LUBA
OCT 21 2022 PM01:31

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3
4 DAVE HUSK and WILLIAM LINCOLN,
5 *Petitioners*,
6
7 vs.
8
9 CITY OF BEND,
10 *Respondent*,
11
12 and
13
14 BARRY HELM and BCL, LLC,
15 *Intervenors-Respondents*.
16
17 LUBA No. 2022-052
18
19 FINAL OPINION
20 AND ORDER
21
22 Appeal from City of Bend.
23
24 Timothy J. Fransen filed the petition for review and reply brief and
25 argued on behalf of petitioners. Also on the brief were Brandon L. Thornburg
26 and Cosgrave Vergeer Kester LLP.
27
28 No appearance by City of Bend.
29
30 Christopher P. Koback filed the intervenors-respondents' brief and
31 argued on behalf of intervenors-respondents. Also on the brief was Hathaway
32 Larson LLP.
33
34 RYAN, Board Chair; ZAMUDIO, Board Member, participated in the
35 decision.
36
37 RUDD, Board Member, did not participate in the decision.
38

1 REMANDED 10/21/2022
2
3 You are entitled to judicial review of this Order. Judicial review is
4 governed by the provisions of ORS 197.850.

1 Opinion by Ryan.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city hearings officer decision approving a tentative
4 plan for a 26-lot subdivision and a waiver of public improvement standards to
5 allow for a partial street improvement.

6 **MOTION TO INTERVENE**

7 Barry Helm and BCL, LLC (intervenors), the applicants below, move to
8 intervene on the side of the city. There is no objection to the motion, and it is
9 allowed.

10 **FACTS**

11 The subject five-acre property is located on the east side of Bachelor
12 View Road, is zoned Standard Density Residential (RS), and is surrounded by
13 RS-zoned properties. Bachelor View Road is a private, 15-foot-wide road
14 running south from Century Drive to the subject property. The property to the
15 north is platted and developed as The Lodges Subdivision, the properties to the
16 east and west are vacant, and the property to the south contains a machine shed.

17 On September 9, 2021, intervenors applied for approval of a tentative
18 plan for a subdivision with 26 lots ranging in size from 4,500 square feet to
19 11,276 square feet, to be developed in three phases. Subdivision Record 52.[1] On

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[1] The city transmitted one record for the subdivision proceeding, city file number PLLD20210848, and another record for the waiver proceeding, city file number PLMISC20211093. We refer to the former record as the "Subdivision Record" and the latter record as the "Waiver Record."

1 October 8, 2021, the city's planning staff notified intervenors that the
2 subdivision application was incomplete. Subdivision Record 734-35.
3 Intervenors then submitted additional materials and, on December 8, 2021, the
4 city notified intervenors that the subdivision application was deemed complete.
5 Subdivision Record 660-61. Also on December 8, 2021, the city notified
6 intervenors that their application for a waiver of public improvement standards
7 to allow for a partial street improvement to Bachelor View Road was complete.
8 Waiver Record 653-54.

9 The hearings officer's original decision approved the applications with
10 conditions. Intervenors requested reconsideration of that decision, and,
11 thereafter, the hearings officer issued a decision on reconsideration. The
12 hearings officer's decision on reconsideration again approved the applications
13 with conditions, but the hearings officer amended Condition 9.[2] That decision
14 was appealed to the city council, and the city council declined review. This
15 appeal followed.

16 **FIRST ASSIGNMENT OF ERROR**

17 Bend Development Code (BDC) chapter 3.4 provides requirements for
18 design and construction of public and private transportation facilities. BDC
19 3.4.200(F) Table A provides minimum right-of-way width, planter strip,

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[2] We address Condition 9 further below, in response to petitioners' third assignment of error.

1 sidewalk, and other requirements for local streets in the RS zone. BDC 3.4.150
2 provides a process to seek a waiver or modification of public improvement
3 standards. BDC 3.4.150(B) provides, in relevant part:

4 "The Review Authority, after considering the recommendation of
5 the City Engineer, may waive or modify the standards of this title
6 and the City of Bend Standards and Specifications based on a
7 determination that (a) the waiver or modification will not harm or
8 will be beneficial to the public in general; (b) the waiver and
9 modification are not inconsistent with the general purpose of
10 ensuring adequate public facilities; and (c) one or more of the
11 following conditions are met:

12 "* * * * *

13 "9. There is insufficient right-of-way to allow a full width street
14 cross-section and additional right-of-way cannot be
15 provided.

16 "10. There is no street or right-of-way adjacent to the property
17 and easement access has been obtained across private
18 property."

19 Intervenors sought and the hearings officer approved a waiver of the BDC
20 3.4.200(F) Table A requirements for a minimum right-of-way width of 60 feet,
21 planter strips for the entire property frontage, and sidewalks on both sides.
22 Waiver Record 74-75. Although intervenors sought the waiver under BDC
23 3.4.150(B)(10), the hearings officer approved the waiver under BDC
24 3.4.150(B)(9). Waiver Record 75, 680.

