

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

WINDLINX RANCH TRUST,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

OREGON DEPARTMENT OF TRANSPORTATION,
Intervenor-Respondent.

LUBA No. 2024-010

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Christopher P. Koback filed the petition for review and reply brief and argued on behalf of petitioner. Also on the brief was Hathaway Larson LLP.

No appearance by Deschutes County.

Stacy C. Posegate filed the intervenor-respondent's brief and argued on behalf of intervenor-respondent. Also on the brief was Ellen Rosenblum, Attorney General.

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

REMANDED 06/24/2024

You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a hearings officer declaratory ruling concluding that certain property is zoned Rural Residential (RR-10).

FACTS

“There is a road, no simple highway.”¹ The road is US Highway 97, which runs from Oregon’s northern border south to the California border and passes through Deschutes County. As explained in the hearings officer’s decision, intervenor-respondent Oregon Department of Transportation (ODOT) proposes to construct a 6.1-mile pedestrian and bicycle trail, sometimes referred to as a path:

“The path would parallel Highway 97 and provide bicycle and pedestrian access between the City of Bend and areas south of the city, portions of which are on federally-owned lands. When completed the path will tie into the existing Sun Lava Trail, which connects to the Sunriver community and to other recreational areas and attractions in the same vicinity.” Record 46.

As part of that proposal, ODOT submitted an application for a declaratory ruling to establish the zoning of the portion of the Highway 97 right of way on which approximately 2,400 linear feet of the trail, north of the High Desert Museum property and west of petitioner’s property, is proposed to be constructed (Trail Area). The hearings officer held a hearing on the application and

¹ The Grateful Dead, Ripple, on American Beauty (Warner Bros. 1970).

1 determined that the zoning of the right of way in the Trail Area is Rural
2 Residential (RR-10). As we explain in more detail below, certain road and street
3 projects are uses permitted outright in the RR-10 zone. Petitioner sought review
4 by the board of commissioners, but the board of commissioners declined review.
5 This appeal followed.

6 **FIRST ASSIGNMENT OF ERROR**

7 **A. Background**

8 Petitioner's first assignment of error requires a brief foray back in time to
9 1999, when the board of commissioners denied ODOT's application for a
10 conditional use permit and variance to construct a weigh station on the same
11 property that now includes the Trail Area (Weigh Station Decision) and wherein
12 the board of commissioners stated that the Trail Area's zoning was Forest Use
13 (F-2).

14 **B. Assignment of Error**

15 Petitioner's first assignment of error contains two subassignments of error.
16 The first subassignment of error argues that the hearings officer's findings are
17 inadequate to address petitioner's argument below that the hearings officer was
18 bound by the board of commissioners' Weigh Station Decision that concluded
19 that the zoning of the Trail Area was F-2, and consequently that determination
20 could not be collaterally attacked in the proceeding on ODOT's application for a
21 declaratory ruling regarding the Trail Area's zoning. The second subassignment
22 of error argues that the hearings officer's conclusion that the doctrine of issue

1 preclusion does not bar ODOT's application seeking to establish the Trail Area's
2 zoning, misconstrues the applicable law.

3 **1. First Subassignment of Error – Collateral Attack**

4 As the court of appeals recently explained:

5 “A collateral attack ‘is an attempt to impeach the decree in a
6 proceeding not instituted for the express purpose of annulling,
7 correcting, or modifying the decree’ or enjoining its execution.
8 *Morrill v. Morrill and Killen*, 20 Or 96, 101, 25 P 362 (1890).
9 Collateral attacks are not permitted because the court or other
10 tribunal having jurisdiction over parties and subject matter ‘has a
11 right to decide every question arising in the case, and, however
12 erroneous its decision may be, it is binding on the parties until
13 reversed or annulled.’ *Id.* at 102, 25 P 362.” *Johnson v. Landwatch*
14 *Lane County*, 327 Or App 485, 490 n 8, 536 P3d 12 (2023).

