

**Appendix V.A.3. LUBA 28.8.7. HEADNOTES FOR
ASSIGNMENT OF ERRORS
(28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand –
Unsupported by Substantial Evidence)
June 26, 2013**

LUBA HEADNOTES 28

28. LUBA SCOPE OF REVIEW

- 28.1 Generally
- 28.2 Denials

28.8 Grounds for Reversal/Remand

- 28.8.1 Generally
- 28.8.2 Lack of Jurisdiction
- 28.8.3 Unconstitutionality
- 28.8.4 Procedural Errors
- 28.8.5 Noncompliance with Applicable Law
- 28.8.6 Inadequate Findings
- 28.8.7 Unsupported by Substantial Evidence**

OAR 661-010-0030(4)(d)

OAR 661-010-0030(4)(d) “(4) Contents of Petition: The petition for review shall:”

“(d) Set forth each assignment of error under a separate heading. Where several assignments of error present essentially the same legal questions, the argument in support of those assignments of error shall be combined;”

LUBA HEADNOTES 28.8.7 R/R GROUNDS - UNSUPPORTED SUBSTANTIAL EVIDENCE (see Appendix V.A.3. LUBA) Headnote Index)

(<http://www.oregon.gov/LUBA/docs/headnotes/28.8.7.pdf>)

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where the critical finding in a hearings officer’s decision in a code enforcement proceeding is that petitioner had a longstanding regular practice of mowing grass and blackberry bushes in the riparian zone on his property, the only evidence that supports that finding is the testimony of the code enforcement officer based on field notes regarding conversations he had with petitioner that are not part of the record, petitioner testifies in the hearings before the hearings officer that he mowed in the riparian area on only one occasion, and it is not clear that the hearings officer even recognized that the testimony of petitioner and the code enforcement officer conflicted on the critical issue, remand is required. The hearings officer may be able to explain why he believed the code enforcement officer over petitioner, but without any explanation

his decision is not supported by substantial evidence. *Wigen v. Jackson County*, 63 Or LUBA 490 (2011).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A hearing official’s failure to require that the applicant for a group care home show exactly where the proposed home would be located within a proposed 7,700 square foot footprint, how large the home would be and what it would look like provides no basis for reversal or remand, where the applicable approval standard only requires that the home not have significant adverse impacts, and the hearing official explains that the potential number of residents and other operational characteristics of the home are known and the impacts of the home are more likely to be attributable to the operational characteristics than the design, size and location of the home. *Phillips v. Lane County*, 62 Or LUBA 92 (2010).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Although a hearing official is entitled to rely on the expert opinion of a county sanitarian that a required septic drain-field expansion is feasible, where opponents offer a detailed explanation for why the subject property may not be able to accommodate the required expansion and replacement drain-field, the county sanitarian must supply more than an unexplained expression of belief that the needed expansion is feasible. *Phillips v. Lane County*, 62 Or LUBA 92 (2010).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A local government decision that determines that an entire property is located on a foredune and denies an application for a dwelling based on that determination will be remanded where the findings do not explain why the local government reached the conclusion it reached and the conclusion is not supported by any evidence in the record identified by the local government. *Rudell v. City of Bandon*, 62 Or LUBA 279 (2010).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. The lack of evidence in the record regarding depth or location of contaminated groundwater on a mining site and the possibility that groundwater might enter the adjacent river is not a basis to reverse or remand under a code provision requiring consideration of impacts on conflicting uses within 250 feet of the property, where the only conflicting use identified is a city water intake located 3,500 feet upstream of the mining site beyond the head of tide, and the petitioner cites no evidence or argument suggesting how contaminated groundwater from the site could migrate upstream above the head of tide to impact the municipal water intake. *Oregon Shores Cons. Coalition v. Curry County*, 61 Or LUBA 8 (2010).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Although a local government land use decision maker is entitled to choose between conflicting believable expert testimony, where the decision maker does not demonstrate that it recognized the conflicting expert testimony and chose to believe one expert’s testimony rather than the other expert’s testimony, remand is required. *Gould v. Deschutes County*, 59 Or LUBA 435 (2009).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Erroneous information, if relied upon by a city council in rendering a land use decision, might result in a decision that is not supported by substantial evidence. But where petitioner fails to identify any erroneous information, petitioner provides no basis for reversal or remand. *Bowers v. City of Eugene*, 58 Or LUBA 51 (2008).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where the permission of an adjoining private landowner is necessary to provide access to proposed development, the applicant need not submit evidence that the adjoining landowner has granted permission or that it is feasible for the landowner to grant permission, as long as such permission is not precluded as a matter of law and the local government imposes conditions ensuring that permission will be obtained prior to final development approval. *Holbrook v. City of Rockaway Beach*, 58 Or LUBA 179 (2009).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A county errs in taking “official notice” of evidence that is not in the record where it purports to take official notice of the scenic qualities of an area and the decision relies on those qualities. *Hegele v. Crook County*, 56 Or LUBA 1 (2008).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Arguments that merely cite to opposing testimony and contend that that testimony should be believed over the evidence the local government chose to rely upon are insufficient to demonstrate that the decision is not supported by substantial evidence. *Kane v. City of Beaverton*, 56 Or LUBA 240 (2008).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A criterion that requires a county to find that a proposed subdivision is “consistent with the general nature of the area” is very subjective. Where the county’s findings cite the existence of many existing small parcels in the area that are similar in size to the proposed subdivision lots and petitioners merely cite concerns about possible interference with farming operations and a wildlife refuge, the concerns that petitioners cite are not so overwhelming that the county was obligated to acknowledge and expressly address those concerns in its findings. *Hines v. Marion County*, 56 Or LUBA 333 (2008).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where two 25-foot test pits show an aggregate layer that is at least 20 feet deep and shows no sign of diminishing and the decision maker does not seem to have appreciated that the test pits were consistent with the first 25 feet of two deep borings located elsewhere on the site that showed an aggregate layer of far more than the 25-foot width required to qualify as a significant aggregate resource site under OAR 660-023-0180(3)(d)(B)(ii), remand is required so that the county can make it clearer that it understood the significance of the two 25-foot test pits. *Westside Rock v. Clackamas County*, 56 Or LUBA 601 (2008).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Failure to submit required information in the application materials is not necessarily a basis for remand, if the respondent identifies other evidence in the record that is

