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2 **NATURE OF THE DECISION**

3 Petitioner appeals a county decision approving development review to reconstruct,  
4 realign and widen a segment of SW 170<sup>th</sup> Avenue in Washington County and to relocate a  
5 historic resource.

6 **STANDING**

7 The notice of intent to appeal filed in this case lists three named petitioners: Lauren  
8 Paulson, Jane Doe and John Doe. The latter two are described as

9 “those persons \* \* \* who received deficient notice or no notice at all of those  
10 required by Washington County Code or Law.” Notice of Intent to Appeal 2.

11 The county objects to the standing of Jane Doe and John Doe, arguing that no such  
12 parties appeared below, as required by ORS 197.830(2).<sup>1</sup> Petitioner makes no attempt to  
13 establish the identity, much less the standing, of Jane Doe and John Doe. Those parties are  
14 dismissed from this appeal.

15 **MOTION TO FILE REPLY BRIEF**

16 Petitioner moves for leave to file a reply brief pursuant to OAR 661-010-0039, to  
17 address an alleged “new matter” raised in the county’s response brief.<sup>2</sup>

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<sup>1</sup>ORS 197.830(2) provides in relevant part:

“\* \* \* [A] person may petition [LUBA] for review of a land use decision \* \* \* if the person:

“(a) Filed a notice of intent to appeal the decision \* \* \*; and

“(b) Appeared before the local government \* \* \* orally or in writing.”

<sup>2</sup>OAR 661-010-0039 provides in relevant part:

“A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief together with four copies as soon as possible after respondent’s brief is filed. A reply brief shall be confined solely to new matters raised in the respondent’s brief. \* \* \*”

1 In the challenged decision, the hearings officer interpreted certain citizen  
2 involvement provisions to provide a set of procedures that are recommended but not  
3 mandatory. The process the county followed did not conform to all of the recommended  
4 procedures. The first assignment of error challenges the hearings officer’s interpretation and  
5 argues that the pertinent procedures are indeed mandatory or, if not, that the county was  
6 required to adopt findings explaining why it did not follow those procedures. The county’s  
7 brief responds in part that, assuming the hearings officer misinterpreted the applicable  
8 provisions, the gravamen of the first assignment of error then becomes an assertion that the  
9 county committed procedural error in not applying those procedures. To obtain remand  
10 based on procedural error, the county points out, petitioner must demonstrate that the  
11 procedural error prejudiced petitioner’s substantial rights. ORS 197.835(9)(a)(B).<sup>3</sup> The  
12 petition for review makes no such demonstration. Therefore, the county argues, the Board  
13 must deny the first assignment of error.

14 Responses warranting a reply brief tend to be arguments that assignments of error  
15 should fail regardless of their stated merits, based on facts or authority not involved in those  
16 assignments. *Sequoia Park Condo. Assoc. v. City of Beaverton*, 36 Or LUBA 317, 321, *aff’d*  
17 163 Or App 592, 988 P2d 422 (1999). In the present case, petitioner’s first assignment of  
18 error is stated as a challenge to the hearings officer’s interpretation, thereby invoking

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<sup>3</sup>ORS 197.835(9) provides in relevant part:

“\* \* \* [LUBA] shall reverse or remand the land use decision under review if the board finds:

“(a) The local government or special district:

“\* \* \* \* \*

“(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;

“\* \* \* \* \*

“(D) Improperly construed the applicable law[.]”

1 ORS 197.835(9)(a)(D) as our standard of review. *See* n 3. The county’s response assumes  
2 the merits of that assignment of error, but argues that the assignment nonetheless should fail  
3 because petitioner has not made additional allegations that are relevant only if our standard  
4 of review is pursuant to ORS 197.835(9)(a)(B). Having assigned error under  
5 ORS 197.835(9)(a)(D), and in light of the county’s responses, petitioner is entitled to a reply  
6 brief to explain why he believes the appropriate standard of review is under that statutory  
7 provision rather than ORS 197.835(9)(a)(B).

