BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAMES BAKER,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

NORMAN McDOUGAL,
Intervenor-Respondent.

LUBA No. 2002-136

FINAL OPINION
AND ORDER

Appeal from Lane County.

Charles Swindells, Portland, filed the petition for review and argued on behalf of petitioner.

Stephen L. Vorhes, Assistant County Counsel, Eugene, filed a response brief and argued on behalf of respondent.

Bill Kloos, Eugene, filed a response brief and argued on behalf of intervenor-respondent.

BASSHAM, Board Member; HOLSTUN, Board Chair; BRIGGS, Board Member, participated in the decision.

AFFIRMED 01/27/2003

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

Petitioner appeals county approval of a 30-unit lodging facility in a Rural Residential (RR-10) zone.

MOTION TO INTERVENE

Norman McDougal (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property consists of tax lots 600 and 700, totaling approximately 2.29 acres. Tax lot 700 is improved with a dwelling. A stream crosses the southern portion of both tax lots. Each tax lot fronts on Highway 242 to the north. Adjoining tax lot 700 to the west is tax lot 803, a large parcel zoned for forest use but developed with a recreational vehicle (RV) park, cabins and other recreational facilities. The surrounding area is zoned either for rural residential or forest resource uses. Intervenor owns both the subject property and the adjoining RV park on tax lot 803.

The RR-10 zone does not permit hotels, motels or resorts, but does allow "[l]odges and grange halls" as a conditional use, subject to hearings official approval. On December 10, 2001, intervenor applied to the county to construct a 30-unit "lodge," with dining facilities. Intervenor proposed development in two phases. The first phase is a 15-unit building, including the dining facilities, on tax lot 600. The second phase includes 15 additional units on tax lot 700, connected or adjacent to the first building. The existing dwelling would be removed.

After a public hearing, the hearings official issued an order April 15, 2002, approving the proposed development as a "lodge," subject to conditions. Petitioner appealed to the board of county commissioners (BOCC), and also requested that the hearings official reconsider his decision. The hearings official re-opened the record to consider the issues

raised by petitioner and, on July 25, 2002, issued an order again approving the proposed development, with modified conditions.

Petitioner appealed the order on reconsideration to the BOCC. The hearings official declined further consideration, but recommended that the BOCC accept the appeal to determine whether the term "lodge" was correctly interpreted. At a public meeting on September 25, 2002, the BOCC voted not to conduct a hearing on the appeal, and issued an order affirming the hearings official's decision and adopting his interpretations as its own. This appeal followed.

FIRST ASSIGNMENT OF ERROR

A. Standard of Review

Under ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), LUBA will defer to a governing body's interpretation of a local code provision that is consistent with the language, purpose and policy underlying the code provision. Such deference is afforded only to an interpretation by the governing body, not other bodies such as a hearings officer or other non-elected officials. *Gage v. City of Portland*, 319 Or 308, 316-17, 877 P2d 1187 (1994). However, where the governing body affirms or adopts a lower body's decision as its own, LUBA and the appellate courts will treat the governing body's decision as adopting any interpretations of local provisions in the lower body's decision. *Derry v. Douglas County*, 132 Or App 386, 391, 888 P2d 588 (1995). In *Derry*, the court explained:

> "In the usual situation where a local governing body unanimously or by majority vote affirms or adopts a subordinate body's decision, we understand the correct application of *Gage* to be that any interpretation that the lower body rendered in its decision and that was necessary to the decision is to be regarded as having obtained governing body approval, whether or not the governing body's own order *expressly* adopts or reiterates the interpretation. The logic of *Gage* is that an interpretation of local legislation is entitled to deference if the governing body indicates that it subscribes to the interpretation. However, it is not necessary that the governing body expressly state or replicate an essential interpretation that originates in the order of a

> lower local entity which the governing body affirms. The lower body's interpretation is presumptively accepted along with its decision. To hold otherwise would foster endless possibilities of gamesmanship among the participants in local land use proceedings, designed to obtain or avoid a particular standard of LUBA and judicial review.
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> "We hold that, unless the governing body expressly changes an interpretation by a lower body in affirming that body's decision, the interpretation of the local provision in the lower body's decision will be treated as the governing body's for purposes of *Clark* and *Gage*. * * *" *Id.* at 391-92 (emphasis original).

