

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

ROSEWOOD NEIGHBORHOOD ASSOCIATION,
Petitioner,

vs.

CITY OF LAKE OSWEGO,
Respondent,

and

LAKE OSWEGO SCHOOL DISTRICT,
Intervenor-Respondent.

LUBA No. 2023-035

FINAL OPINION
AND ORDER

Appeal from City of Lake Oswego.

Sean T. Malone filed the petition for review and reply brief and argued on behalf of petitioner.

Evan Boone filed the joint respondent's and intervenor-respondent's brief.

Carrie A. Richter filed the joint respondent's and intervenor-respondent's brief and argued on behalf of intervenor-respondent. Also on the brief were William K. Kabeiseman and Bateman Seidel P.C.

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

AFFIRMED

11/01/2023

You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

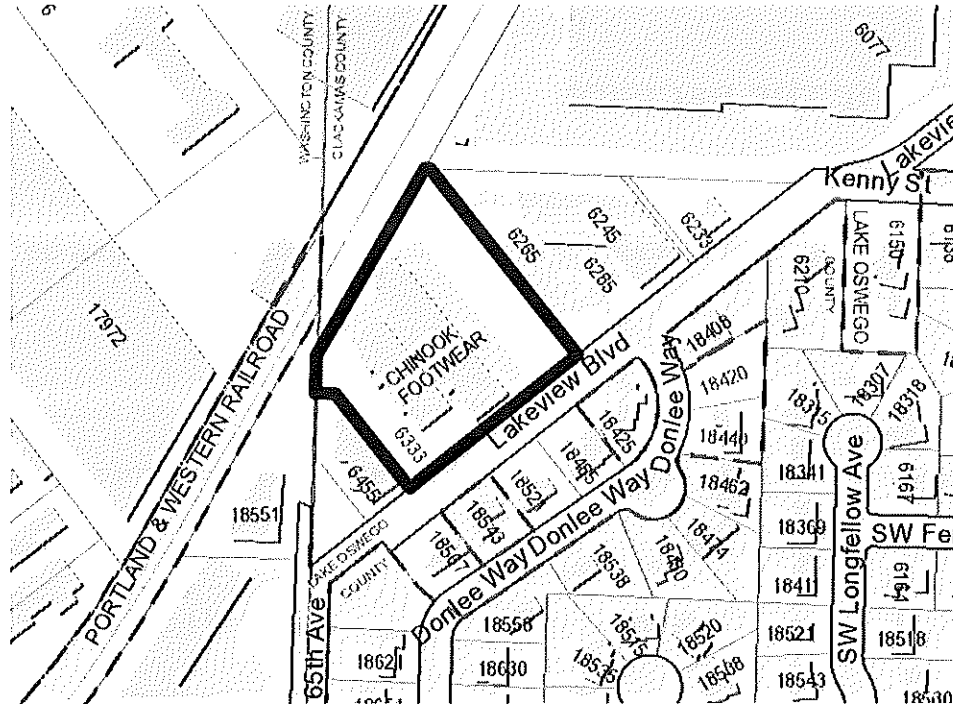
NATURE OF THE DECISION

Petitioner appeals a city council decision approving an application for a conditional use permit and site plan review for a school bus depot on land zoned Industrial Park.

FACTS

Intervenor-respondent (intervenor) applied for conditional use and site plan review approval to site a school bus depot on a 2.4-acre property zoned Industrial Park (IP). The subject property abuts a railroad line located adjacent to its northwestern property line. Adjacent properties to the north and south of the subject property are developed with office and industrial uses. To the south is Lakeview Boulevard, and across Lakeview Boulevard to the south are properties zoned residential and developed with single family homes.

The property's only access is via Lakeview Boulevard to the south, which is designated as a neighborhood collector street. Lakeview Boulevard's paved width varies from approximately 21 feet to 25 feet and it lacks sidewalks. Lakeview Boulevard ends approximately 200 feet to the south of the subject property, where it becomes SW 65th Avenue. SW 65th Avenue runs south and intersects with McEwan Road approximately 500 feet south of where Lakeview Boulevard ends. A railroad crossing is located on McEwan Road to the west of its intersection with SW 65th Avenue.



Replacement Record 320 (site labeled "Chinook Footwear").

