

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

3  
4 OREGON COAST ALLIANCE, ARCH CAPE  
5 FALCON COVE BEACH COMMUNITY CLUB,  
6 and STUART SANDLER,  
7 *Petitioners,*

8  
9 vs.

10  
11 CLATSOP COUNTY,  
12 *Respondent,*

13  
14 and

15  
16 CY SMITH and WILLIAM ANDERSON,  
17 *Intervenors-Respondents.*

18  
19 LUBA No. 2021-085

20  
21 FINAL OPINION  
22 AND ORDER

23  
24 Appeal from Clatsop County.

25  
26 Sean T. Malone filed the petition for review and reply brief and argued on  
27 behalf of petitioner.

28  
29 No appearance by Clatsop County.

30  
31 Garrett H. Stephenson filed the response brief. Also on the brief was Sara  
32 Kobak. Garrett H. Stephenson and Joseph Gaon argued on behalf of intervenors-  
33 respondents.

34  
35 RYAN, Board Member; RUDD, Board Member, participated in the  
36 decision.

37  
38 ZAMUDIO, Board Chair; did not participate in the decision.

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2  
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5

REMANDED

04/18/2022

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

**NATURE OF THE DECISION**

Petitioners appeal a county decision approving a conditional use permit to construct an access road within an unimproved public right-of-way.

**FACTS**

Intervenor-respondent Smith (Smith) owns three lots in a subdivision that was platted in 1926, in an area zoned Arch Cape Rural Community Residential (AC-RCR). Some of the subdivision's lots and roads, including Smith's lots, are unimproved. As platted, Smith's lots are accessed via Anvil Rock Road, a 40-foot-wide, currently unimproved, dedicated right-of-way that runs north-south and that intersects with an improved roadway, East Shingle Mill Lane, to the south.

Smith filed a conditional use permit application to improve 150 feet of Anvil Rock Road north of its connection with East Shingle Mill Lane in order to provide developed access to their three lots.<sup>1</sup> Amended Record (AR) 6. Intervenor-respondent Anderson (Anderson) owns 10 lots in the subdivision and testified in support of Smith's application.<sup>2</sup> In this opinion, we sometimes refer to Smith and Anderson together as intervenors.

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<sup>1</sup> Smith has not filed applications for development of their three lots.

<sup>2</sup> Anderson testified:

“Good morning, I would like to register to testify in support of the Smith Conditional Use Permit in Tuesday's appeals hearing. This

1 Smith included with their application a wetland delineation for their three  
2 lots and a portion of Anvil Rock Road. The delineation, approved by the Oregon  
3 Department of State Lands, shows that most of Smith's lots and a significant  
4 portion of Anvil Rock Road adjoining their lots consists of wetlands. Smith's  
5 delineation indicates that the identified wetlands continue beyond the study area  
6 to the north, east, and west. North of the subject property is a very large,  
7 inventoried wetland identified as ARC-13 in the Arch Cape Local Wetlands  
8 Inventory. AR 76.

9 The county planning director approved the application subject to a  
10 condition recommended by the county public works department that  
11 improvements to Anvil Rock Road extend an additional 40 feet to the north, to  
12 include a turnaround, for a total of 190 feet of improved roadway.

13 Petitioners appealed the director's approval to the hearings officer, who  
14 conducted a hearing on June 22, 2021. The hearings officer issued a decision on  
15 August 3, 2021, denying the appeals and approving the application based on  
16 adoption of the director's decision and additional findings addressing issues  
17 raised at the hearing. Petitioners appealed the hearings officer's decision to the  
18 county board of commissioners. The commissioners declined review and adopted

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road is the only means of entry to the 10 lots that we own off Shingle Mill of which we plan to build a small eco-friendly family cabin on 1-2 of the lots while preserving the rest of our property and leaving it untouched. Our permit documents are complete just wanting on approval of the road to be able to formally submit." AR 467.

1 the hearing officer's decision as their own, including any interpretations of the  
2 county code.

