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

MARCUS UMSTEAD and JILL PRUITT,
*Petitioners*,

vs.

WASHINGTON COUNTY,
*Respondent*,

and

TESS PROPERTIES, LLC,
*Intervenor-Respondent*.

LUBA No. 2025-040

FINAL OPINION
AND ORDER

Appeal from Washington County.

Meriel L. Darzen filed the petition for review and reply brief and argued on behalf of petitioners. Also on the brief was Crag Law Center.

Melissa M. Ryan filed the respondent's brief and argued on behalf of respondent. Also on the brief was Bateman Seidel Miner Blomgren Chellis & Gram, P.C.

Andrew H. Stamp filed the intervenor-respondent's brief and argued on behalf of intervenor-respondent. Also on the brief were Matthew Martin and VF Law.

BASSHAM, Board Member; ZAMUDIO, Board Chair; WILSON, Board Member, participated in the decision.

REMANDED 11/25/2025

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

Opinion by Bassham.

## NATURE OF THE DECISION

Petitioners appeal a hearings officer's approval of a preliminary plat for a 30-lot subdivision within a rural exception area.

## MOTION TO INTERVENE

Tess Properties, LLC (intervenor), the applicant below, moves to intervene on the side of the county. There is no opposition to the motion and it is allowed.

## MOTIONS TO TAKE OFFICIAL NOTICE

The county moves to take official notice of four documents that adopt or are included as elements of the county's acknowledged comprehensive plan, all involving identification of natural resources. Intervenor moves to take official notice of five maps that are part of the county's comprehensive plan, all involving identification of areas subject to landslide risk. There is no opposition to either motion, and the motions are allowed. OAR 661-010-0046; ORS 40.090(7).

## MOTION FOR OVERLENGTH REPLY BRIEF

Petitioners move to file a single overlength reply brief not to exceed 2,000 words. There is no opposition to the motion and it is granted.

## FACTS

The subject property is a 151.55-acre parcel zoned Agriculture and Forest 5-Acre (AF-5). The property is undeveloped, other than some unimproved dirt roads historically used for agricultural activities. South Fork Hill Creek crosses the property from the southeast to the northwest, and is designated as a drainage

hazard area, and part of the 100-year floodplain. The county's Rural/Natural Resources Plan designates the creek as a Water Area and Wetland, as well as Fish and Wildlife Habitat. In 2022, the Oregon Department of Fish and Wildlife (ODFW) designated the eastern portion of the property as Priority Wildlife Connectivity Habitat, the consequence of which is discussed below.

The northern portion of the subject property has frontage on SW Laurelwood Road, but no direct access to that public road. The only access to the property is via two private roads, SW Nelson Drive to the west, and SW Academy to the northeast.

Intervenor applied to the county for preliminary plat approval of a 30-lot subdivision of the property, in four phases. Several issues arose early in the application process. County staff, as well as opponents, took the position that the ODFW-designated Priority Wildlife Connectivity Habitat in the eastern portion of the property constrained proposed development in that area. Staff later changed their position, and recommended that the hearings officer find that ODFW designation does not impose any approval criteria for the application, because the county had not adopted or included that designation in its natural resource planning documents.

Opponents also argued that subject property has steep slopes and is susceptible to shallow-seated landslides, triggering the requirement for a geologic study. In response, intervenor took the position that no study was required, but nonetheless submitted during the first open record period a

geotechnical engineering report concluding, based on multiple test sites, that the property did not include any areas susceptible to shallow-seated landslides.

The subject property is within the Chehalem Mountain Groundwater Limited Area, designated by the Oregon Water Resources Department. OAR 690-502-0200. Record 59. The application proposed that development be supplied either from new mainline from a nearby reservoir or individual wells. Many neighbors testified in opposition, arguing that the reservoir did not have capacity to serve the 30-lot development, and that digging new wells may impact existing wells, which often run dry or have limited pressure. *See, e.g.*, Record 735, 804, 807. Subsequently, intervenor identified a third potential source for water: installing water tanks on each lot, and filling the tanks either with well water or by trucking water in if well water is insufficient or unavailable.

Opponents also argued that the property lacks adequate access, specifically that the easements underlying the two private roads that lead to the subject property do not allow access to the property. Several property owners whose property is burdened by the private road easements testified that they would not consent to new or revised easements to allow access over their property for the proposed use. *See, e.g.*, Record 749, 753, 1230.

The hearings officer held a hearing March 13, 2025, followed by a first open record period in which any party could submit additional evidence and argument, and a second open record period that was limited to responding to evidence and arguments submitted in the initial open record period. After the

close of the second open record period, intervenor submitted its final written argument. On May 12, 2025, the hearings officer issued the county's final decision approving the preliminary plat. This appeal followed.

**FIRST ASSIGNMENT OF ERROR**

Washington County Community Development Code (CDC) 422 regulates development in certain natural resource areas. CDC 422-2 identifies the resource areas subject to those regulations as follows:

> "Lands Subject to this Section:
>
> "Those areas identified in the applicable community plan or the Rural/Natural Resource Plan Element as Significant Natural Resources and areas identified as Regionally Significant Fish & Wildlife Habitat on Metro's current Regionally Significant Fish & Wildlife Habitat Inventory Map. Significant Natural Resources have been classified in the Community Plans or the Rural/Natural Resource Plan Element by the following categories:
>
> "422-2.1 Water Areas and Wetlands. 100-year floodplain, drainage hazard areas and ponds, except those already developed.
>
> "422-2.2 Water Areas and Wetlands and Fish and Wildlife Habitat. Water areas and wetlands that are also fish and wildlife habitat.
>
> "422-2.3 Wildlife Habitat. *Sensitive habitats identified by the Oregon Department of Fish and Wildlife*, the Audubon Society Urban Wildlife Habitat Map, and forested areas coincidental with water areas and wetlands.
>
> "422-2.4 Significant Natural Areas. Sites of special importance, in their natural condition, for their ecological, scientific, and educational value." (Emphasis added.)

As noted, county staff and intervenor's habitat expert initially assumed that proposed development within the ODFW-designated Priority Wildlife Connectivity Habitat on the property was subject to CDC 422-2. Several opponents also noted the ODFW designation and argued for protecting that habitat. However, during the first open record period, staff submitted a revised staff report that agreed with intervenor that lands subject to CDC 422 did not include the ODFW-designated habitat, because the county had not adopted that habitat designation into one of its natural resource plans. Record 359-60. The hearings officer ultimately agreed with that interpretation of CDC 422, and declined to apply CDC 422 to proposed development within the ODFW-designated habitat.[1]

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[1] The hearings officer's decision states, in relevant part:

> "Staff also noted the presence of 'Priority Wildlife Connectivity Habitat' along the eastern portion of the property. [ODFW] is the source[] of this habitat designation on the property, not Washington County. The Applicant's plans show some disturbance of the ODFW habitat designation.
>
> "ODFW stated it does not have any regulations that govern encroachments into areas subject to the designation. It was initially unclear whether the county itself regulated the ODFW habitat designations via Section 422. However, during the open record period, staff clarified that the county has not incorporated the ODFW designations into the Plan. As such, the county does not consider the ODFW designation to regulate the application in any manner. The Hearings Officer agrees that in the absence of county

On appeal, petitioners argue that the hearings officer misconstrued CDC 422. According to petitioners, CDC 422-2.3 expressly provides that land subject to regulation under CDC 422 includes sensitive habitats identified by ODFW, and nothing in the text or context of CDC 422 limits its regulatory scope to ODFW-designated sensitive habitats that are subsequently adopted into the county's natural resource plans. Petitioners also challenge the adequacy of and evidentiary support for the hearings officer's findings quoted in the margin.