8 The reply brief is allowed.

9 **FACTS**

10 The challenged decision approves an application by the county’s Capital Project  
11 Management Division for a large road improvement, involving 2.38 miles of SW 170<sup>th</sup>  
12 Avenue and .51 miles of SW Oak Street located within the City of Beaverton and  
13 unincorporated Washington County. The project was one of the road improvements  
14 approved by Washington County voters in 1995 as part of a larger transportation  
15 improvement program.

16 SW 170<sup>th</sup> Avenue is currently a two-lane road within the project area. The proposed  
17 improvements will widen SW 170<sup>th</sup> Avenue to three to five lanes and add traffic signals at  
18 several intersections. The improvements will require more than 200 property acquisitions,  
19 including the removal or demolition of 28 homes.

20 To address issues and to receive comments arising from the available improvement  
21 and alignment alternatives, the county Department of Land Use and Transportation  
22 (department) convened a project advisory committee (PAC), comprised of 19 members  
23 representing affected governmental entities, business owners and other interested parties.  
24 Petitioner was one of the 19 members. The PAC gathered information over a lengthy  
25 process, and voted to adopt a number of recommendations on a number of issues, including  
26 alignment of the proposed improvements. The selected alignment affects two historic

1 properties, Blanton House and Kohler House.<sup>4</sup> With respect to Blanton House, the county  
2 proposes to acquire a portion of the .73-acre parcel on which the house stands. As a result,  
3 two concrete pedestal archways leading to the house will be removed. With respect to  
4 Kohler House, the house will be relocated.

5 The department director and the applicant accepted the PAC's recommendations, and  
6 the department prepared a staff report recommending that the hearings officer approve the  
7 application. The hearings officer conducted a public hearing on the application. Petitioner,  
8 who was one of the dissenting members of the PAC with regard to Blanton House  
9 recommendation, appeared before the county hearing officer and testified in opposition to the  
10 proposed project. The hearings officer approved the application, with conditions. This  
11 appeal followed.

## 12 **FIRST ASSIGNMENT OF ERROR**

13 In 1993, the county board of commissioners adopted by resolution and order a  
14 document entitled "Guidelines for Public Involvement in Transportation Project  
15 Development" (the guidelines). The guidelines provide that, as a general rule, large  
16 improvement projects, like the one challenged in this appeal, should be guided by the input  
17 of two advisory groups: (1) a technical advisory committee (TAC) representing affected  
18 governmental and service providers, and (2) a citizen advisory committee (CAC)  
19 representing those persons whose property is affected by the proposed project.<sup>5</sup> For

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<sup>4</sup>Petitioner owns Blanton House.

<sup>5</sup>The guidelines describe TACs and CACs as follows:

“\* \* \* The [TAC's] roles in the project are primarily to facilitate the interagency coordination necessary to ensure that all potential public service and public policy impacts are identified and considered, and to recommend a preferred alternative to the Department Director.

“If a number of jurisdictions and service provider agencies are directly and significantly affected by a large and complex project, formation of a [TAC] should be strongly considered to ensure adequate technical review and intergovernmental coordination. [TACs] will generally be utilized on Large Projects, as defined in the previous section.” Record 71.

1 medium-sized improvement projects, the guidelines indicate that a single project advisory  
2 committee, or PAC, which combines the functions of the TAC and CAC, is generally  
3 appropriate.<sup>6</sup> The guidelines provide that the department director has the discretion to  
4 choose the appropriate means to effect public participation.<sup>7</sup>  
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“\* \* \* The purposes of the [CAC] are to ensure a consistent, continuous citizen presence in the project development process for large complex projects, to provide a forum for general public input and to recommend a preferred alternative to the Department Director. \* \* \*

“A [CAC] should be utilized for large, complex projects to ensure that the ideas and concerns of interested and affected parties are identified and considered as project development proceeds. More generally, utilization of a CAC should be strongly considered when the range and intensity of project issues indicate that focused and sustained review effort is warranted.

“\* \* \* [CACs] generally will be used in Large Projects, as defined in the previous section.”  
Record 71-72.

<sup>6</sup>The guidelines describe PACs as follows:

“A [PAC] combines the functions of the CAC and TAC described above, which are to ensure a consistent, continuous citizen presence in the project development process, and to provide the interagency coordination necessary to ensure that potential public service and public policy impacts are identified and considered.