As we stated earlier, Lane Code (LC) 16.231(4)(j) allows "[l]odges and grange halls" as a conditional use subject to hearings official approval in the RR-10 zone. The hearings official interpreted the term "lodge" to include the proposed 30-unit facility. Petitioner appealed the hearings official's decision to the BOCC, pursuant to LC 14.600.[1] In relevant

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[1] LC 14.600 provides, in relevant part:

> "(1) Purpose. This section establishes the procedure and criteria which the Board shall follow in deciding whether or not to conduct an on the record hearing for an appeal of a decision by the Hearings Official.
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> "(2) Procedure.
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> "(a) The Board shall determine whether or not they wish to conduct an on the record hearing for the appeal after an indication from the Hearings Official not to reconsider the decision and within 14 days of the expiration of the appeal period from the Hearings Official's decision.
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> "(b) Within seven days of the determination mentioned in LC 14.600(2)(a) above, the Board shall adopt a written decision and order electing to have a hearing on the record for the appeal or declining to further review the appeal.
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> "(c) The Board order shall specify whether or not the decision of the Board is to have a hearing on the record for the appeal and shall include findings addressing the decision criteria in LC 14.600(3) below. If the Board's decision is to have a hearing on the record for the appeal, the Board order shall also specify the tentative date for the hearing on the record for the appeal and shall specify the parties who qualify to participate in the hearing on the record for the appeal.
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> "(d) If the decision of the Board is to not have a hearing, the Board order shall specify whether or not the Board expressly agrees with or is silent regarding any interpretations of the comprehensive plan policies or implementing ordinances made by the Hearings Official in the decision

part, LC 14.600 requires the BOCC to first determine whether it will conduct an on-the-record hearing on the appeal, based on criteria set forth at LC 14.600(3). If the BOCC decides not to conduct a hearing on the appeal, it must affirm the hearings official's decision. In doing so, LC 14.600(2)(d) requires the BOCC to indicate whether it "expressly agrees with or is silent regarding any interpretations" made by the hearings official. In the present case, the BOCC applied the criteria at LC 14.600(3) and decided not to conduct a hearing on the appeal.[2] Accordingly, it affirmed the hearings official's decision and, pursuant to LC 14.600(2)(d), indicated that:

> "The [BOCC] expressly agrees with the July 25, 2002 decision of the Lane County Hearings Official interpreting [LC] 16.090, 16.231, 14.535, and the policies of the Rural Comprehensive Plan, attached here as Exhibit 'B.' The Hearings Official's decision and interpretations are affirmed and adopted by the [BOCC] as its own interpretation." Record 7.

Notwithstanding the BOCC's express agreement with and adoption of the hearings official's interpretation of LC 16.231, petitioner argues that the rationale described in *Derry* does not apply in the present case, and that no deference is due to that interpretation. According to petitioner, whether a lower body's interpretation is imputable to the governing

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> being appealed. The Board order shall affirm the Hearings Official decision.
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> "(3) Decision Criteria. A decision by the Board to hear the appeal on the record must conclude the issue raised in the appeal to the Board could have been and was raised before the close of the record at or following the final evidentiary hearing and must comply with one or more of the following criteria:
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> "(a) The issue is of Countywide significance.
>
> "(b) The issue will reoccur with frequency and there is a need for policy guidance.
>
> "(c) The issue involves a unique environmental resource.
>
> "(d) The Planning Director or Hearings Official recommends review."

