

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

3
4 1000 FRIENDS OF OREGON,
5 *Petitioner,*

6
7 vs.

8
9 LINN COUNTY,
10 *Respondent,*

11
12 and

13
14 LYNN MERRILL, WHISPERING PINES LLC,
15 and ACREAGE LAND SOLUTIONS LLC,
16 *Intervenors-Respondents.*

17
18 LUBA No. 2022-003/004

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Linn County.

24
25 Andrew Mulkey filed a petition for review and reply brief and argued on
26 behalf of petitioner.

27
28 No appearance by Linn County.

29
30 Wendie L. Kellington filed the intervenors-respondents' brief and argued
31 on behalf of intervenors-respondents.

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

35
36 ZAMUDIO, Board Member, dissenting.

37
38 REMANDED

09/26/2022

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

1

2 **NATURE OF THE DECISION**

3 Petitioner appeals an ordinance adopting a plan amendment and zone
4 change from Farm/Forest to Non-Resource 5-acre minimum and a resolution and
5 order adopted in support of the ordinance.¹

6 **MOTION TO DISMISS**

7 Intervenors-respondents (intervenors) move to dismiss these appeals
8 arguing that the petition for review was not timely filed. The petition for review
9 must be filed “within 21 days after the date the record is received or settled by
10 the Board.” OAR 661-010-0030(1) (July 1, 2021).² Failure to timely file a
11 petition for review “shall result in dismissal of the appeal.” *Id.* The deadline for
12 filing the petition for review in these appeals was May 24, 2022. Our rules require
13 that the petition for review include a certificate of filing and service. OAR 661-
14 010-0075(2)(b)(C), (D). Petitioner did not include a certificate of filing and

¹ This is the second time that the county has approved the challenged plan amendment and zone change. The challenged decisions are on remand after the original approvals were appealed. We reversed the decisions in *1000 Friends of Oregon v. Linn County*, ___ Or LUBA ___ (LUBA Nos 2019-103/104, May 8, 2020) (*Henthorne I*). The Court of Appeals reversed and remanded our decision in *1000 Friends of Oregon v. Linn County*, 306 Or App 432, 475 P3d 121, *rev den*, 367 Or 290, 477 P3d 407 (2020). We remanded the decisions in *1000 Friends of Oregon v. Linn County*, ___ Or LUBA ___ (LUBA Nos 2019-103/104, Feb 9, 2021) (*Henthorne II*).

² We have amended our rules since the filing of the Notice of Intent to Appeal (NITA) in this case. All references and citations to our rules are to the rules that were in affect at the time the NITA was filed.

1 service with the original petition for review and intervenors argued that there was
2 no evidence that the petition for review was timely filed.

3 On May 24, 2022, petitioner mailed the original petition for review to the
4 Board via certified mail, as indicated by the postmark on the envelope containing
5 that document. *See* OAR 661-010-0075(2)(a)(B)(i), (ii) (providing that,
6 generally, filing a document with the Board is accomplished by mailing on or
7 before the due date and, if the date of mailing is relied upon as the date of filing,
8 then the date of the postmark is the date of filing). Accordingly, the original
9 petition for review was timely filed. The motion to dismiss is denied.

10 **PETITION FOR REVIEW DEFICIENCIES**

11 Intervenors also argue that the original petition for review was so deficient
12 as to not constitute a timely petition for review. The original petition for review
13 failed to conform to our rules governing the format and contents of a petition for
14 review in OAR 661-010-0030(2) and (4). The original petition for review failed
15 to include a certificate of service, certificate of compliance, assignments of error,
16 table of contents and authorities, or summary of arguments. *See* OAR 661-010-
17 0075(2)(b)(D) (“Documents filed with the Board shall contain either an
18 acknowledgement of service by the person served or proof of service by a
19 statement certified by the person who made service of the date of * * * deposit in
20 the mail, and the names and addresses of the persons served[.]”); OAR 661-010-
21 0030(2) (providing specifications for petition for review); OAR 661-010-0030(4)
22 (providing requirements for contents of petition for review).

1 On May 25, 2022, petitioner filed a corrected and amended petition for
2 review. In the cover letter enclosed with the corrected and amended petition for
3 review, petitioner explained:

4 “The original petition for review filed on May 24, 2022 failed to
5 comply with a number of requirements in LUBA’s rules. In
6 anticipation of a correction notice, Petitioner has fixed those errors
7 in the corrected and amended petition for review. The corrected and
8 amended petition filed today includes an Index, a Table of
9 Authorities, a Certificate of Service, and a Certificate of
10 Compliance, none of which were included in the original petition.
11 This filing of the corrected and amended petition for review also
12 includes two copies. The text of the corrected and amended petition
13 remains the same except that certain headings were reformatted and
14 in one instance changed for consistency to create the table of
15 contents.”

16 Intervenors argue that petitioner intentionally filed an incomplete petition
17 for review, in an effort to gain an extra day and circumvent the rules that petitions
18 for review must be timely filed and that amended petitions for review may be
19 filed only upon permission of the board, citing OAR 661-010-0030(3), (6).
20 Intervenors argue that both the original and corrected petitions for review are so
21 deficient that the Board should refuse to consider them.

22 Intervenors also argue that we should deny all of petitioner’s
23 subassignments of error because petitioner failed to demonstrate that the issues
24 raised in the petition were preserved and failed to include assignments of error,
25 as required by OAR 661-010-0030(4)(d), which provides that the petition for
26 review shall

1 “[s]et forth each assignment of error under a separate heading. Each
2 assignment of error must demonstrate that the issue raised in the
3 assignment of error was preserved during the proceedings below.
4 Where an assignment raises an issue that is not identified as
5 preserved during the proceedings below, the petition shall state why
6 preservation is not required.”

7 We first address the threshold procedural issue of whether we should allow
8 the corrected petition. Our rules set out the required format and content of the
9 petition for review under two separate sections. OAR 661-010-0030(2) generally
10 sets out formatting requirements. Under section (2), a petition must begin with a
11 table of contents and authorities, conform to word limits, conform to printing
12 specifications, contain a signature, and include a signed certificate of compliance.
13 If the Board determines that the petition for review fails to conform with the
14 requirements of section (2), then the Board will notify the author, “and a brief
15 conforming with the requirements of section (2) shall be filed within three (3)
16 days of notification by the Board. The Board may refuse to consider a brief that
17 does not substantially conform to the requirements of this rule.” OAR 661-010-
18 0030(3).

19 OAR 661-010-0030(4) sets out the requirements for the “contents of
20 [p]etition.”³ Under section (4), a petition must include the following: statement

³ OAR 661-010-0030(4)(d) provides that a petition for review shall:

“Set forth each assignment of error under a separate heading. 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

1 of petitioner's standing, statement of LUBA's jurisdiction, nature of the
2 challenged decision and relief sought, summary of the arguments, narrative
3 summary of material facts with supporting citations to the record, assignment(s)
4 of error, statement of preservation, copy of the challenged decision, and a copy
5 of local law cited in the petition. OAR 661-010-0030(4).

6 A petition for review which fails to comply with section (4) may, with
7 permission of the Board, be amended. OAR 661-010-0030(6).⁴ The Board will
8 determine whether to allow an amended petition for review based on whether an
9 amended petition would prejudice the substantial rights of the parties.

10 We agree with intervenors' criticism of petitioner's action of knowingly
11 filing a petition for review that, at a minimum, failed to include the required index
12 or table of authorities, certificate of service, certificate of filing, or summary of
13 arguments. In response to the motion to dismiss, petitioner's attorney explains
14 that they encountered "technical difficulties" that led them to file the original
15 petition for review knowing that the petition did not include the required index

preserved during the proceedings below, the petition shall state why
preservation is not required. Each assignment of error must state the
applicable standard of review. Where several assignments of error
present essentially the same legal questions, the argument in support
of those assignments of error shall be combined[.]”

⁴ OAR 661-010-0030(6) provides: “A petition for review which fails to
comply with section (4) of this rule may, with permission of the Board, be
amended. The Board shall determine whether to allow an amended petition for
review to be filed in accordance with OAR 661-010-0005.”