25 Petitioners' first assignment of error is that the hearings officer's decision
26 does not comply with BDC 3.4.150(B) because (1) the hearings officer was

1 required to determine whether the waiver itself, rather than the proposed
2 development, would cause harm and (2) intervenors could have dedicated more
3 of their own property to provide sufficient right-of-way. We understand
4 petitioners' first assignment of error to argue that the hearings officer's decision
5 "does not comply with the applicable provisions of the land use regulations."[3]
6 ORS 197.828(2)(b).

7 Our review of a decision is confined to those "[i]ssues * * * raised by
8 any participant before the local hearings body as provided by ORS * * *
9 197.797." ORS 197.835(3). ORS 197.797(1) provides:

10 "An issue which may be the basis for an appeal to [LUBA] shall be
11 raised not later than the close of the record at or following the final
12 evidentiary hearing on the proposal before the local government.
13 Such issues shall be raised and accompanied by statements or
14 evidence sufficient to afford the * * * hearings officer[] and the
15 parties an adequate opportunity to respond to each issue."

16 When attempting to differentiate between "issues" and "arguments," there is no
17 "easy or universally applicable formula." *Reagan v. City of Oregon City*, 39 Or
18 LUBA 672, 690 (2001). While a petitioner is not required to establish that a
19 *precise* argument made on appeal was made below, that does not mean that
20 "*any* argument can be advanced at LUBA so long as it has some bearing on an
21 applicable approval criterion and general references to compliance with the

[3] Petitioners argue that the hearings officer "improperly analyzed elements (a) and (c) of BDC 3.4.150(B)." Petition for Review 12.

criterion itself were made below." *Id.* (emphasis in original). A particular issue must be identified in a manner detailed enough to give the decision-maker and the parties fair notice and an adequate opportunity to respond. *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991); *see also Vanspeybroeck v. Tillamook County*, 221 Or App 677, 691 n 5, 191 P3d 712 (2008) ("[I]ssues [must] be preserved at the local government level for board review * * * in sufficient detail to allow a thorough examination by the decision-maker, so as to obviate the need for further review or at least to make that review more efficient and timely.").

Intervenors argue, initially, that petitioners' first assignment of error is waived because it was not raised as an issue before the hearings officer. Intervenors-Respondents' Brief 11-14. Petitioners respond that they are not limited on appeal to the exact same arguments made below and that issues need only have been raised sufficiently to avoid "unfair surprise." Reply Brief 1 (citing *Boldt v. Clackamas County*, 21 Or LUBA 40, 46 (1991)). In the petition for review and reply brief, petitioners cite Subdivision Record 707 to 709, 711 to 712, 403 to 404, and 525 to 528 in support of their argument that the issues raised in the first assignment of error were preserved.

We have reviewed the cited record pages, and we agree with intervenors that the issue raised in the first assignment of error was not raised on any of those pages. Petitioners cite intervenors' application submittals at Subdivision Record 707 to 709. Those pages quote BDC 3.4.150 in its entirety. There is no

1 mention of the elements of BDC 3.4.150(B) beyond merely stating what they
2 are and requesting the public improvement standards waiver pursuant to BDC
3 3.4.150(B)(10). If those pages raise an issue, it is "certainly not the issue that
4 petitioners raise under this assignment of error." *Butte Conservancy v. City of*
5 *Gresham*, 51 Or LUBA 194, 208 (2005).

6 Petitioners also cite their February 8, 2022 letter at Subdivision Record
7 403 to 404 as supporting their claim that this issue is preserved. Those pages
8 argue that BDC 3.4.200 is clear and objective and, therefore, intervenors cannot
9 argue that they are entitled to a waiver because BDC 3.4.150 is not clear and
10 objective. The letter states, "[Intervenors] fail[] to meet the clear and objective
11 standards of BDC 3.4.200 (among other provisions). Because [intervenors] also
12 fail[] to meet the waiver standard in BDC 3.4.150, the application should be
13 denied." Subdivision Record 404. Such a passing mention of BDC 3.4.150 was
14 not enough to give the hearings officer or intervenors a reasonable opportunity
15 to respond. *DLCD v. Coos County*, 25 Or LUBA 158, 8 167-68 (1993); *see also*
16 *Friends of Yamhill County v. Yamhill County*, ___ Or LUBA ___, ___ (LUBA
17 No 2021-074, Apr 8, 2022), *aff'd*, 321 Or App 505 (2022) (stating that a
18 passing mention of an issue while focusing the bulk of the argument elsewhere
19 is not sufficient to allow a respondent a reasonable opportunity to respond) (slip
20 op at 8-9).

