

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

3
4 OREGON COAST ALLIANCE, BOB FISCHER,
5 CAROL FISCHER, and VICKIE CROWLEY,
6 *Petitioners,*

7
8 vs.

9
10 CITY OF BANDON,
11 *Respondent,*

12
13 and

14
15 STEER BANDON ASSOCIATES,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2019-064

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from City of Bandon.

24
25 Sean T. Malone, Eugene, filed the petition for review and a reply brief, and
26 argued on behalf of petitioners.

27
28 Frederick J. Carleton, filed a response brief and argued on behalf of
29 respondent. With him on the brief was Carleton Law Offices.

30
31 Bill Kloos, Eugene, filed a response brief and argued on behalf of
32 intervenor-respondent. With him on the brief was Law Office of Bill Kloos, PC.

33
34 RUDD, Board Chair; RYAN, Board Member, participated in the decision.

35
36 ZAMUDIO, Board Member, did not participate in the decision.

37
38 AFFIRMED

04/28/2020

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

NATURE OF THE DECISION

Petitioners appeal a city council decision granting a conditional use permit for a 32-unit hotel with ground floor café and offsite parking.

FACTS

The subject property is located on the west side of Beach Loop Drive and is adjacent to a portion of the Oregon Islands National Wildlife Refuge Complex known as “Coquille Point.” Record 645. The importance of Coquille Point to the community is reflected in Bandon Comprehensive Plan (BCP) Special Policy 2 which provides:

“When property within 100 feet of the Refuge property is proposed for development, the applicant shall demonstrate that the proposal will have no adverse impact on the function of the Refuge. This shall be accomplished by supplying detailed plans that include proposed landscaping and vegetation, shielded exterior lighting, and noise minimization. In addition, the applicant shall demonstrate how the proposal enhances an identified scenic resource.” BCP 12.

The property is zoned Controlled Development One (CD-1), a zone whose purpose is:

“[T]o recognize the scenic and unique qualities of Bandon’s ocean front and nearby areas and to maintain these qualities as much as possible by carefully controlling the nature and scale of future development in [the] zone. It is intended that a mix of uses would be permitted, including residential, tourist commercial and recreational. Future development is to be controlled in order to enhance and protect the area’s unique qualities.” Bandon Municipal Code (BMC) 17.20.010.

1 Consistent with the purpose of the zone, the property is currently developed with
2 a tourist use. The existing 24-unit motel obtained a conditional use permit (CUP)
3 in 1989. Intervenor seeks a new CUP authorizing replacement of the existing
4 motel with a 32-unit hotel and café. Intervenor also proposes parking on property
5 across the street to serve the hotel. The proposed parking site previously
6 contained a restaurant and associated parking but the site is currently vacant.
7 Record 644.

8 On November 15, 2018, the planning commission held a hearing on the
9 CUP application.¹ BMC 17.92.040(A) requires that conditional uses be in

¹ Approval standards for CUPs are set forth in BMC 17.92.040 and require that:

“The approval of all conditional uses shall be consistent with:

- “A. The comprehensive plan;
- “B. The purpose and dimensional standards of the zone except as those dimensional standards have been modified in authorizing the conditional use permit;
- “C. That the site size and dimensions provide adequate area for the needs of the proposed use;
- “D. That the site size and dimensions provide adequate area for aesthetic design treatment to mitigate possible adverse effect from the use of surrounding properties and uses;
- “E. The characteristics of the site are suitable for the proposed use considering size, shape, location, topography and natural features;

1 compliance with the comprehensive plan, and the initial staff report for the
2 November 15, 2018 planning commission meeting had not addressed that plan
3 provision. Accordingly, on January 14, 2019, the city’s planning staff issued a
4 supplemental staff report addressing application compliance with Special Policy
5 2. On January 24, 2019, and February 7, 2019, the planning commission held
6 continued hearings on the CUP application. On February 28, 2019, the planning
7 commission issued its decision approving the CUP.

8 Petitioners appealed the planning commission decision to the city council.
9 On April 9, 2019, the city council held a hearing on the appeal. On June 3, 2019,
10 the city council issued its decision denying the appeal and approving the CUP.
11 This appeal followed.

