

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

OREGON COAST ALLIANCE, ARCH CAPE  
FALCON COVE BEACH COMMUNITY CLUB,  
and STUART SANDLER,  
*Petitioners,*

vs.

CLATSOP COUNTY,  
*Respondent,*

and

CY SMITH and WILLIAM ANDERSON,  
*Intervenors-Respondents.*

LUBA No. 2022-076

FINAL OPINION  
AND ORDER

Appeal from Clatsop County.

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

No appearance by Clatsop County.

Garrett H. Stephenson filed the intervenors-respondents' brief and argued on behalf of intervenors-respondents. Also on the brief were Andrew J. Lee and Schwabe, Williamson & Wyatt, P.C.

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

RUDD, Board Member, did not participate in the decision.

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AFFIRMED

01/10/2023

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**

This is the second time that the county has approved the challenged conditional use permit. We remanded the county's original decision in *Oregon Coast Alliance v. Clatsop County*, \_\_\_ Or LUBA \_\_\_ (LUBA No 2021-085, Apr 18, 2022) (*Smith I*). We restate the facts from our decision in *Smith I*:

"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. Intervenor-respondent Anderson (Anderson) owns 10 lots in the subdivision and testified in support of Smith's application. In this opinion, we sometimes refer to Smith and Anderson together as intervenors.

"Smith included with their application a wetland delineation for their three lots and a portion of Anvil Rock Road. The delineation, approved by the Oregon Department of State Lands, shows that most of Smith's lots and a significant portion of Anvil Rock Road adjoining their lots consists of wetlands. Smith's delineation indicates that the identified wetlands continue beyond the study area

1 to the north, east, and west. North of the subject property is a very  
2 large, inventoried wetland identified as ARC-13 in the Arch Cape  
3 Local Wetlands Inventory.

4 “The county planning director approved the application subject to a  
5 condition recommended by the county public works department that  
6 improvements to Anvil Rock Road extend an additional 40 feet to  
7 the north, to include a turnaround, for a total of 190 feet of improved  
8 roadway.

9 “Petitioners appealed the director’s approval to the hearings officer,  
10 who conducted a hearing on June 22, 2021. The hearings officer  
11 issued a decision on August 3, 2021, denying the appeals and  
12 approving the application based on adoption of the director’s  
13 decision and additional findings addressing issues raised at the  
14 hearing. Petitioners appealed the hearings officer’s decision to the  
15 county board of commissioners. The commissioners declined  
16 review and adopted the hearing officer’s decision as their own,  
17 including any interpretations of the county code.” \_\_\_\_ Or LUBA at  
18 \_\_\_\_ (slip op at 3-5) (citations and footnotes omitted).

19 Clatsop County Land and Water Development and Use Code (LAWDUC)

20 2.4030 governs the authorization of conditional uses. LAWDUC 2.4030(3)

21 provides, in relevant part:

22 “In addition to the other applicable standards of this ordinance, the  
23 hearing body must determine that the development will comply with  
24 the following criteria to approve a conditional development and use.

25 “\* \* \* \* \*

26 “(C) The site under consideration is suitable for the proposed use  
27 considering:

28 “(1) The size, design, and operating characteristics of the  
29 use, including but not limited to off-street parking,  
30 fencing/buffering, lighting, signage, and building  
31 location.

1           “(2) The adequacy of transportation access to the site,  
2           including street capacity and ingress and egress to  
3           adjoining streets.

4           “(3) The adequacy of public facilities and services  
5           necessary to serve the use.

6           “(4) The natural and physical features of the site such as  
7           topography, natural hazards, natural resource values,  
8           and other features.”

9           In a portion of the first assignment of error in *Smith I*, petitioners argued  
10       that the county’s findings were inadequate to explain how the site was suitable  
11       for the proposed use, under LAWDUC 2.4030(3)(C)(4), given the presence of  
12       wetlands and seasonal flooding. We agreed with petitioners that more adequate  
13       findings were necessary to explain the apparent contradiction between (1) a  
14       condition of approval that effectively required Smith to “[s]tay out of delineated  
15       wetlands” and (2) a finding that, with the 40-foot extension, the road  
16       improvements might encroach on delineated wetlands. Although intervenors  
17       observed that a different condition of approval required Smith to obtain a state  
18       wetland removal-fill permit if construction required at least 50 cubic yards of  
19       removal or fill, we agreed with petitioners that more adequate findings, and  
20       perhaps an express interpretation of LAWDUC 2.4030(3)(C)(4), were needed to  
21       explain how that requirement was sufficient, without more, to demonstrate the  
22       suitability of the site with respect to wetlands. We also agreed with petitioners  
23       that the county’s findings failed to address the suitability of the site with respect

1 to seasonal flooding. We therefore sustained the first assignment of error, in part.

2 \_\_\_\_ Or LUBA at \_\_\_\_ (slip op at 12-16).

3 On remand, the board of commissioners conducted a hearing, reapproved  
4 the conditional use permit, and adopted supplemental findings. This appeal  
5 followed.