21 Petitioners' January 31, 2022 letter at Subdivision Record 525 to 528
22 states:

1 "A street standards waiver requires that the waiver 'will not harm
2 or will be beneficial to the public in general.' BDC 3.4.150 B.
3 * * * [F]or the reasons discussed above, the proposed development
4 *would* harm the public in general, because it creates unnecessary
5 risks and promotes unsustainable burdens on utilities and
6 roadways." Subdivision Record 528 (emphasis in original).

7 The issue raised by this paragraph is the opposite of that which petitioners now
8 attempt to raise in the first assignment of error. Petitioners' letter clearly takes
9 the position that, for the reasons discussed in the letter, the *proposed*
10 *development* would cause harm.[4] In their first assignment of error, petitioners
11 argue that the hearings officer's decision does not comply with BDC 3.4.150(B)
12 because the hearings officer was required to determine whether *the waiver*
13 *itself,* rather than the proposed development, would cause harm.[5] Petitioners
14 cannot argue that BDC 3.4.150(B) should be interpreted one way during the

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[4] Petitioners' January 31, 2022 letter discusses their concerns regarding increased wildfire risk, "significant problems for the area" stemming from intervenors' utilities plan, and a precedent being set for "for future development to cut corners, compounding the issues." Subdivision Record 526-27.

[5] Petitioners now argue that the correct interpretation

> "is whether the *waiver itself* 'will not harm or will be beneficial to the public in general.' BDC 3.4.150 B therefore required the Hearings Officer to consider 'the effect of constructing [the road, sidewalks, and planters] without the waiver'; that is, whether [intervenors'] request to *not* dedicate the full 60-foot right-of-way, to *not* establish sidewalks on both sides of the street, and to *not* establish planter strips on both sides of the street 'will not harm or will be beneficial to the public in general.'" Petition for Review 15 (emphases and first brackets in original; second brackets added).

1 local proceedings and then argue before LUBA that the hearings officer erred in
2 adopting that interpretation. That is "unfair surprise," and this issue is therefore
3 waived. *Boldt*, 21 Or LUBA at 46.

4 Petitioners also cite *Lucier v. City of Medford*, 26 Or LUBA 213, 216
5 (1993), and argue that they are not restricted in their arguments challenging
6 findings that are adopted as part of a decision. In *Lucier*, we held that a
7 petitioner who raises issues below regarding compliance with an approval
8 criterion is not required to anticipate the findings that the local government will
9 ultimately adopt with respect to that approval criterion in order to challenge
10 those findings at LUBA. Here, petitioners' first assignment of error does not
11 challenge the adequacy of the hearings officer's findings in support of the
12 decision. The standard of review section under petitioners' first assignment of
13 error similarly does not cite or rely on ORS 197.195(4), which requires that
14 approval or denial of a limited land use decision be supported by findings.
15 Rather, petitioners' first assignment of error challenges the hearings officer's
16 interpretation and application of BDC 3.4.150(B). *Lucier* does not assist
17 petitioners.

18 The first assignment of error is denied.

19 **SECOND ASSIGNMENT OF ERROR**

20 The hearings officer concluded that a maximum of 26 dwellings would
21 be developed on the newly created lots. Subdivision Record 425 (explaining
22 that intervenors "general plan of development is to construct one single family

dwelling on each lot"). Petitioners' second assignment of error is that that conclusion is not supported by substantial evidence in the record, specifically a Transportation Facilities Report (TFR) submitted into the record by intervenors and the tentative plan as it purports to demonstrate adequate water and sewer capacity and compliance with the Oregon Fire Code (OFC). ORS 197.828(2)(a). Petitioners argue that the TFR and other evidence in the record regarding water and sewer capacity and compliance with the OFC fail to consider the potential number of dwellings that ORS 197.758 allows to be developed outright on each lot.

We begin with a discussion of ORS 197.758, which we refer to as the Middle Housing Statute. ORS 197.758 was enacted by the legislature in 2019 through House Bill (HB) 2001. Or Laws 2019, ch 639, § 2. ORS 197.758(2) provides:

> "Except as provided in subsection (4) of this section, each city with a population of 25,000 or more and each county or city within a metropolitan service district shall allow the development of:
>
> "(a) All middle housing types in areas zoned for residential use that allow for the development of detached single-family dwellings; and
>
> "(b) A duplex on each lot or parcel zoned for residential use that allows for the development of detached single-family dwellings."

Thus, the Middle Housing Statute requires the city to allow middle housing and duplexes in areas and on lots that are zoned for residential use. ORS 197.758(1)(b) defines "middle housing" to mean:

> "(A) Duplexes;
>
> "(B) Triplexes;
>
> "(C) Quadplexes;
>
> "(D) Cottage clusters; and
>
> "(E) Townhouses."

ORS 197.758(1)(a) in turn defines "cottage clusters" to mean "groupings of no fewer than four detached housing units per acre with a footprint of less than 900 square feet each and that include a common courtyard."