15 Petitioner argued below that “[f]inal land use decisions cannot be collaterally
16 attacked in a later application. *Gansen v. Lane County*, ___ Or LUBA ___
17 (LUBA No 2020-074[, Feb 22, 2021]).”² Record 219. Petitioner argued below

² *Gansen* concerned an appeal of a 2020 hearings officer decision determining that the petitioner's property was not a lawfully established unit of land. In 2001, the county engineer verified that the property was a “legal lot,” that is, a lawfully created, legally separate unit of land for development purposes that may be conveyed without county approval of a subdivision. A 2002 building permit for a home constructed on the property included a section entitled “Land Use Review.” Next to “Legal Lot Status,” staff wrote the letter “Y” with the additional language “PA 01-5412,” the number associated with the 2001 verification. In 2020, the petitioner, in advance of a property line adjustment application, applied for a legal lot verification. The planning director concluded that the subject property was not a lawful parcel and the hearings officer affirmed that decision. The petitioner appealed the hearings officer's decision to us.

1 and argues here that the board of commissioners in the Weigh Station Decision
2 determined that the Trail Area is zoned F-2, and that ODOT could have, but did
3 not, appeal that determination. Thus, petitioner argued to the hearings officer that
4 the board of commissioners' determination regarding the Trail Area's zoning is
5 final, ODOT's application requests that the county make a decision that
6 collaterally attacks the board of commissioners' previous determination in the
7 Weigh Station Decision that the Trail Area is zoned F-2, and a different
8 determination that the Trail Area is zoned RR-10 is prohibited by the collateral
9 attack doctrine.

10 Deschutes County Code (DCC) 22.40.010 addresses declaratory rulings
11 and provides, in part:

12 "A. Subject to the other provisions of DCC 22.40.010, there shall
13 be available for the County's comprehensive plans, zoning
14 ordinances, the subdivision and partition ordinance and DCC
15 Title 22 a process for:

We explained that in challenging a development approval that depends upon a prior, unappealed land use decision, LUBA will not review arguments that the prior, unappealed decision was procedurally flawed or substantively incorrect, because such a challenge would constitute an impermissible collateral attack on a decision not before LUBA. ____ Or LUBA ____, ____ (LUBA No 2020-074, Feb 22, 2021) (slip op at 11-12). We reversed the hearings officer's decision, explaining that "the county's attempt to correct what the county has essentially concluded was a mistake in the 2002 Building Permit is nothing short of a collateral attack on the correctness of that decision." *Id.* at ____ (slip op at 13).

1 “1. Interpreting a provision of a comprehensive plan or
2 ordinance (and other documents incorporated by
3 reference) in which there is doubt or a dispute as to its
4 meaning or application;

5 “2. Interpreting a provision or limitation in a land use
6 permit issued by the County or quasi-judicial plan
7 amendment or zone change (except those quasi-judicial
8 land use actions involving a property that has since
9 been annexed into a city) in which there is doubt or a
10 dispute as to its meaning or application;

11 “3. Determining whether an approval has been initiated or
12 considering the revocation of a previously issued land
13 use permit, quasi-judicial plan amendment or zone
14 change;

15 “4. Determining the validity and scope of a nonconforming
16 use;

17 “5. Determination of other similar status situations under a
18 comprehensive plan, zoning ordinance or land division
19 ordinance that do not constitute the approval or denial
20 of an application for a permit; and

21 “6. Verifying that a lot of parcel meets the ‘lot of record’
22 definition in 18.040.030 pursuant to DCC
23 22.04.040(D).

24 “Such a determination or interpretation shall be known as a
25 ‘declaratory ruling’ and shall be processed in accordance with DCC
26 22.40. In all cases, as part of making a determination or
27 interpretation the Planning Director (where appropriate) or Hearings
28 Body (where appropriate) shall have the authority to declare the
29 rights and obligations of persons affected by the ruling.

30 “B. A declaratory ruling shall be available only in instances
31 involving a fact-specific controversy and to resolve and
32 determine the particular rights and obligations of particular
33 parties to the controversy. Declaratory proceedings shall not

1 be used to grant an advisory opinion. Declaratory proceedings
2 shall not be used as a substitute for seeking an amendment of
3 general applicability to a legislative enactment.