12 **FIRST ASSIGNMENT OF ERROR**

13 Petitioners argue that the city’s findings that BMC 17.92.040(E) and BCP
14 Special Policy 2 are met, are inadequate because they do not consider impacts

“F. All required public facilities and services have adequate capacity to serve the proposal, and are available or can be made available by the applicant;

“G. The proposed use will not alter the character of the surrounding area in a manner which substantially limits, impairs, or precludes the use of surrounding properties for the permitted uses listed in the underlying zoning district;

“H. All other requirements of this title that apply[.]”

1 associated with destruction of the existing motel and construction of the new
2 hotel. Petition for Review 8. Intervenor and the city (collectively respondents)
3 contend that petitioners failed to adequately define their appeal issue before the
4 city council, and that under the exhaustion of remedies principles articulated in
5 *Miles v. City of Florence*, 190 Or App 500, 510, 79 P3d 382 (2003), *rev den*, 336
6 Or 615 (2004), this issue is now waived. In the alternative, respondents also argue
7 that the city council’s findings are adequate.

8 **A. BMC 17.92.040**

9 As a general response, respondents argue that petitioners failed to comply
10 with the city ordinance requiring specificity in appeal statements and therefore
11 may not raise the issues they now raise before us. Where a local code requires
12 that appeals identify the basis for the appeal with specificity, the failure of
13 objectors to do so will bar objectors from raising the issue at LUBA. In *Miles*,
14 the city’s ordinance required that the local appeal petition include “a statement
15 of ‘[t]he specific errors, if any made in the decision of the initial action and the
16 grounds therefore.” *Id.* at 503. On appeal to the city council, petitioners
17 abandoned the issues raised in their appeal petition and instead raised new issues.
18 The court held that consistent with the exhaustion principle expressed in ORS
19 197.825(2)(a), “parties should be required to pursue their available local remedies
20 *and* to present their substantive claims to the local appeal body; their failure to
21 do so should be deemed to be a waiver of those claims.” *Miles* at 509 (emphasis
22 in original).

1 BMC 17.124.010 sets forth requirements for local appeal of land use
2 decisions and provides in part:

3 “C. An appeal of a decision shall contain the following:

4 “1. An identification of the decision sought to be reviewed,
5 including the name, site, location information and the
6 date of the decision;

7 “2. A statement of the interest of the person seeking the
8 review and that the individual was a party to the initial
9 proceedings;

10 “3. *The specific grounds upon which the review and appeal*
11 *are being based.* The criteria against which the appeal
12 and review are being requested were addressed during
13 the original determination.” (Emphasis added).

14 BMC 17.124.010(C)(3) thus requires that the statement of appeal (appeal
15 statement) to the city council (1) identify the relevant criteria, (2) state with
16 specificity grounds for alleging that the criteria are unmet and (3) show that the
17 issue was raised below.

18 Petitioners stated in their appeal statement that:

19 “The actual construction impacts (as well as impacts related to
20 razing the existing motel) have not been addressed by the applicant.
21 Because the proposal is so close to the [Oregon Island National
22 Wildlife Refuge Complex] impacts are likely to be significant, but
23 the applicant has not proposed any mitigation measures to address
24 those issues.” Record 110.

25 In their first assignment error, petitioners argue that the city’s finding that
26 BMC 17.92.040(E), which requires evaluation of whether “[t]he characteristics
27 of the site are suitable for the proposed use considering size, shape, location,

1 topography and natural features,” is satisfied are inadequate. Petition for Review
2 14. However, petitioners did not explain in their appeal statement how the
3 construction and deconstruction were relevant to this criterion or its operative
4 language, and petitioners may not make that argument for the first time to us.²

5 **B. BCP Special Policy 2**

6 Although petitioners also failed in their appeal statement to specifically
7 identify BCP Special Policy 2 as the relevant criteria or cite any of its operative
8 language in relation to the potential impacts of construction and deconstruction,
9 the city council’s findings indicate that it understood the alleged error specified
10 in the appeal statement to relate to that criterion. BCP Special Policy 2 requires
11 that the applicant “demonstrate that the proposal will have *no adverse impact* on
12 the function of the Refuge,” and petitioners argue that the impacts associated with
13 demolition and construction *will be significant*. BCP 12 (emphasis added). As
14 discussed below, the city council addressed petitioners’ construction and
15 deconstruction assertions in the context of impacts on the Refuge prohibited by
16 BCP Special Policy 2.