### 6 **THIRD ASSIGNMENT OF ERROR**

7 As explained above, we remanded the county's original decision, in part,  
8 because we agreed with petitioners that more adequate explanatory findings, and  
9 perhaps an express interpretation of LAWDUC 2.4030(3)(C)(4), were needed to  
10 explain how a requirement for Smith to obtain a removal-fill permit if necessary  
11 was sufficient, without more, to demonstrate the suitability of the site with respect  
12 to wetlands.

13 Consistent with that direction, the supplemental findings include an  
14 express interpretation of LAWDUC 2.4030(3)(C). The board of commissioners  
15 concluded that the considerations in LAWDUC 2.4030(3)(C)(1) to (4) are factors  
16 for determining whether a site is suitable for a proposed use, not individual  
17 approval criteria that must be satisfied, and that a site need not be suitable with  
18 respect to each of the considerations in LAWDUC 2.4030(3)(C)(1) to (4) for an  
19 application to comply with LAWDUC 2.4030(3)(C). In other words, even if a  
20 site is not suitable with respect to "[t]he natural and physical features of the site  
21 such as topography, natural hazards, natural resource values, and other features,"  
22 LAWDUC 2.4030(3)(C)(4), an application may nonetheless comply with

1 LAWDUC 2.4030(3)(C) if the site is suitable with respect to the considerations  
2 in LAWDUC 2.4030(3)(C)(1) to (3).

3 The board of commissioners proceeded to interpret “topography,” “natural  
4 hazards,” “natural resource values,” and “other features.” It referred to the  
5 dictionary for the definition of “topography.” It interpreted “natural hazards” to  
6 implicitly refer to sites within the county’s Flood Hazard Overlay (FHO) and  
7 Geologic Hazard Overlay (GHO) zones, which implement Statewide Planning  
8 Goal 7 (Areas Subject to Natural Hazards). It interpreted “natural resource  
9 values” to implicitly refer to sites containing inventoried Statewide Planning  
10 Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces)  
11 resources. Finally, it interpreted “other features” to implicitly refer to any  
12 measures proposed by an applicant or required by local, state, or federal permits  
13 to enhance or mitigate the natural and physical features of the site. Based on those  
14 interpretations, the board of commissioners explained that the presence of  
15 wetlands and seasonal flooding would not *necessarily* render a site unsuitable for  
16 a proposed use. Record 49-50.<sup>1</sup> Applying that interpretation, the board of

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<sup>1</sup> The supplemental findings provide:

“As interpreted by this Board, the overarching purpose of LAWDUC Section 2.4030(3)(C) is to determine a proposed property’s ‘suitability’ for the proposed use. Rather than setting forth numerous elements, each of which must individually be satisfied to in-turn determine that a proposed property is ‘suitable,’ the Board interprets LAWDUC Section 2.4030(3)(C) as setting

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forth a number of factors, each of which should be ‘considered’ to ultimately determine that proposed property is or is not ‘suitable’ for the proposed use. This interpretation is supported by well-established land use precedent in Oregon preferring a factor-based analysis when codified provisions specifically directs a decision maker to ‘consider’ certain criteria. *See, e.g., Rawson v. Hood River County*, [75 Or LUBA 200 (2017)]; *Freeland v. City of Bend*, 45 Or LUBA 125, 131 (2003); *Frankton Neigh. Assoc. v. Hood River County*, 25 Or LUBA 396 (1993).

“Distinguishing between ‘elements’ and ‘factors’ is important in this case because a decision maker may still find that a proposed property is ‘suitable’ for the proposed use even if individual factors enumerated in the subparts of LAWDUC Section 2.4030(3)(C) suggest otherwise. As interpreted by this Board, LAWDUC Section 2.4030(3)(C) directs the decision maker to focus the ‘suitability’ determination on the balance of the enumerated factors.

“The subparts following LAWDUC Section 2.4030(3)(C) sets forth four overarching categories of factors focusing generally on (1) the ‘operating characteristics of the use,’ (2) ‘transportation access to the site,’ (3) ‘adequacy of public facilities and services,’ and (4) the ‘natural and physical features of the site.’ The findings in the April 23, 2021 staff report regarding LAWDUC Section 2.4030(3)(C) subparts (1) through (4)—which both the Hearings Officer and this Board adopted—all suggest that the proposed site in this case is ‘suitable’ for the proposed use, with only the factors set forth in subpart (4) now being at issue following LUBA’s remand. It very well may be that the balance of the remaining factors tips the scales towards a suitability finding in this case regardless of any remaining issues with the subpart (4) factors. But, as discussed below, even the subpart (4) factors suggest that the proposed site is ‘suitable’ for the proposed use in this case.

“As noted above, subpart (4) of LAWDUC Section 2.4030(3)(C) generally directs the decision maker to consider if the ‘natural and physical features’ of the proposed property, with the enumerated



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factors including (a) 'topography,' (b) 'natural hazards,' (c) 'natural resource values,' and (d) 'other features.'

