BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CENTRAL OREGON LANDWATCH,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

TODD TAYLOR,
Intervenor-Respondent.

LUBA No. 2006-156

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

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

No appearance by Deschutes County.

Kristin L. Udvari, Portland, filed the response brief and argued on behalf of intervenor-respondent. With her on the brief was Ball Janik, LLP.

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

REMANDED 02/02/2007

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

Petitioners appeal county approval of a large-tract forest dwelling.

MOTION TO FILE REPLY BRIEF

Petitioner moves to file a reply brief to respond to three alleged "new matters" raised in the response briefs, under OAR 661-010-0039.[1] The proposed reply brief addresses three arguments raised in the response briefs: (1) that the challenged decision implicitly adopts the entirety of a consultant's forest plan, not just those portions of the plan's recommendations embodied in specific conditions of approval, (2) that county code provisions regarding the siting and impacts of proposed dwellings are applied in a particular sequence, and (3) that petitioners waived an issue raised under the fourth assignment of error.

Intervenor-respondent (intervenor) agrees that the third issue, waiver, is a "new matter" that warrants a reply brief, but disputes that the first two issues are new matters. Intervenor argues that the arguments that petitioner contends give rise to the first two new issues simply respond directly to the merits of arguments made in the petition for review, and therefore may be appropriately addressed at oral argument, but are not proper subjects for a reply brief. *See D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516, 527-28 (1999) *aff'd as modified* 165 Or App 1, 994 P2d 1205 (2000) ("new matters" tend not to be direct responses to the stated merits of an assignment of error, but rather arguments why the assignment of error should fail regardless of its merits, based on facts or authority not cited in the assignment of error).

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[1] 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. * * *"

Turning to the first issue identified by petitioner, petitioner argued in its petition for review that the challenged decision's conditions of approval are inadequate because they do not include specific recommendations endorsed by the forest plan. The response brief does not directly dispute that point, but argues that the assignment of error should fail because the challenged decision implicitly requires compliance with the entire forest plan. We agree with petitioner that a reply brief is warranted to respond to that argument.

Turning to the second issue, petitioner argued in its petition for review that the hearings officer misconstrued the applicable law by relying on a code provision that requires an alternative sites analysis, to determine that a different code provision, which requires a general impacts analysis, is satisfied. Intervenor responded by disputing petitioner's view of how the two code provisions should be applied, and advancing an interpretation that is consistent with the approach the hearings officer took. We agree with intervenor that the second issue is not a "new matter" and does not justify submission of a reply brief.

The reply brief is allowed; however, the Board will not consider the arguments in Part B of the reply brief.

FACTS

The subject property is a 322-acre parcel zoned Forest Use (F-1), located west of the City of Bend's urban growth boundary. The property is irregular in shape, with a large square-shaped western portion, and a long panhandle strip of land to the east that is approximately 2,983 feet long on its east-west axis, with a north-south width that varies from 600 feet to 1000 feet. The panhandle connects the property to Johnson Market Road. A paved section of Bulls Springs Road runs east-west through the panhandle from Johnson Market Road to connect with Sisters Mainline Loop Road in the western square-shaped portion of the property. The subject property is vacant and has historically been used for timber production, except for a 40-acre portion along the western boundary that is zoned and

used for surface mining. A very small area in the panhandle of the subject property along Johnson Market Road is zoned Rural Residential (RR-10).

The panhandle portion is bordered on the north by three parcels zoned for forest use (F-2) and one parcel zoned rural residential, all developed with dwellings. To the northeast along Johnson Market Road there are multiple parcels zoned for rural residential use and developed with residences. To the southeast of the panhandle is a 270-acre parcel zoned F-1 with a dwelling.

The square-shaped portion of the property is bordered on the south and west by large privately owned forest lands without dwellings. To the north of the square-shaped parcel are three forest parcels; one has been issued a permit to build a dwelling, and the other two are vacant.

Intervenor's predecessor-in-interest applied for a partition of the subject property and a conditional use permit for a large tract dwelling, pursuant to Deschutes County Code (DCC) 18.36.050(C), which implements ORS 215.740. A consulting forester recommended that the dwelling be sited in a southeast area of the square-shaped portion of the property, an area known as Site 2, based on the presence of an existing well and driveway, and other factors. A county hearings officer denied the partition, but approved the permit for the dwelling on Site 2 as recommended by the applicant's consulting forester. The board of county commissioners declined to hear petitioner's appeal of the dwelling approval. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner challenges the hearings officer's findings addressing DCC 18.36.040(A), which requires a finding that the proposed conditional use "will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agricultural or forest lands."

A. More Intensive Forest Practices

Petitioner argues first that in assessing the dwelling's impact on forest practices on the subject property and nearby properties, the hearings officer erred in assessing the current relatively low level of intensity of forest practices in the area, rather than the potential level of intensity of forest practices that would typically occur if timber lands in the area were being actively managed for forest use. According to petitioner, the subject property and most of the surrounding forest lands were mismanaged by the previous owner, a timber company that went bankrupt, and the current, relatively low intensity of timber production and harvesting in the area should not represent the level of "accepted forest practices" used to evaluate compliance with DCC 18.36.040(A). Instead, petitioner argues, the hearings officer must assume that timber production and harvesting in the area will occur at the most intensive level possible.