17 Findings must “(1) identify the relevant approval standards, (2) set out the
18 facts which are believed and relied upon and (3) explain how those facts lead to
19 the decision on compliance with the approval standards.” *Heiller v. Josephine*

² For example, in their petition for review petitioners repeatedly refer to noise impacts, but do not direct us to any issues raised in their appeal statement regarding noise.

1 *County*, 23 Or LUBA 551, 556 (1992). The findings must respond to specific
2 issues raised concerning standards compliance. *Norvell v. Portland Metro*, 43 Or
3 App 849, 853, 604 P2d 896 (1979). Substantial evidence exists to support a
4 finding of fact when the record, viewed as a whole, would permit a reasonable
5 person to make that finding. *Dodd v. Hood River County*, 317 Or 172, 179, 855
6 P2d 608 (1993); *Younger v. Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988).
7 The city council found that the allegation in the appeal statement was generalized
8 and did not specify the nature of the impacts asserted or the way the construction
9 or demolition will cause those impacts. Record 51. The city council nonetheless
10 also found that:

11 “With respect to the ‘no adverse impact’ part of this policy, the
12 Planning Commission determined that the function of the upland
13 portion of the Refuge, which is closest to the proposed use, is to
14 provide access to the Coquille Point headland so that the public may
15 view and enjoy the resource. It provides a buffer between the urban
16 development to the east and the bluff, beach and offshore rocks to
17 the west. The area of the Refuge that is beyond the public access
18 area is quite remote from the proposed development. The proposed
19 motel redevelopment will not have an adverse impact on the part of
20 the refuge that provides public access for viewing the balance of the
21 Refuge. The public access facilities and the motel improvements are
22 adjacent to compatible forms of development.” Record 43-44.

23 The city council concluded that the character of the uses in the part of the Refuge
24 closest to the proposed hotel were:

25 “Generally, those are uses that involve the comings and goings of
26 the general public to view the protected resource further to the west.
27 The appellants have not alleged how typical demolition and
28 construction activities might conflict with the nearby uses.” Record

1 51.

2 The city council concluded that given the character of the uses in the part of the
3 Refuge closest to the proposed motel, it was not clear how construction or
4 demolition activity would create a conflict. Record 17. Petitioners argue in their
5 petition for review that the city council improperly focused on impacts related to
6 the operation of the hotel but do not direct us to assertions in their appeal
7 statement clarifying why construction and deconstruction were relevant and the
8 specific adverse impacts of concern.

9 The city council’s discussion of the no adverse impact provision of BCP
10 Special Policy 2 also included the finding that “the scope of the phrase ‘no
11 adverse impact’” is limited by the terms of the policy. Record 44. The city council
12 held that:

13 “The second sentence of the policy provides meaning to [the]
14 phrase. The City Council interprets the policy as limiting the range
15 of issues that are relevant to the potential for adverse impacts to
16 several types of potential impacts—landscaping and vegetation,
17 exterior lighting, and noise. These issues are to be the subject of
18 detailed plans, which are to be submitted to the applicant.” Record
19 44.

20 Petitioners do not challenge the city council’s finding, but rather argue for a
21 different conclusion. *McGowan v. City of Eugene*, 24 Or LUBA 540, 546 (1993)
22 (that a petitioner may disagree with the local government’s conclusions provides
23 no basis for reversal or remand). Petitioners cite to various complaints raised in
24 the proceedings before the planning commission but do not identify where the
25 appeal statement linked issues such as excavation to potential deconstruction and

1 construction impacts and BCP Special Policy 2. We find that the findings identify
2 the relevant criteria, the related evidence in the record and the basis for the city
3 council’s conclusion that the standard is met. The findings are adequate and
4 supported by substantial evidence.