“[PACs] are appropriately utilized when use of the [TAC] and [CAC] structure is not warranted, but when the range and intensity of project issues indicates that both a continuous citizen presence and some provision for regular agency review are desirable in the project development effort.

“If it is determined that an advisory committee would be useful in the development of a Medium Project, a [PAC] rather than separate TAC and CAC will generally be used.”  
Record 72.

<sup>7</sup>The guidelines state:

“Recognizing that there are different public involvement and public information needs for different types of projects, three categories of project guidelines [for large, medium and small projects] have been created to help provide direction. *It is essential to recognize that these categories are for guidance only.* Every project, large or small, occurs in a unique set of circumstances and has a unique set of potential impacts. To be effective, provisions for public involvement and information must respond to the specific needs of each project, which in many cases will not fit neatly into one of the three categories. Relatively low cost projects may be complex and have large potential impacts and relatively high cost projects may be straightforward and have few significant impacts. These guidelines do not reduce the importance of evaluating and addressing the particular public information and public involvement needs of each project; they will provide better direction for those efforts, however. Recommendations regarding the appropriate public involvement structure for a particular project may be made during development of the Capital Improvement Program by

1 As noted above, the department director in the present case chose to use a single  
2 combined committee, a PAC, rather than separate technical and citizen’s advisory  
3 committees. The PAC was comprised of 19 members (more than the six to nine members  
4 recommended in the guidelines) and conducted 16 meetings (more than the recommended  
5 four to seven). The PAC also considered information that was gathered at two community  
6 open houses and a number of meetings with neighborhood associations and community  
7 participation organizations. The PAC’s involvement culminated in a formal public hearing  
8 and in a number of recommendations regarding potential alternatives.

9 Petitioner argued to the hearings officer, and now to us, that the guidelines mandate  
10 that the county convene separate technical and citizens’ advisory committees when  
11 considering a large transportation project. The hearings officer rejected that argument,  
12 concluding that the guidelines provide just that—guidance—for the department director in  
13 exercising discretion to choose the appropriate citizen involvement process. The hearings  
14 officer concluded that the department director’s exercise of discretion in selecting one of the  
15 recommended advisory committee structures over another was not reviewable in the land use  
16 permitting process.<sup>8</sup>

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the Capital Projects Committee. *The Department Director is responsible for defining the appropriate public involvement structure.*” Record 70 (emphasis added).

<sup>8</sup>The hearings officer’s decision states in relevant part:

“\* \* \* It was alleged that the applicant’s citizen involvement process was inadequate and failed to comply with the [guidelines]. It was alleged that the applicant’s Project Management Team \* \* \* ‘subverted’ the citizen involvement process and ignored minority opinions about alternative design and alignment choices.

“a. Given the amount of animosity expressed at the hearing, the hearings officer finds that the applicant clearly could have done a better job of involving people in the process in a meaningful way, explaining the feasibility of the various alternatives and ensuring that minority opinions are recognized and responded to. This project clearly meets the Guideline definition of ‘Large Projects,’ for which the Guidelines recommend the use of separate Citizen and Technical Advisory Committees.

“b. However, the Guidelines are just that, Guidelines. They expressly provide that the ‘categories are for guidance only.’ The Department Director is responsible for

1           Petitioner further argues that, to the extent the guidelines grant the department  
2 director discretion to choose the type of committee that serves as a vehicle for public  
3 participation, that discretion is limited. If the department director deviates from the  
4 recommended types of citizen participation, petitioner argues, that deviation must be justified  
5 with findings that demonstrate that the goal of optimal citizen participation is equally or  
6 better served by the alternative. Petitioner also argues that the choice between types of  
7 citizen participation is reviewable by the county hearings officer during review of the  
8 improvement project.

9           The county argues, and we agree, that the hearings officer correctly interpreted the  
10 guidelines. The relevant terms of the guidelines make it clear that the recommended  
11 processes are simply recommendations to the department director for determining the  
12 appropriate vehicle for public involvement. Nothing pointed out to us in the guidelines, in  
13 the resolution and order adopting the guidelines, or in the CDC, indicates that the  
14 recommended processes are mandatory in the circumstances for which they are  
15 recommended. To the contrary, the guidelines state clearly that the citizen involvement  
16 provisions should be considered guidelines to be applied flexibly to meet the unique public  
17 involvement needs of each project.<sup>9</sup>

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defining the appropriate public improvement structure, and that decision is not  
subject to review in the land use permitting process.