3 This appeal followed.

4 **FIRST ASSIGNMENT OF ERROR**

5 Clatsop County Land and Water Development and Use Code (LAWDUC)  
6 2.4030(3)(C) is part of a conditional use permit standard and requires a finding  
7 that

8 "[t]he site under consideration is suitable for the proposed use  
9 considering:

10 "\* \* \* \* \*

11 "(4) The natural and physical features of the site such as  
12 topography, natural hazards, natural resource values, and  
13 other features."

14 As noted, the board of commissioners adopted the hearings officer's decision as  
15 its own. In approving the conditional use permit, the hearings officer adopted  
16 some new findings and incorporated by reference some findings set out in the  
17 staff report. In their first assignment of error, petitioners argue that the hearings  
18 officer erred in failing to adopt any of their own findings addressing LAWDUC  
19 2.4030(3)(C)(4) despite testimony and issues raised below regarding the  
20 suitability of the site given the existence of wetlands, seasonal flooding, and  
21 potential impacts on an elk herd that is sometimes present on the subject property.

22 Adequate findings are required to support quasi-judicial land use  
23 decisions. *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 20-21,

1 569 P2d 1063 (1977). Generally, findings must (1) identify the relevant approval  
2 standards, (2) set out the facts which are believed and relied upon, and (3) explain  
3 how those facts lead to the decision on compliance with the approval standards.  
4 *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). In their decision, the  
5 hearings officer explained that they adopted specific findings addressing only  
6 criteria and issues raised during the hearing process and, for all other criteria,  
7 relied upon incorporation of staff findings attached to the planning director's  
8 decision. AR 8. The hearings officer apparently did not understand petitioners to  
9 raise any issue under the "suitability" standard at LAWDUC 2.4030(3)(C)(4)  
10 and, accordingly, relied entirely upon the incorporated staff findings to address  
11 that standard. However, petitioners argue that the incorporated staff findings are  
12 inadequate because they fail to address issues raised regarding the suitability of  
13 the site given the presence of wetlands, seasonal flooding, and potential impacts  
14 on the elk herd.

15 **A. Waiver**

16 Initially, intervenors argue that no party raised prior to the close of the  
17 initial evidentiary hearing any issues under LAWDUC 2.4030(3)(C)(4) regarding  
18 the suitability of the right-of-way for the proposed road improvement with  
19 respect to wetlands or any other natural feature. Intervenors therefore argue that

1 all of the issues raised under the first assignment of error are waived pursuant to  
2 ORS 197.797(1).<sup>3</sup>

3 In the petition for review, petitioners cite a number of instances in the  
4 record where opponents raised issues regarding wetlands, seasonal flooding, and  
5 impacts on the elk herd. Petition for Review 3-8, 9-12.<sup>4</sup> One opponent, Kerr, cited  
6 the suitability standard at LAWDUC 2.4030(3)(C)(4) and discussed impacts of  
7 development on the delineated wetlands. AR 402-04, 411-13 (quoting the  
8 suitability standard and referring to the presence of wetlands).<sup>5</sup>

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<sup>3</sup> In 2021, the *former* ORS 197.763(1) (2019) “raise-it-or-waive-it” requirement was renumbered as ORS 197.797(1). The operative wording is unchanged:

“An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

<sup>4</sup> Some of the citations to the Amended Record are citations to an abbreviated transcript of the June 22, 2021 hearing.

<sup>5</sup> In support of their obligation to demonstrate that the issues raised in the first assignment of error were preserved, petitioners also cite portions of the “Hearings Official Audio Recording.” Petition for Review 9-10. However, neither the Record nor the Amended Record include an “audio recording;” rather, the tables of contents for both records include a hyperlink to a “Video Exhibit” labeled “6/22/21 Video of Public Hearing (Hearings Officer Tommy Brooks).” AR Table of Contents 9. Identifying where a document or media recording may be accessed online is insufficient to include that material in the record before LUBA. *Terra*

1           Intervenors argue that Kerr’s comments appeared to focus on potential  
2 future residential development of intervenors’ lots, not the right-of-way  
3 improvements proposed in this application. Petitioners reply that Kerr’s  
4 comments were made in response to the present application to develop a road,  
5 and the hearings officer reasonably understood that the “development” opponents  
6 objected to included the proposed road improvements impacting wetland areas in  
7 the right-of-way, as the staff report itself noted. AR 25 (staff report noting that  
8 the proposed road improvements “may impact a portion of an identified wetland  
9 within the right-of-way”).

