BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SISTERS FOREST PLANNING COMMITTEE,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent.

LUBA No. 2004-073

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Paul D. Dewey, Bend, filed the petition for review and argued on behalf of petitioner.

Laurie E. Craghead, Assistant Legal Counsel, Bend, and Peter Livingston, Portland, filed the response brief and argued on behalf of respondent. With them on the brief was Schwabe, Williamson & Wyatt, P.C.

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

REMANDED 10/13/2004

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a county decision approving a conditional use permit to build a large tract forest dwelling.

FACTS

The subject property is located approximately three miles northwest of the westernmost edge of the City of Bend's urban growth boundary. The property is approximately 320 acres in size and is zoned Forest Management (F-1). The property is also in a Wildlife Area Combining Zone due to its location within the Tumalo Deer Winter Range. The property is currently unoccupied and has no structures. The property is forested and was most recently logged in 1992 and 2002. The topography of the property is varied and includes a small canyon with steep slopes. Sisters Mainline Road, a major Forest Service Road running between Bend and Sisters, runs along the southern and western boundaries of the property. The property is surrounded by other unoccupied forestlands. Upon receipt of the application, the county made an administrative decision rather than refer the case directly to the hearings officer. The application was approved without a hearing, and the decision was appealed to the hearings officer. The hearings officer also approved the application. Petitioner appealed the hearings officer's decision to the Board of County Commissioners (BCC), but the BCC declined to review the hearings officer's decision. This appeal followed.

MOTION TO FILE A REPLY BRIEF

Petitioner moves to file a reply brief to address three issues: (1) the county's argument that it was not required to develop a study area; (2) the county's argument that the petitioner's substantial rights were not prejudiced; and (3) documents that are not in the record, but are attached to the county's brief. The issues addressed in the reply brief are confined to "new matters raised in the respondent's brief." OAR 661-010-0039. Therefore, the reply brief is allowed.

FIRST ASSIGNMENT OF ERROR

The hearings officer essentially rejected petitioner's appeal below on alternative grounds. Initially, the hearings officer determined that petitioner's local notice of appeal, considered in isolation, was not specific enough to preserve the issues for appeal.[1] The hearings officer rejected the appeal for lack of specificity in the appeal notice, but she nonetheless proceeded to address the merits of all the issues raised by petitioner, taking into account argument and evidence submitted at the hearing. Petitioner raises three separate subassignments of error challenging the hearings officer's rejection of their local appeal notice for lack of specificity. We need reach only the second subassignment, that the failure to provide a de novo hearing was a violation of state law.[2]

Deschutes County Code (DCC) 22.32.020(A) provides that every notice of appeal shall include:

> "A statement raising any issue relied upon for appeal with sufficient specificity to afford the Hearings Body an adequate opportunity to respond to and resolve each issue in dispute."

While the county may properly reject appeals of some local decisions under this provision, ORS 215.416(11)(a) requires a *de novo* appeal when a decision made without a hearing is appealed:

> "(D) An appeal from a hearings officer's decision made without a hearing under this subsection shall be to the planning commission or governing body of the county. An appeal from such other person as the governing body designates shall be to a hearings officer, the planning commission or the governing body. In either case, the appeal shall be to a de novo hearing.

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[1] The hearings officer did find that one issue was raised with sufficient specificity, but that issue is not before us on appeal.

[2] Petitioner's other arguments are that the local notice was indeed specific enough, and that the county was estopped from relying on the alleged lack of specificity because it did not act on that basis until six months after the notice had been filed, by which time petitioner had expended substantial amounts of time and money.

> "(E) The de novo hearing required by subparagraph (D) of this paragraph shall be the initial evidentiary hearing required under ORS 197.763 as the basis for an appeal to [LUBA]. At the de novo hearing:
>
> "(i) The applicant and other parties shall have the same opportunity to present testimony, arguments and evidence as they would have had in a hearing under subsection (3) of this section before the decision;
>
> "(ii) *The presentation of testimony, argument and evidence shall not be limited to issues raised in a notice of appeal*; and
>
> "(iii) The decision maker shall consider all relevant testimony, arguments and evidence that are accepted at the hearing." (Emphasis added.)

