

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

KARON V. JOHNSON, SARA MOSS, SUSI GAYLORD,  
and JAMES CHRISTO,  
*Petitioners,*

vs.

CITY OF BEND,  
*Respondent,*

and

COLVIN OIL I, LLC,  
*Intervenor-Respondent.*

LUBA No. 2023-024

FINAL OPINION  
AND ORDER

Appeal from City of Bend.

Karon V. Johnson, Susi Gaylord, and James Christo filed the petition for review and reply brief and Karen V. Johnson argued on behalf of themselves.

Sara Moss represented themselves.

No appearance by City of Bend.

J. Kenneth Katzaroff filed the intervenor-respondent's brief and argued on behalf of intervenor-respondent. Also on the brief was D. Adam Smith, Schwabe, Williamson & Wyatt, P.C., Liz Fancher and Law Office of Liz Fancher.

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

1  
2 ZAMUDIO, Board Member, did not participate in the decision.

3  
4 AFFIRMED

09/14/2023

5  
6 You are entitled to judicial review of this Order. Judicial review is  
7 governed by the provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioners appeal a city council decision approving conditional use permits (CUPs) for (1) a market/convenience store and gas station, and (2) a drive-through food use.<sup>1</sup>

**FACTS**

The 2.7-acre subject property is located on the southwest corner of Murphy Road and Brosterhous Road. The subject property is zoned Commercial Convenience (CC). The property to the south of the subject property is zoned Standard Density Residential (RS) with a Manufactured Home Park Redevelopment Overlay and is improved with a Trailer Park RV site. The property to the west of the subject property is zoned RS and developed as a utility facility site. The RS zoned property across Murphy Road to the northwest contains an elementary school and to the north is developed with residences with rear or side yards facing Murphy Road. The RS zoned property to the east and across Brosterhous Road contains two vacant RS zoned lots with their side and rear lots facing Brosterhous Road.

On April 14, 2022, intervenor-respondent (intervenor) applied for city approval of four applications required to develop the vacant subject property:

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<sup>1</sup> Petitioners, intervenor, and the record refer to the gas station in a number of ways, *e.g.*, fueling station, fuel station. For clarities sake, we will refer to it solely as a gas station.

1 (1) a CUP for a market/convenience store and gas station, (2) a CUP for a  
2 coffee shop with drive-through and indoor and outdoor seating, (3) a waiver of  
3 public improvement standards, and (4) a phased site plan review for a mixed  
4 use development. The hearings officer approved the four applications.

5 Petitioners appealed the two CUP approvals to the city council. The city  
6 council denied the appeal without holding a hearing, and adopted the hearings  
7 officer's decision as its own. This appeal followed.

## 8 **JURISDICTION**

9 ORS 197.825(2)(a) provides that our jurisdiction "[i]s limited to those  
10 cases in which the petitioner has exhausted all remedies available by right  
11 before petitioning [LUBA] for review[.]" Although the hearings officer  
12 approved all four of intervenor's applications, petitioners only appealed the  
13 approval of the two CUPs to the city council. Intervenor argues that we do not  
14 have jurisdiction over this appeal because petitioners were required to appeal  
15 the site plan approval to the city council as well and therefore failed to exhaust  
16 all remedies before appealing to LUBA.

17 BDC 4.2.500(D) contains the following site plan approval criteria:

18 "(1) The proposed land use is a permitted or conditional use in  
19 the zoning district;

20 "(2) *Conditionally permitted uses require approval of a*  
21 *Conditional Use Permit and shall meet the criteria in BDC*  
22 *4.4.400[.]*" (Emphasis added.)

1 BDC 4.4.400 contains CUP approval criteria. Intervenor argues that the un-  
2 appealed site plan approval also approved the CUPs. Intervenor maintains that  
3 because petitioners did not appeal the site plan approval:

4 “The site plan decision and its approval of the [CUPs] \* \* \* is final  
5 and should have been appealed to preserve the right to challenge  
6 approval of the [CUPs]. *Housing Land Advocates v. City of Happy*  
7 *Valley*, 73 Or LUBA 405 (2016). Because all administrative  
8 remedies were not first exhausted, ORS 197.825(2)(a) bars  
9 LUBA’s jurisdiction.” Intervenor-Respondent’s Brief 6 (footnote  
10 omitted).

11 Petitioners respond that the CUP approvals are independent of the site  
12 plan approval and we have jurisdiction. Petitioners’ Reply Brief 1. We agree  
13 with petitioners. The hearings officer’s decision quotes the “Site Plan Review  
14 Approval” criteria in BDC 4.2.500(D) and then quotes BDC 2.2.300 “Permitted  
15 and Conditional Uses.” *See* Record 100-01. BDC 2.2.300 provides:

16 “The land uses listed in Table 2.2.300 are allowed in the  
17 Commercial Districts, subject to the provisions of this code. Uses  
18 that are listed in Table 2.2.300 and land uses that are similar are  
19 permitted or conditionally allowed. The land uses identified with a  
20 ‘C’ in Table 2.2.300 require [CUP] approval prior to development,  
21 in accordance with BDC Chapter 4.4.”

22 In response to BDC 4.2.500(D)(1), (2), and BDC 2.2.300, the hearings officer  
23 found:

24 “The proposed uses include a convenience store, fuel/gas station, a  
25 food cart plaza, a mixed use commercial/residential building and  
26 two retail/food buildings that include a drive through food  
27 building. *The market/convenience store and fuel station and the*  
28 *drive through food use are auto-dependent uses that require*

1       *Conditional Use approval in addition to Site Plan Review and*  
2       *Design Review.* The proposed mixed use building, food court plaza  
3       and retail building without a drive through component are  
4       permitted uses in the CC zone, subject to Site Plan Review and  
5       Design Review.” Record 101 (emphasis added).

6       The site plan criteria, read in conjunction with BDC 2.2.300, provide that  
7       if the proposed use is a conditional use in the zoning district, a CUP is required  
8       “prior to development.” The hearings officer identified the parts of intervenor’s  
9       project requiring CUPs. In approving the site plan, the hearings officer did not  
10      attempt to resolve whether the CUP criteria in BDC 4.4.400 were met. Record  
11      101. The hearings officer’s approval of the site plan did not approve the CUPs.  
12      We agree with petitioners that they were not required to appeal the site plan  
13      permit approval. Petitioners exhausted local remedies related to the CUPs by  
14      appealing the hearings officer’s approval of the CUPs to the city council.

#### 15      **COLLATERAL ATTACK**

16      Intervenor argues generally that we should deny all of the assignments of  
17      error because, according to intervenor, they are impermissible collateral attacks  
18      on the site plan because the site plan approval concluded that the CUP criteria  
19      are met. With one exception, we agree with petitioners that their assignments of  
20      error are not a collateral attack on the site plan approval.

21      In *Sahagian v. Columbia County*, we discussed collateral attacks in the  
22      context of the designation of property as county forest. 27 Or LUBA 341, 344  
23      (1994). In 1970, the county designated certain property as a county park. In  
24      1992, the county redesignated a portion of the county park as county forest. In

1 1993, the county amended the 1992 order to correct references to recording and  
2 filing citations in the 1992 order. The petitioners appealed the 1993 order,  
3 arguing that the 1993 order redesignated the land as county forest. We  
4 concluded that arguments that challenged the 1993 decision were an  
5 impermissible collateral attack on the prior, un-appealed 1992 decision  
6 redesignating the property. Unlike the facts in *Sahagian*, this appeal does not  
7 concern an attack on a prior, un-appealed decision. As we explained in our  
8 discussion of jurisdiction, although the applications were processed together,  
9 the site plan approval did not approve either CUP. This appeal of the city  
10 council's approval of the CUPs is not a collateral attack on the site plan  
11 approval.

