v. Jackson County*, 23 Or LUBA 628, 646-47 (1992) (a condition of approval requiring that a state agency permit be

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In *Gould Golf*, petitioner disputed the status of intervenors' water rights. Petitioner argued that intervenors could not satisfy FMP Condition 10 because the permit had expired and because the permit extension was contested before OWRD and not final. We concluded that petitioner had not established that as a matter of law the permit was not a valid water right and that intervenors had satisfied Condition 10 by providing documentation that the permit was not cancelled, and an accounting of the mitigation water needed for the golf course site plan. *Gould Golf*, ___ Or LUBA at ___ (slip op at 17-18).

Petitioner again disputed the status of intervenors' water rights during the county's review of the site plan applications at issue in *Gould v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2022-013, June 1, 2022) (*2022-013*), *appeal pending* (CA178949), making the same arguments that the county and LUBA rejected in *Gould VIII* and *Gould Golf*. The hearings officer found that the facts related to the Water Permit had not changed and found that FMP Condition 10 was satisfied. *2022-013*, ___ Or LUBA at ___ (slip op at 14-16).

secured is an appropriate way to ensure compliance with a water supply criterion, unless it was shown that obtaining the required permits is "precluded * * * as a matter of law.").

Petitioner's argument is similar to the argument we recently rejected in *2022-013*. It is an argument that the hearings officer's decision is not supported by substantial evidence. Substantial evidence is evidence that a reasonable person would rely on in making a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). In reviewing the evidence, LUBA may not substitute its judgment for that of the local decision-maker. Rather, LUBA must consider all the evidence to which it is directed and determine whether, based on that evidence, a reasonable local decision-maker could reach the decision that it did. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988).

Intervenors' applications for water rights that are different from the rights under the Water Permit do not contradict the evidence in the record that intervenors' water right under the Water Permit remains valid. Intervenors do not rely on any alternative water right or any pending OWRD application to satisfy FMP Condition 10 for the site plan. Accordingly, the evidence that intervenors are seeking OWRD approval to use water rights other than those rights under the Water Permit does not undermine the hearings officer's conclusion that intervenors' evidence satisfies FMP Condition 10 for the site plan.

In addition, petitioner's confidence that petitioner will prevail in the contested case proceeding does not establish that as a matter of law intervenors

are precluded from securing water under the Water Permit. We conclude that the hearings officer's finding that FMP Condition 10 is satisfied is supported by substantial evidence.

C. FMP Condition 38

We repeat Condition 38 here:

> "[Intervenors] shall abide by the April 2008 Wildlife Mitigation Plan, the August 2008 Supplement, and agreements with the BLM and ODFW for management of offsite mitigation efforts. Consistent with the plan, [intervenors] shall submit an annual report to the county detailing mitigation activities that have occurred over the previous year. The mitigation measures include removal of existing wells on the subject property, and coordination with ODFW to model stream temperatures in Whychus Creek." Record 78.

We have explained what Condition 38 requires:

> "The requirement that [intervenorss] 'abide by' the FWMP is a continuous requirement for resort development, even without FMP Condition 38. *See* DCC 18.113.040(C) ('Each element or development phase of the destination resort must receive additional approval through the required site plan review (DCC 18.124) or subdivision process (DCC Title 17). In addition to findings satisfying the site plan or subdivision criteria, findings shall be made that the specific development proposal complies with the standards and criteria of DCC 18.113 *and the FMP*.' (Emphasis added.)).
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> "However, that does not mean, as petitioner argues, that FMP Condition 38 requires specific proof of mitigation measures at the site plan review or subdivision stage. The phrase 'abide by' refers to specific documents that comprise the FWMP—with respect to fish habitat, the April 21, 2008 Mitigation Plan and an August 11, 2008 letter that provides for additional mitigation for Whychus Creek. Petitioner quotes at length the April 2008 Mitigation Plan in the petition for review and argues that the FWMP requires proof of

> fish habitat mitigation actions at the site plan review or subdivision stage. We see nothing in those quoted passages that requires *proof* of fish habitat mitigation actions at the third-stage development application." *2022-013*, ___ Or LUBA at ___ (slip op at 18-19) (emphasis added; citations omitted).