**A. Preservation**

Intervenor initially responds that the issues presented in this assignment of error were not preserved below. Although intervenor does not cite the statute, the source of the preservation requirement at issue is presumably ORS 197.797(1).[2]

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action to adopt the ODFW habitat designation, the county has no independent regulatory authority over the designation." Record 18.

"Section 422 also recognizes sensitive habitat identified by [ODFW] as Wildlife Habitat but this is limited to those sensitive habitats adopted into the County's Rural Natural Resource Plan. The subject site is intersected by an [ODFW] designated Priority Wildlife Connectivity Habitat to the east of the South Fork Hill Creek riparian corridor. This overlay is not adopted by the County's Rural Natural Resource Plan. Hence, the ODFW habitat is for informational purposes only and as stated earlier, not subject to the standards of Section 422." Record 31.

[2] ORS 197.797(1) provides:

"An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government.

Intervenor does not dispute that, as far as ORS 197.797(1) is concerned, the general issue of whether CDC 422 regulates the ODFW-designated habitat was preserved below, as evidenced by the fact that the hearings officer adopted findings addressing the issue. Instead, intervenor argues that petitioners failed to adequately demonstrate, in the petition for review, that the issue of the regulatory scope of CDC 422 was raised below, under the reasoning in *Rosewood Neighborhood Ass'n v. City of Lake Oswego*, LUBA No 2023-035 (Nov 1, 2023) (*Rosewood*).

In *Rosewood*, we rejected an assignment of error based on our administrative rule, OAR 661-010-0030(4)(d), which requires that "[e]ach assignment of error must demonstrate that the issue raised in the assignment of error was preserved during the proceedings below." The *Rosewood* petitioner's attempt to comply with OAR 660-010-0030(4)(d) consisted of a series of record citations, including block citations to large ranges of pages, totaling some 131 pages in the record. We held that that demonstration did not comply with OAR 660-010-0030(4)(d), and that failure to comply with the rule prejudiced the

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> Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."
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> *See also* ORS 197.835(3) (limiting LUBA's scope of review to issues raised under, as relevant here, ORS 197.797(1)).

substantial rights of the other parties, requiring them to comb through a large range of record pages looking for where the issue might have been raised.

In the present case, the petition for review states that petitioners and others raised below the issue presented in the first assignment of error, citing six record pages: Record 803, 804, 809, 817, 1109, 1192. Intervenor does not explain why that citation is insufficient under *Rosewood*, or why any insufficiency prejudices any party's substantial rights in this appeal. Unlike the demonstration in *Rosewood*, petitioners here provided pin cites to specific record pages, and did not cite to a broad range of pages, forcing the parties to sift through that range to confirm whether the issue had been raised.

Intervenor also argues that petitioners failed to preserve their findings and evidentiary challenges to the hearings officer's findings quoted in the margin. According to intervenor, when staff submitted a revised staff report in the first open record period, which included a statement that staff had changed its position regarding the applicability of CDC 422 to the ODFW-designated habitat, it became incumbent on petitioners to raise their findings and evidentiary challenges in the second open record period.

We disagree with intervenor. Once the issue of whether CDC 422 regulated the ODFW-designated habitat was raised by any party below, and we do not understand intervenor to dispute that it was, petitioners were not obligated to anticipate the hearings officer's findings on that issue, and advance during the hearing or open record period challenges to the adequacy or evidentiary support

of those findings, which in this case were not adopted until the hearings officer's final decision. *Lucier v. City of Medford*, 26 Or LUBA 213, 216 (1993). In *Lucier*, we held that once the issue of compliance with an approval criterion is raised below, the statutory precursor to ORS 197.797(1) does not require the petitioner to challenge proposed findings, or anticipate the actual findings a local government ultimately adopts in support of its final decision, or question the adequacy of the evidence accepted into the record to support such findings. *Id.* Similarly, in the present case, ORS 197.797(1) does not obligate petitioners to anticipate that the hearings officer would adopt findings agreeing with the staff's change of position, in order to preserve the right before LUBA to challenge the adequacy or evidentiary support for the hearings officer's findings on that issue.

**B. CDC 422**

On the merits, petitioners argue that the hearings officer misconstrued CDC 422 in concluding that ODFW-designated habitat is regulated only if the county incorporates the designated habitat into its natural resource planning documents. According to petitioners, nothing in the text or context of CDC 422 imposes such a limitation, and therefore the hearings officer's interpretation inserts a qualification into the text that is not present. To the contrary, petitioners argue, the text of CDC 422-2 states, without qualification, that Significant Natural Resources subject to CDC 422 include "Wildlife Habitat," which is further specified to include "[s]ensitive habitats identified by the Oregon Department of Fish and Wildlife[.]" CDC 422-2.3.

The county responds that both CDC 422 and the county's natural resource protection program, the Rural/Natural Resource (RNR) Plan, were adopted in 1983. The RNR Plan includes maps that identify the location of Wildlife Habitat referenced in CC 422-2.3. *See* County's Motion to Take Official Notice, Exhibits 1 and 2. According to the county, the relevant map for this area of the county does not identify any Wildlife Habitat on the subject property. The county argues that the 2022 ODFW designation has no bearing on "Wildlife Habitat" for purposes of CDC 422-2.3 unless and until the county amends the RNR Plan and Wildlife Habitat maps to include such a designation. The county notes that the introductory language to CDC 422-2 specifically identifies lands subject to regulation in relevant part as "those areas identified in the * * * Rural/Natural Resource Plan Element as Significant Natural Resources[.]"

