



**NATURE OF THE DECISION**

Petitioner appeals a county hearings officer’s decision denying its request for Special Use and Development Review approval for a drive-thru restaurant.

**FACTS**

The subject property is a 2.24-acre parcel located at 10535 and 10565 SW Beaverton-Hillsdale Highway. The subject property has three driveway access points to the south on SW Beaverton-Hillsdale Highway and one driveway access point to the north on SW Laurel Street.

“The majority of the [subject property] and the property abutting the north portion of the east boundary are zoned CBD (Community Business District). The northeast and northwest corners of the [subject property] and the property abutting the north boundary of the [subject property] are zoned OC (Office Commercial). Properties to the north, across SW Laurel Street, are zoned R-15 (Residential, 15 units per acre). Properties to the west, south, and southeast are in the City of Beaverton.” Record 8.

Petitioner applied to the county for a Special Use and Development Review for an approximately 3,885 square foot restaurant with drive-thru and outdoor seating at the subject property. The proposed site plan is depicted below:



1 driveway to right-in/right-out turning movements, and operating the left  
2 driveway as “‘full access’ (right-in/right-out/left-in/left-out) under ‘normalized’  
3 operating conditions. [As proposed,] [t]he eastern access \* \* \* [would] be  
4 restricted to right-in only during the ‘opening period’ of the fast-food restaurant.  
5 The SW Laurel Street driveway [would be gated and locked and] restricted to  
6 emergency access only.” Record 9.

7 On June 16, 2022, the hearings officer held a public hearing on the  
8 application. On August 29, 2022, the hearings officer adopted findings and  
9 denied petitioner’s application. This appeal followed.

## 10 **FIRST ASSIGNMENT OF ERROR**

### 11 **A. Background**

12 Washington County Development Code (CDC) 430-41 defines “Drive-in  
13 or Drive-up Establishment” as “[a]ny establishment or portion of an  
14 establishment designed and operated to serve a patron while seated in an  
15 automobile (not including drive-in theaters).” Drive-in and drive-up  
16 establishments are permitted uses in the CBD zone subject to the special use  
17 standards in CDC 430-41. CDC 313-3.6. CDC 312-3.2 provides that drive-in and  
18 drive-up establishments are allowed as an accessory use to an Office Commercial  
19 Center in the OC zone subject to the standards in CDC 430-41.<sup>1</sup> “For simplicity,

---

<sup>1</sup> The CDC’s special use standards applicable to drive-ins and drive-up establishments are:

1 the hearings officer uses the term ‘drive-thru’ to refer to ‘Drive-In or Drive-Up  
2 Restaurants.’” Record 8, n 1. We do so as well.

3 Similarly, eating and drinking establishments are permitted in the CBD  
4 zone. CDC 313-3.6. Eating and drinking establishments with 5,000 square feet

---

“430-41.1 Entrances and Exits:

“A. Access shall be determined based upon a site inspection which considers the following:

“(1) Site size;

“(2) Road Classification;

“(3) Sight distance and allowed m.p.h.;

“(4) Adjacent development.

“B. Consolidation of access with adjoining uses shall be encouraged; and

“C. Driveway entrances and exits shall be clearly marked.

“430-41.2 Drive-in facilities located in the parking lot or part of a larger commercial center shall not have separate access points to the street and shall utilize the center’s access points;

“430-41.3 Lighting, sign illumination and height, and hours of operation may be restricted through the development review process to insure compatibility within the Office Commercial District; and

“430-41.4 In an Office Commercial District, hours of operation shall be limited to normal hours of operation in the Office Commercial District. Normal hours of operation are 7:00 a.m. to 6:00 p.m.”

1 or less gross floor area are permitted accessory uses in the OC zone. CDC 312-  
2 3.2.

3 **B. Operations in the OC Zone**

4 Petitioner’s first assignment of error is that the hearings officer  
5 misconstrued the applicable law by applying and extending what it terms the  
6 “‘zone crossing doctrine’ to a drive-thru eating and drinking establishment that  
7 can provably function without any zone crossing.” Petition for Review 11. We  
8 will reverse or remand a local government decision that improperly construed the  
9 applicable law. ORS 197.835(9)(a)(D).

10 Petitioner argues that the hearings officer erred in extending “the zone  
11 crossing doctrine first articulated in *Bowman Park v. City of Albany*, 11 Or LUBA  
12 197 (1984),” maintaining:

13 “The Hearings Officer concluded that, notwithstanding the fact that  
14 the proposed restaurant would be located in the CBD zone where it  
15 is allowed by right, and notwithstanding the fact that this restaurant  
16 could be accessed and used without crossing the OC zone (which  
17 prohibits stand-alone drive-thru restaurants), that the entire  
18 Application must be denied. In so doing, the Hearings Officer erred  
19 as a matter of law in applying the zone crossing doctrine to the  
20 present Application and by extending that doctrine to situations in  
21 which zone crossing is not required to serve the use and to parking,  
22 neither of which situations are addressed in the case law. Such  
23 decision also conflicts with certain CDC regulations pertaining to  
24 drive-thru restaurants that, in certain instances, would require just  
25 the sort of zone crossing that is proposed here.” Petition for Review  
26 11-12.

