

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

3
4 KEVIN GUAY and VICKI GUAY,
5 *Petitioners,*

6
7 vs.

8
9 CLACKAMAS COUNTY,
10 *Respondent,*

11
12 and

13
14 WELKIN ENGINEERING, P.C., JENSEN HUFFMAN,
15 and HUFFMAN K9 OBEDIENCE LLC,
16 *Intervenors-Respondents.*

17
18 LUBA No. 2024-050

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Clackamas County.

24
25 Jennifer M. Bragar filed the petition for review and reply brief and argued
26 on behalf of petitioners. Also on the brief was Jay M. Harris and Tomasi Bragar
27 DuBay.

28
29 Caleb Huegel filed the joint respondent's and intervenor-respondent's
30 brief and argued on behalf of respondent.

31
32 E. Michael Connors filed the joint respondent's and intervenor-
33 respondent's brief and argued on behalf of intervenors-respondents. Also on the
34 brief was Hathaway Larson LLP.

35
36 RYAN, Board Member; ZAMUDIO, Board Chair; RUDD, Board
37 Member, participated in the decision.

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REMANDED

12/12/2024

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

Opinion by Ryan.

1

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county hearings officer decision approving a
4 conditional use permit (CUP) for a dog boarding kennel and a nonconforming
5 use of an existing building, a portion of which will be used for dog kennels, on
6 property zoned Exclusive Farm Use (EFU).

7 **FACTS**

8 The subject property is approximately 5.25 acres in size and zoned EFU.
9 The property is developed with an existing building that is located approximately
10 5.3 feet from the east property line. Intervenor-respondent Huffman K9
11 Obedience LLC (intervenor) currently conducts dog training classes on the
12 property.¹ Properties in the immediate vicinity of the subject property, including
13 petitioners' property, are zoned EFU. Petitioners' property, on which they farm
14 hazelnuts, abuts the east property line of the subject property. The subject

¹ The county found that intervenor's dog training classes are an allowed use on EFU land and do not require conditional use approval. Record 9 ("Dog training classes that meet the standards of [Clackamas County Zoning and Development Ordinance (ZDO)] 401.05(D)(6) are allowed outright; however, if the training classes exceed those limitations, then a conditional use permit would be required. The applicants provided a signed affidavit from the property owner acknowledging the limitations of dog training set forth in [ZDO] 401.05(D)(6) and agrees to stay within those limitations. Therefore, a conditional use permit is not necessary for the dog training activities on site[.]"). *See also* ZDO Table 401-1, 401.05(D)(6); ORS 215.283(1)(x).

1 property is located on Pelican Court, which serves as an access road to a
2 subdivision of which the subject property is a part. Record 22.

3 Intervenor-respondents Welkin Engineering, P.C., Jensen Huffman, and
4 Huffman K9 Obedience LLC (together, intervenors) applied for a CUP for a dog
5 boarding kennel that will accommodate up to 16 dogs in separate, individual
6 kennels. Intervenor also requested nonconforming use verification and alteration
7 of the existing building for use as part of the dog kennel. Intervenor proposed
8 locating eight of the individual kennels within an approximately 750-square-foot
9 portion of the existing building, and the additional eight individual kennels within
10 an approximately 650-square-foot new structure. Each individual kennel includes
11 an outdoor dog run, which the boarded dog can access during the daytime.

12 County planning staff recommended approval of the application. After a
13 hearing, the hearings officer issued a decision approving the CUP and the
14 nonconforming use, with conditions. This appeal followed.

15 **FIRST ASSIGNMENT OF ERROR**

16 Petitioners argue that the county misconstrued the law and made
17 inadequate findings unsupported by substantial evidence in finding that the
18 proposed use satisfies Clackamas County Zoning and Development Ordinance
19 (ZDO) 401.05(A)(1), ORS 215.296(1), and ZDO 1203.03(D) without an
20 adequate wastewater management plan.

21 ZDO Table 401-1 provides that “[c]ommercial dog boarding kennels[]”
22 may be allowed as a conditional use in the EFU zone, subject to ZDO

1 401.05(A)(1).² ZDO 401.05(A)(1) implements and adopts ORS 215.296(1),
2 which we refer to as the farm impacts test. ZDO 401.04(A)(5) provides that
3 conditional uses are subject to additional standards at ZDO 1203, Conditional
4 Uses.