The proposal includes parking for 51 full-length buses and 15 shorter buses, 70 employee parking spaces, a new building that includes maintenance bays and office space, a fueling station, and a 10-foot-high concrete wall along the southern and eastern property lines. The city's development review commission (DRC) held public hearings on the application and at the conclusion, approved the application with conditions. Petitioner appealed the decision to the city council, which held an on-the-record hearing and at the conclusion, voted to approve the application.¹ This appeal followed.

¹ The city council's findings incorporate as findings the DRC's findings, as well as several staff reports. Replacement Record 37.

1 **SECOND ASSIGNMENT OF ERROR**

2 Lake Oswego Code (LOC) 50.07.005.3 sets out the city's conditional use
3 approval criteria. Petitioner's second assignment of error challenges the city's
4 conclusion that "[t]he functional characteristics of the proposed use are such that
5 it can be made to be reasonably compatible with uses in its vicinity."² LOC
6 50.07.005.3.a.iv. We refer to that criterion as the Compatibility Criterion. For the
7 reasons explained below, the second assignment of error is denied.

8 **A. Preservation**

9 LUBA's rule at OAR 661-010-0030(4) sets out, in detail, the required
10 elements of a petition for review. OAR 661-010-0030(4)(d) requires that the
11 petition for review set forth assignments of error, and requires that "[e]ach
12 assignment of error must demonstrate that the issue raised in the assignment of
13 error was preserved during the proceedings below," or explain why preservation
14 is not required. Petitioner's second assignment of error contains at its beginning
15 a section titled "Preservation of Assignment of Error." This section consists of a
16 three-sentence list of 131 pages from the Replacement Record. Petition for
17 Review 27.³

² In two subassignments of error, petitioner argues that the city council misconstrued the Compatibility Criterion and made inadequate findings regarding the functional characteristics of the proposed use.

³ Petitioner does not state that preservation is not required.

1 The city and intervenor (respondents) respond that petitioner failed to
2 demonstrate that the issues raised in the assignment of error were preserved
3 because petitioner's second assignment of error fails to identify whether and
4 where the issues were raised below. Respondents argue that that failure
5 prejudices their substantial rights because it improperly shifts the burden from
6 petitioner to respondents to comb the record to determine whether the issues were
7 raised. Joint Respondent's and Intervenor-Respondent's Brief 19. Respondents
8 argue that the issues raised in the second assignment of error were not raised
9 below. Joint Respondent's and Intervenor-Respondent's Brief 19-20.

10 As the party seeking relief from LUBA, petitioner bears the burden of
11 establishing error in the land use decision on review. *See Morse Bros., Inc. v.*
12 *Clackamas County*, 18 Or LUBA 188, 215 n 25 (1989) ("It is petitioner's
13 responsibility to explain the basis upon which we may grant relief."). The
14 requirement in OAR 661-010-0030(4)(d) that petitioner establish where an issue
15 raised in an assignment of error was preserved furthers the purpose of ORS
16 197.835(3), which requires that issues before LUBA on review "shall be limited
17 to those raised by any participant before the local hearings body as provided by
18 ORS 197.195 or 197.797, whichever is applicable." ORS 197.797(1), in turn,
19 requires that:

20 "An issue which may be the basis for an appeal to the Land Use
21 Board of Appeals shall be raised not later than the close of the record
22 at or following the final evidentiary hearing on the proposal before
23 the local government. Such issues shall be raised and accompanied

1 by statements or evidence sufficient to afford the governing body,
2 planning commission, hearings body or hearings officer, and the
3 parties an adequate opportunity to respond to each issue.”

4 *See Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991)
5 (explaining that the objective of ORS 197.797(1) (formerly 197.763(1)) is to
6 afford the decisionmaker and the parties “an adequate opportunity to respond to
7 each issue”).

8 A petitioner establishes error by assigning error, *demonstrating that the*
9 *issue was preserved*, identifying the applicable standard of review, and providing
10 substantive argument supporting the assignments of error, all in the petition for
11 review. Absent an argument that preservation is not required, it is improper for a
12 petitioner to raise an unpreserved issue for review. It is the petitioner’s burden to
13 demonstrate that the issue raised on appeal was presented below, or explain why
14 the preservation requirement does not apply. Failure to comply with that
15 affirmative obligation results in prejudice to the responding parties where the
16 failure improperly shifts the burden to the responding parties to determine
17 whether the preservation obligation applies and whether the issues raised in an
18 assignment of error were preserved.