The hearings officer rejected that argument below, quoting findings from a similar recent application (the *Hogensen* application) that were later upheld on appeal to LUBA, in *Sisters Forest Planning Comm. v. Deschutes County*, 48 Or LUBA 78 (2004), *rev'd on other grounds* 198 Or App 311, 108 P3d 1175 (2005):

> "Landwatch argues that although current forest practices in the study area are of low intensity, the Hearings Officer should include within the 'accepted forest practices' in the study area much more intensive practices that could occur in the future if reforestation occurs on a large scale and mature trees are harvested in greater numbers. Landwatch's predecessor Sisters Forest Planning Committee (SFPC) made the same argument in *Hogensen*. In that decision, I made the following pertinent findings:
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> > "'The Hearings Officer concurs with the appellant that it is reasonable to assume the term 'accepted' forest practices includes not only those practices currently taking place, but those that could occur in the future. Nevertheless, I find it is not reasonable to speculate from this record that all land in the study area will be reforested and harvested to the most intense degree possible—particularly where, as here, the record indicates Crown Pacific has been selling tracts of its forest-zoned land for residential development purposes rather than for timber management and harvest. Therefore, I find it appropriate to evaluate the impacts of the proposed dwelling on those forest practices that are

> most prevalent currently and in the recent past—*i.e.*, selective harvesting of trees, log hauling, slash and prescribed burning, and some chemical spraying.'
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> "These findings were challenged by SFPC and upheld on appeal. *Sisters Forest Planning Committee v. Deschutes County*. The Hearings Officer adheres to these findings here. I also find the applicant's list of accepted forest practices currently taking place within the study area is somewhat more inclusive than the list in *Hogensen* in identifying open space, wildlife habitat, and recreational uses. For this reason, I find the applicant's list of accepted forest practices is comprehensive and appropriate, and I will evaluate the impact of the proposed large tract dwelling on those practices." Record 178.

Thus, the hearings officer found it unreasonable to expect that forest lands in the immediate vicinity would be managed more intensively in the future than they are currently or have been in the recent past. Petitioner does not challenge that finding, or point to any evidence that future forest operations in the area are likely to exceed the current and recent levels of intensity. The scope and intensity of "accepted farming or forest practices" that must be evaluated under DCC 18.36.040(A) is a fact-specific inquiry. Given that unchallenged finding, we cannot say that the hearings officer erred in basing the scope and intensity of "accepted forest practices" on the scope and intensity of forest uses occurring in the area currently or in the recent past.

B. Impacts on Adjacent Lands

Petitioner next challenges a specific finding addressing the impact of the dwelling on forest practices on adjacent lands. The hearings officer found, in relevant part:

> "* * * The record indicates the adjacent F-1 zoned parcels range in size from 80 to over 1,000 acres. The nature of these parcels is essentially the same as the parcels adjacent to the Hogensen parcel. In *Hogensen* I made the following findings:
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> > "'The Hearings Officer finds that because of the size of the subject property, the presence of the proposed dwelling would have fewer impacts on forest practices on adjacent parcels. That is because the distance between the proposed dwelling and forest practices on adjacent parcels would attenuate impacts such as noise, dust, smoke and chemical overspray. Trees harvested on the subject property would be transported by truck on Sisters Mainline Road, thus adding

> traffic to this road during harvest. However, I find this traffic would not be generated by the proposed dwelling and would occur with or without the dwelling as long as trees are being harvested from the subject property.'
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> "The Hearings Officer finds these findings are equally applicable here. Accordingly, I find as I did in *Hogensen* that the proposed large tract dwelling will not force a significant change in, or significantly increase the cost of, accepted forest practices on adjacent parcels." Record 181.

Petitioner argues that the hearings officer erred in relying so heavily on the quoted *Hogensen* finding, because the adopted finding suggests that the dwelling at issue in the Hogensen application was located near the center of the parcel, not near the edge of the property, as in the present case. The present findings are inadequate, petitioner argues, because they are not based on the specific facts of this case and fail to explain why findings imported from a different case are sufficient.

Intervenor responds that the subject property and the parcel at issue in *Hogensen* are both large parcels, 322 and 320 acres, respectively, and that the adopted finding from *Hogensen* expressly relied on the *size* of the parcel rather than the location of the dwelling. According to intervenor, the proposed dwelling location in the present case is not on the edge of the property, as petitioner asserts, but 450 feet from the southern boundary, 800 feet from the eastern boundary, and over 1,800 feet from the western boundary. Intervenor cites to findings that intensive forest practices are more likely to occur on the F-1 zoned parcels to the west of the property, where the buffering distance is the greatest.

While it is somewhat risky relying on adopted findings from other applications, even similar applications on similar properties, we generally agree with intervenor that the challenged finding is not inadequate for the reason cited by petitioner. As intervenor notes, the adopted finding does not suggest that the dwelling in *Hogensen* is located near the center of the property, and cites only the size of the parcel in that case as the relevant consideration. The sizes of the Hogensen parcel and the present property are nearly identical. On parcels so large, there may be many locations that provide adequate distance from adjacent forest lands

to buffer adjacent forest practices, for purposes of DCC 18.36.040(A). The hearings officer evidently believed that distances of 450 feet, 800 feet and 1,800 feet are sufficient to provide an adequate buffer from adjacent lands, and petitioner does not explain why greater distances are necessary to demonstrate compliance with DCC 18.36.040(A). For these reasons, petitioner has not demonstrated that the hearings officer erred in relying on the adopted finding from the *Hogensen* decision to explain why the proposed dwelling will not force a significant change in, or significantly increase the cost of, accepted forest practices on adjacent parcels.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Under the second assignment of error, petitioner challenges the hearings officer's findings under DCC 18.36.040(B), which requires a finding that the "proposed use will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel."