12 The one exception to our conclusion is raised by intervenor in response to  
13 petitioners' second assignment, second subassignment of error. Petitioners  
14 argue within their second assignment second subassignment of error that the  
15 city erred by not concluding that need is an approval standard based on an  
16 analysis of BDC 4.4.400(B) and 4.2.500(D). Conditional use criterion BDC  
17 4.4.400(B) provides "Where appropriate, the criteria for Site Development  
18 Review approval listed in BDC 4.2.500(D)(4), Site Plan Review Approval  
19 Criteria, shall be met."<sup>2</sup> Petitioners argue that BDC 4.2.500(D)(4) mandates

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<sup>2</sup> This is similar to BDC 4.2.500(D)(2), a site plan approval criterion that provides that "Conditionally permitted uses require approval of a [CUP] and shall meet the criteria in BDC 4.4.400[.]"

1 “that the gas station and drive-through meet the standards of the CC zone as  
2 defined by the Bend Comprehensive Plan [(BCP)], which is identical to BDC  
3 2.2.200.” Petition for Review 19 (underscoring in original; citing BCP chapter  
4 6, Table 6-1). As we explain in more detail below, we agree with intervenor that  
5 compliance with the site plan criteria in BDC 4.2.500(D) was determined in the  
6 approved, un-appealed site plan permit and is not subject to collateral attack.

7 We proceed to consider petitioners’ assignments of error.

## 8 **FIRST ASSIGNMENT OF ERROR**

9 Petitioners and intervenor agree that the first assignment of error is  
10 subject to the standard of review set out in ORS 197.829. ORS 197.829  
11 provides:

12 “(1) [LUBA] shall affirm a local government’s interpretation of its  
13 comprehensive plan and land use regulations, unless the  
14 board determines that the local government’s interpretation:

15 “(a) Is inconsistent with the express language of the  
16 comprehensive plan or land use regulation;

17 “(b) Is inconsistent with the purpose for the comprehensive  
18 plan or land use regulation;

19 “(c) Is inconsistent with the underlying policy that  
20 provides the basis for the comprehensive plan or land  
21 use regulation; or

22 “(d) Is contrary to a state statute, land use goal or rule that  
23 the comprehensive plan provision or land use  
24 regulation implements.

25 “(2) If a local government fails to interpret a provision of its  
26 comprehensive plan or land use regulations, or if such



1 interpretation is inadequate for review, the board may make  
2 its own determination of whether the local government  
3 decision is correct.”

4 The test under ORS 197.829(1) is not whether the interpretation is  
5 correct, or the best or superior interpretation, but whether the governing body’s  
6 interpretation is “plausible,” given its text and context. *Siporen v. City of*  
7 *Medford*, 349 Or 247, 243 P3d 776 (2010). In light of the standard described in  
8 *Siporen*, deference is owed under ORS 197.829(1) when (1) a governing body  
9 of a local government; (2) makes an interpretation of its own land use policies;  
10 (3) that is plausible and not inconsistent with the standards set out in the statute.  
11 Where the governing body declines to review the decision of a lower decision-  
12 making body, whether the interpretations of the lower decision-making body  
13 are given deference turns on whether the governing body affirms, adopts, or  
14 incorporates the lower decision-making body’s decision as its own. *CRAW v*  
15 *City of Warrenton*, 67 Or LUBA 263, 266 (2013).

16 The city council declined to review the appeals and adopted the hearings  
17 officer’s decision as its own. Record 1. Accordingly, interpretations of local  
18 code in the decision are entitled to *Siporen* deference. *See Derry v. Douglas*  
19 *County*, 132 Or App 386, 391, 888 P2d 588 (1995) (where the governing  
20 body’s decision affirms or adopts a lower body’s decision on appeal as its own,  
21 any interpretation of local legislation that the lower body rendered in its  
22 decision that was necessary to the decision is regarded as having obtained  
23 governing body approval, regardless of whether the governing body’s own

1 decision expressly adopts the interpretation); *Green v. Douglas County*, 245 Or  
2 App 430, 438 n 5, 263 P3d 355 (2011) (deference is due where governing  
3 body's decision declining review states that the governing body affirms the  
4 lower body's decision and incorporates it as the governing body's own  
5 decision).

6       **A. Bend Comprehensive Plan (BCP) and Bend Transportation**  
7       **System Plan (BTSP)**

8       Petitioners advise that they argued before the hearings officer that the gas  
9 station and drive-through failed to satisfy the purposes and goals of the BCP  
10 and the BTSP. Petitioners argue that the hearings officer “refused to take  
11 judicial notice” of the BCP and BTSP and that it “was error” for the hearings  
12 officer to “decline to recognize [the BSP and BTSP.]”<sup>3</sup> Petition for Review 7.  
13 ORS 40.090 defines “[l]aw that is judicially noticed.”<sup>4</sup> Petitioners argue that

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<sup>3</sup> Petitioners label this their first subassignment to their first assignment of error. Petition for Review 7.

<sup>4</sup> ORS 40.090 provides:

“Law judicially noticed is defined as:

“\* \* \* \* \*

“(7) An ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom. As used in this subsection, ‘comprehensive plan’ has the meaning given that term by ORS 197.015.”

1 the BCP and BTSP are local enactments, and that “[e]vidence ‘includes an  
2 ordinance, comprehensive plan or enactment of any county or incorporated city  
3 in this state, or a right derived therefrom.’” Petition for Review 7 (quoting ORS  
4 40.090(7)).

5 Intervenor answers that petitioners mischaracterize the hearings officer’s  
6 findings and have not developed their argument that the hearings officer  
7 committed error. We agree with intervenor that petitioners mischaracterize the  
8 decision. The hearings officer did not decline to take judicial notice of the BCP  
9 and BTSP. The hearings officer concluded that the purposes and goals of the  
10 BCP and TSP do not contain applicable approval criteria, because they found  
11 that

12 “unless these documents are specifically included as relevant  
13 approval criteria then the Hearings Officer may not consider them  
14 relevant approval criteria. The Hearings Officer addressed the  
15 relevant approval criteria in the findings of these Decisions. The  
16 Hearings Officer did not apply the [BCP], [BTSP] and the Oregon  
17 Transportation Planning Rule as independent relevant approval  
18 criteria.”<sup>5</sup> Record 269.

19 Intervenor also explains that the BTSP is part of the BCP and that BCP  
20 Policy 1-1 provides:

21 “The Goals stated within this Comprehensive Plan are intended to  
22 be guiding and aspirational; they are not regulatory policies. The  
23 Policies in the [BCP] are intended to provide standards for the City

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<sup>5</sup> Petitioners direct our attention to the hearings officer’s decision at Record 269. Petition for Review 7.

1 in adopting land use regulations, and compliance with the  
2 implementing regulations shall be deemed in compliance with the  
3 [BCP].” Intervenor-Respondent’s Brief 10 (quoting BCP policy 1-  
4 1).

5 We agree with intervenor that petitioners do not develop an argument  
6 explaining why the hearings officer’s finding that the BCP and BTSP do not  
7 contain approval criteria is in error. We will not develop petitioners’ argument  
8 for them. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220  
9 (1982).

10 This subassignment of error is denied.

11 **B. “Appropriate” as an Approval Criterion**

12 **1. BDC 4.4.100**

13 BDC chapter 4.4 is titled “Conditional Use Permits.” BDC 4.4.100,  
14 “Purpose,” provides:

15 “There are certain uses, which, due to the nature of their impacts  
16 on surrounding land uses and public facilities, require a case-by-  
17 case review and analysis. These are identified as ‘Conditional  
18 Uses’ in this code. The purpose of this chapter is to provide  
19 standards and procedures under which a conditional use may be  
20 permitted, enlarged or altered *if the site is appropriate and if other*  
21 *appropriate conditions of approval can be met.*” (Emphasis  
22 added.)

23 Petitioners argue that the hearings officer erred because they failed to apply  
24 BDC 4.4.100 as a CUP approval criterion.<sup>6</sup> Petition for Review 9. Petitioners

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<sup>6</sup> Petitioners label this their third subassignment of error. Petition for Review 9.

