

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 ELIZABETH WILLHITE,

5 *Petitioner,*

6
7 vs.

8
9 CLACKAMAS COUNTY,

10 *Respondent,*

11
12 and

13
14 JOHN VAN DIEST and RICHARD REMSBURG,

15 *Intervenors-Respondent.*

16
17 LUBA No. 2003-155

18
19 FINAL OPINION

20 AND ORDER

21
22 Appeal from Clackamas County.

23
24 Ty K. Wyman, Portland, filed the petition for review and argued on behalf of petitioner.
25 With him on the brief was Jack D. Hoffman and Dunn Carney Allen Higgins and Tongue LLP.

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27 Michael E. Judd, Clackamas County Counsel, Oregon City, filed a response brief on behalf
28 of respondent.

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30 Barry L. Adamson, Lake Oswego, filed a response brief and argued on behalf of
31 intervenors-respondent.

32
33 HOLSTUN, Board Member; BASSHAM, Board Chair; BRIGGS, Board Member,
34 participated in the decision.

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36 AFFIRMED

02/02/2004

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

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NATURE OF THE DECISION

Petitioner appeals a county decision that grants approval for a 14-lot rural subdivision.

MOTION TO INTERVENE

John Van Deist and Richard Remsburg move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property includes 71.5 acres in five separate tax lots. The property is zoned Rural Residential Farm Forest, Five Acre Minimum Lot Size (RRFF-5) and is subject to the county’s River and Stream Conservation Area regulations.

The property is located approximately six miles northeast of the City of Sandy. The majority of the property is located east of Bull Run Road. Access to the proposed lots would be provided by improving Laughing Water Road, an existing substandard road that intersects with Bull Run Road at the north end of the property. Laughing Water Road travels east along Deer Creek Fork and the northern part of the property and then turns south along an unnamed tributary of Deer Creek Fork to provide access to proposed lots at the south end of the property. Under county regulations, Laughing Water Road must be widened and improved before it can provide the required access for the proposed lots.¹

In this appeal, petitioner contends the county erroneously concluded that the proposed improvements to Laughing Water Road comply with setback and vegetation preservation requirements that apply to Deer Creek Fork and the unnamed tributary and with required protections for wildlife habitat and wetlands.

¹ The above is an incomplete description of the precise layout of the proposed subdivision, but it is sufficient to provide a basis for considering petitioner’s assignments of error.

1 **FIRST ASSIGNMENT OF ERROR**

2 The property is subject to the county’s River and Stream Conservation Area (RSCA)
3 regulations, which protect rivers and streams from development. Clackamas County Zoning and
4 Development Ordinance (ZDO) Section 704. ZDO 704.04 requires that “primary and accessory
5 structures” be setback from rivers, and large, medium and small streams. Deer Creek Fork
6 qualifies as a small stream. The required setback from small streams is a “[m]inimum [of] fifty (50)
7 feet from the mean high water line of the stream.” ZDO 704.04(B)(3).

8 It is not disputed that significant portions of the existing Laughing Water Road lie closer to
9 Deer Creek Fork than 50 feet. In some places, the entire existing roadway is less than 50 feet from
10 Deer Creek Fork. It is also not disputed that the challenged decision authorizes widening and other
11 improvements to Laughing Water Road. The question is whether that widening and improvement
12 violates the 50-foot setback from Deer Creek Fork that is required by ZDO 704.04(B)(3).

13 ZDO 704.06 provides exceptions to the setbacks required by ZDO 704.04. ZDO
14 704.06(B) allows “additions” and “alterations” to “roadways [that are] closer to a river or stream”
15 than would be permitted by the applicable ZDO 704.04 setback, “provided that such development
16 does not encroach into the setback any more than the existing * * * roadways * * *.”² Petitioner
17 understands the county to have adopted an implicit interpretation of ZDO 704.06(B) to authorize
18 roadway widening and improvement to Laughing Creek Road, so long as the widened and
19 improved roadway is no closer to Deer Creek Fork than the existing roadway. We also understand
20 the county to have interpreted ZDO 704.04(B)(2) and 704.06(B) in that way.³

² The full text of the exception provided by ZDO 704.06(B) is as follows:

“Repairs, additions, alterations to, or replacement of structures, roadways, driveways, or other development, which is located closer to a river or stream than permitted by the setback requirements of Subsection 704.04 shall be permitted, provided that such development does not encroach into the setback any more than the existing structures, roadways, driveways, or other development, and complies with the other provisions of Section 704.”