A. Limiting Fire Hazard Analysis to Proposed Dwelling Site

Petitioner first contends that the hearings officer erred in determining that DCC 18.36.040(B) is satisfied based solely on the proposed site of the dwelling and the impacts of the dwelling at that site, without considering fire hazards arising generally from the construction of a dwelling on the property. According to petitioner, the general conditional use standards at DCC 18.36.040 are distinct from the locational standards at DCC 18.36.060, discussed below under the fourth assignment of error. Petitioner argues that the hearings officer improperly conflated the two, by focusing exclusively on the fire hazard created by locating the dwelling at the preferred site, rather than a more general assessment of fire hazard created by the existence of a dwelling on the property, as well as activities associated with the residents of the dwelling that occur away from the dwelling.

The hearings officer's findings under DCC 18.36.040(B) discuss the various siting options, concluding, in relevant part, that with the imposition of conditions recommended by the applicant's consultant, the "proposed large tract dwelling on the applicant's preferred site (Site 2) will not significantly increase fire hazard over having no dwelling" on the subject property. Record 186-87. As discussed further below under the fourth assignment of error, we see no necessary analytical error in addressing the general conditional use criteria in DCC 18.36.040(B) based in part on evidence directed at the locational standards at DCC 18.36.060. While the focus of DCC 18.36.040(B) is on the property as a whole, rather than selecting a specific site for the dwelling, the analysis required under DCC 18.36.040(B) may be informed by consideration of the specific sites addressed under DCC 18.36.060.[2] Indeed, it would arguably be error to determine whether the proposed dwelling would significantly increase fire hazards or increase risks to fire suppression personnel without giving at least some consideration to the location on the property where the dwelling will be sited, because different fire hazards and risks may be associated with different sites.

Petitioner appears to be correct that the hearings officer did not explicitly consider fire hazards associated with general residential use of the property, as distinct from those associated with a dwelling at preferred Site 2. As noted above, the hearings officer concluded that the "proposed large tract dwelling on the applicant's preferred site (Site 2) will not significantly increase fire hazard over having no dwelling" on the subject property.

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[2] As petitioner notes, in *Sisters Forest Planning Committee*, we held that the hearings officer erred in relying on findings addressing the general conditional use standards at DCC 18.36.040 to satisfy the locational siting standards of DCC 18.36.060. 48 Or LUBA at 96. Petitioner argues that the hearings officer essentially committed the reverse error in the present case, by relying on the locational siting analysis to find compliance with the conditional use standards. We disagree. Both sets of standards address the issue of fire hazards, albeit from different perspectives, and it would be odd if there were no overlap in analysis, or if the analysis under one standard did not inform the other analysis. Further, the main problem with the hearings officer's findings in *Sisters Forest Planning Committee* was the complete failure to consider any alternative sites, which we understood DCC 18.36.060 to require. General findings addressing fire hazards obviously cannot substitute for the alternative site analysis required by DCC 18.36.060. While the reverse may also be true, in the present case the hearings officer adopted extensive findings addressing both sets of standards, and did not simply rely on findings addressing one standard to satisfy the other.

Petitioner argues that residential use of the property entails fire hazards that extend beyond those associated with a particular dwelling at a particular location, including outdoor burning, fireworks, power lines and other ignition sources that may occur away from the dwelling as a general consequence of residential use of the property.

The hearings officer concluded that, as conditioned, the proposed dwelling would not significantly increase fire hazards compared to having no dwelling on the property at all. Thus, the hearings officer appears to have considered whether a dwelling on the property would significantly increase fire hazards, as distinct from a dwelling at a particular site. Petitioner does not explain why that finding is inadequate to demonstrate compliance with the fire hazard standard in DCC 18.36.040(B).

B. Fire Suppression Costs/ Risks to Fire Suppression Personnel

Petitioner next argues that the hearings officer failed to adequately address the remaining standard in DCC 18.36.040(B), whether the proposed use significantly increases fire suppression costs or risks to fire suppression personnel. According to petitioner, the hearings officer erred in relying exclusively on the conclusion that the dwelling does not significantly increase fire hazards, to conclude that the dwelling will not significantly increase fire suppression costs or risks to fire suppression personnel. Further, petitioner argues that the hearings officer failed to address adequately issues raised by petitioner's expert regarding fire suppression costs and risks to fire suppression personnel.