1 Petitioner maintains that customers will be able to access the subject property and  
2 the proposed drive-thru without crossing the OC zone. Petitioner argues that its  
3 use is therefore distinguishable from those in *Bowman Park, Roth v. Jackson*  
4 *County*, 38 Or LUBA 894 (2000), and *Wilson v. Washington County*, 63 Or  
5 LUBA 314 (2011), where crossing a zone where the use to be accessed was not  
6 allowed was unavoidable. For the reasons set out below, we deny this assignment  
7 of error.

8 As the hearings officer explained, petitioner argued that “[t]he proposed  
9 development has two driveways providing access to Beaverton Hillsdale  
10 Highway and the western driveway allows customers to access the restaurant and  
11 exclusive drive-thru lanes without passing through the OC zoned portions of the  
12 site.” Record 25. The hearings officer found, however, “the [petitioner] is clearly  
13 proposing to utilize the OC zoned portions of the site for vehicle parking and  
14 maneuvering associated with the restaurant use.” *Id.* The hearings officer  
15 concluded that both restaurants and drive-thrus are restricted uses in the OC zone:

16 “The majority of the site is zoned CBD. However, the northwest and  
17 northeast corners of the site are zoned OC. Restaurants, including  
18 drive-thru restaurants, are only allowed as a very limited use in the  
19 OC zone (See CDC 312-5.2, CDC 312-3.2.A(2) and (3), and CDC  
20 312-3.2.B). Restaurants (referred to as ‘[E]ating and Drinking or  
21 Food Specialty Establishments’) and Drive-In or Drive-Up  
22 Restaurants are only allowed as accessory uses in the OC zone,  
23 subject to the criteria in See CDC 312-3.2.B (See CDC 312-3.2.A(2)  
24 and (3)). Pursuant to CDC 312-3.2.B, restaurants, including drive-  
25 thru restaurants in the OC zone must be scaled to serve the tenants  
26 of the complex or surrounding office commercial area, no more than

1 20-percent of the gross floor area of new or existing structures,  
2 accessed by an internal office complex street with siting and signage  
3 internally oriented. *The hearings officer finds that the restaurant*  
4 *proposed in this case is not permitted in the OC zone, as it does not*  
5 *comply with the accessory use approval criteria of CDC 312-3.2.B.”*  
6 Record 24 (emphasis added).

7 The hearings officer also found:

8 “Restaurant uses are only allowed in the OC zone as accessory uses  
9 serving an Office Commercial Center, where the restaurant use is  
10 ‘scaled to serve the tenants of the complex or surrounding office  
11 commercial area.’ CDC 312-3[.2].B. *The [petitioner] is proposing*  
12 *a stand-alone restaurant that is not accessory to an Office*  
13 *Commercial Center, nor is the restaurant use ‘scaled to serve the*  
14 *tenants of the complex or surrounding office commercial area.’*  
15 Therefore, the proposed uses are prohibited in the OC zone.” Record  
16 32 (emphasis added).

17 The hearings officer ultimately concluded:

18 “Based on the findings and discussion provided or incorporated  
19 herein, the hearings officer concludes that [petitioner] failed to  
20 sustain its burden of proof that the proposed use complies with all  
21 of the applicable approval criteria. *Specifically, the [petitioner]*  
22 *failed to demonstrate that the proposal to utilize the OC zoned*  
23 *portions of the site for excess drive-thru vehicle storage during the*  
24 *potentially multi-year ‘opening’ period is allowed as a permitted,*  
25 *accessory, nonconforming, or temporary use.”* Record 10, 56  
26 (emphasis added).

27 The hearings officer’s findings span almost fifty pages and the statement in the  
28 hearings officer’s conclusion “specifically” referring to excess vehicle storage  
29 must be read in the context of the preceding sentence, relying upon the “findings  
30 and discussion provided or incorporated herein.” Record 10. These incorporated  
31 findings include the hearings officer’s findings that the use of the OC-zoned

1 portion of the property for the accessory restaurant uses, including excess drive-  
2 thru vehicle storage, is not allowed as a permitted or accessory use.

3 We have explained that where a county adopted approximately 77 pages  
4 of findings in support of a decision with descriptive section headings and the  
5 petitioner “quotes isolated findings contained in the decision without citing to or  
6 acknowledging other findings” that address the same approval criteria, and the  
7 petitioner fails to address and assign error to all the responsive findings, the  
8 petitioner runs the risk that dispositive findings are not challenged in the petition  
9 for review. *Protect Grand Island Farms v. Yamhill County*, 66 Or LUBA 291,  
10 295-96 (2012). The hearings officer’s references to the “zone crossing” cases  
11 were cited as support for the hearings officer’s conclusion that

12 “the driveways and parking areas are part of the proposed restaurant  
13 ‘use’ based on LUBA’s holdings in *Wilson v. Washington County*,  
14 63 Or LUBA 314 (2011)[], *Bowman Park v. City of Albany*, 11 Or  
15 LUBA 197 (1984) and *Roth v. Jackson County*, 38 Or LUBA 894,  
16 905 (2000). As LUBA held in *Wilson*:

17 “*Bowman Park* and *Roth* stand for the somewhat  
18 unremarkable proposition that where a property is to be  
19 developed with a commercial or industrial use, the internal  
20 driveway on that property that connects the commercial or  
21 industrial buildings to the nearest public right of way is  
22 properly viewed as part of the commercial or industrial use.  
23 Whether that driveway is labeled as ‘accessory’ to the  
24 business, as in *Roth*, or an integral part of the use itself, as in  
25 *Bowman Park*, is not material.’