In *McKeown v. City of Eugene*, 46 Or LUBA 494, 503-506 (2004), we explained that ORS 227.175(10)(a)(E)(ii), the city equivalent to ORS 215.416(11)(a)(E), was adopted in response to the Court of Appeals' decision in *Johns v. City of Lincoln City*, 146 Or App 594, 933 P2d 978 (1997), where the court held that the issues a local government could consider in a local appeal were limited to those raised in the notice of appeal. Although the county has not amended its code to comply with the relatively new statutory directive, ORS 215.416(11)(a)(E) requires the county to provide a *de novo* hearing, and expressly provides that arguments "shall not be limited to the issues raised in the notice of appeal." The hearings officer's initial approach in limiting the issues on appeal to those issues raised with sufficient specificity in the notice of appeal is inconsistent with the statute.

The first assignment of error is sustained.[3]

SECOND ASSIGNMENT OF ERROR

Under the DCC, when the decision of a hearings officer is appealed to the BCC, the BCC has discretion whether to hear the appeal. In this case, the BCC chose not to hear the appeal. Petitioner apparently paid a $1,381 appeal fee in its attempt to appeal the decision to the BCC. In its second assignment of error, petitioner argues that the county improperly

[3] Because the hearings officer adopted alternative findings addressing the merits, the hearings officer's error is reversible only if petitioner also prevails on at least one of its assignments of error challenging the county's decision on the merits.

failed to refund its appeal fee because the BCC did not hear the appeal. The county responds that due to administrative error, the refund had not yet been provided to petitioner. The county states that 75% of the appeal fee has now been returned, as provided by the county's fee schedule. In the reply brief, petitioner argues that the county cannot retain 25% of petitioner's appeal fee.

We need not decide whether the county improperly retained part of petitioner's appeal fee below because that is a separate decision that is not before us in this appeal. The final decision in this appeal was made on April 14, 2004. All of the various actions that have occurred regarding the return of the appeal fee occurred after the final decision in this matter was adopted, and are embodied in a different decision or decisions. Any such decision or decisions cannot be reviewed in the appeal of the April 14, 2004 decision before us.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In order to approve a large tract forest dwelling, the county must find that DCC 18.36.040(A) is satisfied, which requires:

> "The proposed use will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands."

A. Study Area

In order to determine whether the proposed use will have a significant impact on forest uses, nearby forest uses must be identified so that the significance of the impacts can be considered. The county and petitioner agreed upon a study area consisting of "the subject property, adjacent parcels, the southern half of Crown Pacific's Bull Springs Block, and that land managed by the Forest Service that takes access from the Sisters Mainline Road south to Bull Springs Road." Record 94. Petitioner argues that the hearings officer failed to clearly delineate the extent or outer boundaries of the study area. For instance, the hearings officer acknowledged there was "an undetermined amount of Forest Service land" taking access

from Sisters Mainline Road. *Id*. The hearings officer also failed to identify exactly what constituted the "southern half of Crown Pacific's 33,000-acre Bull Springs Block." Record 97.

The county responds that nothing in the DCC or corresponding OARs require that a specific study area be delineated. *Donnelly v. Curry County*, 33 Or LUBA 624 (1997), the case cited by petitioner, provides that the "significant change/significant increase" standard only requires a description of farm and forest practices on "at least agricultural or forest lands adjacent or nearby to the subject property." The only reason for identifying a study area is to determine the impacts of the proposed dwelling on the farming or forest practices within it. The subject property is surrounded by similarly zoned F-1 properties, and beyond that the study area encompasses huge tracts of forestland. Record 96-97. The hearings officer found that the proposed dwelling would not create significant impacts on adjacent or nearby forest practices. Petitioner does not dispute that the use and characteristics of the surrounding area are relatively homogeneous. Given that homogeneity, it is reasonable to assume that if there are not significant impacts on adjacent or nearby properties then significant impacts further away from the property are unlikely. Therefore, the fact that the hearings officer may not have specifically delineated the outer boundary of the study area does not prevent a finding that the proposed dwelling will not significantly affect forest practices.

The first subassignment of error is denied.

B. Accepted Forest Practices

In order to determine whether the proposed use will have significant impacts on accepted forest practices, the hearings officer had to determine what the accepted forest practices are. Petitioner argues that the hearings officer did not properly identify what the accepted forest practices are. The hearings officer found that accepted forest practices include:

> "harvesting of trees, hauling logs by truck, 'slash' (debris) burning, prescribed burning and aerial chemical spraying." Record 94.