1 argue that review of a CUP application requires consideration of the language  
2 in BDC 4.4.100 providing that a conditional use may be permitted “if the site is  
3 appropriate and if other appropriate conditions of approval can be met.”  
4 Petitioners maintain “Depending on the text of the code, a zoning district  
5 purpose statement can operate as a mandatory approval standard.” Petition for  
6 Review 9. BDC 4.4.400 contains “A. Use Criteria,” “B. Site Design Standards,”  
7 “C. Conditions of Approval,” and “D. Hydroelectric Facilities.” Petitioners  
8 argue that the language in BDC 4.4.400(B), providing that the criteria for site  
9 plan review approval listed in BDC 4.2.500(D) shall be met “[w]here  
10 appropriate,” supports their argument that the reference to “appropriate” in  
11 BDC 4.4.100 reflects an approval criterion. Petition for Review 9-11.

12 BDC chapter 1 contains the “General Administration” section of the  
13 city’s development code. BDC 1.1.200(C) provides “*Most Restrictive*  
14 *Regulations Apply*. Where this code contains conflicting standards, or imposes  
15 greater restrictions than those imposed or required by other rules or regulations,  
16 the most restrictive or that imposing the higher standard shall govern.”

17 (Emphasis in original.) BDC 1.1.900(B) provides:

18 “Purpose statements for each chapter are descriptive of the  
19 chapter’s characteristics and intent and are drawn from the [BCP]  
20 and/or the [BDC]. *Purpose statements are informational and not*  
21 *standards or approval criteria.*” (Emphasis added.)

22 Petitioners argue that we should disregard the admonition in BDC 1.1.900(B)  
23 that purpose statements are not approval criteria. Petition for Review 11.

1 Petitioners argue that BDC 4.4.100 is a specific standard and BDC 1.1.900(B)  
2 is a general standard, so BDC 4.4.100 should prevail.

3 The parties do not identify an interpretation of the “appropriate” language  
4 in BDC 4.4.100 in the decision and we make our own determination as allowed  
5 by ORS 197.829(2). We agree with intervenor that BDC 4.4.100 is not an  
6 approval criterion based on the considerations set out below.

7 In construing the BDC, we will consider the text and context. *State v.*  
8 *Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). BDC 1.1.100 expressly  
9 states that purpose statements in the BDC are not approval criteria. BDC  
10 4.4.100 is labeled a purpose statement and explains “*The purpose of this*  
11 *chapter is to provide standards and procedures* under which a conditional use  
12 may be permitted, enlarged or altered if the site is appropriate and if other  
13 appropriate conditions of approval can be met.” (Emphasis added.) BDC  
14 4.4.100 does not purport to contain approval criteria. “[W]here there are several  
15 provisions or particulars, such construction is, if possible, to be adopted as will  
16 give effect to all.” ORS 174.010. Reading BDC 1.1.100 to mean that BDC  
17 4.4.100 is not an approval criterion gives effect to both sections.

18 Petitioners argue that BDC 4.4.100 would not include the language “if  
19 the site is appropriate and if other appropriate conditions of approval can be  
20 met” if it was not intended that BDC 4.4.100 be an approval criterion. We do  
21 not agree. BDC 4.4.400 provides in part:

22 “A. *Use Criteria.*

1           “1. The site size, dimensions, location, topography and  
2           access are adequate for the needs of the proposed use,  
3           considering the building mass, parking, traffic, noise,  
4           vibration, exhaust/emissions, light, glare, erosion,  
5           odor, dust, visibility, safety, and aesthetic  
6           considerations;

7           “2. Any negative impacts of the proposed use on adjacent  
8           properties and on the public can be mitigated through  
9           application of other code standards, or other  
10          reasonable conditions of approval that include but are  
11          not limited to those listed in subsection (C) of this  
12          section; and

13          “3. All required public facilities have adequate capacity,  
14          as determined by the City, to serve the proposed use.

15          “B. *Site Design Standards*. Where appropriate, the criteria for  
16          Site Development Review approval listed in BDC  
17          4.2.500(D), Site Plan Review Approval Criteria, shall be  
18          met.” (Emphases in original.)

19          Read in the context of the chapter, the “if” language in the purpose statement  
20          explains what will be determined by applying the criteria in BDC 4.4.400(A).

21          Further, the requirement in BDC 4.4.400(B) that the criteria for “Site  
22          Development Review approval listed in BDC 4.2.500(D)” shall be met “where  
23          appropriate,” does not lead to a different conclusion. This provision is similar to  
24          the site plan approval criterion we reviewed in our discussion of jurisdiction. It  
25          provides only that if a site plan permit is required, it must be obtained.

26          Lastly, petitioners argue that the hearings officer applied part of BDC  
27          4.4.100 as an approval criterion when they discussed the requirement for a case-  
28          by-case analysis of applications for CUPs. According to petitioners, if case-by-

1 case analysis, a phrase found in BDC 4.4.100, is an approval criterion,  
2 “appropriate” is an approval criterion. We do not agree with petitioners that the  
3 hearings officer found case-by-case review is an approval criterion in BDC  
4 4.4.100. The hearings officer simply described the distinction between  
5 permitted and conditionally permitted uses and commented that conditional  
6 uses require case-by-case analysis. BDC 4.4.100 is not an approval criterion.

7 This subassignment of error is denied.

8 **2. BDC 2.2.100, BCP Policies, and ORS 227.173**

9 Petitioners argue that “appropriate” is also properly viewed as an  
10 approval criterion given the purpose of the city’s commercial districts described  
11 in BDC 2.2.100 and objectives set out in certain BCP goals.<sup>7</sup> We agree with  
12 intervenor that, based on the considerations below, these provisions are not  
13 approval criteria.

14 The purpose of the city’s commercial zones is described in BDC 2.2.100.

15 Petitioners argue that the pertinent portion of BDC 2.2.100, which provides:

16 “This chapter applies to all development in the Central Business  
17 District (CB), Convenience Commercial District (CC), Limited  
18 Commercial District (CL) and the General Commercial District  
19 (CG). Collectively, these districts are the City’s Commercial  
20 Zoning Districts. The purpose of these zoning districts [includes]:

21 “\* \* \* \* \*

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<sup>7</sup> This is also part of what petitioners label their third subassignment of error.



1       “•     Develop commercial and mixed-use areas that are safe,  
2             comfortable and attractive to pedestrians;

3       “\* \* \* \* \*

4       “•     Reinforce streets as public places that encourage pedestrian  
5             and bicycle travel;

6       “\* \* \* \* \*

7       “•     Provide appropriate locations and design standards for  
8             automobile- and truck-dependent uses[.]”<sup>8</sup>

9       Petitioners cite a number of policies in the BCP chapter 6, “Economy,”  
10     that they argue should also be considered as guidance. Petition for Review 13.  
11     For example, petitioners cite BCP chapter 6 “Economy” goals to “promote a  
12     vital, diverse and sustainable economy, while enhancing the communities’  
13     overall livability[.]” and “encourage the development of Neighborhood  
14     Commercial centers. Such centers should be scaled to serve the frequent needs  
15     of the residents of the neighborhoods.” Petition for Review 13-14.

16     For the reasons we discussed above, we agree with intervenor that  
17     purpose statements in the BDC are not approval criterion. BDC 2.2.100 is a  
18     purpose statement and is not an approval criterion. Similarly, we agree with  
19     intervenor that the BCP policies are not approval criteria. As we also explained  
20     above, BCP Policy 1-1 provides:

21     “The Goals stated within this Comprehensive Plan are intended to

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<sup>8</sup> These are the three out of 13 “purposes” set out in BDC 2.2.100 that petitioners argue are “pertinent.” Petition for Review 13.

1 be guiding and aspirational; they are not regulatory policies. The  
2 Policies in the Comprehensive Plan are intended to provide  
3 standards for the City in adopting land use regulations, and  
4 compliance with the implementing regulations shall be deemed  
5 compliance with the Comprehensive Plan.”

6 The city explains in this policy that it implements the BCP through the  
7 provisions in the implementing regulations. BCP policies are not CUP approval  
8 criteria.