4 “C. Declaratory rulings shall not be used as a substitute for an
5 appeal of a decision in a land use action or for a modification
6 of an approval. In the case of a ruling on a land use action a
7 declaratory ruling shall not be available until six months after
8 a decision in the land use action is final.”

9 We agree with petitioner that the hearings officer’s findings addressing
10 petitioner’s argument that the doctrine of collateral attack precludes the hearings
11 officer from determining in a declaratory ruling that the zoning of the Trail Area
12 is other than F-2 are inadequate. As far as we can tell, those findings are:

13 “Windlinx does argue that the Applicant’s request is precluded by
14 [DCC 22.40.010(B)] because it is ‘used to review and reverse the
15 prior County Board decision.’ The prior decision Windlinx refers to
16 is the County’s 1999 denial of the Applicant’s request to site a weigh
17 station in the same or similar portion of the right-of-way comprising
18 Parcel 1 (the ‘Weigh Station Decision’). That decision applied the
19 F2 zone to that portion of the Subject Property, which Windlinx
20 asserts is dispositive of the zoning issue. The binding nature of the
21 Weigh Station Decision is addressed in more detail below in
22 findings addressing the zoning of Parcel 1. Regardless of the
23 outcome of that issue, however, I find that Windlinx’s argument is
24 not applicable to this specific Code provision, which prevents
25 Declaratory Rulings from serving as ‘a substitute for seeking an
26 amendment of general applicability to a legislative enactment.’ The
27 Weigh Station Decision Windlinx asserts the Applicant is trying to
28 ‘amend’ was not a legislative enactment and, instead, denied the
29 issuance of a conditional use permit. Nor would that decision or any
30 later ‘amendment’ of that decision be of general applicability, as
31 they would apply only to the Applicant.

32 “Based on the foregoing, I find that [DCC 22.40.010(B)] does not
33 limit the Applicant’s ability to make the requests presented in the

1 Application for a Declaratory Ruling.

2 “ * * * * *

3 “Windlinx asserts that [DCC 22.40.010(C)] prohibits the Applicant
4 from requesting a Declaratory Ruling because, according to
5 Windlinx, the request serves as an appeal of the Weigh Station
6 Decision by seeking to overturn that decision. *The binding nature of*
7 *the Weigh Station Decision is addressed in more detail below in*
8 *findings addressing the zoning of Parcel 1.*

9 “The only thing that Applicant’s request in this proceeding has in
10 common with the Weigh Station Decision is that they both involve
11 Parcel 1. The two proceedings do not involve the same use (a weigh
12 station for trucks versus a path for bicycles and pedestrians). The
13 two proceedings also do not appear to involve the same properties
14 other than Parcel 1, as Parcel 2 was not part of the proposal in the
15 Weigh Station Decision. To the extent that the two proceedings may
16 invoke a common issue (the zoning of Parcel 1), that issue is relevant
17 only to a portion of the Applicant’s request in this proceeding, as the
18 Applicant makes alternative requests, some of which assume Parcel
19 1 is zoned RR-10, and some of which assume Parcel 1 is zoned F-2.

20 “The argument Windlinx presents relies on a faulty assumption.
21 Windlinx asserts that ‘[i]f the Hearings Officer declares the subject
22 property RR-10, that decision reverses the 1999 Board decision.’ *
23 * * The Board’s prior decision was to deny a conditional use permit.
24 *As discussed in more detail below*, the Board’s denial was not based
25 on the zoning of the property and, instead, was based on the
26 Applicant s failure to satisfy certain approval standards. If this
27 Decision determines Parcel 1 is zoned RR-10, that will have no
28 effect on the County’s prior decision. The Applicant would not be
29 able to, for example, argue that it now has a conditional use permit
30 for a weigh station. I find it is more accurate to address Windlinx’s
31 argument as one of ‘issue preclusion.’ *That argument is addressed*
32 *in more detail below.*

33 “Based on the foregoing, I find that [DCC 22.40.010(C)] does not
34 limit the Applicant’s ability to requests presented in the Application

1 for a Declaratory Ruling.” Record 49-50 (emphases added;
2 emphases in original omitted; footnote omitted).