19 We have held that where preservation is disputed, LUBA will not search
20 the record or large page ranges cited in the petition for review to determine
21 whether an issue was raised below. *H2D2 Properties, LLC v. Deschutes County*,
22 80 Or LUBA 528, 532-33 (2019) (preservation statement that cited to over 100
23 pages of the petitioner’s submissions to the local government inadequate to

1 comply with the rule, and such failure was not a technical violation where the
2 lack of specificity in the petitioner’s preservation citations interfered with the
3 substantial rights of the parties, because it improperly shifted the burden to
4 respondents to review over one hundred pages to determine whether the issues
5 raised in six assignments of error were preserved); *Central Oregon Landwatch v.*
6 *Deschutes County*, ___ Or LUBA ___, ___ (LUBA Nos 2023-006/009, July 28,
7 2023) (slip op at 55) (“A citation to 50 pages in the record is not sufficiently
8 specific to establish that an issue was preserved. A petitioner must quote or point
9 to a specific page, passage, or portion of an audio recording to demonstrate where
10 an issue was raised in the local proceedings.”).

11 The current version of OAR 661-010-0030(4)(d) has been in effect for
12 nearly 10 years since it was first adopted in 2014. Shortly after it was adopted,
13 we explained that the intent of the rule is to “help[] eliminate waiver disputes or
14 frame waiver disputes earlier in an appeal, and in many cases will eliminate the
15 need for a reply brief altogether with attendant efficiencies to LUBA’s appellate
16 review.” *Wal-Mart Stores, Inc. v. City of Hood River*, 72 Or LUBA 1, 7, *aff’d*,
17 274 Or App 261, 363 P3d 522 (2015); *Gould v. Deschutes County*, ___ Or LUBA
18 ___, ___ (LUBA No 2022-025, Sept 9, 2022) (slip op at 8) (“Failure to cite the
19 specific portion of the record where an issue was raised can be prejudicial to the
20 respondent where preservation is disputed.”). In *Wal-Mart Stores*, we concluded
21 that although the petitioner had failed to comply with the rule, it was a technical
22 violation as described in OAR 661-010-0005. However, we cautioned:

1 “OAR 660-010-0005 provides that ‘[t]echnical violations not
2 affecting the substantial rights of parties shall not interfere with the
3 review of a land use decision or limited land use decision.’ * * *
4 Moreover, our 2014 rule change is relatively new, and some
5 flexibility is appropriate as practitioners adjust. We caution,
6 however, that our amendment to OAR 661-010-0030(4) was
7 adopted for a reason. Compliance with OAR 661-010-0030(4) helps
8 eliminate waiver disputes or frame waiver disputes earlier in an
9 appeal, and in many cases will eliminate the need for a reply brief
10 altogether with attendant efficiencies to LUBA’s appellate review.
11 Our decision to overlook petitioner’s failure to comply with OAR
12 661-010-0030(4) in this case should not be viewed as an indication
13 that LUBA necessarily will overlook such failures in the future.”
14 *Wal-Mart Stores*, 72 Or LUBA at 7.

15 *See also Housing Land Advocates v. City of Happy Valley*, 75 Or LUBA 227, 232
16 (2017) (the petitioner’s overbroad citation to 60 record pages without any specific
17 reference to the content of any cited page invites waiver challenges that then lead
18 to the filing of a reply brief, and unnecessarily complicates LUBA review).

19 Prejudice to responding parties from failure to comply with OAR 661-010-
20 0030(4)(d) is also not remedied by an after-the-fact attempt to demonstrate
21 preservation in a reply brief, because LUBA does not address issues presented
22 for the first time in a reply brief, or at oral argument. OAR 661-010-0039; *DLCD*
23 *v. Polk County*, 31 Or LUBA 69, 70, *aff’d*, 142 Or App 311, 920 P2d 181, *rev*
24 *den*, 342 Or 322 (1996) (“We generally do not consider arguments made for the
25 first time at oral argument before the Board.”). Moreover, although OAR 661-
26 010-0039 allows a reply brief as of right, the reply brief is confined to “responses
27 to arguments in the respondent’s brief[.]” To the extent we have sometimes
28 previously interpreted OAR 661-010-0039 (2019) to allow a petitioner to satisfy