10           Although it is a close call, we agree with petitioners that Kerr’s testimony  
11 raised the issue that, due to the presence of wetlands, the existing right-of-way is  
12 not suitable for the proposed road construction, contrary to LAWDUC  
13 2.4030(3)(C)(4). Kerr was clearly *also* concerned with future development of  
14 wetland areas on the adjoining lots, which was not proposed in this application,  
15 but that was not Kerr’s *exclusive* concern.

16           Petitioner Sandler and others also raised concerns about wetlands,  
17 flooding, and impacts to elk during the hearing, although they did not specifically  
18 cite LAWDUC 2.4030(3)(C)(4) in their testimony. AR 463-64. Intervenors argue  
19 that, because those opponents failed to cite the suitability standard, or even use

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*Hydr Inc. v. City of Tualatin*, 68 Or LUBA 511, 513 (2013). Accordingly, the hyperlinks in the table of contents are inadequate to include the media recordings in the record before LUBA.



1 its operative terms, their general testimony was insufficient to give the hearings  
2 officer and the parties “fair notice” that the opponents intended to connect issues  
3 of wetlands, flooding, or wildlife to the suitability standard at LAWDUC  
4 2.4030(3)(C)(4). *Boldt v. Clackamas County*, 107 Or App 619, 623, 814 P2d  
5 1078 (1991) (ORS 197.797(1) requires “fair notice” of the issues raised but not  
6 “preservation” of such issues as recognized in judicial contexts).

7 We understand petitioners to allege that the seasonal flooding issue  
8 identified below is related to the wetlands in the area, including in the right-of-  
9 way. Although it is a close question, we agree with petitioners that the seasonal  
10 flooding issue was raised below with the specificity required by ORS 197.797(1),  
11 notwithstanding the failure to cite or connect the issue to LAWDUC  
12 2.4030(3)(C)(4). The gist of petitioner Sandler’s testimony was that the proposed  
13 development would impact wetlands and, due to existing seasonal flooding  
14 associated with the presence of those wetlands, the right-of-way was not a  
15 suitable site for the proposed development, although Sandler did not use the word  
16 “suitable” or cite LAWDUC 2.4030(3)(C)(4). AR 463-64. Given the fairly raised  
17 issues regarding wetlands in the additional 40 feet for the turnaround, we  
18 conclude that testimony regarding flooding associated with the wetlands also  
19 presented an issue under the suitability standard that warranted responsive  
20 findings.

21 However, with respect to testimony that the local elk herd sometimes beds  
22 down in forested areas including the right-of-way, we agree with intervenors that

1 that testimony was not phrased in any manner that would suggest a concern that  
2 the right-of-way is not “suitable” for the proposed road construction. The county  
3 and other parties apparently understood testimony related to the elk herd to  
4 concern a different approval standard requiring minimization of the loss of  
5 important wildlife habitat such as sensitive deer and elk range. As we discuss  
6 below, the county adopted unchallenged findings that the subject area is not  
7 designated as big game habitat or wildlife habitat of any kind. If petitioners  
8 wished to preserve the argument that the suitability standard at LAWDUC  
9 2.4030(3)(C)(4) should be interpreted to protect undesignated wildlife habitat, it  
10 was incumbent on petitioners to make that argument with greater clarity and  
11 specificity before the close of the evidentiary hearing. We conclude that the issue  
12 of compliance with LAWDUC 2.4030(3)(C)(4) arising from impacts to the local  
13 elk herd was not raised below with the specificity required by ORS 197.797(1)  
14 and is waived.

15 **B. Staff Findings**

16 As noted, the hearings officer adopted no additional findings addressing  
17 LAWDUC 2.4030(3)(C)(4) and, instead, simply incorporated staff report  
18 findings that were, in turn, adopted as part of the planning director’s decision.