3 These findings intermingle references to the criteria applicable to applications for
4 a declaratory ruling and the binding nature of the prior CUP decision and do not
5 address the core of petitioner’s argument, which is that in this proceeding the
6 county is bound by the final, unappealed board of commissioners’ Weigh Station
7 Decision concluding that the Trail Area is zoned F-2. In a section of the decision
8 under the heading “Impacts of the Weigh Station Decision,” the hearings officer
9 viewed petitioner’s argument as an argument that the doctrine of issue preclusion
10 barred the county from reaching a conclusion that the Trail Area is RR-10 and
11 addressed that argument. The doctrine of issue preclusion is related to, but
12 distinct from, the collateral attack doctrine. We agree with petitioner that remand
13 is required for the hearings officer to adopt adequate findings addressing
14 petitioner’s argument that the application is a collateral attack on the final and
15 unappealed Weigh Station Decision.

16 The first subassignment of error is sustained.

17 **C. Second Subassignment – Issue Preclusion**

18 In the Weigh Station Decision, the board of commissioners concluded that
19 the Trail Area’s zoning was Forest Use (F-2):

20 “Highway 97 divides RR-10 zoning to the west and F-2 zoning to
21 the east in the vicinity of the proposed weigh station facility. Section
22 18.12.040 of Title 18 establishes standards for determining zone
23 boundaries cases such as this where a roadway divides zoning
24 districts. Subsection 1 of this section states: ‘Where a boundary line
25 is indicated as following a street, alley, canal or railroad right of

1 way, it shall be construed as following the centerline of such right
2 of way.’ Accordingly, the F-2 zone begins in this area at the
3 centerline of Highway 97 and therefore, that portion of the right-of-
4 way lying east of the highway in this area is zoned F-2, Forest Use.
5 Consequently, the area proposed for the weigh scale facility is zoned
6 F-2.”³ Record 644.

7 In the second subassignment of error, petitioner challenges the hearings
8 officer’s findings that the doctrine of issue preclusion does not prevent the county
9 from determining that the Trail Area is zoned RR-10. LUBA has held that
10 Oregon’s system of land use adjudication “is incompatible with giving preclusive
11 effect to issues previously determined by a local government tribunal in another
12 proceeding.” *Nelson v. Clackamas County*, 19 Or LUBA 131, 140 (1990). We
13 have explained:

14 “When an issue has been decided in a prior proceeding, the prior
15 decision on that issue may preclude relitigation of the issue if five
16 requirements are met: (1) the issue in the two proceedings is
17 identical; (2) the issue was actually litigated and was essential to a
18 final decision on the merits in the prior proceeding; (3) the party
19 sought to be precluded had a full and fair opportunity to be heard on
20 that issue; (4) the party sought to be precluded was a party or was in
21 privity with a party to the prior proceeding; and (5) the prior
22 proceeding was the type of proceeding to which preclusive effect
23 will be given.” *Lawrence v. Clackamas County*, 40 Or LUBA 507,
24 519 (2001), *aff’d*, 180 Or App 495, 43 P3d 1192 (2002).

25 The hearings officer found that factor 1 was unmet because the issue in the Weigh
26 Station Decision was “whether the applicant had demonstrated compliance with
27 the county’s conditional use criteria,” which is not identical to the issue presented

³ We discuss DCC 18.12.040 in detail in the second assignment of error.