1 the requirement in OAR 661-010-0030(4)(d) in a reply brief by providing
2 citations to and explanation of where issues were raised, we now conclude that
3 OAR 661-010-0030(4) and OAR 661-010-0039 do not allow it. Such an approach
4 is, in effect, an unauthorized amendment of the petition for review. We also reach
5 that conclusion because to allow a petitioner to satisfy its obligation to
6 demonstrate for the first time in the reply brief that an issue is preserved
7 prejudices the responding parties' substantial rights where preservation is
8 disputed, because at that point in the adversarial proceeding, they have already
9 filed their responsive brief, and have no further opportunity to dispute a
10 demonstration of preservation in a reply brief. *Crowley v. City of Hood River*, 81
11 Or LUBA 490, 498, *rev'd and rem'd on other grounds*, 308 Or App 44, 480 P3d
12 1007 (2020) (issues that are raised for the first time in a reply brief or at oral
13 argument do not provide an opposing party an adequate opportunity to respond).
14 In short, a petitioner must demonstrate in the petition for review that an issue was
15 preserved. A petitioner may not satisfy that obligation in a reply brief.⁴

⁴ Petitioner's reply brief does not include any arguments in response to respondents' argument that petitioner's preservation statement fails to comply with OAR 661-010-0030(4)(d). Instead, the reply brief merely provides several pages of record citations with explanatory summaries, some of which include new record page citations that were not included in the petition for review's preservation statement.

1 **B. The Second Assignment of Error Was Not Preserved**

2 Here, we conclude that petitioner fails to comply with OAR 661-010-
3 0030(4)(d) because it fails to demonstrate in the assignment of error where the
4 issues raised in the second assignment of error were preserved. The assignment
5 of error requires respondents to engage in a search for a needle in a haystack.
6 That failure is not a technical violation; that failure prejudiced respondents'
7 substantial rights to "reasonable time to prepare and submit their cases, and a full
8 and fair hearing" by requiring respondents to comb the record to determine
9 whether an issue was raised below. OAR 661-010-0005.

10 Finally, for the reasons explained above, petitioner's inclusion of enhanced
11 and new citations in the reply brief does not mitigate its failure to satisfy OAR
12 661-010-0030(4)(d) in the petition for review. Accordingly, petitioner has not
13 demonstrated that the issues raised in the second assignment of error were
14 preserved, and LUBA will not consider the issues raised in the second assignment
15 of error. ORS 197.835(3).

16 The second assignment of error is denied.

17 **FIRST, FOURTH, AND FIFTH ASSIGNMENTS OF ERROR**

18 In three subassignments of error under petitioner's first assignment of
19 error, petitioner challenges the city's conclusion that "[t]he site is physically
20 capable of accommodating the proposed use[.]" LOC 50.07.005.3.a.iii. We refer
21 to that provision as the Site Capability Criterion. We understand petitioner to

1 argue that the city improperly construed the Site Capability Criterion and that its
2 findings are inadequate and not supported by substantial evidence.

3 Petitioner's second subassignment of error is entirely derivative of the
4 issue raised in petitioner's fourth assignment of error, and petitioner's fourth
5 assignment of error entirely incorporates its arguments under the second
6 subassignment of error. Petitioner's third subassignment of error is entirely
7 derivative of the issue raised in petitioner's fifth assignment of error, and
8 petitioner's fifth assignment of error entirely incorporates its arguments under the
9 third subassignment of error. Accordingly, the first, fourth, and fifth assignments
10 of error raise the same issues.

11 **A. Preservation**

12 In the petition for review, petitioner cites 25 pages of the record as
13 demonstrating that the issues raised in the first assignment of error were
14 preserved.⁵ Petition for Review 15. Respondents respond that petitioner's
15 preservation statement is insufficient to comply with OAR 661-010-0030(4)(d)
16 because it cites a large range of record pages, fails to include "further
17 identification of where specific issues were raised," and thus prejudices
18 respondents' ability to respond to the issues. Joint Respondent's and Intervenor-
19 Respondent's Brief 4. Respondents also argue that the issues presented in the first
20 assignment of error were waived.

⁵ Petitioner does not state that preservation is not required.