The hearings officer reasoned that if the dwelling does not significantly increase fire hazards, the dwelling also will not significantly increase fire suppression costs and risks to firefighters.[3] We tend to agree with petitioner that the hearings officer's conclusion

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

> "The Hearings Officer finds these factors in the analysis are largely derivative of the increased fire hazard factor discussed above. In other words, if the forest fire hazard created by the dwelling is mitigated so that the presence of the dwelling will not significantly increase that hazard, it stands to reason that the fire suppression costs and risks to firefighters

unnecessarily conflates the two standards. While there may be overlap between the "fire hazard" analysis and the "increased firefighting cost/risk" analysis, it is not clear to us that analysis of the former constitutes a sufficient analysis of the latter. The focus of the "fire hazard" analysis is apparently the increased risk of wildfire *caused* by the dwelling itself and activities associated with it. The focus of the "increased firefighting cost/risk" analysis appears to be different and broader. For example, it appears to encompass the costs or risks associated with protecting the dwelling or its inhabitants from wildfires, whatever their cause. That said, the hearings officer is correct that most of the mitigations cited by the hearings officer (reducing vegetation around the dwelling, etc.) serve both to contain or minimize the likelihood of wildfires associated with the dwelling or the activities of its inhabitants *and* to reduce risk to the dwelling and its inhabitants from approaching fires that start elsewhere. Such measures may also assist firefighters in protecting the dwelling and property in the event of a wildfire, and indeed several of the proposed mitigations are

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associated with the presence of the dwelling also will not significantly increase. However, I recognize there is another consideration that must be weighed with respect to these two factors. As I stated in my decision in *Tweedfam* cited above, the presence of dwellings in the forest zone:

> "'* * * may cause firefighting efforts to be shifted from protecting timber and forestry equipment to protecting residential structures and people.'

"This shifting can increase both firefighting costs and risks. As discussed in the findings below concerning the alternative sites analysis under [DCC] 18.36.060, [petitioner's expert] Mr. Johnson expressed concern that widely dispersing dwellings in the forest zones may have the effect of increasing the risk to firefighters in the event they have to make the difficult decision about which structures to protect and which structures to abandon to the fire. However, Mr. Johnson acknowledged that such a decision naturally will be informed by the location of the dwelling. Mr. Johnson noted that in contrast to residential neighborhoods in the 'Wildland Urban Interface' which may be protected in the face of an advancing fire, scattered dwellings 'stand a much smaller chance of surviving.' As such, these dwellings are in fact *less* likely to receive firefighting resources when the 'triage' decisions are made. The question posed by this siting standard is whether the proposed dwelling will 'significantly' increase fire suppression costs and risks over having no dwelling on * * * the subject property. Because I have found the presence of the dwelling will not increase the risk of fire, I find it also will not increase fire suppression costs or the risk to fire suppression personnel." Record 187 (emphasis in original).

justified in part because they would assist firefighters. Record 184 ("[d]efensible space also provides an area for fire management personnel to safely work around structures").

Petitioner's real dispute with the findings regarding fire suppression costs and risk appears to involve the proposal to site the dwelling at the relatively remote Site 2 rather than Site 4, which is significantly closer to the main road and other dwellings in the area. After discussing the fire safety merits of Site 4, petitioner's consultant testified:

> "Site 2, the preferred location under [intervenor's consultant's] analysis is the second most desirable location. But this location is in effect scattering housing further than good land management planning should allow. This 'shotgun' approach of greater dispersal of homes dictates that fire fighting resources be increased logarithmically in a wildland fire situation as resources cannot be relied on to assist each other when more than one mile separates each structure being protected. With the potential lack of sufficient resources to protect each house, a scene commander is forced to triage; letting some structures fend for themselves or put insufficient resources on each structure; depending upon whose politics are dictating. This situation is putting the firefighter in an unnecessary 'physical risk' position. * * *
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> "Creating a fireline from which to burn out is efficient from a neighborhood stance, but dangerous, if not impossible, when trying to ring individual structures. Lighting a fire (burn out) to protect a single structure creates a chance that the fire you lit will strike another home before other firefighters are ready. The use of aerial retardant is ineffective for a single structure but effective use to protect a neighborhood. And finally, it is against federal policy to drop retardant on a home, but it is common practice to drop it between the fire and neighborhoods.
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> "In conclusion, in my expert opinion, the scattering of homes in the Wildland Urban Interface puts an unnecessary physical risk to those individuals that protect our community from the inherent dangers that come with dispersed living in forested areas." Record 825-26 (emphasis deleted).

The hearings officer addressed the above-quoted testimony, but essentially found it consistent with her conclusion that locating the dwelling at preferred Site 2 would not significantly increase firefighting costs or risks, because isolated dwellings "are in fact *less* likely to receive firefighting resources when the 'triage' decisions are made." Record 187 (emphasis original).

Petitioner argues that the hearings officer misunderstood the point of the consultant's testimony. We agree with petitioner that the above-quoted testimony does not support the conclusion that isolated dwellings would be abandoned to wildfire and thus would not result in significantly increased firefighting costs or risks to firefighters, as the hearings officer suggests. The point of the above-quoted testimony is that scattered, isolated dwellings force firefighters to choose either to abandon some homes in the area *or* to devote insufficient resources to defend all of them. It is clear that petitioner's expert believes that defending isolated homes with insufficient resources significantly increases costs and risks to firefighters.[4] The hearings officer did not address that part of the expert's testimony, and we are cited to nothing in the record that contradicts it. If it can be assumed that firefighters would abandon a dwelling at Site 2 to wildfire because it is too isolated and risky to defend and would instead focus their efforts on dwellings that are less isolated and less risky to defend, that might be a sufficient basis for concluding that the proposed dwelling is consistent with DCC 18.36.040(B). However, the hearings officer does not explain why such an assumption is warranted, and nothing in the record that is cited to us seems to support that assumption.

