

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

H2D2 PROPERTIES, LLC,  
*Petitioner,*

vs.

DESCHUTES COUNTY,  
*Respondent,*

and

JOEL GISLER, JULIA GISLER and J'S 4 LLC,  
*Intervenors-Respondents.*

LUBA No. 2019-066

FINAL OPINION  
AND ORDER

Appeal from Deschutes County.

Stephanie Marshall, Bend, filed the petition for review and argued on behalf of petitioner. With her on the brief was Bennu Law, LLC.

D. Adam Smith, Assistant Deschutes County Counsel, Bend, filed a response brief and argued on behalf of respondent.

J. Kenneth Katzaroff, Bend, filed a response brief. With him on the brief was Donald Joe Willis and Schwabe Williamson & Wyatt PC. Donald Joe Willis argued on behalf of intervenors-respondents.

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

AFFIRMED

12/19/2019

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

1

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county board of commissioner’s decision denying  
4 conditional use permit (CUP) and site plan approval for a marijuana dispensary.

5 **FACTS**

6 Petitioner sought a CUP and site plan review for a 1,375-square-foot  
7 marijuana dispensary, plus bathroom, on a 0.5-acre site in the Tumalo  
8 Commercial (TuC) District.<sup>1</sup> Record 833, 1383, 1400, 1875. The proposed  
9 dispensary site (the subject property) “is bordered to the north and east by  
10 commercial uses, and to the west by Highway 20.” Record 845. Intervenors own  
11 property to the north and east of the subject property. Record 1626.

12 Prior to 2002, Highway 20 and Cook Avenue intersected and the subject  
13 property had direct access to Cook Avenue. The subject property’s direct access  
14 to Cook Avenue was, however, closed as part of a 2002 Oregon Department of

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<sup>1</sup> The prior use on the property operated under a CUP authorizing five food trucks. Petitioner’s July 5, 2018 application proposed reduction of the number of food trucks from five to one and construction of “a 1,224 +/- square foot commercial building for multiple use space.” Record 1878. The commercial building was to house a 150 +/- square foot area for a farmer’s market and an ~1,075 square foot marijuana retail space. Petitioner later modified the application to remove the food truck and farmer’s market and stated that the intent of the dispensary was to provide a home base for delivery, explaining:

“The primary purpose of the site is delivery service. The site will be used for delivery service to the county. \* \* \* The secondary purpose is walk-in marijuana retail sales.” Record 1175.

1 Transportation (ODOT) road project. Record 1626. Access to the subject  
2 property is now over a 30-foot-wide access easement across the eastern portion  
3 of intervenors' property, approximately 20 feet of which are currently paved as  
4 an access aisle connecting to 8<sup>th</sup> Street.<sup>2</sup> Record 19, 490-92. Intervenors granted  
5 petitioner's predecessor in interest the easement and dispute petitioner's right to  
6 further improve or utilize the easement to serve the proposed marijuana retail use.

7         Petitioner explained the purpose of the dispensary is to provide delivery  
8 services and support 1,860 medical marijuana patients in the county and 34  
9 recreational marijuana farms. Record 840. The hearings officer approved the  
10 CUP and site plan review with a condition of approval requiring "A plot plan  
11 showing that the access driveway from 8th Street will be 24-foot wide and  
12 improved to that width shall be submitted prior to issuance of building permits  
13 and/or initiation of the use." Record 1440. Intervenors appealed the hearings  
14 officer's decision to the board of commissioners.

15         The board of commissioners denied the applications on a number of  
16 grounds. The board concluded that the existing 20-foot wide paved access aisle  
17 failed to satisfy the requirement in Deschutes County Code (DCC) 18.116.030F  
18 and Table 18.116.030 for a 24-foot wide access aisle. Record 52. The board of  
19 commissioners also determined that the delivery component of the use was not

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<sup>2</sup> In this decision, we refer to the easement agreement as "the easement" or "the access easement" and the existing paved access drive as "the access aisle."

1 authorized in the applicable zoning district. The board concluded that while  
2 “incidental deliveries” would be allowed in the TuC zone, “county-wide delivery  
3 as the primary purpose of the propose[d] use is not permitted by DCC 18.67.040.”  
4 Record 48.