26 “The hearings officer acknowledges that LUBA’s holdings in  
27 *Wilson et. al.* determined that driveways in other zones were part of  
28 the proposed use. LUBA did not address the issue of parking in

1 another zone. However, the hearings officer finds that LUBA's  
2 holdings in those cases should be extended to include parking, as the  
3 vehicle parking and maneuvering areas in the OC zoned portion of  
4 the site are clearly part of the proposed restaurant 'use,' similar to  
5 the driveways at issue in *Wilson, et al.*" Record 24-25.

6 We provided the following summary of the above cases in *Del Rio Vineyards,*  
7 *LLC v. Jackson County*, explaining:

8 "In *Wilson*, we held that an access road/driveway to a winery is an  
9 accessory use to the winery, and upheld the county's denial of a  
10 permit for the winery on an EFU-zoned parcel where the zoning of  
11 the access road did not allow wineries. In *Roth*, we held that an  
12 access road/driveway to a winery is an accessory use to the winery  
13 and that the county erred in approving the winery where the  
14 residential zoning of the access road/driveway did not allow  
15 wineries. In *Bowman Park*, we held that an access road/driveway to  
16 an industrial use was an accessory use to the industrial use, and that  
17 the city erred in approving the industrial use where the residential  
18 zoning of the access road/driveway did not permit industrial uses."  
19 73 Or LUBA 301, 309 (2016).

20 Petitioner maintained before the hearings officer that it was not necessary  
21 to cross the OC zone in order to access the drive-thru. Record 77-2. The proposed  
22 drive-thru loop and the minimum code-required number of parking spaces (19)  
23 are located entirely on the CBD portion of the site where drive-thrus are  
24 permitted, if they comply with the applicable criteria. However, the hearings  
25 officer explained, uses accessory to or part of petitioner's restaurant and drive-  
26 thru use are not permitted outright in the OC zone. The additional parking and  
27 parking access is proposed to serve a use not allowed in the zone where parking  
28 and parking access is proposed. Petitioner argues that the hearings officer did not  
29 identify a provision in the CDC that prohibits parking located in one zone to serve

1 a use allowed in an abutting zone. Petition for Review 20. Petitioner, however,  
2 bears the burden of proof for its application. Petitioner has not identified any OC  
3 zone provision under which the proposed use is allowed. Petitioner argues that  
4 “[t]he parking at issue here is not required or necessary for the permanent use of  
5 the Property to function.” Petition for Review 21. This may or may not be the  
6 case, but petitioner has asked the county to allow parking and related activity in  
7 the OC zone as part of its application.

8 Petitioner’s argument that joint driveways in shopping centers with  
9 multiple zones are common, that shared access points are desirable, and that  
10 public policy concerns are not compromised on the present facts are not  
11 responsive to the hearings officer’s findings concerning what the CDC allows in  
12 the OC zone. Petition for Review 15, 17. There is no shopping center here and  
13 whether shopping centers with multiple underlying zones are common is  
14 irrelevant. Furthermore, nothing in the special use standards encouraging  
15 consolidation of access points overrides the OC zone’s use restrictions. We agree  
16 with the hearings officer that the parking lot (that is the parking and parking  
17 accessways) serving the restaurant use are part of the restaurant use and not  
18 permitted in the OC zone.

19 Petitioner argues that the hearings officer erred in finding that the proposal  
20 for excess parking in the OC zone justified denial of the application because it  
21 conflicts with the hearings officer’s finding that the parking requirement is met.

1 We conclude that the hearings officer's findings are not inconsistent. The  
2 minimum required parking spaces for a 3,885-square-foot drive-thru restaurant  
3 is 19 and the maximum number of parking spaces is generally 48. Record 40.  
4 CDC 413-6.1 and 413-6.3 provide that for a "Drive-in restaurant or similar drive-  
5 in used for the sale of beverages, food or refreshments for consumption off the  
6 premises," the maximum number of off-street parking spaces is "5 per one  
7 (1,000) thousand square feet of gross floor area." And in Zone A, "12.4 per one  
8 (1,000) thousand square feet of gross floor area." Record 40. CDC 413-6.6  
9 provides, however, that in Zone A, the review authority may approve off-street  
10 parking in excess of the maximum parking standards based on findings that:

11 "A. The nature of the development will result in higher off-street  
12 parking demand relative to similar uses in the same parking  
13 zone; and

14 "B. To the greatest degree practicable, the development includes  
15 the implementation of opportunities for shared parking,  
16 parking structures, utilization of public parking spaces and  
17 other appropriate demand management programs. Demand  
18 management programs may include, but are not limited to  
19 subsidized transit passes, shuttle service, and carpool  
20 programs."