9 Petitioners argue that ORS 227.173(1) provides guidance for the city to  
10 consider many factors in determining whether “appropriate” is an applicable  
11 standard or criterion. Petition for Review 12. Intervenor responds, and we  
12 agree, that ORS 227.173(1) does not require the application of the purpose  
13 statements or BCP provisions as approval criteria or guidance. ORS 227.173(1)  
14 provides:

15 “Approval or denial of a discretionary permit application shall be  
16 based on standards and criteria, which shall be set forth in the  
17 development ordinance and which shall relate approval or denial of  
18 a discretionary permit application to the development ordinance  
19 and to the comprehensive plan for the area in which the  
20 development would occur and to the development ordinance and  
21 comprehensive plan for the city as a whole.”

22 “ORS 227.173(1) does not require perfect standards, but only standards that are  
23 clear enough for an applicant to know what [they] must show during the  
24 application process.” *Lee v. City of Portland*, 57 Or App 798, 802, 646 P2d 662  
25 (1982) (citing *Sun Ray Dairy v. OLCC*, 16 Or App 63, 72, 517 P2d 289 (1973)).  
26 The standards must “inform interested parties of the basis on which applications

1 would be granted or denied.” *Id.* at 803. The BCP and the purpose statements  
2 do not inform the parties that they are approval standards. Rather, they inform  
3 the parties that they do not contain approval standards.

4 This subassignment of error is denied.

### 5 **C. Adequacy of Findings**

6 Petitioners argue that if the hearings officer found that “appropriate” is  
7 not an approval criterion, that finding is inadequate for review.<sup>9</sup> Petitioners  
8 maintain that they argued below that a use must be “appropriate” for the site  
9 and that the hearings officer was required “to explain the extent to which the  
10 provision applies to the decision.” Petition for Review 8.

11 ORS 227.173(3) provides:

12 “Approval or denial of a permit application or expedited land  
13 division shall be based upon and accompanied by a brief statement  
14 that explains the criteria and standards considered relevant to the  
15 decision, states the facts relied upon in rendering the decision and  
16 explains the justification for the decision based on the criteria,  
17 standards and facts set forth.”

18 Findings must (1) identify the relevant approval standards, (2) set out the facts  
19 which are believed and relied upon, and (3) explain how those facts lead to the  
20 decision on compliance with the approval standards. *Heiller v. Josephine*  
21 *County*, 23 Or LUBA 551, 556 (1992). However, we agree with intervenor that

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<sup>9</sup> Petitioners label this their second subassignment to their first assignment of error.

1 before the city has an obligation to adopt a finding responding to a provision,  
2 the petitioner must establish that the provision is relevant to the decision.  
3 *Whittemore v. City of Gearhart*, 75 Or LUBA 374, 380-81 (2017) (a city is not  
4 required to make Statewide Planning Goal 8 (Recreational Needs) findings  
5 where the petitioner has not established that Goal 8 applies to the decision).  
6 Petitioners argue that “appropriate” is an approval criterion based upon  
7 reference to the purpose statements and BCP policies. For the reasons set out in  
8 our resolution of the prior subassignments of error, the purpose statements and  
9 BCP policies are not approval criteria and the hearings officer was not required  
10 to make findings addressing them.

11 This subassignment of error is denied.

12 The first assignment of error is denied.

### 13 **SECOND ASSIGNMENT OF ERROR**

14 Petitioners argue in their second assignment of error that “The City erred  
15 by finding that ‘need’ is not a criterion or standard for uses conditionally  
16 allowed in the [CC] zone, and further erred by approving [CUPs] for businesses  
17 without proof that they are needed by the surrounding neighborhoods.” Petition  
18 for Review 15 (boldface omitted). Petitioners and intervenor agree that this  
19 assignment of error, like the first, is subject to the standard of review set out in  
20 ORS 197.829.

1           **A.     Adequacy of Finding Addressing BDC 2.2.200**

2           Petitioners argue that the city council “erred in finding that the  
3     descriptions of uses permitted in the [CC] zone do not constitute standards  
4     which the gas station and drive-thru must meet for [CUPs] at this location.”<sup>10</sup>  
5     Petition for Review 15.

6           BDC 2.2.200 contains a table titled “Zone District Locations and  
7     Characteristics.” In one column, the table sets out the names of city commercial  
8     zones. In the adjacent column, the table sets out characteristics of the zones. For  
9     locations zoned CC, BDC 2.2.200 provides:

10          “The [CC] District is adjacent and connected to the Residential  
11          District(s) it is intended to serve. [CC] uses are larger in scale and  
12          area than neighborhood commercial uses and *provide for frequent*  
13          *shopping and service needs of nearby residents.* The zone is  
14          intended to provide locations for a wide range of small and  
15          medium sized businesses and services as a convenience to the  
16          neighboring residential areas. New convenience commercial nodes  
17          shall develop as commercial centers rather than a commercial strip  
18          and be limited in size up to 5 acres.” (Emphasis added.)

19          Petitioners argue that the findings addressing BDC 2.2.200 are  
20     inadequate because they do not address whether the use is needed at the subject  
21     property. Petition for Review 16. We agree with intervenor that the findings  
22     identified by petitioners do not accurately reflect the hearings officer’s response  
23     to BDC 2.2.200. Intervenor-Respondent’s Brief 17. In response to arguments

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<sup>10</sup> Petitioners identify this as their first subassignment to their second assignment of error.

1 below that BDC 2.2.200 and BDC 2.2.300 supported the conclusion that need  
2 was a CUP approval criterion, the hearings officer found:

3 “Further, K. Johnson (November 14, 2022, Memo, pages 1 & 2)  
4 stated that:

5 ‘automobile-dependent and automobile-oriented businesses  
6 are the only uses which require a conditional use permit for  
7 this zone. BDC 2.2.300. Thus, gas stations and drive-  
8 throughs are not ipso facto considered to be “needed” at a  
9 [CC] site. If they were, there would be no point to requiring  
10 a conditional use permit for such businesses. It follows that  
11 an applicant who wants to build such businesses in a [CC]  
12 zone must first demonstrate that they are needed.’

13 “The Hearings Officer notes that BDC 2.2.200 is titled Zoning  
14 District Locations and Characteristics. It identifies the commercial  
15 zoning districts in the City of Bend and then describes generally  
16 the characteristics of each zone. The Hearings Officer finds BDC  
17 2.2.200 is not a relevant approval criterion for these Applications.

18 “K. Johnson also references BDC 2.2.300 in her above-quoted  
19 comments. BDC 2.2.300 is titled Permitted and Conditional Uses  
20 for all of the City of Bend zoning districts. K. Johnson is correct  
21 that auto dependent uses are listed as conditional uses in Table  
22 2.2.300.

23 “BDC 1.2 Definitions provides the following definition:

24 ““Conditional use means a use that requires a Conditional  
25 Use Permit. See BDC Chapter 4.4 Conditional Use Permits.’

26 “BDC 4.4.100 further describes Conditional Uses as follows:

27 ““There are certain uses, which, due to the nature of their  
28 impacts on surrounding land uses and public facilities,  
29 require a case-by-case review and analysis. These are  
30 identified as “Conditional Uses” in this code. The purpose of

1 this chapter is to provide standards and procedures under  
2 which a conditional use may be permitted, enlarged or  
3 altered if the site is appropriate and if other appropriate  
4 conditions of approval can be met.’

5 *“The Hearings Officer finds that designating a particular use on a*  
6 *site as a conditional use simply means that the City of Bend policy*  
7 *makers considered ‘auto-dependent uses’ to potentially have*  
8 *impacts on surrounding properties that should be looked at on a*  
9 *case-by-case basis. The Hearings Officer finds there is no ‘need’*  
10 *demonstration required by relevant conditional use approval*  
11 *criteria.”*<sup>11</sup> Record 92 (emphasis added, emphasis and boldface  
12 from original omitted).

13 Petitioners cite only the emphasized portion of the above findings at Petition for  
14 Review 15. The emphasized language responds to BDC 2.2.300; petitioners do  
15 not address the earlier section of the findings evaluating BDC 2.2.200.  
16 Petitioners have not developed an argument that the findings responding to  
17 BDC 2.2.200 are inadequate.