"When it comes to 'topography,' the LAWDUC does not directly include a definition of the term. Instead, the Board must utilize *Webster's Third [New] International Dictionary* as the Oregon Appellate Court's official dictionary. Of the several options suggested online, **the County interprets 'topography' in the context of LAWDUC Section 2.4030(3)(C)(4) to mean 'the configuration of a surface including its relief and the position of its natural and man-made features.'**

"With regard to 'natural hazards,' the Board notes Clatsop County's efforts to map known geologic hazards pursuant to Statewide Planning Goal 7 and as part of adopting the County's Comprehensive Plan. The result of those efforts was, in part, the adoption of the County's [Flood Hazard Overlay (FHO) and Geologic Hazard Overlay (GHO)] zones addressed in Article 5 of the LAWDUC. Rather than an invitation to re-hash past land use planning efforts, **the Board interprets 'natural hazards' in the context of LAWDUC Section 2.4030(3)(C)(4) as a specific reference to the [FHO and GHO] zones.**

"With regard to 'natural resource values,' the Board again notes Clatsop County's past planning efforts with regard to Statewide Planning Goal 5, and **similarly interprets that term as a reference to the County's inventoried resources pursuant to Goal 5.**

"With regard to the 'other features' phrase concluding LAWDUC Section 2.4030(3)(C)(4), the Board finds that the clear intent is that a decision maker may additionally consider other factors beyond 'topography,' 'natural hazards' and 'natural resource values' to generally determine if a proposed property's 'natural and physical features' make it suitable for a proposed use. 'Other features' which may be considered by a decision maker include features naturally occurring on a proposed property which, for example, enhance 'natural resource values' or mitigate 'natural hazards.' As such, **the Board further finds that 'other features' includes any mitigation**

1 commissioners concluded that the site was suitable for the proposed use under  
2 LAWDUC 2.4030(3)(C)(4).

3 In the third assignment of error, petitioners argue that the board of  
4 commissioners improperly construed LAWDUC 2.4030(3)(C)(4). ORS  
5 197.835(9)(a)(D). In this assignment of error, we do not understand petitioners  
6 to challenge the board of commissioners' conclusion that the considerations in  
7 LAWDUC 2.4030(3)(C)(1) to (4) are *factors* for determining whether a site is  
8 suitable for a proposed use, as opposed to individual approval criteria that must  
9 be met. Rather, petitioners challenge the board of commissioners' interpretation  
10 of "natural hazards," "natural resource values," and "other features."

11 We review the board of commissioners' interpretation under the "highly  
12 deferential" standard of review in ORS 197.829(1). *Mark Latham Excavation,*

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**proposed by an applicant to enhance or mitigate a proposed property's 'natural and physical feature,' or other such mitigation that may be required pursuant to other local, state, or federal permits.**

**"As a final matter, the Board specifically rejects any interpretation of LAWDUC Section 2.4030(3)(C)(4) that automatically disqualifies a property for any and all development because of the presence of delineated wetlands and/or associated flooding that may occur in relation to that wetland.** As discussed above, such a broad (and erroneous) interpretation ignores the factor-based analysis required by LAWDUC Section 2.4030(3)(C), and elevates one sub-factor regarding 'natural hazards' above all other considerations." Record 49-50 (boldface in original).

1 *Inc. v. Deschutes County*, 250 Or App 543, 555, 281 P3d 644 (2012). Under ORS  
2 197.829(1), LUBA must affirm a governing body’s interpretation of its own land  
3 use regulation if the interpretation is not inconsistent with the regulation’s  
4 express language, purpose, or underlying policy. The test under ORS 197.829(1)  
5 is not whether the interpretation is correct, or the best or superior interpretation,  
6 but whether the governing body’s interpretation is “plausible,” given its text and  
7 context. *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010). The  
8 “existence of a stronger or more logical interpretation does not render a weaker  
9 or less logical interpretation ‘implausible.’” *Mark Latham*, 250 Or App at 555  
10 (citing *Siebert v. Crook County*, 246 Or App 500, 509, 266 P3d 170 (2011)).

11 We understand petitioners to identify five reasons why the board of  
12 commissioners’ interpretation of “natural hazards” and “natural resource values”  
13 is implausible, and one reason why its interpretation of “other features” is  
14 implausible. Some of those reasons overlap, while others contain multiple  
15 discrete arguments. We address those arguments by discrete argument, grouping  
16 overlapping reasons together where necessary.

17 Petitioners observe that LAWDUC 2.4030(3)(C) requires a finding that  
18 “[t]he site under consideration is suitable for the proposed use.” (Emphasis  
19 added.) Petitioners observe that LAWDUC 2.4010 provides that the purpose of  
20 the conditional use provisions is “to provide a system of review of such uses so  
21 that the community is assured that the uses are compatible with *their locations*  
22 *and with surrounding land uses*.” (Emphasis added.) Based on those provisions,

1 petitioners argue that the purpose of LAWDUC 2.4030(3)(C)(4) is to require an  
2 assessment of the site's physical characteristics. Petitioners argue that the board  
3 of commissioners' interpretation of "natural hazards" and "natural resource  
4 values" is inconsistent with that purpose since all that matters under that  
5 interpretation is whether a site is within the FHO or GH0 zones or whether the  
6 site contains inventoried Goal 5 resources, not the site's physical characteristics.  
7 Petitioners also argue that the board of commissioners' interpretation of "other  
8 features" is inconsistent with that purpose since enhancement and mitigation are  
9 not themselves part of a site's physical characteristics.