We review the hearings officer's interpretation of a local code provision to determine whether the interpretation is correct. *Kenagy v. Benton County*, 115 Or App 131, 134-35, 838 P2d 1076, *rev den*, 315 Or 271 (1992); ORS 197.835(9)(a)(D). We agree with the county that the hearings officer correctly construed CDC 422 to regulate only natural resources that are identified, as relevant here, in the RNR Plan. The CDC 422-2 introductory language makes it reasonably clear that land subject to CDC 422 includes only areas identified in community plans, the RNR Plan, or Metro's current Regionally Significant Fish & Wildlife Habitat Inventory Map. CDC 422-2.1 through 422-2.4 describe the different types of resources that are identified in the three documents listed in the

CDC 422 introductory paragraph, but they do not expand the category of resources subject to CDC 422 to include resources not identified in those documents. The county is correct that, read in context, the reference in CDC 422-2.3 to "[s]ensitive habitats identified by the Oregon Department of Fish and Wildlife" describes one source of information that the county used in 1983 and presumably could use in any subsequent plan amendments to identify the resources protected by CDC 422. But that identification of resources would require listing or describing those resources in a community plan, the RNR Plan, or the current Metro Wildlife Habitat map.

We note that, by identifying the "current" Metro Wildlife Habitat map as one of three triggers for application of CDC 422, it is clear that the county knows how to link application of CDC 422 to externally maintained designations of significant wildlife habitat. If the county had intended updated ODFW wildlife habitat maps to automatically trigger application of CDC 422, as it apparently intended with the current Metro wildlife habitat map, then it could have listed current ODFW wildlife habitat maps as one of the triggers described in the CDC 422 introductory paragraph.[3]

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[3] However, as intervenor argues, linking the CDC to current versions of externally maintained natural resource maps could, potentially, run afoul of Article I, Section 21 of the Oregon Constitution, which has been interpreted to prohibit delegating legislative authority to amend laws, including land use regulations, to another governmental entity. *See, e.g., Advocates for Effective Regulation v. City of Eugene*, 160 Or App 292, 311, 981 P3d 368 (1999); *Barnes*

In sum, viewed in context with the CDC 422 introductory paragraph, the hearings officer correctly concluded that CDC 422-2.3 does not trigger application of CDC 422 based on the 2022 ODFW designation, because that designation has not been adopted into one of the three documents listed in the introductory paragraph.

In the alternative, petitioners argue that, even if CDC 422 is properly construed to limit its regulatory scope to resources identified in the documents listed in the introductory paragraph, the hearings officer's findings fail to explain why they agreed with county staff's change of position, given that staff had from the filing of the application to after the hearing maintained that the ODFW-designated area is subject to CDC 422. However, petitioners have not established why such an explanation is necessary in order for the hearings officer to adopt a reviewable and sustainable interpretation of CDC 422.

Finally, petitioners argue that the record does not include evidence supporting the hearings officer's characterization of the ODFW designation as "for informational purposes only," or ODFW's purported statement that "it does not have any regulations that govern encroachments into areas subject to the designation." Record 18, 31. However, petitioners do not explain how the findings on those points relate to CDC 422, or why lack of evidentiary support on those points would have any bearing on the correct application of CDC 422.

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*v. City of Hillsboro*, 61 Or LUBA 375, 391-92, *aff'd*, 239 Or App 73, 243 P3d 139 (2010).

Absent a more developed argument, petitioner's evidentiary challenges to the above findings do not provide a basis for remand.

The first assignment of error is denied.

**SECOND ASSIGNMENT OF ERROR**

Petitioners argue that the hearings officer misapplied CDC 410-4, which in certain circumstances requires submittal of an initial engineering geology report followed by a more detailed geotechnical report to address potential landslide hazards.

The hearings officer concluded that intervenor had demonstrated compliance with all CDC 410-4 requirements related to slope stability and landslide hazards, and adopted as findings in support of that conclusion a portion of intervenor's final argument addressing landslide hazards. Record 29-30.[4] On appeal, petitioners argue that the hearings officer erred in concluding that all CDC 410-4 requirements had been met. Specifically, petitioners argue that the

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[4] The hearings officer's findings state:

> "Opponents questioned whether the Applicant has shown compliance with CDC 410-4. The Hearings Officer finds the Applicant has demonstrated compliance with Code requirements related to slope stability and landslide hazards. In support of this finding, the Hearings Officer adopts by reference the Applicant's response to this issue in its final argument to the Hearings Officer." Record 29-30 (footnote omitted).

In the omitted footnote, the hearings officer adopts by reference section II(D) of intervenor's final argument, found at Record 88-91.

geotechnical engineering report intervenor submitted failed to evaluate landslide risks on lands within 500 feet of the property, as required CDC 410-4.1(C), and further failed to evaluate the proposed stormwater management approach, as required by CDC 410-4.1(D)(5).[5]

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[5] CDC 410-4.1 provides, in relevant part:

> "B. An engineering geology report prepared and stamped by an Oregon certified engineering geologist shall be submitted for review and approval by the Building Official prior to submittal of a development application[.] * * *
>
> "* * * * *
>
> "C. The engineering geology report prepared in accordance to Section 410-4.1 B. shall include the following land within the study area:
>
> "* * * * *
>
> "(2) *Five acres and greater: Development site, plus an area measuring at least 500 feet from the perimeter of the property.*
>
> "D. The engineering geology report prepared in accordance to Section 410-4.1 B. shall:
>
> "(1) Address any potential geological hazard associated with grading on steep slopes and the proposed development and recommend measures intended to mitigate potential hazards;
>
> "(2) Address any potential landslide hazards associated with grading on land and developing land determined to be susceptible to either shallow- or deep-seated

The county and intervenor initially dispute whether, and when, the requirements of CDC 410-4 apply. The county argues that CDC 410-4, properly interpreted, does not apply at all to the proposed development, because the subject property is not identified on any of the county's maps of areas susceptible to landslide hazards. Intervenor argues that CDC 410-4, properly interpreted, applies only at the building permit stage, not when seeking a preliminary subdivision plan approval. However, both of those interpretations are at least somewhat in tension with the hearings officer's finding that the CDC 410-4 requirements are met at Record 29-30.[6] Because the hearings officer did not

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> landslides and recommend measures intended to mitigate potential landslide hazards;
>
> "(3) Contain a detailed description of the study area's (as defined in Section 410-4.1) geology and include findings regarding the effect of the geologic conditions on the proposed development;
>
> "(4) When applicable, provide findings regarding the effect of the geologic conditions on the susceptibility of both shallow- and deep-seated landslides; and
>
> "(5) *Address proposed stormwater management approach.*" (Emphases added.)

[6] Intervenor's final argument, portions of which the hearings officer adopted as support for the primary conclusion that the requirements of CDC 410-4 are met, includes some equivocal arguments that the requirement for a geotechnical engineering report can be deferred to the grading permit stage. Record 88. However, to the extent the incorporated findings conflict with the hearings officer's own findings regarding applicability of CDC 410-4 to the preliminary plat application, the latter control.

appear to adopt the interpretations of CDC 401-4 advanced in the response briefs, we do not consider respondents' initial theories or interpretations regarding whether and when CDC 410-4 applies in the present proceeding.