18 This subassignment of error is denied.

19 **B. Interpretation of BDC 2.2.200 and 2.2.300**

20 The hearings officer determined that a demonstration of need was not  
21 required by the applicable approval criteria. Petitioners argue that need must be  
22 shown under BDC 2.2.200 and BDC 2.2.300 and that the hearings officer’s

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<sup>11</sup> In the first assignment of error, we noted that the hearings officer’s reference to “case-by-case analysis” did not reflect that BDC 4.1.100 was an approval criterion. As is clear from reviewing the finding in context, the hearings officer was observing that unlike uses permitted outright, conditional uses require additional consideration.

1 “interpretation of BDC 2.2.200 and [BDC] 2.2.300 is not plausible  
2 because it treats the terms of BDC 2.2.200 as suggestions when in  
3 fact they are standards for permitted and conditional uses in the CC  
4 zone. The [hearings officer’s] interpretation is inconsistent with the  
5 express language and the underlying policy of BDC 2.2.200.”  
6 Petition for Review 17-18.

7 BDC 2.2.200 sets out “Zoning District Locations and Characteristics” of  
8 the city’s commercial zones. BDC 2.2.300 sets out the permitted and  
9 conditional uses in each zone. Petitioners argue that the hearings officer’s  
10 interpretation is inadequate because it does not explain or analyze its conclusion  
11 that “need” is not an approval criterion. Petition for Review 16. Petitioners  
12 argue:

13 “The use of every lot, parcel and tract of land is limited to the uses  
14 permitted by the applicable [land use district].’ BDC 2.0.100.  
15 Table 2.0.100 defines four types of commercial uses. BDC  
16 2.2.200, ‘Zoning Districts and Characteristic’ defines [CC] \* \* \*.  
17 ‘Characteristic’ means a distinguishing quality, a ‘quality or  
18 feature that is typical of someone or something.[’] It follows that  
19 the descriptions of the types of uses permitted in a CC zone are  
20 characteristics, standards for the permitted uses in that zone.”<sup>12</sup>  
21 Petition for Review 16 (internal footnotes omitted).

22 The CC zone is described in part as “provid[ing] for frequent shopping and  
23 service *needs of nearby residents*.” BDC 2.2.200 (emphasis added). Petitioners  
24 argue that the CC zone is not intended to promote vehicle intensive uses and  
25 therefore intervenor’s conditional uses are not consistent with the CC zone.

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<sup>12</sup> Table 2.0.100 identifies the city’s four commercial districts as Convenience Commercial District, Limited Commercial, General Commercial District, and Central Business District.



1           Petitioners argue that the findings are inadequate because they “failed to  
2   *apply* the plain text of BDC 1.0.100, BDC 2.0.100, BDC 2.2.200 and BDC  
3   Table 2.2.300.” Petition for Review 16 (emphasis added, underscoring from  
4   original omitted). Petitioners argue “BDC 1.0.100 regulates and limits the type  
5   of uses allowed in each zone and standards which apply to each type of use.” *Id.*  
6   Petitioners argue that BDC 2.0.100 provides that “[t]he use of every lot parcel  
7   and tract of land is limited to the uses permitted by the applicable zone” and  
8   that “[i]t follows that the descriptions of the types of uses permitted in the CC  
9   zone are characteristics, standards for the permitted uses in that zone.” *Id.*

10          BDC 1.0.100 is titled “How to Use the Development Code” and  
11   describes generally the content of each chapter of the BDC. BDC 2.0.100 is  
12   titled “Classification of Land Use Districts[,]” and provides in part:

13           “All areas within the urban growth boundary of the City of Bend  
14           are divided into land use districts. The use of each lot, parcel and  
15           tract of land is limited to the uses permitted by the applicable land  
16           use district. The applicable land use district is determined based on  
17           the Zoning Map, and the provisions of this chapter.”

18          Intervenor answers and we agree that petitioners did not preserve the  
19   issue raised in this assignment of error that BDC 1.0.100 and BDC 2.0.100  
20   make need an approval criterion that the hearings officer was required to  
21   “apply,” or that BDC 2.2.200 and BDC 2.2.300 impose a “need” criterion.  
22   When the local appeal ordinance requires an appealing party to specify the  
23   issues for appeal, and the local ordinance expressly or impliedly limits the

1 appeal body to the issues so specified, the appeal body's review is generally  
2 limited to the specified issues. *Miles v. City of Florence*, 190 Or App 500, 509-  
3 10, 79 P3d 382 (2003), *rev den*, 336 Or 615 (2004). In discussing this type of  
4 waiver, which we refer to as exhaustion waiver, we have said:

5 "The purpose of the exhaustion waiver doctrine is to ensure that  
6 the final decision-maker has an opportunity to address the issues  
7 that may become the basis for appeal to LUBA. That purpose is  
8 achieved only if the appellant identifies the appellant's particular  
9 concerns with the underlying decision in the notice of local appeal,  
10 where the local ordinance requires such an identification." *Cerelli*  
11 *v. City of Manzanita*, \_\_\_ Or LUBA \_\_\_, \_\_\_ (LUBA No 2022-  
12 073, Feb 27, 2023) (slip op at 5-6).

13 BDC 4.1.1120(A)(3) provides that a notice of appeal to the city council  
14 must include:

15 "A description of the issues sought to be raised by the appeal; and  
16 a statement that the issues were raised during the proceeding that  
17 produced the decision being appealed. This description must  
18 include the specific criteria relied upon as the basis for the appeal,  
19 and an explanation of why the decision has not complied with the  
20 standards or requirements of the criteria. The issues raised by the  
21 appeal must be stated with sufficient specificity to afford the  
22 reviewing authority an opportunity to resolve each issue raised."

23 BDC 4.1.1120(A)(3) requires specificity in the notice of appeal. Petitioners do  
24 not identify where applicability of BDC 1.0.100 or 2.0.100 were raised in the  
25 notice of appeal.<sup>13</sup>

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<sup>13</sup> Intervenor does not dispute that whether need was an approval criterion was raised before the hearings officer. *See* Record 1240-52 (petitioner Johnson's notice of appeal of the hearings officer's decision).

1        Petitioners asserted in their notice of appeal that CUPs cannot be  
2 approved unless the business serve the needs of the neighborhood. Record 46.  
3 Petitioners recognized in the notice of appeal that the hearings officer addressed  
4 BDC 2.2.200 and argue that the hearings officer did not address BDC 4.4.100  
5 or BDC 4.2.500(D). Record 47. In their notice of appeal, petitioners identified  
6 BDC 2.2.200 and BDC 2.2.300 as relevant to the question of whether a use is  
7 “appropriate” or “compatible.” Record 38. BDC 1.0.100 and BDC 2.0.100 were  
8 not raised in the discussion of need. The issue that these provisions were not  
9 considered or applied in relation to a purported need criterion is waived.

10        Furthermore, we agree with intervenor that the hearings officer did not  
11 err in their interpretation of BDC 2.2.200 and BDC 2.2.300. The city council  
12 adopted the hearings officer’s decision and the hearings officer’s interpretation  
13 is entitled to deference. *Derry*, 132 Or App at 391; *Green*, 245 Or App at 438 n  
14 5. Petitioners argue “The City’s interpretation of BDC 2.2.200 and [BDC]  
15 2.2.300 is not plausible because it treats the terms of BDC 2.2.200 as  
16 suggestions when in fact they are standards for permitted and conditional uses  
17 in the CC zone.” Petition for Review 17. In construing the law, we are tasked  
18 with “ascertain[ing] and declar[ing] what is, in terms or in substance, contained  
19 therein, not to insert what has been omitted or to omit what has been  
20 inserted[.]” ORS 174.010. The hearings officer found that BDC 2.2.200  
21 describes the general characteristics of each commercial zone and is not an  
22 approval criterion. Record 92. This is consistent with the text of the BDC. The

1 hearings officer found that the table in BDC 2.2.300 identifies conditionally  
2 allowed uses and “that designating a particular use on a site as a conditional use  
3 simply means that the City of Bend policy makers considered ‘auto-dependent  
4 uses’ to potentially have impacts on surrounding properties that should be  
5 looked at on a case-by-case basis.” Record 92. The hearings officer’s  
6 interpretation of the BDC to conclude that BDC 2.2.300 is not an approval  
7 criterion is consistent with the plain language of the code.

