

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

TIM KOHLER,
Petitioner,

vs.

JACKSON COUNTY,
Respondent,

and

SAGN, LLC,
Intervenor-Respondent.

LUBA No. 2021-015

DAVID BENSON and JENNIFER PIERCE,
Petitioners,

vs.

JACKSON COUNTY,
Respondent,

and

SAGN, LLC,
Intervenor-Respondent.

LUBA No. 2021-016

FINAL OPINION
AND ORDER

Appeal from Jackson County.

1 Charles Sarkiss filed a petition for review and argued on behalf of
2 petitioner Tim Kohler. Also on the brief were Mark S. Bartholomew and
3 Hornecker Cowling, LLP.
4

5 Sean Malone filed a petition for review on behalf of petitioners David
6 Benson and Jennifer Pierce.
7

8 No appearance by Jackson County.
9

10 Garrett K. West filed the response brief and argued on behalf of intervenor-
11 respondent. Also on the brief was O'Connor Law, LLC.
12

13 RUDD, Board Member, ZAMUDIO, Board Chair, participated in the
14 decision.
15

16 RYAN, Board Member, did not participate in the decision.
17

18 AFFIRMED 08/27/2021
19

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

NATURE OF THE DECISION

Petitioners appeal a hearings officer approval of a forest template dwelling.

BACKGROUND

The subject property is a vacant, 23-acre parcel zoned Woodland Resource, a zone which implements Statewide Planning Goal 4 (Forest Lands).¹ Jackson County Land Development Ordinance (LDO) 5.2.2. On November 27, 2019, intervenor-respondent (intervenor) submitted an application to develop a forest template dwelling on the subject property. On September 25, 2020, staff issued a tentative decision denying the application. On October 6, 2020, intervenor appealed staff's tentative decision. On November 16, 2020, the hearings officer held a public hearing on intervenor's application. On January 6, 2021, the hearings officer granted the appeal and approved the forest template dwelling application.

¹ Goal 4 is:

“To conserve forest lands by maintaining the forest land base and to protect the state's forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water, and fish and wildlife resources and to provide for recreational opportunities and agriculture.”

1 These appeals followed.²

2 **FIRST ASSIGNMENT OF ERROR**

3 The subject property is in the Area of Special Concern 90-1 (ASC 90-1)
4 overlay zone. The ASC 90-1 overlay is applied to

5 “all lands on which development can affect survival of Black-tailed
6 deer or Roosevelt elk herds as described in the Natural and Historic
7 Resources Element (Chapter 16) of the Comprehensive Plan. Such
8 lands are identified as winter range habitat on base maps prepared
9 by the Oregon Department of Fish and Wildlife (ODFW) and
10 adopted by the Board of Commissioners as ASC 90-1.” LDO
11 7.1.1(C).

12 Petitioners’ first assignment of error is that the hearings officer made inconsistent
13 findings of compliance with the ASC 90-1 overlay approval criteria set out in
14 LDO 7.1.1(C)(5) and (6) or, alternatively, that the findings are not clear as to the
15 basis for the approval.³ Petition for Review 9-10. Petitioners also argue that the

² The petition for review filed on behalf of petitioners Benson and Pierce adopts the assignments of error asserted by petitioner Kohler and does not add additional assignments of error. We will refer to Kohler, Benson, and Pierce collectively as petitioners. Citations to the Petition for Review are to the petition for review filed on behalf of Kohler.

³ Petitioners argue:

“The County approved Intervenor’s application based on a finding that it is feasible for intervenor to comply with LDO 7.1.1(C)(6)(b). The County imposed a condition requiring Intervenor to submit documentation of ODFW approval of an alternate site plan prior to the issuance of building permits to ensure compliance with LDO 7.1.1(C)(6)(b). However, the County also imposed conditions that correspond to a finding of compliance with LDO 7.1.1(C)(5). The

1 hearings officer misconstrued LDO 7.1.1(C)(6). We deny this assignment of
2 error.

3 Adequate findings identify the relevant approval criteria and the evidence
4 relied upon and explain how the evidence leads to the conclusion that the
5 approval criteria are or are not met. *Heiller v. Josephine County*, 23 Or LUBA
6 551, 556 (1992). We agree with intervenor and conclude that the findings are not
7 inconsistent or unintelligible.