1 in the application for a declaratory ruling, which the hearings officer described
2 as “a precise question about the applicable zoning and whether [ODOT’s] bicycle
3 and pedestrian path is a ‘Class III’ project permitted outright in either the RR-10
4 or F-2 zone.” Record 56. The hearings officer also found that factor 2 was unmet
5 because the issue of the zoning of the property was not “actually litigated” and
6 was not “essential” to the final outcome:

7 “[T]he Board did address the zoning of the Highway 97 right-of-
8 way in the [Weigh Station Decision], but that issue was not actually
9 litigated. Rather, the evidence in this record includes a letter from
10 the Applicant’s representative who reviewed the Zoning Map in
11 1994 and concluded that ‘this area appears to be zoned F-2.’ Shortly
12 thereafter, Staff responded that it was Staff’s ‘understanding’ that
13 the F-2 zoning was correct, but that response does not indicate if that
14 understanding was based on a zoning analysis or based on the
15 Applicant’s representation. Further, it is not clear that the zoning
16 issue was essential to the outcome in the earlier case. Indeed, the
17 Weigh Station Decision also expressly determined that a portion of
18 the subject property in that case (an acceleration lane existing the
19 facility) was zoned RR-10. The essential components of that earlier
20 decision were therefore the criteria the Board addressed that it
21 determined were not met rather than any specific findings about the
22 zoning.

23 “The Board’s Weigh Station Decision does describe Highway 97 as
24 dividing ‘the RR-10 zoning to the west and the F-2 zoning to the
25 east in the vicinity of the proposed weigh station facility.’ That
26 description also refers to DCC 18.12.040 and its reference to street
27 centerlines. Despite that language, there is no evidence in the Weigh
28 Station Decision that there was a dispute over the zoning of the
29 right-of-way, much less any indication that the Board addressed the
30 portion of DCC 18.12.040 that states a zone boundary can also
31 follow lot lines. Indeed, the decision expressly notes that it was the
32 Applicant that provided the location and map information the Board

1 relied on. Further, that decision followed a decision by a hearings
2 officer and a staff report, neither of which indicates the zoning of
3 the property was an issue in dispute. Windlinx's own
4 characterization of the earlier proceeding undercuts its position, and
5 Windlinx submitted comments in this proceeding that "[t]he County
6 Board's 1998 [sic] decision simply confirmed what ODOT
7 represented." Record 56-57 (footnote omitted).

8 Petitioner argues that factor 1 is satisfied and that "[t]he zoning issue ODOT
9 raised in [the current application] is exactly the same as the issue decided in 1998-
10 1999. The County Board applied the official zoning map and DCC 18.12.040
11 expressly determining that the subject property is zoned F2." Petition for Review
12 13. Petitioner also argues that factor 2 is satisfied because the issue of the zoning
13 of the Trail Area was "actually litigated" in the Weigh Station Decision, and that
14 determining the zoning was an essential prerequisite to the decision whether to
15 grant the conditional use permit and variance.

16 ODOT responds that the hearings officer correctly decided that factors 1
17 and 2 are not met. Regarding factor 1, ODOT argues that the issue in the present
18 proceeding is not the same as the issue in the Weigh Station Decision because the
19 issue in the Weigh Station Decision was whether the application met the
20 conditional use and variance criteria. ODOT also responds that the hearings
21 officer correctly concluded that factor 2 was unmet because the issue of the
22 zoning of the Trail Area was not actually litigated in the Weigh Station Decision.
23 ODOT argues that nothing in the Weigh Station Decision supports petitioner's
24 argument that the location of the zoning boundary was in dispute and that the
25 decision assumed that the zoning was F-2. We understand ODOT to contend that

1 the board of commissioners' reference to DCC 18.12.040 was not essential to the
2 decision because DCC 18.12.040 by its terms only applies *if* a zoning boundary
3 is in dispute *and if* the original county zoning map does not resolve the question
4 of the location of the zoning boundary. Petitioner does not identify evidence in
5 the record that the zoning was in dispute below. The issue of the zoning of the
6 Trail Area was not actually litigated and issue preclusion does not prevent the
7 county from considering the Trail Area's zoning in resolving the application.