CDC 410-4.1 requires that, prior to submitting a development application for certain lands, the applicant must participate in a pre-application conference and submit an engineering geology report to the county building official for review and approval. The geology report approved by the building official must then be submitted along with the development application, as well as a more detailed "geotechnical engineering report" for lands determined to be susceptible to landslides. CDC 410-4.2. The geotechnical report must include

> "a comprehensive description of the site topography and geology; an opinion as to the adequacy of the proposed development from an engineering standpoint; and opinion as to the extent that instability on adjacent properties may adversely affect the project; a description of the field investigation and findings; conclusions regarding the effect of geologic conditions on the proposed development; and specific requirements for plan modification, corrective grading and special techniques and systems to facilitate a safe and stable development. The report shall provide other recommendations as necessary, commensurate with the proposed grading and development." CDC 410-4.2(C)(2).

Intervenor did not participate in the pre-application conference required by CDC 410-4.1 or submit an engineering geology report to the building official prior to submitting the preliminary subdivision plan application. Intervenor also did not submit a geotechnical engineering report when it first submitted the application for preliminary plan approval. However, in response to objections

raised before the hearings officer, intervenor submitted during the first open record period a geotechnical engineering report assessing the landslide hazard risk on the property (Hardman Report). The Hardman Report included Department of Geology and Mineral Industries (DOGAMI) maps indicating that portions of the property are subject to Low, Moderate, and High Risk of shallow-seated landslides, and that an adjoining property to the north includes a mapped landslide area that is rated Very High Risk for shallow-seated landslides. Record 501. However, based on evaluation of the property using multiple test pits, the Hardman Report found no evidence of landslides or unstable slopes on the subject property, or any areas of instability on adjoining properties that could adversely affect the project. The Hardman Report concluded that the

> "site soil and geologic conditions are adequate for the planned development, provided the results of this report are incorporated in design and construction. From a geotechnical perspective, it is our opinion that the proposed development is adequately designed, and construction of the development is feasible." Record 480.

In the rebuttal open record period, an opponent, who is also an engineer, critiqued the Hardman Report, arguing in relevant part that it failed to evaluate landslide risks on lands within a study area 500 feet from the property line, as required CDC 410-4.1(C), and further failed to address the proposed stormwater management approach, as required by CDC 410-4.1(D)(5). On appeal, petitioners repeat those critiques, arguing that the findings and Hardman Report fail to evaluate landslide risks on adjacent lands and fail to address proposed stormwater management, as required by CDC 410-4.1(C) and CDC 410-4.1(D)(5).

We note, initially, that both CDC 410-4.1(C) and CDC 410-4.1(D)(5) apply only to the initial *engineering geology report* submitted pre-application to the building official, as required in some circumstances under CDC 410-4.1, not the *geotechnical engineering report* submitted with the development application, as required in some circumstances under CDC 410-4.2.[7] Petitioners do not dispute that the Hardman Report is a geotechnical engineering report, or argue that the Report does not meet the requirements of CDC 410-4.2. However, because intervenor did not prepare or submit an initial engineering geology report, and no party argues otherwise, we will assume, without deciding, that the Hardman Report was intended to address the requirements of both CDC 410-4.1 and 410-4.2.

On the merits, intervenor argues that the incorporated findings at Record 90-91 address the issue, raised under CDC 410-4.1(C), that the Report fails to evaluate landslide hazards on adjoining land within 500 feet of the property line.

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[7] Petitioners' brief frequently conflates the two reports. For example, petitioners argue that the Hardman geotechnical engineering report was not submitted prior to the development application, as required by CDC 410-4.1(B). However, as explained above, CDC 410-4.1(B) concerns only the engineering geology report, which we understand to differ in scope and focus from the geotechnical engineering report. Petitioners go on to state that the belated submittal of the Hardman geotechnical engineering report during the proceedings on the development application likely cured any error resulting from failure to submit the report pre-application. Petition for Review 16, n 4. We understand petitioners to concede that the timing and manner in which the Hardman Report was submitted does not represent a procedural error that warrants remand.

The incorporated findings take the position that the Hardman Report did evaluate lands within 500 feet of the property line. Intervenor notes that the Hardman Report concluded that "[t]here are no offsite zones of instability that could impact the subject site." Record 486. Intervenor argues that petitioners do not challenge either the findings at Record 90-91 addressing this issue, or the conclusion at Record 486 that there are no offsite zones of instability that could impact the subject site. We agree with intervenor that, absent a focused challenge to those findings and the supporting evidence, petitioners' findings and evidentiary challenges under CDC 410-4.1(C) do not provide a basis for remand.

As noted, CDC 410-4.1(D)(5) requires that the engineering geologic report "[a]ddress [the] proposed stormwater management approach." Petitioners argue that the Hardman Report does not address stormwater management. However, as intervenor notes, the Hardman Report does in fact include a brief discussion of stormwater management, at Record 487.[8] Petitioners do not acknowledge, or challenge, that discussion of stormwater management.

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[8] The Hardman Report states, in relevant part:

> "Storm water management systems should be constructed such that potential overflow is discharged in a controlled manner away from structures and slopes. During and following site development within sloped areas, surface runoff should be collected, and storm water should be discharged in a controlled manner. In no case should uncontrolled stormwater runoff be allowed to flow over slopes." Record 487.

Intervenor also notes that the hearings officer adopted extensive findings addressing stormwater management, at Record 22-24. In those findings, the hearings officer discusses various approaches to stormwater management that were presented in testimony, and ultimately agrees with intervenor that it is unnecessary to resolve at the preliminary plat stage the exact type of stormwater facility that will be required. The hearings officer determined that it was feasible to construct adequate stormwater management facilities, and left the technical details and choice of which type of facility to construct to the grading or building permit process.[9]

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[9] The findings state, in relevant part:

> "The Hearings Officer agrees with the Applicant that at this preliminary approval stage, determining whether the Applicant has shown it is feasible to obtain a grading permit is what is necessary. As is true with other aspects of this application (and other land division applications generally), it is not necessary - nor necessarily prudent - for the Hearings Officer to be considering highly specific, technical engineering data that relates to building and operating the broader, general use (the subdivision) the Hearings Officer approves through the land use process. Whether the Applicant must provide a 'regional' facility, a 'sub-regional' facility, one of each, several of one or none of them at all is not a question I am qualified to answer. In the opinion of the Hearings Officer, that is still an open question, which the county can definitively answer during the grading/building permit stage by experts trained in those technical details.
>
> "The Hearings Officer finds that the Applicant has demonstrated it is feasible to meet the requirements of CDC 410. The Hearings Officer has imposed a condition of approval in this order to ensure

Petitioners argue that "even if the Applicant is not required, at this stage, to make a final decision about which type of stormwater management will be constructed, the geotechnical report needs to discuss the potentially feasible approaches to stormwater in the context of landslide and soil issues." Petition for Review 18. However, petitioners do not explain why. As the county argues, CDC 410-4.1(D)(5) is an informational requirement, specifying the content of the engineering geology report that is submitted, in some circumstances, at a pre-application conference. Generally, informational requirements that must be submitted as part of the application (or in this case, pre-application) are not themselves approval criteria, and the absence of such information does not necessarily warrant reversal or remand unless the petitioner can establish that the missing information is necessary to establish compliance with an approval criterion. *Citizens for Responsible Development v. City of The Dalles*, 59 Or LUBA 369, 378 (2009); *Papadopoulos v. City of Corvallis*, 59 Or LUBA 384, 386 (2009); *see also Save Oregon's Cape Kiwanda Organization v. Tillamook County*, 177 Or App 347, 362, 34 P3d 745 (2001) (cautioning that failure to include information on landslide hazards in a required geologic hazard assessment may warrant remand if equivalent information is not found elsewhere

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that the Applicant meets those requirements and manages stormwater on the property consistent with the county's regulations." Record 23-24.

in the record and the information is necessary to establish compliance with development standards).