21 The hearings officer concluded that petitioner had met the requirements to  
22 provide more than the maximum amount of parking, 48 spaces, allowed to serve  
23 a 3,885 square foot restaurant under the code. The hearings officer's findings that  
24 these standards are met include that "[t]here is no dispute that this use is expected  
25 to generate greater customer demand than most other drive-in restaurants."

1 Record 41. However, petitioner proposed providing some of that parking and  
2 related maneuverability area within a zone where the parking and maneuvering  
3 use is not allowed under the OC zone regulations. The hearings officer's  
4 conclusion that 94 spaces have been justified is not in conflict with the hearings  
5 officer's determination that parking associated with the drive-thru restaurant use  
6 is not allowed on the OC-zoned portion of the property.

7 Lastly, petitioner argues that the hearings officer does not explain why  
8 limitations on proposed uses in the OC zone requires denial of the entire  
9 application. Petitioner relies on *Del Rio Vineyards* for the argument that "a  
10 princip[al] use need not be subject to the land use restrictions applying only to its  
11 accessory access." Petition for Review 16. In *Del Rio Vineyards*, we determined  
12 that an access road accessory to a proposed mining use was a conditional use in  
13 the zone in which the road was proposed. We concluded that the mining use itself,  
14 located in a zone where mining is permitted, was not subject to the conditional  
15 use approval criteria applicable to the road. *Del Rio Vineyards* provides no  
16 support for petitioner's argument that the hearings officer was required to  
17 approve part of the application (those uses allowed in the CBD zone) when  
18 presented with a site plan proposing uses in both the CBD and OC zones.

19 The first assignment of error is denied.

## 20 **SECOND ASSIGNMENT OF ERROR**

21 Petitioner's second assignment of error is that the hearings officer's  
22 findings are not supported by substantial evidence and are inadequate and

1 conclusory. Petitioner argues that the findings do not explain why the hearings  
2 officer reached a given conclusion, and the conclusion is not supported by any  
3 evidence in the record. Adequate findings identify the relevant criteria, the facts  
4 relied upon, and how the facts lead to the conclusion that the criteria are or are  
5 not met. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). Substantial  
6 evidence is evidence that a reasonable person would rely on in making a decision.  
7 *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). We will  
8 reverse or remand a local government decision that is not supported by substantial  
9 evidence in the whole record. ORS 197.835(9)(a)(C).

10 The hearings officer found:

11 “[Petitioner] proposes to use the OC zoned area in the northeast  
12 corner of the site *for storing excess drive-thru queues at least during*  
13 *the ‘opening’ period of the use. (See page 29 of Exhibit T of the*  
14 *application, which shows excess drive-thru vehicle queuing along*  
15 *the west and north boundaries of the site and [petitioner’s*  
16 *development manager’s] testimony at the hearing).*” Record 26.

17 Petitioner argues that the hearings officer’s conclusion that excess drive-thru  
18 queues will occur in the OC zone, at least during the “opening period,” is not  
19 supported by substantial evidence. Petitioner maintains that the site plan shows  
20 queuing only in the CBD zone as shown at Record 130, reproduced above, and  
21 that the hearings officer’s contrary conclusion is inconsistent with the site plan  
22 and that this evidence clearly outweighs the conflicting evidence. Petition for  
23 Review 25-26. Petitioner maintains that no portion of the drive-thru use is  
24 proposed in the OC-zoned portion of the Property. Petition for Review 23.

1 Petitioner cites its argument below that “[s]taff agreed with this assessment, and  
2 in its July 7 memo to the Hearings Officer, staff concurred ‘that the drive-thru  
3 functions occur strictly in the Community Business District (CBD) only and not  
4 in the OC zoning district.’” Record 100, Petition for Review 26. Petitioner cites  
5 Record 110. Petition for Review 26. This record page includes the statement:

6 “[T]he Kittleson Memo, dated June 28, 2022, includes a graphical  
7 attachment that addresses questions concerning the Office  
8 Commercial (OC) zoning district and how it relates to the drive-thru  
9 functions of the propose[d] fast-food restaurant. The graphic  
10 identifies where the OC zoning district is on the subject site in  
11 relation to the drive-thru of the restaurant. Staff concurs that the  
12 drive-thru functions occur strictly in the Community Business  
13 District (CBD) only and not in the OC zoning district.” Record 110.

14 Petitioner contends that any conclusion about excess vehicle queuing is merely  
15 speculative. Petitioner maintains that there is not substantial evidence that the  
16 applicant proposed to use the OC-zoned portion of the site for excess drive-thru  
17 vehicle queuing. We deny this assignment of error for the reasons set out below.