³ The hearings officer cites the following explanation of the exception provided by ZDO 704.06(B):

1 In essence, petitioner characterizes the 50-foot setback that is required by ZDO
2 704.04(B)(2) as a buffer zone or buffer area along each side of Deer Creek Fork. In areas where
3 the existing Laughing Creek Road is entirely within 50 feet of Deer Creek Fork, petitioner contends
4 that widening of that roadway necessarily “encroaches into the setback,” notwithstanding that the
5 roadway is being widened on the side of Laughing Creek Road that is away from Deer Creek Fork.
6 Petition for Review 5.

7 The county on the other hand views the 50-foot setback as proximity restriction. Under the
8 county’s view, where a roadway already violates that proximity restriction, 704.06(B) permits
9 expansion of that existing roadway, so long as the proximity restriction is not exacerbated. The
10 county explains in its brief:

11 “Petitioner focuses on the words ‘the setback’ [in ZDO 704.06(B)];
12 understandably, she does not discuss the preceding words ‘encroach into’. [ZDO
13 704.06(B)] does not say development shall not ‘occur on’ the setback any more
14 than the existing development, it says ‘encroach into’. Given that the setback starts
15 from the stream bank and extends outward, the only reasonable interpretation of
16 ‘encroach into’ is to undertake development closer to the stream than the existing
17 development. * * *” Respondent’s Brief 2 (emphasis in original).

18 Even if petitioner’s reading of ZDO 704.06(B) is textually plausible, we believe the county’s
19 reading of ZDO 704.06(B) is more consistent with the text of that provision. In addition, petitioner
20 identifies no policy reason or purpose that might be served by interpreting ZDO 704.06(B) to
21 require preservation of narrow strips of land that are located less than 50 feet from a stream but are

“Road sections A and C are adjacent to Deer Creek Fork * * *. ZDO 704.06.B prohibits road widening which results in additional encroachment into the stream setback. Condition of approval 12 requires that the applicants relocate the proposed improvements to widen the roads *away* from the stream.” Record 3 (emphasis added).

As relevant, the referenced condition of approval 12 (condition 12) provides:

“Lands within the proposed plat area located * * * within fifty (50) feet of the mean high water line of Deer Creek Fork, are subject to the provisions of [ZDO] 704[.] * * * No development may be permitted within * * * riparian buffer areas, except to the extent necessary to accommodate road improvements allowed by subsections 704.06 and 1002.05. The stream conservation area setbacks, standards for development and vegetation preservation requirements shall be complied with in these areas. * * *” Record 18.

1 located on the landward side of an existing roadway that intrudes into the required streamside
2 setback.

3 The first assignment of error is denied.⁴

4 **SECOND ASSIGNMENT OF ERROR**

5 Petitioner next argues that the county's imposition of condition 12 to ensure that the
6 proposed improvements to Laughing Water Road along Deer Creek Fork comply with the RSCA
7 vegetation preservation requirements is inadequate to ensure compliance with that criterion. The
8 RSCA vegetation preservation requirements are set out at ZDO 704.07.⁵ The hearings officer
9 adopted the following findings concerning the vegetation preservation obligation imposed by ZDO
10 704.07:

11 "The hearings officer finds that the proposed development can comply with the
12 vegetation preservation requirements of ZDO 704.07. This section prohibits the
13 removal of trees, with certain exceptions, and requires the applicants to preserve at

⁴ Petitioner divides her first assignment of error into subassignments of error. However, her subassignment of error B, which is directed at condition 12, is premised on her interpretation of ZDO 704.06(B). To the extent that petitioner argues that the county has not demonstrated that it is feasible to require that any road improvements to Laughing Water Road not encroach closer to Deer Creek Fork, petitioner offers no suggestion why it is not feasible to do so and points to no evidence that suggests it is not feasible to do so. Unless petitioner can point to something in the record that questions the feasibility of complying with condition 12, we agree with the county and intervenors that there is no requirement that the county address that question.