19 The staff findings state, in relevant part:

20 “The proposed access is outside of lands mapped for geologic  
21 hazards and is outside the area mapped as either Major or Peripheral  
22 Big Game Habitat. *The 150-foot-long extension proposed by*  
23 *[Smith], with the additional 40-foot-long extension required by*  
24 *Public Works (to be discussed in further detail elsewhere in this*

1 *report), may impact a portion of an identified wetland within the*  
2 *right-of-way.* [Smith has] provided a wetland delineation approved  
3 by the Oregon Department of State Lands. Any impacts to this  
4 wetland area would be subject to the requirements of the state  
5 Removal-Fill Law. Cumulative fill or removal of 50 cubic yards or  
6 greater would require a state permit.

7 “Per bare earth lidar hillshade information from the Department of  
8 Geology and Mineral [Industries] (DOGAMI) the subject right-of-  
9 way is relatively level, varying in elevation from approximately 23  
10 to 25 feet. The area is heavily wooded.

11 “\* \* \* \* \*

12 “In 2020, Public Works issued [five] permits for work within the  
13 surrounding rights-of-way.

14 “\* \* \* \* \*

15 “These permits, which were issued for work in the same area as the  
16 subject property and with similar or steeper topography verify that  
17 the natural and physical features of the subject right-of-way are  
18 suitable to support the proposed road. \* \* \*

19 “**With conditions of approval staff finds the site is suitable for**  
20 **the development when considering Section 2.40[3]0(3)(C)(4)**  
21 **(Conditions #5 and #8).”** AR 25-26 (boldface in original; emphasis  
22 added).

23 Condition 5, noted in the findings, requires Smith to “adhere to all requirements  
24 of Permit #21-02,” which is apparently a permit that the county issued to Smith  
25 for work on a portion of Anvil Rock Road prior to filing the present application.  
26 One of the requirements of Permit #21-02 is to “[s]tay out of delineated  
27 wetlands.” AR 292. The staff report notes that, in filing the present application,  
28 Smith took the position that improving 150 feet of Anvil Rock Road, as proposed,  
29 would not encroach on the delineated wetland. However, the staff findings also

1 note that, with the additional 40-foot extension required by the public works  
2 department for a turnaround, the road improvements “may impact a portion of an  
3 identified wetland within the right-of-way.” AR 25.

4 Petitioners argue that the incorporated staff findings are inadequate to  
5 address compliance with the suitability standard at LAWDUC 2.4030(3)(C)(4)  
6 for two reasons. First, the staff findings rely on adherence to the requirements of  
7 Permit #21-02 to satisfy LAWDUC 2.4030(3)(C)(4) but fail to recognize the  
8 apparent conflict between the Permit #21-02 requirement to “[s]tay out of  
9 delineated wetlands” and the staff acknowledgment that, with the 40-foot  
10 extension, the road improvements may well encroach on delineated wetlands in  
11 the right-of-way.

12 Intervenors respond that the incorporated staff findings dealt appropriately  
13 with the possibility that the road and turnaround will encroach on delineated  
14 wetlands by requiring, in a different condition, Condition 9, that intervenors  
15 comply with all state permit requirements, which include state wetland removal-  
16 fill permits that must be obtained if construction requires at least 50 cubic yards  
17 of removal or fill within a jurisdictional wetland. Intervenors argue that the  
18 requirement to obtain state removal-fill permits is sufficient, without more, to  
19 demonstrate compliance with the suitability standard at LAWDUC  
20 2.4030(3)(C)(4).

21 We agree with petitioners that more adequate findings are necessary to  
22 explain the apparent contradiction between (1) requiring that the road and

1 turnaround “[s]tay out of delineated wetlands” while (2) acknowledging that at  
2 least the turnaround may encroach on delineated wetlands. The possibility of  
3 obtaining state wetland permits does nothing to resolve that apparent  
4 contradiction. Staff apparently concluded that adherence to Permit #21-02’s  
5 requirements, including to avoid *any* encroachment into delineated wetlands, was  
6 necessary to find that the site is suitable for the proposed use. Without some  
7 explanation, that conclusion cannot be readily squared with allowing road  
8 construction in delineated wetlands as long as the construction involves less than  
9 50 cubic yards of fill or removal or, if at least 50 cubic yards are involved, state  
10 wetland permits are obtained.

