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

ANNUNZIATA GOULD,
Petitioner,

and

PAUL J. LIPSCOMB,
and CENTRAL OREGON LANDWATCH,
Intervenors-Petitioners,

vs.

DESCHUTES COUNTY,
Respondent,

and

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

LUBA No. 2022-025

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Jennifer M. Bragar filed a petition for review and reply brief. Also on brief was Stephen Thorpe, Tomasi Brager Dubay, and Jeffrey L. Kleinman. Jeffrey L. Kleinman argued on behalf of petitioner.

Carol E. Macbeth represented intervenor-petitioner Central Oregon Landwatch.

Paul J. Lipscomb represented themselves.

No appearance by Deschutes County.

J. Kenneth Katzaroff filed a response brief and argued on behalf of the intervenors-respondents. Also on the brief was Schwabe, Williamson & Wyatt, PC.

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

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

AFFIRMED 09/09/2022

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 hearings officer approving a subdivision tentative plan to create 108 single-family residential dwelling lots as part of a phased destination resort.

FACTS

Intervenors-respondents (intervenors) applied for approval of a subdivision tentative plan to create 108 single-family residential lots, to be platted in four phases, as part of Phase A-2 of the approximately 1,980-acre Thornburg Destination Resort (Resort). The Resort has a long history most recently summarized in detail in *Gould v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2021-112, June 9, 2022), *appeal pending* (A178963) (*2021-112*). 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. DCC 18.113.040(C).

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 of the FWMP relevant to this appeal addresses off-site fish habitat and requires intervenors to secure water rights for fish habitat mitigation from Big Falls Ranch (BFR) and Central Oregon Irrigation District (COID).[1] FMP Condition 38 requires intervenors to "abide by" the FWMP and to provide annual reporting:

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[1] The first component addresses terrestrial wildlife and is not at issue 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 off-site 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 application satisfied all applicable DCC criteria and satisfied the applicable FMP conditions, including Condition 10 and Condition 38. This appeal followed.

ASSIGNMENT OF ERROR

A. Preservation

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). A petitioner must demonstrate in the petition for review that each issue was

preserved, or explain why preservation is not required. OAR 661-010-0030(4)(d).

The petition for review includes a section entitled "Preservation" that states:

> "Petitioner preserved error with respect to this assignment of error, including in her appeal of the hearings officer's decision to the [board of county commissioners]. Record 27-55, 452-460, 1226-1346, 1347-1391, 1417-1498, 1725-1765, Supp.Rec. 1-274."[2]

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[2] OAR 661-010-0030(4)(d) provides, in part, that within the petition for review petitioner 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 preserved during the proceedings below, the petition shall state why preservation is not required."

Petitioner's single assignment of error is:

> "Respondent misinterpreted and misconstrued the applicable law, and failed to make adequate findings supported by substantial evidence, in approving the proposed site plan in violation of [FMP] Conditions 1, 10 and 38, and in approving [intervenors'] request to amend FMP Conditions 21, 33 and 35." Petition for Review 6.

In the 36 pages that follow that statement are 12 subsections labeled as "arguments" in support of the single assignment of error. Most of the subsections refer to the operative language of one or more sections of ORS 197.835(9), which sets out LUBA's standard of review of the decision, and assign error to different rulings by the hearings officer based on those standards of review. As noted, the arguments contained in the single assignment of error also include record citations, presumably to demonstrate where issues were preserved.

Petition for Review 6.

Some of the arguments contained in petitioner's single assignment of error also include record citations.

Intervenors argue that petitioner's preservation section fails to comply with OAR 661-010-0030(4)(d) because it cites to almost 600 pages of the record. Intervenors further argue that the petition for review's failure to comply with OAR 661-010-0030(4)(d) prejudiced their substantial rights because it required intervenors to "comb the record to discover how (and if) Petitioner raised an argument below and to devote substantive briefing space to respond to Petitioner's deficiency rather than the merits of Petitioner's arguments." Intervenors-Respondents' Brief 5. Intervenors urge us to reject "Petitioner's undocumented challenges as did the Court of Appeals in *Willamette Oaks v. City of Eugene*, 295 Or App 757, 437 P3d 314 (2019)." Intervenors-Respondents' Brief 5-6.