8 LDO 7.1.1(C)(4) provides, in part:

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

15 “a) Public or private road;

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

20 “c) *Other developed access way that existed as shown on the*
21 *County 2001 aerials or other competent evidence (e.g., a road*
22 *or driveway for a legal easement recorded prior to the aerial*
23 *date).*” (Emphasis added.)

24 LDO 7.1.1(C)(5) provides:

conditions imposed by the County are inconsistent with the
County’s finding of compliance with LDO 7.1.1(C)(6)(b).” Petition
for Review 11.

1 “General Development Standards

2 “The following standards apply to all discretionary land use permits
3 subject to review under this Section, unless a condition of approval
4 when the parcel was created required compliance with prior habitat
5 protection standards. The land use decision will include findings that
6 the proposed use will have minimal adverse impact on winter deer
7 and elk habitat based on:

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

10 “b) Consideration of the cumulative effects of the proposed
11 action and other development in the area on habitat carrying
12 capacity; and

13 “c) *Location of dwellings and other development within 300 feet*
14 *of an existing public or private road, or driveway that*
15 *provides access to an existing dwelling as shown on the*
16 *County 2001 aerials or other competent evidence. When it*
17 *can be demonstrated that habitat values and carrying*
18 *capacity are afforded equal or greater protection through a*
19 *different development pattern an alternative location may be*
20 *allowed through the discretionary review process described*
21 *in subsection (6), below;*

22 “d) Dwellings other than the initial dwelling on a lot or parcel will
23 comply with one (1) of the following, as applicable:

24 “i) A maximum overall density (within the tract) of one (1)
25 dwelling unit per 160 acres in Especially Sensitive
26 Winter Range units, or one (1) dwelling unit per 40
27 acres in Sensitive Winter Range units; or

28 “ii) Clustering of new structures within a 200-foot radius
29 of the existing dwelling to achieve the same
30 development effect as would be achieved under i),
31 above.” (First emphasis in original; second emphasis
32 added.)

1 We have discussed the interplay of LDO 7.1.1(C)(4), (5), and (6) in the context
2 of forest template dwelling approvals in a number of recent cases. *Kohler v.*
3 *Jackson County*, ___ Or LUBA ___ (LUBA No 2020-091, Jan 14, 2021) (*Kohler*
4 *I*); *Joe Ben, LLC v. Jackson County*, ___ Or LUBA ___ (LUBA No 2020-115,
5 Apr 12, 2021); *Kohler v. Jackson County*, ___ Or LUBA ___ (LUBA No 2021-
6 022, May 28, 2021) (*Kohler II*); *Kohler v. Jackson County*, ___ Or LUBA ___
7 (LUBA No 2021-024, May 28, 2021) (*Kohler III*); *Kohler v. Jackson County*,
8 ___ Or LUBA ___ (LUBA No 2021-025, June 1, 2021). LDO 7.1.1(C)(4) applies
9 to certain Type 1 development applications. *Kohler I*, ___ Or LUBA at ___ (slip
10 op at 4-11). LDO 7.1.1(C)(5) applies to certain Type 2 development applications,
11 including intervenor’s forest template dwelling application. *Id.* Both LDO
12 7.1.1(C)(4) and (5) restrict the location of a dwelling to within 300 feet of an
13 existing access. As we explained in *Kohler II*, however, an easement is not a
14 qualifying access for purposes of LDO 7.1.1(C)(5):

15 “LDO 7.1.1(C)(4) provides that the first dwelling on a lawfully
16 created lot or parcel must be located within 300 feet of a public or
17 private road, a driveway, or an ‘other developed access way,’ such
18 as an easement. LDO 7.1.1(C)(5)(c) provides that dwellings and
19 other development reviewed through a Type 2 process must be
20 located within 300 feet of a public or private road or a driveway, but
21 it does not include the ‘other developed access way’ option found in
22 LDO 7.1.1(C)(4).” ___ Or LUBA at ___ (slip op at 5-6) (footnote
23 omitted; emphasis added).

24 LDO 7.1.1(C)(4)(c) provides as an example of an “other developed access
25 way” “a road or driveway for a legal easement recorded prior to the aerial date.”