18 In order to prevail on a substantial evidence challenge, a petitioner must  
19 identify the challenged findings and explain why a reasonable person could not  
20 reach the same conclusion based on all the evidence in the record. In *Stoloff v.*  
21 *City of Portland*, we explained:

22 “The hearings officer made detailed findings explaining why the  
23 approval criterion is satisfied. Petitioner does not acknowledge, let  
24 alone challenge, those findings. In order to prevail on a substantial  
25 evidence challenge, a petitioner must identify the challenged  
26 findings and explain why a reasonable person could not reach the  
27 same conclusion based on all the evidence in the record. Petitioner

1 has done neither. A reasonable person could reach the conclusion of  
2 the hearings officer that PZC 33.665.310A is satisfied.” 51 Or  
3 LUBA 560, 568 (2006) (citations omitted).

4 “LUBA frequently analyzes findings challenges and evidentiary challenges  
5 separately. In fact, we generally analyze findings challenges first, because our  
6 resolution of the findings challenge frequently affects our resolution of the  
7 evidentiary challenge or makes it unnecessary to decide the evidentiary  
8 challenge.” *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261, 277-78  
9 (2006) (citing *Friends of Linn County v. Linn County*, 37 Or LUBA 844, 856  
10 (2000); *1000 Friends of Oregon v. Columbia County*, 27 Or LUBA 474, 476  
11 (1994); *Holliday Family Ranches v. Grant County*, 10 Or LUBA 199, 205  
12 (1984)).

13 Petitioner argues:

14 “*The Hearings Officer principally relied on pg. 29 of ‘Exhibit T’ of*  
15 *the original application for his conclusion that In-N-Out proposed*  
16 *excess drive-thru queuing in the OC zone. (Rec. 26 ER-19.)*  
17 However, Exhibit T is merely In-N-Out’s neighborhood meeting  
18 notes and is not the same as the initial site plan that In-N-Out  
19 submitted with its Application, or its final annotated site plan  
20 submitted during the open record periods. This is plain when  
21 comparing the following images. The first, shown below, is the pre-  
22 application plan diagram, which was part of In-N-Out’s power point  
23 presentation, upon which the Hearings Officer relied (Rec  
24 629). \* \* \* The second, shown below, is ‘Exhibit A’ to the actual  
25 Application, which is labeled ‘New Site Plan’ by In-N-Out and  
26 ‘Proposed Site Plan – Revised’ in the Record. (Rec. 318).”<sup>2</sup> Petition

---

<sup>2</sup> The site plan at Record 318 appears to us to be the same as that at Record 130 and reproduced above.

1 for Review 23-24 (emphasis added).

2 Petitioner does not explain its reasoning for concluding that the hearings officer  
3 relied *principally* on Exhibit T. The hearings officer found:

4 “[Petitioner] also proposes to use the OC zoned area in the northeast  
5 corner of the site for storing excess drive-thru queues at least during  
6 the ‘opening ‘period of the use. (See page 29 of Exhibit T of the  
7 application, which shows excess drive-thru vehicle queuing along  
8 the west and north boundaries of the site and [petitioner’s  
9 development manager’s] testimony at the hearing).” Record 26  
10 (emphasis added).

11 The hearings officer cited both Exhibit T of petitioner’s application and the  
12 testimony of petitioner’s development manager. Petitioner does not address the  
13 hearings officer’s finding that petitioner’s development manager’s testimony  
14 supported the conclusion that the northeast corner of the site would be used for  
15 excess drive-thru vehicle queues. Although petitioner argues “both staff and In-  
16 N-Out portrayed [the later site plan] as more accurately reflective of the necessity  
17 for queuing (and specifically the lack thereof) in the OC zone,” the record is  
18 ambiguous concerning planning staff’s conclusion. Petitioner’s counsel’s July  
19 14, 2022, letter stated:

20 “First, as shown by the graphical attachment to Kittelson &  
21 Associate’s June 28, 2022 memorandum to the Hearings Officer (the  
22 ‘Kittelson Memo’), cars do not have to cross the OC zone to get to  
23 the drive-through. Staff agreed with this assessment, and in its July  
24 7 memo to the Hearings Officer, staff concurred ‘that the drive-thru  
25 functions occur strictly in the Community Business District (CBD)  
26 only and not in the OC zoning district.’” Record 100.

1 Planning staff’s reference to “drive-thru functions” could reasonably be read to  
2 mean that the staff agreed with Kittelson that cars do not have to cross the OC  
3 zone in order to get to and through the drive-thru loop. Record 110.

4 In its statement of facts, petitioner describes a “conceptional temporary  
5 traffic management condition which will occur, to some degree and for some  
6 undetermined duration, during the period immediately after the restaurant opens  
7 (the ‘opening period’).” Petition for Review 5. Petitioner argues that the hearings  
8 officer found that during the “opening period,” the drive-thru vehicle queuing is  
9 likely to be extended beyond that shown on petitioner’s plan entirely within the  
10 drive-thru loop in the CBD zone without pointing to supporting evidence. Petition  
11 for Review 26-27. Elsewhere in the findings, however, the hearings officer found:

12 *“[U]se of the OC zoned portions of the site for excess drive-thru*  
13 *vehicle queue storage is a necessary part of the proposed*  
14 *development. There is no evidence that the use can meet County and*  
15 *ODOT mobility requirements without providing excess drive-thru*  
16 *vehicle queue storage within the OC zoned portions of the site,*  
17 *especially during the restaurant’s ‘opening’ period. The ‘opening’*  
18 *period may continue ‘for several years.’ ([city planner]*  
19 *testimony).”<sup>3</sup> Record 26.*

20 SW Beaverton-Hillsdale Highway is also known as OR-10 and is “a  
21 County Arterial but under Oregon Department of Transportation (ODOT)  
22 jurisdiction.” Record 8. The hearings officer concluded that “[petitioner] will be

---

<sup>3</sup> We also observe that the hearings officer found that excess drive-thru vehicle storage to meet mobility requirements was *especially* needed during the opening period, not that it would only occur during the opening period.

1 required to submit a Traffic Management Plan, to be approved by ODOT in  
2 coordination with Washington County.” *Id.* Petitioner correctly states that  
3 petitioner’s Traffic Management Plan was not included in the record before the  
4 hearings officer. Petitioner also points out that the hearings officer stated that the  
5 future traffic management plan will be subject to state and county review without  
6 public input. Petition for Review 6. However, neither argument undercuts the  
7 hearings officer finding that based on evidence of petitioner’s mobility  
8 requirements, vehicle queue storage will be an operational necessity.

9 The hearings officer found that petitioner’s development manager testified  
10 that petitioner plans to open other restaurants in the Portland metro area and that  
11 as new restaurants open, demand at the subject property will decrease. Record  
12 21. The hearings officer concluded, however, that during the opening period

13 “drive-thru vehicle queues are likely to extend beyond the drive-thru  
14 lanes surrounding the proposed building and exceeding the 24  
15 vehicle storage shown in [petitioner’s] plan. [Petitioner] proposed to  
16 allow these excess traffic queues to extend into the on the site  
17 parking lot drive aisles, providing additional on-site queue storage  
18 in order to limit the potential for traffic queues spilling onto SW  
19 Beaverton-Hillsdale Highway. [Petitioner] will utilize additional  
20 on-site traffic control personnel to direct traffic and maintain orderly  
21 movements during this ‘opening’ period.” Record 22.

22 Consistent with this finding, the hearings officer found that petitioner

23 “can manage on-site traffic during the ‘opening’ period to ensure  
24 that on-site vehicle queues do not extend past the drive-thru exit and  
25 prevent customers from leaving the site. On and off-site traffic  
26 control personnel can direct drive-thru customers to the eastern  
27 driveway where they will circle around the building to the north and

1 west prior to entering the exclusive drive-thru lanes in the northwest  
2 portion of the site.” Record 23.

3 Petitioner does not address evidence referenced in the findings that excess vehicle  
4 queuing storage is necessary and proposed and therefore does not establish a basis  
5 for reversal or remand based on inadequate findings or lack of substantial  
6 evidence.

7 The hearings officer stated that “it is not possible to approve this  
8 application subject to a condition of approval prohibiting use of the OC zoned  
9 portions of the site for excess drive-thru vehicle queue storage.” Record 26.

10 Petitioner also argues that the hearings officer’s finding that a condition of  
11 approval providing that the OC-zoned portion of the property may not be used  
12 for this purpose is “not appropriate and is not supported by substantial evidence  
13 \* \* \*.” Petition for Review 27. ORS 215.416(4)(a) provides that “[a] county may  
14 not approve an application if the proposed use of land is found to be in conflict  
15 with \* \* \* applicable land use regulation or ordinance provisions. The approval  
16 *may* include such conditions as are authorized by statute or county legislation.”  
17 (Emphasis added.) Petitioner does not identify any CDC provision, statute, or  
18 case law that requires the hearings officer to impose conditions of approval to  
19 satisfy the county’s special use standards, and ORS 215.416(4) provides only that  
20 the county has the option of doing so. This argument is insufficiently developed  
21 for our review.

22 The second assignment of error is denied.

1 **FOURTH ASSIGNMENT OF ERROR**

2 CDC 430-135 regulates “temporary uses,” that is, uses “of an impermanent  
3 nature, or one used for a limited time.” Petitioner’s fourth assignment of error is  
4 that the hearings officer’s finding “that the temporary use of the OC-zoned  
5 portion of the Property cannot be approved by the Director is not supported by  
6 an adequate interpretation of the CDC, is not supported by evidence, and such a  
7 finding is plainly inadequate.” Petition for Review 47. Petitioner also argues that  
8 the “Hearings Officer failed to set out the facts which are believed and relied  
9 upon, and explain how those facts lead to the decision regarding compliance with  
10 CDC 430.135.1.C.8.” *Id.*

11 Petitioner stated in its August 9, 2022, letter:

12 “[Petitioner] is cognizant of the Hearings Officer’s concerns about  
13 the *temporary* primary use of the east access point during the  
14 opening period as part of the Traffic Management Plan. However,  
15 none of the cases above concern only temporary conditions and the  
16 Application is for a permanent use, not a temporary one. Regardless,  
17 the Planning Director has wide authority to approve temporary uses  
18 for up to one year CDC 430-135.1.C as a Type I permit.” Record  
19 77-6 n 1 (emphasis in original).