1 or table of authorities. Response to Motion to Dismiss 7-8. Petitioner's attorney
2 does not explain why other required elements were omitted or whether they were
3 aware of those omissions when they filed the original petition for review.

4 We agree with intervenors that petitioner's action in filing the original
5 petition for review with obvious deficiencies and omissions on the due date,
6 followed by a corrected petition for review the next day, was intended to avoid
7 the appeal being dismissed for failure to timely file the petition for review.
8 *Terrace Lakes Homeowners Assoc. v. City of Salem*, 29 Or LUBA 532, 535, *aff'd*,
9 138 Or App 188, 906 P2d 871 (1995) (the deadline for filing the petition for
10 review is strictly enforced). However, our rules provide an opportunity for a
11 petitioner to correct deficiencies and noncompliance with the specifications in
12 OAR 661-010-0030(2), within a short timeframe. OAR 661-010-0030(3).
13 Petitioner filed the corrected petition one day after filing the deficient original
14 petition. The corrected petition conforms to the specifications in section (2). The
15 corrected petition does not include new assignments of error or amend the
16 substance of the arguments in the petition. Accordingly, the corrected petition is
17 allowed under OAR 661-010-0030(3).⁵ Because the corrected petition for review
18 does not amend the petition to comply with section (4), or otherwise amend the

⁵ If petitioner had not proactively filed a corrected petition, the Board would likely have ordered petitioner to file a corrected petition under OAR 661-010-0030(3).

1 *substance* of the petition, permission for the corrected petition was not required
2 from the Board under OAR 661-010-0030(6).

3 The issue then becomes whether the Board should accept intervenors'
4 request to refuse to consider the petition for review or reject the arguments
5 presented in it due to petitioner's alleged failure to set out assignments of error
6 or demonstrate that the issues raised in the petition were preserved. *See* n 3. We
7 decline intervenors' request to reject the entire assignment of error for failure to
8 comply with OAR 661-010-0030(4)(d) because, in the circumstances presented
9 here, we view that failure as a technical violation, and intervenors have not
10 established that that violation prejudices their substantial rights.⁶

11 We will not generally reject a petition for review solely due to petitioner's
12 failure to set out separate assignments of error where the petition includes
13 arguments that allege error. *See Freels v. Wallowa County*, 17 Or LUBA 137,
14 140-41 (1988) (where petitioner does not include specific assignments of error in

⁶ OAR 661-010-0005 provides in relevant part:

“These rules are intended to promote the speediest practicable review of land use decisions and limited land use decisions, in accordance with ORS 197.805–197.855, while affording all interested persons reasonable notice and opportunity to intervene, reasonable time to prepare and submit their cases, and a full and fair hearing. The rules shall be interpreted to carry out these objectives and to promote justice. Technical violations not affecting the substantial rights of parties shall not interfere with the review of a land use decision or limited land use decision.”

1 the petition for review, LUBA will limit its review to the alleged errors that are
2 clearly presented in the arguments contained in the petition for review); *see also*
3 *Schoonover v. Klamath County*, 16 Or LUBA 846, 848 n 4 (1988) (same); *Heiller*
4 *v. Josephine Co.*, 23 Or LUBA 551, 554 (1992) (LUBA would consider only the
5 arguments stated clearly enough to afford respondents an opportunity to respond
6 where the petitioner failed to set out assignments of error under separate headings
7 as required by OAR 661-010-0030(3)(d)).

8 The Court of Appeals has held that a failure to set out assignments of error
9 in the petition for review before LUBA will not warrant striking the petition or
10 dismissing the appeal where “the claimed errors are discernible from the
11 petition.” *Hallmark Inns & Resorts v. City of Lake Oswego*, 186 Or App 710,
12 717, 65 P3d 300 (2003) (quoting *Eckis v. Linn County*, 110 Or App 309, 311, 821
13 P2d 1127 (1991)). As explained further below, the claimed errors are discernable
14 from the arguments in the petition, notwithstanding petitioner’s failure to set out
15 assignments of error. Intervenors responded to the arguments and were provided
16 a fair opportunity to address the issues presented in the petition for review.
17 Accordingly, we conclude that petitioner’s failure to set out assignments of error
18 in the petition for review is a technical violation and not a basis for us to refuse
19 to consider the arguments.

20 We turn to the OAR 661-010-0030(4)(d) requirement that each assignment
21 of error must demonstrate that the issue raised in the assignment of error was
22 preserved during the proceedings below, or explain why preservation is not

1 required. *See* n 3. The current version of OAR 661-010-0030(4)(d) became
2 effective in 2014. We have explained that the intent of this rule is to “help[]
3 eliminate waiver disputes or frame waiver disputes earlier in an appeal, and in
4 many cases will eliminate the need for a reply brief altogether with attendant
5 efficiencies to LUBA’s appellate review.” *Wal-Mart Stores, Inc. v. City of Hood*
6 *River*, 72 Or LUBA 1, 7, *aff’d*, 274 Or App 261, 363 P3d 522 (2015).

7 We have held that where preservation is disputed, LUBA will not search
8 the record or large page ranges cited in the petition for review to determine
9 whether an issue was raised below. *H2D2 Properties, LLC v. Deschutes County*,
10 ___ Or LUBA ___, ___ (LUBA No 2019-066, Dec 19, 2019) (slip op at 7-9). In
11 *H2D2*, the petitioner set out six assignments of error, and under each assignment
12 of error the petitioner set out the same record citations to over one hundred pages
13 of the petitioner’s submissions to the local government. In addressing the
14 county’s general challenge to the petitioner’s preservation statement under OAR
15 661-010-0030(4)(d), we explained that “[a] petitioner errs by requiring the
16 reviewing body to comb the record to determine if an issue is preserved.” *Id.* at
17 ___ (slip op at 7). We concluded that “lack of specificity in petitioner’s
18 preservation citations interferes with the substantial rights of the parties, because
19 it improperly shifts the burden to respondents to review over one hundred pages
20 to determine whether issues raised in six assignments argued in an overlength 68-
21 page petition for review have been preserved.” *Id.* at ___ (slip op at 8-9). In
22 *H2D2*, the petitioner did not file a reply brief or provide at oral argument more

1 specific citations to where issues were raised and we stated that we would not
2 consider the assignments of error. We then went on to address the merits of
3 petitioner's first assignment of error, concluded that the county's decision to deny
4 the application for site plan review due to a lack of adequate access aisle width
5 was supported by substantial evidence in the record, and affirmed the county's
6 decision. *See Simonson v. Marion County*, 21 Or LUBA 313, 327 (1991) ("A
7 finding of noncompliance with a single mandatory approval standard is sufficient
8 to support a decision to deny an application for land use approval.")

9 We have also held that even where a preservation statement is overbroad,
10 we will not deny an assignment of error based on an inadequate preservation
11 statement included in the petition for review where (i) the respondent does not
12 contend that issues were not raised during the proceedings below, but only
13 objects to the adequacy of the preservation statement; (ii) a reply brief provides
14 more focused citations to places where an issue was raised below; and (iii) it is
15 evident from the challenged decision itself that the issues raised on appeal at
16 LUBA were central to the local proceedings and the local government's decision
17 responds to those issues. *Nehmzow v. Deschutes County*, ___ Or LUBA ___, ___
18 (LUBA No 2019-110, Aug 10, 2020), *aff'd*, 308 Or App 533, 479 P3d 340 (2021)
19 (slip op at 13-14). In *Nehmzow*, the petition for review cited to 136 pages from
20 the record to support that the issues presented in the assignments of error were
21 preserved, and an additional 222 pages to support that the issue raised in the
22 second assignment of error were preserved. *Id.* at ___ (slip op at 13). We rejected

1 the county's argument that LUBA should deny all three assignments of error
2 based on the overbroad preservation statement. We first pointed out that the
3 county did not dispute that the issues presented in the assignments of error were
4 raised below. We also explained that the reply brief provided more focused
5 record citations within the original citations to establish that the issues raised in
6 the three assignments of error were raised below, and that it was evident from the
7 challenged decision itself that the issues raised on appeal were central to the local
8 proceedings and the county's decision responds to those issues. *Id.* at ___ (slip
9 op at 14).