Petitioners do not cite, in the petition for review, any applicable approval standards that require a discussion of stormwater management approaches in the geology report or geotechnical report, in order to establish compliance with those standards. In the reply brief, petitioners argue that such information may be necessary to establish that compliance with "other standards in CDC 410" is feasible. Reply Brief 6. Petitioners also specifically cite to CDC 410-3.2, a grading permit approval standard, which requires a finding that "[p]roposed grading will not cause erosion to any greater extent than would occur in the absence of the proposed development or result in erosion, stream sedimentation, or other adverse off-site effects or hazards to life or property." However, under OAR 661-010-0039, a reply brief "shall be confined to responses to arguments in the [response briefs and] shall not include new assignments of error or advance new bases for reversal or remand." Petitioners' citations to CDC 410 provisions in the reply brief impermissibly expand on their arguments in the petition for review. Further, the only specific CDC 410 provision cited is a grading permit approval standard, not a preliminary plat approval standard.

In sum, petitioners have not established that the Hardman Report fails to include information required by CDC 410-4.1(D)(5) or that any informational deficiency undermines a finding of compliance with an applicable approval criterion, or otherwise warrants reversal or remand.

The second assignment of error is denied.

**THIRD ASSIGNMENT OF ERROR**

Petitioners challenge the county's findings that the proposed development will "have an adequate water supply," as required by CDC 423-11.[10]

As noted, intervenor initially proposed to supply water to the proposed development from one of two sources: (1) installing a water mainline from a nearby reservoir that is a community water source, or (2) drilling wells to serve each lot. Considerable opposition arose regarding those two approaches, including testimony that neither option offered a reliable source of water, given

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[10] CDC 423-11 provides:

> "All development shall be required to have an adequate water supply. Adequacy shall include:
>
> "423-11.1 Adequate supply for the use prior to issuance of a building permit (see Section 501-7.1, Critical Services).
>
> "423-11.2 Outside the UGB, when any Special Use of Article IV will require an amount of water in excess of what would normally be used if the property were developed for rural homesites, the following information:
>
> "A. An explanation of how the water will be supplied; and
>
> "B. An explanation of the potential impact of the proposed water system on the surrounding properties.
>
> "C. Approval of a Standard Subdivision outside the UGB proposing a community water supply shall be subject to the provisions of Section 423-11.2 A. and B."

limited reservoir capacity and a limited groundwater aquifer, and that drilling new wells may impact existing wells, which under current conditions sometimes run dry, or require expensive storage and filtration facilities to deal with limited groundwater supply.

At the end of the first open record period, intervenor introduced a potential third option as a variant on the groundwater option: install water tanks at each homesite, which could be filled by well water or, if well water were insufficient, by trucking in water to each homesite.[11] Later, at the end of the second open record period, intervenor submitted a raft of materials on water supply, including the water tank option. Record 242-323. That submittal included a letter with attachments from a water supplier regarding the logistics of trucking water to each site. Record 262-71. The supplier recommended that water tanks be at least

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[11] On the last date of the first open record period, intervenor submitted a memorandum regarding water service, which identified the following option:

> "C. Construct individual water holding tanks on each lot. The holding tanks may either be filled via wells if groundwater testing is favorable, or by water truck if necessary. These holding tanks would store water for home use and would serve as a reserve of water to fight fires during emergency situations. Holding tanks also provide a way to accommodate the use of low production wells since they can fill the tank slowly over an extended period of time. Holding tanks can range in capacity from 300 gallons to 20,000 gallons, and will be sized based on fire flow requirements and groundwater availability (see attached Figure 1 for example 2,000 gallon holding tank)." Record 662.

6,000 gallons in size, to allow a "full truckload delivery each time[.]" Record 262. The attachments include a photograph of one of the supplier's water trucks. Record 271.

In its final argument, intervenor presented the third option as an independent option, one that could feasibly supply the entirety of the required water for the subdivision, without the use of groundwater wells or other sources of water. Intervenor argued that the hearings officer did not need to approve any of the three identified options, but simply determine that at least one of the three options are technically "feasible," and leave the final choice to a later final plat stage that does not offer opportunity for public comment.

Intervenor cited a line of cases beginning with *Meyer v. City of Portland*, 67 Or App 274, 280 n 5, 678 P2d 741, *rev den*, 297 Or 82 (1984), for the proposition that in a multi-stage development process such as for subdivision plat approval, the local government may find compliance with first stage approval criteria that concern technical engineering issues based upon findings, supported by substantial evidence, that solutions to technical engineering issues are "feasible," meaning solutions to the relevant problems posed by a project are "possible, likely and reasonably certain to succeed." Under this approach, the local government may later approve one of the solutions determined to be feasible as part of the second stage approval process, which need not provide for public notice or participation.

Intervenor acknowledged that the current record might not support a finding that the first two options, community water or individual wells, are feasible. However, intervenor argued that the evidence showed that the third option, using water tanks and trucked-in water, could feasibly supply all the water required.[12]

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[12] Intervenor argued, as relevant:

> "The third option is to serve some or all of the properties with trucked-in water. This option is the least preferred, but it is the most certain from the standpoint of feasibility. Regardless of which of the second or third options is chosen, the Applicant is proposing to provide two water storage tanks on each lot. The first tank will be used for potable water, and the other tank will be used for fire suppression. In this manner, even if the wells are installed but either (1) fail after use or (2) are required to be turned off by the watermaster, the homeowners will still have potable water and fire suppression water.
>
> "The potable water tank will be sized around 6,000 gallons and will either be filled by the on-site well or on an as-needed basis by tanker trucks. * * *
>
> "* * * * *
>
> "Depending on water consumption, a 6,000-gallon water tank will need to be filled once every one or two months. Currently, the provision of such water by truck costs around $400 dollars per trip. *See* email dated March 31, 2025 from Josh Rhuman of Water Wagon, LLC, which is set forth at Exhibit 27 to the Applicant's Second Open Record Period Submittal. We also included some screenshots of Water Wagon's website, so that the Hearings Officer could understand the nature of their business. * * *" Record 55-56.