⁵ In relevant part, ZDO 704.07 provides:

- "A. A minimum of seventy-five percent (75%) of the setback area (distance) shall be preserved with native vegetation.
- "B. Tree cutting and grading shall be prohibited within the buffer or filter strip, with the following exceptions:
 - "1. Diseased trees or trees in danger of falling may be removed; and
 - "2. Tree cutting or grading may be permitted in conjunction with those uses listed in subsection 704.05 and 704.06 to the extent necessary to accommodate those uses.
 - "3. Vegetation removal may occur when approved by the Oregon Department of Fish and Wildlife (ODFW) upon written notification that such removal is required as part of a river or stream enhancement project.

1 least seventy-five (75%) of native vegetation in the setback area * * *. This is
2 required by condition * * * 12.” Record 11.⁶

3 Petitioner focuses exclusively on the requirement of ZDO 704.07(A): “[a] minimum of
4 seventy-five percent (75%) of the setback area (distance) shall be preserved with native
5 vegetation.” Putting aside for a moment the additional questions that are raised by the fact that
6 Laughing Water Road already intrudes into the setback, ZDO 704.07(A) is ambiguous. The
7 county’s decision does not adopt an express interpretation. It is not clear from the petition for
8 review precisely what petitioner believes ZDO 704.07(A) requires.

9 Although ZDO 704.07(A) is ambiguous, assuming there were no existing development in
10 the setback required by ZDO 704.04(B)(3), it is reasonably clear that ZDO 704.07(A) requires
11 that a minimum of 75 percent of the 50-foot setback area “shall be preserved with native
12 vegetation.” In other words, ZDO 704.07(A) requires that at least 37.5 feet of the 50-foot setback
13 area “shall be preserved with native vegetation.” The next question is what does it mean to
14 “preserve[that 37.5-foot area]” “with native vegetation?” The way ZDO 704.07(A) is written, it
15 appears that the *subject* of the preservation obligation that is imposed by that section is the 37.5-
16 foot area; the *duty* is to preserve that 37.5-foot area with native vegetation. It is possible to read
17 the ZDO 704.07(A) “shall be preserved with native vegetation” language to require that native
18 vegetation be preserved if it exists and to require that native vegetation be planted if it does not
19 exist. We are not sure that petitioner adopts that interpretation of ZDO 704.07(A). Intervenors
20 expressly reject it, and the county does not appear to embrace that interpretation of ZDO
21 704.07(A). Rather, like intervenors, the county appears to read the obligation to preserve native
22 vegetation within the 37.5-foot area as an obligation to preserve whatever native vegetation already
23 exists in that area. While either interpretation may be possible, for the textual and contextual
24 reasons set out below, we agree with the county and intervenors’ understanding of ZDO
25 704.07(A).

⁶ The relevant part of condition 12 is set out at n 3.

1 The text of ZDO 704.07(A) could have expressly stated that it imposes an obligation to
2 plant native vegetation in setback areas where it is absent, but it does not. That is at least some
3 indication that ZDO 704.07(A) is concerned with *existing* native vegetation only. We also believe
4 it is appropriate to interpret ZDO 704.07(A) in context with ZDO 704.07(B). *See* n 5. ZDO
5 704.07(B) refers to the area of concern in ZDO 704.07 as a “buffer or filter strip.” ZDO 704.07(B)
6 is clearly concerned with limiting removal of vegetation that is already located within that “buffer or
7 filter strip.” Given that context, we do not believe the somewhat ambiguous wording of ZDO
8 704.07(A) is sufficient to interpret it to require more than preservation of any existing native
9 vegetation within a minimum of 75 percent of the required setback area.