“c. In addition, compliance or lack of compliance with the Guidelines is irrelevant,  
because such compliance is not required for approval. [Community Development  
Code] CDC 707 sets out the applicable approval criteria for this project. \* \* \*

“\* \* \* \* \*

“d. \* \* \* The applicant provided an opportunity for public input about the proposed  
alignments through the PAC, neighborhood meetings and public open house  
meetings, and the applicant explained that process in its report. The CDC does not  
require that the applicant use a particular process or that the chosen process provide  
the greatest opportunity for public involvement.” Record 25 (footnote omitted).

<sup>9</sup>The background section of the guidelines states:

1 Further, neither the guidelines nor the CDC appears to limit the exercise of discretion  
2 granted to the director under the guidelines, or require findings by the director justifying that  
3 discretion. Neither do the guidelines or the CDC provide for review of the exercise of that  
4 discretion. Moreover, petitioner does not suggest what standards might apply to such  
5 review.<sup>10</sup>

6 The first assignment of error is denied.

7 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

8 Petitioner argues that the hearings officer erred in determining that the protections of  
9 the Historic and Cultural Resource Overlay District (Historic District) do not apply to the  
10 trellised arches of the Blanton House.

11 CDC 373 sets forth provisions governing the Historic District. CDC 373-4.2  
12 provides that the county shall apply the Historic District to “all buildings and structures” in  
13 the county’s Cultural Resources Inventory. CDC 373-5 states that, even though the entire tax  
14 lot containing inventoried buildings and structures is designated Historic District, the only  
15 buildings and structures subject to the Historic District’s provisions are those described in the  
16 inventory as significant, important, or contributing to the significance of the resource.<sup>11</sup> The

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“In the past, Washington County has defined transportation project public involvement activities on a project by project basis using common practices and experience as a guide. A formal description of a transportation project public involvement process and public information strategies will provide Washington County residents with a better understanding of what to expect, and project staff with more specific direction for designing the public involvement element of project development. *However, since each transportation project and the circumstances surrounding it is unique, these provisions for involving and informing the public in transportation project development should be considered guidelines—guidelines which allow the flexibility necessary to meet the unique public involvement needs of each project.*” Record 69 (emphasis added).

<sup>10</sup>Petitioner does cite to CDC 708-1, which requires that the “applicant shall submit an alternative analysis report demonstrating that the applicant has \* \* \* provided an opportunity for citizen input into the selection of the proposed alignment.” However, the hearings officer found, and we agree, that nothing in CDC 708-1, or elsewhere in the CDC, requires that the applicant use a particular process or the process providing the greatest opportunity for public involvement.

<sup>11</sup>CDC 373-5 provides:

1 county's Cultural Resources Inventory describes the Blanton House and its grounds, but does  
2 not mention the disputed arches.<sup>12</sup> In addition to the written description, the county's  
3 inventory contains a hand-drawn site map and a picture of the house with the arches in the

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“When the Historic and Cultural Resource Overlay District is applied to a resource, the tax lot that contains the resource shall be so designated on the relevant plan maps. This does not mean, however, that the entire tax lot is subject to the provisions of Section 373. Instead, the only buildings and structures on the tax lot subject to the Overlay District's provisions are those described in the Cultural Resources Inventory as significant, important, or contributing to the significance of the overall resource.”