Petitioner argues that the hearings officer erred by not breaking accepted forest practices down into categories based on the different ownership of various adjacent and nearby parcels. The county responds that because all of the surrounding lands, regardless of ownership, are managed in the same manner, the accepted forest practices are the same on all the properties. According to the county, it would not make sense to try and distinguish between the different properties. We agree with the county that, absent any explanation from petitioner as to how the accepted forest practices would be different on different properties, the hearings officer did not inadequately identify the accepted forest practices.

Petitioner also argues that the use of the term "selective harvesting" is too vague to describe accepted forest practices. While it is true that we held in *DLCD v. Klamath County*, 25 Or LUBA 355, 366 (1993) that merely describing a forest practice as "logging" or "salvage logging" was not sufficient, the description of forest practices in this appeal is far more detailed. The accepted forest practices described only as "selective harvesting," were only one of many practices. Furthermore, the hearings officer relied on the testimony of a professional forestry consultant, and as the county explains, the term is better understood as a term of the trade rather than an attempt to avoid specificity. The use of the term "selective harvesting" does not render the hearings officer's description of the accepted forest practices inadequate.

Finally, petitioner argues that the hearings officer erred in basing her description of accepted forest practices on those practices currently being conducted by Crown Pacific in the area. According to petitioner, Crown Pacific is in bankruptcy and has engaged in longstanding mismanagement of its forestlands. Accepted forest practices, petitioner argues, should be based on what would be conducted under competent management of the resource land. We agree with petitioner that basing accepted forest practices on such a minimum level would be improper, however, the hearings officer clearly stated that she was basing her

description of accepted forest practices on more than those currently taking place. Record 94. Petitioner has not established that the hearings officer misidentified the accepted forest practices.

The second subassignment of error is denied.

C. Impacts on Accepted Forest Practices on Nearby Forestlands

Petitioner argues that the hearings officer failed to properly analyze impacts on accepted forest practices within the study area. As discussed above, the hearings officer found that equivalent forest practices were conducted on both public and private forest lands within the study area. According to petitioner, the hearings officer failed to adequately address the impacts on Forest Service lands specifically, as opposed to forestlands in general. However, because the same accepted forest practices are taking place on Forest Service forestlands and other forestlands, the hearings officer did not err in failing to separately describe impacts on Forest Service lands.

The third subassignment of error is denied.

D. Impacts on Accepted Forest Practices on the Subject Property

The hearings officer found that the proposed dwelling would not significantly affect forest practices on the subject property itself, given the historic use of the property for low-intensity, selective tree harvesting, and the applicant's representation that it would continue low-intensity, selective tree harvesting, pursuant to a management plan, aided by the presence of a "resident manager" on the property. The only likely change, the hearings officer found, is greater consideration to wind direction and speed in conducting prescribed burning or chemical spraying, considerations that are routine in such operations. The hearings officer rejected petitioner's concerns that there is no guarantee that future owners will implement the management plan or that there will be a "resident manager." Even if there is no resident manager, the hearings officer concluded, that would not constitute a change from the existing

situation, and therefore could not significantly affect forest practices or significantly increase the costs of such practices.

Petitioner argues that the hearings officer erred in (1) failing to specifically describe or quantify impacts on forest practices attributed to the proposed dwelling, (2) relying on the applicant's representations regarding a management plan, without imposing a condition requiring such a plan, and (3) failing to require a resident manager.

The county responds, and we agree, that the hearings officer's findings adequately describe forest practices in the surrounding area, including the subject property. We also agree that, while the hearings officer cited the applicant's management plan and the potential for a resident manager as evidence that historic forest practices would continue and the dwelling would not significantly change forest practices on the subject property, the hearings officer did not find that either the plan or the manager were necessary to ensure compliance with DCC 18.36.040(A). Petitioner has not demonstrated that either the management plan or the presence of a resident manager is necessary to comply with DCC 18.36.040(A).

The fourth subassignment of error is denied.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

In order to approve a large tract forest dwelling, the county must find that DCC 18.36.040(B) is satisfied, which requires:

> "The proposed use will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel."