5 This assignment of error is denied.

6 **SECOND ASSIGNMENT OF ERROR**

7 BMC 17.20.040.C sets forth “Limitations on use” in the CD-1 zone. It
8 requires that development plans “be reviewed to assess the possible presence of
9 any geologic hazard,” and provides that if a geologic hazard is suspected, the
10 planning commission will require a developer to submit a report:

11 “which satisfactorily evaluates the degree of hazard present and
12 recommends appropriate precautions to avoid endangering life and
13 property and minimize erosion. The burden of proof is on the
14 landowner to show that it is safe to build.” *Id.*

15 We refer to this criterion as the “safe to build” criterion. BMC 17.20.40.C(1)(c)
16 provides that reports that may be required include:

17 “Hydrology Report. This report shall include an adequate
18 description, as defined by the city manager or designate, of the
19 hydrology of the site, conclusions and recommendations regarding
20 the effect of hydrologic conditions on the proposed development,
21 and options and recommendations covering the carrying capabilities
22 of the sites to be developed. The investigation and report shall be
23 prepared by a professional civil engineer currently registered in the
24 state of Oregon.”

25 Intervenor submitted a combined report (the Cascadia report), that
26 included a hydrology report, and petitioners’ expert, (GeoSciences), challenged

1 aspects of the report during the proceedings before the planning commission.³
2 Record 785. The planning commission imposed the following condition of
3 approval:

4 “The Zoning Compliance application shall include a hydrology
5 study and report prepared by a registered professional civil engineer
6 which examines both groundwater and surface water impacts of the
7 proposed development and how those impacts are to be mitigated.”⁴
8 Record 192.

9 The city council determined, however, that the approval standard requiring a
10 hydrology report to be submitted in order for the city to evaluate whether the
11 “safe to build” criterion in BMC 17.20.040.C was satisfied was met without the
12 need for an additional hydrology report. The city council removed the planning
13 commission condition requiring an additional hydrology report, concluding:

14 “The City is satisfied that the applicant’s report contains the
15 information that is relevant and material to reaching the required
16 conclusions, including the ultimate standard that the project is safe
17 to build. Any information that the appellants assert is needed but not
18 present is waived.” Record 52.

³ The Cascadia report included the statement

“that this geotechnical report meets [the code] standard and provides information, conclusions, and recommendations as they pertain to the soils, geology, and hydrology of the site. The authors of this report are an Oregon Certified Engineering Geologist and a Licensed Oregon Geotechnical Engineer.” Record 790.

⁴ A zoning compliance review does not include public notice or the opportunity to comment. BMC 17.120.050.

1 Petitioners' second assignment of error is:

2 "The city misconstrued and made inadequate findings not based on
3 substantial evidence as it relates to the decision to not require a
4 hydrology report." Petition for Review 15.

5 **A. Preservation of Error**

6 Respondents first respond that petitioners did not preserve most of the
7 issues raised in their second assignment of error in their appeal statement, and are
8 therefore precluded from raising these issues to LUBA under the exhaustion of
9 remedies principles, because they are waived. *Miles*, 190 Or App 500, 510.
10 Intervenor's Response Brief 21.

11 The statement of error in petitioners' appeal statement is as follows:

12 "The public has not yet seen or reviewed a hydrology study to
13 determine how that study affects the conditional use criteria and
14 other approval standards. In the absence of providing that hydrology
15 study now, the City must make a condition requiring the same
16 procedural and substantive process as has been provided here."
17 Record 33.

18 Petitioners' appeal to the city council argued that the planning commission's
19 condition requiring an additional hydrology report had to be subject to public
20 review. The city council concluded that the hydrology report in the record was
21 sufficient to satisfy the requirement to provide a hydrology report and to allow
22 the city council to determine that the ultimate "safe to build" criterion was met.
23 However, we agree with petitioners that petitioners could not reasonably be
24 expected to anticipate that the city council would decide that no additional
25 hydrology report was required *at all*. Petitioners may argue on appeal to us that

1 the city council erred in not requiring an additional hydrology study. *See Olstedt*
2 *v. Clatsop County* 62 Or LUBA 131 (2010) (the *Miles* waiver principle is
3 inapplicable where petitioners at LUBA prevailed in the initial decision below,
4 and the applicants filed the local appeal where they ultimately gained approval
5 of their application, because petitioners at LUBA had no reason to appeal the
6 initial decision). However, to the extent petitioners' second assignment of error
7 challenges the evidentiary value of the hydrology report that intervenor did
8 provide, we agree with intervenor that petitioners are precluded under the *Miles*
9 principles of exhaustion from raising those issues for the first time at LUBA,
10 because those issues have been waived.