[2] Among the reasons cited for not conducting a hearing, the BOCC found that the provision for a "lodges and grange halls" at LC 16.231(4)(j) was recently replaced by a qualitatively different provision, and thus the specific interpretative issue in this appeal was unlikely to arise again.

body under *Derry* depends on whether the governing body conducted a *hearing* on the appeal, at which parties may appear and present argument on the interpretative issue, and at which the governing body reviews the merits of that issue. Citing to *Gutoski v. Lane County*, 141 Or App 265, 917 P2d 1048 (1996), petitioner argues that such imputation is not warranted where the governing body declines to conduct a hearing or review the merits of the appeal. In *Gutoski*, the BOCC's review was conducted pursuant to a local provision that gave the BOCC discretion to hear or not to hear an appeal, and the BOCC declined to review the hearings official's decision.[3] The court rejected the county's argument that the BOCC decision effectively adopted the hearings official's interpretation pursuant to *Derry*:

> "Because the governing body's denial was accompanied by incidental language that respondent understands to imply agreement with the substance of the hearings officer's decision, respondent attempts to analogize the situation here to *Derry v. Douglas County*. We held in that case that, when a governing body affirms a lower body's decision and either expressly agrees with or is silent concerning the latter's interpretation of local legislation, the interpretation is imputable to the governing body and is to receive deference on review. Here, however, the governing body expressly declined to consider the case. We conclude that *Derry* is inapposite, and that the local interpretation here is not subject to deferential review under *Clark* or *Gage*." 141 Or App at 268 (citations omitted).

Petitioner reads too much into *Gutoski*. The critical distinction between that case and *Derry* is not whether the governing body conducted a hearing and allowed argument on the merits of the hearings officer's interpretation, but rather whether the governing body affirmed the hearings officer's decision. Under *Derry* and *Gutoski*, a governing body's decision to affirm the hearings officer's decision is sufficient to impute any local code interpretation of the hearings officer to the governing body, unless that body expressly rejects or changes that interpretation. Here, the BOCC's decision expressly affirms the hearings

[3] Although it is not entirely clear, the review procedures applicable in *Gutoski* differ from the currently applicable procedures at LC 16.400. Indeed, the similarity in phrasing between the below-quoted portion of *Gutoski* and LC 16.400, suggests that LC 16.400 was adopted or amended after *Gutoski* to reflect the holding in that case.

official's decision. For good measure, the BOCC went further and indicated that it agreed with the hearings official's code interpretation. Neither *Derry* nor *Gutoski* require more. Consequently, we conclude that ORS 197.829(1) and *Clark* provide the appropriate standard of review for the hearing official's code interpretations.

B. Interpretation of "Lodge"

LC 16.090 provides that where code terms are not defined in the code, "they shall have their ordinary accepted meanings within the context with which they are used" and that "Webster's Third New International Dictionary of the English Language, Unabridged, Copyright 1981, Principal Copyright 1961, shall be considered as providing ordinary accepted meanings." The term "lodge" has no code definition. Therefore, the hearings official looked to the dictionary definitions of that term:

> "* * * The dictionary definition of lodge includes: '*an inn or resort hotel*' and '*a recreation center of a camp or vacation spot often containing dining facilities*.' Evidence in the record demonstrates that rural residential zoning has been applied to at least four similar facilities within Lane County and that the intent of the Code is not to restrict the application of 'lodge' to fraternal organizations such as the Masonic Lodge, Elk, etc.
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> "The lodge facility proposed by this application is consistent with the accepted meaning of a lodge. The application portrays a facility that is not focused upon serving a transient population that needs a place to sleep in route from one location to another, such as a motel. Rather, it is intended to offer natural and recreational amenities to the vacationing public. The proposed lodge is therefore permitted subject to Hearings Official approval * * *." Record 217-18.

Petitioner argues that the hearings official's interpretation fails to take into account the *context* in which the term "lodge" appears at LC 16.231(4)(j), as LC 16.090 directs. According to petitioner, the term "lodge" when read in the context of "lodges and grange halls" is clearly a reference to fraternal lodges such as Masonic Lodges or Elks Lodges, and

does not encompass the several different senses of "lodge" that are compiled in the dictionary definition.[4]

Petitioner also argues that the hearing official's interpretation is inconsistent with the purpose and intent of the RR zone, particularly in light of the purpose and intent of the county's Rural Commercial (C-R) zone. The RR zone is intended to provide for "primary and accessory residential uses," petitioner argues, and permits only "nonresidential uses which may be compatible with primary residential uses." LC 16.231(1)(b). In contrast, the C-R zone is intended to provide, among other things, "services and facilities to tourists and travelers." LC 16.223(1)(b). Further, petitioner notes that the purpose of the RR zone is to implement residential comprehensive plan policies, while the purpose of the C-R zone is to implement commercial comprehensive plan policies. LC 16.231(1)(c); 16.223(1)(c).

