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

MICHAEL HALE,
Petitioner,

vs.

WASHINGTON COUNTY,
Respondent,

and

IN-N-OUT BURGER,
Intervenor-Respondent.

LUBA No. 2024-028

FINAL OPINION
AND ORDER

Appeal from Washington County.

Michael Hale filed the petition for review and argued on behalf of themselves.

No appearance by Washington County.

Keenan Ordon-Bakalian filed the intervenor-respondent's brief and argued on behalf of intervenor-respondent. Also on the brief were Garrett H. Stephenson and Schwabe, Williamson & Wyatt, P.C.

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

RYAN, Board Chair, did not participate in the decision.

AFFIRMED 08/19/2024

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

Opinion by Rudd.

NATURE OF THE DECISION

Petitioner appeals a county hearings officer's decision approving (1) a Special Use and Development Review for an approximately 3,885 square foot eating and drinking establishment (fast food restaurant) with drive-thru, outdoor seating and parking, and (2) Property Line Adjustments.

BACKGROUND

The subject property is a 2.24-acre parcel located north of SW Beaverton-Hillsdale Highway, south of SW Laurel Street, and 250 feet east of SW 107th Avenue. A Hawaiian Time restaurant formerly operated on the portion of the subject property designated 10565 SW Beaverton-Hillsdale Highway and an Azteca restaurant formerly operated on the portion of the property designated 10505 SW Beaverton-Hillsdale Highway. Intervenor applied for a Special Use and Development Review to redevelop the subject property with one fast food restaurant with drive-thru, outdoor seating and parking.[1]

The appealed decision follows our remand of the hearings officer's decision denying intervenor-respondent's (intervenor's) application to redevelop the subject property with a fast food restaurant, drive-thru, outdoor seating and parking. *In-N-Out Burger v. Washington County*, ___ Or LUBA ___ (LUBA No

[1] The subject property is also described as tax lots 1S114BC 2000, 2100, 2400 and 2401. The hearings officer approved property line adjustments removing lot lines from tax lots 2000, 2400 and 2401, consolidating three of the four existing tax lots into a single lot.

2022-083, Oct 27, 2023) (*In-N-Out*). We summarize the issues and holding in *In-N-Out* in detail here. As we explained in *In-N-Out*, the majority of the subject property is zoned Community Business District (CBD) with the northeast and northwest corners of the subject property zoned Office Commercial (OC). Eating and dining establishments are permitted uses in the CBD zone. Drive-thrus are permitted uses in the CBD zone subject to special use standards.[2] Both eating and drinking establishments with limited square footage and drive-thrus are permitted *as accessory uses* in the OC zone subject to applicable special use and accessory use standards. For example, Washington County Development Code (CDC) 312-3.2(A)(2) and (3) authorize eating establishments and drive-thrus as accessory uses when the standards in CDC 312.3.2(B) are met, including that "[t]he use is scaled to serve the tenants of the complex or surrounding office commercial area[.]" CDC 312-3.2(B)(1). The hearings officer determined that activity intervenor proposed in the OC zone was not allowed under the CDC and denied intervenor's application. Intervenor appealed the denial and no party intervened to defend the denial or challenge any findings or conclusions in the denial decision. The county did not file a response brief or otherwise defend the denial. We remanded the hearings officer's decision.

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[2] Drive-thrus are uses allowed under county code provisions authorizing "drive-in or drive-up" uses, that is, "[a]ny establishment or portion of an establishment designed and operated to serve a patron while seated in an automobile (not including drive-in theaters)." CDC 430-41.

Although we agreed with the hearings officer that the OC regulations prohibited certain of intervenor's proposed activity, we agreed with intervenor that the hearings officer was required to make findings as to whether there was a legal nonconforming use right to conduct the proposed activities in the OC zone, what, if any, was the extent of the nonconforming use right, and explain the basis for that finding.[3] *In-N-Out*, ___ Or LUBA at ___ (slip op at 26). We also remanded for the hearings officer to examine whether intervenor's proposed use was allowed as an alteration of a nonconforming use. *Id.*

The hearings officer also concluded that certain restaurant related activity could not be authorized on the OC portion of the property as a temporary use during the restaurant's high traffic volume opening period.[4] We agreed with intervenor that the hearings officer was required to adopt findings interpreting the term "similar" uses that qualify for a temporary permit. In addition, "[w]e agree[d] with [intervenor] that the hearings officer did not identify language in the CDC supporting its conclusion that multiple temporary permits or extensions

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[3] A nonconforming use is "[a] structure or use of land which does not conform to the provisions of [the CDC] or Comprehensive Plan lawfully in existence on the effective date of enactment or amendment of [the CDC] or Comprehensive Plan." CDC 106-141.