The hearings officer's decision did not evaluate the feasibility of the first two options, but instead evaluated only the feasibility of the third option, concluding that intervenor had established compliance with CDC 423-11, by demonstrating that it is feasible to supply the proposed development with trucked-in water.[13]

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[13] The hearings officer's decision states, in relevant part:

> "In its final argument to the Hearings Officer, the Applicant summarizes three options to provide water to residents of the subdivision, in the order the Applicant prefers. The first option is to use the LA Water Co-op system, based on 30 water right certificates the Applicant possesses. The Applicant's second option is to drill 15 exempt wells. Finally, the Applicant proposes to truck water into the site and fill storage tanks on each lot.
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> "Based on the language of CDC 423-11, the Hearings Officer agrees with the Applicant that, at the preliminary approval stage, it only needs to show it is feasible to provide an adequate water supply to serve the proposed subdivision. While all of the options are possible, substantial evidence shows that trucking the water into the subdivision is both likely and reasonably certain to succeed.
>
> "The Applicant states it will provide two storage tanks on the property, one for potable water and one for fire suppression, even if it is able to rely on option two for a water supply. The Applicant provides evidence of a company that delivers water to storage tanks throughout the region, including NW Oregon and specifically in Forest Grove. The Applicant's commitment to providing the tanks if its preferred option fails, and its identification of a going concern that would fill them, makes the third option likely. Because the Applicant has shown option three is possible and likely, the Hearings Officer finds that the third option is reasonably certain to

On appeal, petitioners argue that the findings and evidence do not support a conclusion that the first two options are feasible. With respect to the third option, installing water tanks and trucking in water, petitioners argue that the findings and record do not address (1) whether the proposed private roads can physically handle the weight of 6,000-gallon tanker trucks frequently serving each of the 30 proposed dwellings in perpetuity, (2) the impact of frequent water truck traffic on neighbors, and (3) whether the proposed water truck traffic fits within the scope of the easements for each private road.

**A. Preservation**

**1. *Rosewood* Demonstration re Options One and Two**

Respondents argue that petitioners' preservation statement under the third assignment of error violates OAR 661-010-0030(4)(d) as interpreted in *Rosewood*, LUBA No 2023-035 (Nov 1, 2023).

The third assignment of error alleges that "the decision contains insufficient and unsupported findings regarding water availability." Petition for Review 19. The body of the assignment of error challenges findings on all three water supply options presented to the hearings officer. The preservation section of that assignment of error in the petition for review states:

> "Petitioner and others raised this issue during the local proceedings. *E.g.*, Rec. 790-97, 337, 735-39, 750, 801, 804, 807, 812, 820, 1105,

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succeed in providing an adequate supply of water for use in the subdivision." Record 20 (footnotes omitted).

1108, 1112, 1115, 1116, 1123, 1129-30, 1162, 1174, 1181, 1240, 1247-48, 1280; *see* 58-59." *Id.*

The county and intervenor contend that the preservation section violates *Rosewood* because it lists a total of 36 record pages, but without specifying exactly where on those pages the issue presented in this assignment of error was raised. According to respondents, that lack of specificity violates OAR 661-010-0030(4)(d), and that violation cannot be dismissed as a technical violation of LUBA's rules under OAR 661-010-0005 because it prejudices respondents' substantial rights in this appeal by forcing them to comb through 36 pages to identify whether and where the issue was raised.

Petitioners' preservation statement here consists almost entirely of pin cites to individual pages in the record. True, there *are* many pin cites, but that presumably reflects the fact that water availability was a contested issue in the proceedings below, and numerous participants submitted comments on that issue. We disagree with respondents that the multiplicity of pin cites, in itself, violates OAR 661-010-0030(4)(d) or causes prejudice to the parties' substantial rights. We also disagree that the effort required to review each of the pin cites imposes a prejudicial burden on the parties. We have reviewed each of the cites, and they all state issues regarding water availability, focused on the initial two water supply options presented in the application and discussed at the hearing. No party disputes that the content of the cited pages are insufficient to raise issues with respect to those two options, for purposes of ORS 197.797(1).

### 2. *Rosewood* Demonstration re Option Three

None of the pages cited in the preservation statement raise any issues with respect to Option Three, to use storage tanks and truck in water if wells were unavailable or insufficient. OAR 661-010-0030(4)(d) provides that "[w]here an assignment raises an issue that is not identified as preserved during the proceedings below, the petition shall state why preservation is not required." The preservation statement for the third assignment of error does not include any explanation for why preservation of petitioners' challenges to Option Three were not required. Instead, petitioners argue, in a footnote in the reply brief, that:

> "To the extent that Intervenor argues that Petitioners did not raise a specific argument regarding the use of water trucks on the private roads, [Intervenor's Brief] at 26, that issue could not have been raised because the Applicant only submitted their information about water trucks on the last day of the second open record period. See Record Index, showing that Rec. 242-262 were submitted on April 10, 2025, the final day of the second and final open record period." Reply Brief 2, n 1.

In its response brief the county argues that LUBA should reject any attempt by petitioners to remedy their violation of OAR 661-010-0030(4)(d) via the reply brief because, under OAR 661-010-0039, the reply brief is confined to responses to arguments in the response briefs, and offering a new argument for why preservation should not be required would not allow respondents an adequate opportunity to respond, citing *Rosewood.*

In *Rosewood*, we explained:

> "Prejudice to responding parties from failure to comply with OAR 661-010-0030(4)(d) is also not remedied by an after-the-fact attempt

> to demonstrate preservation in a reply brief, because LUBA does not address issues presented for the first time in a reply brief, or at oral argument. * * * Moreover, although OAR 661-010-0039 allows a reply brief as of right, the reply brief is confined to 'responses to arguments in the respondent's brief[.]' To the extent we have sometimes previously interpreted OAR 661-010-0039 (2019) to allow a petitioner to satisfy the requirement in OAR 661-010-0030(4)(d) in a reply brief by providing citations to and explanation of where issues were raised, we now conclude that OAR 661-010-0030(4) and OAR 661-010-0039 do not allow it. Such an approach is, in effect, an unauthorized amendment of the petition for review.
>
> "We also reach that conclusion because to allow a petitioner to satisfy its obligation to demonstrate for the first time in the reply brief that an issue is preserved prejudices the responding parties' substantial rights where preservation is disputed, because at that point in the adversarial proceeding, they have already filed their responsive brief, and have no further opportunity to dispute a demonstration of preservation in a reply brief. * * * In short, a petitioner must demonstrate in the petition for review that an issue was preserved. A petitioner may not satisfy that obligation in a reply brief." LUBA No 2023-035 (slip op at 9-10) (citations and footnote omitted).