A. Study Area

This subassignment of error is similar to the argument we rejected under the first subassignment of the third assignment of error. Again, there is nothing in the DCC that requires that the hearings office delineate a particular study area or the outer boundaries of an otherwise homogenous study area.

The first subassignment of error is denied.

B. Fire Risks

Petitioner argues that the hearings officer did not properly consider the fire hazard, fire costs, and risks to firefighters that would be caused by the proposed dwelling. According to petitioner, the hearings officer did not properly break her analysis down into separate inquiries into the risk of fire, increased fire suppression costs, and risk to firefighters. Instead, petitioner argues, the hearings officer considered only the increased risk of fire, and treated fire suppression costs and risk to firefighters as derivative issues. Petitioner cites to testimony from its expert that, even assuming there is no increase in the risk of fire, the presence of the proposed dwelling at the end of a long driveway will increase fire suppression costs and risk to firefighters, in the event of a fire.

The county responds that the applicant's expert responded to the concerns raised by petitioner's expert, including those raised regarding increased fire suppression costs and risk to firefighters, and recommended a number of measures that the hearings officer imposed as conditions of approval. Record 203-215. The hearings officer found the applicant's expert more persuasive, and found that the applicant had demonstrated compliance with DCC 18.36.040(B), including a finding that the dwelling will not significantly increase fire suppression costs or risks to firefighters, if the measures recommended by the applicant's expert are undertaken. Record 100.[4]

[4] The hearings officer's decision states, in relevant part:

> "The Hearings Officer finds both Mr. Johnson [the petitioner's expert] and Mr. Jackson [the applicant's expert] are qualified to express an opinion on fire risk assessment and mitigation in general and on the subject property in particular. However, I find Mr. Jackson's opinion more persuasive than Mr. Johnson's for the following reasons. Mr. Johnson's opinion is based primarily on his conclusion that the applicant did not conduct a sufficient analysis of fire risks and behavior before developing his proposed fire mitigation plan. Mr. Johnson's report does not express an opinion as to whether and under what circumstances an effective fire mitigation plan *could* be developed if a sufficient analysis were conducted. In contrast, Mr. Jackson's opinion acknowledges the hypothetical questions raised by Mr. Johnson and responds to them

As discussed below, several of the recommendations imposed as conditions of approval have a direct bearing on making fire suppression easier and safer in the event of a fire. For example, one recommendation is to develop a secondary access route to a different road than Mainline Road, and establish loops in the road system, in order to provide "ready access for timely initial attack and enhance safety by providing multiple fire fighter escape routes." Record 208. While the hearings officer's decision may not have conducted a separate analysis of fire suppression costs and risk to firefighters, distinct from the increased risk of fire, we disagree with petitioner that the hearings officer failed to address those matters.

The second subassignment of error is denied.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

As noted, the applicant's expert on fire prevention submitted a letter in response to petitioner's expert, and that response letter contained many recommendations. In her decision, the hearings officer included as a condition of approval that the applicant implement all of the recommendations contained in the letter. Record 100. Petitioner argues that the condition of approval is legally insufficient, because the county failed to find that it is feasible to implement any of the recommendations. Petitioner contends further that the county failed to identify exactly what "recommendations" in the 12-page letter are adopted as

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with specific mitigation strategies based on his knowledge of fire behavior, fire fighting techniques, and the characteristics of the subject property and surrounding area.

"Based on Mr. Jackson's opinion, the Hearings Officer finds the applicant has met his burden of demonstrating the proposed dwelling will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel if the measures recommended by Mr. Jackson are undertaken. * * * However, because the measures recommended by Mr. Jackson are more detailed and comprehensive than those proposed by the applicant in his burden of proof, I find the applicant will be required as a condition of approval to follow the specific recommendations in Mr. Jackson's January 25, 2004 report. * * *" Record 100 (emphasis in original).

conditions of approval, and that many of the "recommendations" are so vague, imprecise and hortatory that they cannot function as legally sufficient conditions of approval.