[4] Due to the popularity of intervenor's restaurant brand and the limited number of its restaurants in Oregon, higher levels of vehicle traffic were anticipated at the restaurant during an undefined opening period. A county code provision allows issuance of temporary permits for certain listed uses and similar uses for a period of up to one year. CDC 430-135.

of temporary permits are not permissible or requiring a finding that the temporary activity will end within one year." *In-N-Out*, ___ Or LUBA at ___ (slip op at 22).

On December 27, 2023, intervenor requested that the county initiate proceedings on the remand. On March 26, 2024, the hearings officer held an on-the-record hearing on remand, allowing all parties to submit additional argument without new evidence. Following the public hearing, the hearings officer adopted findings and concluded in part:

> "a. [Intervenor] sustained its burden of proof that restaurant related vehicle parking, maneuvering, and cross-circulation access is permitted as a nonconforming use that may be continued on the OC zoned portions of the site;
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> "b. Although restaurant drive-thru vehicle queueing was legally established in the OC zoned area in the northeast corner of the site, [intervenor] failed to demonstrate that this use was not discontinued or abandoned for more than one year. CDC 440-4. Therefore, restaurant drive-thru vehicle queueing may not be continued as a non-conforming use in the OC zoned portions of the site;
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> "c. It is feasible to operate the proposed restaurant drive-thru without allowing vehicles to queue in the OC zoned portions of the site;
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> "d. Drive-thru queueing cannot be approved as a temporary use in the OC zone because:
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> "i. Drive-thru queueing is not a temporary use listed in CDC 430-135; and
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> "ii. Drive-thru queueing cannot be approved as use that is similar to other permitted temporary uses pursuant to CDC 430-135.1.C(8);

> "e. The Director can approve additional one-year temporary permits allowing a temporary use to continue beyond the original approval period." Record 6-7.

The hearings officer ultimately approved intervenor's application, concluding:

> "Based on the findings and discussion provided or incorporated [in the final decision] * * * subject to the conditions of approval recommended by county staff, [intervenor] sustained the burden of proof that the proposal does or will comply with the applicable approval standards in the [CDC] subject to those conditions." Record 53.

This appeal followed.

SECOND ASSIGNMENT OF ERROR

Petitioner's second assignment of error is that the decision allows the restaurant operating hours to exceed the operating hours allowed within the OC zone. Intervenor responds that petitioner does not identify where the alleged error was preserved and that the assignment of error should be denied.

> "LUBA's rule at OAR 661-010-0030(4) sets out, in detail, the required elements of a petition for review. OAR 661-010-0030(4)(d) requires that the petition for review set forth assignments of error, and requires that '[e]ach assignment of error must demonstrate that the issue raised in the assignment of error was preserved during the proceedings below,' or explain why preservation is not required."[5] *Rosewood Neighborhood Association v. City of Lake Oswego*, ___ Or LUBA ___, ___ (LUBA No 2023-035, Nov 1, 2023) (slip op at 5).

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[5] Petitioner also fails to identify a standard of review for this assignment of error as required by OAR 661-010-0030(4)(d).

The petition for review does not include an assertion that petitioner argued below that intervenor's operating hours violated restrictions applicable to uses in the OC zone. As we explained in *Rosewood Neighborhood Association*,

> "Absent an argument that preservation is not required, it is improper for a petitioner to raise an unpreserved issue for review. It is the petitioner's burden to demonstrate that the issue raised on appeal was presented below, or explain why the preservation requirement does not apply. Failure to comply with that affirmative obligation results in prejudice to the responding parties where the failure improperly shifts the burden to the responding parties to determine whether the preservation obligation applies and whether the issues raised in an assignment of error were preserved." ___ Or LUBA at ___ (slip op at 7).

Absent any citations from petitioner in their petition for review identifying where this issue was raised before the hearings officer, we agree with intervenor that the second assignment of error was not preserved as required by our rule.

We also agree with intervenor that petitioner does not develop an argument that any restrictions the OC zoning places on restaurant operating hours are relevant to the hearings officer's decision. The hearings officer concluded that "[intervenor] sustained its burden of proof that restaurant related vehicle parking, maneuvering, and cross-circulation access is permitted as a nonconforming use that may be continued on the OC zoned portions of the site." Record 6. As explained in CDC 440-1:

> "A nonconforming use is a structure or use of land which does not conform to the provisions of [the CDC] or Comprehensive Plan, lawfully in existence on the effective date of enactment or amendment of [the CDC] or Comprehensive Plan. It is the intent of

> this Section to allow and regulate existing uses and structures that were lawfully established and are not now in conformance with the applicable regulations of [the CDC].
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> "* * * [I]t is not the purpose of this Section to force all nonconforming uses or structures to be eliminated or brought into conformance with existing standards * * *."