<sup>12</sup>The Cultural Resources Inventory states in relevant part:

“ARCHITECTURAL DESCRIPTION

“Built in the Craftsman Bungalow style, the Blanton residence is an architectural success of detail and design. The massive 2 1/2 story rectangular building has a gable roof of medium pitch and boxed eaves. The barge boards have returns with truss motif in the gable ends. Narrow clapboard sides the entire house. There is one central interior brick chimney and one side exterior chimney with patterned brick and ornamental iron stays. Gabled dormers extend from the north and south roof facades. Window bays are 1/1 double hung sash with cornice moldings. The west front polygonal bay has a central diamond leaded glass transom. Square projecting bays appear on the north elevation and south elevation, with gable hood covering. The front porch has a shed roof with projecting gable above entry stairs, a boxed cornice, and three boxed posts with four molded brackets each, resting on clapboard porch walls. The main entry door of eight panels is recent. On the north facade is a shed roof side entry porch. Cut stone and a partial basement support the house. Just east of the residence is the clapboard pumphouse, site of the razed garage and a small 6 [foot] by 6 [foot] cement swimming pool. Original concrete walks encircle the house. Rows of large chestnut trees enclose the house. Lilac, roses and yew shrubs are examples of ornamental vegetation found on the property.

“CONTEXTUAL DESCRIPTION

“The residence is sited several lots south of Tualatin Valley Highway, and east of 170th Avenue. Heavy traffic travels both roads. Commercial and residential buildings are visible in all directions. Acreage extending east of the house is undeveloped.

“HISTORICAL SIGNIFICANCE

“In 1909 this property was part of the Arthur Johnson Estate. Johnson began acquiring land in the area in 1857 which eventually totaled 1400 acres. W. A. Shaw, presumably of Shaw-Fear Real Estate Co., owned the property for one year in 1911. In December of 1911 two lots were sold to M. E. Blanton. He graded roads made for the Shaw-Fear Co. real estate development c. 1912. According to a previous owner, John Slifer, the residence was constructed in 1909 to house a large family. At that time it was the only house on the block, on a total of three acres. Blanton held title to the property until 1922, when it was sold to Avondale Farm Co.

“The Blanton House was added to the National Register of Historic Places in April of 1989.” Record 993-94.

1 foreground. The Blanton House is also listed in the National Register of Historic Places.  
2 The National Register description of the Blanton House mentions the arches.<sup>13</sup>

3 The hearings officer found that the proposed removal of the arches does not impact  
4 any resources identified in the county’s inventory:

5 “\* \* \* The hearings officer finds, based on the County’s inventory and the  
6 National Register designation, that, although the project will impact the  
7 Blanton House site, it will not impact the identified resources.

8 “\* \* \* \* \*

9 “\* \* \* The cultural inventory for this site is limited to a description of the  
10 House. The inventory makes no mention of the trellis arches. The National  
11 Register notes the existence of the trellis arches among other features.  
12 However they are not specifically identified as being part of the historic  
13 resource or as a ‘contributing resource.’ The National Register does include  
14 the detached pumphouse as a ‘contributing resource.’ The proposed project  
15 will not impact these identified resources—the house and pumphouse.  
16 Therefore [the project] complies with CDC 373.” Record 28.

17 Petitioner contends that, contrary to the hearings officer’s finding, the trellised arches  
18 are historically and functionally part of the Blanton House and therefore a component of that  
19 building for purposes of review under CDC 373. Petitioner notes that the arches are depicted  
20 in a picture of the house contained in the county’s inventory. Further, petitioner argues that  
21 the hand-drawn site plan in the inventory depicts two small squares on either side of the  
22 walkway that may represent the pedestals supporting the arched trellis. Petitioner also notes  
23 that, even though the arches are not specifically described in the county’s inventory, the  
24 inventory does describe the “concrete walkway” around the house, which is connected to the

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<sup>13</sup>The National Register description states in relevant part:

“The building is prominently sited on the east side of S.W. 170th Avenue in the unincorporated area of Aloha. Oriented to the west, it is set back approximately 50 feet from the street. A wire mesh fence delineates the south (side) and west (front) perimeters of the lot. Paired concrete pedestals with iron pipe—which act as a trellis for climbing roses—flank the entrance to the original driveway, no longer in use, on the southwest corner of the lot. A second set of pedestals, located on the northwest corner of the lot, frame the entrance to a concrete walkway which encircles the house.” Record 1001.

1 walkway passing through the arches. Similarly, petitioner argues, the inventory mentions  
2 ornamental vegetation such as the climbing roses that the arches support.