5 ZDO 401.05(A)(1), mirroring ORS 215.296(1), provides that the proposed
6 use may be approved only where the use:

7 “a. Will not force a significant change in accepted farm or forest
8 practices on surrounding lands devoted to farm or forest use; and

9 “b. Will not significantly increase the cost of accepted farm or
10 forest practices on surrounding lands devoted to farm or forest use.”

11 ZDO 1203.03(D) is a county conditional use criterion that requires a
12 finding that the proposed use will not

13 “alter the character of the surrounding area in a manner that
14 substantially limits, impairs, or precludes the use of surrounding
15 properties for the primary uses allowed in the zoning district(s) in
16 which surrounding properties are located.”

² ORS 215.283(2) provides, in part:

“The following nonfarm uses may be established, subject to the approval of the governing body or its designee in any area zoned [EFU] subject to ORS 215.296:

“* * * * *

“(n)(A) Commercial dog boarding kennels[.]”

1 **A. Preservation**

2 Petitioners argue that the decision is not supported by adequate findings or
3 substantial evidence in concluding that the proposed use satisfies ZDO
4 401.05(A)(1), ORS 215.296(1), and ZDO 1203.03(D) without an adequate
5 wastewater management plan. The county and intervenors (together,
6 respondents) respond, initially, that petitioners failed to adequately preserve this
7 argument because petitioners' comments during the local proceedings below
8 were different than the issue petitioners advance now before LUBA, and, thus,
9 petitioners have waived that issue. ORS 197.835(3); ORS 197.797(1).

10 Respondents argue that petitioners' comments below

11 “do not mention ZDO 401.05(A)(1), ORS 215.296, or ZDO
12 1203.03, argue that a waste management plan is required or
13 comment on [i]ntervenors' waste management plan. Rather,
14 [p]etitioners' comments were limited to their claim that a dog kennel
15 is a non-EFU use, inherently inconsistent with farm uses and cannot
16 be operated in a manner that will avoid impacts to their hazelnut
17 farm.” Joint Respondent's and Intervenor-Respondent's Brief 10
18 (citation omitted).

19 ORS 197.835(3) requires that LUBA “may only review issues raised by
20 any participant before the local hearings body as provided by ORS 197, 195,
21 197.622 or 197.797, whichever is applicable.” ORS 197.797(1), in turn, requires
22 that:

23 “An issue which may be the basis for an appeal to [LUBA] shall be
24 raised not later than the close of the record at or following the final
25 evidentiary hearing on the proposal before the local government.
26 Such issues shall be raised and accompanied by statements or
27 evidence sufficient to afford the governing body, planning

1 commission, hearings body or hearings officer, and the parties an
2 adequate opportunity to respond to each issue.”

3 The “raise it or waive it” principle does not limit the parties on appeal to the exact
4 same arguments made below, but it does require that the issue be raised below
5 with sufficient specificity to prevent “unfair surprise” on appeal. *Boldt v.*
6 *Clackamas County*, 21 Or LUBA 40, 46, *aff’d*, 107 Or App 619, 813 P2d 1078
7 (1991); *Friends of Yamhill County v. Yamhill County*, LUBA No 2021-074 (Apr
8 8, 2022), *aff’d*, 321 Or App 505 (2022) (nonprecedential memorandum opinion),
9 *rev den*, 370 Or 740 (2023) (slip op at 5-6). A particular issue must be identified
10 in a manner detailed enough to give the local government and the parties fair
11 notice and an adequate opportunity to respond. *Boldt*, 21 Or LUBA at 46. When
12 attempting to differentiate between “issues” and “arguments,” there is no “easy
13 or universally applicable formula.” *Reagan v. City of Oregon City*, 39 Or LUBA
14 672, 690 (2001).