Although petitioner's arguments are exceedingly difficult to follow, we understand petitioner to argue, as they argued in *2022-013*, that the hearings officer erred by not requiring intervenors to establish, during site plan review (1) a water right which will allow intervenor to place the mitigation water permanently instream; and (2) that actual water exists instream in Deep Canyon Creek in a sufficient quantity to satisfy the required mitigation. Petition for Review 22-23. We rejected a nearly identical argument in *2022-013* and for the same reasons, we reject it here as well. ___ Or LUBA at ___ (slip op at 17). While intervenors must provide the full amount of mitigation water for each phase "in advance of water use," neither Condition 38 nor the FWMP require *proof of mitigation actions* in advance of pumping. Condition 38 requires intervenors to act in accordance with the FWMP and to submit an annual report of mitigation actions. The FWMP requires intervenors to provide mitigation water—of both the quantity and quality required by the FWMP—*before pumping water for the uses allowed by the approved phase of development*. *Gould VIII*, 79 Or LUBA at 577. The FWMP does not require mitigation actions and reporting as a condition to site plan approval. *Id.* at 583.

D. OAR 643-415-0025(2)

OAR 635-415-0025(2) is an ODFW rule that is part of the agency's Mitigation Policy at OAR chapter 635, division 415. *See Dept. of Fish and Wildlife v. Crook County*, 315 Or App 625, 629-30, 504 P3d 68 (2021) (explaining the ODFW Mitigation Policy at chapter 635, division 415). We understand petitioner to argue that OAR 635-415-0025(2) applies and requires intervenors to establish compliance with it. Petition for Review 30.

Intervenors respond, initially, that petitioner failed to raise any issue during the proceedings below that OAR 635-415-0025(2) applies and is precluded from raising the issue for the first time at LUBA. To be preserved for LUBA review, an issue must "be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue." ORS 197.797(1). Specific arguments need not have been raised below to preserve an issue for LUBA review, so long as the issue was raised with sufficient specificity. *See Boldt v. Clackamas County*, 21 Or LUBA 40, 46, *aff'd*, 107 Or App 619, 813 P2d 1078 (1991) (the "raise it or waive it" principle does not limit the parties on appeal to the exact same arguments made below, but it does require that the issue be raised below with sufficient specificity so as to prevent "unfair surprise" on appeal).

In the petition for review, petitioner cites Record 41-42 and 1036-37 to support that the issue was raised. However, OAR 635-415-0025(2) is cited on

those pages in a general discussion of the consultation process between intervenor and ODFW that occurred during the FMP application phase, in 2007. Nothing on those record pages raises the issue that petitioner raises in their argument under the first assignment of error, which, again, is that OAR 635-415-0025(2) applies and requires intervenors to establish compliance with it.

E. FMP Condition 1

FMP Condition 1 provides:

> "Approval is based upon the submitted plan. Any substantial change to the approved plan will require a new application." Record 154.

Petitioner argues that Condition 1 requires intervenors to submit a new application for final master plan approval because, according to petitioner, "[intervenors have] applied for and here received permission to develop specific facilities without access to water for quasi-municipal use under the [Water Permit] or the ability to timely obtain and use the required [Big Falls Ranch] mitigation water." Petition for Review 31. Intervenors respond, and we agree, that petitioner's argument is derivative of their arguments regarding Conditions 10 and 38. We rejected above petitioner's challenges to the hearings officer's conclusion that intervenors have complied with Conditions 10 and 38, and

petitioner's arguments regarding Condition 1 provide no basis for reversal or remand.[7]

The first assignment of error is denied.

INTERVENOR-PETITIONER'S ASSIGNMENT OF ERROR

A brief description of additional facts is necessary to understand this assignment of error. The development proposed in the applications is proposed on a portion of a Resort that we and the parties refer to as Tax Lot 7800. Tax Lot 7800 is zoned Exclusive Farm Use (EFU), with a Destination Resort (DR) overlay. In July, 2021 intervenor conveyed one-half acre of Tax Lot 7800 to Pinnacle Utilities, LLC (Pinnacle), an entity affiliated with intervenors. In August, 2021, the grantee, Pinnacle, conveyed the same property back to intervenors. Record 70.

In its single assignment of error, intervenor-petitioner Central Oregon LandWatch (COLW) argues that the hearings officer's findings are "vague, conclusory, and not supported by substantial evidence." Intervenor-Petitioner's Brief 7. We also understand COLW to argue that the hearings officer incorrectly concluded that Tax Lot 7800 is a lot of record and that there is not substantial evidence to support the decision.