HB 2001 also provides that a subdivision can no longer be restricted to single-family housing:

> "A provision in a recorded instrument affecting real property is not enforceable if:
>
> "(1) The provision would allow the development of a single-family dwelling on the real property but would prohibit the development of:
>
> "(a) Middle housing[.]"[6] Or Laws 2019, ch 639, §13.

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[6] "It is time to accept that single-family zoning is a thing of the past." Video Recording, House Committee on Human Services and Housing, HB 2001, Feb 11, 2019, at 1:05 (statement of Multnomah County Board of Commissioners Chair Deborah Kafoury).

1 As to implementation, HB 2001 provides that cities with populations
2 greater than 25,000 were required to adopt land use regulations and amend their
3 comprehensive plans to implement the Middle Housing Statute not later than
4 June 30, 2022. *Id.* § 3(1)(b). If a city failed to adopt regulations and amend its
5 plan to implement the statute within that time, then the city was required to
6 directly apply a model middle housing ordinance adopted by the Land
7 Conservation and Development Commission (LCDC Model Ordinance).[7] *Id.* §
8 3(2), (3).

9 Petitioners' second assignment of error argues that, because the Middle
10 Housing Statute requires the city to allow up to four dwellings on each newly
11 created lot, intervenors' TFR, water and sewer capacity review, and OFC
12 compliance review are required to take into account the potential number of
13 dwellings that could be developed on a lot within the new subdivision.

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[7] HB 2001 allowed the Department of Land Conservation and Development (DLCD) to grant an extension of time for a local government to adopt land use regulations or amend its comprehensive plan to implement the Middle Housing Statute where the local government identified specific areas where water, sewer, storm drainage, or transportation services were either significantly deficient or expected to be significantly deficient before December 31, 2023, and where the local government had established and DLCD had approved a plan of actions that would have remedied the deficiency in those services. Or Laws 2019, ch 639, § 4(1), (2). Such extensions were not to extend beyond the date that the local government intended to correct the deficiency under the plan of actions. *Id.* § 4(2). Requests for such extensions were required to be filed not later than June 30, 2021, for cities with populations greater than 25,000. *Id.* § 4(4)(b).

1 Petitioners argue that the hearings officer's decision should have considered
2 "that the development will consist of 'up to 104' dwelling units" and that
3 intervenors' application submittals and the hearings officer's decision are not
4 supported by substantial evidence in the record because they fail to consider the
5 potential for "up to 104" dwelling units. Petition for Review 19.

6 Petitioners cite BDC 4.7.400(C)(3)(b), which requires that a more
7 comprehensive Transportation Impact Analysis be submitted for any proposed
8 development that "[f]orecasts net increase in site traffic volumes greater than
9 700 average daily vehicle trips or off-site major intersections within one mile
10 are impacted by 50 or more peak-hour vehicle trips." *Id.* As noted, intervenors
11 submitted a TFR, which estimated an additional 245 daily trips from the
12 development of 26 dwellings, one on each lot. Subdivision Record 720.

13 Petitioners also argue that OFC D107.1 requires two separate and
14 approved fire apparatus access roads if a development of one- or two-family
15 dwellings has more than 30 dwelling units unless all of the dwelling units are
16 equipped with automatic sprinklers.[8] Petition for Review 19. The tentative plan
17 proposes only one fire apparatus road. In addition, petitioners argue that
18 intervenors' water and sewer capacity analysis, which assumes 26 to 28
19 dwelling units, is deficient because it significantly underestimates the impact to

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[8] BDC 4.2.500(D)(6) requires that "[a]ll applicable building and fire code standards are or will be met," and Bend City Code (BCC) 8.10.010(A) adopts the OFC into the BCC.

1 water and sewer infrastructure from the development of middle housing that is
2 allowed outright on each lot. *Id.* (citing Subdivision Record 717-18, 736-37).
3 Intervenors respond first that ORS 227.173(1) prevents the hearings
4 officer from applying the Middle Housing Statute in considering the number of
5 potential dwellings.[9] However, ORS 227.173(1) applies to permits. A limited
6 land use decision is not a permit. ORS 227.160(2)(a) (defining "permit" and so
7 stating); ORS 197.015(12)(a)(A) (defining "limited land use decision" to
8 include "a final decision * * * pertaining to a site within an urban growth
9 boundary that concerns * * * the approval or denial of a tentative subdivision or
10 partition plan"). ORS 227.173(1) is inapplicable.
11 Intervenors also argue that the city's maximum density standards at BDC
12 2.1.600 limit the number of dwellings that can be developed on the property.[10]

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[9] ORS 227.173(1) provides:

> "Approval or denial of a discretionary permit application shall be based on standards and criteria, which shall be set forth in the development ordinance and which shall relate approval or denial of a discretionary permit application to the development ordinance and to the comprehensive plan for the area in which the development would occur and to the development ordinance and comprehensive plan for the city as a whole."