11 **B. Adequacy of Hydrology Report in the Record**

12 Petitioners argue that the city misconstrued the law and made inadequate
13 findings unsupported by substantial evidence by not requiring an additional
14 hydrology report. Petition for Review 15. The city council expressly adopted the
15 staff reports submitted during the review process to the extent those reports were
16 not inconsistent with the city council's express findings. Record 24. The March
17 28, 2019 Supplemental Staff Report included the following summary of the
18 reports submitted by intervenor:

19 "The applicant submitted a required geotechnical report with the
20 application. The report was prepared by [Cascadia]. Bob Fischer
21 submitted a geotechnical report prepared by GeoSciences. The
22 GeoSciences report challenged some of the findings in the
23 [Cascadia] report. One of the key concerns expressed by Mr. Fischer
24 based upon his study of the Cascadia report related to level of

1 groundwater at the site and what the depth of foundation would do
2 to disrupt and redirect groundwater flow in the area. At the January
3 24 public hearing, the engineering geologist and civil engineer from
4 Cascadia presented rebuttal testimony responding to the challenges
5 in the GeoSciences report and the written and oral testimony of Mr.
6 Fischer. The Cascadia team answered questions from several
7 Planning Commission members. On the issue of groundwater
8 disruption, the Cascadia representative stated that there will be no
9 disruption of groundwater flow as the foundation will not be at the
10 depth of the groundwater level. The Commission was given
11 assurances by these engineering professionals that it is safe to build
12 the proposed hotel and that doing so will cause no significant bluff
13 erosion or instability. The Commission decided that the applicant
14 had met their burden of proof that it is safe to build.” Record 80-81.

15 The city council’s findings explain its decision that the Cascadia report
16 provided the information required by the code and to the extent petitioners argued
17 additional information was needed, an additional hydrology report was not
18 required.⁵ Petitioners argue that Cascadia recommended groundwater monitoring
19 during the winter months. Petition for Review 18. We agree with respondents
20 that this was not a suggestion for additional hydrology reporting.⁶ In addition,

⁵ BMC 17.20.040(C)(1)(d) provides that any reports deemed irrelevant to the site may be waived.

⁶ Cascadia explained:

“Based on our investigation and experience with similar soils, it is [Cascadia’s] opinion that the site is geologically suitable for the proposed structure and that the structure can be supported on conventional spread footings provided the site is prepared in accordance with our recommendations. We base this on our work experience involving similar structures in similar settings.

1 Condition 10 of the city council’s decision incorporates the recommendations of
2 the Cascadia report.⁷

3 Petitioners also argue, however, that the findings are inadequate because
4 they do not explain why the city council concluded that the planning
5 commission’s condition of approval requiring an additional report was not
6 necessary. However, the city council explained its reasons for concluding that the
7 hydrology report submitted by intervenor was sufficient to allow the city council
8 to determine that the “safe to build” criterion in BMC 17.20.040(C) was met.

“As we note in the Groundwater section of this report, it has been our experience that shallow, perched water tables will develop in the surficial deposits during periods of sustained seasonal rainfall. Because of this, we recommend that either groundwater be monitored during the winter months or that near-surface, shallow groundwater elevations be anticipated for purposes of design.” Record 790.

⁷ Cascadia recommended that it:

“be retained to provide Construction Observation Services (COS) based upon our familiarity with the project, the subsurface conditions, and the geotechnical recommendations and design criteria provided.” Record 781.

Condition 10 of the city council decision provides:

“A certified engineering geologist must be present to observe and advise on general excavation, soil stripping, fill placement, footings subgrades, and subgrades and base rock for footings, floor slabs, and pavements to ensure that the applicant follows all recommendations included in the geotechnical report prepared by [Cascadia] dated July 31, 2017.” Record 25.

1 Petitioners do not identify any requirement in the BMC or elsewhere for the city
2 council to explain why it reached a different conclusion than the planning
3 commission reached. As the final decision maker, the city council is entitled to
4 disagree with the planning commission.