The county responds, and we agree, that there is no general requirement that a local government adopt a finding that it is feasible to implement all conditions of approval, although if an issue is raised regarding feasibility of compliance with an approval standard, or conditions designed to ensure compliance, findings responsive to that issue may be necessary. However, petitioner does not question the feasibility of implementing the recommendations imposed as conditions of approval, or argue that an issue regarding feasibility was raised below.[5]

We also agree with the county that there is no generally applicable requirement that conditions of approval be stated in clear and objective language, or impose only mandatory, unambiguous, easily enforced obligations. To be sure, a condition of approval may be drafted so poorly that it may be inadequate to ensure compliance with an applicable approval standard it has been imposed to address. However, petitioner has not established that the recommendations adopted as conditions of approval in the present case fall into that category. The January 25, 2004 letter sets out its recommendations under clear headings, and it is reasonably evident what constitutes a recommendation and what is simply commentary or analysis. While some of the recommendations are phrased in discretionary or difficult to enforce terms ("[s]trongly consider the benefit of applying [landscaping standards] to the greatest extent possible consistent with reasonable aesthetic considerations"), most of the recommendations are simple and direct ("[p]rune off lower tree limbs," "[d]evelop an access route in the gap in the rimrock west of the building site to link the area of residential development with the old Railroad Grade").

[5] Actually, it appears that petitioner did argue before the hearings officer that the recommendation for hazardous fuel treatment was unenforceable because the county could not impose that condition in perpetuity. The hearings officer's findings address and reject that argument. Record 100. Petitioner does not challenge those findings or renew that argument on appeal.

To reduce the potential for confusion, it would perhaps have been a better practice for the hearings officer to select those recommendations she believed necessary to ensure compliance with applicable standards and expressly include them in the list of conditions appended to the decision, rather than incorporate by reference recommendations scattered throughout a 12-page document. However, petitioner has not demonstrated that the hearings officer erred in adopting those recommendations as conditions of approval.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

DCC 18.36.060 provides, in relevant part:

> "All new dwellings and structures approved pursuant to DCC 18.36.030 or permitted under DCC 18.36.020 shall be sited in accordance with DCC 18.36.060 and DCC 18.36.070. Relevant physical and locational factors including, but not limited to, topography, prevailing winds, access, surrounding land use and source of domestic water shall be used to identify a site which:
>
> "A. Has the least impact on nearby or adjacent lands zoned for forest or agricultural use;
>
> "B. Ensures that forest operations and accepted farming practices will not be curtailed or impeded;
>
> "C. Minimizes the amount of forest lands used for the building site, road access and service corridors; and
>
> "D. Consistent with the applicable provisions of DCC 18.36.070, minimizes the risks associated with wildfire."

DCC 18.36.060 implements OAR 660-006-0029.[6] Petitioner argues first that the code and rule standards are not identical, and the county erred in addressing only the code

[6] OAR 660-006-0029 provides, in relevant part:

> "The following siting criteria or their equivalent shall apply to all new dwellings and structures in forest and agriculture/forest zones. These criteria are designed to make such uses compatible with forest operations and agriculture, to minimize wildfire hazards and risks and to conserve values found on forest lands. A governing body shall consider the criteria in this rule together with the requirements OAR 660-0060-0035 to identify the building site:

language, and failing to address the rule language, where it differs. Petitioner next argues that the county's findings fail to address the "locational factors" set out in the code: topography, prevailing winds, access, surrounding land use and source of domestic water. Finally, petitioner contends that the county's findings fail to adequately address each of the four standards set out in DCC 18.36.060(A–D) and OAR 660-006-0029(1)(a–d).[7] According to petitioner, the hearings officer misconstrued those standards, and erred in relying on incorporated findings that do not address those standards. Petitioner argues that the incorporated findings address significantly different standards and that those findings

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"(1) Dwellings and structures shall be sited on the parcel so that:

"(a) They have the least impact on nearby or adjoining forest or agricultural lands;

"(b) The siting ensures that adverse impacts on forest operations and accepted farming practices on the tract will be minimized;

"(c) The amount of forest lands used to site access roads, service corridors, the dwelling and structures is minimized; and

"(d) The risks associated with wildfire are minimized.

"(2) Siting criteria satisfying section (1) of this rule may include setbacks from adjoining properties, clustering near or among existing structures, siting close to existing roads and siting on that portion of the parcel least suited for growing trees."