*Rosewood* did not involve a failure to state why preservation is not required under the third sentence of OAR 661-010-0030(4)(d), but we see no principled difference between a failure to demonstrate that an issue was preserved under the second sentence of the rule and a failure to demonstrate why preservation is not required, under the third sentence. In both cases, any prejudice to the parties' substantial rights caused by the violation cannot be remedied by making the required demonstration in the reply brief. Under *Rosewood*, if we were to consider the argument in footnote 1 of the reply brief that would compound, rather than remedy, the prejudice to the parties' substantial rights to a "reasonable

time to prepare and submit their cases, and a full and fair hearing." OAR 661-010-0005.

Even if we were to consider the argument set out in footnote 1 of the reply brief, that argument falls short of an adequate demonstration for why preservation is not required. Petitioners cite no authority or explanation for their position that preservation is not required because evidence regarding Option Three was not submitted until the final day of the second open record period. Without a more developed argument, LUBA is left to speculate why petitioners believe the timing of submissions during the proceedings below offered petitioners no reasonable opportunity to respond or raise objections to the evidence regarding Option Three, or what authority LUBA would invoke to conclude that preservation was not required. Accordingly, we agree with respondents that petitioners failed to demonstrate that their challenges to Option Three raised on appeal were either preserved below, or that preservation of those issues was not required. LUBA will not, therefore, consider petitioners' challenges to Option Three.

**B. Adequate Water Supply**

On the merits, petitioners first challenge the findings regarding Options One and Two, providing water from a community source or groundwater wells. Petitioners argue that to the extent the hearings officer found compliance or feasibility of compliance with CDC 432-11 based on Options One or Two, the record does not support those findings. Petitioners cite to evidence in the record, some of it from intervenor's own experts, that neither the community water

source nor the groundwater aquifer in the area are reliable sources of water for the proposed development. Petitioners also argue that the portion of intervenor's final argument addressing CDC 423-11, which the hearings officer adopted by reference, acknowledges the difficulties of relying on Options One or Two, and does not claim that either option is sufficient to support a finding of compliance or feasibility of compliance with CDC 423-11.

Intervenor responds that the findings addressing Options One and Two are "nonessential," and chides petitioners for wasting five pages attacking nonessential findings. We understand intervenor to argue that, because the hearings officer found that Option Three is feasible, any deficiency in the findings or supporting evidence regarding the feasibility of Options One and Two does not provide a basis for remand.

*Meyer* allows the local government to find compliance with an approval standard for multi-stage development such as a subdivision, notwithstanding some uncertainty regarding exactly which technical or engineering solutions will be adopted, as long as the local government adopts a finding, supported by substantial evidence, that the identified solutions are "likely and reasonably certain to succeed." 67 Or App at 282 n 5. If so, then the choice of which identified solution will be selected can be determined at subsequent development stages that do not provide for public participation. *Id.* at 282 n 6. In the present case, the hearings officer concluded in relevant part that Option Three is "reasonably likely to succeed in providing an adequate water supply" for the

subdivision. Record 20. As far as we can tell, the hearings officer adopted no such findings with respect to Options One and Two. Accordingly, we agree with intervenor that the findings discussing Options One and Two are "nonessential" to the hearings officer's ultimate conclusion that CDC 423-11 is satisfied, and that petitioners' challenges to those findings therefore do not provide a basis for remand.[14]

The third assignment of error is denied.

**FOURTH ASSIGNMENT OF ERROR**

As noted, intervenor proposed to access the subject property via two private roads created by several easements, SW Nelson Drive and SW Academy Way. CDC 348-7 requires that all lots either abut a public street or have "an easement of record at least 30 feet wide[.]" CDC 348-7.1 and 7.2. Further, CDC 348-7.3 requires that access roadways be approved, developed and maintained according to the requirements of the appropriate fire protection agency.

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[14] Because the hearings officer adopted no findings concluding that Options One or Two are "feasible" solutions to complying with CDC 423-11, it is arguable that if, at a subsequent stage of the subdivision application, intervenor seeks to implement Options One or Two, instead of Option Three, the county can approve Option One or Two only if the county first conducts an additional land use proceeding that allows public participation. That is because *Meyer* does not allow a local government to select a technical or engineering solution at a subsequent stage that does not allow public participation, *if* that solution was not evaluated at the first stage with public participation, and found, based on substantial evidence, to be "feasible," that is, "likely and reasonably certain to succeed." 67 Or App at 282 n 6. However, because no party advances any arguments on this point, we do not consider it further.

Under this assignment of error, petitioners argue that the "County incorrectly addressed access issues and the project fails to demonstrate that access is feasible." Petition for Review 28.

**A. Preservation**

Intervenor responds, initially, that petitioners failed to adequately demonstrate preservation of the issue raised under the fourth assignment of error. According to intervenor, the preservation statement in the petition for review provides a string of cites to approximately 70 pages, in 24 different documents, contrary to *Rosewood*.[15] Intervenor also faults petitioners for not explaining, for each cited page, how the access issues presented in this assignment of error are preserved on those pages.

With one exception discussed below, intervenor does not dispute that the letter and the other cited pages raised issues below regarding access with the specificity required by ORS 197.797(1), as evidenced by the fact that intervenor responded to those issues at length during the local proceeding. Intervenor argues only that the demonstration of preservation in the fourth assignment of error does not satisfy OAR 661-010-0030(4)(d).

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[15] The preservation section of the fourth assignment of error states:

> "Petitioner and others raised this issue during the local proceedings. *E.g.*, Rec. 21-22, 64-75, 155, 160-188, 338, 377-79, 732, 741-49, 753, 757-60, 801-2, 812, 819-20, 1115-16, 1118, 1125-28, 1131, 1156, 1162, 1183, 1191, 1211, 1214, 1239." Petition for Review 28.

Most of the cites in the preservation statement are pin cites to individual pages. As explained above, citations to specific pages in the record, even if those citations are numerous, do not present the same potential prejudice to the parties' substantial rights as a block citation to a large range of record pages. The preservation statement includes some block citations to what appear to be entire documents, for example Record 161-88, which is a letter with attachments from a lawyer for opponents that analyzes at length the legal validity of the easements at issue in this case, which is one of the issues raised in this assignment of error.

We agree with intervenor that a block citation to a lengthy multi-page document in its entirety, without any parenthetical description of the relevant issues raised in the cited document, or on which specific pages those issues are raised, is not consistent with the letter or purpose of OAR 661-010-0030(4)(d). However, the question is whether any deviation from OAR 661-010-0030(4)(d) is severe enough that it causes prejudice to the parties' substantial rights for purposes of OAR 661-010-0005. If not, then the violation of OAR 661-010-0030(4)(d) is a "technical violation" of our rules that does not warrant the remedy of summarily rejecting the associated assignment of error. Here, intervenor makes no effort to identify any prejudice to its substantial rights caused by the block citations in the preservation statement, but instead appears to argue for some kind of "per se" prejudice.