15 In their preservation statement in the petition for review, petitioners state:

16 “Petitioners preserved this issue by submitting comments during the
17 [c]ounty’s review regarding the adverse impacts from uncontained
18 dog kennel waste on their farming operations. Rec[ord] 133-35.
19 Petitioners asserted that water contaminated by dog waste will likely
20 contaminate their hazelnut harvest and has the potential to
21 contaminate the harvest of many hazelnut farms in the area.
22 Rec[ord] 133. Petitioners specifically stated that ‘dog kennel waste
23 will exclude us from harvesting nuts from the ground’ and that ‘no
24 harvest means no income[.]’ Rec[ord] 135.” Petition for Review 11.

25 In their reply brief, in response to respondents’ waiver argument, petitioners point
26 out that what is required for preservation is “fair notice” to the local government

1 and the parties that the issue is being raised by petitioners, not that petitioners
2 presented the exact same arguments as below. Reply Brief 1; *Boldt*, 21 Or LUBA
3 at 46.

4 We have reviewed petitioners' comments at Record 133 to 135 and
5 conclude that petitioners adequately raised the issue of compliance with ZDO
6 401.05(A)(1), which, again, implements ORS 215.296(1). Record 133 describes
7 potential impacts to petitioners' hazelnut farming operations due to potential
8 wastewater from the proposed use, and Record 135 cites ZDO 401.05(A)(1) and
9 explains that

10 “[u]ses may be approved only where such uses: **a.** Will not force a
11 significant change in accepted farm or forest practice on
12 surrounding lands devoted to farm or forest use, – (dog kennel waste
13 will exclude us from harvesting nuts from the ground) and **b.** Will
14 not significantly increase the cost of accepted farm or forest
15 practices on surrounding lands devoted to farm or forest use – (and
16 no harvest means no income).” (Boldface in original, emphasis
17 omitted.)

18 These statements were adequate to give the respondents fair notice that
19 petitioners were raising issues under ZDO 401.05(A)(1) and ORS 215.296(1)
20 related to potential impacts to petitioners' hazelnut farming operation due to
21 potential wastewater from the proposed use.

22 We also conclude that petitioners adequately raised the issue of wastewater
23 impacts to their hazelnut farm as it relates to compliance with ZDO 1203.03(D).
24 Although petitioners do not specifically cite ZDO 1203.03(D) or its operative
25 terms in their comments at Record 133 to 135, their statements were adequate to

1 raise the issue that wastewater from the dog kennels would “substantially limit”
2 or “impair” their hazelnut farming operation, a primary use allowed in the EFU
3 zone. *See, e.g.*, Record 133 (wastewater carrying dog waste onto petitioners’
4 property “would render the entire crop unsellable, and would cause substantial
5 economic loss.”). In addition, it is evident from the challenged decision itself that
6 the county had fair notice that this issue was raised; the wastewater contamination
7 issue was considered and responded to by the county in its findings addressing
8 ZDO 1203.03(D). *See* Record 13-14 (findings addressing wastewater
9 contamination under ZDO 1203.03(D)); *Nehmzow v. Deschutes County*, 81 Or
10 LUBA 571, 579 (2020), *aff’d*, 308 Or App 533, 479 P3d 340 (2021) (citing *Boldt*,
11 107 Or App at 623 (explaining that the objective of ORS 197.797(1) is to “afford
12 the decisionmaker and the parties ‘an adequate opportunity to respond to each
13 issue.’ * * * The plain thrust of that language is that the statute requires no more
14 than fair notice to adjudicators and opponents[.]”).

15 **B. Adequate Findings/Substantial Evidence**

16 Petitioners argue that the county “failed to adequately address
17 [p]etitioners’ concerns regarding the impacts to their farm and the other farms
18 stemming from kennel wastewater travelling to [petitioners’] property and
19 contaminating hazelnut crops.” Petition for Review 13. Petitioners argue that the
20 county failed to require a wastewater management plan that adequately disposed
21 of wastewater generated by the kennel, and that failure means that the county’s

1 findings that ZDO 401.05(A)(1), ORS 215.296(1), and ZDO 1203.03(D) are
2 satisfied are inadequate and unsupported by substantial evidence.

3 Generally, findings must (1) address the applicable standards, (2) set out
4 the facts relied upon, and (3) explain how those facts lead to the conclusion that
5 the standards are met. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992).
6 Findings must address and respond to specific issues relevant to compliance with
7 applicable approval standards that were raised in the proceedings below. *Norvell*
8 *v. Portland Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979). “What is
9 needed for adequate judicial review is a clear statement of what, specifically, the
10 decision-making body believes, after hearing and considering all the evidence, to
11 be the relevant and important facts upon which its decision is based.” *South of*
12 *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 21, 569 P2d 1063
13 (1977).