20 The hearings officer found:

21 “[Petitioner] argued that ‘[t]he Planning Director has wide authority  
22 to approve temporary uses for up to one year . . . as a Type I permit’  
23 pursuant to CDC 430-135.1.C. (Footnote 1 of Exhibit OR 1-g). The  
24 hearings officer disagrees. CDC 430-135.1.C limits temporary uses  
25 to those listed in CDC 430-135.1.C(1)-(7), (9), and (10) as well as  
26 ‘Other similar uses of a temporary nature when approved by the  
27 Director.’ CDC 430-135.1.C(8).

1           “i.     There is no evidence that the use of the OC zoned portions of  
2           the site for excess drive-thru vehicle queue storage is one of  
3           the uses listed in CDC 430-135.1.C(1)-(7), (9), and (10), or  
4           that such use is ‘similar’ to any of the listed uses. Therefore,  
5           the hearings officer cannot find that it is feasible for the  
6           applicant to obtain a temporary permit for this use.

7           “ii.    In addition, temporary permits are limited to ‘[a] period not  
8           to exceed 1 year.’ CDC 430-135.1.C. The language of the  
9           Code does not allow for approval of the extension of a  
10          temporary permit approval or back to back one-year  
11          temporary permits for the same use.” Record 26-27.

12           We will remand a decision where the findings are inadequate to explain  
13          why a hearings officer interprets an applicable criterion in a given manner.  
14          *Butcher v. Washington County*, 65 Or LUBA 263, 270 (2012) (decision remanded  
15          where the findings were inadequate to explain why a hearings officer interpreted  
16          setback provisions that require a 100-foot setback to apply only to a proposed  
17          new kennel building and to not apply to outdoor dog play areas). Petitioner argues  
18          that the hearings officer did not provide an adequate interpretation of the CDC.  
19          We agree with petitioner that the hearings officer did not identify language in the  
20          CDC supporting its conclusion that multiple temporary permits or extensions of  
21          temporary permits are not permissible or requiring a finding that the temporary  
22          activity will end within one year.

23           The hearings officer also found that there was no evidence that excess  
24          drive-thru vehicle storage is similar to those uses that qualify for temporary  
25          permits. We have held that a hearings officer’s interpretation is inadequate for  
26          review where the hearings officer finds that a proposed bed and breakfast inn

1 designed for occupancy by an employee caretaker and up to eight non-resident  
2 guests qualifies as a “bed and breakfast inn,” without explaining how a caretaker  
3 occupancy is consistent with the county code which defines a bed and breakfast  
4 inn as an “owner-occupied” “single-family dwelling.” *Elenes v. Deschutes*  
5 *County*, 78 Or LUBA 483, 494 (2018). Similarly here, the hearings officer was  
6 required to adopt findings interpreting “similar” uses potentially eligible for a  
7 temporary permit.

8 Because we conclude that the hearings officer did not adopt adequate  
9 findings construing the CDC, we will not address petitioner’s argument that the  
10 hearings officer misconstrued the code or made findings not supported by  
11 substantial evidence.

12 The fourth assignment of error is sustained.

13 **THIRD ASSIGNMENT OF ERROR**

14 CDC 106-141 defines a nonconforming use as “[a] structure or use of land  
15 which does not conform to the provisions of this Code or Comprehensive Plan  
16 lawfully in existence on the effective date of enactment or amendment of this  
17 Code or Comprehensive Plan.” Petitioner’s third assignment of error is that the  
18 hearings officer made inadequate and inconsistent findings concerning whether  
19 there was a legal nonconforming use right to conduct petitioner’s operations in  
20 the OC zone.

21 In their summary of facts, the hearings officer stated: “The [subject  
22 property] is currently developed with two existing restaurants, one with a drive-

1 thru (Hawaiian Time), the other with dine in, Azteca, which is permanently  
2 closed.” Record 8. The hearings officer found:

3 “[Petitioner] argues that use of the OC zoned portions of the [subject  
4 property] for vehicle parking and maneuvering is allowed as a legal  
5 nonconforming use that may be continued. The existing restaurants  
6 on the site were legally established when the entire site was zoned  
7 CBD. Those approvals included use of the now OC zoned portions  
8 of the site for vehicle parking and maneuvering associated with  
9 those restaurant uses. (See attachments 2 through 8 of Exhibit OR  
10 1-g). It appears that these uses were legally established more than  
11 20 years ago and [petitioner] argued that the uses have continued  
12 without interruption of more than one year. (See attachment 9 of  
13 Exhibit OR 1-g). *Assuming, without deciding, that the applicant  
14 sustained its burden of proof that the existing restaurant uses were  
15 legally established and continued without interruption for one year  
16 or more, the applicant would be allowed to continue using these  
17 areas for vehicle parking and maneuvering associated with the  
18 proposed restaurant use, pursuant to CDC 440-1.*