In *Willamette Oaks*, the court concluded that the issue presented in the petitioner's first assignment of error at the court was unpreserved before LUBA, and consequently before the court. In reaching that conclusion, the court reviewed both the single page of the record cited in the petitioner's preservation of error section of its opening brief at the court and "[the petitioner's] LUBA petition as a whole[.]" *Willamette Oaks*, 295 Or App at 766. The court also discussed the role of preservation more broadly:

> "As we have previously emphasized, the statutory framework for review of quasi-judicial local government land use decisions

> ""suggests that issues be preserved at the local government level for board review, and at LUBA level for judicial review, in sufficient detail to allow a thorough examination of the issue by the decision-maker, so as to potentially obviate the need for further review or at least to make that review more efficient and timely."'" *Willamette Oaks*, 295 Or App at 767 (citing *Willamette Oaks v. City of Eugene*, 248 Or App 212, 225, 273 P3d 219 (2012) (*Willamette III)* (quoting *VanSpeybroeck v. Tillamook County*, 221 Or App 677, 691 n 5, 191 P3d 712 (2008))).

We have explained that "[c]ompliance with OAR 661-010-0030(4) helps eliminate waiver disputes or frame waiver disputes earlier in an appeal, and in many cases will eliminate the need for a reply brief altogether with attendant efficiencies to LUBA's appellate review." *Wal-Mart Stores, Inc. v. City of Hood River*, 72 Or LUBA 1, 7, *aff'd*, 274 Or App 261, 363 P3d 522 (2015). Failure to cite the specific portion of the record where an issue was raised can be prejudicial to the respondent where preservation is disputed.

Where preservation is disputed, LUBA will not search the record or large page range citations in the petition for review to determine whether an issue was raised below. *H2D2 Properties, LLC v. Deschutes County*, ___ Or LUBA ___, ___ (LUBA No 2019-066, Dec 19, 2019) (slip op at 7-9). However, where a reply brief provides more focused citations to places where an issue was raised below, and where it is evident from the challenged decision itself that the issues raised on appeal at LUBA were central to the local proceedings and the local government's decision responds to those issues, we will not deny an assignment of error based on an inadequate preservation statement included in the petition for review. *Nehmzow v. Deschutes County*, ___ Or LUBA ___, ___ (LUBA No

2019-110, Aug 10, 2020) (citing *Boldt*, 107 Or App at 623 (explaining that the objective of ORS 197.763(1) (renumbered 197.797(1)) is to "afford the decisionmaker and the parties 'an adequate opportunity to respond to each issue.' The plain thrust of that language is that the statute requires no more than fair notice to adjudicators and opponents[.]")) (slip op at 14-15).

We decline intervenors' request to deny the entire assignment of error for failure to comply with OAR 661-010-0030(4)(d) because, in the circumstances presented here, we view that failure as a technical violation, and intervenors have not established that that violation prejudices their substantial rights.[3] With the exception of two issues that we discuss below, intervenors do not dispute that the issues raised in the petition for review were raised in the local proceeding. However, where intervenors allege that two issues were not raised prior to the close of the initial evidentiary hearing, and absent any attempt by petitioner in the petition for review or in the reply brief to identify where those issues were

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[3] 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. * * *"

raised or argue that they were not required to be preserved, we decline to address them.

B. Effect of Prior Appeals

The hearings officer adopted findings concluding that many if not all of petitioner's challenges to the application were addressed and resolved by prior LUBA and Court of Appeals' decisions regarding development of the Resort and applying those prior resolutions to the application. Record 59-64. We understand petitioner to argue that the hearings officer improperly construed the applicable law in determining that petitioner's challenges to the application were previously resolved, and in applying those resolutions to the application. Petition for Review 12-17, 31-33.

The hearings officer also adopted alternative, independent findings that intervenors 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 application should be approved, we need not address petitioner's challenge to the hearings officer's conclusion that petitioner's challenges to the application were addressed and resolved by prior decisions.

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

C. FMP Condition 10

Condition 10 is:

"[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, 1919.

In *Gould v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2020-095, June 11, 2021), *aff'd*, 314 Or App 636, 494 P3d 357 (2021), *rev den*, 369 Or 211, 503 P3d 446 (2022) (*Gould Golf*), 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 consumptive use of water. *Gould Golf*, ___ Or LUBA at ___ (citations omitted) (slip op at 13-14).

Intervenors possess a water rights permit, Permit G-17036 (Water Permit) that was extended by the Oregon Water Resources Department (OWRD). Record 73-74. 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. The hearings officer concluded that intervenors satisfied the requirements of Condition 10 by providing documentation that intervenors' Water Permit is not cancelled.[4] Record 74.

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[4] Intervenors argued in *Gould v. Deschutes County*, 79 Or LUBA 561 (2019), *aff'd*, 310 Or App 868, 484 P3d 1073 (2021) (*Gould VIII*) 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 Condition 10 to require documentation of the water right and that intervenors had sufficiently documented their water right, notwithstanding petitioner's protest. Our decision was upheld by the Court of Appeals. *Gould*, 310 Or App 868.