[7] The county's findings addressing DCC 18.36.060 state, in full:

"For the reasons set forth in the findings above concerning appellant's second assignment of error, incorporated by reference herein, the Hearings Officer finds the proposed forest dwelling homesite will have the least impact on adjacent and nearby lands devoted to forest use and will not curtail or impede forest operations on such lands. [DCC] 18.36.070 establishes the fire siting standards for forest dwellings. The administrative decision concluded the applicant's proposal will comply with these standards with the imposition of conditions of approval. Appellant challenged only those portions of the administrative decision's findings on those standards, and those challenges are addressed in the findings below on appellant's seventh and eighth assignments of error. Based on those findings, incorporated by reference herein, I find the applicant's proposal is consistent with the fire siting standards in [DCC] 18.36.070. The administrative decision found that the building site and access driveway will minimize the amount of forest land utilized because they are proposed to be located on an existing open area and dirt road consisting of only a few of the property's 320 acres, and will require the removal of few if any trees. For this reason, I find the applicant has met his burden of proving compliance with this criterion, and appellant's sixth assignment of error is without merit." Record 104.

cannot demonstrate compliance with the very different standards of set out in DCC 18.36.060(A), (B) and (D)

More generally, petitioner contends that the focus of the code and rule is to determine the *location* on the subject parcel where the proposed dwelling would have the "least impact" on adjoining resource operations, that minimizes adverse impacts on resource operations on the subject property, that minimizes the amount of forest land used for the dwelling and access roads, and that minimizes the risk of wildfire. To make that determination, petitioner argues, the county must explain why the location preferred by the applicant best satisfies those standards, compared to other possible locations on the 320-acre parcel. According to petitioner, it is undisputed that the applicant chose the building location, on a scenic ridge at the end of a long driveway, based on aesthetics. Petitioner argues that neither the applicant nor the hearings officer considered alternative locations suggested below that are arguably more consistent with the code and rule standards, such as locations in the southern portion close to Mainline Road, which would require a shorter access road.

The county responds that the rule imposes no different or additional standards than the code, and that petitioner has not established that separate or additional findings are necessary to address the rule. The county concedes that DCC 18.36.060 adds several explicit "locational factors," and that the county's findings addressing DCC 18.36.060 do not expressly consider those factors. However, the county points out that several other places in the decision the hearings officer discusses topography, weather, access, surrounding land uses, and the source of domestic water. With respect to alternative sites, the county argues that the code does not require the county to consider alternative sites before approving the applicant's preferred location.

Turning to the four criteria at DCC 18.36.060, the county argues that petitioner does not explain why the preferred site has more impact on nearby or adjoining forest lands or forest operations than any other site on the subject property, for purposes of

DCC 18.36.060(A) and (B). According to the county, the hearings officer incorporated findings addressing DCC 18.36.040(A), which in relevant part requires a determination that the proposed use will not force a significant change in, or significantly increase the cost of, accepted forest practices. The county argues that those incorporated findings are adequate to explain why the preferred site has the "least impact" on forest lands and ensures that forest operations will not be curtailed or impeded.

With respect to the DCC 18.36.060(C) requirement to minimize the use of forest lands, the county argues that the findings adequately explain that the preferred site is on a previously cleared area of the parcel, and will use existing forest management roads for access, thus minimizing the use of forest lands for the dwelling and access roads. With respect to the DCC 18.36.060(D) requirement to minimize risk of wildfire "[c]onsistent with the applicable provisions of DCC 18.36.070," the county argues that the hearings officer's finding of compliance with DCC 18.36.070 is sufficient to demonstrate compliance with DCC 18.36.060(D).

We generally agree with the county that the rule imposes no different or additional standards than the code, and that petitioner has not established that separate or additional findings are necessary to address the rule.[8] That said, it is clear that the code requires consideration of several explicit "locational factors," and the hearings officer did not apply those factors in determining compliance with the four criteria at DCC 18.36.060(A-D). While other portions of the hearings officer's decision discuss topography, access, etc., as far as we can tell the discussion of those topics has little to do with justifying the location of the proposed dwelling under DCC 18.36.060.

[8] OAR 660-0060-0029(2) does list various factors to consider in applying the standards in OAR 660-006-0029(1), such as "setbacks from adjoining properties, clustering near or among existing structures, siting close to existing roads and siting on that portion of the parcel least suited for growing trees" that are not expressly reflected in the code. However, we generally agree with the county that these factors or considerations are largely subsumed in the code factors and standards.

