

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

JOE BEN, LLC,  
*Petitioner,*

vs.

JACKSON COUNTY,  
*Respondent,*

and

TIMOTHY KOHLER,  
*Intervenor-Respondent.*

LUBA No. 2020-115

FINAL OPINION  
AND ORDER

Appeal from Jackson County.

Garrett K. West filed the petition for review and reply brief and argued on behalf of petitioner. Also on the brief was O'Connor Law, LLC.

No appearance by Jackson County.

Charles D. Sarkiss filed the response brief and argued on behalf of intervenor-respondent. Also on the brief were Mark S. Bartholomew and Hornecker Cowling LLP.

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

REMANDED

04/12/2021

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**

Petitioner appeals a hearings officer decision denying an application for a forest template dwelling in an area of special concern.

**FACTS**

The subject property is a vacant, 20-acre parcel zoned Woodland Resource and within the Area of Special Concern (ASC) 90-1 overlay. ASC overlays are intended, in part, to protect site-specific environmental features through the application of additional development regulations and requirements. The ASC 90-1 overlay is applied to

“all lands on which development can affect survival of Black-tailed deer or Roosevelt elk herds as described in the Natural and Historic Resources Element (Chapter 16) of the Comprehensive Plan. Such lands are identified as winter range habitat on base maps prepared by the Oregon Department of Fish and Wildlife (ODFW) and adopted by the Board of Commissioners as ASC 90-1.” Jackson County Land Development Ordinance (LDO) 7.1.1(C).

Petitioner submitted a Type 2 application for a forest template dwelling. The planning director approved the application, and intervenor appealed the decision to the hearings officer. The hearings officer held a hearing on the appeal and, in a decision issued November 10, 2020, denied the application. This appeal followed.

**FIRST ASSIGNMENT OF ERROR**

LDO 7.1.1(C) is the applicable criterion for petitioner’s forest template dwelling application. It provides, in relevant part:

1           “4) The standards of this subsection are deemed to comply with  
2 the deer and elk habitat protection measures recommended by  
3 ODFW and therefore do not require ODFW comment on  
4 Type 1 permits issued in conformance with this subsection. A  
5 first dwelling on a lawfully created lot or parcel will be  
6 located within 300 feet of an existing:

7           “a) Public or private road;

8           “b) Driveway that provides access to an existing dwelling  
9 on another parcel (provided the new dwelling unit will  
10 not take access on it unless the driveway is improved  
11 to the private road standards of Section 9.5.3); or

12           “c) Other developed access way that existed as shown on  
13 the County 2001 aerials or other competent evidence  
14 (e.g., a road or driveway for a legal easement recorded  
15 prior to the aerial date).

16           “To be considered under the locational criteria of this  
17 subsection, any access must, at a minimum, conform with the  
18 emergency vehicle access standards of Section 9.5.4. When  
19 an initial dwelling is proposed to be sited in an alternative  
20 location that does not conform to the standards of this  
21 subsection, the alternative location may be allowed through a  
22 Type 2 review process in accordance with subsection (6),  
23 below.

24           “5) *General Development Standards*

25           “The following standards apply to all discretionary land use  
26 permits subject to review under this Section, unless a  
27 condition of approval when the parcel was created required  
28 compliance with prior habitat protection standards. The land  
29 use decision will include findings that the proposed use will  
30 have minimal adverse impact on winter deer and elk habitat  
31 based on:

32           “a) Consistency with maintenance of long-term habitat  
33 values of browse and forage, cover, sight obstruction;

- 1 “b) Consideration of the cumulative effects of the proposed  
2 action and other development in the area on habitat  
3 carrying capacity; and
- 4 “c) Location of dwellings and other development within  
5 300 feet of an existing public or private road, or  
6 driveway that provides access to an existing dwelling  
7 as shown on the County 2001 aerials or other  
8 competent evidence. When it can be demonstrated that  
9 habitat values and carrying capacity are afforded equal  
10 or greater protection through a different development  
11 pattern an alternative location may be allowed through  
12 the discretionary review process described in  
13 subsection (6), below;
- 14 “d) Dwellings other than the initial dwelling on a lot or  
15 parcel will comply with one (1) of the following, as  
16 applicable:
- 17 “i) A maximum overall density (within the tract) of  
18 one (1) dwelling unit per 160 acres in Especially  
19 Sensitive Winter Range units, or one (1)  
20 dwelling unit per 40 acres in Sensitive Winter  
21 Range units; or
- 22 “ii) Clustering of new structures within a 200-foot  
23 radius of the existing dwelling to achieve the  
24 same development effect as would be achieved  
25 under i), above.”
- 26 “6) *ODFW Approved Alternate Siting Plan*
- 27 “Initial dwellings and other development may be sited in  
28 locations that do not conform with subsections (4) and (5)  
29 above when the applicant demonstrates at least one (1) of the  
30 following:
- 31 “a) The wildlife habitat protection measures required by  
32 Section 7.1.1(C)(4) will render the parcel unbuildable;  
33 or

1           “b) A written authorization approving an alternate siting  
2           plan is received from ODFW. Any such authorization  
3           must include a statement from ODFW that confirms  
4           habitat values and carrying capacity will be afforded  
5           equal or greater protection if the dwelling or other  
6           development is sited in the alternate location. The  
7           written authorization must be made on ODFW  
8           letterhead or forms and be signed by an ODFW official  
9           with authority to make habitat protection decisions.  
10          Authorization of an alternative dwelling location will  
11          not release an applicant from compliance with any  
12          other applicable standard of this Ordinance.”  
13          (Emphases in original.)