Petitioner argues that the hearings officer improperly construed Condition 10 by concluding that intervenors were required to and did provide documentation that the Water Permit was not cancelled, and an accounting of the mitigation water needed for the subdivision tentative plan. Petitioner argues that Condition 10 requires intervenors to prove that they are able to "draw on the water now," that is, at the time the subdivision tentative plan is approved. Petition for Review 9. While petitioner characterizes Condition 10 as "a mixed question of law and fact," the issue presented by petitioner is really, again, whether Condition 10 is satisfied by evidence that intervenors' Water Permit is not cancelled and that intervenors can obtain the water rights necessary to satisfy

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In *Gould Golf*, petitioner disputed the status of intervenors' water rights. Petitioner argued that intervenors could not satisfy 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), *appeal pending* (A178949) (*2022-013*), 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 Condition 10 was satisfied. *2022-013*, ___ Or LUBA at ___ (slip op at 13-16).

Condition 10.[5] Petition for Review 9; *see also* Petition for Review 20, 23, 26-29. Petitioner's argument that the hearings officer misconstrued Condition 10 is essentially the same argument that the county and LUBA have thrice rejected. *Gould v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2022-013, June 1, 2022), *appeal pending* (A178949) (*2022-013*) (slip op at 13); *Gould Golf*, ___ Or LUBA at ___ (slip op at 17-18); *Gould v. Deschutes County*, 79 Or LUBA 561, 581 (2019), *aff'd*, 310 Or App 868, 484 P3d 1073 (2021) (*Gould VIII*). Petitioner has not, in this appeal, established that our prior decisions were wrongly decided, and we adhere to them.

In the alternative, petitioner points to testimony and evidence from petitioner's water expert and argues that petitioner has established that intervenors are precluded as a matter of law from obtaining 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 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 expresses confidence that petitioner will prevail in the contested

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[5] Intervenors respond that petitioner failed to raise an issue that Condition 10 is a "mixed question of law and fact." Intervenors-Respondents' Brief 11. While we agree with intervenors, we need not address intervenors' waiver argument because we conclude that petitioner's argument is really just a rehashing of its prior challenges to the hearings officer's and LUBA's interpretation of Condition 10.

case proceeding, but confidence does not establish that intervenors are precluded as a matter of law from securing water under the Water Permit. Petitioner has not established that intervenors are precluded as a matter of law from securing water under the Water Permit.

Petitioner's argument is also somewhat similar to the argument we recently rejected in *2022-013* and in *Gould v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2022-026, July 28, 2022), *appeal pending* (A179306) (*2022-026*).[6] 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).

Petitioner points to evidence in the record that intervenors are also seeking water rights different from the Water Permit for some resort purposes. Supplemental Record 97-100. Petitioner argues that the evidence that intervenors are seeking other water rights calls into question the evidence that intervenors

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[6] The petition for review in this appeal was filed on June 23, 2022, before we issued our decision in *2022-026*.

submitted regarding the Water Permit. Petition for Review 21-22, 26-27. We reject petitioner's argument. 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 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 Condition 10 for the site plan.

D. 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 off-site 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.

In *2021-112*, we explained what the FWMP requires:

> "However, we agree with the county that the FWMP does not require Thornburgh to establish that wet water is actually in Deep Canyon Creek at the tentative plan stage. Instead, the FWMP requires Thornburgh to provide mitigation water instream 'before water use may begin' for development approved in Phase A-1 TP. Record 573; *see [2022-013]*, ___ Or LUBA at ___ (slip op at 20) ('[T]he FWMP requires Thornburgh 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 574 ('[T]he mitigation plan requires [Thornburgh] to provide in-stream mitigation water "in advance for the full amount of water to be pumped under each phase of development[.]"'). Accordingly, the hearings officer did not err by not requiring Thornburgh to demonstrate in the Phase A-1 TP proceeding that a certain volume of wet water is currently available in Deep Canyon Creek." *2021-112*, ___ Or LUBA at ___ (slip op at 24).

We have also again recently explained what Condition 38 requires:

> "The requirement that [intervenors] '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*.'
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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 ___ (first emphasis in original; second emphasis added; citations omitted) (slip op at 18-19).