Finally, petitioner argues that a comparison of the uses allowed in the RR and C-R zones demonstrates that, in the context of LC 16.231, the term "lodge" does not include the proposed facility. The RR zone allows as permitted uses only single family dwellings and similar uses compatible with residential uses. The conditional uses the RR zone allows subject to hearings official approval, petitioner argues, do not include hotels, motels, inns or similar commercial lodging facilities serving travelers.[5] In contrast, petitioner argues, the C-R zone allows a number of such facilities, including restaurants and "[h]otel, motel or lodge,

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[4] Webster's Third New International Dictionary of the English Language, Unabridged, 1329, sets forth nine senses of the word "lodge," including the following:

> "* * * **2 a** *obs* **:** the workshop of a body of freemasons **b :** the meeting place of a branch of a fraternal organization <a Masonic ~ > **c :** the body of members composing a branch of a fraternal organization **3 a :** a house set apart for residence in the hunting or other special season <had a hunting and fishing ~ on the peak—Nard Jones> **b :** an inn or resort hotel <gave half-hour magic shows at mountain ~ and dude ranches>—*Current Biog.*> **c :** a recreation center of a camp or vacation spot often containing dining facilities <in the evening we gathered in the main ~>—Wright Morris> * * *"

[5] LC 16.231(4) specifies the uses allowed in the RR zone subject to hearings official approval, including animal hospitals, commercial breeding kennels, commercial kennels, campgrounds, camping vehicle parks, tourists parks, cemeteries, churches, group care homes, day care nurseries, golf courses, nursing homes, parks, playgrounds, community centers, public and private schools, and commercial riding stables, among others.

and related recreational facilities." LC 16.223(2)(m). Petitioner notes that the proposed facility includes "dining facilities," and that the challenged decision requires intervenor to obtain a "Tourist and Traveler" license and a restaurant license. Petitioner argues that it is especially significant that the proposed development includes what appears to be a restaurant, a use that is not allowed at all in the RR zone but is allowed in the C-R zone.

As petitioner notes, both the RR zone and the C-R zone allow a "lodge." However, petitioner argues that in their respective contexts, it is clear that the "lodge" allowed in the RR zone is a building housing a fraternal organization, corresponding perhaps to the second dictionary definition quoted at n 4, while the "lodge" allowed in the C-R zone is a commercial lodging facility similar to a hotel, motel or resort, perhaps corresponding to the third dictionary definition quoted at n 4.

Petitioner's contextual analysis is plausible, and if our standard of review were less deferential, we might well agree that the hearings official incorrectly viewed the term "lodge" as used in LC 16.231(4)(j) to include the proposed facility.[6] However, as discussed above, we must apply a deferential standard of review, under which we must affirm the county's interpretation unless we can say that no person could reasonably interpret the code provision in the manner that the county has here. *Huntzicker v. Washington County*, 141 Or App 257, 261, 917 P2d 1051, *rev den* 324 Or 322 (1996). A reasonable person could interpret the term "lodge" as used in LC 16.231(4)(j) and as viewed in context to encompass the proposed facility. Petitioner has not demonstrated that the county's interpretation is inconsistent with the express language or purpose of LC 16.231(4)(j).