5 The board of commissioners also concluded that the project failed to be  
6 compatible with or “relate harmoniously” to its surroundings, as required by CUP  
7 and site plan review standards. DCC 18.128.015, 18.124.060. Record 53, 54, 56.  
8 The board of commissioners determined that petitioner had failed to adequately  
9 address opponents’ objections related to the concentration of businesses selling  
10 intoxicants in the area, effects on community livability and inconsistency with  
11 community values and concluded that the use was not compatible with  
12 surrounding uses. Record 56. The board of commissioners held that opponents’  
13 objections to the proposed development “call[ed] into question that the proposed  
14 development is harmonious with existing and projected developments on  
15 surrounding properties.” Record 53. The board of commissioners also determined  
16 that the 20-foot wide access aisle was inadequate to demonstrate that points of  
17 access were harmonious or compatible with neighboring buildings and structures  
18 and concluded that transportation access is not adequate. Record 54, 56.

19 This appeal followed.

20 **REQUEST FOR OFFICIAL NOTICE**

21 Petitioner requests that we take official notice of County Ordinance No.  
22 2019-014, an ordinance adopting a moratorium it describes as “prohibiting any

1 new marijuana-related applications, pending a vote in November 2020 on a  
2 proposed new ‘opt-out’ ordinance.” Petition for Review 7. The county objects to  
3 the request. Response Brief 6.

4 We will take official notice of documents subject to judicial notice in order  
5 to recognize applicable law. *Friends of Deschutes County v. Deschutes County*,  
6 49 Or LUBA 100, 103 (2005). Judicially noticed law is defined to include “[a]n  
7 ordinance, comprehensive plan or enactment of any county or incorporated city  
8 in this state, or a right derived therefrom.” ORS 40.090(7). Petitioner did not,  
9 however, provide us with a copy of applicable law but rather appended copies of  
10 unadopted draft ordinances to its petition. Petition for Review App 205-15.  
11 Unadopted, draft ordinances do not reflect applicable law and we will not take  
12 notice of them. The motion is denied.<sup>3</sup>

### 13 **PRESERVATION OF ERROR**

14 With limited exceptions not at issue in this appeal, ORS 197.763(1) and  
15 ORS 197.835(3) limit LUBA’s scope of review to “issues” that were raised prior  
16 to the close of the initial evidentiary hearing. As the response brief notes, our  
17 rules require that “[e]ach assignment of error must demonstrate that the issue  
18 raised in the assignment of error was preserved during the proceedings below.”

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<sup>3</sup> The county submitted a copy of Ordinance No. 2019-014 for our use to the extent we find it relevant and asked that if we take judicial notice of Ordinance 2019-014, we also take notice of Ordinance No. 2019-015. Response Brief 6–7 n 5. Given that the county did not request notice of Ordinance No. 2019-014 and in fact objected to such notice, we decline to notice either document.

1 Response Brief 22; OAR 661-010-0030(4)(d). OAR 661-010-0030(4)(d) was  
2 adopted in 2014 in part to implement ORS 197.763(1) and ORS 197.835(3).

3 Under each assignment of error, petitioner provided the following record  
4 citations to establish that the issue raised in the assignment of error was  
5 preserved: Record 319–44, 345–68, 1443–61 and 832–79. Petition for Review  
6 20, 27, 33, 41, 48. 60.<sup>4</sup> The county objects that petitioner failed to establish that  
7 any of the issues raised in its six assignments of error were preserved as required  
8 by ORS 197.763(1) and ORS 197.835(3). Response Brief 22.

9 A petitioner errs by requiring the reviewing body to comb the record to  
10 determine if an issue is preserved. *Willamette Oakes LLC v. City of Eugene*, 295  
11 Or App 757, 767, 437 P3d 314, *rev den*, 365 Or 192 (2019). We conclude that

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<sup>4</sup> The county summarized those pages as follows:

“‘RR 319-44’ cites to the entirety of Petitioner’s written rebuttal argument and evidence (including exhibits) provided to the County Commissioners on April 10, 2019;

“‘RR 345-68’ cites to entirety of Petitioner’s written initial argument (exhibits excluded) provide to the County Commissioners on March 27, 2019;

“‘RR 1443-61’ cites to the entirety of Petitioner’s final argument (including exhibits) provided to the Hearings Officer on December 27, 2019; and

“‘RR 832-79’ cites to all of Petitioners slides presented to the County Commissioners during their public hearing on March 13, 2019.” Response Brief 23.