1 The “existing access” on which intervenor relies for forest template dwelling
2 approval is *an easement* extending from Coleman Creek Road across several
3 parcels to the subject property. Record 2-3. As explained above, siting a dwelling
4 within 300 feet of an existing easement meets the standard in LDO 7.1.1(C)(4),
5 but intervenor’s application is subject to LDO 7.1.1(C)(5)(c) and an easement is
6 not a qualifying access for purposes of that standard. Accordingly, the hearings
7 officer determined that intervenor’s application does not comply with LDO
8 7.1.1(C)(5)(c) because the proposed dwelling will not be located within 300 feet
9 of *an existing public road, private road, or driveway* that provides access to an
10 existing dwelling. Record 18.

11 When the proposed dwelling will not be located within 300 feet of a
12 qualifying access, LDO 7.1.1(C)(5)(c) contains an option for an applicant to
13 proceed under LDO 7.1.1(C)(6). Accordingly, the hearings officer reviewed
14 intervenor’s application for compliance with LDO 7.1.1(C)(6). However,
15 petitioners argue that, in order

16 “[t]o ensure that the dwelling would be within 300 feet of a
17 qualifying road or driveway as required under LDO 7.1.1(C)(5)(c),
18 the County imposed the following condition:

19 “2) *Revised Site Plan: Prior to issuance of permits* a revised site
20 plan shall be submitted and approved by Planning. The site
21 shall comply with the following:

22 “F) The dwelling shall be located within 300’ of the
23 existing access shown on the 2001/2003 aerials.”
24 Petition for Review 12 (*italics and boldface in original*)
25 (*citing Record 25*).

1 Petitioners argue that the hearings officer's imposition of this condition of
2 approval to ensure compliance with LDO 7.1.1(C)(5)(c) is inconsistent with their
3 review of the application for compliance with LDO 7.1.1(C)(6).

4 First, a condition of approval requiring the dwelling to be located with 300
5 feet of the existing easement does not demonstrate compliance with LDO
6 7.1.1(C)(5)(c). The 300-foot distance referenced in Condition 2 is measured from
7 an easement and not "an existing public or private road, or driveway," as required
8 to comply with LDO 7.1.1(C)(5)(c). Second, LDO 7.1.1(C)(5)(c) requires that
9 both dwellings and other development be located with 300 feet of "*an existing*
10 *public or private road, or driveway that provides access to an existing dwelling*
11 *as shown on the County 2001 aerials or other competent evidence.*" (Emphasis
12 added.) A different condition of approval that the hearings officer imposed,
13 Condition 1, provides that "[t]he proposed residential development, including the
14 dwelling, accessory structures and propane tank shall be located within the 200'
15 x 300' building envelope shown on the approved site plan." Record 25. Condition
16 2 addresses the dwelling only and does not restrict the location of "other
17 development," namely the propane tank and accessory structures, to within 300
18 feet of a qualifying access. The decision is clear that the basis of the approval is
19 compliance with LDO 7.1.1(C)(6), rather than LDO 7.1.1(C)(5)(c). Condition 2
20 does not establish that LDO 7.1.1(C)(5)(c) is met or create confusion.

21 Petitioners also argue that the hearings officer "misconstrued applicable
22 law by conditionally approving Intervenor's application under LDO

1 7.1.1(C)(6)(b) while also imposing conditions to ensure compliance with LDO
2 7.1.1(C)(5).” Petition for Review 14-15. We will reverse or remand a local
3 government decision that improperly construes the applicable law. ORS
4 197.835(9)(a)(D). The hearings officer did not, however, misconstrue LDO
5 7.1.1(C)(6)(b). Consistent with our holding in *Kohler I*, the hearings officer
6 concluded that intervenor’s Type 2 forest template dwelling application was
7 subject to LDO 7.1.1(C)(5)(c). Because intervenor’s application did not comply
8 with LDO 7.1.1(C)(5)(c), the hearings officer evaluated whether the application
9 could be approved under the alternate path provided in LDO 7.1.1(C)(6) and
10 ultimately conditioned their approval on intervenor obtaining ODFW approval of
11 the county-approved building envelope location. Record 20, 28. As we explained
12 above, the hearings officer did not impose conditions of approval to ensure
13 compliance with LDO 7.1.1(C)(5)(c) and, therefore, did not “misconstrue[]
14 applicable law by conditionally approving Intervenor’s application under
15 LDO(C)(6)(b) while also imposing conditions to ensure compliance with LDO
16 7.1.1(C)(5).” Petition for Review 14-15.