10 Petitioner's preservation statement in the petition for review is "Petitioner
11 and the other parties adequately raised the legal issues argued below in its
12 comments on remand before the county." Petition for Review 3. Intervenor
13 argue that petitioner's preservation statement fails to comply with OAR 661-010-
14 0030(4)(d)'s requirement to "demonstrate that the issue raised in the assignment
15 of error was preserved during the proceedings below." Intervenor-Respondents'
16 Brief 12. We agree with intervenors that statement is inadequate to demonstrate
17 that the issue raised in the assignment of error was preserved during the
18 proceedings below.

19 However, petitioner identifies in the reply brief where the issues raised in
20 the subassignments of error were raised during the remand proceeding by
21 citations to the challenged decision itself and submissions in the record, including
22 written testimony that petitioner submitted to the county during the remand

1 proceeding.⁷ See Petitioner’s Reply Brief 1 (referencing Record 146-49 (August
2 31, 2021, testimony) and Record 197-204 (August 17, 2021, testimony) as
3 preservation). It is undisputed that the reply brief that petitioner filed complies
4 with OAR 661-010-0039. It is also undisputed that some of the issues raised in
5 the petition for review are addressed by the county in the challenged decision.

6 After reviewing the challenged decision and the record citations provided
7 in the reply brief, it appears to us that the issues presented in the petition concern
8 many of the same issues that were disputed before the county and addressed in
9 the challenged decision. At the very least, we are able to ascertain from the cited
10 record pages where petitioner alleges that the issues raised in the petition for
11 review were preserved and what issues the county actually addressed during the
12 local proceeding on remand. Although it is a close call, we conclude that in these
13 circumstances, petitioner’s complete failure to identify *in the petition for review*
14 whether the issues presented were preserved, or why preservation was not
15 required, is a technical violation that did not affect the substantial rights of

⁷ OAR 661-010-0039, the current version of which became effective in 2019, provides in relevant part:

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

1 intervenors. In so concluding, we note that intervenors assert in their brief that
2 only some of the issues under all five argument subsections of the petition were
3 not preserved, were waived, or were resolved in earlier proceedings. We address
4 those arguments in the analyses below.

5 **BACKGROUND**

6 This is the second time that the county has approved the challenged plan
7 amendment and zone change. The challenged decisions are on remand after the
8 original approvals were appealed. We reversed the decisions in *1000 Friends of*
9 *Oregon v. Linn County*, ___ Or LUBA ___ (LUBA Nos 2019-103/104, May 8,
10 2020) (*Henthorne I*). The Court of Appeals reversed and remanded our decision
11 in *1000 Friends of Oregon v. Linn County*, 306 Or App 432, 475 P3d 121, *rev*
12 *den*, 367 Or 290, 477 P3d 407 (2020). We then remanded the decisions in *1000*
13 *Friends of Oregon v. Linn County*, ___ Or LUBA ___ (LUBA Nos 2019-
14 103/104, Feb 9, 2021) (*Henthorne II*). We reiterate the facts from our decision in
15 *Henthorne I*.

16 “The subject property is an approximately 108-acre vacant parcel
17 designated on the county’s comprehensive plan map as Farm Forest
18 (F/F) and zoned F/F. Together with the Agricultural Resources
19 Lands (AR) and the Forest Resources Lands (FR) designations, the
20 F/F plan designation implements Statewide Planning Goal 3
21 (Agricultural Lands), Goal 4 (Forest Lands), and Goal 5 (Natural
22 Resources, Scenic and Historic Areas, and Open Spaces). Linn
23 County Comprehensive Plan Code (LCC) 905.020(D)(1).

24 “A majority of the property is included on the county’s mapped
25 peripheral big game habitat, an area jointly identified and mapped
26 by the county and the Oregon Department of Fish and Wildlife

1 (ODFW). The property borders land zoned Rural Residential and
2 Forest Conservation Management (FCM) to the east, and land zoned
3 FF and FCM to the west, north and east. Land to the south is zoned
4 EFU. The property includes sloped and stepped bench slopes, with
5 volcanic rock, clay, basalt, cobble and gravel, with intermittent
6 drainage ways.

7 “Intervenors applied to change the plan designation for the property
8 from F/F to Non-Resource (NR) and zone the property Non-
9 Resource 5-acre minimum (NR-5). The board of county
10 commissioners held hearings on the application and approved the
11 application.” *Henthorne I*, ___ Or LUBA at ___ (slip op at 3-4)
12 (internal record citations omitted).

13 For plan amendments, Linn County Code (LCC) 921.874(A)(1) requires
14 the county to adopt findings that “[t]he amendment is consistent with and does
15 not alter the intent of applicable section(s) of the Comprehensive Plan.”⁸
16 (Emphasis omitted.) In *Henthorne I*, we sustained a portion of petitioner’s first
17 assignment of error which argued that the express language of LCC
18 903.550(A)(1) and LCC 903.510(B)(3) require resource designations for property
19 that is mapped as big game habitat and, therefore, the county’s decision to
20 approve Non-Resource plan and zoning designations was inconsistent with the
21 express language of those provisions.⁹ ___ Or LUBA at ___ (slip op at 11-12).

⁸ In this decision, we refer to the county code as LCC because that abbreviation is used in the pertinent code provisions. LCC 900.010(A) (“LCC 900.010 to 919.999 shall be known as the ‘Linn County *Comprehensive Plan* Code.’”) (Emphasis in original.); LCC 920.010(A) (“LCC 920.010 to 939.999 shall be known as the ‘Linn County Land Development Code.’”).

⁹ LCC 903.550, “Policy Implementation of fish and wildlife areas and habitat,” provides, in part:

1 We concluded that the county's decision was prohibited as a matter of law and
2 reversed. *Id.* The Court of Appeals reversed and remanded our decision after
3 concluding that that the county board of commissioners' implied interpretation
4 of LCC 903.550(A)(1) and LCC 903.510(B)(3) was plausible under *Siporen v.*
5 *City of Medford*, 349 Or 247, 262, 243 P3d 776 (2010). *1000 Friends of Oregon*
6 *v. Linn County*, 306 Or App 432, 475 P3d 121, *rev den*, 367 Or 290 (2020). On

“(A) The policies set forth in LCC 903.510 (B) (2) to [(10)] shall be implemented by the following:

“(1) The Agricultural Resource, Forest Resource, and Farm/Forest plan designations shall be used on the Linn County Comprehensive Plan to conserve sensitive fish and wildlife habitats. Land use proposals subject to Linn County review that have undesirable impacts on these resources shall be reviewed during the plan amendment, zone amendment and conditional use permit process.” (Emphasis omitted.)

LCC 903.510(B)(3) provides:

“The major and peripheral habitats are protected from most conflicting uses through application of the Forest Conservation and Management (FCM), Exclusive Farm Use (EFU), and Farm/Forest (F/F) zones. The FCM, EFU, and F/F zones encourage resource activities and limit potentially conflicting uses. Because of the recreational, economic, aesthetic, and ecological value of fish and wildlife, the potential impact on sensitive habitats will be assessed on planning permit applications for conditional uses, variances, and zone and plan amendments. Siting standards, including the use of setbacks and clustering methods, will be used to lessen impact on habitats.”

1 remand from the Court of Appeals, we remanded for the county to analyze the
2 impacts of the plan and zone change on mapped wildlife habitat, as required by
3 LCC 921.874(A)(1), LCC 903.550(A)(1), and LCC 903.510(B)(3). *Henthorne II*,
4 ___ Or LUBA at ___ (slip op at 3).

5 On remand, the county identified the purpose and scope of the remand:
6 “LUBA’s opinions require the county to address LCC 921.874[(A)](1)’s
7 requirement to demonstrate that the proposed amendment ‘is consistent with and
8 does not alter the intent of’ Comprehensive Plan policies embodied in LCC
9 903.510(B)(3) and LCC903.550(B)(1).” Record 14; Record 15 (“[T]he Board [of
10 Commissioners] concludes that LUBA expressly remanded on the grounds that
11 the findings regarding LCC 921.874(A)(1) were inadequate in that the findings
12 failed to address plan policies LCC 903.510(B)(3) and LCC 903.550(B)(1) with
13 respect to big game habitat. The Board [of Commissioner]’s task on remand is to
14 adopt findings regarding whether the proposal complies with those standards and
15 only those standards.”).