8 This subassignment of error is denied.

9 **C. Compliance with BDC 4.2.500(D)(4)**

10 BDC 4.4.400(B) provides that for CUPs, “[w]here appropriate, the  
11 criteria for Site Development Review approval listed in BDC 4.2.500(D), Site  
12 Plan Review Approval Criteria, shall be met.” BDC 4.2.500(D) provides:

13 “The City shall approve, approve with conditions, or deny the  
14 proposed Site Plan Review Application based on the following  
15 criteria:

16 “(1) The proposed land use is a permitted or conditional use in  
17 the zoning district;

18 “(2) Conditionally permitted uses require approval of a  
19 Conditional Use Permit and shall meet the criteria in BDC  
20 4.4.400;

21 “(3) The land use, building/yard setback, lot area, lot dimensions,  
22 density, lot coverage, building height, design review  
23 standards and other applicable standards of the zoning  
24 district(s) are met;

1       “(4) The proposal complies with the standards of the zoning  
2       district that implements the [BCP] designation of the subject  
3       property[.]”

4       Petitioners argue that site plan review approval criteria in BDC 4.2.500(D)(4) is  
5       applicable to the CUP applications through BDC 4.4.400(B) and demonstrates  
6       that “need” is an applicable approval criterion.<sup>14</sup> Intervenor responds that “[t]he  
7       City’s approval of the site plan is now a final and binding land use decision.”  
8       Intervenor-Respondent’s Brief 25. For the reasons we explained in our  
9       discussion of collateral attack, we conclude that this subassignment of error is  
10      an impermissible collateral attack on the unappealed site plan review permit.

11      This subassignment of error is denied.

12      **D.    ORS 227.173**

13      Petitioners argue that the city “erred by failing to apply ORS 227.173(1)  
14      in considering whether the characteristics of the CC zone set standards which  
15      apply to conditional use permits.”<sup>15</sup> Petition for Review 20. Petitioners argue

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<sup>14</sup> Petitioners identify this as their second subassignment to their second assignment of error.

<sup>15</sup> 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.”

1 that planning concepts reflected in BCP policies are not furthered by this  
2 project. We agree with intervenor that ORS 227.173(1) requires approval  
3 standards be identified in the BDC. As previously explained, the BCP states  
4 that it is implemented by the provisions in the BDC. The hearings officer was  
5 not required to apply the BCP provisions to the CUP applications.

6 This subassignment of error is denied.

7 The second subassignment of error is denied.

### 8 **THIRD ASSIGNMENT OF ERROR**

9 BDC 4.4.400(A) provides:

10 “The City shall approve, approve with conditions, or deny an  
11 application for a conditional use or to enlarge or alter a conditional  
12 use based on findings with respect to each of the following  
13 standards and criteria:

#### 14 **A. *Use Criteria.***

15 “1. The site size, dimensions, location, topography and  
16 access are adequate for the needs of the proposed use,  
17 considering the building mass, parking, traffic, noise,  
18 vibration, exhaust/emissions, light, glare, erosion,  
19 odor, dust, visibility, safety, and aesthetic  
20 considerations;

21 “2. Any negative impacts of the proposed use on adjacent  
22 properties and on the public can be mitigated through  
23 application of other code standards, or other  
24 reasonable conditions of approval that include but are  
25 not limited to those listed in subsection (C) of this  
26 section; and

27 “3. All required public facilities have adequate capacity,  
28 as determined by the City, to serve the proposed use.”

1       Petitioners’ third assignment of error is that the hearings officer’s  
2 conclusion that the CUP approval criteria are met is not supported by  
3 substantial evidence. LUBA shall reverse or remand a decision that is not  
4 supported by substantial evidence in the whole record. ORS 197.835(9)(a)(C).  
5 Substantial evidence is evidence that a reasonable person would rely on in  
6 making a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608  
7 (1993). Where there is conflicting evidence and we conclude a reasonable  
8 person could reach the decision made by the local government, in view of all  
9 the evidence in the record, we defer to the local government’s choice of  
10 evidence. *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988). In  
11 order to prevail on a substantial evidence challenge, petitioners must identify  
12 the challenged findings and explain why a reasonable person could not reach  
13 the same conclusion based on all the evidence in the record. *Stoloff v. City of*  
14 *Portland*, 51 Or LUBA 560, 568 (2006).

15       **A.     Traffic<sup>16</sup>**

16               **1. Comparison of Traffic Generated by Conditional Uses**  
17               **Compared to Permitted Uses**

18       Petitioners argue that

19       “BDC 4.4.400 requires a comparison between the traffic generated  
20       by the permitted uses and that caused by the gas station and drive-

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<sup>16</sup> Petitioners identify this as their first subassignment of their third assignment of error.

1 thru. For example, if a stand-alone convenience store at this  
2 location generates 300 vehicle trips/day and a gas  
3 station/convenience store generates 600, the effect of the gas  
4 station is to cause 300 more vehicles to turn into the complex [.]”  
5 Petition for Review 23.

6 Intervenor argues, initially, that petitioners did not preserve this issue  
7 because they did not argue that segregation of trips into permitted and  
8 conditionally allowed uses was required, or that there was a required  
9 relationship of the number of trips generated by a permitted use as compared to  
10 a conditional use. ORS 197.797(1) provides:

11 “An issue which may be the basis for an appeal to LUBA shall be  
12 raised not later than the close of the record at or following the final  
13 evidentiary hearing on the proposal before the local government.  
14 Such issues shall be raised and accompanied by statements or  
15 evidence sufficient to afford the governing body, planning  
16 commission, hearings body or hearings officer, and the parties an  
17 adequate opportunity to respond to each issue.”

18 The purpose of the statutory waiver requirement is to provide “fair notice” of an  
19 issue, such that the decision-maker and other parties have an adequate  
20 opportunity to respond to the issue. *Boldt v. Clackamas County*, 107 Or App  
21 619, 623, 813 P2d 1078 (1991).

22 In their reply, petitioners answer that public comment focused on issues  
23 of pedestrian and cyclist safety, including in their notice of appeal. Petitioners  
24 Reply Brief 5 (citing Record 55-56). We have reviewed the pages of the record  
25 cited by petitioners in their petition for review and reply and agree with  
26 petitioners that members of the public raised pedestrian and cyclist safety



1 concerns. Nonetheless, we agree with intervenor that the issue presented in this  
2 subassignment of error has not been preserved.

3 The issues in the record reflect a different argument than that posed in the  
4 subassignment of error. *Vanspeybroeck v. Tillamook County*, 221 Or App 677,  
5 691 n 5, 191 P3d 712 (2008) (“[I]ssues [must] be preserved at the local  
6 government level for board review \* \* \* in sufficient detail to allow a thorough  
7 examination by the decision-maker, so as to obviate the need for further review  
8 or at least to make that review more efficient and timely.”). While a petitioner is  
9 not required to establish that a precise argument made on appeal was made  
10 below, that does not mean that “any argument can be advanced at LUBA so  
11 long as it has some bearing on an applicable approval criterion and general  
12 references to compliance with the criterion itself were made below.” *Reagan v.*  
13 *City of Oregon City*, 39 Or LUBA 672, 690 (2001) (emphasis omitted). The  
14 issue raised in this subassignment of error was not raised at the local level and  
15 is waived under ORS 197.797.

16 This subassignment of error is denied.

## 17 **2. Traffic Volume Generated by Different Uses**

18 The hearings officer found:

19 “[T]hat opponents did not provide any credible substantial  
20 evidence that the traffic generated by a [ ]gas station and/or  
21 convenience store would create more severe safety risks to  
22 students walking along and/or across Murphy Road and/or  
23 Brosterhous Road other than the commercial uses that could (by  
24 right or conditional use) be approved on the Subject Property.”

1 Record 264.

2 Petitioners argue that there is no evidence to support this finding because the  
3 development will generate less vehicular traffic if the conditional uses are not  
4 approved. Petition for Review 24. Petitioners argue that allowing “vehicle-  
5 intensive uses raises the risks because everyone entering or leaving the complex  
6 will be in a car. Accordingly, BDC [c]hapter 4.4 requires an analysis of how  
7 much the risks to pedestrians/cyclists will increase. This, [intervenor] failed to  
8 do.” Petition for Review 24-25.