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[7] Petitioner argues that Conditions 21, 33, and 35 are not relevant in the appeal. Petition for Review 32. Petitioner's arguments are not an assignment of error and we do not address them.

A. The Findings Are Adequate

Generally, findings must: (1) identify the relevant approval standards; (2) set out the facts which are believed and relied upon; and (3) explain how those facts lead to the decision on compliance with the approval standards. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). The hearings officer adopted findings at Record 66 to 72 addressing the issues that COLW raises in its assignment of error. The findings are not perfect, but neither are they inadequate. The findings adopt alternative reasons for rejecting COLW's arguments, including that (1) intervenor is not required to demonstrate that Tax Lot 7800 is a lot of record; and (2) Tax Lot 7800 is a lot of record. As we explain below, COLW does not challenge all of the hearings officer's alternative findings.

B. A Lot of Record Determination Is Not Required

COLW argues that DCC 22.04.040(B)(1) required the hearings officer to verify that Tax Lot 7800 is a lot of record in order to approve development, and that Tax Lot 7800 is not a lot of record, because a portion of it was conveyed and reconveyed in 2021. DCC 22.04.040(B)(1) provides:

> "Permits Requiring Verification
>
> "(1) Unless an exception applies pursuant to subsection (B)(2) below, verifying a lot or parcel pursuant to subsection (C) shall be required prior to issuance of the following permits:
>
> "a. Any land use permit for a unit of land in the Exclusive Farm Use Zones (DCC Chapter 18.16)[.]"

The hearings officer found that the provisions of DCC 18.16 do not apply because although the underlying zoning of Tax Lot 7800 is EFU, Tax Lot 7800 is zoned with a DR overlay. The hearings officer found that the provisions of DCC 18.16 that apply to properties zoned EFU do not apply to property that is subject to the DR overlay.[8] Intervenors respond that the hearings officer's finding is correct, and cites DCC 18.113.020(A) and (B), which provide that the provisions of the DR zone apply to areas designated DR, and supersede the provisions of the underlying EFU zone:

> "(A) The provisions of DCC 18.113 shall apply to proposals for the development of destination resorts, as defined in DCC Title 18, in areas designated DR by the County zoning maps. The provisions of DCC 18.113 shall not apply to any development proposal in an area designated DR other than a destination resort.
>
> "(B) *When these provisions are applicable, they shall supersede all other provisions of the underlying zone.* Other provisions

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[8] The hearings officer found:

> "DCC 18.116 is the portion of the DCC that directly addresses the EFU zone. DCC 22.04.040(B)(1)(a) generally imposes the county lot of record requirements on land within the EFU zone. Based upon the County Pronghorn and Eagle Crest modification decisions referenced above the Hearings Officer finds that DCC 18.116 EFU zoning provisions are no longer considered relevant approval criteria when a destination resort has undergone full conditional use permit review (CMP and FMP processes). Therefore, the Hearings Officer finds, based upon the Pronghorn and Eagle Crest modification decisions cited above that DCC 22.04.040(B)(1)(a) is not a relevant approval requirement for this case." Record 69.

> of the zoning ordinance, made applicable by specific map designations, such as the SMIA, AH, CH, FP or LM, or otherwise applicable under the terms of the zoning ordinance text shall remain in full force and effect, unless otherwise specified herein." (Emphasis added).

COLW does not challenge the hearings officer's finding at Record 69. However, in the reply brief, COLW argues that DCC 18.113.040(C), which requires site plan review for development of an approved destination resort, requires the hearings officer to determine whether Tax Lot 7800 is a lot of record because Tax Lot 7800 is zoned EFU.

COLW does not address DCC 18.113.020(B) at all. We agree with intervenors that the hearings officer correctly concluded that lot of record verification is not required for properties that are in areas designated DR and subject to the provisions of DCC 18.113. DCC 18.113.020(B) provides that the provisions of DCC 18.113 supersede "all other provisions of the underlying zone." The underlying zone is the EFU zone. Thus, to the extent any provision of the EFU zone requires verification of a lot of record for development, that provision is superseded by the provisions of DCC 18.113, which do not require lot of record verification.

COLW's assignment of error is denied.

The county's decision is affirmed.