We understand petitioner to argue, as they argued in *2022-013*, in *2022-026,* and other cases, that the hearings officer erred by not requiring intervenors to establish, during subdivision tentative plan review, (1) that they possess an OWRD approved water right which will allow intervenors to place the mitigation water permanently instream; and (2) that actual wet water exists instream in Deep Canyon Creek in a sufficient quantity to satisfy the required mitigation.[7] Petition for Review 22-23, 36-38. We rejected nearly identical arguments in *2021-112* and *2022-013* and for the same reasons, we reject them here as well. *2021-112*, ___ Or LUBA at ___ (slip op at 24); *2022-013*, ___ Or LUBA at ___ (slip op at 17-19). 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 (emphasis added). The FWMP does not require mitigation actions and reporting as a condition to subdivision tentative plan approval. *Id.* at 583.

Petitioner also argues that the FWMP requires that the Water Permit be "operable and available to" intervenors. Petition for Review 9-10. Intervenors

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[7] The evidence in the record is that intervenors have purchased and contracted to purchase BFR water rights and will apply to OWRD to change the point of appropriation of BFR water rights back to a point of diversion from Deep Canyon Creek. Record 323, 1124-26, 2966.

respond, initially, and we agree, that petitioner has failed to demonstrate where the issue was raised during the proceedings below, and therefore the issue is waived. Petitioner cites 89 record pages to support its argument. Petition for Review 10. For the reasons explained above, we agree with intervenors that petitioner has failed to demonstrate that the issue was preserved for our review as required by OAR 661-010-0030(4)(d).

Finally, petitioner advances an additional argument that construction activity on the Resort property has begun and water for the resort uses has commenced without the required mitigation or reporting, in violation of Condition 38 and the FWMP. Petition for Review 38. The hearings officer adopted findings responding to petitioner's argument below. Record 89. The hearings officer concluded that use of water by intervenors for construction purposes does not trigger a requirement for mitigation or reporting, because such use is authorized by ORS 537.545 and OAR 690-300-0010(6) and because the FWMP specifically authorizes use of the existing exempt wells on the property until after the Resort's water system is developed.[8] Intervenors respond that

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[8] The hearings officer found:

> "Appellant, through a large number of open-record submissions, provided photos of alleged construction activity on the Thornburgh Resort. The Hearings Officer is uncertain as to the specific legal argument raised by the inclusion of the photos or the allegation of construction activities. The Hearings Officer finds that Appellant's Construction Activities appeal issue is broadly stated, conclusory

petitioner does not acknowledge those findings or assign error to them, and that the hearings officer's conclusion is correct that mitigation is required for consumptive resort use and not for construction use of water. We agree with intervenors that the petition for review fails to challenge the hearings officer's findings.

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and lacks the necessary specificity to allow the Hearings Officer to effectively respond.

"Alternatively, the Hearings Officer takes notice of [intervenors'] final argument comments below:

"'*Appellant Gould argues that water use is occurring and so mitigation is also due. That is not correct. Mitigation obligations are due at the time of pumping under the relevant water right permit or certificate, according to the specified phased requirements of the Deschutes Basis Mitigation Rules. See FWMP, p. 8-9. All use by Thornburgh for construction purposes is authorized by statute and rule under exempt use allowance, and, the FWMP does not require the abandonment of exempt well use until after the water system is developed. FWMP, p.10.*'

"The Hearings Officer finds the FWMP is a document in the record and may be considered by the Hearings Officer in this case. Further, the Hearings Officer finds that there is no persuasive evidence or argument in the record to dispute the [intervenors'] assertion that water used for construction purposes is authorized by statute, rule and the FWMP.

"The Hearings Officer finds Appellant's construction activities argument is not persuasive." Record 89 (italics in original).

In the reply brief, petitioner argues that the FWMP does not distinguish between pumping for construction purposes and pumping for the resort.[9] Reply Brief 4. Petitioner also argues in the reply brief that Condition 28 of the FMP requires the FWMP to be implemented "throughout the life of the resort." Reply Brief 4. The petition for review does not mention Condition 28 or include any argument that Condition 28 has any bearing on whether construction activities require mitigation and reporting.

In a reply brief, petitioner cannot advance a new challenge to a finding or a portion of the decision that was unchallenged in the petition for review. In this circumstance, the reply brief must be limited to arguing that it was unnecessary to assign error to the unchallenged finding, or that failure to challenge the finding in the petition for review should not affect LUBA's resolution of the assignment of error at issue. *McGovern v. Crook County*, 60 Or LUBA 177, 181 (2009), *aff'd* 234 Or App 365, 228 P3d 736 (2010); *VanSpeybroeck v. Tillamook County*, 56 Or LUBA 184, 187-88, *aff'd* 221 Or App 677, 191 P3d 712 (2008). We conclude that the reply brief advances a new argument as a basis for reversal or remand. A new assignment of error or basis for reversal or remand cannot be advanced for the first time in a reply brief. *Porter v. Marion County*, 56 Or LUBA 635, 641 (2008).