16 As described further below, the county found that the proposed amendment
17 is consistent with and does not alter the intent of the comprehensive plan policies
18 embodied in LCC 903.510(B)(3) and LCC 903.550(B)(1). This appeal followed.

1 **NUMBER THREE SUBASSIGNMENT OF ERROR**¹⁰

2 Petitioner argues that the County erred by applying only LCC
3 903.510(B)(3) and LCC 903.550(A)(1) on remand. Intervenors respond, and we
4 agree, that the county properly applied a limited scope of remand.

5 The number three subassignment of error is denied.

6 **NUMBER SIX SUBASSIGNMENT OF ERROR**

7 The approval imposes conditions on future residential subdivision or
8 residential partition. Those prospective conditions include density limitations,
9 compliance with intervenors' Wildlife Management Plan, limiting residential
10 improvements to no more than one acre area of each parcel, wildlife-friendly
11 fencing, restrictions for keeping domestic dogs, prohibition on the discharge of
12 fireworks and firearms, limiting hours for operation of landscaping equipment
13 and common trail use, and restrictions on exterior illumination. Record 42-43.

14 Petitioner argues that "the comprehensive plan does not allow the county
15 to adopt alternate ad hoc methods described in the conditions of approval" to
16 protect wildlife habitat. Petition for Review 26. Petitioner argues that the
17 county's interpretation of its a comprehensive plan is inconsistent with Statewide
18 Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open

¹⁰ As explained above, petitioner does not set out any assignment of error in the petition for review. Instead, petitioner sets out numbered "subassignments of error" with argument under an overarching heading "First Assignment of Error." We address the arguments by the number under which they are listed in the petition for review.

1 Spaces) and state administrative rules for complying with Goal 5, OAR chapter
2 660, division 23. According to petitioner, the county's assessment and review of
3 impacts cannot result in less protection for habitat than the those required by Goal
4 5 implementing regulations. Petitioner argues that the county is required to follow
5 the prescribed Goal 5 decision process and analyze the economic, social,
6 environmental, and energy (ESEE) consequences that could result from a
7 decision to allow, limit, or prohibit a conflicting use. OAR 660-023-0040.
8 Petitioner argues that the county's findings "mimic" the ESEE process, but that
9 the county's findings fail to address "the full scope of the impacts of its decision."
10 Petition for Review 29.

11 Intervenor respond that the issues of compliance with Goal 5 and OAR
12 chapter 660, division 23 were not raised in the initial proceeding and, thus,
13 petitioner is precluded from raising those issues. On review in post-remand
14 proceedings, petitioner is foreclosed from raising issues at LUBA that were
15 "conclusively decided against them by the first final and reviewable LUBA
16 decision." *Beck v. City of Tillamook*, 313 Or 148, 150, 831 P2d 678 (1992). That
17 rule is commonly referred to as "the law of the case." *See Green v. Douglas*
18 *County*, 63 Or LUBA 200, 206, *rev'd and rem'd on other grounds*, 245 Or App
19 430, 263 P3d 355 (2011) (under *Beck*, a party at LUBA fails to preserve an issue
20 for review if, in a prior stage of a single proceeding, that issue is decided
21 adversely to the party or that issue could have been raised and was not raised).

1 In *Henthorne I*, petitioner asserted for the first time at LUBA that the
2 county improperly failed to address conflicts from the proposed plan and zone
3 change with peripheral big game habitat, as required by OAR 660-023-0250(3).¹¹
4 *Henthorne I*, ___ Or LUBA at ___ (slip op at 9-10). Intervenors responded, and
5 we agreed, that petitioner was precluded from raising an issue regarding the
6 county’s compliance with OAR 660-023-0250(3) because that issue was not
7 raised prior to the close of the evidentiary hearing as required by *former* ORS
8 197.763(1) (2019), *renumbered as* ORS 197.797 (2021), and ORS 197.835(3).

9 In this appeal, petitioner argues that the county’s interpretation of LCC
10 903.510(B)(3) and LCC 903.550(A)(1) conflicts with state law. Petitioner argues

¹¹ OAR 660-023-00250(3) provides:

“Local governments are not required to apply Goal 5 in consideration of a [Post Acknowledgement Plan Amendment (PAPA)] unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal 5 resource only if:

- “(a) The PAPA creates or amends a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5;
- “(b) The PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list; or
- “(c) The PAPA amends an acknowledged UGB and factual information is submitted demonstrating that a resource site, or the impact areas of such a site, is included in the amended UGB area.”

1 that the county is required to apply Goal 5 regulations in consideration of the
2 proposed post-acknowledgement plan amendment. That is essentially the same
3 argument that we concluded was waived in *Henthorne I*. We agree with
4 intervenors that the issue of compliance with Goal 5 and OAR chapter 660,
5 division 23 was decided adversely to petitioner in *Henthorne I* and may not be
6 raised in this appeal.

7 The number six subassignment of error is denied.

8 **NUMBER SEVEN SUBASSIGNMENT OF ERROR**

9 LCC 921.874(A)(4) requires the county to adopt findings that “[t]he
10 amendment will not have a significant adverse impact on a sensitive fish or
11 wildlife habitat.” In *Henthorne I*, in response to the first assignment of error,
12 intervenors argued that the county’s findings that address LCC 921.874(A)(4)
13 also addressed LCC 921.874(A)(1). ___ Or LUBA at ___ (slip op at 11). We
14 disagreed and concluded that the county’s (A)(4) analysis that intervenors relied
15 upon did not address the part of the county’s Goal 5 program embodied in LCC
16 903.510(B)(3) or LCC 903.550(A)(1).

17 On remand, opponents to the proposal argued about impacts to peripheral
18 wildlife habitat under LCC 921.874(A)(4). Relying on *Beck*, the county found
19 those arguments were not open to dispute on remand. Record 17-18. The county
20 explained that the original approval contained detailed findings of compliance
21 with LCC 921.874(A)(4),

22 “However, at LUBA, the petitioner did not assign as error the

1 Board's findings or conclusions regarding LCC 921.874(A)(4) at
2 all. Rather, at LUBA, the Applicant explained that the County
3 findings of compliance with LCC 921.874(A)(4) helped to
4 demonstrate the proposal's compliance with LCC 921.874(A)(1).
5 [*Henthorne I*] mentions LCC 921.874(A)(4) several times,
6 disagreeing with the Applicant that the findings of compliance with
7 LCC 921.874(A)(4) also satisfied LCC 921.874(A)(1). LUBA
8 ultimately concluded that the unchallenged findings for LCC
9 921.874(A)(4) were not comprehensive enough to demonstrate
10 consistency with LCC 921.874(A)(1), which was the policy that was
11 the basis for LUBA's remand, which LUBA decided implicated
12 LCC 903.503(A)(3) and 903.550(A)(1). Neither of LUBA's
13 opinions determines that the findings adopted for LCC
14 921.874(A)(4) were inadequate. In fact, LUBA's remand decision
15 does not mention LCC 921.[8]74(A)(4) at all; rather LUBA's
16 remand decision only refers to the two plan policies (905.510(B)(3)
17 and 550(A)(1)) with LUBA concluding that those two policies had
18 not been adequately addressed." Record 17.

19 Petitioner argues that the county was wrong to conclude that LCC
20 921.874(A)(4) does not apply on remand.

21 Intervenors respond, first, that because petitioner could have but did not
22 assign error in *Henthorne I* to the county's finding that LCC 921.874(A)(4) was
23 satisfied, petitioner waived that issue. We agree. *Beck*, 313 Or at 150; *Green*, 63
24 Or LUBA at 206.

25 Moreover, the county adopted precautionary, alternative findings that that
26 the proposal complies with LCC 921.874(A)(4). Intervenors-Respondents' Brief
27 11; *see* Record 36-39. Petitioner does not acknowledge or assign error to those
28 alternative findings. Accordingly, petitioner's argument that the county erred by
29 concluding that LCC 921.874(A)(4) does not apply on remand provides no basis
30 for reversal or remand.