10 With that understanding of how ZDO 704.07(A) operates in a situation where there is no
11 existing development within the required 50-foot setback, we return to the present case where there
12 is existing development. Laughing Water Road already intrudes into the 50-foot setback required
13 by ZDO 704.04(B).⁷ The question becomes whether the obligation to preserve 75 percent of the
14 existing native vegetation within the “setback area (distance)” applies to the entire 50-foot setback
15 distance or, in areas where Laughing Creek Road lies closer than 50 feet to Deer Creek Fork,
16 whether it applies to whatever setback exists between the existing road and Deer Creek Fork.
17 Although it is not expressly stated in the county’s decision, we understand the hearings officer to
18 have applied that obligation to the existing area or distance that the existing road is setback from
19 Deer Creek Fork. We understand condition 12 to prohibit *any* encroachment of Laughing Water
20 Road into the 50-foot setback, where it does not presently do so. *See* n 3. Condition 12 also
21 prohibits any *additional* encroachment toward Deer Creek Fork into whatever setback exists
22 between Laughing Water Road and Deer Creek Fork, where Laughing Creek Road already
23 encroaches into that 50-foot setback. We understand the county to have found that the ZDO

⁷ Although the parties do not really address the question directly, it appears that the proposed improvements to Laughing Water Road are the only improvements that might implicate the ZDO 704.07(A) obligation to preserve native vegetation.

1 704.07(A) requirement to preserve at least 75 percent “of the setback area (distance)” is
2 necessarily met because *all* of that existing “setback area (distance)” will be preserved from
3 encroachment by roadway improvements to Laughing Water Road where it parallels Deer Creek
4 Fork. We find that interpretation and application of ZDO 704.04(B) to be reasonable and correct.

5 The second assignment of error is denied.

6 **THIRD ASSIGNMENT OF ERROR**

7 The southern portion of Laughing Water Road proceeds south from Deer Creek Fork,
8 along an unnamed tributary of Deer Creek Fork. The parties agree that the ZDO 704.04 setbacks
9 that apply within the RSCA do not apply to this unnamed tributary. However, the parties also agree
10 that this portion of Laughing Water Road is subject to a different setback requirement imposed by
11 ZDO 1002.05, which imposes development standards to protect natural features.⁸

⁸ In relevant part, ZDO 1002.05 provides:

“A. All developments shall be planned, designed, constructed, and maintained so that:

- “1. River and stream corridors are preserved to the maximum extent feasible and water quality is protected through adequate drainage and erosion control practices.
- “2. Buffers or filter strips of natural vegetation are retained along all river and stream banks.

“B. The minimum separation distance necessary to maintain or improve upon existing water quality shall be the required setback for buildings or structures proposed alongside of any river or perennial streambed. This distance shall be determined by a site investigation, but will not exceed 150 feet. Investigation shall consider:

- “1. Soil types.
- “2. Types and amount of vegetation cover.
- “3. Bank stability.
- “4. Slope of the land abutting the stream.
- “5. Hazards of flooding.
- “6. Stream character.

1 Whereas ZDO 1002.05(B) requires that the minimum setback for “proposed buildings and
2 structures” is to be determined based on a “site investigation” that considers certain listed factors,
3 petitioner contends the hearings officer erroneously applied a 25-foot setback along the unnamed
4 tributary based on testimony by the planning department that it generally applies a 25-foot setback
5 under ZDO 1002.05(B). According to petitioner, it was error not to perform the individualized
6 “site investigation” that is required by ZDO 1002.05(B) to determine whether a 25-foot setback is
7 sufficient. Petitioner contends that error, in turn, led the hearings officer to impose condition 12,
8 which requires that 25-foot setback, and to conclude erroneously that condition 12 is sufficient to
9 ensure that the proposal complies with ZDO 1002.05(B).