We reject the argument. Intervenor responded at length to the legal arguments set out in the letter at Record 161-88, both below and on appeal, and

is clearly familiar with that document. The hearings officer incorporated intervenor's arguments regarding access as findings. Record 22. We conclude that although the block citations in the preservation statement deviate from the requirements of OAR 661-010-0030(4)(d), the deviation does not prejudice any party's substantial rights. *See Kipp v. City of Astoria*, LUBA No 2024-012 (Dec 11, 2024) (no prejudice from a block citation in the preservation statement to a 15-page document where the findings address the issues raised in the document cited).

In the petition for review, petitioners also cite to ORS 92.090(2) in support of their arguments regarding access. ORS 92.090(2) requires that a tentative subdivision or partition plan clearly indicate any private roads and include all "reservations or restrictions relating to such private roads[.]" Petitioners argue that the preliminary plat map does not include the required information regarding restrictions or reservations related to the proposed private roads. However, intervenor argues that, while one party quoted large sections of ORS chapter 92 below, including ORS 92.090(2) at Record 791, no party developed any argument under the statute that gave respondents fair notice of any issue raised under the statute, as required by ORS 197.797(1). Petitioners do not respond to intervenor's waiver argument. We agree with intervenor that petitioners' argument regarding ORS 92.090(2) was not raised with sufficient specificity below, and that issue is waived.

### B. CDC 328-7 and the Legal Validity of Access Easements

On the merits, Petitioners argue that, during the proceedings below, opponents argued that intervenor failed to demonstrate that the proposed access to the 30-lot subdivision is consistent with the existing easements for the private roads used to reach the county road. Further, some of the subservient owners stated that they would not sign any new or revised easements to provide access to the subdivision. As noted, an opponent submitted letters from a lawyer reviewing the existing easements and opining that they were legally insufficient to authorize the proposed access. Given the dispute over whether the existing easements are legally sufficient to allow the proposed access, and given the unlikelihood of obtaining new or revised easements, petitioners argue that it was incumbent on the county to adopt findings that it is feasible for intervenor to obtain the easements required for access, and to impose conditions as needed to ensure compliance with CDC 348-7. *See Royal Blue Organics v. City of Springfield*, 81 Or LUBA 723, 755-56 (2020), *aff'd in part, rev'd and rem'd in part on other grounds*, 310 Or App 518, 487 P3d 440 (2021) (stating that where a local government imposes a condition of approval requiring the applicant to obtain easement rights, the local government is not required to find that it is feasible to obtain such easements, absent some indication that there is a legal or practical impediment to obtaining the easements).

In the present case, petitioners argue that the record includes evidence of both legal and practical impediments to obtaining the easements required by CDC

328-7. Petitioners assign error to the county's failure to adopt findings regarding feasibility of access, and failure to adopt adequate conditions of approval that will ensure resolution of the disputed access issues and compliance with CDC 328-7.

The hearings officer adopted the following finding addressing CDC 328-7:

> "As noted, the subject parcel abuts SW Laurelwood Road along its north property line. The proposed accesses onto SW Laurelwood Road are via access easement. A condition requires the Applicant to record the appropriate easements for access to the subdivided property." Record 28.

The condition apparently referenced, Condition V.B.1, requires that, prior to any ground-disturbing activity within each phase, including construction or modification for access, intervenor must submit to planning staff evidence of a

> "[r]ecorded easement (if applicable) demonstrating the right to perform grading, install utilities and/or implement erosion control measures (as applicable) has been obtained from the affected property owners when plans include work on an adjacent property." Record 10.

As noted, the hearings officer adopted by reference a portion of intervenor's final argument that, in part, addresses CDC 348-7. Record 22, n 13 (incorporating section II(C) of the final argument, found at Record 64-75). In the incorporated findings, intervenor takes the position that the legal dispute regarding the scope or validity of the three existing easements for SW Nelson Drive and SW Academy Way cannot be resolved in the land use hearing, as only

the circuit courts have jurisdiction to provide a definitive interpretation and resolution of the disputed easements. Record 65. The incorporated findings agree with opponents that the issue of the scope and legality of the existing access easements can only be resolved through private litigation in circuit court. *Id.*

On appeal, intervenor argues that CDC 348-7.2 requires only that the applicant identify the source of the required access, here, the three existing easements, but it does not require the hearings officer to inquire into the scope or validity of those easements, even if that were an appropriate role for the hearings officer. Under this view, intervenor argues, the hearings officer need not adopt any findings regarding the feasibility of obtaining the required easements, or impose conditions to ensure that the required easements are provided prior to development, because intervenor has already provided the required easements.

We disagree with that limited view of CDC 348-7.2. Where opponents below identify substantial legal impediments to existing access easements relied upon by the applicant, or substantial practical impediments to obtaining new or revised easements, CDC 348-7.2 is not satisfied simply by citing the existence of easements that underly the existing private access roads. While the hearings officer may not have the authority to definitively resolve legal disputes over the scope or validity of those easements, the existence of such disputes requires, at a minimum, that the hearings officer evaluate whether it is feasible to resolve those disputes or otherwise obtain the required easements, and impose conditions robust enough to ensure that the dispute is resolved or the required easements are

obtained prior to any subsequent stage of subdivision plat approval that requires resolution of the access issue. It bears repeating that preliminary plat approval is the only stage of the county subdivision process that provides for public participation, and accordingly, it is incumbent on the hearings officer to ensure that compliance with CDC 348-7.2, or at least feasibility of compliance with that code provision, is demonstrated during the preliminary plat phase. That demonstration must be supported by adequate findings of compliance or feasibility of compliance, and conditions ensuring that the required access is obtained prior the appropriate subsequent stage of the application.

The present adopted and incorporated findings fall short of that demonstration. The adopted and incorporated findings do not address the issue of whether the existing easements allow access to the proposed subdivision, or the feasibility of obtaining a judicial ruling or similar resolution to that issue, or the feasibility of obtaining new or revised easements.

More importantly, the hearings officer failed to impose conditions sufficient to ensure either resolution of the access dispute or, if not resolved, that the subdivision application does not proceed. Condition V.B.1, quoted above, was recommended in the initial staff report at Record 1084 and was adopted verbatim in the final decision. It requires only that intervenor submit a recorded easement (if applicable) demonstrating the right to perform grading, install utilities or implement erosion control measures (if applicable). Condition V.B.1 apparently represents a boilerplate staff condition rather than one crafted to

ensure resolution of the dispute over the access issue that developed through the course of the hearing. During the proceeding below, intervenor took the position that the existing easements are sufficient to provide lawful access to the proposed subdivision for all relevant purposes. As it is worded, Condition V.B.1 could be read to allow intervenor to simply re-submit the existing easements to planning staff, without any judicial or other resolution to the dispute, at a stage in the subdivision process where no notice or opportunity for public comment is available.

For the foregoing reasons, remand is necessary for the hearings officer to adopt findings addressing the feasibility of resolving the dispute over the scope and validity of the existing easements, and to impose conditions sufficient to ensure that required access is assured prior to final subdivision application plat approval.

The fourth assignment of error is sustained, in part.

The county's decision is remanded.