10 We reject these arguments. LAWDUC 5.1010 provides that the purpose of  
11 the FHO zone is to "identify those areas of the County subject to the hazards of  
12 periodic flooding. This district shall apply to all areas of special flood hazards  
13 within the unincorporated areas of Clatsop County as identified on Flood  
14 Insurance Rate Maps (FIRM) and Flood Boundary and Floodway Maps."  
15 LAWDUC 5.3005 provides that the purpose of the GH0 zone is to "minimize  
16 building hazards and threats to life and property that may be created by  
17 landslides, ocean flooding and erosion, weak foundation soils, and other hazards  
18 as identified and mapped by the County." LAWDUC 5.3010 provides that the  
19 GH0 zone applies to areas subject to mass wasting, as identified in various  
20 Department of Geology and Mineral Industries bulletins and a report, including  
21 areas needing site-specific investigations; areas subject to wave attack, including  
22 all oceanfront lots and the beach and dune hazard area; and areas with

1 compressible soils, as identified in a soil study and a background report to the  
2 county's comprehensive plan. In addition, the Goal 5 process is notoriously site-  
3 specific. *See Columbia Steel Castings Co. v. City of Portland*, 314 Or 424, 840  
4 P2d 71 (1992) (rejecting a local government's Goal 5 analysis methodology that  
5 identified 36 specific resource sites but proceeded to analyze the resource sites  
6 based on five large "sub-areas," which were essentially units of land that were  
7 much larger in some cases than the resource sites).

8 Assuming that petitioners are correct that the purpose of LAWDUC  
9 2.4030(3)(C)(4) is to require an assessment of the site's physical characteristics,  
10 implicit in the way the board of commissioners applied the standard is its  
11 conclusion that whether a site is within the FHO or GHO zones and whether the  
12 site contains inventoried Goal 5 resources provides *sufficient indication* of the  
13 site's physical characteristics to enable the county to determine whether a site is  
14 suitable for a proposed use under LAWDUC 2.4030(3)(C)(4). Petitioners have  
15 not established that that interpretation is implausible. Likewise, petitioners have  
16 not established that any enhancements or mitigation proposed by an applicant or  
17 required by a permit may not be considered in determining whether a site's  
18 physical characteristics make it suitable for a proposed use.

19 Petitioners also observe that, while other LAWDUC provisions expressly  
20 refer to the FHO and GHO zones and inventoried Goal 5 resources, LAWDUC  
21 2.4030(3)(C)(4) does not. We understand petitioners to argue that the board of  
22 commissioners' interpretation of "natural hazards" and "natural resource values"

1 is inconsistent with the express language of the provision because it is contrary  
2 to the presumption that, when the legislature uses different words, it intends those  
3 words to have different meanings. Intervenor's respond, and we agree, that  
4 petitioners have not established that the board of commissioners' interpretation  
5 is implausible. That LAWDUC 2.4030(3)(C)(4) does not expressly refer to the  
6 FHO and GH0 zones and inventoried Goal 5 resources does not establish that  
7 the board of commissioners' interpretation of the provision to implicitly do so is  
8 inconsistent with the provision's express language. That petitioners believe a  
9 stronger or more logical interpretation exists does not render a weaker or less  
10 logical interpretation implausible. *Mark Latham*, 250 Or App at 555.

11 Petitioners argue that, under the board of commissioners' interpretation of  
12 "natural hazards," the county would be prohibited from approving any  
13 conditional uses in the FHO and GH0 zones, a result which petitioners  
14 characterize as "absurd." Petition for Review 32. However, the board of  
15 commissioners concluded that the considerations in LAWDUC 2.4030(3)(C)(1)  
16 to (4), including "natural hazards" and "natural resource values," are *factors* for  
17 determining whether a site is suitable for a proposed use, not *elements*. That is, a  
18 site need not be suitable with respect to *each* of the considerations in LAWDUC  
19 2.4030(3)(C)(1) to (4)—or each of the considerations in LAWDUC  
20 2.4030(3)(C)(4) alone, such as "natural hazards"—for an application to comply  
21 with LAWDUC 2.4030(3)(C). In other words, even if a site is within the FHO or  
22 GH0 zones or contains inventoried Goal 5 resources, an application may

1 nonetheless comply with LAWDUC 2.4030(3)(C) if the site is suitable with  
2 respect to the other considerations in LAWDUC 2.4030(3)(C)(4), such as  
3 “topography,” and the considerations in LAWDUC 2.4030(3)(C)(1) to (3). We  
4 do not understand petitioners to challenge that interpretation. Accordingly, this  
5 argument provides no basis for reversal or remand.