[10] The version of BDC 2.1.600 that applied when the subdivision application was submitted on September 9, 2021, provided that the maximum density in the RS zone was 7.3 units per gross acre, which equates to approximately 36 units for the five-acre subject property. BDC 2.1.600(B)(2)(a) and (c) now exempt from the maximum density standards "accessory dwelling units (ADUs)" and

1 Finally, intervenors argue that "[t]he BDC requires traffic and other impacts to
2 be evaluated against the proposed number of lots. There is no BDC provision
3 that requires an applicant to assume what a future lot owner may construct on
4 any lot."[11] Intervenors-Respondents' Brief 28.

"[d]uplexes, triplexes, quadplexes, townhomes and cottage cluster developments."

[11] BDC 4.3.300(E)(4) provides that an applicant for subdivision approval must demonstrate that "[a]ll required public facilities have adequate capacity, as determined by the City, to serve the proposed subdivision, partition or replat." The hearings officer rejected intervenors' argument below that the city could not apply BDC 4.3.300(E)(4) because it was not "clear and objective," as required by ORS 197.307(4). The hearings officer found:

> "The Hearings Officer takes note of * * * BDC 1.2 which defines 'capacity' as:
>
> > "'the maximum holding or service ability, as applied to transportation, utilities, parks and other public facilities.'
>
> "The Hearings Officer also takes note of the Webster's Online Dictionary definition of 'capacity' and 'adequate' which state:
>
> > "'capacity - maximum amount that something can contain'
> >
> > "'adequate - satisfactory or acceptable in quality or quantity'
>
> "The Hearings Officer finds that the term 'adequate' could be interpreted in multiple ways and on its face may allow the city to exercise discretion. However, the Hearings Officer, as required by LUBA in the *Knoell* decision must consider the term 'adequate' in the context that it is used. The Hearings Officer finds that 'adequate' is used as an objective limit; there must be capacity (a maximum amount something can contain) remaining if a proposed development is approved. The Hearings Officer finds that the

1 We will reverse or remand a limited land use decision if it does not
2 comply with the applicable provisions of the land use regulations. ORS
3 197.828(2)(b). We agree with petitioners that the Middle Housing Statute, if
4 applicable, would require the city to estimate the amount of traffic, determine
5 impacts on water and sewer, and determine compliance with the OFC based on
6 the statute's requirement to allow middle housing on the newly created lots, and
7 to consider the evidence in the record that up to 104 dwelling units could be
8 constructed on the newly created lots. However, as explained above, the Middle
9 Housing Statute gave the city until June 30, 2022, to amend the BDC to
10 implement its provisions, after which date the LCDC Model Ordinance would
11 apply. Neither petitioners nor intervenors provide any argument or explanation
12 regarding the status of the city's implementation of the Middle Housing Statute.
13 The hearings officer's decision also does not address these issues or consider
14 whether the Middle Housing Statute; the city's implementation of it, if that has
15 occurred; or the LCDC Model Ordinance, if implementation has not occurred,

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> capacity of a public improvement is objectively obtainable and the current and proposed use of the public improvement can be objectively calculated. If 'capacity' remains following an approval of an application then there is 'adequate capacity.'" Subdivision Record 68-69 (italics omitted).

Intervenors did not file a cross petition for review assigning error to that finding.

1 affect the reliability of intervenors' analyses.[12] Accordingly, remand is required
2 for the hearings officer to consider these issues in the first instance.
3 The second assignment of error is sustained.

4 **THIRD ASSIGNMENT OF ERROR**

5 As noted, intervenors submitted a TFR. Subdivision Record 810-32.
6 BDC 4.7.400(6)(c)(i) requires that the TFR evaluate and document

> 7 "[l]egal access and recorded easements for all driveway and access
> 8 systems serving the site. For all driveways and new intersections
> 9 created by the proposed development, intersection sight distance
> 10 measurements must be provided for all movements into and out of
> 11 the proposed accesses. Field measurements should be used
> 12 wherever possible, although plan measurements from civil
> 13 drawings may be used, particularly for planned intersections or
> 14 driveways. Measurements need to account for vertical and
> 15 horizontal curvature, grades, landscaping, and right-of-way
> 16 limitations. *Sight distance measurements must comply with City of*
> 17 *Bend Standards and Specifications for the posted speed of the*
> 18 *road. At the written request of an applicant and as part of the*
> 19 *discretionary track development review process, the City Engineer*
> 20 *may approve an alternate sight distance standard based on*
> 21 *existing constraints*." (Emphasis added.)

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[12] Based on intervenors' representations that there will be one dwelling on each new lot, the hearings officer concluded that "the maximum site density is 36 dwelling units (5 x 7.3 = 36.5, rounded down) and the minimum site density is 20 units (5 x 4.0 = 20). The Tentative Plan shows 26 lots intended for single-family dwelling units. Therefore, these standards are met." Subdivision Record 87 (emphasis added). As noted, the BDC maximum density standards that were in effect when the application was filed were subsequently amended to exempt middle housing. *See* n 10.