Turning to the question of alternative sites, we agree with petitioner that the focus of the code (and the rule it implements) is on identifying the location on the subject parcel that best satisfies the four standards at DCC 18.36.060(A-D) and the similar standards at OAR 660-006-0029(1)(a-d). We note first that those standards are, or can be in particular circumstances, in tension with each other. For example, consideration of the location that "least impacts" adjoining properties might indicate a location as far from adjoining forest lands as possible, *e.g.*, near the middle of a parcel that is surrounded by forest lands. On the other hand, consideration of the location that minimizes adverse impacts on forest operations on the subject property may suggest a location on the windward side of the parcel, taking into account the "prevailing winds." Similarly, consideration of the location that "[m]inimizes the amount of forest lands used for the building site [and] road access" might dictate a location close to the property boundary and close to the main access road, to limit the length of the internal driveway, or a location on less productive forest soils. Consideration of the location that "minimizes the risks associated with wildfire" might indicate a location that is most accessible to fire suppression personnel, or that is on slopes or in areas least susceptible to wildfire. In our view, DCC 18.36.060 requires consideration of the four criteria in light of the prescribed "locational factors," and some balancing of those criteria, where circumstances require.

Second, we do not see that it is possible to demonstrate compliance with the criteria of DCC 18.36.060 without making *some* comparison between the preferred site and other potential locations on the property, at least at an abstract level. The requirement to identify the location that "least impacts" nearby resource operations and that "minimizes" various adverse impacts and risks necessarily entails a demonstration and some discussion of why the preferred location is, on balance, equal or superior to other potential locations on the property in those respects. The detail required of that demonstration and discussion and whether specific alternative sites must be evaluated may depend on the extent to which such alternate

sites are identified by opponents or other participants in the proceeding. Where no such alternatives are identified, and there is no reason to believe the preferred site would have any more or different impacts than other sites on the property, the findings can simply state that. However, where, as here, participants in the proceedings identify other locations or areas on the property and argue that they are more consistent with the DCC 18.36.060 criteria than the preferred location, it is incumbent on the hearings officer to address those arguments and compare the alternative location or area against the preferred location.

Third, we generally agree with petitioner that the hearings officer's effort to demonstrate compliance with DCC 18.36.060(A), (B) and (C) by incorporating findings addressing other standards is insufficient in this case. The question of whether locating the proposed dwelling will force a significant change in or significantly increase the cost of forest operations on the subject property and on nearby resource lands is a different question than which location "least impacts" or minimizes adverse impacts on forest operations on the property or nearby lands. That the dwelling at the preferred location will not force a significant change, etc., does not necessarily mean that it "least impacts" forest operations, etc., compared to a different location on the subject property. Similarly, that the applicant has demonstrated compliance with the requirements of DCC 18.36.070, which implements the requirements of OAR 660-006-0035 and which generally relate to how the dwelling is designed or protected against fire, does not necessarily demonstrate that the *location* of the dwelling on the property "minimizes the risks associated with wildfire." The hearings officer's approach conflates DCC 18.36.060(D) with DCC 18.37.070, and OAR 660-006-0029(1)(d) with OAR 660-006-0035.[9]

[9] While DCC 18.36.060(D) requires that the applicant "minimize[] the risk associated with wildfire" "[c]onsistent with the applicable provisions of [DCC] 18.36.070," we do not understand DCC 18.36.060(D) to provide that compliance with DCC 18.36.070 is sufficient in itself to satisfy DCC 18.36.060(D). As petitioner points out, DCC 18.36.060 is concerned with the location of the dwelling within the parcel, while DCC 18.36.070 is almost entirely concerned with how the dwelling and landscaping is designed, constructed and maintained to protect against fire. The only aspect of DCC 18.36.070 that has a bearing on where the

In sum, we agree with petitioner that the hearings officer misconstrued DCC 18.36.060 and adopted insufficient findings to demonstrate compliance with that code provision.

The sixth assignment of error is sustained.