17 The first assignment of error is denied.

18 **THIRD ASSIGNMENT OF ERROR**

19 LDO 7.1.1(C)(6) provides:

20 “*ODFW Approved Alternate Siting Plan*

21 “Initial dwellings and other development may be sited in locations
22 that do not conform with subsections (4) and (5) above when the
23 applicant demonstrates at least one (1) of the following:

1 “a) The wildlife habitat protection measures required by Section
2 7.1.1(C)(4) will render the parcel unbuildable; or

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

14 The hearings officer found that

15 “subsection 6(b) can be met with a condition of approval requiring
16 submission of ODFW approval of an alternative siting plan prior to
17 the issuance of a building permit. That is a clear and objective
18 standard for which only documentation is necessary. Thus, such a
19 condition does not require the county to provide additional public
20 review. Given that the language between subsections (4) and (5) are
21 similar and were approved by ODFW, the Hearings Officer finds
22 that it is feasible for the applicant to obtain such an ODFW
23 approval.” Record 20.

24 Petitioners argue that (1) the hearings officer committed error because they
25 “did not impose the conditions necessary to ensure compliance with the ‘feasible’
26 criteria in LDO 7.1.1(C)(6)(b)” and (2) “the County must condition approval
27 upon the *implementation* of the criteria and requirements detailed in the ODFW
28 approved alternate siting plan.” Petition for Review 23, 25 (emphasis in original).
29 We will reverse or remand a decision that is not in compliance with applicable

1 land use regulations. ORS 197.835(8). We deny these elements of the third
2 assignment of error.

3 Petitioners argue that the hearings officer could not impose adequate
4 conditions of approval based upon the record. Petition for Review 27. To the
5 extent that petitioners argue that the county must condition its approval upon the
6 implementation of the criteria and requirements detailed in an ODFW-approved
7 alternative site plan, petitioners do not develop that argument sufficiently for our
8 review and we will not develop it for them. *Deschutes Development v. Deschutes*
9 *Cty.*, 5 Or LUBA 218, 220 (1982). Further, petitioners do not challenge the
10 hearings officer's finding that LDO 7.1.1(C)(4) and (5) support the conclusion
11 that it is feasible for intervenor to obtain ODFW approval of development within
12 300 feet of another developed access way on the subject property or explain why
13 the finding is incorrect. The hearings officer concluded that, because ODFW
14 approved LDO 7.1.1(C)(4) and (5), which allow development within 300 feet of
15 other developed access ways in some situations, it is feasible that ODFW would
16 approve development within 300 feet of another developed access way in this
17 case. Record 20. A party provides no basis for reversal or remand where the party
18 makes no attempt to explain why the local government's findings are inadequate
19 or not supported by substantial evidence in the record. *Marine Street LLC v. City*
20 *of Astoria*, 37 Or LUBA 587, 610 (2000).

21 As noted, petitioners also argue that the county was required to condition
22 its approval on the *implementation* of an ODFW-approved alternative site plan.

1 We rejected similar arguments in *Kohler II* and *Kohler III*. *Kohler II*, ____ Or
2 LUBA at ____ (slip op at 12) (“To the extent that petitioner argues that the county
3 erred because intervenor may not comply with any conditions that ODFW places
4 on its approval of an alternative site plan, the county is not required to consider
5 what conditions ODFW might place on its approval.”); *Kohler III*, ____ Or LUBA
6 at ____ (slip op at 12) (same). That reasoning applies equally here.