5 This assignment of error is denied.

6 **THIRD ASSIGNMENT OF ERROR**

7 A restaurant which was previously located across the street from the
8 property has been removed and a parking lot is now proposed on that site.
9 Intervenor's project proposes a café on the ground floor of the new hotel.
10 Petitioner's third assignment of error is that:

11 "The City * * * misconstrued applicable law and made inadequate
12 findings not based on substantial evidence in relation to the solid
13 waste management plan." Petition for Review 31.

14 Petitioners argued in their appeal statement that:

15 "The Café will clearly entail food waste that will attract scavengers,
16 which will threaten the native wildlife. The applicant has not
17 demonstrated how this is consistent with [BCP] Special Policy 2,
18 and similarly fails to demonstrate how attracting scavengers will
19 enhance [Coquille Point]." Record 50.

20 Petitioners also argued in their appeal statement that without having had an
21 opportunity to review the plans "[i]t is impossible to determine how these plans
22 will affect the applicable criteria[.]" Record 33. Petitioners do not develop any
23 argument that intervenor submitting a plan that will secure the waste in

1 impenetrable containers may not be possible, but only that the public has a right
2 to review the plan.⁸

3 The city council imposed the following condition of approval:

4 “The applicant shall prepare and implement a solid waste
5 management plan and integrated pest management plan that assures
6 that trash and food waste is contained and handled in a way to be
7 unavailable to rodents, gulls, and other scavenging animals.” Record
8 25.

9 As we explained in *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447-48
10 (1992) (footnotes omitted):

11 “Where the evidence presented during the first stage approval
12 proceedings raises questions concerning whether a particular
13 approval criterion is satisfied, a local government essentially has
14 three options potentially available. First it may find that although the
15 evidence is conflicting, the evidence nevertheless is sufficient to
16 support a finding that the standard is satisfied or that feasible
17 solutions to identified problems exist, and impose conditions if
18 necessary. Second, if the local government determines there is
19 insufficient evidence to determine the feasibility of compliance with
20 the standard, it could on that basis deny the application. Third, if the
21 local government determines that there is insufficient evidence to
22 determine the feasibility of compliance with the standard, instead of
23 finding the standard is not met, it may defer a determination
24 concerning compliance with the standard to the second stage. In
25 selecting this third option, the local government is not finding all

⁸ The city council’s findings also noted that the allegation was based on the assumption that the café operations would not comply with city health and safety operations. The city found that if the café operated in a way that attracted scavengers, “the city code explicitly states that such a situation could be abated by the City as a nuisance. See BMC 9.04.050.” Record 51.

1 applicable approval standards are complied with, or that it is feasible
2 to do so, as part of the first stage approval (as it does under the first
3 option described above). Therefore, the local government must
4 assure that the second stage approval process to which the decision
5 making is deferred provides the statutorily required notice and
6 hearing, even though the local code may not require such notice and
7 hearing for second stage decisions in other circumstances.”

8 Intervenor “incorporated all of the [United States Fish and Wildlife Services’
9 (USFWS)] suggestions for ‘best management practices’ related to * * * waste
10 management for the Bandon Beach Hotel as expressed in [the USFWS] letter of
11 May 3, 2018 [.]” Record 463. The city council determined that there was evidence
12 that the adverse impacts would be avoided by securing the café waste in
13 scavenger proof containers and that more was not required. In other words, the
14 city council found that BCP Special Policy 2 was satisfied as to waste
15 management. Petitioners have not established that there was insufficient evidence
16 to support that finding or that scavenger proof containers may be infeasible.

17 This assignment of error is denied.

18 **FOURTH ASSIGNMENT OF ERROR**

19 BMC 17.92.040(E) requires that “the characteristics of the site are suitable
20 for the proposed use considering size, shape, location, topography and natural
21 features[.]” We refer to this as the “suitability” criterion. Petitioners’ fourth
22 assignment of error is “[t]he City’s decision failed to respond to Petitioners’
23 argument about the suitability determination under applicable code provisions.”
24 Petition for Review 33. As explained in the discussion of the first assignment of
25 error, the city code requires that petitioners identify with specificity the basis for

1 their appeal to the city council. Petitioners state that they preserved this
2 assignment in their appeal statement:

3 “As set forth below and in testimony submitted before the Planning
4 Commission, Appellants also assign error to the City’s conclusion
5 that the * * * characteristics of the site are suitable for the proposed
6 use considering the size, shape, location, topography and natural
7 features.” Record 32.