9 The challenged finding is included in the hearings officer’s response to  
10 “Traffic impacts on Jewell Elementary School – BDC 4.7.500 (B)(1)(b) & BDC  
11 3.1.200” which, in its entirety, states:

12 “General concerns were raised with respect to risks to the safety of  
13 students walking on/across Murphy Road, Brosterhous Road and  
14 the roundabout. Kevin Johnson (November 17, 2022 email)[ ](See  
15 also Richard A. Smith, November 12, 2022 email) referenced BDC  
16 4.7.500 (B)(1)(b) and BDC 3.1.200 in the context of Jewell  
17 Elementary school student safety.

18 “Richard A. Smith stated that ‘the existing school zone for Jewel  
19 Elementary is not sufficiently far enough east and students  
20 regularly cross the road and walk in this area. This complex will  
21 put student safety at significantly higher risk for injury related  
22 accidents.’ The Hearings Officer finds that this comment relates to  
23 Richard A. Smith’s perception (which may be accurate) that the  
24 location of the ‘existing cross walk’ is misplaced. The Hearings  
25 Officer finds that even if such perception (improper location of a  
26 cross walk) is correct it is not a relevant matter for consideration in  
27 this case.

28 “The Hearings Officer was unable to identify a specific student

1 safety issue implicated by BDC 4.7.500 (B)(1)(b) or BDC 3.1.200.  
2 BDC 4.7.500 relates to requirements for a transportation impact  
3 analysis. The Hearings Officer, in previous findings determined  
4 that [intervenor's] transportation impact analysis met the  
5 requirements of BDC 4.7.500. BDC 3.1.200 relates to lot, parcel  
6 and block design. BDC 3.1.200 does not relate to the Subject  
7 Property's location in relation to students walking to/from Jewell  
8 Elementary School.

9 "The Hearings Officer finds the traffic impacts on Jewell  
10 Elementary School in the context of BDC 4.7.500(B)(1)(b) or  
11 BDC 3.1.200 arguments were not set forth with sufficient  
12 specificity to allow the Hearings Officer to provide a basis to  
13 authoritatively make a decision based upon relevant approval  
14 criteria. In addition, the Hearings Officer notes that the majority of  
15 opponents were against the location of a gas station and  
16 convenience store but not opposed to other commercial uses. The  
17 Hearings Officer finds that opponents did not provide any credible  
18 substantial evidence that the traffic generated by a fuel/gas station  
19 and/or convenience store would create more severe safety risks to  
20 students walking along and/or crossing Murphy Road and/or  
21 Brosterhous Road than other commercial uses that could (by right  
22 or by conditional use) be approved on the Subject Property. *The*  
23 *Hearings Officer takes note that the SE BNRD traffic consultant*  
24 *did not identify any safety issues specifically related to Jewell*  
25 *Elementary School students."* Record 264 (emphasis from original  
26 omitted, emphasis added).

27 Petitioners do not address the hearings officer's finding that the SE  
28 BNRD traffic consultant did not identify any safety issues specifically related to  
29 students. We agree with intervenor that a reasonable person could rely on the  
30 testimony of the traffic consultant.

31 This subassignment of error is denied.

1                   **3. Intervenor Comments on Traffic at Other Locations**

2           Petitioners argue that intervenor “was required to focus on the  
3 pedestrian/cyclist safety impacts at this particular CC site.” Petition for Review  
4 25. We agree with intervenor that petitioners do not develop this assignment of  
5 error. Petitioners do not identify any finding by the hearings officer that they  
6 allege was not supported by substantial evidence and instead argue that the  
7 intervenor made a mistake.

8           This subassignment of error is denied.

9                   **4. Intervenor Analysis of Pedestrian/Cyclist Safety**

10          Petitioners argue that BDC 4.7.400(8)(a) and (b) require intervenor “to  
11 analyze the walking, biking and transit facilities within one mile of the  
12 elementary school, one-half mile of the park, and 1.5 miles of the high school.”  
13 Petition for Review 26. Petitioners contend:

14           “[Intervenor’s] only direct proof concerning pedestrian/cyclist  
15 safety for both the gas station and drive-thru concerned visibility:

16                   “Please see the Traffic Impact Analysis, the TIA, attached  
17 for the traffic and pedestrian safety review. The site’s flat  
18 topography and straight primary frontages create a very safe  
19 environment for pedestrians and cyclists.’ R[ecord] 1723,  
20 1929; and

21                   ““There would be good visibility “from inside and outside to  
22 inside” the buildings (Rec[ord] 1729, 1735).” Petition for  
23 Review 25.

24          Petitioners argue that the TIA does not address the expected volume or pattern  
25 of pedestrian/cyclist traffic.

1 Intervenor responds that petitioners did not raise this issue in their notice  
2 of appeal and that it is therefore waived. *Miles*, 190 Or App at 509-10.  
3 Petitioners do not identify where compliance with BDC 4.7.400(8)(a) and (b)  
4 was raised in their notice of appeal. This issue is waived.

5 This subassignment of error is denied.

6 **B. Findings and Evidence Concerning Idling Vehicle**  
7 **Exhaust/Emissions<sup>17</sup>**

8 Petitioners first argue that evidence submitted by intervenor was  
9 “conclusory” and is not substantial evidence that BDC 4.4.400(A) is met.  
10 Petition for Review 23, 26-28. Petitioners then argue that the hearings officer’s  
11 findings related to vehicle exhaust and emissions are inadequate.<sup>18</sup>

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<sup>17</sup> Petitioners identify this as their second subassignment of their third assignment error.

<sup>18</sup> Petitioners begin this subassignment of error with the statement that the hearings officer:

“mischaracterized some of opponents’ objections:

“‘The Hearings Officer finds that opponents “environmental issues” related to the gas station can reasonably be considered “safety issues” under BDC 4.4.400(A)(1) The Hearings Officer notes that no participant raising “environmental issues” referenced any other relevant approval criteria in his/her “environmental issues” comments.’

“But many opponents specifically referenced the impacts of the ‘exhaust/emissions’ caused by idling vehicles.” Petition for Review 26 (quoting Record 275).

1                   **1. Intervenor Evidence and Testimony**

2           Petitioners’ argument that intervenor submitted evidence and testimony  
3   that is conclusory is unmoored from any hearings officer finding. An  
4   assignment of error asserting that a decision is not supported by substantial  
5   evidence must first identify the finding the petitioner asserts is not supported by  
6   substantial evidence and must identify the applicable criterion that requires a  
7   finding of compliance. We agree with intervenor that petitioners have not  
8   developed their argument concerning the cited testimony from intervenor  
9   comparing impacts to that of “other polluters in the area” or “other gas stations”  
10   and “bigger operations” and we will not address it further. Petition for Review  
11   27-28.

12           This subassignment of error is denied.

13                   **2. Finding and Evidence Concerning Idling Vehicles**

14           Petitioners argue that the hearings officer made inadequate findings that  
15   the negative exhaust and emissions impact from idling vehicles could be  
16   mitigated or made compatible with adjacent or surrounding uses. Petitioners  
17   argue:

18           “Although the Hearings Officer adopted [intervenor’s] Final  
19           Argument concerning ‘environmental issues’ (Rec[ord] 272),  
20           [their] only finding was:

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          Petitioners do not identify a basis for reversal or remand related to this finding and we do not address it further.

1           “Exhaust and Emissions. There are no direct exhaust and  
2           [e]mission impacts from the market convenience store other  
3           than the exhaust and emissions and typical heating and  
4           cooling units. The fuel equipment will be required to meet or  
5           exceed all DEQ and EPA standards with double wall lined  
6           tanks, etc., all of which are monitored [24/7] with sensor in  
7           the interstitial space.” Petition for Review 29 (quoting  
8           Record 315).