1 petitioner has failed to satisfy OAR 661-010-0030(4)(d) or to establish that the  
2 issues raised in the six assignments of error were raised as required by ORS  
3 197.763(1) and ORS 197.835(3).

4 Our rules are “intended to promote the speediest practicable review of land  
5 use decisions \* \* \* while affording all interested persons reasonable notice and  
6 opportunity to intervene, reasonable time to prepare and submit their cases, and  
7 a full and fair hearing. The rules shall be interpreted to carry out these objectives  
8 and promote justice.” OAR 661-010-0005.

9 Petitioner’s broad citation of its submittals into the record during the  
10 proceedings before the county does not demonstrate that the issues presented in  
11 the assignments of error were preserved. We conclude that such a broad citation  
12 is not a technical violation.<sup>5</sup> We agree with county that the lack of specificity in

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<sup>5</sup> In *Wal-mart Stores v. City of Hood River*, 72 Or LUBA 1, 7, *aff’d*, 274 Or App 261, 363 P2d 522 (2015), we cautioned:

“OAR 660-010-0005 provides that ‘[t]echnical violations not affecting the substantial rights of parties shall not interfere with the review of a land use decision or limited land use decision.’ \* \* \* Moreover, our 2014 rule change is relatively new, and some flexibility is appropriate as practitioners adjust. We caution, however, that our amendment to OAR 661-010-0030(4) was adopted for a reason. Compliance with OAR 661-010-0030(4) helps eliminate waiver disputes or frame waiver disputes earlier in an appeal, and in many cases will eliminate the need for a reply brief altogether with attendant efficiencies to LUBA’s appellate review. Our decision to overlook petitioner’s failure to comply with OAR

1 petitioner's preservation citations interferes with the substantial rights of the  
2 parties, because it improperly shifts the burden to respondents to review over one  
3 hundred pages to determine whether issues raised in six assignments argued in  
4 an overlength 68-page petition for review have been preserved. We therefore  
5 deny the six assignments of error.

6 We also, however, address the first assignment of error on the merits.

7 **FIRST ASSIGNMENT OF ERROR**

8 ORS 215.416(8)(a) provides:

9 "Approval or denial of a permit application shall be based on  
10 standards and criteria which shall be set forth in the zoning  
11 ordinance or other appropriate ordinance or regulation of the county  
12 and which shall relate approval or denial of a permit application to  
13 the zoning ordinance and comprehensive plan for the area in which  
14 the proposed use of land would occur and to the zoning ordinance  
15 and comprehensive plan for the county as a whole."

16 Petitioner's first assignment of error alleges that the decision violated ORS  
17 215.416 because the county denied the applications based on standards not  
18 adopted in the DCC. Petition for Review 19. Petitioner argues in part:

19 "The proposed use was denied on the basis of undefined and/or  
20 unadopted standards with respect to: (1) 'incidental deliveries' and  
21 (2) the determination that the 'purpose' of the TuC District is a  
22 criterion that is not met because delivery beyond the 'surrounding  
23 area' is proposed. The Applications also were denied for Petitioner's  
24 failure to disprove a challenge to the Easement and general  
25 opposition to marijuana." Petition for Review 20.

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661-010-0030(4) in this case should not be viewed as an indication  
that LUBA necessarily will overlook such failures in the future." *Id.*

1 We have held that where there is one valid basis for denial, we will affirm a  
2 decision denying an application. *Simonson v. Marion County*, 21 Or LUBA 313,  
3 327 (1991) (“A finding of noncompliance with a single mandatory approval  
4 standard is sufficient to support a decision to deny an application for land use  
5 approval.”). As discussed below, the county and intervenor (collectively  
6 respondents) have identified a valid basis for the denial and we affirm the  
7 county’s decision.

8 **A. Conditional Use Permit**

9 As explained above, petitioner sought a CUP and a site review approval.

10 CUP approval criteria set forth in DCC 18.128.015 provide that:

11 “Except for those conditional uses permitting individual single-  
12 family dwellings, conditional uses shall comply with the following  
13 standards in addition to the standards of the zone in which the  
14 conditional use is located and any other applicable standards of the  
15 chapter.