sufficient to support a finding of compliance with the approval criteria, or at least explains why required information is not necessary to support the decision. *Brodersen v. City of Ashland*, 55 Or LUBA 350 (2007).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where petitioners’ evidence contradicted the applicant’s expert’s assumptions and conclusions regarding the projected volume of sewage and the adequacy of the proposed treatment methods, and nothing in the record responded to or rebutted that evidence, it was not reasonable for the county to rely on intervenor’s evidence in light of petitioners’ contradictory and un rebutted evidence. *Oregon Shores Conservation Coalition v. Coos County*, 55 Or LUBA 545 (2008).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Remand is necessary where the city concludes based on petitioner’s traffic impact analysis that proposed development will cause intersection performance to fall below the minimum standard, but the city misconstrues the analysis, which indicates that the proposed development will not cause the intersection to fall below the minimum performance standard. *Vista Construction LLC v. City of Grants Pass*, 55 Or LUBA 590 (2008).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. To obtain remand of development approval based on evidentiary grounds, it is insufficient to simply cite the evidence that the hearings officer rejected and argue that the evidence undermines the hearings officer’s ultimate evidentiary choice. The petitioner must also challenge and establish error in the findings in which the hearings officer explained why he found petitioner’s evidence unreliable. *Wal-Mart Stores, Inc. v. City of Gresham*, 54 Or LUBA 16 (2007).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A hearings officer’s partial reliance on an ambiguous easement to determine that an applicable approval criterion was not met was not unreasonable in light of the easement’s confusing language and other evidence in the record regarding that language. *Adams v. Jackson County*, 54 Or LUBA 103 (2007).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A hearings officer is not obligated to disregard evidence placed in the record by an applicant that creates a question about whether an applicable approval criterion is met, even if the applicant later repudiates or explains some of that evidence, where other evidence remains unexplained. *Adams v. Jackson County*, 54 Or LUBA 103 (2007).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. In resolving an evidentiary challenge, LUBA will not consider evidence supporting the application (1) that was submitted as part of final legal argument after the evidentiary record closed, and (2) that the hearings officer declined to consider for that reason. *Lenox v. Jackson County*, 54 Or LUBA 272 (2007).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a hearings officer’s evaluation of the evidence is based in part on a considered assessment that one set of witnesses is more credible or reliable than others with respect to a disputed factual issue, it will be a rare circumstance where LUBA has a basis to overturn that credibility judgment. *Applebee v. Washington County*, 54 Or LUBA 364 (2007).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A hearings officer does not err in determining that property that is accessed directly from a county road meets a code requirement for access for a home occupation permit, even though adjoining property owners may possess a right to use that access as well. *Merrill v. Clackamas County*, 54 Or LUBA 713 (2007).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A city’s findings that applicable transportation criteria were satisfied based on an applicant’s transportation impact analysis (TIA) is supported by substantial evidence, notwithstanding the TIA’s reliance on some traffic counts that were more than 12 months old, where the requirement that traffic counts be less than 12 months old was not absolute and some of the traffic counts used in the TIA were less than 12 months old. *Lubischer v. City of Hillsboro*, 53 Or LUBA 143 (2006).

28.8.7 LUBA Scope of Review - Grounds for Reversal/Remand - Unsupported by Substantial Evidence. A broadcast tower approval criterion that requires a decision maker to determine whether identified “public benefits outweigh any impacts which cannot be mitigated” is subjective. In assessing a findings and evidentiary challenge to a decision maker’s weighing of public benefits, the question is whether that weighing is (1) inadequately explained (necessitating a remand for additional findings) or (2) petitioners cite are not so overwhelming that the county was obligated to acknowledge and expressly address those concerns in its findings. *Hines v. Marion County*, 56 Or LUBA 333 (2008).

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28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Failure to submit required information in the application materials is not necessarily a basis for remand, if the respondent identifies other evidence in the record that is sufficient to support a finding of compliance with the approval criteria, or at least explains why required information is not necessary to support the decision. *Broderson v. City of Ashland*, 55 Or LUBA 350 (2007).

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FOR FURTHER HEADNOTES GO TO:

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