8 The second subassignment of error is denied.

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

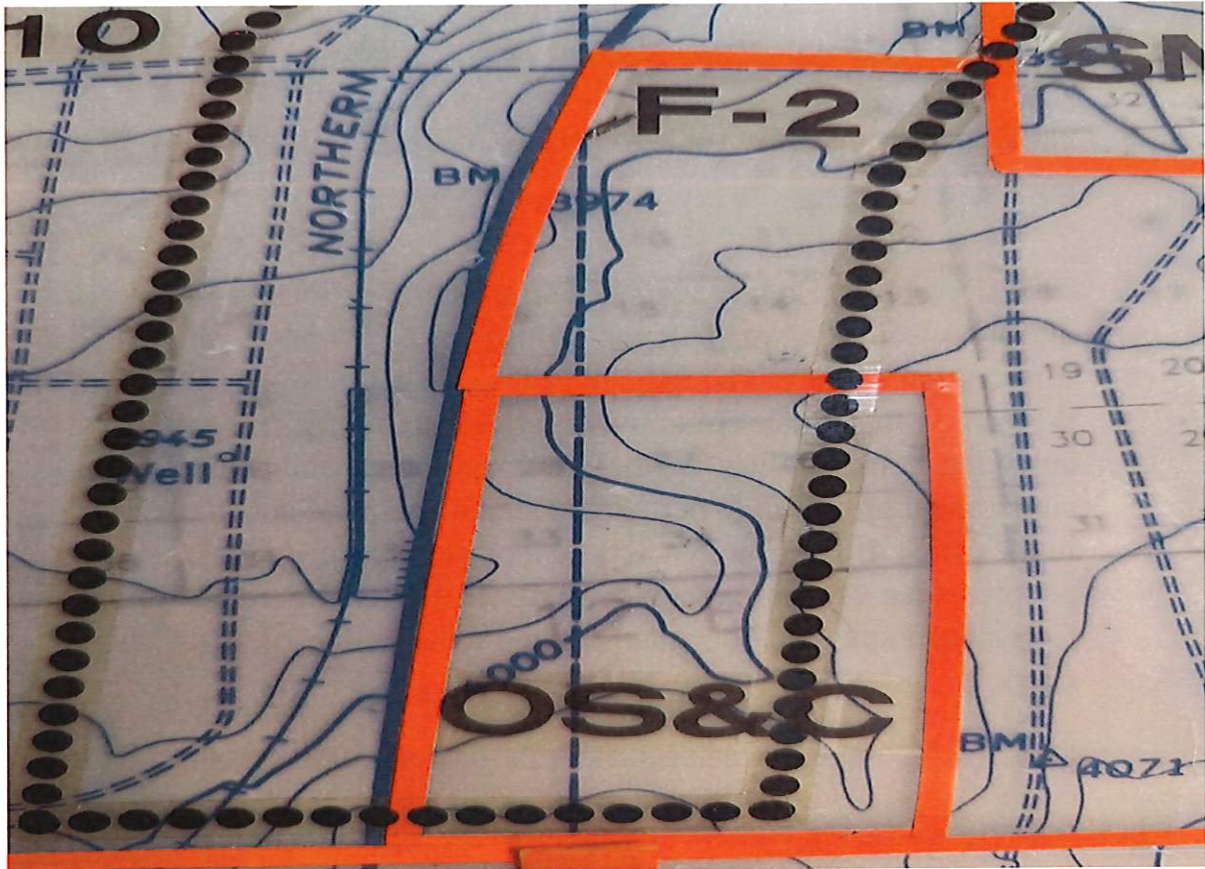
10 **SECOND ASSIGNMENT OF ERROR**

11 A brief description of the various iterations of the county's zoning map is
12 necessary to understand part of the second assignment of error.

13 **A. The County Maps**

14 The county adopted its official zoning map in 1979 (1979 Map). The 1979
15 Map is comprised of a mylar sheet or sheets that depict zoning district boundaries
16 using strips of colored tape. Record 105. Petitioner and ODOT agree that the
17 1979 Map is the official county zoning map.⁴ The 1979 Map that includes the
18 Trail Area is reproduced below.

⁴ Petitioner and ODOT do not agree regarding the parentage of the GIS Maps. Petitioner takes the position that the 1992 Maps and the GIS Maps are different. Petition for Review 24. ODOT maintains that "the same digital data set used to construct the 1992 Maps is used to create maps on the County's GIS database[.]" Intervenor-Respondent's Brief 16.