10 The county argues a July 30, 2003 planning staff report in this matter recommends that the
11 hearings officer employ a 25-foot setback along the unnamed tributary to comply with ZDO
12 1002.05. Use of a 25-foot setback to comply with ZDO 1002.05 was discussed by both planning
13 staff and petitioner during the proceedings below. Record 36, 47, 55-56. The county argues
14 petitioner did not raise any issue that a site investigation must be performed under ZDO 1002.05(B)
15 to support the proposed use of a 25-foot setback along the unnamed tributary. The county and
16 intervenors argue that because petitioner failed to raise this issue below, she may not raise the issue
17 for the first time on appeal to LUBA. ORS 197.763(1); 197.835(3).

18 Petitioner does not identify where this issue was raised below. Accordingly, this issue is
19 waived.⁹

“7. Any special plan designation or management program such as the
Willamette River Greenway.”

⁹ The county and intervenors also point out that an August 29, 2001 planning department staff report that was prepared in response to a prior application to subdivide the property demonstrates that the planning department did perform the “site investigation” that is required by ZDO 1002.05 in recommending the 25-foot setback. Record 137-140. The July 30, 2003 planning staff report that was prepared in response to the current application adopts that prior staff report. Record 260. The hearings officer adopts the July 30, 2003 staff report in support of his decision. Absent some argument that the incorporated August 29, 2001 planning staff report is inadequate to comply with the “site investigation” required by ZDO 1002.05, we agree with the county and intervenors that the third assignment of error would have to be denied in any event.

1 The third assignment of error is denied.

2 **FOURTH ASSIGNMENT OF ERROR**

3 Petitioner’s fourth assignment of error is difficult to follow. That assignment of error is as
4 follows:

5 “In finding compliance with ZDO 1002.06, [the hearings officer] concluded that the
6 Applicants could widen [Laughing Creek Road] near the unnamed tributary and
7 preserve at least 75% of the vegetation in the adjacent setback as required by ZDO
8 1002.04. In so doing, [the hearings officer] adopted a condition of approval for
9 which there is no substantial evidence that compliance is feasible.” Petition for
10 Review 10.

11 As intervenors point out, neither ZDO 1002.06 nor 1002.04 impose a requirement that the
12 proposal “preserve at least 75% of the vegetation in the adjacent setback.”¹⁰ Petitioner’s
13 assignment of error fails to allege a basis for reversal or remand.¹¹

14 The only argument that petitioner sets out under the fourth assignment of error is equally
15 difficult to follow. Petitioner quotes a portion of ZDO 1002.04 and provides the following
16 argument:

¹⁰ The relevant part of ZDO 1002.06 is set out at n 13 in our discussion of the fifth assignment error below. The part of ZDO 1002.04 that petitioner quotes under this assignment of error is as follows:

- A. Existing wooded areas, significant clumps or groves of trees and vegetation, consisting of conifers, oaks and large deciduous trees, shall be incorporated in the development plan wherever feasible. Site planning and design techniques which address this standard include, but are not limited to, the following:

“1. Siting of roadways and utilities easements to avoid substantial disturbance of significant clumps or groves of trees.

“2. Preservation of existing trees within rights-of-way and easements when such trees are suitably located, healthy, and when approved grading allows.”

¹¹ Petitioner may have meant to allege that the decision inadequately addresses ZDO 1002.05 under this assignment of error. As noted in our discussion of the third assignment of error, ZDO 1002.05 does impose a setback requirement. *See* n 8. In any event, petitioner does not mention ZDO 1002.05 under the fourth assignment of error and ZDO 1002.05 does not impose a requirement that the applicant preserve 75 percent of the vegetation in the required setback.

1 “In addition, because there was no inventory of the native vegetation, there is no
2 evidence that it is feasible that the access road can satisfy ZDO 1002.04.” Petition
3 for Review 10.

4 It is not apparent to us why an “inventory of native vegetation” is essential for an adequate
5 evidentiary basis for a finding that the proposed improvements to Laughing Creek Road along the
6 unnamed tributary comply with ZDO 1002.04. The above-quoted argument is insufficiently
7 developed to provide a basis for reversal or remand. *Deschutes Development v. Deschutes Cty.*,
8 5 Or LUBA 218, 220 (1982).