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[6] Not that contextual analysis points uniformly in one direction. For one thing, LC 16.223(2) allows in the RR zone several commercial activities, such as "campgrounds, camping vehicle parks [and] tourist parks." For another, it is awkward that, under petitioner's view, the BOCC chose to use the same word in LC 16.231(4)(j) and LC 16.223(2)(m) to describe two very different types of facilities, fraternal meeting places and a type of commercial lodging facility. Equally significant is the fact that LC 16.223(2)(k) allows in the C-R zone "[c]ivic, social and fraternal meeting places." That phrase appears to describe what petitioner believes "lodges and grange halls" to mean under LC 16.231(4)(j). Hence, petitioner's view also has the county using the terms "lodge" and "fraternal meeting places" to describe the *same* type of facility.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the county's finding that the proposed development can be adequately served by a subsurface sewage disposal system is inadequate and not supported by substantial evidence. According to petitioner, intervenor's consultant determined that the proposed development requires 1,400 lineal feet of septic drainage pipe, in order to satisfy Department of Environmental Quality (DEQ) requirements. However, petitioner argues, the drainfield plan shows that only 1,180 lineal feet are available. In his initial decision, the hearings official recognized that the subject property did not have enough area to accommodate the expected drainfield requirements for a 30-unit facility. However, the hearings official found that the proposed development could distribute effluent to a drainfield serving the adjoining development on tax lot 803. On reconsideration, the hearings official agreed with petitioner that a septic drainfield that served multiple uses on multiple lots or parcel is prohibited by OAR 660-011-0060(2)(a). However, the hearings official found that the two tax lots on the subject property could be reconfigured, perhaps along with the adjoining resource-zoned parcel, to place the proposed facility and drainfield on a single parcel, and that the proposed parking lot could be modified to provide room for the required 1,400 lineal feet of drainfield pipe.[7] If that does not work, the hearings official found, the proposed lodge will have to be scaled down to comply with DEQ regulations.

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[7] The challenged decision states, in relevant part:

> "If tax lots 600 and 700 were reconfigured so that the former was located entirely to the south (cabin side) of the stream on the subject property, the proposed lodge parking lot could be modified to provide the estimated 1,400 lineal feet required for the subsurface disposal system's drainfield and replacement drainfield. * * *" Record 13.
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> "The applicant has suggested a remedy that consists of taking one or more lot line adjustments affecting tax lots 600 and 700, and possibly 803. Such reconfiguration(s) could maximize the size of the lot that will accommodate the proposed lodge. The subsurface sewage disposal system that served the lodge would then be located on the lodge parcel.

Petitioner argues that the hearings official's findings are inadequate and contradictory. Petitioner notes that reconfiguring the two tax lots to place the entire facility on one lot might avoid running afoul of the administrative rule but would not itself expand the area available for the septic system. Petitioner argues that it is unclear how the parking lot could be modified to expand the area available for the septic system on the subject property, and the decision does not describe what modifications to the parking plan are possible.[8] Further, petitioner points out, the decision imposes a condition of approval requiring the parking layout to be completed as shown on the site plan.[9] Petitioner argues that this condition contradicts the finding that the parking layout can be modified to accommodate the required 1,400 lineal foot septic system.

Finally, petitioner argues that the decision impermissibly defers a finding of compliance with sewage system requirements to a later administrative action, in suggesting that if sufficient area cannot be found then the lodge will have to be scaled down to comply with DEQ regulations. *See Tenly Properties Corp. v Washington County*, 34 Or LUBA 352 (1998); *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992) (in approving a land use

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> "The record indicates that the soil characteristics, estimated drainfield area, and availability of alternative treatment systems support a conclusion that it is feasible to design a subsurface sewage disposal system to serve the first phase of the proposed lodge. * * * If the assumptions made by the applicant's engineer are too liberal and/or sufficient area cannot be acquired through lot line adjustment, then the lodge will have to be scaled down to comply with DEQ regulations." Record 17.

[8] Petitioner also notes that the decision appears to contemplate the possibility of a property line adjustment with tax lot 803, an adjoining resource-zoned parcel owned by intervenor. Petitioner advances several arguments against that possibility. However, intervenor repudiates the possibility of an adjustment with tax lot 803, arguing that no such adjustment was proposed. We accept that position, and therefore do not address petitioner's arguments against the hearings official's suggestion of a property line adjustment with tax lot 803.