7 The county may approve a forest template dwelling on the condition that
8 ODFW approve an alternative site plan under LDO 7.1.1(C)(6)(b)—that is, a site
9 plan locating the dwelling and other development more than 300 feet from a
10 qualifying access. If ODFW does not approve the site plan approved by the
11 hearings officer in this decision as an alternative site plan, then the forest template
12 dwelling cannot be built as approved by the hearings officer. In that instance,
13 intervenor would likely have to work with ODFW to determine whether a
14 different site plan will afford equal or greater protection for identified habitat
15 values and carrying capacity and, if it differs from the site plan approved by the
16 hearings officer, apply to the county for a new land use approval. In other words,
17 in waiting until after obtaining county approval to obtain an ODFW-approved
18 alternative site plan, an applicant bears the risk that ODFW may not approve the
19 site plan approved by the county as an alternative site plan. However, the county
20 is not responsible for ensuring through conditions of approval that the applicant
21 will comply with any requirements in an ODFW-approved alternative site plan.

1 Accordingly, petitioners' argument that the county erred by failing to impose
2 such a condition provides no basis for remand.

3 The third assignment of error is denied.

4 **SECOND ASSIGNMENT OF ERROR**

5 The subject property is capable of producing at least 85 cubic feet per acre
6 per year of wood fiber. Record 9. ORS 215.750(2) provides, in part:

7 "In western Oregon, a governing body of a county or its designate
8 may allow the establishment of a single-family dwelling on a lot or
9 parcel located within a forest zone if the lot or parcel is
10 predominantly composed of soils that are:

11 "* * * * *

12 "(c) Capable of producing more than 85 cubic feet per acre per
13 year of wood fiber if:

14 "(A) All or part of at least 11 other lots or parcels that existed
15 on January 1, 1993, are within a *160-acre square*
16 *centered on the center of the subject tract*; and

17 "(B) At least three dwellings existed on January 1, 1993, on
18 the other lots or parcels." (Emphasis added.)

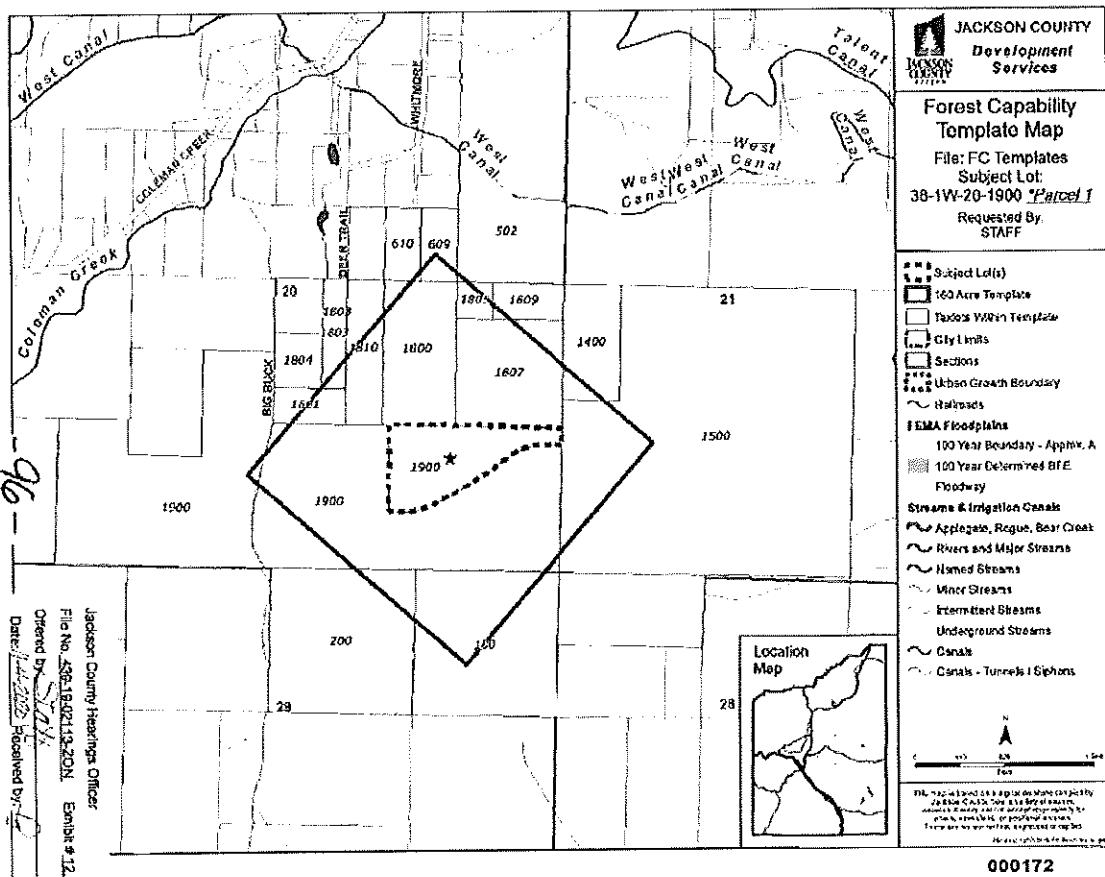
19 This statute is implemented locally at LDO 4.3.6(B)(2)(b). The 160-acre square
20 is the "template" for purposes of siting the dwelling in a forest zone. Petitioners'
21 second assignment of error is that