14 Substantial evidence is evidence a reasonable person would rely on in
15 making a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608
16 (1993). A finding of fact is supported by substantial evidence if the record,
17 viewed as a whole, would permit a reasonable person to make that finding.
18 *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988). In reviewing
19 the evidence, we may not substitute our judgment for that of the local decision
20 maker. Rather, we must consider all the evidence to which we are directed and
21 determine whether, based on that evidence, a reasonable local decision maker

1 could reach the decision that it did. *Id.* at 358-60; *1000 Friends of Oregon v.*
2 *Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

3 **1. ZDO 401.05(A)(1) and ORS 215.296(1)**

4 As cited above, ZDO 401.05(A)(1) provides that the proposed use may be
5 approved only where the use:

6 “a. Will not force a significant change in accepted farm or forest
7 practices on surrounding lands devoted to farm or forest use;
8 and

9 “b. Will not significantly increase the cost of accepted farm or
10 forest practices on surrounding lands devoted to farm or forest
11 use.”

12 *See also Stop the Dump Coalition v. Yamhill County*, 364 Or 432, 435 P3d 698
13 (2019) (explaining ORS 215.296). The farm impacts test is applied to specific
14 farm practices on individual farms. *Id.* at 459. The applicant carries the burden
15 of proving that ORS 215.296(1) has been met. *Id.* at 458.

16 The entirety of the county’s findings with respect to ZDO 401.05(A)(1)
17 state:

18 “The kennel will reduce the number of vehicle trips on Pelican
19 Court, a gravel road, because [intervenors’] clients will not have to
20 travel back and forth to the site each day when their dog is
21 participating in a multi-day training session. Neighbors argued that
22 the presence of dogs on the site will create anxiety for livestock.
23 However, they failed to provide any support for that assertion. Dogs
24 are common in EFU zones and on properties with livestock. As
25 noted in the testimony at the hearing, several area residents also own
26 dogs. The applicants state that dogs are not permitted to roam free
27 or bark while on the premises; therefore, they would pose no threat
28 or harm to any surrounding livestock if present. The business is not

1 associated with farm or forest uses and will not pose as competition
2 in the same market that farmers or forestry operations do business
3 in. The dog kennel will not impact farming costs or the price of farm
4 products. This criterion is met.” Record 10 (citation omitted).

5 Petitioners argue that the county’s findings regarding ZDO 401.05(A)(1) and
6 ORS 215.296(1) fail to respond to petitioners’ concerns that potential wastewater
7 generated by the kennel will impact their hazelnut farming operation.

8 We agree with petitioners that the findings are inadequate. The findings
9 fail to adequately identify the farm uses and practices on surrounding lands,
10 including petitioners’ property, and fail to address petitioners’ concerns
11 regarding potential wastewater from the proposed use impacting their hazelnut
12 farming operation. *Norvell*, 43 Or App at 853. On remand, the county must
13 identify “the surrounding lands, the farms on those lands, the accepted farm
14 practices on each farm, and the impacts of the proposed nonfarm use on each
15 farm practice[.]” *Stop the Dump*, 364 Or at 444. Even if the county ultimately
16 concludes that the use will not result in any significant impacts, substantial
17 evidence and adequate findings must support that conclusion.

18 2. ZDO 1203.03(D)

19 ZDO 1203.03(D) requires a finding that the proposed use will not

20 “alter the character of the surrounding area in a manner that
21 substantially limits, impairs, or precludes the use of surrounding
22 properties for the primary uses allowed in the zoning district(s) in
23 which surrounding properties are located.”

24 The county found with respect to ZDO 1203.03(D), in relevant part:

25 “The site is in the EFU zoning district and is surrounded by other

1 properties in the EFU district. Primary uses of the EFU district are
2 included in ZDO [s]ection 401, and primarily include farming and
3 forestry uses. Pelican Court is the access road to the Canby-Needy
4 Ranchettes subdivision. The subdivision was platted in 1972 and
5 lends itself to a rural residential neighborhood of lot[s] sized
6 between two and ten acres. The surrounding area is similarly
7 developed with rural homesites and farm land.