8 Petitioners’ appeal statement included the assertion that the property was not
9 suitable for the use because, according to petitioners, intervenor’s geologic report
10 was “deeply flawed.” Record 103. In their petition for review, petitioners argue
11 that there are shortcomings in the geologic report. Petitioners argue that the
12 shallow groundwater and the status of the hydrology report affect the suitability
13 of the site for the proposed hotel use, but that the city council failed to consider
14 the groundwater issues.

15 The city council found that the geologic report analysis related to the “safe
16 to build” criterion in BMC 17.20.040(C). The city council concluded that with
17 respect to the geologic study, the “ultimate conclusion that must be made is that
18 the proposal is ‘safe to build,’ not that it is ‘suitable.’” Record 53. We will give
19 deference to the city council’s interpretation of its own code and its determination
20 that the geological characteristics of a site are properly evaluated under the BMC
21 17.20.040(C) “safe to build” criterion. *Siporen v. City of Medford*, 349 Or 247,
22 243 P3d 776 (2010) (LUBA must defer to a local government’s own

1 interpretation of its own land use regulation as long as the interpretation is
2 “plausible”).

3 The “suitability” criterion at BMC 17.92.040(E) that petitioners cite in
4 their fourth assignment of error is in fact part of a different criterion than the “safe
5 to build” criterion at BMC 17.20.040(C). In addressing the suitability criterion,
6 the city council incorporated findings of compliance with BMC 17.92.040 from
7 the staff report that:

8 “The Comprehensive Plan states that the classification of the
9 Controlled Development areas is to recognize the scenic and unique
10 quality of Bandon’s ocean front and view areas and to maintain the
11 quality of Bandon’s ocean front by carefully controlling the nature
12 and scale of future development in the area. It is intended that a mix
13 of uses would be permitted, including residential, tourist
14 commercial, and recreational. Future development is to be
15 controlled in order to enhance the area’s unique qualities. The
16 application is for a hotel, which is considered a tourist commercial
17 use.” Record 650-51.

18 As respondents note, the findings incorporated the staff report’s findings of
19 suitability, which petitioners failed to appeal. Intervenor’s Response Brief 45.

20 To the extent the city council nonetheless considered the suitability of the
21 site based on its geotechnical characteristics, the city council also weighed the
22 evidence of competing experts and found intervenor’s expert more credible. The
23 city council incorporated the planning commission findings and staff report into

1 its findings.⁹ Record 24. The city council incorporated by reference the planning
2 commission findings:

3 “The Commission believes the applicant has demonstrated that the
4 characteristics of the site are suitable for the hotel use. The
5 Commission has relied upon the applicant’s geotechnical report in
6 reaching that conclusion.” Record 190.

7 The city’s findings also incorporated findings from the staff report concluding
8 that:

9 “The applicant presented a Geotechnical Report addendum for the
10 property as part of their application, dated October 16, 2018 and
11 prepared by Cascadia Geoservices Inc. The soils, geology, and
12 hydrology for the site have been investigated and specific
13 recommendations, conclusions and options for development have
14 been made. Ultimately, Cascadia Geoservices confirms that the site
15 is suitable for the proposed commercial development given the
16 recommendations outlined in their report.” Record 647.

⁹ “The Planning Commission adopted nine pages of findings in support of its decision approving this application. Those findings are incorporated here. These findings supplement those of the Commission in order to address the issues on appeal. These findings control over the findings of the Commission to the extent of any inconsistencies.” Record 24.

The city council also adopted as findings the staff reports, stating:

“Similarly, there were several Staff Reports issued in the course of this application. Each addressed standards for the decision based on the record. The Staff Reports are adopted as findings of the Council to the extent those Staff Reports are not inconstant with the findings made here.” Record 24.

1 The city weighed the evidence provided by intervenor’s expert, Cascadia,
2 and petitioners’ expert, GeoScience and decided that Cascadia was more credible.
3 Record 52-53. Given that petitioners did not challenge the city council’s finding
4 that the suitability criteria was met by a proposed hotel in an area intended in part
5 to serve tourists, we disagree with petitioners that the city’s decision failed to
6 address the BMC 17.92.040(E) suitability determination.

7 This assignment of error is denied.

8 The decision is affirmed.