9 The fourth assignment of error is denied.

10 **FIFTH ASSIGNMENT OF ERROR¹²**

11 ZDO 1002.06(C) requires that development within 100 feet of a “natural wetland” must
12 “[p]rotect native plant species, aquatic habitats, and endangered or otherwise important wildlife
13 species” and “[m]inimize adverse wildlife impacts in sensitive habitat areas.”¹³ In addressing this
14 requirement, the hearings officer adopted the following findings:

¹² Petitioner alleges two fourth assignments of error. Like intervenors, we treat the fourth assignment of error that appears at pages 11-12 of the petition for review as the fifth assignment of error.

¹³ As relevant, ZDO 1002.06 provides:

“A. Decisions regarding development of wetlands in urban areas as identified on the North Urban Area Land Use Plan Map have been made pursuant to the Goal 5 and Oregon Administrative Rules 660, Division 16 provisions. Wetlands in this urban area that are subject to County regulations are identified as Conservation Wetlands and are regulated pursuant to Section 709 of this Ordinance. The remaining wetlands in these urban areas shall not be regulated pursuant to this Ordinance.

“B. Development of wetlands in areas not identified as urban in the Comprehensive Plan are not regulated by the County but are subject to the requirements of the U.S. Army Corps of Engineers and the Oregon Division of State Lands. The County will notify the Oregon Division of State Lands of development applications proposed in areas shown on the Statewide Wetland Inventory as prescribed in ORS 215.418.

“C. All developments, except as provided in Subsection 1002.06A above, proposed in or near (within one hundred (100) feet of) natural wetlands shall be designed to:

“1. Protect native plant species, aquatic habitats, and endangered or otherwise important wildlife species.

1 “As noted above, there is no substantial evidence in the record regarding the
2 location [or] extent of wetlands on the site. However, given the topography of the
3 site and the vegetation shown in the photographs, wetlands are likely to be
4 associated with the streams on the site. Compliance with the setback requirements
5 of the RSCA and ZDC 1002.05 will minimize impacts to these areas to some
6 extent. However, the setback requirements extend to a maximum of 70 feet from
7 the high water line of the stream. ZDO 1002.06 requires protection of wildlife
8 habitat within 100 feet of natural wetlands. Therefore the hearings officer finds that,
9 before the County authorizes development permits, the applicants should be
10 required to provide additional information regarding the existence and location of
11 wetlands on this site and potential development impacts within 100 feet of identified
12 wetlands. The planning director should be required to find, through at least a Type
13 II administrative review process, that the proposed development minimizes adverse
14 impacts to wildlife habitat within these areas, as required by ZDO 1002.06. This is
15 required by condition of approval 13.” Record 13.¹⁴

16 In her fifth assignment of error, petitioner assumes that ZDO 1002.06 imposes an approval
17 criterion that the county must address at the time of tentative subdivision plan approval. Petitioner
18 contends that improvements to Laughing Water Road along the unnamed tributary will not “minimize
19 adverse wildlife impacts” as required by ZDO 1002.06. Petition for Review 12. Petitioner also
20 argues that the hearings officer’s decision does not “show that compliance with [condition 13] is

“2. Minimize adverse wildlife impacts in sensitive habitat areas, such as deer and elk winter range below 3,000 feet elevation, riparian areas, and wetlands.”

¹⁴ Condition 13 is as follows:

“Prior to final subdivision plat approval, the applicants shall commission a wetlands delineation study to be performed by a qualified wetlands consultant to determine the location and extent of any jurisdictional wetlands within the plat area. The applicants shall obtain a ‘Letter of Concurrence’ from the Oregon Division of State Lands signifying that agency’s concurrence with the delineation report, also prior to final plat approval.

“a. No development shall be permitted within any identified jurisdictional wetland unless such development is approved by the Oregon Division of State Lands and/or U.S. Army Corps of Engineers and approved wetland impacts are mitigated.

“b. If such wetland areas lie within the required stream conservation area buffers (setbacks, see condition No. 12), no development is permitted in these areas.