1 The number seven subassignment of error is denied.

2 **NUMBERS FOUR AND FIVE SUBASSIGNMENTS OF ERROR**

3 **A. Comprehensive plan habitat density limitations**

4 We explained in *Henthorne I* that the county’s Goal 5 program “includes
5 identifying and mapping big game habitat, applying plan and zoning designations
6 that protect big game habitat from most conflicting uses, applying density
7 standards that limit development in big game habitat, and applying siting
8 standards that require clustering.” *Henthorne I*, ___ Or LUBA at ___ (slip op at
9 4). We noted in *Henthorne I* that the record was unclear as to the number of acres
10 of the subject property that is mapped big game habitat. *Id.* at ___ n 1 (slip op at
11 5 n 1). In its decision on remand, the county found that the area of mapped big
12 game habitat on the subject property is approximately 90 acres. Record 13, 207.

13 The comprehensive plan policies for wildlife habitat provide that the
14 county will review proposed development for consistency with the Oregon
15 Department of Fish and Wildlife (ODFW) dwelling density recommendations
16 and describes those recommendations. LCC 903.510(B)(5) – (7). For peripheral
17 habitat, the ODFW recommended density is one unit per 40 acres (16 units per
18 section). LCC 903.510(B)(7). A section is 640 acres. LCC 903.510(B)(4). When
19 dwellings are sited using clustering techniques, then the ODFW accepts one unit
20 per 20 acres (32 units per section). LCC 903.510(B)(7). The county requires
21 clustering for new dwellings located in peripheral habitat. LCC 903.510(B)(8).

1 Petitioner argues that the NR designation and NR-5 zone allow dwelling
2 densities that are not consistent with mapped big game habitat. NR-5 allows one
3 dwelling per 5 acres and NR-10 allows 1 dwelling per 10 acres. The
4 comprehensive plan allows maximum one dwelling per 20 acres when clustering
5 techniques are used. Condition 1 provides, in part: “A maximum of 10 dwellings
6 shall be allowed within the Peripheral Habitat designated area on the subject
7 property and dwellings must be approved in compliance with LCC
8 90[3].510(B)(7) through (10).” Record 43. Petitioner argues that condition allows
9 one dwelling per nine acres, which exceeds the density allowed in the
10 comprehensive plan. Petitioner argues that that allowed density would change the
11 area from peripheral to impacted and thus change the habitat type designation
12 and effectively remove the mapped protection. *See* LCC 903.510(B)(4) (“Where
13 the combined density of existing and approved, but not constructed dwellings,
14 exceed the ODFW acceptable density standards, the section is considered
15 impacted and is not subject to wildlife habitat management considerations.”).

16 The county reasoned that the challenged decision does not subdivide the
17 property, so the only outright permitted use would be one dwelling on the entire
18 subject property. The county further reasoned that any subdivision or partition
19 will require compliance with the comprehensive plan, including the density
20 standards in LCC 903.510(B)(7) to (10), through the application of (1) LCC
21 926.170(B)(3), which requires the subdivision tentative plan to conform to the
22 comprehensive plan; (2) LCC 924.250(B)(1), which requires an application for

1 partition of property without recognized access demonstrate compliance with the
2 comprehensive plan; and (3) conditions of approval in the challenged decision
3 that require compliance with the density standards in in LCC 903.510(B)(7) to
4 (10). Record 41. In other words, the density allowed in NR-5 zone is not
5 dispositive because later approvals required before residential development can
6 occur require finding of compliance with the comprehensive plan. So, in theory,
7 the county will require a lower density (i.e., fewer houses on larger lots than
8 allowed in the NR-5 zone) in later land division decisions.

9 Intervenor respond initially that, to the extent that petitioner argues that,
10 as a matter of law, the NR designation and NR-5 zoning are inconsistent with
11 peripheral big game habitat designation, the Court of Appeals has already decided
12 this issue against petitioner and petitioner is precluded from raising it in this
13 appeal. We disagree. The Court of Appeals held that the county could plausibly
14 interpret its code to allow non-resource zoning for designated big game habitat.
15 The Court of Appeals did not address whether the NR designation and NR-5 zone
16 allow dwelling densities that are inconsistent with the comprehensive plan.

17 Intervenor argue that petitioner waived the argument that relies on LCC
18 903.510(B)(4)—that the decision effectively removes the mapped habitat
19 protection by allowing a dwelling density that exceeds the ODFW acceptable
20 density standards. Intervenor-Respondents' Brief 27.

21 We summarized the applicable standard in *Friends of Yamhill County v.*
22 *Yamhill County*:

1 “To be preserved for LUBA review, an issue must ‘be raised and
2 accompanied by statements or evidence sufficient to afford the
3 governing body, planning commission, hearings body or hearings
4 officer, and the parties an adequate opportunity to respond to each
5 issue.’ Former ORS 197.763(1) (2019), *renumbered as* ORS
6 197.797(1) (2021). Specific arguments need not have been raised
7 below to preserve an issue for LUBA review, so long as the issue
8 was raised with sufficient specificity. *See Boldt v. Clackamas*
9 *County*, 21 Or LUBA 40, 46, *aff’d*, 107 Or App 619, 813 P2d 1078
10 (1991) (the ‘raise it or waive it’ principle does not limit the parties
11 on appeal to the exact same arguments made below, but it does
12 require that the issue be raised below with sufficient specificity so
13 as to prevent ‘unfair surprise’ on appeal). When attempting to
14 differentiate between ‘issues’ and ‘arguments,’ there is no ‘easy or
15 universally applicable formula.’ *Reagan v. City of Oregon City*, 39
16 Or LUBA 672, 690 (2001). While a petitioner is not required to
17 establish that precise argument made on appeal was made below,
18 that does not mean that ‘any argument can be advanced at LUBA so
19 long as it has some bearing on an applicable approval criterion and
20 general references to compliance with the criterion itself were made
21 below.’ *Id.* (emphasis in original). A particular issue must be
22 identified in a manner detailed enough to give the governing body
23 and the parties fair notice and an adequate opportunity to respond.
24 *Boldt v. Clackamas County*, 107 Or App 619, 623 (1991); *see also*
25 *Vanspeybroeck v. Tillamook County*, 221 Or App 677, 691 n 5, 191
26 P3d 712 (2008) (‘[I]ssues [must] be preserved at the local
27 government level for board review * * * in sufficient detail to allow
28 a thorough examination by the decision-maker, so as to obviate the
29 need for further review or at least to make that review more efficient
30 and timely.’).” ___ Or LUBA ___, ___ (LUBA No 2021-074, Apr
31 8, 2022), *aff’d*, 321 Or App 505 (2022) (slip op at 5-6).

32 Petitioner replies that it raised that issue in Record 201-03. Petitioner’s
33 Reply Brief 2. We have reviewed those cited record pages. Citing LCC
34 903.510(B)(4), petitioner argued that “In some cases, the county’s
35 comprehensive plan states that certain non-resource zoning, such as rural

1 residential zoning, is inherently incompatible with mapped big game habitat.
2 LCC 903.510(B)(4).” Record 201. Petitioner also argued that the county “need[s]
3 to explain, in a manner consistent with Goal 5 and implementing regulations, how
4 the dwellings located outside of the habitat but within the same section (section
5 8) would or would not affect the remaining area designated as peripheral big
6 game habitat. LCC 903.510(B)(2) and (4).” Record 202. Petitioner further
7 argued:

8 “Finally, the county must explain whether or how a decision to
9 rezone the portions of the property outside of the mapped habitat is
10 consistent with the comprehensive plan protections for big game and
11 whether such a change would have an impact on mapped habitat.
12 The comprehensive plan explains that habitats have been identified
13 and mapped and applied to ‘habitat areas,’ but also states that entire
14 640-acre sections have been considered ‘impacted and is not subject
15 to wildlife habitat management considerations’ because of the
16 density of existing and approved dwellings within that section. LCC
17 903.510(B)(2) and (4). In this case, the big game habitat crosses and
18 does not completely cover the entire section (section 8). In
19 evaluating the impact of the proposed zone change, the county must
20 interpret its policies for mapping (and remapping) big game habitat
21 and describe whether or not dwellings approved outside the habitat
22 but within the section would have an effect on mapped habitat in
23 located in the remainder of the section. Once habitat has been
24 initially mapped, an interpretation of the comprehensive plan that
25 would result in development outside existing habitat to result in the
26 removal of big game habitat protection measures on land elsewhere
27 in the section is not consistent with Goal 5 or its implementing
28 regulations.” Record 203.