22 "[t]he County failed to address Petitioner's argument challenging
23 the method of determining the center point of the subject property
24 for purposes of drawing the 160-acre template square that
25 determines whether the tract qualifies for a forest template dwelling
26 under ORS 215.750 and LDO 4.3.6(B). The County failed to
27 adequately explain why the forest template map the County relied

upon is appropriate.” Petition for Review 15.

As explained above, adequate findings identify the relevant criteria, identify the evidence relied upon, and explain why the evidence leads to the decision maker’s conclusion. We will reverse or remand a decision that is “not supported by substantial evidence in the whole record.” ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely upon to make a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988).

The map depicting the template shown below was offered by staff and accepted into the record by the hearings officer.



1 Record 172. The hearings officer found:

2 “[Petitioner Kohler] raised two issues concerning the use of this
3 template. One was a question by [petitioner Kohler] as to whether
4 the template was actually centered on the property. The template,
5 however, was created by a CADD program * * * and the star at the
6 center of the lot * * * appears to be equidistant from all sides of the
7 square. [Petitioner Kohler] provided no evidence to the contrary.
8 Therefore the Hearings Officer finds that the template is centered on
9 the property.” Record 9.

10 The hearings officer concluded that the star was at the “center of the lot.” We
11 understand the finding to state that the template, including the star, was created
12 through a computer-aided design and drafting (CADD) program and that the
13 template and the star were properly located. The finding identifies the relevant
14 criteria and explains why the evidence led the hearings officer to conclude that
15 the criteria are met. We agree with intervenor that the template in the record is
16 evidence a reasonable person would rely upon to reach a decision and, therefore,
17 substantial evidence that the template is centered on the property as required by
18 ordinance and statute.

19 Petitioners argue that the county’s findings are inadequate based on *Eng v.*
20 *Wallowa County*, 79 Or LUBA 421 (2019). In *Eng*, the petitioners argued that
21 the property’s odd shape had to be considered in determining the location of its
22 center for purposes of applying the template test and that the county erred in its
23 application of the template test. *Eng*, 79 Or LUBA at 442. The county applied the
24 template based upon the applicant’s “Exhibit D” because “that template
25 appear[ed] most logical in review and application,” but the county did not explain

1 why that exhibit depicted the most appropriate center of the property. *Id.* at 442-
2 43. We remanded for the county to “adopt findings explaining the basis for its
3 template selection and addressing petitioners’ argument challenging the center
4 point method if it is selected.” *Id.* at 443.

5 Here, petitioners did not propose a different method of determining the
6 center of the property below or explain why they believed the center identified
7 by staff was incorrect. The hearings officer responded to the question raised by
8 petitioners and explained that the center of the subject property and the center of
9 the template were determined using a computer program. Under the
10 circumstances of this case, the hearings officer was not required to do more.

11 Petitioners also argue that ORS 215.750(1) dictates the manner for
12 determining the center of the template:

13 “ORS 215.750(1) now provides a methodology for establishing the
14 center point of a subject property. ORS 215.750(1) (“center of the
15 subject tract” means the mathematical centroid of the tract’). The
16 County failed to make any findings to indicate that the County * * *
17 employed [the] methodology prescribed in ORS 215.750(1) to
18 establish the center of the subject parcel.” Petition for Review 18.

19 Petitioners do not develop their argument that the hearings officer erred by not
20 making findings that the decision relied upon the method set out in ORS
21 215.750(1). Accordingly, that argument provides no basis for reversal or remand.

22 The second assignment of error is denied.

23 The county’s decision is affirmed.