Remand is necessary under DCC 18.36.040(B) to address the issues raised by petitioner's expert regarding whether locating the dwelling at preferred Site 2 significantly increases fire suppression costs or risks to fire suppression personnel. We also discuss below, under the fourth assignment of error, petitioner's similar arguments under the locational criteria at DCC 18.36.060, which requires that the county select a dwelling site that on balance best meets four criteria, including a site that "minimizes the risks associated

[4] Even if it were assumed that isolated dwellings would always be abandoned to wildfire, it seems likely that the mere existence of an isolated dwelling could complicate and delay any triage decision, potentially increasing costs and risks to firefighters. For example, firefighters may have to travel to an isolated dwelling to ensure that it is uninhabited or to ascertain its chances of survival, which may put those firefighters at risk and delay decision-making and implementation of measures to protect more densely developed areas.

with wildfire." For the reasons explained therein, the issues raised by petitioner's expert regarding the relative merits of Site 2 and 4 with respect to fire suppression costs and risks to fire suppressions personnel also have a bearing on the analysis required by DCC 18.36.060.

The second assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that intervenor's consultant made several specific recommendations he believed were necessary to comply with DCC 18.36.040(B), including a recommendation that vegetation be removed 10 feet on either side of the main access roads, secondary access roads, and driveways to structures, in order to "provide effective locations for wildland fire personnel to safely conduct burnouts and other fire control actions to limit spread of an advancing fire." According to petitioner, while the hearings officer quoted that recommendation, the conditions of approval that were imposed require vegetation removal only around the driveway to the proposed dwelling, not the main and secondary access roads. Similarly, petitioner argues, the consultant made other specific recommendations, including thinning the forest on the property, but the hearings officer adopted and imposed as conditions of approval only certain recommendations that relate to the dwelling site.

Intervenor responds that the application states all recommendations in the consultant's forest plan would be implemented, and the hearings officer quoted and relied on that statement. Intervenor cites *Wilson Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 106, 123-24, *rev'd on other grounds*, 129 Or App 33, 877 P2d 1205 (1994); *Perry v. Yamhill County*, 26 Or LUBA 73, 87, *aff'd* 125 Or App 588, 865 P2d 1314 (1993), and *Friends of the Metolius v. Jefferson County*, 25 Or LUBA 411, 421, *aff'd* 123 Or App 256, 860 P2d 278, *on recon* 125 Or App 122, 866 P2d 463 (1993), for the proposition that, where the application represents that certain actions will be taken to ensure compliance with approval criteria, such actions are part of the approved development and need not be imposed as conditions of approval.

In *Wilson Park*, we rejected arguments that compliance with submitted elevation and site plans must be imposed as conditions of approval of a housing development. Similarly, in *Perry* we held that compliance with a submitted drainage plan need not be imposed as a condition of approval of a subdivision application. In *Friends of the Metolius*, we held that compliance with submitted site, landscaping and building design plans need not be imposed as conditions of approval). In all three decisions, we distinguished our holding in *Neste Resins Corp. v. City of Eugene*, 23 Or LUBA 55, 67 (1992) (non-binding promises by the applicant are not a substitute for conditions of approval). Intervenor argues in the present case that *Wilson Park*, *Perry* and *Friends of the Metolius* are controlling, and that *Neste Resins Corp.* is distinguishable because it involved a zone change rather than a specific quasi-judicial development, as here.

We disagree. As we understand *Wilson Park*, *Perry* and *Friends of the Metolius*, the salient point in those cases was that the applicant submitted specific site plans or similar documents depicting characteristics of the proposed development, and the local government approved those plans or documents. In that circumstance, there is no need for an explicit condition of approval requiring compliance with such site plans or documents. In the present case, the forest plan is a general forest management plan for the entire property. Its submission is not required to obtain a large tract dwelling permit, the forest plan was not submitted for approval, and the hearings officer did not purport to approve it. The forest plan is not a site plan or similar plan for the approved development, as in *Wilson Park*, *Perry* and *Friends of the Metolius*. Accordingly, we do not believe the principle described in *Wilson Park*, *Perry* and *Friends of the Metolius* controls the present case.

Although the hearings officer quoted and relied on parts of the forest plan to conclude that the dwelling complies with applicable criteria, the hearings officer did not approve the forest plan or adopt all of its recommendations. Indeed, the fact that the hearings officer specifically adopted certain recommendations as conditions of approval but not others

suggests that the hearings officer did not adopt those other recommendations. That selective approach may have been prompted by the Court of Appeals' decision in *Sisters Forest Planning Committee*, where the court rejected a condition of approval that required implementation of the recommendations in a forest consultant's letter, including several vague and imprecise recommendations. The hearings officer in the present case apparently selected those specific recommendations in the forest plan she wished to require the applicant to comply with, and imposed conditions of approval only with respect to those recommendations. As far as we can tell, the hearings officer did not require compliance with other recommendations in the forest plan, much less the entire forest plan itself, as intervenor asserts.