9           Petitioners argue that if the above is a finding, it is inadequate. Petition for  
10          Review 30. Petitioners argue that because “DEQ and EPA standards’ refer  
11          only to vapor release from the infrastructure and vehicle gas tanks, not to  
12          exhaust/emissions from idling vehicles[,]” the hearings officer’s finding is  
13          inadequate. Petition for Review 29. Intervenor argues that petitioners did not  
14          preserve the issue of the impacts of idling vehicles raised in this assignment of  
15          error. Petitioners respond that this issue was preserved at Record 1528.  
16          Petitioners’ Reply Brief 5. We agree with intervenor that impacts from idling  
17          vehicles was not preserved as an issue.

18          Intervenor also responds that the hearings officer’s responsive findings  
19          are found in four pages of the decision that are not challenged or addressed by  
20          petitioners. Intervenor-Respondent’s Brief 42 (citing Record 95-99). We agree  
21          with intervenor that the hearings officer made extensive findings addressing the  
22          air quality impacts of the gas station and the evidence in the record, and  
23          petitioners fail to address these findings or explain why they are inadequate. For  
24          example, petitioners argue that “[a] reasonable person would not rely upon the  
25          CARB report[,]” but do not address the hearings officer’s findings discussing

1 the CARB report. Petition for Review 30. Petitioners argue that “[i]f the City’s  
2 approval of these [CUPs] was based on the CARB report, without any  
3 consideration of its impact on adjacent or surrounding properties, the same rule  
4 must apply to every gas station with a throughput of less than 3.6M  
5 gallons/year[,]” without discussing any finding basing the decision on the  
6 CARB report. Petition for Review 31; *see* Record 96-98 (findings basing the  
7 decision on the CARB Report).<sup>19</sup> Petitioners have not addressed the air quality  
8 findings in the decision and have not established a basis for a substantial  
9 evidence challenge.

10 This subassignment of error is denied.

11 **C. Lack of Substantial Evidence of Compatibility**

12 **1. Emissions<sup>20</sup>**

13 Petitioners argue that the evidence intervenor submitted concerning  
14 exhaust and emissions is conclusory and that intervenor failed to explain “the

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<sup>19</sup> The hearings officer concluded:

“For the foregoing reasons, the Hearings Officer should conclude that the EPA and the CARB recommendations that were actually placed in the record represent the substantial evidence in the record demonstrating ‘safe’ siting distances when it comes to gas stations emissions, and opponents’ hyperlinks to studies from around the world where environmental regulations differ do not alter the weighing of that substantial evidence.” Record 98.

<sup>20</sup> Petitioners identify this as their third subassignment of their third assignment of error.



1 nature of these ‘remnant emissions from the drive-through lane’ or how a wall  
2 and bushes on the south side of the property makes them compatible with the  
3 residential RV area to the south or with the surrounding residential areas,  
4 schools and parks.” Petition for Review 32. Intervenor responds that petitioners  
5 do not identify “any finding in the [d]ecision that is not based on substantial  
6 evidence.” Intervenor-Respondent’s Brief 38. In *Stoloff*, we observed:

7 “The hearings officer made detailed findings explaining why the  
8 approval criterion is satisfied. Petitioner does not acknowledge, let  
9 alone challenge, those findings. In order to prevail on a substantial  
10 evidence challenge, a petitioner must identify the challenged  
11 findings and explain why a reasonable person could not reach the  
12 same conclusion based on all the evidence in the record. Petitioner  
13 has done neither. A reasonable person could reach the conclusion  
14 of the hearings officer that [the local code provision] is satisfied.”  
15 *Stoloff*, 51 Or LUBA at 568 (internal citation omitted).

16 Petitioners do not address the hearings officer’s findings addressing  
17 emissions. Record 96-98. We agree with intervenor that petitioners’ argument is  
18 not adequately developed for review.

19 This subassignment of error is denied.

## 20 **2. Odor<sup>21</sup>**

21 Petitioners argue that there is not substantial evidence concerning the  
22 odor associated with a gas station or drive-through. Intervenor’s representative  
23 testified about their personal experience living in a house five doors down and

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<sup>21</sup> Petitioners identify this as their fourth subassignment of their third assignment of error.

1 350 feet away from busy streets and an older gas station, and opined that there  
2 should not be odor issues. Petitioners argue that “should” is speculative and a  
3 reasonable person would not rely on intervenor’s anecdotal evidence related to  
4 a Portland site.

5 Petitioners do not address the hearings officer’s finding regarding odor:

6 “As a 2.69-acre retail plaza with major arterial roadways on two  
7 sides and adjacent to residential development is well situated for a  
8 Commercial node in the SE side. There should not be odor issues  
9 associated with the proposed uses. The new convenience store will  
10 not have a kitchen function so there will not be on site frying or  
11 production cooking.” Record 140.

12 Petitioners argue that intervenor’s comment about their experience with a lack  
13 of odor in Portland is inadequate but, as intervenor points out, do not address  
14 other evidence in the record related to odor. For example, the CARB report  
15 includes a list of common sources of odor complaints and does not list gasoline  
16 uses as such a use. Record 886. The record also includes the statement “Diesel  
17 locomotives idle and switch cars at the BNSF switchyard to the east producing  
18 exhaust, emissions, noise and odors. Some local large septic systems also  
19 contribute odors that are more impactful than the nearly unmeasurable impacts  
20 of the fueling station use.” Record 1726.

21 Intervenor responds, and we agree, that petitioners have failed to develop  
22 their assignment of error because they have not addressed the hearings officer’s  
23 odor findings that they allege are not supported by substantial evidence or  
24 addressed the additional odor related evidence in the record.

1 This subassignment of error is denied.

2 **3. Traffic and Noise<sup>22</sup>**

3 Petitioners argue that intervenor failed to offer evidence addressing  
4 negative traffic and noise impacts caused by the gas station and drive-through.  
5 We rejected petitioners' challenges to the hearings officer's findings regarding  
6 traffic impacts above and we reject them here as well.

7 Petitioners contend that intervenor failed to produce evidence, other than  
8 a conclusory statement, concerning noise and "[n]oise is measurable. See  
9 [BMC] 5.5020(A)." Petition for Review 33. Intervenor responds, initially, that  
10 no issue regarding a lack of compliance with BMC 5.5020(A) was raised  
11 below, and petitioners have not preserved any issue related to BMC 5.5020(A).  
12 Petitioners state in their reply that their reference to BMC 5.5020(A) was  
13 "merely to demonstrate that noise is measurable[,] and we understand  
14 petitioners to clarify that they are not raising an assignment of error concerning  
15 compliance with BMC 5.5020(A). Petitioners' Reply Brief 5.

16 Petitioners also argue intervenor was required and failed to address noise  
17 caused by braking and acceleration of vehicles as they turn into the  
18 development to access one of the conditional uses. The hearings officer's  
19 findings include:

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<sup>22</sup> Petitioners identify this as their fifth subassignment of their third assignment of error.

1 “Traffic will enter and exit the site at access locations already  
2 selected for the site by the City of Bend. Traffic and noise from  
3 these entries will be minimal and not directly adjacent to  
4 residential development. The mechanical roof top areas will be  
5 screened from the ground with exterior parapet panels that are  
6 design[ed] with sound attenuation features. The mechanical units’  
7 housings will be shrouded in acoustical backing as well. The  
8 [m]arket convenience store units will be located on the flat roof  
9 that is interior from the street on the south end of the building  
10 additionally separated and screened from the Brosterhous frontage  
11 by a shed roof. This end of the building is adjacent to the CC  
12 zoned parcel to the south.” Record 139.

13 We agree with intervenor that petitioners do not discuss the hearings  
14 officer’s findings on noise or the noise related evidence in the record identified  
15 by intervenor. In response to the CUP criterion addressing noise, intervenor’s  
16 architect submitted testimony that the subdivisions across both streets have  
17 privacy walls around them and that the Brosterhaus Road right-in, right-out  
18 driveway functions as a low impact intersection and will merge flows more  
19 easily than stop and go left turn movements. Record 1725. The staff report and  
20 testimony from intervenor’s architect both state that noise from the vehicle  
21 entrances will be minimal and will not be directly adjacent to residential  
22 development. Record 315, 1725.

23 This subassignment of error is denied.

24 The decision is affirmed.