[9] Condition 5 of the challenged decision states:

> "Graveled parking area, meeting the general requirements of LC 16.250, and space requirements of LC 16.250(2)(a)(ii), shall be completed prior to final occupancy of each unit. All required parking shall be within the subject property. The proposal shall occur as shown in the submitted site plan unless modifications are approved by Hearings Official and the Fire Chief as noted in Condition of Approval #3." Record 14.

permit, a local government must either (1) find compliance or feasibility of compliance with approval criteria, and impose conditions sufficient to ensure compliance; or (2) defer a finding of compliance to a stage of review that provides statutorily required notice and hearing).

Intervenor responds, first, that petitioner fails to identify the applicable standard the challenged findings relate to. According to intervenor, nothing in the county's conditional use criteria requires a finding that there will be an adequate septic system.

The hearings official's findings address septic system adequacy under LC 16.231(5), which requires a finding that the proposed use "[w]ill not significantly impact existing uses on adjacent and nearby lands and other uses permitted in the zone in which the subject property is located." The decision recites concerns from neighbors that an inadequate septic system might impact water quality of the nearby creek and the groundwater from which neighbors draw their water. While intervenor is correct that no applicable criteria specifically require an adequate septic system, the hearings official treated LC 16.231(5) as authorizing inquiry into the adequacy of the proposed system. Petitioner's failure to recite the code provision to which the challenged findings are directed is not a basis to summarily reject this assignment of error.

Intervenor next argues that evidence in the record demonstrates that it is feasible to modify the parking layout to construct 1,400 lineal feet of septic system on the subject property. Intervenor cites to the following portion of a letter from intervenor's engineer:

> "The attached drainfield plot plan (provided by applicant) indicates an available length of drainfield of 1,180 feet (1,400 lineal feet required) within tax lots 600 and 700. I have reviewed this plan, and it appears likely that the parking for the facility can be reconfigured (either south of the expansion units or west of the existing road approach) and the indicated drainfield lines can be extended 25 [feet] further to the west and the 700 lineal feet of drainfield area necessary to serve [the expansion unit] with a 700 lineal foot reserve field will be available on site." Record 133.

We agree with intervenor that the letter at Record 133 is substantial evidence supporting the hearings official's finding that it is feasible to modify the parking plan to provide for 1,400 lineal feet of septic system on the subject property.

Intervenor also argues that there is no conflict between that finding and condition of approval 5, which requires that the "proposal shall occur as shown on the submitted site plan * * *." *See* n 9. According to intervenor, the challenged decision does not approve or require a specific parking layout.

The site plan submitted with the original application did not depict any parking area, and proposed that parking be addressed when a building permit is sought. Record 390, 402. Apparently in response to a staff request, intervenor submitted a site plan depicting a "potential parking and drainfield layout." Record 372. Staff recommended approval, subject to condition 5. Record 359. That condition was accepted by the hearings official with a finding that the modified site plan appeared to show compliance with the parking standards of LC 16.250(2)(a)(ii), and carried forward to the final decision without alteration. Record 222. The parking standards at LC 16.250(2)(a) are concerned with the number of spaces, not their location. We agree with intervenor that condition 5 is not intended to impose a particular parking layout, and that there is no conflict between condition 5 and the finding that the parking plan can be modified.

Finally, intervenor argues, and we agree, that the hearings official did not defer a finding of compliance with LC 16.231(5), without providing for statutorily required notice and hearing. The hearings official only suggested that if for some reason sufficient area cannot be found on the subject property for the required 1,400 lineal feet, then the proposed lodge will have to be scaled down to meet DEQ requirements. The hearings official found that it was feasible to comply with LC 16.231(5), insofar as that standard required consideration of septic system adequacy. As explained, that finding is adequate and supported by substantial evidence. *See Salo v. City of Oregon City*, 36 Or LUBA 415, 425