Petitioner appears to be correct that the applicant's consultant believed that vegetation removal along all roads on the property, not just the driveway, is necessary to ensure compliance with DCC 18.36.040(B). Intervenor argues, apparently in the alternative, that conditions of approval to that effect are unnecessary, because the property is within a rural fire protection district and the main access roads have been dedicated to the county, and the district and county will require the landowner to comply with certain standards of road maintenance. That may be so, but it is not clear that district and county road maintenance standards require removal of vegetation consistent with the consultant's recommendations.[5] We agree with petitioner that remand is necessary so that the hearings officer can address the recommendation for vegetation removal for all access roads. The hearings officer must either adopt the recommendation and impose an appropriate condition of approval, or explain why the recommendation is not adopted or why no condition of approval is necessary to ensure compliance with DCC 18.36.040(B). The hearings officer should also address other

[5] Intervenor cites to findings at Record 166-67, which discuss city fire department access road standards. However, those standards appear to involve road width, turning radii and similar characteristics, and do not appear to require vegetation removal.

relevant recommendations in the forest plan cited by petitioner, including the recommendation for thinning of trees, and adopt responsive findings.

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

The locational criteria at DCC 18.36.060 provide that:

> "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:
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> "A. Has the least impact on nearby or adjacent lands zoned for forest or agricultural use;
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> "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
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> "D. Consistent with the applicable provisions of DCC 18.36.070, minimizes the risks associated with wildfire."

We held in *Sisters Forest Planning Committee* that DCC 18.36.060 "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" with respect to the four DCC 18.36.060 criteria. 48 Or LUBA at 96. Intervenor's consultant initially evaluated three dwelling sites, including the preferred Site 2, using a "matrix" that assigned points to each site based on six factors (topography, prevailing winds, access, surrounding land uses, domestic water sources, and proximity to roads that existed as of August 1992), and applied those factors to each of the four DCC 18.36.060 criteria.[6] The consultant submitted a

[6] The proximity of roads that existed as of August 1992 reflects a county code requirement unrelated to DCC 18.36.060.

supplement that evaluated three additional sites, including Site 4, a site identified by petitioner in the eastern end of the panhandle near the main road. Intervenor's consultant concluded that the preferred Site 2 was superior to the other alternatives, in large part because it is located in an area that has already been cleared, is close to an existing well, and has an existing driveway, which would reduce the need for additional road grading and tree removal. As noted, petitioner's forest consultant submitted a letter critiquing both of the site analyses, opining that Site 4 is superior to Site 2, in large part because it is located much closer to the main paved road and further from large-scale forest operations to the west. However, the hearings officer chose to accept the testimony of intervenor's consultant as more comprehensive, detailed, and credible, finding that intervenor's consultant addressed and evaluated the locational and road access factors that petitioner's consultant emphasized.[7]

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[7] The hearings officer's findings state, in relevant part:

> "As noted above, Landwatch's professional forester Mr. Johnson stated that in his opinion Site 2 was 'second best' to Site 4. Specifically, he argued that Site 4 is the best site because it is closest to Johnson Market Road, a paved road, and is further from potential sources of wildland fires to the west, and because its location on the subject property's 'panhandle' would still allow sufficient room to do necessary fuel treatments. Mr. Johnson acknowledged that Site 4 would require more road construction than Site 2, would require a new well, and would have essentially the same surrounding land uses and related risks as Site 2.
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> "Based on Mr. Jackson's two alternative site analyses, the applicant argues that on balance his preferred site, Site 2, best satisfies the siting criteria in this section. Specifically, the applicant notes Site 2 is relatively flat, is located in an existing clearing far from other parcels engaged in forest use and far enough from the subject property's boundaries to allow the applicant to maintain required fire and fuel breaks, is very close to the Old Railroad Grade Road which intersects with Loop Road, is very close to an existing well, and has an existing driveway reducing the need for additional road grading and tree removal.
>
> "The Hearings Officer finds the alternative site analyses conducted by Mr. Jackson more than satisfy the inquiry required under [DCC] 18.36.060 as interpreted by LUBA in *Sisters Forest Planning Committee*. I also find Mr. Jackson's January 18, 2006 analysis is specifically responsive to Landwatch's identification of alternate homesite locations as required by LUBA. The remaining question is whether considering the evidence in the record Site 2 better meets the requirements of this section than Site 4. Mr. Jackson's analysis found overwhelmingly that it does. Mr. Johnson apparently concurs with much of Mr. Jackson's analysis but would weight more heavily Site 4's location closer to Johnson Market Road and further from forest land and activities to the west. As I found in my decision in *Hogensen*, both Mr. Jackson and Mr. Johnson are qualified to express an opinion on fire risk assessment and mitigation in general and on the subject property in particular. However, I

Petitioner advances several challenges to the hearings officer's findings under DCC 18.36.060.

A. Minimizing Risks Associated with Wildfire

Petitioner argues first that its expert testified that the fourth criterion under DCC 18.36.060, minimizing the risks associated with wildfire, is more important than the other criteria and should be given more weight, given the parcel's location in a recognized high fire risk area. According to petitioner, the hearings officer erred in failing to adopt findings addressing this issue or explaining why the fourth criterion should not be given more weight.