29 We agree with petitioner that the argument at pages 201-203 provides fair notice
30 to the county and intervenors that petitioner argued that zoning the property NR-

1 5 would allow dwelling density that would effectively remove the habitat
2 protections from the subject property. Accordingly, that issue is not waived.

3 On the merits, intervenors respond that petitioner has not cited any
4 applicable law that requires zoning criteria be the only measure to protect the
5 Goal 5 resource. According to intervenors, it does not matter whether the NR-5
6 zone *could* allow residential density that conflicts with the comprehensive plan,
7 because, as the county found, land division criteria will require compliance with
8 habitat density requirements. Intervenors also respond that Condition 1 includes
9 the requirement that “dwellings must be approved in compliance with LCC
10 90[3].510(B)(7) through (10),” which are the habitat density requirements.
11 Record 43.

12 Petitioner does not challenge the county’s finding that the challenged
13 decision itself does not permit more than one dwelling to be constructed on the
14 subject property because the subject property would first need to be divided.
15 Thus, the issue is whether the county improperly construed LCC 903.510(B)(4)
16 in concluding that the land division criteria and Condition 1 will require
17 compliance with the density standards in LCC 903.510(B)(7) to (10), so that the
18 challenged decision “is consistent with and does not alter the intent of applicable
19 section(s) of the Comprehensive Plan.” LCC 921.874(A)(1) (emphasis omitted).

20 **1. Subdivision Criteria**

21 LCC 926.170(B)(3) requires every subdivision tentative plan to conform
22 to the comprehensive plan. Petitioner argues that the subdivision criteria are not

1 implementation measures for the county's Goal 5 program. However, petitioner
2 has not demonstrated that the county can avoid applying LCC 926.170(B)(3) and
3 the density standards in LCC 903.510(B)(7) to (10) to an application to subdivide
4 the subject property.

5 **2. Partition Criteria**

6 LCC 924.250(B)(1) provides the decision criteria for an application for
7 partition of property "without recognized access," and requires the applicant to
8 demonstrate compliance with the comprehensive plan. LCC 924.100.¹² Petitioner

¹² LCC 924.100 provides, in part:

"(B) Without recognized access.

"(1) The partition requires a specific application form, fee
and additional review if:

"(a) a road must be created in order to provide ingress
and egress to parcels of land in a partition;

"(b) a private easement of road access must be
created; or

"(c) a flag strip must be created.

"(3) Partition applications without recognized access are
subject to the decision criteria set forth in LCC 924.200
and 924.250 but may not need a road-approach permit.

"(C) With recognized access. Partition applications with
recognized access are subject to the decision criteria set forth
in LCC 924.200 and 924.210." (Emphasis omitted.)

1 argues that nothing prevents intervenors from pursuing a series of partitions to
2 avoid the application of LCC 924.250(B)(1) and, thus, avoid triggering
3 compliance with the comprehensive plan. Petition for Review 21.

4 Intervenor respond that the issue of intervenors potentially pursuing
5 strategic serial partitions to avoid the application of LCC 924.250(B)(1) was not
6 raised in the local proceeding and is waived. Intervenor Response Brief 34.
7 Petitioner replies that petitioner argued that LCC 924.250 does not “fully
8 implement the relevant density and clustering provisions of the comprehensive
9 plan,” citing Record 202 and Record 28 to 29. Petitioner’s Reply Brief 3. We
10 have reviewed Record 202 and Record 28 to 29 and conclude that petitioner did
11 not raise the issue of the potential loophole for serial partitions or that the county
12 made any findings on this issue. We agree with intervenors that issue is waived.

13 Petitioner also argues that the partition criteria do not require an applicant
14 to identify any dwelling site, so the division process will not ensure clustering of
15 dwellings. Intervenor respond, and we agree, that if an applicant wishes to avail
16 itself of higher densities permitted through applying clustering techniques, then
17 the applicant would be required to establish the location of the dwellings or be
18 limited to the general density requirements.

19 **3. Condition 1**

20 Condition 1 states:

21 “If the property is subdivided, use of the property shall be limited to
22 a residential subdivision and its accessory uses. If the property is
23 partitioned, use shall be limited to residential and accessory uses. A

1 maximum of 10 dwellings shall be allowed within the Peripheral
2 Habitat designated area on the subject property and dwellings must
3 be approved in compliance with LCC 905.510(B)(7) through (10).”
4 Record 43.

5 We assume that the county intended to reference LCC 903.510(B)(7)
6 through 10.¹³ As explained, the county found that any future land division will

¹³ LCC 903.510(B) provides in part

- “(7) The county recognizes that within the peripheral habitat the ODFW recommended density is one unit per 40 acres (16 units per section). When dwellings are sited using clustering techniques, then the ODFW finds one unit per 20 acres (32 units per section) is acceptable.
- “(8) The county shall require clustering provisions for new dwellings located in the major and peripheral habitat. Application of clustering techniques will preserve habitat and provide for uniform density standards of 16 units per section in the unimpacted major habitat and 32 units per section in the unimpacted peripheral habitat.
- “(9) The county will review all development requests in the major wildlife habitat areas for conformity with density standards with the exception of those sections which are identified as being impacted. If the density standard cannot be achieved, then a variance maybe initiated. ODFW will be notified and their comments taken into consideration before action is taken on a proposal occurring outside of an impacted area which exceeds the recommended density.
- “(10) Clustering techniques shall be used to implement the ODFW acceptable density standard in the major and peripheral game ranges. Clustering means all of the following as applicable to the situation:

- 1 require review for compliance with the comprehensive plan, including the habitat
- 2 density requirements.¹⁴

“(a) Locating dwellings and structures near each other and existing roads;

“(b) Locating dwellings and structures to avoid habitat conflicts and utilize least valuable habitat areas; and

“(c) Minimize road development to that necessary to support the residential use.”

¹⁴ The county found:

“[T]he assessment and review required by the remanded policies must be conducted in light of the County’s subdivision approval standards and the conditions of approval imposed by this decision. Those standards and conditions limit the nature and scale of a residential subdivision (or any series of partitions) that can be approved on the subject property to a maximum of 10 dwellings within the designated Peripheral Habitat on the subject property.

“Furthermore, the conditions of approval impose additional restrictions on future development that further demonstrate that it is feasible to have a subdivision that has limited impacts on wildlife habitat and that complies with the requirements of these remanded policies. To summarize those conditions: subdivision use of the property is limited to residential and wildlife uses and to a maximum of 10 dwellings within the Peripheral Habitat designation area on the subject property. * * * These conditions, proposed by the Applicant and imposed by this decision, are in response to issues raised by ODFW and others during the original and remand proceedings and contribute greatly to the Board’s conclusions regarding potential impacts that could flow from a subsequent residential subdivision approval.” Record 29.

“Appellant asserts that the NR-5 zone does not have implementing measures intended to protect Peripheral Habitat, and then argues that the Board cannot conclude that development that will result from this decision will protect sensitive wildlife habitat. The Board concludes their assertion is incorrect.

“Appellant’s arguments ignore several key facts. First, the only development directly allowed by this decision are those permitted outright in the NR-5 zone (such as one single-family dwelling on the entire property) and no party has argued that such uses will adversely impact sensitive wildlife habitat. As discussed in the findings above, the Board concludes such permitted uses will not.

“Second, Appellant ignores the fact that the residential subdivision that is envisioned by the Applicants will require approval of a subdivision application. As discussed above, that application will be subject to LCC 926.170(3), which requires the subdivision tentative plan to conform to the Comprehensive Plan, to include LCC 903.510(B)(7)-(10) which are acknowledged to deliver residential development at density levels that are deemed to be acceptable for habitat maintenance. It does not matter that the NR-5 zone itself does not have protective implementing measures because the residential development that Appellant is concerned about requires compliance with the Comprehensive Plan. Likewise, if the subject property is partitioned, LCC 924.250(B)(1), which applies to this property due to the lack of existing roads, similarly requires compliance with the Comprehensive Plan.

“Third, the conditions of approval for this decision ensure that the density standards in LCC 903.510(B)(7)-(10), which limit residential densities, will be met by residential development of the property.