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[9] Petitioner does not cite the FWMP to support this proposition but rather, cites an argument in their opening brief to the Court of Appeals in *Gould Golf*. Reply Brief 4 (citing Record 2695).

E. OAR 635-415-0025(2)

OAR 635-415-0025(2) is an Oregon Department of Fish and Wildlife (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 the no net loss standard in DCC 18.113.070(D) is the county's implementation of that rule. Petition for Review 41-42. Petitioner's argument is difficult to understand, and petitioner does not develop any argument explaining why OAR 635-415-0025(2) is relevant to our review of the hearings officer's decision or how the hearings officer erred.

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. Intervenors also respond that petitioner's argument is undeveloped and accordingly, should be rejected.

We agree with intervenors on both counts. In the petition for review, petitioner cites Record 1033-34 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 intervenors 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.

In the reply brief, petitioner argues that "[p]etitioner presents legal arguments characterizing the evidence in the record, and this is sufficient for LUBA's consideration." Reply Brief 5 (citing *Boldt*, 107 Or App at 623, and *DLCD v. Tillamook County*, 34 Or LUBA 586, 591, *aff'd*, 157 Or App 11, 967 P2d 898 (1998)). We reject that argument. Petitioner's argument in the petition for review regarding OAR 635-415-0025(2) is, as far as we can tell, an argument that the rule applies directly to the county's review of the subdivision tentative plan. It is not a legal argument characterizing the evidence in the record and does not depend on any evidence in the record at all.

Further, as explained above, petitioner does not develop any argument explaining why OAR 635-415-0025(2) is relevant to our review of the hearings officer's decision or how the hearings officer erred. We will not develop the argument for petitioner. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

F. 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 155.

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 BFR mitigation water." Petition for Review 42-43. 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.

G. Conditions 21, 33 and 35

A destination resort must provide visitor-oriented accommodations, including overnight lodging units (OLUs). ORS 197.435(5); ORS 197.445(4). Condition 21 of the FMP provided a 2:1 OLU ratio. Record 1921. Condition 33 included, as relevant here, a construction or bonding requirement. Record 1922. Condition 35 required 45 weeks of rental availability. Record 1922.

In a previous and separate decision, the county approved modifications to Conditions 21, 33, and 35 to reflect a 2.5:1 OLU ratio and a 38-week OLU rental requirement, and to amend the construction or bonding requirement as provided in the amended version of the DCC. In *Gould v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2022-011, June 16, 2022), *appeal pending* (A179002) (*2022-011*), we affirmed that decision.[10] The challenged decision includes findings that

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[10] We explained:

> "In 2003, Senate Bill (SB) 911 amended state law governing destination resorts and created a 2.5:1 OLU ratio for eastern Oregon, while retaining a 2:1 OLU ratio for western Oregon. Or Laws 2003,

quote modified conditions 21, 33 and 35 as the operative language of those conditions.

We understand petitioner's argument in this section of the petition for review to preserve their challenges to the modifications to Conditions 21, 33 and 35 because the challenged decision includes findings that quote the modified conditions as the operative conditions. Petition for Review 43-44. Because the hearings officer did not approve those modifications in this decision, petitioner's argument does not present a cognizable assignment of error in this appeal.

The county's decision is affirmed.

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ch 812, § 2 (amending ORS 197.445). SB 911 changed the weekly rental requirement from 45 weeks to 38 weeks for eastern Oregon, while retaining the 45-week requirement for western Oregon. Or Laws 2003, ch 812, § 1 (amending ORS 197.435(5)(b)).

"In 2007, after the Thornburgh Destination Resort CMP was approved, the county amended DCC 18.04 and 18.113 to change to the weekly rental requirement from 45 weeks to 38 weeks for eastern Oregon. Ordinance No. 2007-05. In 2013, the county amended DCC 18.04 and 18.113 to change the OLU ratio from 2:1 to 2.5:1. Ordinance No. 2013-008. The amendment provides that the 2.5:1 OLU ratio 'applies to destination resorts which were previously approved under a different standard.' DCC 18.113.060(D)(2)(a). In 2015, the county amended DCC 18.113.060(A)(1)(b)(iv) to change the OLU ratio from 2:1 to 2.5:1 to conform to the prior amendments to DCC 18.113. Ordinance No. 2015-016. Those DCC amendments align with state law. ORS 197.435; ORS 197.445." *2022-011*, ___ Or LUBA at ___ (slip op at 4).