14   LDO 7.1.1(C)(6) provides an alternative pathway to approval for development  
15   that does not comply with LDO 7.1.1(C)(4) or (5).

16          There is no dispute that the proposed dwelling will not be located “within  
17   300 feet of an existing public or private road, or driveway that provides access to  
18   an existing dwelling,” and therefore petitioner sought approval under LDO  
19   7.1.1(C)(6) because its discretionary Type II application did not meet the access  
20   requirements in LDO 7.1.1(C)(5)(c). The hearings officer found:

21          “[B]ecause this application is a Type 2 application and [the]  
22          proposed dwelling will not be within 300 feet of an existing public  
23          or private road or driveway, the application must comply with  
24          Subsection 6. Contrary to prior Hearings Officer decisions, after a  
25          more careful review of these code provisions and a better  
26          understanding of the appellant’s arguments, as discussed below, *the*  
27          *Hearings Officer does not find that the application complies with*  
28          *subsection 6.* Therefore, the application does not meet this  
29          criterion.” Record 19 (emphasis added).

30   After finding that LDO 7.1.1(C)(6) was not met, albeit in their discussion of  
31   paragraph (5), the hearings officer quoted paragraph (6). Record 20.

1       The LDO 7.1.1(C)(6)(b) path to approval requires ODFW approval of a  
2 site plan. The hearings officer found that “[t]he applicant did not seek ODFW  
3 approval of an alternate siting plan. ODFW approval, however, is needed only if  
4 there are no findings under Subsection 6(a).” *Id.*

5       The LDO 7.1.1(C)(6)(a) path to approval requires that the site be  
6 unbuildable if the wildlife protections in LDO 7.1.1(C)(4) are applied.<sup>1</sup> The  
7 hearings official explained that petitioners had failed to establish that the site is  
8 unbuildable if the wildlife protections are imposed:

9       “The applicant argued in its final arguments that interpreting  
10 subsection 5 as not allowing compliance with Section 7.1.1(C)(4)(c)  
11 to qualify as compliance for subsection 5)c) would [render] the lot  
12 unbuildable. *Therefore, the application, according to the applicant,*  
13 *complies with subsection 6)a) eliminating the need to seek ODFW*  
14 *approval.*

15       “*Merely requiring approval of ODFW because the other developed*  
16 *access way is inadequate to comply with subsection 5, however,*  
17 *does not render the property unbuildable.* It could very well be that  
18 the ODFW approval will be easily obtained because having a  
19 dwelling close to the other developed access way likely provides  
20 little to no difference in impact to being close to the other two listed  
21 types of access ways.

22       “The opponents, however, misinterpret the code in claiming that  
23 ODFW must approve the alternate site plan merely because of the  
24 long length of the road. Nothing in the code requirement relates to

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<sup>1</sup> We have previously held that the criteria in LDO 7.1.1(C)(4) apply only to Type 1 applications. *Kohler v. Jackson County*, \_\_\_ Or LUBA \_\_\_, \_\_\_ (LUBA No 2020-091, Jan 14, 2021) (slip op at 4-11).

1 the amount of road used as access to a property. The code  
2 requirements relate only to the location of the dwelling on the  
3 subject property. The applicant could improve the road easement  
4 even without the application for a dwelling, especially if such  
5 improvements are needed to manage the forest lands for timber  
6 production and preservation. No one cited any code provision to the  
7 contrary.” Record 20-21 (emphases added).

8 In its first assignment of error, petitioner argues that the hearings officer’s  
9 findings are inadequate to explain why the hearings officer denied the application  
10 and that the decision improperly failed to consider whether the application could  
11 be approved under LDO 7.1.1(C)(6)(a). Petitioner then explains its theory for  
12 why LDO 7.1.1(C)(6)(a), not (b), applies to the application and argues that “[t]he  
13 subject application would be approved if Subsection (6)(a) were applied.”  
14 Petition for Review 11-12. Intervenor takes the position that LDO 7.1.1(C)(6)(a)  
15 does not apply to the application at all and that the application could only be  
16 approved under LDO 7.1.1(C)(6)(b) if the applicant receives ODFW approval for  
17 an alternative siting plan.

18 Adequate findings set out the applicable approval criteria and explain the  
19 facts relied upon to conclude whether the applicable criteria are satisfied. *Le Roux*  
20 *v. Malheur County*, 30 Or LUBA 268, 271 (1995); *Heiller v. Josephine County*,  
21 23 Or LUBA 551, 556 (1992). In denying an application for land use approval  
22 based on a finding that the application does not comply with applicable criteria,  
23 the local government’s findings must be sufficient to inform the applicant either  
24 of what steps are necessary to obtain approval or that it is unlikely that the  
25 application will be approved. *Bridge Street Partners v. City of Lafayette*, 56 Or



1 LUBA 387, 394 (2008) (citing *Commonwealth Properties v. Washington County*,  
2 35 Or App 387, 400, 582 P2d 1384 (1978); *Rogue Valley Manor v. City of*  
3 *Medford*, 38 Or LUBA 266, 272 (2000)). The findings must provide a coherent  
4 explanation for why the county believes the proposal does not comply with the  
5 criteria. *Id.* (citing *Caster v. City of Silverton*, 54 Or LUBA 441, 457 (2007)).

6 We agree with petitioner. The hearings officer failed to adopt any findings  
7 explaining why they believed the application did not comply with LDO  
8 7.1.1(C)(6)(a). Remand is required for the hearings officer to adopt findings in  
9 the first instance regarding whether the application satisfied that provision.

10 The first assignment of error is sustained.

11 The county's decision is remanded.