6       Petitioners further observe that LAWDUC 2.4030(3) requires a finding of  
7 compliance with LAWDUC 2.4030(3)(C)(4) “[i]n addition to the other  
8 applicable standards of this ordinance.” (Emphasis added.) Petitioners argue that,  
9 if “natural hazards” and “natural resource values” implicitly refer to the FHO and  
10 GH0 zones and inventoried Goal 5 resources, then the “[i]n addition to” language  
11 would be superfluous. We reject this argument. First, the board of  
12 commissioners’ interpretation of LAWDUC 2.4030(3)(C)(4) does not itself  
13 require the county to apply the standards governing the FHO and GH0 zones and  
14 inventoried Goal 5 resources. Rather, it makes the applicability of those standards  
15 a threshold for considering “natural hazards” and “natural resource values” in  
16 determining whether a site is suitable for a proposed use under LAWDUC  
17 2.4030(3)(C)(4). Second, even if the board of commissioners’ interpretation did  
18 require the county to apply the standards governing the FHO and GH0 zones and  
19 inventoried Goal 5 resources, there are presumably other LAWDUC standards  
20 having nothing to do with the FHO and GH0 zones and inventoried Goal 5  
21 resources that would still be applicable through the “[i]n addition to” language.  
22 There is no superfluity.

1       Petitioners also argue that the board of commissioners' interpretation of  
2   "natural hazards" and "natural resource values" is inconsistent with the  
3   requirement in LAWDUC 2.4030(3)(C) that "[t]he site under consideration" be  
4   suitable for the proposed use since the site would have already been considered  
5   during the FHO or GHO zoning or Goal 5 proceedings and, therefore, would not  
6   actually be "under consideration" during the conditional use permit proceedings.  
7   We reject this argument. "The site under consideration," as used in LAWDUC  
8   2.4030(3)(C), refers to the site that is the subject of the conditional use permit  
9   application. The site that is the subject of the conditional use permit application  
10   remains "[t]he site under consideration" even if the presence of wetlands and  
11   seasonal flooding on the site was effectively determined during the FHO or GHO  
12   zoning or Goal 5 proceedings. There is no superfluity.

13       In addition, petitioners observe that LAWDUC 2.4020 provides that  
14   conditional use permit applications are "subject to approval under Sections  
15   2.4000 to 2.4050." Petitioners argue that the board of commissioners'  
16   interpretation is inconsistent with that language since it would subject conditional  
17   use permit applications not only to LAWDUC 2.400 to 2.4050 but also to the  
18   LAWDUC provisions governing the FHO and GHO zones and inventoried Goal  
19   5 resources. We reject this argument. The board of commissioners' interpretation  
20   of LAWDUC 2.4030(3)(C)(4) to implicitly refer to the FHO and GHO zones and  
21   inventoried Goal 5 resources is not inconsistent with the express language of  
22   LAWDUC 2.4020 that conditional use permit applications are subject to



1 LAWDUC 2.4000 to 2.4050. Petitioners have not established that the board of  
2 commissioners' interpretation is implausible.

3 Finally, petitioners observe that LAWDUC 2.4040 sets out the conditions  
4 that the county may impose on conditional uses. Petitioners argue that, if  
5 enhancement and mitigation were addressed by "other features," as used in  
6 LAWDUC 2.4030(3)(C)(4), then LAWDUC 2.4040 would be superfluous.  
7 Intervenor respond, and we agree, that there is no superfluity. LAWDUC 2.4040  
8 allows the county to impose conditions, which may or may not require  
9 enhancement or mitigation. Differently, the board of commissioners'  
10 interpretation of "other features" allows the county to consider enhancement and  
11 mitigation proposed by an applicant, or required by local, state, or federal permits  
12 in determining whether a site is suitable for a proposed use under LAWDUC  
13 2.4030(3)(C)(4). LAWDUC 2.4040 and the board of commissioners'  
14 interpretation of "other features" serve different purposes.

15 For the foregoing reasons, petitioners have not established that the board  
16 of commissioners' interpretation of "natural hazards," "natural resource values,"  
17 and "other features" is inconsistent with the express language, purpose, or  
18 underlying policy of LAWDUC 2.4030(3)(C)(4). We conclude that that  
19 interpretation is plausible. Accordingly, we defer to it. ORS 197.829(1); *Siporen*,  
20 349 Or 247.

21 However, we also observe that, in concluding that the site is suitable for  
22 the proposed use, under LAWDUC 2.4030(3)(C)(4), with respect to wetlands and

1 seasonal flooding, the board of commissioners did not limit its analysis to the fact  
2 that the site is not within the FHO or GHO zones and contains no inventoried  
3 Goal 5 resources. The board of commissioners “thoroughly combed the record”  
4 and concluded that the record did not include “specific evidence of flooding  
5 occurring in the existing right-of-way to the extent that said flooding would  
6 regularly and/or repeatedly damage or destroy any constructed access road  
7 thereby rendering the propose[d] site unsuitable.” Record 51. In addition, the  
8 board of commissioners expressly concluded that the site is suitable for the  
9 proposed use considering the presence wetlands that are not included on the  
10 county’s Goal 5 inventory.<sup>2</sup> Petitioners challenge the board of commissioners’

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<sup>2</sup> The supplemental findings provide:

***“Natural Hazards***

“With regard to the natural hazard factor, LUBA determined that ‘There is *some* testimony in the record that flooding occurs on the site and that flooding might get worse if a portion of the wetland is filled for road construction.’ (emphasis in original). The Board has thoroughly combed the record and agrees that the record includes what are best described as anecdotal concerns with flooding generally associated with wetlands. Most of those concerns are arguably inapplicable because they focus on the impact the proposed access road may have on the wetlands rather than on how the wetlands and any associated flooding makes the existing right-of-way unsuitable for the proposed access road. The record does not include specific evidence of flooding occurring in the existing right-of-way to the extent that said flooding would regularly and/or repeatedly damage or destroy any constructed access road thereby rendering the propose[d] site unsuitable. Such evidence would

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perhaps have included pictures or other documents suggesting the depth of flooding on the subject property, dates when the flooding occurred, length of time the water remained, etc.