8 “* * * * *

9 “The hearings officer finds that the proposed kennel use will not
10 create a significant risk of contamination or odors. As noted above,
11 the existing dog training use is permitted and the hearings officer
12 has no authority to impose conditions on that use. This review is
13 limited to the proposed kennel facility. Dogs in the kennel will be
14 confined inside of a building or covered run, where feces and urine
15 are not exposed to rain and runoff. [Intervenors’] staff pick up feces
16 by hand and store it in waste containers which the local solid waste
17 provider collects and disposes on a weekly basis. Dog feces are not
18 disposed of in the septic system serving the site. [Intervenors’] staff
19 clean the kennels with mops, rather than hoses that could generate
20 runoff. Dog waste may generate odors, however, given that waste is
21 contained in plastic bags which are then placed in trash containers,
22 combined with the size of the site, any odors are unlikely to be
23 detectable offsite. In addition, such odors are not inconsistent with
24 the character of the EFU zone, where a wide variety of potentially
25 odor generating agricultural activities are allowed.

26 “* * * * *

27 “Based on the above, the hearings officer finds that the proposed
28 development will not alter the character of the surrounding area, and
29 will not substantially limit, impair or preclude the use of
30 surrounding properties for the primary uses allowed. This criterion
31 is met.” Record 12-14.

32 Petitioners argue that these findings are inadequate and unsupported by
33 substantial evidence. Respondents respond that the hearings officer relied on

1 intervenors' plan introduced into the record for managing waste from the
2 boarding operation consisting of immediate removal and storage of dog waste
3 and use of mops instead of hoses to clean up waste and avoid runoff. We conclude
4 that the county's ZDO 1203.03(D) findings regarding wastewater are adequate
5 and supported by substantial evidence.

6 The first assignment of error is sustained, in part.

7 **SECOND ASSIGNMENT OF ERROR**

8 Petitioners argue that the county failed to adopt any findings regarding
9 ZDO 1006.05. ZDO 1006.05(A) provides:

10 "All development that requires onsite wastewater treatment shall
11 receive approval for the system from the [c]ounty prior to submittal
12 of a land use application for development. Onsite wastewater
13 treatment systems shall be installed pursuant to: [ORS] 454.605
14 through 454.745; [OAR] chapter 340, divisions 71 and 73; and the
15 policies of the [c]ounty."

16 Petitioners argue that the county was required to adopt findings under ZDO
17 1006.05 because "wastewater is associated with this application and needs
18 management[.]" Petition for Review 25. Petitioners assert that this issue was
19 preserved below at Record 133 and 129. In the alternative, petitioners argue that
20 preservation is not required because the lack of adequate findings addressing
21 ZDO 1006.05 did not arise until the decision was made.

22 Respondents respond that this issue was not preserved below, and that
23 petitioners were required to but did not raise the issue during the proceedings

1 below. According to respondents, this issue is waived. ORS 197.835(3); ORS
2 197.797(1).

3 A particular issue must be identified in a manner detailed enough to give
4 the decision-maker and the parties fair notice and an adequate opportunity to
5 respond. *Boldt*, 107 Or App at 623; *see also Vanspeybroeck v. Tillamook County*,
6 221 Or App 677, 691 n 5, 191 P3d 712 (2008) (“[I]ssues [must] be preserved at
7 the local government level for board review * * * in sufficient detail to allow a
8 thorough examination by the decision-maker, so as to obviate the need for further
9 review or at least to make that review more efficient and timely.”).