3 If not part of the house or otherwise included in the inventory, petitioner argues, the  
4 arches are nonetheless part of the historical context for the house and thus deserving of  
5 protection under CDC 373. Petitioner cites in particular to the National Register description  
6 as evidence of the arches' contextual significance.

7 Under CDC 373-5, a resource is subject to review under CDC 373 if it is (1) a  
8 building or structure that is (2) described in the county's inventory (3) as significant,  
9 important, or contributing to the significance of the overall resource. We agree with the  
10 hearings officer that the disputed arches are not subject to review under CDC 373, because  
11 they are not described in the county's inventory as significant, important, or contributing to  
12 the significance of the overall resource. Indeed, they are not described at all. Petitioner may  
13 be correct that the inventory should have described the arches in some manner that would,  
14 under CDC 373-5, subject them to the protections of CDC 373. However, the fact is they  
15 were not so described, and that circumstance is fatal to petitioner's argument.<sup>14</sup> That the  
16 National Register describes the arches does not alter our conclusion. It is the county's  
17 inventory that is pertinent under CDC 373-5. Petitioner does not cite to anything in the CDC  
18 or federal law that makes the National Register description material to review under CDC  
19 373.

20 The second and third assignments of error are denied.

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<sup>14</sup>We disagree with petitioner that the picture or the site plan suffices to "describe" the arches as "significant, important, or contributing to the significance of the overall resource," for purposes of CDC 373-5. CDC 373-5 clearly contemplates a narrative description of some kind. It is difficult to imagine how a graphic depiction could "describe" and assign significance to a resource in the manner petitioner suggests. Nor is petitioner assisted by the argument that the arches are "described" for purposes of CDC 373-5 because the narrative mentions walkways and ornamental vegetation tangentially associated with the arches. Even assuming such elements are "buildings or structures," petitioner does not dispute that the inventory does not describe those elements as "significant, important, or contributing to the significance of the overall resource." Petitioner points out, correctly, that the county's inventory in fact does not describe anything on the subject property, even the house itself, as significant, important or contributing. However, that defect, if it is one, is in the county's inventory, and does not provide a basis to alter the requirements of CDC 373-5.

1 **FOURTH ASSIGNMENT OF ERROR**

2 Petitioner argues that the hearings officer misinterpreted CDC 373-6.8(A), and failed  
3 to adopt adequate findings of compliance with that provision, in refusing to consider whether  
4 alternative alignments might obviate the need to remove or demolish the historic Kohler  
5 House.<sup>15</sup>

6 In response to arguments below that the land on which the Kohler House is located is  
7 not “needed to accommodate” the proposal for purposes of CDC 373-6.8(A), the hearings  
8 officer found:

9 “\* \* \* The Code expressly allows impacts to cultural and historic resources in  
10 this case, *i.e.*, where the designated resource is located on land needed to  
11 accommodate the planned widening or realignment of a public road.  
12 CDC 373-6.8(A). The applicant considered these and other impacts through  
13 the alignment selection process as required by CDC 708-2.3(K). The hearings  
14 officer has no authority to second-guess the alignment selection in this  
15 proceeding. CDC 708-3.” Record 29.

16 The hearings officer thus interpreted CDC 373-6.8(A) in the context of CDC 708-3, which  
17 states that, in reviewing an alternative alignment analysis for a transportation improvement,  
18 the hearings officer “shall not consider whether alternative alignments might better or more  
19 clearly meet the standards of this Article.”<sup>16</sup>

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<sup>15</sup>CDC 373-6.8 provides in relevant part:

“Approval of a development permit to relocate a designated resource shall be based on all the following findings:

- “A. The designated resource is in a land use district (e.g., R-9, R-15, R-24, R-25+, Neighborhood Commercial, Community Business, General Commercial, Office Commercial, Industrial, MAE, Rural Industrial or Rural Commercial) that allows higher density development; is an accessory building or structure to a historic farm house (e.g., a barn, garage or shed) in the R-5 or R-6 district; *or is on land that is needed to accommodate the planned widening or realignment of a public road or transportation facility[.]*” (Emphasis added).