16 “(A) The site under consideration shall be determined to be  
17 suitable for the proposed use based on the following factors:

- 18 “1. Site, design and operating characteristics of the use;  
19 “2. Adequacy of transportation access to the site; and  
20 “3. The natural and physical features of the site, including,  
21 but not limited to, general topography, natural hazards  
22 and natural resource values.

23 “(B) The proposed use shall be compatible with existing and  
24 projected uses on surrounding properties *based on the factors*  
25 *listed in DCC 18.128.015(A).*

1           “(C) These standards and any other standards of DCC 18.128 may  
2           be met by the imposition of conditions calculated to [e]nsure  
3           that the standard will be met.” (Emphasis added.)

4 Part of petitioner’s challenge in its first assignment of error asserts that the  
5 applications “were denied for Petitioner’s failure to disprove a challenge to the  
6 Easement and general opposition to marijuana.” Petition for Review 20.  
7 Petitioner argues that “opponents expressed personal disapproval of marijuana  
8 dispensaries as a *permitted use* based on fears and prejudice associated with such  
9 use. The ‘failure’ of Petitioner to disprove objections to a legal use allowed in the  
10 TuC is not a basis for denial.” Petition for Review 23 (emphasis added). Contrary  
11 to petitioner’s statement, marijuana retail is not a “permitted use” in the TuC  
12 zone. It is conditionally allowed.

13           **B.     Opposition to Marijuana Retail Use**

14           General opposition to marijuana retail use is discussed in the county’s  
15 findings addressing the compatibility of the use as required by general CUP  
16 criteria. DCC 18.128.015. County findings include reference to the following  
17 statements from intervenors:

18           “Negative impacts on adjoining properties as a result of marijuana  
19 use. Recently I have had inquiries from prospective tenants who are  
20 fleeing from the smells and disruptions [] marijuana businesses have  
21 caused them. Compatibility to a community is a function of what  
22 types of businesses the citizens of that community want to see in  
23 their community. There are no ordinances that can address this  
24 criteria. The only gauge the hearings officer can use is the comments  
25 from the community itself. In this case opposition is overwhelming  
26 and the application should be denied.” Record 55–56.

1 The county followed its reference to intervenors' comments with these  
2 observations:

3 "The Board notes that other record submittals also cite concerns,  
4 including the close proximity of the proposed use to a state scenic  
5 bikeway, public lands, and trails; traffic impacts on already  
6 dangerous intersection of Highway 20/Cook Avenue; planned  
7 improvements to the intersection of Highway 20/Cook Avenue,  
8 concentration of existing businesses that sell intoxicants in the  
9 vicinity; effects on the livability of community; and that the use is  
10 inconsistent with community values. These numerous objections  
11 call into question that the proposed development is compatible with  
12 existing and projected developments on surrounding properties.  
13 Based on substantial evidence in the record, the Board finds that the  
14 Applicant failed to meet its burden of adequately addressing these  
15 objections to thereby demonstrate that the proposal complies with  
16 this standard. The Board thereby finds that the proposed use would  
17 *significantly adversely impact operating characteristics of*  
18 *surrounding commercial, residential, and recreational uses and is*  
19 *not compatible with those existing and projected uses.* The Board  
20 denies on this basis." Record 56 (emphasis added).

21 DCC 18.128.015(B) requires that the county consider the operational and  
22 physical characteristics of a proposed use when evaluating whether the proposed  
23 use will be "compatible with existing and projected uses on surrounding  
24 properties *based on the factors in DCC 18.128.015(A).*" (Emphasis added.) Thus  
25 DCC 18.128.015(B) expressly references site, design and operating  
26 characteristics as well as natural and physical features of the site. We agree with  
27 petitioner that to the extent the county improperly evaluated, under DCC  
28 18.128.015(B), whether marijuana retail use is an appropriate conditional use  
29 independent of its operational and physical characteristics, that evaluation has no

1 basis in DCC 18.128.105(B). The county findings regarding community  
2 livability, community values and the concentration of businesses selling  
3 intoxicants appear to be critiques of marijuana retail as a use. Critiques of  
4 marijuana retail as a use is not an evaluation of “[s]ite, design and operating  
5 characteristics” of the use or the “natural and physical features of the site,  
6 including, but not limited to, general topography, natural hazards and natural  
7 resource values” as required by DCC 18.128.015(B), (A)(1) and (A)(3). Stated  
8 differently, the county has already legislatively determined to allow marijuana  
9 uses as conditional uses in the zone, and may not interpret the CUP provisions of  
10 the DCC in a way that reverses that legislative determination. However, any error  
11 in applying DCC 18.128.015(B) does not require remand in this case because we  
12 affirm the county’s denial of the application based on inadequate transportation  
13 access to the site, as we discuss below.