10 We conclude that comments in the record at 133 and 129 do not adequately
11 raise the issue of the applicability of ZDO 1006.05 with the specificity required
12 by ORS 197.797(1). Statements at Record 133 are from a letter from petitioners
13 that discuss generally the issue of potential wastewater from the proposed use
14 impacting their hazelnut operation. Record 129 is testimony from another
15 resident of Pelican Court which states that “[d]og waste is not properly treated by
16 a [r]esidential [s]eptic [t]ank and needs special handling of a [w]aste [t]reatment
17 [p]lant.” General statements that potential wastewater from the proposed use will
18 impact surrounding farms, or that dog waste needs special handling by a waste
19 treatment plant, are insufficient to raise the issue with the specificity required by
20 ORS 197.797(1) that ZDO 1006.05 is applicable to the proposal. *Boldt*, 107 Or
21 App at 623; *see also, Cornelius First v. City of Cornelius*, 52 Or LUBA 486, 495
22 (2006) (generalized arguments about lack of justification for commercial zoning

1 are insufficient to raise an issue under Statewide Planning Goal 9 (Economic
2 Development) or the Goal 9 rule where neither Goal 9 nor the Goal 9 rule were
3 cited and no issue was raised regarding the substantive requirements of Goal 9 or
4 the Goal 9 rule); *Cox v. Yamhill County*, 29 Or LUBA 263, 266 (1995) (general
5 argument that good farm land should not be used for a church insufficient to raise
6 an issue under OAR 660-033-0120 which prohibits churches on high value farm
7 land); *Spiering v. Yamhill County*, 25 Or LUBA 695, 712 (1993) (no issue raised
8 regarding the ORS 215.296 EFU zone standards where the statute was not cited
9 and none of the operative terms of the statute were employed in the petitioner's
10 arguments below); *ODOT v. Clackamas County*, 23 Or LUBA 370, 375 (1992)
11 (general references to Statewide Planning Goal 12 (Transportation) are
12 insufficient to raise an issue under OAR 660-012-0060).

13 Petitioners also argue, in the alternative, that they were not required to raise
14 the issue of the applicability of ZDO 1006.05 below, because the lack of findings
15 on ZDO 1006.05 did not arise until the decision was made. Respondents assert
16 that ZDO 1006.05 was not identified by the county as an applicable criterion, and
17 that because the staff report did not address ZDO 1006.05 in its analysis of the
18 ZDO Section 1000 criteria, petitioners were on notice that the county had
19 determined ZDO 1006.05 did not apply. Respondents argue that if petitioners
20 desired to raise an issue that the criterion applied, they were required to raise that
21 issue below.

1 We also agree with respondents that petitioners were required to raise the
2 issue of the applicability of ZDO 1006.05 during the proceedings below. The
3 county's public hearing notice identified the applicable ZDO criteria to include
4 the "1000-series." Record 186. ZDO Section 1000 includes 15 subsections,
5 including ZDO 1006, which is entitled "Utilities, Street Lights, Water Supply,
6 Sewage Disposal, Surface Water Management, and Erosion Control." ZDO
7 1001.03 "Applicability" provides that:

8 "Section 1000 applies to all development, as identified in Table
9 1001-1, *Applicability of Section 1000*. If a section is identified as
10 applicable with a '✓' in Table 1001-1, it does not necessarily mean
11 that every subsection within that section will apply; rather, each
12 applicable section must be reviewed to determine which, if any,
13 provisions in that section are applicable to the proposed
14 development." (Emphasis in original.)

15 As noted, the staff report identified the ZDO criteria that applied, and ZDO
16 1006.05 was not among them. We agree with respondents that petitioners were
17 required to and failed to raise the issue of the applicability of ZDO 1006.05
18 below, and, thus, the issue is waived.

19 The second assignment of error is denied.

20 **THIRD AND FIFTH ASSIGNMENTS OF ERROR**

21 In the third assignment of error, petitioners argue that the county adopted
22 inadequate findings, unsupported by substantial evidence, in concluding that the
23 subject property's existing fencing is adequate to protect the safety and character
24 of the neighborhood. ZDO 1203.03(D). In the fifth assignment of error,

1 petitioners argue that the county adopted inadequate findings, unsupported by
2 substantial evidence, in concluding that noise associated with the proposed dog
3 kennel would not impair the existing residential neighborhood under ZDO
4 1203.03(D) because the noise study relied upon by the county to support its
5 conclusion was inadequate. As cited above, ZDO 1203.03(D) requires a finding
6 that the proposed use will not:

7 “alter the character of the surrounding area in a manner that
8 substantially limits, impairs, or precludes the use of surrounding
9 properties for the primary uses allowed in the zoning district(s) in
10 which surrounding properties are located.”