“Consistent with the interpretation set forth above, the Board further references the County’s [FHO and GH0] zones, and notes that the proposed property is not included within either aforementioned zones. **This Board is persuaded by that evidence, and finds that the natural hazard factor does not disfavor that ‘the site under consideration is suitable for the proposed use.’**

*“Natural Resource Values*

“As understood by this Board, the presence of delineated wetlands within the ‘site under consideration’ is the most significant unresolved issue and is best addressed pursuant to the ‘natural resources values’ factor. Similar to the aforementioned ‘natural hazard’ factor, the Board should begin its analysis under this factor by noting that neither [Smith’s] property nor the public right-of-way that is the subject of these proceedings are included on the County’s Goal 5 Inventory of significant wetlands or located within the Lake and Wetlands Zone. Consistent with the Board’s interpretation set forth above, that could be the end of the analysis under this factor.

“However, although perhaps overlapping with the fourth and final factor, the Board notes an additional consideration specifically relevant to the wetlands concern. The record includes an April 1, 2021 letter from the Department of State Lands (‘DSL’) calling out that ‘a state permit is required’ in this case ‘for cumulative fill or annual excavation of 50 cubic yards or more in the wetlands \* \* \*.’ **This Board still agrees with County Staffs original assessment of the DSL letter:**

““State law permits removal and fill activities within a wetland and conditions may be imposed and/or mitigation required. Removal and fill activities within wetlands are under the jurisdiction of [DSL]. \* \* \* DSL has approved the [a]pplicants’ wetland delineation (WD #2020-0667). Any

1 conclusion with respect to seasonal flooding in the second assignment of error.  
2 However, they do not challenge the board of commissioners' conclusion with  
3 respect to wetlands. Accordingly, petitioners' argument that the board of  
4 commissioners misconstrued "natural resource values" provides no basis for  
5 reversal or remand.

6 The third assignment of error is denied.

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impacts to the wetland from road construction activities will require review, permitting and/or mitigation as determined by DSL. A copy of any federal and/or state permits must be submitted to Clatsop County in order for a development permit to be issued.'

"Although not the case herein, this Board agrees that delineated wetlands left unmitigated and occupying the majority of a 'site under consideration' would be a factor suggesting that a site is not suitable for a proposed use. But even in that scenario, and as discussed above, a solitary factor on its own does not compel that overarching finding. In this case, **if the construction of the access road requires fill or excavation less than 50 cubic yards, then the Board finds that the delineated wetlands on a small portion of the 'site under consideration' clearly is not significant enough to compel an 'unsuitable' finding under this 'natural resource values' factor alone. And if the construction of the access road does require fill or excavation greater than 50 cubic yards such that a DSL permit is required, then this Board finds that the mitigation provided by that DSL permit tips the scales towards determining that the 'natural resource values' factor does not render the public right-of-way unsuitable for the proposed access.**" Record 51-52 (boldface and italics in original).

1   **FIRST ASSIGNMENT OF ERROR**

2           Again, we remanded the county's original decision, in part, because "we  
3   agree[d] with petitioners that more adequate explanatory findings, and perhaps  
4   an express interpretation of LAWDUC 2.4030(3)(C)(4), [were] needed to  
5   establish compliance with the suitability standard." *Smith I*, \_\_\_\_ Or LUBA at \_\_\_\_  
6   (emphasis added) (slip op at 13-14). The county's notice of hearing on remand  
7   identified LAWDUC "2.4030(3)(C)(4)" as an applicable criterion. Record 302  
8   (emphasis added). Although the board of commissioners conducted a hearing on  
9   remand, it did not reopen the record for the submission of new evidence or  
10   argument. As explained above, the supplemental findings include an express  
11   interpretation of LAWDUC 2.4030(3)(C).

12           In the first assignment of error, petitioners argue that the board of  
13   commissioners erred in expanding the scope of the remand from adopting an  
14   interpretation of LAWDUC 2.4030(3)(C)(4) in particular, as referenced in our  
15   decision in *Smith I* and the county's notice of hearing on remand, to adopting an  
16   interpretation of LAWDUC 2.4030(3)(C) in general. Petitioners acknowledge  
17   that "a local government has considerable discretion in determining the  
18   procedures on remand." Petition for Review 18. However, petitioners argue that  
19   the board of commissioners erred in expanding the scope of the remand beyond  
20   that indicated in the county's notice of hearing on remand. Petitioners also argue  
21   that the board of commissioners erred in expanding the scope of the remand  
22   beyond that required by LUBA in *Smith I* without giving petitioners an

1 opportunity to submit new evidence. We understand petitioners to argue that the  
2 board of commissioners “[f]ailed to follow the procedures applicable to the  
3 matter before it in a manner that prejudiced the substantial rights of \* \* \*  
4 petitioner[s].” ORS 197.835(9)(a)(B).