11         The staff findings implicitly acknowledge that the wetlands in the right-of-  
12 way are one of “[t]he natural and physical features of the site such as topography,  
13 natural hazards, natural resource values, and other features” that must be  
14 considered in determining whether the site is “suitable” for the proposed use.  
15 Presumably, the continued existence of those wetlands might render a portion of  
16 the site not “suitable” for proposed development for purposes of LAWDUC  
17 2.4030(3)(C)(4). Condition 9 and associated findings suggest staff believed that  
18 allowing Smith to fill or eliminate a portion of the wetlands in the right-of-way,  
19 while obtaining state permits if required, is a permissible means to render a site  
20 otherwise encumbered by wetlands “suitable.” That may well be a sustainable  
21 application of LAWDUC 2.4030(3)(C)(4), but we agree with petitioners that  
22 more adequate explanatory findings, and perhaps an express interpretation of

1 LAWDUC 2.4030(3)(C)(4), is needed to establish compliance with the suitability  
2 standard.

3 Petitioners also argue that the findings fail to address the suitability of the  
4 site with respect to the issue of seasonal flooding that was raised before the  
5 hearings officer. Petitioners cite testimony that seasonal flooding involving the  
6 delineated wetland “frequently” occurs and that filling parts of the wetland may  
7 exacerbate flooding events. AR 602.

8 Intervenors respond that there is no evidence in the record that the subject  
9 right-of-way is located within a designated floodplain. Apart from the testimony  
10 petitioners cite, intervenors argue that there is no evidence in the record of any  
11 flooding associated with the delineated wetland on the subject property or any  
12 basis for concern that filling a portion of the wetland might exacerbate or cause  
13 flooding. Intervenors also suggest that any concerns about flooding are reduced  
14 by Condition 7, which requires Smith to submit a grading, draining, and erosion  
15 control plan for review by the public works department prior to commencing road  
16 construction.

17 Intervenors do not dispute that, if seasonal flooding occurs on the site, that  
18 would constitute one kind of “natural hazard” or “other feature” that might have  
19 a bearing on whether the site is “suitable” for the proposed use for purposes of  
20 LAWDUC 2.4030(3)(C)(4). There is *some* testimony in the record that flooding  
21 occurs on the site and that flooding might get worse if a portion of the wetland is  
22 filled for road construction. AR 602. Intervenors cite no countervailing evidence.

1 Whether the property is located in a floodplain may be dispositive or it may not,  
2 but it is unclear whether floodplain designations necessarily reflect seasonal  
3 water level fluctuations associated with a wetland. Neither the hearings officer's  
4 decision nor the staff report includes any findings addressing flooding. The  
5 drainage plan required by Condition 7 would likely go a long way toward  
6 ensuring that road construction would not exacerbate and could mitigate any  
7 existing flooding, but Condition 7 cannot substitute for findings addressing that  
8 issue or findings establishing the suitability of the site if, in fact, seasonal  
9 flooding is a problem. Accordingly, we agree with petitioners that remand is  
10 necessary for the hearings officer to adopt findings on this issue, supported by  
11 substantial evidence.

12 Finally, petitioners cite testimony that elk occasionally bed down in  
13 forested areas within the right-of-way and argue that the right-of-way therefore  
14 includes "wildlife habitat," which petitioners assert is a type of "natural feature"  
15 that must be considered in determining whether the site is suitable for the  
16 proposed use.

17 The above-quoted staff findings note that the property is not designated as  
18 big game habitat, but they do not address, under LAWDUC 2.4030(3)(C)(4),  
19 whether the forested areas on the property might nonetheless represent a "natural  
20 feature" that could affect the site's suitability for road access. However, as  
21 explained above, the absence of findings on this point is likely because no party  
22 raised a cognizable issue during the proceedings below under LAWDUC

1 2.4030(3)(C)(4) with respect to wildlife habitat. Accordingly, that issue is waived  
2 and beyond our scope of review. ORS 197.797(1).