“Appellants are incorrect in their assertion that future residential development proposals (other than one new house) will not be reviewed for consistency with the plan policies intended to protect big game peripheral habitat. The Plan Policies that protect big game

1 While the particular issue of the potential loophole for serial partitions to
2 avoid the application of LCC 924.250(B)(1) was not raised below, intervenors
3 explain that the county “was aware of the potential for a series of partitions to
4 divide land on the property that could eventually allow a higher number of
5 dwellings than permitted by the comprehensive plan.” Intervenors-Respondents’
6 Brief 33. According to intervenors, the county addressed that concern, first, by
7 the express finding that there is no recognized access on the subject property,
8 which makes applicable LCC 924.250(B)(1)’s requirement that a partition
9 comply with the comprehensive plan. Record 19. Second, the county limited the
10 number of dwellings that can be developed through partitioning in the peripheral
11 habitat area by imposing Condition 1. Intervenors’ Response Brief 33; *see* Record
12 43. Accordingly, the county relied on Condition 1 as establishing that that zone
13 change, as conditioned, is consistent with the comprehensive plan. In other
14 words, the county did not find that the subdivision and partition criteria would
15 capture the density criteria in all potential instances of future development. Stated
16 differently, the county adopted Condition 1 to fill an identified gap (instead of as
17 suspenders in addition to the subdivision and partition criteria belt). Thus, if
18 Condition 1 does not ensure that future development will be consistent with the
19 comprehensive plan, then the county has not established that the challenged

habitat are those that rely upon siting standards to include the LCC 903.510(B)(7)-(10) standards. All future subdivisions and partitions will be reviewed for consistency with those policies.” Record 41 (emphasis omitted).

1 decision “is consistent with and does not alter the intent of applicable section(s)
2 of the Comprehensive Plan.” LCC 921.874(A)(1) (emphasis omitted).

3 It is undisputed that the peripheral habitat on the property covers
4 approximately 90 acres. *See* Record 13, 207. Condition 1 allows up to 10
5 dwellings in that area, which could allow up to one dwelling per nine acres. We
6 understand petitioner to argue that the density allowed by Condition 1 is a greater
7 density than is allowed by LCC 903.510(B)(7) and thus, the decision does not
8 comply with the comprehensive plan.¹⁵ Intervenors do not address that apparent
9 conflict in their response brief or direct us to any findings in which the county
10 addresses that apparent conflict.

11 At oral argument, intervenors argued that the density standards in LCC
12 903.510(B) are calculated and applied by dwelling units per 640-acre section of
13 land, not by the size of each parcel. However, that position was first raised at oral
14 argument and the county did not adopt any findings interpreting the density
15 standard denominator or explaining how the county calculated the allowed
16 density with respect to Condition 1.

¹⁵ LCC 903.510(B)(7) provides:

“The county recognizes that within the peripheral habitat the ODFW recommended density is one unit per 40 acres (16 units per section). When dwellings are sited using clustering techniques, then the ODFW finds one unit per 20 acres (32 units per section) is acceptable.”

1 We agree with petitioner that Condition 1 appears to allow a dwelling
2 density that exceeds ODFW recommended density described in LCC
3 903.510(B)(7).¹⁶ Remand is appropriate for the county to adopt findings on that
4 issue.

5 In remanding, we note that the comprehensive plan is ambiguous as to how
6 density is evaluated with respect to habitat quality and habitat protective
7 measures. For example, LCC 903.510(B)(2) refers to maps of specific habitat
8 “areas.” LCC 903.510(B)(4) explains that “dwelling unit density per section”
9 determines whether “the *section* is considered impacted and is not subject to
10 wildlife habitat management considerations.” (Emphasis added.) In this case, the
11 mapped habitat crosses and does not completely cover the entire section. The
12 county found that “332.2 acres of the 640-acre section that includes the subject
13 property is subject to the peripheral big game habitat overlay.” Record 13. It is
14 unclear whether and how the county evaluated the impact of the proposed zone
15 change with respect to dwelling density and protected habitat. If, as intervenors
16 argue, density is calculated by section, then the county should also explain
17 whether dwelling density that could be approved under the zone change within

¹⁶ Intervenors do not argue that, even if the 10 dwellings allowed by Condition 1 exceeds the density standard in LCC 903.510(B)(7), then Condition 1 still requires that “dwellings must be approved in compliance with LCC 903.510(B)(7).” In all events, even if that is a potential interpretation of Condition 1, remand is appropriate for the county to address that ambiguity in Condition 1.

1 the applicable section but outside the 90 acres of mapped habitat on the subject
2 property will affect mapped habitat in the remainder of the section.

3 **B. Mechanism for compliance with conditions of zone change**
4 **approval**

5 Petitioner argues that there is no mechanism by which future applications
6 would be required to comply with the conditions of the zone change approval.
7 Petition for Review 24. Intervenor's respond that no applicable criteria require the
8 county to articulate the mechanism by which future applications will be required
9 to comply with the conditions of approval. Intervenor's-Respondents' Brief 36.
10 We agree with petitioner. If the county relies on the conditions of approval to
11 satisfy applicable criteria, combined with a conclusion that future applications
12 will comply with the conditions, then the county must demonstrate the
13 mechanism by which the county will ensure that future applications for land
14 division, or land partition, and dwelling development will be required to comply
15 with the conditions of approval for the zone change. *Heiller*, 23 Or LUBA at 556
16 (1992) (findings must set out the facts relied upon and explain how those facts
17 lead to the conclusion that the standards are met).

18 The numbers four and five subassignments of error are sustained, in part.

19 The county's decision is remanded.

20 Zamudio, Board Member, dissenting.

21 I respectfully dissent because, in my view, petitioner's failure to include
22 contents of the petition required by OAR 660-010-0030(4) prejudiced

1 intervenors' substantial right to prepare and submit their case in defense of the
2 challenged decision. I would therefore reject the arguments in the petition for
3 review and affirm the county's decision.

4 "Technical violations not affecting the substantial rights of parties shall not
5 interfere with the review of a land use decision or limited land use decision."
6 OAR 661-010-0005. Intervenor's substantial rights include "reasonable notice
7 and opportunity to intervene, reasonable time to prepare and submit their cases,
8 and a full and fair hearing." *Id.*

9 As the party seeking relief from LUBA, the petitioner bears the burden of
10 establishing error in the land use decision on review. *See Morse Bros., Inc. v.*
11 *Clackamas County*, 18 Or LUBA 188, 215 n 25 (1989) ("It is petitioner's
12 responsibility to explain the basis upon which we may grant relief."). A petitioner
13 establishes error by assigning error, demonstrating that the issue was preserved,
14 identifying the applicable standard of review, and providing substantive
15 argument supporting the assignments of error.

16 OAR 660-010-0030 requires a petition for review to, among other things,
17 "[p]resent a clear and concise statement of the case" and include "[a] brief
18 summary of the arguments appearing under the assignments of error in the body
19 of the petition." OAR 660-010-0030(4)(b)(B). OAR 660-010-0030(4)(d)
20 provides that the petition for review shall:

21 "Set forth each assignment of error under a separate heading. Each
22 assignment of error must demonstrate that the issue raised in the
23 assignment of error was preserved during the proceedings below.

1 Where an assignment raises an issue that is not identified as
2 preserved during the proceedings below, the petition shall state why
3 preservation is not required. Each assignment of error must state the
4 applicable standard of review. Where several assignments of error
5 present essentially the same legal questions, the argument in support
6 of those assignments of error shall be combined.”

7 The petition for review in this appeal fails to comply with OAR 660-010-
8 0030(4) in three respects: (1) petitioner does not set out any assignments of error;
9 (2) petitioner does not demonstrate that the issues raised in the arguments in the
10 petition were preserved during the proceedings below; and (3) petitioner does not
11 include a brief summary of the arguments in the body of the petition. I understand
12 intervenors to argue that those combined failures prejudice intervenors’
13 substantial right to reasonable notice of petitioner’s challenges to the county’s
14 decision, reasonable time to prepare and submit their cases, and a full and fair
15 hearing.