SEVENTH ASSIGNMENT OF ERROR

DCC 18.88.060(B) provides:

> "The footprint, including decks and porches for new dwellings shall be located entirely within 300 feet of public roads, private roads or recorded easements for vehicular access existing as of August 5, 1992. * * *"

The primary vehicular access to the proposed homesite is to be provided by a driveway connecting to Sisters Mainline Road that is approximately 1200 feet long. The homesite is 440 feet from Sisters Mainline Road. If this were the only road near the property then DCC 18.88.060(B) would not be satisfied. There is also, however, an old railroad grade that was later converted to a logging road, the aptly named Old Railroad Grade Road. The proposed homesite is within 150 feet of the Old Railroad Grade Road. The homesite is located on the top of a rimrock ridge that is above the Old Railroad Grade Road.

Petitioner argues that the clear import of DCC 18.88.060(B) is that the road that is actually used for vehicular access and is currently in use that must be within 300 feet of the proposed homesite. While the hearings officer could not fault petitioner's logic, she nonetheless found that the "plain language of this provision does not support [petitioner's] interpretation." Record 109. Petitioner repeats its argument below that a road that is not currently capable of providing and is actually used to provide vehicular access to the homesite cannot serve as the road that is within 300 feet of the homesite for purposes of DCC 18.88.060(B).

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dwelling is located or sited on the property is the DCC 18.36.070(C) requirement that no single family dwelling be located on slopes greater than 40 percent, which implements OAR 660-006-0035(5). Arguably, the cross-reference to the "applicable provisions" of DCC 18.36.070 is a reference to those provisions that relate to location, and not, as the hearings officer appeared to view the matter, an indication that compliance with DCC 18.36.070 is sufficient, without more, to demonstrate compliance with DCC 18.36.060(D).

Regarding whether the Old Railroad Grade Road is capable of currently providing vehicular access to the homesite, the hearings officer adopted alternative findings based on letters from four current or former employees of Crown Pacific that the road "is still in existence and is capable of providing vehicular access to the dwelling." Record 109. Even if there is not currently a connection between the Old Railroad Grade Road and the homesite, as petitioner argues, the letter from applicant's expert that provided recommendations that were included as conditions of approval discussed under the fifth assignment or error requires that the applicant "[d]evelop an access route in the gap in the rimrock west of the building site to link the area of residential development with [Old Railroad Grade Road]." Record 208. Therefore, neither of the petitioner's bases for challenging the hearings officer's decision is accurate.

The seventh assignment of error is denied.

EIGHTH ASSIGNMENT OF ERROR

The hearings officer conducted a site visit to the property with an assistant planner from the county. The hearings officer provided a detailed summary of the result of her site visit. Record 357-58.[10] The hearings officer provided petitioner with a week to respond to her site visit report. Petitioner argues that the hearings officer erred by not granting petitioner the right to a site visit, by not providing a map depicting her site visit, and by failing to respond to petitioner's challenge in the findings.

When a decision maker conducts a site visit of the subject property, the result of the visit must be disclosed and made part of the record to allow effective rebuttal by other parties in the case. *Friends of Benton County v. Benton County*, 3 Or LUBA 165, 173 (1981). The site visit "must be disclosed in sufficient detail to allow other parties a meaningful opportunity to comment on and rebut, if needed, any evidence or impression gained by the

[10] The applicant did not accompany the hearings officer on her site visit.

view before the decision is made." *Id*; *see also Angel v. City of Portland*, 21 Or LUBA 1, 8 (1991) (same); *Jessel v. Lincoln County*, 14 Or LUBA 376, 381 (1986) (same); *Concerned Property Owners v. Klamath County*, 3 Or LUBA 182, 188 (1981) (same).

The description of the site visit by the hearings officer is quite detailed. Petitioner argues that it could not respond to the report without conducting its own site visit with its experts and without a map. Petitioner cites no authority for the proposition that the hearings officer could force the applicant to allow opponents on private property against the applicant's will.[11] The refusal of the hearings officer to force the applicant to accede to such a request was not error. We also do not see that the hearings officer's refusal to provide a map of her site visit renders her report unrebuttable. Even with a more limited understanding of the area and property, we had no trouble following the hearings officer's report. We hold the report is sufficiently detailed "to allow other parties a meaningful opportunity to comment and rebut" the report. Finally, although petitioner raised the issue below, because it did not concern any of the applicable approval criteria, the hearings officer was not required to address the issue in her findings.

The eighth assignment of error is denied.

The county's decision is remanded.

[11] The applicant refused petitioner permission to enter the property.