Drive-thru queuing is the only activity proposed in the OC zone that the hearings officer determined was not authorized as a nonconforming use and therefore was required to occur on the CBD zoned portion of the site. Petitioner does not explain how hours of operation restrictions in the OC zone are applicable to the parking, maneuvering, and cross-circulation access authorized by the hearings officer as a nonconforming use. We will not develop an argument for them. *Deschutes Development Co. v. Deschutes County*, 5 Or LUBA 218, 220 (1982).

The second assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

Petitioner's first assignment of error is that the decision is not supported by substantial evidence in the whole record because the record includes contradictory and misleading evidence. We will reverse or remand a decision not supported by substantial evidence in the whole record. ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely upon to reach a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). We are required to consider whether supporting evidence is rebutted or undermined by other evidence in the record, but we cannot reweigh the evidence. *Wilson Park Neighborhood Assoc. v. City of Portland*, 27 Or LUBA 106, 113 (1994).

As we explained in our resolution of the second assignment of error, petitioner bears the burden of establishing that error is preserved or that preservation is not required. Intervenor argues that petitioner did not preserve this assignment of error. We agree with intervenor that there is no statement by petitioner in the first assignment of error explicitly recognizing that preservation is required and stating where the alleged error was preserved, or stating that preservation is not required and explaining why. However, petitioner includes in their petition for review the assertion that "Travis Chesney presented oral testimony on numbers that were gathered regarding locations at Yorba Linda and Rancho Santa Margarita by Ganddini Group Inc. (See 001 Record page 14)." Petition for Review 8. Petitioner also states:

> "The argument was made that In-N-Out Burger would 'generate 458 fewer average daily trips compared to the potential traffic generated by the two existing restaurants on the site.' (See 001 Record page 13). The incorrect traffic assessment will impact the potential for queueing in the office commercial zone, which was stated in the most recent decision dated April 16, 2024 as follows: 'Drive-thru queueing cannot be approved as a temporary use in the OC zone'. (See 001 Record page 10)." Petition for Review 7.

In these statements, petitioner cites Record 10, 13 and 14. We have reviewed Record 13 and 14. They contain the hearings officer's summary of the history of the subject property and application and we are unable to glean any link to preservation of the alleged error by petitioner. However, at Record 10, we find a hearings officer's summary of testimony from petitioner and Chesney.

The hearings officer stated that petitioner summarized their written testimony that their company had historically maintained a flag pole on the western portion of the subject property, that they did not recall a drive-thru on the eastern portion of the subject property, and that the Azteca restaurant on the eastern part of the subject property closed before intervenor's application was filed. The hearings officer reports that petitioner also stated that the shared access drive between parcels did not always exist, that the drive-thru on the western portion of the site did not historically generate large lines, and asserted that intervenor's traffic would line up on the OC portion of the property. The hearings officer also stated that petitioner testified that their brother told them that lines at the In-N-Out restaurant in Keizer, Oregon exceeded those anticipated in intervenor's traffic analysis for the Keizer site.

With respect to Chesney, the hearings officer stated Chesney argued that the traffic analysis improperly used ITE Manual traffic numbers given that In-N-Out generates more traffic than ITE Manual reflects, and that because In-N-Out restaurants in Yorba Linda (reported 270 vehicles per hour at peak) and Rancho Santa Margarita (reported 248 vehicles per hour at peak) are located in smaller communities, more traffic should be expected on the subject property and that queue capacities will be exceeded. Record 10. We conclude that petitioner preserved their argument that there was not substantial evidence that a nonconforming use right remained in effect. We also conclude that petitioner preserved the argument that substantial evidence does not support the conclusion

that the drive-thru related use will not encroach on the OC portion of the site because that contrary evidence was submitted regarding traffic volumes.

In their petition for review, petitioner states that the nonconforming use status was lost because there is evidence that the use was discontinued for more than one year from the date of the Final Written Argument and Decision. Petition for Review 7. The hearings officer made extensive findings setting out historic restaurant operations on the property. Record 14-15. The hearings officer found:

> "Both restaurants continued to operate and the parking, drive aisles, and cross-access uses located in what is now the OC zoned portion of the site also continued without interruption for at least the past 20 years.
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> "i. Azteca Mexican Restaurant was later converted to Vagabundos Cosina Mexican Restaurant, *which was operating within less than one year from the date the application was filed.* (Exhibit OR1-g, Attachment 9).
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> "ii. At some point the Burger King building was converted to the current Hawaiian Time restaurant without changes to the existing building footprint. *The Hawaiian Time restaurant was operating at the time this application was filed.* (Exhibit OR1-g, Attachments 4, 10, and 11)." Record 15 (emphases added.)