11 **A. Fencing**

12 Respondents respond, initially, that this issue is waived because
13 petitioners’ arguments in the petition for review differ qualitatively from the
14 issues raised below. Respondents argue that the comments at Record 127 and 134
15 raise concerns about the dog training classes occurring on the property, not the
16 proposed dog kennel. Petitioners cite Record 127 and 134 for preservation.
17 Record 134 is a letter from petitioners which asserts that “[t]he subject property
18 * * * does not have a secure perimeter fence. * * * [A] secure fence is necessary
19 – *regardless of dog kennel permit.*” (Emphasis added.) Record 127 is an email
20 from another resident of Pelican Court which asserts that “fencing around [the
21 subject] property is completely inadequate, practically nonexistent. It currently
22 consists of a three foot tall wire fence from the late 1970’s.”

1 The county's findings under ZDO 1203.03(D) with respect to fencing
2 state:

3 "Several persons argued that the existing fencing on the site is
4 inadequate to keep dogs confined to the site, noting that
5 [intervenors'] livestock and their 'livestock dog' have escaped onto
6 neighboring properties in the past. While this is unfortunate, it is not
7 relevant to review of the proposed kennel, as [intervenors'] livestock
8 are unrelated to this proposal. Neighbors have adequate recourse to
9 address this issue through state laws regulating livestock trespass
10 and the [c]ounty's [d]og [c]ontrol regulations, [under t]itle 5 of the
11 Clackamas County Code, which regulates loose dogs. Fencing is not
12 necessary for the proposed kennel use, as dogs will be confined to
13 the fully enclosed kennels." Record 14.

14 We conclude that the issue of fencing was sufficiently raised below. *See*
15 *Nehmzow*, 81 Or LUBA at 579 (where it is evident from the challenged decision
16 itself that the local government considered and responded to issues raised below,
17 the issue is preserved). We now turn to the merits of petitioners' arguments.

18 Petitioners argue that the county's finding that fencing is not necessary for
19 the proposed dog kennel use is inadequate and unsupported by substantial
20 evidence. Petitioners argue that intervenors will board dogs with behavioral
21 problems and that without a secure perimeter fence, there is potential for the dogs
22 to escape the property during pick up and drop off by their owners and cause
23 chaos in the neighborhood. Petitioners claim that these risks will "alter the
24 character of the surrounding area in a manner that substantially limits, impairs,
25 or precludes" the "residential, farm and family" uses of surrounding properties.
26 Petition for Review 31.

1 Respondents respond that petitioners' claims about dangerous dogs and
2 loose dogs are speculative and not supported by any evidence in the record.
3 Respondents assert that petitioners "improperly ask[] LUBA to reweigh the
4 evidence independently and substitute its judgment for that of the hearings
5 officer." Joint Respondent's and Intervenor-Respondent's Brief 32 (citing
6 *Younger*, 305 Or at 358-60).

7 LUBA shall reverse or remand a decision that is not supported by
8 substantial evidence in the whole record. ORS 197.835(9)(a)(C). Substantial
9 evidence is evidence that a reasonable person would rely on in making a decision.
10 *Dodd*, 317 Or at 179. Where there is conflicting evidence and we conclude a
11 reasonable person could reach the decision made by the local government, in
12 view of all the evidence in the record, we defer to the local government's choice
13 of evidence. *Younger*, 305 Or at 360. In order to prevail on a substantial evidence
14 challenge, petitioners must identify the challenged findings and explain why a
15 reasonable person could not reach the same conclusion based on all the evidence
16 in the record. *Stoloff v. City of Portland*, 51 Or LUBA 560, 568 (2006).

17 We agree with respondents that the county's findings regarding fencing
18 are supported by substantial evidence. As the hearings officer recognized, the
19 addition of the dog kennels will have the likely effect of creating less
20 opportunities for loose dogs because the boarding kennels will result in less
21 arrivals and departures to drop off and pick up dogs for training. Second,
22 respondents point out, there is no evidence in the record that in the five years that

1 intervenors have conducted dog training on the property any dogs have escaped.
2 The hearings officer considered the request for additional fencing and determined
3 it was unnecessary because the kennels are fully enclosed by a fence and the only
4 claim of dogs roaming off the property involved dogs or livestock that are not
5 being trained at the dog training facility. That finding is supported by substantial
6 evidence.