3 The first assignment of error is sustained, in part.

#### 4 **SECOND ASSIGNMENT OF ERROR**

5 “Road Development or Extension, Public or Private,” is listed as a category  
6 of use conditionally allowed in the AC-RCR zone. *Former* LAWDUC art 4, Tbl  
7 1 (Dec 9, 2020) (Table 1).<sup>6</sup> Petitioners argued below that the proposed road  
8 construction cannot be evaluated and approved in isolation from the development  
9 that the road will serve, such as future residential development of intervenors’  
10 lots. The hearings officer rejected those arguments, interpreting Table 1, in  
11 context with other code provisions, to allow an application for a road  
12 improvement to be approved as a separate land use without a concurrent  
13 application for development to be served by the road.<sup>7</sup>

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<sup>6</sup> LAWDUC article 4 was significantly recodified in October 2021. Although Table 1 was repealed, LAWDUC 4.0630(12) still allows as a conditional use in the AC-RCR zone “[a]ny new public or private road development or road extension.”

<sup>7</sup> The hearings officer’s findings state:

“The Site is located within the [AC-RCR] Zone. The AC-RCR Zone is unique in that it authorizes private and public road extensions as an independent use in addition to other permitted or conditional uses. Specifically, Section 4.0620 of the [LAWDUC] refers to Table 1 and the permitted and conditional uses allowed in the AC-RCR Zone. Item 98 of Table 1, in turn, identifies ‘Road Development or Extension, Public or Private’ as a conditional use in this zone, and



1           In their second assignment of error, petitioners argue that the hearings  
2 officer's interpretation of Table 1 improperly construes that provision because it  
3 is inconsistent with two LAWDUC purpose statements. ORS 197.835(9)(a)(D).  
4 The first is LAWDUC 3.9810(1), which identifies the purpose of the county's  
5 road and access policies and provides that the county's road standards "are  
6 intended to provide access to new development in a manner which reduces  
7 construction cost, makes efficient use of land, allows emergency vehicle access  
8 while discouraging inappropriate traffic volumes and speeds, and which  
9 accommodates convenient pedestrian and bicycle circulation." Petitioners argued  
10 below that LAWDUC 3.9810(1) supports their preferred interpretation of Table  
11 1 to the effect that a proposed road improvement cannot be evaluated in isolation  
12 from the development to be served by the road. The hearings officer rejected that  
13 argument, noting that LAWDUC 3.9810(1) is simply a purpose statement, not an  
14 approval criterion. To the extent that LAWDUC 3.9810(1) has some bearing on  
15 the proper interpretation of Table 1, the hearings officer noted that the purpose  
16 statement does not require concurrency or any kind of temporal connection  
17 between road construction and the uses to be served by the road.

18           The second purpose statement is LAWDUC 4.0610, which provides that  
19 one purpose of the AC-RCR zone is to allow low-density housing that will not

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no other 'Applicable Standards' or 'Additional Requirements' are listed for that use." AR 8.

1 “adversely impact adjacent resource lands.”<sup>8</sup> Petitioners argue that the wetlands  
2 and habitat in the right-of-way are “adjacent resource lands” referenced in the  
3 purpose statement at LAWDUC 4.0610 and, therefore, the purpose statement is  
4 a relevant consideration in interpreting Table 1.<sup>9</sup>

5 Initially, petitioners argue that the hearings officer erred in dismissing the  
6 purpose statements at LAWDUC 3.9810(1) and LAWDUC 4.0610 simply  
7 because they are purpose statements and not approval criteria. Petitioners argue

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<sup>8</sup> LAWDUC 4.0610 provides:

“The [AC-RCR] zone is intended to accommodate the immediate and foreseeable demand for low density housing in Clatsop County’s rural communities. This zone has been developed with the purpose to: (1) Allow residential development that is compatible with rural communities that wish to maintain a primarily single family rural residential character, (2) do not adversely impact adjacent resource lands, (3) allow for minimum lot sizes and densities, that will provide for an ultimate build out that is more commensurate with actual physical, and (4) environmental constraints, and the availability of community water and sewer facilities, and may provide for non-residential uses that are small in scale, intended for the needs of the local community or for people traveling through the rural community, and are compatible with surrounding uses.”

<sup>9</sup> Petitioners do not explain their assertion that the phrase “adjacent resource lands” in LAWDUC 4.0610 refers to areas with natural resources within the AC-RCR zone. That assertion is dubious, at best. “Adjacent resource lands” almost certainly refers to resource lands, *i.e.*, lands designated and zoned for farm and forest uses, that are adjacent to rural residential lands zoned AC-RCR, not lands within the AC-RCR zone itself.