Intervenor responds, and we agree, that nothing in DCC 18.36.060 indicates that the fourth criterion, minimizing the risk associated with wildfires, is more important or should be weighted more heavily than the other three criteria. As we stated in *Sisters Forest Planning Committee*, each of the four criteria must be considered and balanced, if necessary, to determine the dwelling site that is most consistent with the objectives of DCC 18.36.060. Those objectives, broadly speaking, are to (1) protect farm and forest operations on neighboring lands, (2) protect farm and forest operations on the subject property, (3) preserve forest lands on the subject property, and (4) minimize the risks associated with wildfire. The last objective is certainly an important one, particularly when read in context with other provisions such as DCC 18.36.040(B), but there is no basis in the code to conclude it is a more important consideration than the other objectives.

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find Mr. Jackson's opinion about the preferred homesite is more credible than Mr. Johnson's opinion. That is because Mr. Jackson conducted a much more comprehensive and detailed analysis than did Mr. Johnson—covering as total of 6 sites including the applicant's preferred site, and Mr. Jackson's analysis addressed and evaluated the factors Mr. Johnson raised concerning location and road access." Record 195.

B. Comparison of Site 2 and Site 4

1. Petitioner's Arguments

Petitioner argues that it and its expert made a number of specific arguments below in support of its position that Site 4 is superior in terms of minimizing fire risk, and equal or better with respect to the other locational factors, but the hearings officer made no specific findings regarding those arguments, instead simply stating that she chose to rely on the applicant's expert. Petitioner notes that the applicant's expert submitted reports dated November 11, 2005, and January 24, 2006, while petitioner's expert submitted an undated report on January 26, 2006. Petitioner argues that the applicant's expert submitted no further response to January 26, 2006 report or petitioner's arguments based on that report. Petitioner disputes the hearings officer's statement that the applicant's expert "addressed and evaluated" the issues its expert raised regarding location and road access.

In addition, petitioner contends that the hearings officer erred in accepting and relying on the "point" system used by intervenor's consultant. According to petitioner, the point system assigned points based on irrelevant considerations such as the location of the existing well near the preferred site, ignoring evidence that a well can be drilled anywhere on the property. Petitioner contends that the inconvenience of drilling another well is not a relevant locational factor under DCC 18.36.060, but that the existence of the well played a significant role in the consultant's two analyses. Petitioner notes that intervenor's consultant stated that Site 2 is the preferred site "primarily due to the presence of the well[.]" Record 391. The relevant "source of domestic water" is not the well, petitioner argues, but rather groundwater, which can be accessed from any of the alternative sites on the subject parcel. Petitioner contends that the site analysis is skewed by consideration of pre-existing improvements such as the well and the driveway, and that an applicant should not be able to "pre-determine" a dwelling site under DCC 18.36.060 by relying on pre-application activities

to develop a dwelling site. Such improper considerations must be removed from the analysis, petitioner argues.

2. Intervenor's Responses

Intervenor responds, first, that petitioner made no challenge below to the "point" system used by his expert, and any such challenges are therefore waived. ORS 197.763; 197.835(3). In any case, intervenor argues, the point system is simply a demonstrative method of quantifying the expert's qualitative conclusions regarding the relative merits and demerits of various sites under various factors.

In the reply brief, petitioner argues that both petitioner and its expert challenged the way the applicant's expert used the point system, for example by improperly considering the existing well and driveway. We agree with intervenor that to the extent the fourth assignment of error challenges the methodology or general use of the point system itself, petitioner has not demonstrated that that issue was raised below and it is therefore waived. However, petitioner and its expert certainly raised issues regarding the way the point system evaluated specific factors, as well as the ultimate conclusion that Site 2 is superior to Site 4.

Intervenor also responds that his consultant's January 24, 2006 supplemental report adequately addressed Site 4, including the issues petitioner's expert raised in the January 26, 2006 report, and that the hearings officer's findings adequately explain why the hearings officer chose to rely on intervenor's consultant. In addition, intervenor argues that his counsel submitted a March 17, 2006 memorandum that responded to the January 26, 2006 report and petitioner's arguments based on that report, and asserted additional reasons why Site 2 is superior to Site 4 in terms of fire hazards and safety.

With respect to the existing well and driveway at Site 2, intervenor argues that the existence of those facilities are relevant considerations under DCC 18.36.060, not because a well and driveway could not be constructed at Site 4, but because such construction at Site 4 would require converting additional productive forest lands to residential use, which would

affect the third DCC 18.36.060 criterion, minimizing "the amount of forest lands used for the building site, road access and service corridors."

3. Analysis

As discussed above under the second assignment of error, the DCC 18.36.040(B) fire hazard and fire risk/cost analyses are congruent, if not overlapping, with the DCC 18.36.060 requirement to locate a dwelling site that, among other things, minimizes the risks associated with fire. Petitioner's expert submitted detailed testimony explaining his opinion that an isolated dwelling site such as Site 2 involves significantly more risk and cost to firefighters than one that is located close to other dwellings and the main access road, such as at Site 4. The applicant's expert did not respond to that detailed testimony, and nothing else cited to us in the record contradicts it. As noted above, the hearings officer dismissed that testimony under the view that an isolated dwelling at Site 2 is more likely to be abandoned to wildfire and if so would incur no additional risk or cost to firefighters. As we have already explained, that view is not supported by the record. The testimony of petitioner's expert on this point also seems at least potentially relevant to the DCC 18.36.060 requirement to locate the dwelling at a site that minimizes the risks associated with wildfire. Accordingly, we agree with petitioner that remand is necessary to adopt more adequate findings addressing that testimony, under DCC 18.36.060 as well as DCC 18.36.040(B).