Petitioner does not address the hearings officer's findings or otherwise set out any explanation of why evidence of a restaurant ceasing operation *after the date of the final written argument in the initial application* results in a loss of

nonconforming use status.[6] This subassignment of error is not developed and is denied.

In their petition for review, petitioner argues that the evidence is queuing will occur in the OC zone and cites Record 200 as showing more than 24 cars in the queue line on the CBD zoned portion of the property. However, we do not find a queuing illustration at Record 200.[7] Petitioner's argument is undeveloped and is denied.

Lastly, in their petition for review, petitioner argues that the statement that In-N-Out will generate 458 fewer average daily trips than the potential traffic associated with two restaurants on the subject property is incorrect. Petitioner argues that the 458 trip number is improperly based on the Ganddini Group Focused Traffic Analysis and not public testimony. Expert testimony may be substantial evidence notwithstanding the existence of conflicting evidence on an

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[6] Although petitioner does not direct our attention to it, CDC 440-4 provides, in part:

> "If a nonconforming use of land or structure is discontinued or abandoned for more than 1 year for any reason except bona fide efforts to market the property or structure, it shall not be resumed unless the resumed use conforms with the applicable requirements of [the CDC] at the time of proposed resumption."

[7] A site plan at Record 197 shows cars within the queue line but does not illustrate overflow would occur in the OC zone. Petitioner also does not challenge the hearings officer's findings that it is feasible to operate the drive-thru without queuing in the OC zone.

issue. *Cadwell v. Union County*, 48 Or LUBA 500, 508 (2005).[8] However, we will not consider the issue here. Although petitioner participated in the proceedings before the hearings official prior to our decision in *In-N-Out*, petitioner did not participate in intervenor's LUBA appeal. LUBA No 2022-083 Record 2, 78. Accordingly, intervenor argues that petitioner's assignment of error is barred by the waiver doctrine set out in *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992). The waiver doctrine precludes persons who did not, but could have, participated in the first appeal from raising issues that could have been raised in the first appeal. The hearings officer concluded in *In-N-Out*:

> "Neighbors' unsupported and subjective concerns are not sufficient to counter the expert analysis of the engineers, which is based on objective analysis, including actual traffic counts and nationally accepted engineering standards and analyses. * * *
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> "a. The traffic analyses are based on traffic counts from existing In-n-Out Burger locations and existing conditions on streets in the area near the site.

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[8] In *Cadwell* we concluded:

> "[W]here LUBA is able to determine that a reasonable decision maker could rely on the evidence the decision maker chose to rely on, findings specifically addressing conflicting evidence are unnecessary. We have examined the evidence petitioners cite us to with respect to elk. In our view, the county could reasonably have relied upon either set of experts with respect to elk. Therefore, the choice of which evidence to believe is up to the county." *Id.* at 516-17 (internal citation omitted).

"i. The applicant compared the current traffic counts to prior traffic counts taken before the onset of the Covid pandemic and determined that the current counts accurately reflect expected, non-Covid, traffic conditions.* * * There is no substantial evidence to the contrary.

"ii. Many persons argued that the applicant should have used traffic counts from the existing In-n-Out Burger location in Keizer, Oregon. However, as discussed by the applicant's representatives, the location, design, and operation of the Keizer location are different than this site. In addition, the Keizer location is still operating under 'opening' conditions, when higher traffic volumes are expected. The applicant's traffic analysis is based on 'normal' operating conditions, when traffic volumes are lower. The traffic counts used in the applicant's analysis are 25-30 percent higher than the traffic volumes listed in the ITE Manual. * * *

"iii. The traffic analysis deducted traffic generated by the existing restaurants on the site, based on counts of actual traffic generated by those restaurants, not the higher traffic generation projections in the ITE Manual. * * *." LUBA No 2023-083 Record 19-20.

Petitioner did not participate in *In-N-Out.* Petitioner therefore did not challenge the hearings officer's findings that the expert analysis is more compelling and thus given more weight than statements from the public or explain why the expert analysis is not substantial evidence on which a reasonable person would rely. Petitioner may not raise this assignment of error now.

The first assignment of error is denied.[9]

The decision is affirmed.

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[9] Intervenor also argued that waiver (*Beck*) barred the remainder of the first assignment of error as well the second assignment of error, because the issues could have been raised in *In-N-Out*. In *Setniker v. Polk County*, LUBA elected not to resolve a *Beck* argument because we agreed petitioner had not established that the county was required to evaluate impacts to a road. 63 Or LUBA 38 (2011), *aff'd in part, rev'd in part on other grounds*, 244 Or App 618, 260 P3d 800, *rev den*, 351 Or 216, 262 P3d 402 (2011). Similar to our resolution in *Setniker*, we need not resolve intervenor's *Beck* argument in response to the remainder of the first assignment of error or the second assignment of error, because those arguments are undeveloped.