5       The substantial rights of the parties include “the rights to an adequate  
6 opportunity to prepare and submit their case and a full and fair hearing.” *Muller*  
7 *v. Polk County*, 16 Or LUBA 771, 775 (1988). In order to establish a procedural  
8 error, a petitioner must identify the procedure allegedly violated. *Stoloff v. City*  
9 *of Portland*, 51 Or LUBA 560, 563 (2006). Where a party has the opportunity to  
10 object to a procedural error before the local government, but fails to do so, that  
11 error cannot be assigned as grounds for reversal or remand of the resulting  
12 decision. *Torgeson v. City of Canby*, 19 Or LUBA 511, 519 (1990); *Dobaj v.*  
13 *Beaverton*, 1 Or LUBA 237, 241 (1980).<sup>3</sup>

14       Intervenors observe that a draft of the supplemental findings that the board  
15 of commissioners ultimately adopted was made available to the public before the  
16 county’s hearing on remand and that each petitioner submitted detailed comments  
17 responding thereto. Record 276-78, 281-93, 297-300. Because petitioners had an  
18 opportunity below to object to the board of commissioners allegedly expanding

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<sup>3</sup> The obligation to object to procedural errors overlaps with, but exists independently of, ORS 197.797(1) and ORS 197.835(3). *Confederated Tribes v. City of Coos Bay*, 42 Or LUBA 385, 393 (2002); *Simmons v. Marion County*, 22 Or LUBA 759, 774 n 8 (1992).

1 the scope of the remand from adopting an interpretation of LAWDUC  
2 2.4030(3)(C)(4) in particular to adopting an interpretation of LAWDUC  
3 2.4030(3)(C) in general, and because petitioners did not do so, intervenors argue  
4 that the first assignment of error is waived. In the reply brief, petitioners do not  
5 really respond to intervenors' waiver argument other than to assert that the board  
6 of commissioners was not required to adopt the draft supplemental findings.  
7 Petitioners do not dispute that the draft supplemental findings included an  
8 interpretation of LAWDUC 2.4030(3)(C) in general or that they did not object to  
9 that alleged expansion of the scope of the remand below. Absent a more  
10 developed response to intervenors' waiver argument, we agree that the first  
11 assignment of error is waived.

12       However, even if the first assignment of error was not waived, we agree  
13 with intervenors that it provides no basis for reversal or remand. While petitioners  
14 argue that the board of commissioners erred in expanding the scope of the remand  
15 beyond that required by LUBA in *Smith I* without giving petitioners an  
16 opportunity to submit new evidence, petitioners do not identify the source of that  
17 alleged procedural requirement. Petitioners acknowledge that local governments  
18 have considerable discretion in determining the procedures on remand, and we  
19 have explained that, "[o]n remand, if the county determines that its findings are  
20 inadequate, it may prepare new findings without opening the record." *Roberts v.*  
21 *Crook County*, 33 Or LUBA 267, 271 (1997). Petitioners have not established  
22 any procedural violation.

1       Petitioners also argue that the board of commissioners erred in expanding  
2   the scope of the remand beyond that indicated in the county's notice of hearing  
3   on remand, which identified LAWDUC 2.4030(3)(C)(4) in particular as an  
4   applicable criterion, not LAWDUC 2.4030(3)(C) in general. Assuming that  
5   petitioners have identified a procedural violation, petitioners do not explain how  
6   that violation prejudiced their rights to an adequate opportunity to prepare and  
7   submit their case and a full and fair hearing. Again, petitioners do not dispute that  
8   the draft supplemental findings that were made available to the public before the  
9   county's hearing on remand included an interpretation of LAWDUC  
10  2.4030(3)(C) in general or that each petitioner submitted detailed comments  
11  responding thereto. Petitioners have not established that any procedural violation  
12  prejudiced their substantial rights.

13       Furthermore, we agree with intervenors that the board of commissioners  
14  did not actually expand the scope of the remand. In interpreting a standard, like  
15  LAWDUC 2.4030(3)(C)(4), which is one in a list of considerations, it is often  
16  necessary for a local government to interpret the larger standard of which the  
17  standard at issue is a part. As intervenors observe, the first step in construing a  
18  statute is to examine the text *and context* thereof. *State v. Gaines*, 346 Or 160,  
19  171, 206 P3d 1042 (2009). The board of commissioners did not expand the scope  
20  of remand by explaining how LAWDUC 2.4030(3)(C)(4) relates to the other  
21  considerations in LAWDUC 2.4030(3)(C).