1 that the county cannot adopt an interpretation of Table 1 that is inconsistent with  
2 its purpose or underlying policy, citing ORS 197.829(1)(b) and (c).<sup>10</sup> According  
3 to petitioners, the hearings officer must interpret Table 1 in light of the relevant  
4 purpose statements at LAWDUC 3.9810(1) and LAWDUC 4.0610. Petitioners  
5 contend that, properly construed, the purpose statements at LAWDUC 3.9810(1)  
6 and LAWDUC 4.0610 support petitioners' preferred interpretation of Table 1 to  
7 prohibit consideration of a stand-alone application for a road improvement  
8 without a concurrent application for development to be served by the road  
9 improvement.

10 A hearings officer's code interpretation is generally not subject to a  
11 deferential standard of review on appeal. However, a governing body's  
12 interpretation of its land use legislation *is* generally subject to a deferential  
13 standard of review. *Siporen v. City of Medford*, 349 Or 247, 260-61, 243 P3d 776

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<sup>10</sup> ORS 197.829(1) provides, in relevant part:

“[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:

“(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

“(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation; [or]

“(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]”

1 (2010). As noted above, the board of commissioners expressly adopted the  
2 hearings officer's code interpretations as its own.

3 We disagree with petitioners that the hearings officer erred. The hearings  
4 officer noted, accurately, that the purpose statement at LAWDUC 3.9810(1) does  
5 not, itself, include any approval criteria. The hearings officer then explained why  
6 nothing in LAWDUC 3.9810(1) suggests that a road improvement authorized  
7 under Table 1 must be accompanied by an application for development to be  
8 served by the road. That interpretation is entirely consistent with the express  
9 language of Table 1 and not inconsistent with LAWDUC 3.9810(1), assuming  
10 the latter constitutes context or a relevant purpose statement for the former. We  
11 affirm the county's interpretation.

12 The hearings officer did not address the purpose statement at LAWDUC  
13 4.0610, and there is no express interpretation of that purpose statement in the  
14 findings. However, we agree with intervenors that petitioners have failed to  
15 demonstrate that anything in LAWDUC 4.0610 suggests that a road improvement  
16 authorized by Table 1 can be approved only if accompanied by a concurrent  
17 application for development. Petitioners have not established that the hearings  
18 officer's plain reading of Table 1 is "inconsistent" with any context or  
19 interpretive aid provided by the purpose statement at LAWDUC 4.0610.

20 The second assignment of error is denied.

1 **THIRD ASSIGNMENT OF ERROR**

2 Petitioners' third assignment of error is that the findings are inadequate  
3 because they are inconsistent. In addressing LAWDUC 2.4030(3)(C)(4), the staff  
4 report that the hearings officer incorporated into their decision includes a section  
5 labeled "**APPLICANT RESPONSE**" that recites Smith's position that the  
6 proposed 150-foot road extension will cause "no impact to wetlands or natural  
7 features." AR 25. The following section is labeled "**STAFF FINDINGS and**  
8 **CONCLUSION**," includes a staff discussion of the 40-foot turnaround required  
9 by the public works department, and finds that the 190-foot road improvement  
10 "may impact a portion of an identified wetland within the right-of-way." *Id.*

11 Petitioners argue that the "findings" in those two sections conflict, first  
12 indicating that there will be no impact on wetlands and then concluding there  
13 may be an impact. Petitioners contend that remand is required for the county to  
14 resolve the inconsistency in the findings.

15 Intervenors respond, and we agree, that the first section simply recites  
16 Smith's position with regard to the originally proposed, 150-foot-long road  
17 improvement and is not a staff finding or conclusion that the 150-foot-long road  
18 would not impact the wetland in the right-of-way. Staff's findings and  
19 conclusions are located in the second section, expressly labeled as such. The two  
20 sections do not include conflicting findings. With that understanding, petitioners'  
21 arguments under this assignment of error do not provide a basis for reversal or  
22 remand.

- 1 The third assignment of error is denied.
- 2 The county's decision is remanded.