“c. Development within 100 feet of identified jurisdictional wetlands shall be subject to approval of a Site Specific Design Review approval by the Planning Division to determine that the goals stated in [ZDO] 1002.06(C) are satisfied.” Record 18.

1 feasible” and that the record does not include “substantial evidence that compliance with this
2 condition is feasible.” Petition for Review 11.

3 We note that ZDO 1002.06(C)(2) does not *prohibit* development with adverse wildlife
4 impacts; it requires that development “minimize adverse wildlife impacts.” We also have some
5 question whether petitioner’s assumption that ZDO 1002.06(C)(2) necessarily must be applied at
6 the time of tentative subdivision plan approval is correct. However, even if it is, the hearings
7 officer’s findings and condition 13 are clearly sufficient to ensure such compliance.

8 Petitioner’s suggestion that the hearings officer was obligated to find that it is “feasible” for
9 the proposed development to comply with ZDO 1002.06(C)(2), before he may rely on condition
10 13 to satisfy ZDO 1002.06(C)(2), is presumably based on our decision in *Rhyne v. Multnomah*
11 *County*, 23 Or LUBA 442 (1992). In *Rhyne*, we explained several ways a local government may
12 go about demonstrating compliance with applicable approval criteria in reviewing an application for
13 discretionary land use approval, where a multi-stage approval process is employed and early stage
14 approvals occur in a public planning process but later stage approvals might not include an
15 opportunity for public hearings:

16 “Where the evidence presented during the first stage approval proceedings raises
17 questions concerning whether a particular approval criterion is satisfied, a local
18 government essentially has three options potentially available. First, it may find that
19 although the evidence is conflicting, the evidence nevertheless is sufficient to support
20 a finding that the standard is satisfied or that feasible solutions to identified problems
21 exist, and impose conditions if necessary. Second, if the local government
22 determines there is insufficient evidence to determine the feasibility of compliance
23 with the standard, it could on that basis deny the application. Third, if the local
24 government determines that there is insufficient evidence to determine the feasibility
25 of compliance with the standard, instead of finding the standard is not met, it may
26 defer a determination concerning compliance with the standard to the second stage.
27 In selecting this third option, the local government is not finding all applicable
28 approval standards are complied with, or that it is feasible to do so, as part of the
29 first stage approval (as it does under the first option described above). Therefore,
30 the local government must assure that the second stage approval process to which
31 the decision making is deferred provides the statutorily required notice and hearing,
32 even though the local code may not require such notice and hearing for second

1 stage decisions in other circumstances. * * *” 23 Or LUBA 447-48 (footnotes
2 omitted).

3 The hearings officer did not follow the first option we described in *Rhyne*; he did not find
4 that the proposed subdivision complies with ZDO 1002.06(C)(2), and he did not find that the
5 evidentiary record was sufficient to allow him to find that it is “feasible” for the applicant to comply
6 with ZDO 1002.06(C)(2). The third option we described in *Rhyne* most closely approximates
7 what the county hearings officer did in this case with regard to ZDO 1002.06(C)(2). He found that
8 there was not sufficient evidence in the record to allow him to determine whether the development
9 authorized by the tentative subdivision plan approval will comply with ZDO 1002.06(C)(2). The
10 hearings officer therefore required that the applicant prepare the necessary wetlands study and
11 obtain design review approval in advance of final plat approval. We understand that design review
12 approval to require a public process.

13 Given the approach the hearings officer followed, no “feasibility” finding was required and
14 the lack of such a finding provides no basis for reversal or remand. Petitioner makes no attempt to
15 explain why the approach employed by the hearings officer is impermissible. The hearings officer’s
16 approach seems entirely consistent with the third option we explained in *Rhyne*. The hearings
17 officer’s approach will ensure that the required finding of compliance with ZDO 1002.06(C)(2) will
18 be made following a public process that allows for participation by all parties who are entitled to
19 participate and that the required finding will be made in advance of final plat approval. We see no
20 error in the hearings officer’s consideration of ZDO 1002.06(C)(2).

21 The fifth assignment of error is denied.

22 The county’s decision is affirmed.