<sup>16</sup>CDC 708-1 requires that the applicant for a transportation improvement submit an alternative analysis report demonstrating that the applicant has evaluated alternative alignments. The report must contain, among other items, a description of anticipated impacts of each alternative alignment as it relates to cultural and historic resources. CDC 708-2.3(K) and (M). CDC 708-3 provides in relevant part:

1           Petitioner challenges that interpretation, arguing that however CDC 708-3 may  
2 constrain the hearings officer’s review, it does not waive the hearings officer’s obligation to  
3 address and find compliance with CDC 373-6.8(A), specifically a finding that the land on  
4 which the resource is located is “needed to accommodate” the proposed improvement. If we  
5 understand petitioner correctly, petitioner argues that CDC 373-6.8(A) requires the hearings  
6 officer to determine whether any alternative alignments that do not require relocation of the  
7 resource exist. If so, petitioner argues, the hearings officer must deny the application,  
8 because it fails to satisfy CDC 373-6.8(A). However, petitioner argues, the hearings officer  
9 never conducted that inquiry, because he misconstrued CDC 373-6.8(A) in light of CDC  
10 708-3 to prohibit him from considering alternative alignments.

11           We agree with the county that CDC 373-6.8(A) is not correctly interpreted, either on  
12 alone or in context, to require the hearings officer to consider whether alternative alignments  
13 exist that do not require relocation of the resource. CDC 373-6.8(A) requires the hearings  
14 officer to determine whether the designated resource is on land that is “needed to  
15 accommodate the planned widening or realignment of a public road or transportation  
16 facility.” A straightforward reading of that requirement, and one that is not in tension with  
17 CDC 708-3, is that it is satisfied if the designated resource is on land that is needed to  
18 accommodate the planned improvement, *i.e.* the proposed widening or realignment, once an  
19 alignment is selected. That reading is supported by the other terms of CDC 373-6.8(A),  
20 which allow relocation of a resource under a variety of circumstances, none of which require  
21 an alternative analysis of any kind.

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“The Review Authority shall determine whether the alternative analysis report complies with the requirements of this section, but shall not consider whether alternative alignments might better or more clearly meet the standards of this Article. \* \* \* The Review Authority shall reject this report if it fails to comply with the requirements of this Section and shall not consider an application for design approval until the report is approved. The applicant may submit a new application at any time.”

1 Further, petitioner’s reading of CDC 373-6.8(A) is inconsistent with CDC 708.  
2 CDC 708-2 sets forth the required content of the alternative analysis report. CDC 708-2.3  
3 requires that the report contain a description of anticipated impacts of each alternative  
4 alignment as it relates to 15 different types of concerns, including air quality and wetlands, as  
5 well as cultural and historic resources. CDC 708-2.4 requires that the report contain a  
6 “description of how the anticipated significant impacts were weighed and balanced, the  
7 rationale for selection of the proposed alignment and potential mitigation measures for the  
8 proposed alignment.” CDC 708-3 confines the hearings officer’s review of the report to  
9 whether it complies with the requirements of CDC 708, *i.e.*, whether it contains the required  
10 information and descriptions, and expressly prohibits the hearings officer from considering  
11 whether alternative alignments might better meet the standards of CDC Article 7.<sup>17</sup> It is  
12 clear under this scheme that the hearings officer’s review does not include independent  
13 review of the “weighing and balancing” required by CDC 708-2.4, or evaluation of the  
14 merits of the rationale for the selection of the proposed alignment. Petitioner’s reading of  
15 CDC 373-6.8(A) would expand the hearings officer’s review in a manner that is inconsistent  
16 with CDC 708, and would essentially elevate protection of cultural and historic resources  
17 above the other concerns that must be balanced under CDC 708. For the foregoing reasons,  
18 we agree with the county that CDC 373-6.8(A) is more reasonably read in context not to  
19 require the kind of consideration of alternative alignments that petitioner suggests.

20 The fourth assignment of error is denied.

21 The county’s decision is affirmed.

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<sup>17</sup>The parties agree that CDC 373 is included in CDC 708-3’s reference to CDC Article 7 by virtue of CDC 717, which states that proposals to alter a structure or property designated as a historic or cultural resource under CDC 373 shall comply with the applicable standards of CDC 373.