16 “We have explained that, ‘[a]lthough each of the * * * requirements [for
17 the petition for review] is important, the requirement of OAR 661-10-030([4])(d)
18 that the petition for review include assignments of error, supported by argument,
19 is particularly important.’ *Scholes [v. Jackson County]*, 28 Or LUBA 407, 409
20 (1994)] (citing *Bjerk v. Deschutes County*, 17 Or LUBA 187, 194 (1988)).” *Tadei*
21 *v. City of Astoria*, ___ Or LUBA ___, ___ (LUBA No 2021-048, Apr 6, 2022)
22 (slip op at 5). Our rules do not define “assignment of error” or “argument.” An
23 “assignment of error” is a term of art used in appellate law which means a
24 statement concisely identifying the specific legal challenge.

1 The OAR 661-010-0030(4)(d) requirement that the petition for review set
2 forth assignments of error is not simply an instance of insistence on form.
3 Assignments of error are essential to appellate review. Assignments of error and
4 supportive arguments form the entire basis for LUBA to complete its review
5 function. LUBA does not review the challenged decision and record to identify
6 issues that could potentially lead to reversal or remand of the challenged decision.
7 Instead, LUBA reviews the parties' arguments challenging the local decision in
8 the briefs submitted to LUBA. Those challenges are presented as assignments of
9 error in the petition for review or cross-petition for review. LUBA will not
10 address arguments that arise for the first time in the reply brief or at oral
11 argument. LUBA either sustains or denies assignments of error and thereby either
12 affirms, remands, or reverses the challenged decision. Importantly, clearly stated
13 assignments of error allow a respondent to understand and respond to the specific
14 bases for which petitioner challenges a decision. *See Freels v. Wallowa County*,
15 17 Or LUBA 137, 140 n 1 (1988) ("The requirement for separate assignments of
16 error is important. The assignments of error should identify precisely what the
17 petitioner believes the local government did wrong so that the parties and LUBA
18 can understand the issue to be resolved before considering arguments advanced
19 for resolving the issue in a particular way."); *Standard Insurance Co. v.*
20 *Washington County*, 16 Or LUBA 30, 33 n 1 (1987) ("If errors are not clearly
21 identified, respondents may not provide adequate responses, and the Board may
22 not address all issues in its review."). The requirements for assignments of error

1 and preservation demonstration dovetail and serve the same purpose
2 underpinning appellate review. A clearly stated assignment of error can
3 demonstrate that the issue was presented to and decided by the local decision
4 maker and, thus, preserved for review.

5 We have the discretion to refuse to consider a petition for review that does
6 not substantially conform to OAR 661-010-0030. *Cox v. Polk County*, 174 Or
7 App 332, 337, 25 P3d 970, *rev den*, 174 Or 332 558, 34 P3d 1176 (2001). The
8 Court of Appeals has held that LUBA should reach issues presented in a petition
9 for review despite a petitioner's failure to set out assignments of error "where
10 'the claimed errors are discernible from the petition.'" *Hallmark Inns & Resorts,*
11 *Inc., Hallmark Inns & Resorts, Inc. v. City of Lake Oswego*, 186 Or App 710,
12 717, 65 P3d 300 (2003) (quoting *Eckis v. Linn County*, 110 Or App 309, 311, 821
13 P2d 1127 (1991)); *Heiller v. Josephine County*, 23 Or LUBA 551, 554 (1992)
14 (LUBA would consider only the arguments stated clearly enough to afford
15 respondents an opportunity to respond where the petitioner failed to set out
16 assignments of error under separate headings).

17 Here, the petition includes a heading for the "first assignment of error" but
18 does not set out a statement identifying any legal challenge. Petitioner presents
19 no actual assignment of error, only argument. The body of the petition sets out
20 five subsections of argument under numbered subheadings "3. Sub-Assignment
21 of Error," "4. Sub-Assignment of Error," *et cetera*. Each subsection does not set
22 forth an assignment of error. That is, each subsection does not include a statement

1 identifying the specific legal challenge. For example, “3. Sub-Assignment of
2 Error” begins “LUBA’s remand was not limited to determining whether the
3 county’s decision was inconsistent with LCC 903.510(B)(3) and LCC
4 903.550(A)(1).” Petition for Review 5. This practice permeates the petition for
5 review.

6 The petition in these appeals fails to satisfy the OAR 661-010-0030(4)(d)
7 requirement that the petition for review set forth assignments of error. I agree
8 with intervenors that petitioner’s failure to comply with OAR 661-010-
9 0030(4)(d) imposed an undue burden on intervenors in responding to the
10 arguments in the petition and creates analytical gaps that intervenors filled in for
11 petitioner in the response brief in order to respond. As explained above, LUBA
12 will not generally reject a petition for review solely due to petitioner’s failure to
13 set out separate assignments of error where the petition includes arguments that
14 allege error. The petition includes arguments that challenge the findings and
15 interpretations of the applicable law that the county adopted in the challenged
16 decision. Accordingly, petitioner’s failure to set out separate assignments of
17 error, alone, would not necessarily be fatal to petitioner’s arguments. However,
18 petitioner did not only fail to include assignments of error, but petitioner also
19 failed to include a summary of the arguments, as required by OAR 661-010-
20 0030(4)(b)(B), and to identify in the petition where issues raised were preserved
21 during the proceedings below, as required by OAR 661-010-0030(4)(d).

1 In *H2D2 Properties v. Deschutes County*, ___ Or LUBA ___ (LUBA No
2 2019-066, Dec 19, 2019), the petitioner set out six assignments of error and under
3 each assignment of error petitioner set out the same record citations to over one
4 hundred pages of the petitioner’s submissions to the local government. We
5 explained that “[a] petitioner errs by requiring the reviewing body to comb the
6 record to determine if an issue is preserved.” *Id.* at ___ (slip op at 7). We
7 concluded that “lack of specificity in petitioner’s preservation citations interferes
8 with the substantial rights of the parties, because it improperly shifts the burden
9 to respondents to review over one hundred pages to determine whether issues
10 raised in six assignments argued in an overlength 68-page petition for review
11 have been preserved.” *Id.* at ___ (slip op at 8-9). We denied the assignments of
12 error and affirmed the county’s decision.

13 Here, petitioner’s preservation statement simply states that “Petitioner and
14 other parties adequately raised the legal issues below in its comments on remand
15 before the county.” Petition for Review 3. That statement is unsupported by any
16 citations to the record. The petition for review in these appeals is 33 pages long
17 and includes five separate argument sections. Intervenors argue, and I agree, that
18 petitioner’s failure to identify where any particular issue was preserved is
19 exacerbated by the fact that the petition does not articulate any assignment of
20 error and provides no summary of the arguments that might potentially help
21 intervenors identify main issues. Here, petitioner’s failure to comply with OAR
22 661-010-0030(4)(d) has created a herculean task for intervenors to (1) identify

1 issues raised in the arguments without any clearly stated assignments of error;
2 and (2) then determine whether those issues were preserved without any
3 allegation from petitioner as to where the issues raised in the petition for review
4 were preserved.

5 I agree with intervenors that petitioner's complete failure to identify in the
6 petition for review whether the issues presented were preserved in the initial
7 proceeding, the remand proceeding, or why preservation was not required, is not
8 a technical violation. Petitioner's failure to set forth assignments of error and
9 summary of arguments significantly impaired intervenors' ability to identify the
10 issues presented to allow intervenors to determine whether those issues were
11 preserved. In my view, the petitioner has an affirmative obligation to demonstrate
12 preservation in the petition for review, and not only when preservation is disputed
13 in a responsive brief. In *H2D2*, we agreed with the county that the broad
14 preservation statement in the petition for review prejudiced the county "because
15 it improperly shifts the burden to respondents to review over one hundred pages
16 to determine whether issues raised in six assignments argued in an overlength 68-
17 page petition for review have been preserved." ___ Or LUBA at ___ (slip op at
18 8-9). That prejudice is not remedied by an after-the-fact assertion of preservation
19 in a reply brief.

20 I agree with intervenors that petitioner's combined failures to conform the
21 petition to OAR 660-010-0030(4) prejudiced intervenors' substantial right to
22 prepare and submit their case in defense of the challenged decisions. I would

- 1 therefore reject the arguments in the petition for review and affirm the county's
- 2 decision.