14 **C. Access Aisle**

15 The CUP approval criteria include a determination of whether the site is  
16 suitable for the proposed use based on adequacy of transportation access to the  
17 site. Record 55. DCC 18.116.030(F)(5) requires that access aisles “be of  
18 sufficient width for all vehicular turning and maneuvering.” DCC  
19 18.116.030(F)(6) provides in part that “Service drives to off-street parking areas  
20 shall be designed and constructed to facilitate the flow of traffic, provide  
21 maximum safety of traffic access and egress and maximum safety of pedestrians  
22 and vehicular traffic on the site.” DCC 18.116.030(G) and Table 18.116.030 set

1 forth a 24 foot minimum width for two-way traffic. Accordingly, the county  
2 determined that the subject property’s 20-foot-wide access drive had insufficient  
3 width.

4 In considering compliance with CUP criteria, the board held that:

5 “With regard to adequacy of transportation access to projected uses  
6 on surrounding properties, the Board further finds that, without an  
7 adequately sized access aisle, the subject property is likely to cause  
8 off-site traffic impacts. This is because as the access aisle is of  
9 insufficient width to accommodate two-way vehicle, bicycle, and  
10 pedestrian traffic. Congestion of the access aisle will adversely  
11 impact traffic safety and traffic flow on 8th Street. As such, the  
12 Board finds that the proposed use will not be compatible with  
13 existing and projected uses on surrounding properties with regard to  
14 adequacy of transportation access. The application is denied on this  
15 basis.” Record 56.

16 The parties do not dispute that the subject property has legal access.  
17 Petitioner does not dispute that the proposed use, as designed, requires 24-foot  
18 paved access. Petitioner does not dispute that the current access drive is paved to  
19 approximately 20 feet, which is less than the required 24 feet.<sup>6</sup> Instead, petitioner  
20 argues that it has sufficient legal access pursuant to the 30-foot-wide access  
21 easement and the county should have approved the use conditioned upon  
22 petitioner improving the access drive to 24 feet. Petitioner argues (1) it is not  
23 required to “litigate another person’s objection to its use” of the easement, (2)

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<sup>6</sup> Petitioner did not apply for a variance from the 24-foot requirement. *See* DCC 18.132.020 (providing variance criteria). We express no opinion whether such a variance request would be allowed.

1 that the county improperly interpreted the easement by refusing to accept it as  
2 adequate to meet the applicable criteria, in petitioner’s view necessitating a quiet  
3 title action, and (3) that the county failed to recognize that it could rely on the  
4 easement for adequate access.<sup>7</sup> Petition for Review 23–24.

5 First, the board of commissioners agreed with petitioner that the county  
6 was not the proper entity to resolve the easement dispute. The board of  
7 commissioners concurred with and incorporated the hearings officer’s findings  
8 that

9 “in general, a hearings officer or other land use decision maker is  
10 not legally authorized to engage in dispute resolution concerning the  
11 intent of the parties to an easement or attempt to interpret the  
12 meaning of terms or conditions contained within an easement.”  
13 Record 45.

14 Second, the board of commissioners did not interpret the easement as  
15 “essentially requir[ing] petitioner to initiate a quiet title action, or defend a  
16 lawsuit [intervenor] does not wish [to] commence before accepting the plain  
17 terms of the unrestricted [e]asement as proof of access.” Petition for Review 24.  
18 The board expressly declined to interpret the easement. The board held, “The  
19 Board also concurs that, ‘\* \* \* interpretation of the legal meaning of provisions

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<sup>7</sup> Petitioner also argues that it is precluded from applying for the use in a new application because of the county’s adoption of Ordinance 2019-014. We declined to accept official notice of Ordinance 2019-014 for the reasons explained earlier in this opinion. We observe, however, that the county states in its response that the ordinance does not apply to marijuana retail facilities. Response 7.