7 **B. Noise**

8 The county's findings under ZDO 1203.03(D) with respect to noise state:

9 "Neighbors expressed concerns with noise generated by dogs
10 barking on the site. [Intervenors'] submitted a noise study
11 demonstrating that the sound of dogs barking on the site will not
12 exceed the [c]ounty's noise standards, set out in [s]ection 6.05.050
13 of the Clackamas County Code. Barking noise may be audible on
14 surrounding properties, but it will comply with [c]ounty noise
15 standards. In addition, as noted above, the hearings officer has no
16 authority to regulate noise from [intervenors'] dog training facility,
17 including the use of music and training commands, as that is a
18 permitted use. Dogs in the proposed kennels will be contained
19 within an enclosed building, which will reduce the impact of any
20 barking noise. Many agricultural activities (livestock, tractors and
21 other equipment, etc.) generate noise. The hearings officer finds that
22 noise from this site will be consistent with this type of use. In
23 addition, as noted at the hearing and in the written testimony,
24 barking dogs are common in the rural area.

25 "In addition, [intervenors] testified and provided evidence that much
26 of the barking noise cited by neighboring residents is actually
27 coming from dogs on properties around the site. Dogs that are
28 undergoing training on the site are not allowed to bark. The kennel
29 buildings will be equipped with ultrasonic bark controllers and the
30 applicants have multiple bark collars they can use if necessary to
31 control barking. The applicant proposed to insulate the kennel

1 buildings to limit sound transmission outside the building. A
2 condition of approval is warranted to that effect.

3 “Based on the above, the hearings officer finds that noise from the
4 proposed kennel facility will not alter the character of the area in a
5 manner prohibited by [county c]ode.” Record 13.

6 The decision also imposed two conditions of approval intended to mitigate
7 noise from the kennel:

8 “9. The applicant shall insulate the kennel buildings to limit
9 sound transmission outside the buildings.

10 “10. The applicant shall confine all boarded dogs inside the kennel
11 at night and use bark collars as necessary to control barking.”
12 Record 24.

13 Respondents respond that intervenors’ noise study was just one of several
14 independent bases on which the county determined noise from the kennel would
15 not substantially impair the character of the neighborhood. Respondents argue
16 that in addition to the noise study, the county relied upon conditions of approval
17 requiring insulation of the kennels, confining dogs to the kennels at night, and
18 using bark collars to control barking. Respondents argue that petitioners failed to
19 challenge other, alternative, bases for finding that the standard was met with
20 regard to noise.

21 We agree with respondents. The noise study is one of several bases the
22 county relied upon to conclude that noise will not impair the character of
23 neighborhood. Petitioners do not challenge any of the other, independent
24 evidence that is separate from the noise study. Absent any challenges to the other
25 evidence, this assignment of error provides no basis for reversal or remand.

1 The third and fifth assignments of error are denied.

2 **FOURTH ASSIGNMENT OF ERROR**

3 ZDO 1206.07(B)(1) implements ORS 215.130(5) and (9). ZDO
4 1206.06(B)(1) provides that the county may approve an alteration of a
5 nonconforming use if “[t]he alteration or change will, after the imposition of
6 conditions pursuant to Subsection 1206.07(B)(4), have no greater adverse impact
7 on the neighborhood than the existing structure, other physical improvements, or
8 use.” The hearings officer concluded that there would be no greater adverse
9 impact to the neighborhood by changing the use of a portion of the
10 nonconforming building to a dog kennel, relying on the findings addressing the
11 conditional use criterion, at ZDO 1203.03(D), elsewhere in the decision. Record
12 20-21.

13 Petitioners argue that the county erred in approving the nonconforming use
14 alteration because the county cannot show that the nonconforming building
15 addition will not have a greater adverse impact without accounting for kennel
16 wastewater. Respondents respond, initially, that this issue is waived. We agree.
17 General comments made below of concerns about wastewater impacts are
18 insufficient to raise the issue that the *alteration* of the nonconforming use will
19 have greater adverse impacts with the specificity required by ORS 197.797(1).

20 This assignment of error is denied.

21 The county’s decision is remanded.