1 City Design Standard 3.3.3 in turn provides that "[d]esign speeds shall be
2 consistent throughout a cohesive segment of a roadway corridor. Changes in
3 design speeds from one segment to another shall be strongly identified through
4 design feature changes to encourage compliance with posted speeds and to
5 model the street form after the abutting land use form."[13]

6 The hearings officer also considered City Design Standard 3.5.2.3. City
7 Design Standards section 3.5 provides, "Roadways shall be designed to extend
8 to and through adjoining properties. Designers shall demonstrate with centerline
9 profiles for horizontal and vertical geometry that the roadway can be extended
10 *while meeting the City's standards or shall adjust the design to allow for the*
11 *continuation of the roadway.*" (Emphasis added.) City Design Standard 3.5.2.3
12 contains a table that contemplates design speeds starting at 15 miles per hour to
13 accommodate different design conditions.

14 As noted, on reconsideration, the hearings officer amended Condition 9.
15 In the hearings officer's original decision, Condition 9 provided, "Bachelor
16 View Road shall, for the entire section improved by [intervenors], be designed
17 to a 25-mph design standard." Subdivision Record 122. In the hearings officer's
18 decision on reconsideration, Condition 9 provided:

19 "[Intervenors] shall demonstrate to City staff that both stopping

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[13] The city maintains a City of Bend Standards and Specifications document. Part II of that document contains the City of Bend Design Standards. Like the hearings officer, we refer to those standards as "City Design Standards."

> and intersection sight distance standards for the extension of Bachelor View Road are met for a 20-mph design speed. An exception to the 25-mph sight distance design standard is only approved for the intersection of Bachelor View Road and Street 'A.' [Intervenors] shall provide a sight distance easement over Lot 1 to prohibit any intersection sight distance obstructions such as buildings, fencing, or landscaping." Subdivision Record 24.

on reconsideration, the hearings officer explicitly found that intervenors "did not seek a BDC 3.4.150 waiver or a modification of any City Design Standards. The Hearings Officer finds that Decision findings suggesting the Applicant sought a BDC 3.4.150 waiver or a specific written request to modify City Design Standards are not correct and should be disregarded." Subdivision Record 22. Rather, the hearings officer found that intervenors were requesting reconsideration because there was no requirement in the BDC that 25 miles per hour was the only speed that could be allowed on Bachelor View Road, as written in the original Condition 9. The hearings officer found that the original Condition 9 was "not legally appropriate." *Id.* The hearings officer found:

> "City Design Standards 3.3.3 and 3.5.2.3 exist to promote safely designed streets. In addition, the Hearings Officer finds that the Decision findings related to safety were based primarily upon opinions and speculation and not upon any quantifiable evidence that the imposition of a 20-mph design speed for a 115-foot section of Bachelor View Road would create identifiable safety risks. [Petitioners] and the City Engineer suggest that vehicle drivers will not follow a short-distance reduction of a speed limit. The Hearings Officer finds this type of speculation is not substantial evidence of a safety risk.
>
> "[Petitioners] also suggested that [intervenors] failed to meet [their] burden of proof with respect to City Design Standards 3.3.3

1 and 3.5.2.3. The Hearings Officer finds that with an appropriate
2 condition of approval, [intervenors] will be held to objective
3 standards of proof at the final plat stage. With revised Condition 9
4 language, [intervenors] will be required to meet the sight distance
5 requirements of the City Design Standards. The Hearings Officer is
6 not deferring a subjective or discretionary decision by requiring
7 [intervenors] to meet the requirements of the revised Condition 9
8 language.

9 "* * * * *

10 "The Hearings Officer finds City Staff's proposed Condition 9
11 language related to Bachelor View Road and Street 'A' adds
12 clarity and precision necessary to allow permitting staff to
13 objectively interpret Condition 9. The Hearings Officer also finds
14 reference to a sight distance easement over Lot 1 is necessary to
15 assure that BDC and City Design Standards related to sight
16 distance is satisfied. The Hearings Officer notes that [intervenors'
17 TFR] Appendix A included a diagram showing potential sight line
18 building limitations/restrictions on Lot 1. The Hearings Officer
19 finds City Staff's request for a sight distance easement over Lot 1
20 may be necessary to assure City Design Standards are met."
21 Subdivision Record 22-23.

22 Petitioners first argue that the hearings officer "erred in allowing a
23 waiver or modification of the 25-mph design standard for a portion of the road."
24 Petition for Review 21. Petitioners argue that the hearings officer erred when
25 they "waived" City Design Standard 3.3.3 to allow for "a speed design change
26 that is poorly communicated." *Id.* at 23.

27 Intervenors respond, and we agree, that the hearings officer did not
28 "waive" any City Design Standards. The BDC and City Design Standards both
29 include language that allows for deviation from their strict requirements.