1 contained in [t]he [e]asement is a private civil matter to be resolved by a court of  
2 competent jurisdiction.’ Accordingly, the Board declines to attempt to resolve the  
3 dispute between the parties or interpret the Easement.” Record 45.

4 Third, petitioner contends that the board *could* have relied on the 30-foot  
5 wide easement to find it feasible to construct a 24-foot wide paved access aisle  
6 within that easement and imposed a condition of approval, as the hearings officer  
7 did, requiring a 24-foot wide paved surface and that it was error for the board of  
8 commissioners not to condition its approval in such a manner. Although the  
9 subject property was being used for residential purposes at the time the easement  
10 over intervenor’s property was granted, the subject property has been in  
11 commercial use since approximately 2015. As petitioner points out, the county  
12 previously approved a commercial use on the property with a condition requiring  
13 expansion of the access aisle to 24 feet in width.<sup>8</sup> Petition for Review 10.

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<sup>8</sup> As the county explains:

“On December 11, 2015, a tenant of Petitioner’s predecessor-in-interest applied for a land use permit relying on the aforementioned [e]asement to provide access to the subject property. Record 288. Specifically, that 2015 application sought ‘to establish a drive-[through] food court consisting of five mobile food trucks, [and] a paved driveway from 8th Street [across the easement area] connecting to a paved parking lot with nine vehicle spaces [located on the subject property].’ Record 288.” Response Brief 8–9.

The 2015 approval was subject to a condition that the applicant build all of the improvements as shown on its final site plan. This included the 24-foot-wide

1           The hearings officer’s decision approving petitioner’s application imposed  
2 a condition of approval requiring that petitioner expand the access aisle to 24 feet  
3 in width. However, the board of commissioners chose to deny the application  
4 rather than conditionally approve it.

5           DCC 18.124.050(A) provides: “The Planning Director or Hearings Body  
6 *may* deny the site plan *or* approve it with such modifications and conditions as  
7 may be consistent with the Comprehensive Plan or the criteria and standards  
8 listed in DCC Title 18.” (Emphases added.) Similarly, DCC 18.128.015(C)  
9 provides that the county *may* impose conditions to ensure that CUP criteria are  
10 met. They do not require the county impose a condition. We have held that “[a  
11 local government] is not required to condition an approval, rather than deny an  
12 application, when the applicant has not established compliance with the code  
13 requirements.” *Shelter Resources, Inc. v. City of Cannon Beach*, 27 Or LUBA  
14 229, 241–42, *aff’d*, 129 Or App 433, 879 P2d 1313 (1994); *see also Holland v.*  
15 *City of Cannon Beach*, 35 Or LUBA 482, 488–89, *aff’d*, 161 Or App 128, 984  
16 P2d 957, *rev den*, 329 Or 553 (1999); *Decuman v. Clackamas County*, 25 Or  
17 LUBA 152, 155 (1993); *Simonson v. Marion County*, 21 Or LUBA 313, 325  
18 (1991).

19           The DCC does not require the county to impose a condition to obtain  
20 compliance but rather affords the county the discretion to do so. Given that the

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drive aisle. Response 10; Record 299–300, 310. Although the 2015 food truck  
use operated on the site, the access aisle was never paved to 24 feet.

1 county was not obligated to impose a condition to meet applicable criteria, it was  
2 not error for the board to elect to deny rather than conditionally approve the  
3 application.

4 **D. Site Plan Approval**

5 DCC 18.124.010 provides that the purpose of site plan review is to  
6 “provide[] for administrative review of the design of certain developments and  
7 improvements in order to promote functional, safe, innovative and attractive site  
8 developments compatible with the natural and man-made environment.” DCC  
9 18.124.060 sets out the approval criteria for site plan review and includes the  
10 following provisions:

11 “A. The proposed development shall relate harmoniously to the  
12 natural and man-made environment and existing  
13 development, minimizing visual impacts and preserving  
14 natural features including views and topographical features.

15 “\* \* \* \* \*

16 “E. The location and number of points of access to the site,  
17 interior circulation patterns, separations between pedestrians  
18 and moving and parked vehicles, and the arrangement of  
19 parking areas in relation to buildings and structures shall be  
20 harmonious with proposed and neighboring buildings and  
21 structures.