(1999) (if the local government adopts a finding of compliance or feasibility of compliance with applicable criteria, the issue is whether that finding is adequate and supported by substantial evidence, not whether the local government improperly deferred a finding of compliance to a second stage of review). The hearings official recognized the possibility that for some reason the proposed solution might not work, and noted the consequence that DEQ will require that the proposed development be scaled back. The hearings official also imposed as a condition of approval that intervenor obtain DEQ approval prior to construction. The fact that the hearings official addressed the possibility that the solution found to be feasible might not in fact work does not violate the principles described in *Tenly* and *Rhyne*, or amount to an impermissible deferral of required findings of compliance. *See Mitchell v. Washington County*, 37 Or LUBA 452, 462, *aff'd* 166 Or App 363, 4 P3d 774 (2000) (hearings officer did not violate *Tenly* and *Rhyne* in finding that a proposed turnaround was feasible, while crafting conditions to address the possibility that the fire marshal may require a different turnaround).

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the hearings official failed to adequately address concerns regarding adverse impacts on surrounding lands, in particular trespass onto surrounding residential lands by guests of the proposed lodge, and the impact of septic and stormwater systems on the water quality of the stream on the property.

With respect to trespass, intervenor responds that no issue was raised below regarding trespass, and that is why the hearings official's findings did not address that issue. Intervenor argues, therefore, that that issue is waived. ORS 197.763(1); 197.835(3). Petitioner does not cite to any place in the record where issues were raised regarding trespass. We therefore agree with intervenor that such issues are waived.

With respect to impacts on the water quality of the stream, petitioner notes that one residential neighbor uses that stream for domestic use, and that issues were raised below regarding the potential impacts of the proposed septic system and stormwater discharges into the stream. Petitioner argues that, although intervenor proposed one possible stormwater drainage system, no final site plan or stormwater drainage system was offered or approved. According to petitioner, the hearings official's findings addressing impacts on water quality impermissibly defer a finding of compliance with LC 16.231(5), with respect to impacts on water quality, to a later stage of review that does not provide for notice or hearing.

Although petitioner cites unspecified concerns regarding the septic system under this assignment of error, the only specific challenge petitioner raises concerns the impact of storm water runoff on the stream. With respect to storm water impacts, the hearings official adopted the following findings:

> "* * * the applicant has not provided a storm water runoff plan because the proposed lodge has not yet been designed. However, there does not appear to be any factor associated with the subject property that would preclude the design of a satisfactory storm water runoff plan using accepted engineering practices. Because the design of such a plan is feasible, the applicant will be required through [the] condition of approval to submit an engineered storm water runoff plan to the Lane County Land Management Division prior to obtaining a final occupancy permit for the lodge. The runoff plan must provide for the treatment of water originating on the subject property prior to its entering adjacent or nearby surface waters." Record 219.

> "No storm water runoff plan has been entered into the record. However, the calculations needed to develop a storm water runoff plan are subject to standard engineering practices. The information needed includes the size of the drainage area, including impervious surface; soil permeability; and a coefficient of runoff. The standard is that the proposed use will not exceed the natural drainage system with storm water runoff or allow harmful chemicals to enter into the ecosystem. The Applicant has suggested one system for storm water retention and treatment and there are probably many other designs. The requirement is that the Applicant must show that it is feasible to manage storm water runoff from the proposed use. This standard has been met." Record 17.

The hearings official also imposed a condition of approval requiring that the applicant submit an engineered storm water runoff plan to the county providing for the treatment of storm water prior to entering nearby surface waters. Record 15. Intervenor argues that these findings and the condition adequately address storm water impacts on the stream and are sufficient to ensure that the proposed development complies with LC 16.231(5). We agree. Petitioner does not explain why under LC 16.231(5) consideration of a final site plan or storm water runoff plan is necessary or required, given the hearings official's finding that an adequate storm water system is feasible. As explained above, where the local government adopts a finding of compliance or feasibility of compliance with applicable criteria, the issue is whether that finding is adequate and supported by substantial evidence, not whether the local government improperly deferred a finding of compliance to a second stage of review. *Salo*, 36 Or LUBA at 425. Petitioner has not established that the hearings official's findings regarding storm water impacts on the stream or the feasibility of preventing adverse impacts are inadequate or unsupported by substantial evidence.

The third assignment of error is denied.

The county's decision is affirmed.