We also understand petitioners to argue that the hearings officer's decision was not supported by substantial evidence. *Id.* We will reverse or remand a limited land use decision if it is not supported by substantial evidence in the record. ORS 197.828(2)(a). Substantial evidence is evidence that a reasonable person would rely on in reaching a decision. "Evidence is considered 'substantial evidence' even though it is possible for a reasonable person to draw different conclusions from the same evidence." *Adler v. City of Portland*, 25 Or LUBA 546, 554 (1993). We agree with intervenors that the hearings officer's decision is supported by substantial evidence in the record from intervenors' expert and city planning staff that, with Condition 9, meeting the 20-miles-per-hour sight distance standard is safe.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners argue that hearings officer "erred in disregarding the trespass which will necessarily follow" from their decision and, more specifically, that "tearing out half of the private road will damage the other half." Petition for Review 24. We understand petitioners to argue that the hearings officer's decision "does not comply with applicable provisions of the land use regulations." ORS 197.828(2)(b).

Intervenors initially respond that this issue is waived. ORS 197.797(1). In the petition for review and reply brief, petitioners cite their letter submitted January 31, 2022, which quotes an engineering department comment in the

1 record stating that "it is inevitable that[,] by constructing the proposed road
2 directly adjacent to the private road, spill over will occur—creating a
3 trespassing scenario and undue maintenance costs to the private road through
4 the public use." Subdivision Record 528, 629. Based on the engineering
5 department comment, and in addressing to BDC 3.4.200(D), the staff report
6 states:

7 "If the proposed subdivision is to proceed, the owners of the
8 abutting vacant properties to the west will need to voluntarily
9 dedicate additional public right of way or a public access easement
10 over their portion of Bachelor View Road in order to rectify the
11 inherent public-private conflicts identified in this report."
12 Subdivision Record 487.[14]

13 We agree with petitioners that, to the extent that their fourth assignment of error
14 raises an issue regarding the harm that trespass might cause to the rights of
15 those individuals who hold easements over the private portion of Bachelor
16 View Road, that issue is preserved.

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[14] BDC 3.4.200(D) provides:

"The City may require a vehicular access easement established by deed when the easement is necessary to provide for vehicular access and circulation in conformance with BDC Chapter 3.1, Lot, Parcel and Block Design, Access and Circulation. Access easements shall be created and maintained in accordance with the Uniform Fire Code Section 10.207 and City of Bend Standards and Specifications."

Petitioners argue that "the Hearings Officer decided that, while valid concerns, [issues regarding trespass] were not germane to the decision and were thus disregarded." Petition for Review 25. Intervenors respond that the hearings officer did not disregard the issues raised by petitioners but, rather, found that nothing in the BDC requires consideration of future trespass. Intervenors-Respondents' Brief 35. The hearings officer found:

> "[BDC 3.4.200(D)] is not relevant to a potential private street/public street conflict. Literally, this criterion is only relevant when the city determines that a vehicular access easement is necessary to meet BDC 3.1 requirements. The Hearings Officer, in other criteria findings, determined that [intervenors'] proposed Option/Alternative 2 dedications to the public, with approval of a 3.4.150 waiver, met requirements for vehicular access and circulation. The Hearings Officer finds that either this criterion is met, or in the alternative, this criterion is not relevant to the application in this case.
>
> "The Hearings Officer agrees [intervenors] that resolution of potential disputes between beneficial right holders with respect to the private road easements adjacent to the Subject Property is not within the scope of a land use hearings officer." Subdivision Record 105.

Petitioners do not challenge these findings. Absent any challenge to the findings that the hearings officer adopted to respond to petitioners' trespass concerns, this assignment of error provides no basis for reversal or remand. *See Protect Grand Island Farms v. Yamhill County*, 66 Or LUBA 291, 295-96 (2012) (to demonstrate that a local government adopted a decision that improperly construes an applicable criterion, a petitioner should address and as necessary

1 assign error to all independent findings adopted in support of a conclusion that a
2 particular criterion is or is not satisfied).

3 The fourth assignment of error is denied.

4 **FIFTH ASSIGNMENT OF ERROR**

5 ORS 197.307(4) provides:

6 "Except as provided in subsection (6) of this section, a local
7 government may adopt and apply only clear and objective
8 standards, conditions and procedures regulating the development
9 of housing, including needed housing. The standards, conditions
10 and procedures:

11 "(a) May include, but are not limited to, one or more provisions
12 regulating the density or height of a development.

13 "(b) May not have the effect, either in themselves or
14 cumulatively, of discouraging needed housing through
15 unreasonable cost or delay."