22 “\* \* \* \* \*

23 “K. Transportation access to the site shall be adequate for the use.

24 “1. Where applicable, issues including, but not limited to,  
25 sight distance, turn and acceleration/deceleration lanes,

1 right-of-way, roadway surfacing and widening, and  
2 bicycle and pedestrian connections, shall be identified.

3 “2. Mitigation for transportation related impacts shall be  
4 required.

5 “3. Mitigation shall meet applicable County standards in  
6 DCC 18.116.310, applicable Oregon Department of  
7 Transportation (ODOT) mobility and access standards,  
8 and applicable American Association of State Highway  
9 and Transportation Officials (AASHTO) standards.”

10 The board of commissioners stated in its findings, “The Board has  
11 previously interpreted [DCC 18.124.060A] to require proposed developments to  
12 relate harmoniously to the natural environment and existing development, both  
13 on and off-site.” Record 53. With respect to the applicable site plan review  
14 criteria, the board of commissioners adopted findings substantially similar to  
15 those that it made with respect to the lack of compatibility under the CUP criteria:

16 “The Board notes that other record submittals also cite concerns,  
17 including the close proximity of the proposed development to a state  
18 scenic bikeway, public lands, and trails; traffic impacts on [the]  
19 already dangerous intersection of Highway 20/Cook Avenue;  
20 planned improvements to the intersection of Highway 20/Cook  
21 Avenue; concentration of existing businesses that sell intoxicants in  
22 the vicinity effects on the livability of community; and that the use  
23 is inconsistent with community values. These numerous objections  
24 call into question that the proposed development is harmonious with  
25 existing and projected developments on surrounding properties.  
26 Based on substantial evidence in the record, the Board finds that the  
27 Applicant failed to meet its burden of adequately addressing these  
28 objections to thereby demonstrate that the proposal complies with  
29 this standard. *The Board thereby finds that the proposed  
30 development would significantly adversely impact operating  
31 characteristics of surrounding commercial, residential, and  
32 recreational developments and is not harmonious with those*

1        *existing and projected uses*. The Board denies on this basis.”<sup>9</sup>  
2        Record 53–54 (emphasis added).

3        For the same reasons we explained above, to the extent the board of  
4        commissioners viewed site plan review as an opportunity to evaluate whether the  
5        county should allow marijuana retail uses in the zone generally, that view is error.  
6        However, for the same reasons we explained above, such an error does not  
7        require remand where the county also found, in response to site plan approval  
8        criterion DCC 18.124.060E, that “the existing, undersized access aisle is not  
9        harmonious with proposed and neighboring buildings and structures.” Record 54.  
10       The deficient access aisle is the type of design characteristic regulated by site  
11       review. Thus, the county acted within its discretion in denying the site plan  
12       review based upon access considerations.

13       The first assignment of error is denied.

14       **SECOND THROUGH SIXTH ASSIGNMENTS OF ERROR**

15       As discussed above, we deny the second through sixth assignments of error  
16       because petitioner failed to demonstrate that the issues presented in those  
17       assignments of error were raised as required by ORS 197.763(1) and ORS  
18       197.835(3). Further, as explained in our resolution of the first assignment of error,  
19       the county properly concluded that the access standard at DCC 18.116.0030(F)  
20       and Table 18.116.030 was not met and did not err in denying the application on

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<sup>9</sup> The board of commissioners’ findings largely repeat the findings with respect to compatibility required under the CUP criteria but replace “compatible” with “harmonious”. Record 53, 54, 56.

1 that basis. “A finding of noncompliance with a single mandatory approval  
2 standard is sufficient to support a decision to deny an application for land use  
3 approval,” and we need not address the remaining assignments of error.  
4 *Simonson*, 21 Or LUBA at 327.

5 The county’s decision is affirmed.<sup>10</sup>

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<sup>10</sup> In its petition for review, petitioner asks that LUBA award it attorney fees pursuant to ORS 197.835(10)(b). Petition for Review 2. Requesting attorney fees in the petition for review is premature given that there is no prevailing party at the time the petition for review is filed and presumably the amount of fees is unknown. Further, petitioner is not the prevailing party.