22       The first assignment of error is denied.



1   **SECOND ASSIGNMENT OF ERROR**

2           We also remanded the county's original decision, in part, because we  
3   agreed with petitioners that the county's findings were inadequate to explain how  
4   the site was suitable for the proposed use, under LAWDUC 2.4030(3)(C)(4),  
5   given the presence of wetlands and seasonal flooding. Again, LAWDUC  
6   2.4030(3)(C)(4) requires a finding that

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

9           "\* \* \* \* \*

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

13          In the second assignment of error, petitioners argue that the presence of  
14   wetlands and seasonal flooding are examples of the "natural and physical  
15   features" of the site that must be considered in determining whether the site is  
16   suitable the proposed use under LAWDUC 2.4030(3)(C)(4). Petitioners argue  
17   that "topography," "natural hazards," "natural resource values," and "other  
18   features," as used in LAWDUC 2.4030(3)(C)(4), are part of a nonexclusive list  
19   of "natural and physical features" that must be considered in determining whether  
20   a site is suitable for a proposed use. Petitioners argue that the supplemental  
21   findings are inadequate because, while they interpret the words and phrases  
22   "topography," "natural hazards," "natural resource values," and "other features,"  
23   as used in LAWDUC 2.4030(3)(C)(4), they do not interpret the phrase "natural

1 and physical features.” We understand petitioners to argue that, even if “natural  
2 hazards” and “natural resource values” refer to only those sites within the FHO  
3 and GHO zones and those sites containing inventoried Goal 5 resources, “natural  
4 and physical features” is broader and may refer to seasonal flooding outside the  
5 FHO and GHO zones and wetlands that are not included on the county’s Goal 5  
6 inventory.

7 Adequate findings are required to support quasi-judicial land use  
8 decisions. *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 20-21,  
9 569 P2d 1063 (1977). Generally, findings must: (1) identify the relevant approval  
10 standards, (2) set out the facts which are believed and relied upon, and (3) explain  
11 how those facts lead to the decision on compliance with the approval standards.  
12 *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992).

13 Intervenor respond that the board of commissioners implicitly interpreted  
14 “natural and physical features” as being constrained by its interpretation of  
15 “topography,” “natural hazards,” “natural resource values,” and “other features.”  
16 That is, “natural and physical features” is not broader than “topography,” “natural  
17 hazards,” “natural resource values,” and “other features.” Instead, “topography,”  
18 “natural hazards,” “natural resource values,” and “other features” clarify the  
19 scope of the “natural and physical features” that must be considered in  
20 determining whether a site is suitable for a proposed use under LAWDUC  
21 2.4030(3)(C)(4). We agree with intervenors that an implied interpretation can be  
22 fairly easily understood from the findings in support of the decision and is

1 adequate for review. *Alliance for Responsible Land Use v. Deschutes County*,  
2 149 Or App 259, 266-67, 942 P2d 836 (1997), *rev dismissed as improvidently*  
3 *allowed*, 327 Or 555 (1998). Accordingly, petitioners' argument that the  
4 supplemental findings do not separately interpret "natural and physical features"  
5 provides no basis for reversal or remand.

6 We also remanded the county's original decision because we agreed with  
7 petitioners that the county's findings failed to address the suitability of the site  
8 with respect to seasonal flooding. In the second assignment of error, petitioners  
9 assert that, on remand, the board of commissioners concluded that no seasonal  
10 flooding occurs on the subject property, and petitioners argue that that conclusion  
11 is "not supported by substantial evidence in the whole record." ORS  
12 197.835(9)(a)(C).

13 Substantial evidence is evidence that a reasonable person would rely on in  
14 making a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608  
15 (1993). In reviewing the evidence, LUBA may not substitute its judgment for that  
16 of the local decision-maker. Rather, LUBA must consider all the evidence to  
17 which it is directed and determine whether, based on that evidence, a reasonable  
18 local decision-maker could reach the decision that it did. *Younger v. City of*  
19 *Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988).

20 With respect to "natural hazards" and, therefore, seasonal flooding, the  
21 supplemental findings provide, in relevant part:

22 "With regard to the natural hazard factor, LUBA determined that

1 'There is *some* testimony in the record that flooding occurs on the  
2 site and that flooding might get worse if a portion of the wetland is  
3 filled for road construction.' (emphasis in original). The Board has  
4 thoroughly combed the record and agrees that the record includes  
5 what are best described as anecdotal concerns with flooding  
6 generally associated with wetlands. Most of those concerns are  
7 arguably inapplicable because they focus on the impact the proposed  
8 access road may have on the wetlands rather than on how the  
9 wetlands and any associated flooding makes the existing right-of-  
10 way unsuitable for the proposed access road. *The record does not*  
11 *include specific evidence of flooding occurring in the existing right-*  
12 *of-way to the extent that said flooding would regularly and/or*  
13 *repeatedly damage or destroy any constructed access road thereby*  
14 *rendering the propose[d] site unsuitable.* Such evidence would  
15 perhaps have included pictures or other documents suggesting the  
16 depth of flooding on the subject property, dates when the flooding  
17 occurred, length of time the water remained, etc." Record 51  
18 (emphasis added).

19 Contrary to petitioners' assertion, the board of commissioners did not conclude  
20 that no seasonal flooding occurs on the subject property. Rather, the board of  
21 commissioners acknowledged petitioners' testimony that seasonal flooding does  
22 occur on the subject property. However, the board of commissioners concluded  
23 that petitioners' testimony did not demonstrate that *the extent* of any seasonal  
24 flooding that occurs on the subject property makes the site unsuitable for the  
25 proposed use under LAWDUC 2.4030(3)(C)(4). Petitioners do not develop any  
26 argument that that conclusion is not supported by substantial evidence, and we  
27 will not develop such an argument for them. *Deschutes Development v.*  
28 *Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

29 The second assignment of error is denied.

30 The county's decision is affirmed.