With respect to petitioner's arguments regarding consideration of the existing well and driveway, petitioner appears to be correct that those considerations weighed heavily in intervenor's consultant's conclusion that Site 2 is greatly superior to all other sites. As noted, the consultant stated that Site 2 is the preferred site "primarily due to the presence" of the well and driveway. Record 391. We generally agree with petitioner that the inconvenience and cost of drilling another well or constructing another driveway would not be a legitimate consideration under DCC 18.36.060. However, intervenor appears to be correct that the consultant's conclusions regarding the well and driveway at Site 2 and the

lack of a well and driveway at other sites are based explicitly on the fact that drilling a well and constructing a driveway at any other site would entail additional loss of forest land to non-forest uses, rather than the inconvenience and cost of constructing new facilities. *See* Record 394 (assigning a positive score to Site 2 based in part on "[c]lose proximity of existing well—no additional loss of productive lands for additional drilling or pipeline construction"). The third criterion of DCC 18.36.060 requires comparison of the "amount of forest lands used for the building site, road access and service corridors" at alternative sites, so the consultant's consideration of the *amount of land* taken up by construction of a well and driveway is entirely appropriate.

The apparent intent of DCC 18.36.060(C) is to steer non-forest development toward sites that minimize the loss of forest lands to non-forest uses. It seems entirely consistent with that intent to identify any sites that already have some infrastructure or development that effectively commits that site to non-forest uses. All other things being equal, a site that will not require additional loss of forest lands to forest uses, because the site is already developed for non-forest uses, would seem to be the superior choice under the DCC 18.36.060 criteria, over sites that do require additional loss of forest lands to forest uses. Petitioner is correct that that approach may reward applicants who conduct pre-application development activities with the possible intent of "skewing" the locational analysis toward a preferred site. However, petitioner does not argue that the pre-application development in the present case (constructing the well and driveway) was illegal, or that the applicant or his predecessors-in-interest did anything wrong in constructing the well and driveway. We disagree with petitioner that the hearings officer and forestry consultant erred in considering the existing well and driveway.

Petitioner also challenges the consultant's assumption that locating the dwelling at alternate sites would necessarily require a 300-foot driveway. According to petitioner, there is no evidence in the record supporting that assumption, and the area around Site 4, for

example, includes several secondary access roads that may allow for a shorter driveway. Intervenor responds that the consultant reasonably assumed that any dwelling near Site 4 would be located the maximum distance from the access road that runs east-west through the panhandle, which is also used for heavy truck traffic from the surface mine to the east. We agree with intervenor that the hearings officer and consultant did not err in assuming that the property owner would choose to locate the dwelling as far as possible from access roads.

Finally, petitioner's expert raised three other arguments or points in favor of Site 4 that petitioner argues were never adequately addressed by the applicant's expert or the hearings officer. Petitioner explains that the applicant's January 26, 2006 supplemental report criticized Site 4 on several grounds, including arguments that (1) proximity to the main paved road to the east would increase risk to the dwelling from road-side ignition sources, such as cigarettes tossed from cars, (2) the potential for "increased wind turbulence due to upslope winds out of Tumulo Creek canyon," which lies east of the subject property, combined with prevailing westerly winds, and (3) the fact that the applicant may have no influence over fuel treatment on adjacent parcels north and south of Site 4. Record 396. Petitioner's expert responded to each criticism, noting that (1) prevailing winds are from the west, and thus any fires that start along the main road would spread to the east, not west toward Site 4, (2) given prevailing western winds, the only influence of the Tumulo Creek drainage would be to increase the likelihood of spot fires to the east, not impacting Site 4, and (3) there is plenty of room at Site 4 or in the panhandle generally to provide firebreaks and other fuel treatment required by DCC 18.36.070.

Intervenor responds that the hearings officer reasonably chose to believe the applicant's expert on these and other points of disagreement between the experts, and that LUBA should defer to the hearings officer's choice between conflicting evidence, as long as a reasonable person could reach the same conclusion. *Mazeski v. Wasco County*, 28 Or LBUA 178, 184 (1994), *aff'd* 133 Or App 258 (1995). We tend to agree with petitioner that

its expert made what seem to be effective responses to the consultant's three criticisms of Site 4. Nonetheless, we cannot say that a reasonable person could not rely on the applicant's consultant's analysis to conclude that Site 4 is inferior to Site 2 in those three particulars.

C. Conclusion

In sum, remand is necessary to adopt more adequate findings, supported by substantial evidence, addressing the testimony of petitioner's expert with respect to firefighting risks and costs, to the extent that testimony is applicable under the DCC 18.36.060(D) "minimize risks associated with wildfire" criterion. After addressing that testimony, the hearings officer should re-evaluate the alternative sites under all of the DCC 18.36.060 location criteria and again determine which site best satisfies those criteria. In remanding under this assignment of error, we do not mean to suggest agreement with petitioner's contention that Site 4 is superior to Site 2, when all appropriate factors are considered. It may be that after consideration of the evidence and appropriate factors, that the hearings officer will reach a sustainable conclusion that the preferred Site 2 is a permissible choice under the DCC 18.36.060 locational criteria. However, for the reasons set out above, the present findings and evidence are insufficient to support that conclusion.

The fourth assignment of error is sustained, in part.

The county's decision is remanded.