16 Approval standards are not clear and objective if they impose "subjective,
17 value-laden analyses that are designed to balance or mitigate impacts of the
18 development on (1) the property to be developed or (2) the adjoining properties
19 or community." *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or
20 LUBA 139, 158 (1998), *aff'd*, 158 Or App 1, 970 P2d 685, *rev den*, 328 Or 594
21 (1999). We have explained that the term "clear" means "easily understood" and
22 "without obscurity or ambiguity," and that the term "objective" means "existing
23 independent of mind." *Nieto v. City of Talent*, ___ Or LUBA ___, ___ (LUBA
24 No 2020-100, Mar 10, 2021) (slip op at 9 n 6).

1 BDC 3.4.400(A) requires that sanitary sewers be installed in accordance
2 with the City Design Standards. City Design Standards section 4.1 provides, as
3 relevant here, that

4 "[s]anitary sewers shall be located *as close to the roadway*
5 *centerline as possible* or centered within the right-of-way when no
6 roadway exists. Sewers on curved roadways may vary from the
7 centerline to minimize the use of manholes; however, the manholes
8 themselves shall be located as close to the roadway centerline as
9 possible. On narrow streets where locating the manhole on the
10 center line of the roadway would force a water line in the same
11 roadway to be located outside the paved area or within close
12 proximity to the curb line, the manholes shall be located as close to
13 six (6) feet from the roadway centerline as possible." (Emphasis
14 added.)

15 Due, in part, to preexisting sewer connections on the adjacent property to
16 the north, the application sought to place sewer lines close to the eastern curb of
17 Bachelor View Road, approximately 30 feet from the roadway centerline. The
18 hearings officer found that the city could not apply City Design Standards
19 section 4.1 to the application because that standard is not clear and objective:

20 "The Hearings Officer finds the potentially problematic City
21 Design Standards section 4.1 language is 'be located as close to the
22 roadway centerline as possible. Webster's Online dictionary
23 defines 'close' as 'a short distance away or apart in space or time'
24 and defines 'possible' as 'able to be done; within the power or
25 capacity of someone or something.' The Hearings Officer finds the
26 words 'close' and 'possible' are both subjective. The Hearings
27 Officer finds that the City Design Standards section 4.1 language
28 that includes the words 'close' and 'possible' allows a decision
29 maker to exercise significant discretion. City Design Standards
30 section 4.1 does not provide any objective guidance as how 'close'
31 is 'close' or what is meant by 'possible.' The Hearings Officer

1 characterizes the phrase to 'be located as close to the roadway
2 centerline as possible' as ambiguous." Subdivision Record 63.

3 In their fifth assignment of error, petitioners argue that the hearings
4 officer erred in concluding that ORS 197.307(4) prohibits the city from
5 applying City Design Standards section 4.1. Petitioners argue that that standard
6 is clear and objective when considering all of the language of the provision.

7 Intervenors respond, initially, that this issue was not preserved below and
8 is waived. Petitioners cite their February 8, 2022 letter as having preserved this
9 issue. In the reply brief, petitioners respond that they specifically argued in their
10 February 8, 2022 letter that "code previsions relating to 'sewer line placement'
11 were clear and objective." Reply Brief 4 (citing Subdivision Record 403).
12 Although it is a close call, we agree with petitioners that their February 8, 2022
13 letter raised the issue raised in the fifth assignment of error with the specificity
14 that is required by ORS 197.797(1).[15]

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[15] Petitioners' February 8, 2022 letter contains a section titled "The Relevant BDC Provisions are 'Clear and Objective.'" In that section, petitioners argued:

> "In [their] written submissions and at the February 1, 2022 hearing, [intervenors] argue[] that the Hearings Officer must grant [them] a broad waiver of the applicable BDC code provisions relating to street improvements *and sewer line placement* because the waiver standard under BDC 3.4.150 is not 'clear and objective' under ORS 197.307(4). [Intervenors] misunderstand[] the requirements of ORS 197.307(4) in this context.
>
> "As pertinent here, ORS 197.307(4) requires that 'a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development

1 On the merits, petitioners argue that the hearings officer's decision "did
2 not address the standard as a whole." Petition for Review 28. We understand
3 that argument to invoke ORS 187.828(2)(b). Petitioners argue that the words
4 "close" and "possible" are explained by the phrase "six (6) feet from the
5 roadway centerline"; thus, "close" and "possible" "must mean something less
6 than six feet from the centerline." *Id.*

7 Intervenors respond, and we agree, that the hearings officer correctly
8 concluded that a requirement for sewers to be located "as close to the roadway
9 centerline as possible" is subjective and requires evaluation of the particular
10 circumstances of each application.

11 The fifth assignment of error is denied.

12 The city's decision is remanded.

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of housing, including needed housing.' [Intervenors] concede, as [they] must, that [their] proposal to build a half-street, with noncomplying sidewalks and planter strips, *and with sewer lines running under the curb*, does not meet the requirements of the BDC, *specifically BDC 3.4.200 and the related provisions of the City of Bend Standards and Specifications document*." Subdivision Record 403-04 (emphases added).