19 “*However, [petitioner] also proposes to use the OC zoned area in  
20 the northeast corner of the site for storing excess drive-thru queues  
21 at least during the ‘opening’ period of the use. \* \* \* Based on the  
22 evidence in the record, the exclusive drive-thru lanes for the existing  
23 restaurants on the site were located entirely in the CBD zoned  
24 portions of the site. \* \* \* There is no evidence that the existing  
25 restaurants ever generated excess drive-thru queuing that extended  
26 into the OC zoned portions of the site. Therefore, the hearings  
27 officer finds that [petitioner’s] proposal to use the OC zoned  
28 portions of the site for drive-thru queue storage constitutes an  
29 alteration of the legally established non-conforming use of the OC  
30 zoned portion of the site and [petitioner] failed to demonstrate that  
31 the alteration meets the standards [] for alterations in CDC 440-  
32 6.2.B.*” Record 25-26 (emphasis added).

33 The hearings officer found “[petitioner] argues that these uses have continued  
34 without interruption for twenty years or more. Therefore, *assuming that the uses*

1 *have been continued*, the applicant may continue to use the OC zoned portions of  
2 the site for vehicle parking and maneuvering as a continuation of a legal  
3 nonconforming use.” Record 33 (emphasis added). The hearings officer also  
4 found:

5 “The site encompasses two land use districts: [CBD] and [OC]. The  
6 proposed eating and drinking establishment with drive-thru will be  
7 constructed within the CBD district portion of the site, with  
8 additional overflow parking in the OC designated portions of the  
9 project site. The restaurant structure as well as the drive-thru lanes  
10 are proposed only in the CBD portion of the site. However, as  
11 discussed above, some uses – parking maneuvering, and excess  
12 drive-thru vehicle storage – are proposed in the OC zoned portions  
13 of the site. *If the existing restaurant uses were not discontinued for*  
14 *one year or more and the hours of operation of those uses were*  
15 *consistent with the proposed use, the parking and maneuvering uses*  
16 *may continue as a nonconforming use.* However, the use of the OC  
17 zone for excess drive-thru vehicle storage is prohibited.” Record 44-  
18 45 (emphasis added).

19 The hearings officer found that they were not deciding whether any  
20 nonconforming use rights existed, but assuming they did, those rights did not  
21 include the proposed storage of vehicle overflow from the drive-thru. The  
22 hearings officer also made an inconsistent finding, stating that they

23 “must deny this application because the application is proposing to  
24 use the OC zoned area in the northeast corner of the site for excess  
25 drive-thru vehicle queue storage, *a use prohibited in the OC zone*  
26 *that is beyond the scope of the legally established non-conforming*  
27 *use on the site \* \* \*.*” Record 27.

28 Where a relevant issue is adequately raised in a land use proceeding, the  
29 findings supporting the final decision must address the issue and where the

1 findings do not do so, remand is required. *Space Age Fuel, Inc. v. Umatilla*  
2 *County*, 72 Or LUBA 92, 97 (2015). Whether the OC zone restrictions are  
3 inapplicable to the subject property because petitioner held a nonconforming use  
4 right was a relevant issue that petitioner raised during the proceedings before the  
5 hearings officer.<sup>4</sup> We conclude that the hearings officer was required to make  
6 findings as to whether there was a legal nonconforming use to conduct the  
7 proposed activities in the OC zone, what, if any, the extent of that use is, and  
8 explain the basis for that finding. The hearings officer’s findings “assuming,” for  
9 purposes of their analysis, that the proposed use is nonconforming does not  
10 answer the question of whether the use is nonconforming. The inconsistent  
11 finding that a legal nonconforming use right exists does not explain the basis for  
12 that finding and is also inadequate.

13         Petitioner also argues that the hearings officer could not rely on county or  
14 ODOT mobility standards to conclude excess vehicle storage was proposed and,  
15 if proposed, was not allowed as an alteration of a conforming use. The hearings  
16 officer found that the traffic demand evidence in the record supported the  
17 conclusion that petitioner would store vehicles on the property and we see no  
18 reason why the hearings officer could not consider that evidence. We agree with

---

<sup>4</sup> No party intervened on the side of the county and the county did not file a response brief in this appeal. For the purposes of this decision, we assume that petitioner adequately raised the nonconforming use issue during the course of the proceedings and was not required to modify its application or separately apply for verification of a nonconforming use.

1 petitioner, however, that the hearings officer was required to respond to  
2 petitioner's argument that this could be permitted as an alteration of a  
3 nonconforming use. The hearings officer's findings do not explain the evidence  
4 relied upon by the hearings officer to conclude that the applicant failed to meet  
5 the alteration standards in CDC 440-6.2.B. Record 26. The hearings officer must  
6 address petitioner's argument that its use in the OC zone may be allowed in this  
7 proceeding as an alteration of a nonconforming use.

8         Petitioner also argues that the hearings officer's findings that the proposed  
9 use is beyond the scope of its legally nonconforming use is not supported by  
10 substantial evidence. Because the hearings officer has not adopted adequate  
11 findings, it would be premature for us to address this element of the assignment  
12 of error.

13         This assignment of error is sustained.

14         The decision is remanded.