1 **B. The First, Fourth and Fifth Assignments of Error Were Not**
2 **Preserved**

3 For the reasons explained above, we agree with respondents. Petitioner's
4 petition for review fails to comply with OAR 661-010-0030(4)(d), because it fails
5 to demonstrate in the first assignment of error where the issues raised in the first,
6 fourth and fifth assignments of error were preserved. That failure is not a
7 technical violation; that failure prejudiced respondents' substantial rights to
8 "reasonable time to prepare and submit their cases, and a full and fair hearing"
9 by requiring respondents to comb the record to determine whether an issue was
10 raised below. OAR 661-010-0005. Accordingly, petitioner has not demonstrated
11 that the issues raised in the first, fourth, and fifth assignments of error were
12 preserved, and LUBA will not consider the issues raised in those assignments of
13 error. ORS 197.835(3).

14 The first, fourth, and fifth assignments of error are denied.

15 **THIRD ASSIGNMENT OF ERROR**

16 LOC 50.02.002.2.b.iii(1) requires that "uses in the IP and I zones emitting
17 noise, smoke, glare, vibration, or fumes, or having similar environmental effects,
18 shall mitigate for those effects such that their impacts on people, property and
19 uses beyond the property lines of the subject site are avoided or minimized to the
20 greatest extent practicable." We refer to that as the Mitigation Criterion.
21 Petitioner argues that the city improperly construed LOC 50.02.002.2.b.iii, that
22 its findings are inadequate to explain why the Mitigation Criterion is met, and
23 that the decision is not supported by substantial evidence.

1 Petitioner's third assignment of error totals approximately one page, and
2 references and in some cases incorporates arguments in its second assignment of
3 error. As explained above, the second assignment of error challenges the
4 Compatibility Criterion. Petition for Review 43-44. The Compatibility Criterion
5 differs from LOC 50.02.002.2.b.iii(1). With the exception of one argument that
6 we discuss below, petitioner's third assignment of error does not develop any
7 independent challenge to the Mitigation Criterion, but relies on its arguments in
8 its second assignment of error in support of its challenges to the Compatibility
9 Criterion.⁶ Accordingly, with one exception that we discuss below, petitioner's
10 third assignment of error is insufficiently developed for our review. *Deschutes*
11 *Development Co. v. Deschutes County*, 5 Or LUBA 218, 220 (1982).

12 In the only portion of the third assignment of error that does not reference
13 or incorporate the second assignment of error, we understand petitioner to argue
14 that the city's decision fails to satisfy the Mitigation Criterion because it fails to
15 mitigate for the effects beyond the subject property from fumes emitted by the
16 use. Petition for Review 44. The city council found:

17 "Fumes will occur from engine exhaust from the busses, both from
18 inside the lot (behind the sound wall), and when entering/exiting the
19 site. Such fumes would be comparable to any large vehicle
20 operation, such as semi-tractors. The site is located at the boundary
21 of the IP zone, on a neighborhood collector street. The vehicle fumes

⁶ We also determined above that petitioner failed to establish that the issues raised in its second assignment of error were preserved.

1 from operation of busses within the site not greater than would occur
2 by their lawful operation on the street system. Staff finds that
3 'impacts on people, property and uses beyond the property lines of
4 the subject site are avoided or minimized to the greatest extent
5 practicable' when the impacts are not greater than reasonably
6 occurring outside of the property. Heavy vehicle operation is
7 expected to occur along the roadways to and from an IP street to
8 major arterials and freeways. Absent a change in engine design to
9 electric or natural gas busses, fumes when entering and exiting the
10 property are to be expected, and the on-site impacts from fumes are
11 not greater than reasonably occurring outside of the site."
12 Replacement Record 177-78.

13 The city council interpreted the Mitigation Criterion to mean that "'impacts on
14 people, property and uses beyond the property lines of the subject site are avoided
15 or minimized to the greatest extent practicable' when the impacts are not greater
16 than reasonably occurring outside the property." Replacement Record 178.
17 Petitioner does not develop any argument that challenges the city council's
18 interpretation, or that explains why the findings are inadequate to explain why
19 the Mitigation Criterion is met. Absent any developed argument, petitioner has
20 not established a basis for reversal or remand.

21 The third assignment of error is denied.

22 The city's decision is affirmed.