1

2 In 1992, the county prepared new comprehensive plan mylar maps (1992 Maps)
3 using digital scanning of the 1979 Map. The county adopted Ordinance 92.060,
4 which explained:

5 "The subject map update was accomplished using digital scanning
6 of all county Zoning Maps. The subject Comprehensive Plan Map
7 is essentially an electronic picture of the zoning maps. This new
8 technology allows more precise mapping of exception areas at the
9 scale of the Comprehensive Plan than was possible when the
10 original map was created. The new Comprehensive Plan Map was
11 compared to the original Zoning Maps by overlaying each area of
12 the county to ensure consistency with the original Zoning Maps. The
13 Board finds this to be an accurate methodology to ensure
14 consistency between the original Zoning Maps and the
15 Comprehensive Plan." Record 810.

Sometime after 1992, the county created map layers on the county's geographic information system database (GIS Maps). DCC 18.12.030 provides, in relevant part:

"The Deschutes County zoning map exists in official replica form as an electronic map layer within the County geographic information system. The official copy of the electronic version of the zoning map shall contain a legal description of the area to be amended, a map reflecting the previous zoning and a map of the amendment printed onto permanent media, recorded and maintained in the office of the County Clerk. An original printed version of the adopted map or map amendment signed by the Board of County Commissioners shall be maintained in the office of the County Clerk."

DCC 18.12.040 establishes standards for determining zoning boundaries where the official zoning map, *i.e.* the 1979 Map, is unclear regarding the zoning district boundaries. It provides:

"Unless otherwise specified, zone boundaries are section lines, subdivision lines, lot lines, center lines of street or railroad rights of way, water courses, ridges or rimrocks, other readily recognizable or identifiable natural features, or the extension of such lines. *In case of any dispute regarding the zoning classification of property subject to the County code, the original ordinance with map exhibit contained in the official county records will control.* Whenever uncertainty exists as to the boundary of a zone as shown on the zoning map or amendment thereto, the following rules shall apply:

"A. Where a boundary line is indicated as following a street, alley, canal or railroad right of way, it shall be construed as following the centerline of such right of way.

"B. Where a boundary line follows or approximately coincides with a section lines or division thereof, lot or property ownership line, it shall be construed as following such line.

1 “C. If a zone boundary as shown on the zoning map divides a lot
2 or parcel between two zones, the entire lot or parcel shall be
3 deemed to be in the zone in which the greater area of the lot
4 or parcel lies, provided that this adjustment involves a
5 distance not exceeding 100 feet from the mapped zone
6 boundary. DCC 18.12.040 does not apply to areas zoned
7 flood plain.” (Emphasis added.)

8 **B. Second Assignment of Error**

9 Petitioner’s second assignment of error argues that the hearings officer
10 improperly construed DCC 18.12.040 in concluding that the property is zoned
11 RR-10, and that DCC 18.12.040(A) requires a conclusion that the property is
12 zoned F-2. Preliminarily, we note that petitioner’s second assignment of error is
13 styled as a precautionary assignment of error:

14 “LUBA does not have to decide the second assignment of error if it
15 sustains the first assignment of error as it should. The county made
16 a final land use decision determining that ODOT’s property is zoned
17 F-2. ODOT declined to appeal that decision. The zoning cannot be
18 ‘revisited’ now. If LUBA determines that the 1999 decision cannot
19 be collaterally challenged, ODOT’s request that the county revisit
20 the zoning must be denied and the hearings officer’s decision on that
21 issue must be reversed.” Petition for Review 17.

22 However, petitioner’s first sub-assignment of error under the first assignment of
23 error is a findings challenge only – petitioner argues that the hearings officer’s
24 findings are inadequate to address petitioner’s argument that the Weigh Station
25 Decision cannot be collaterally attacked in the present proceeding. Petition for
26 Review 7, 10-12. Petitioner does not assign as error or otherwise develop an
27 argument that the challenged decision is a collateral attack on the Weigh Station

1 Decision.⁵ Accordingly, our resolution of the first subassignment of error does
2 not require reversal, because the hearings officer must adopt findings addressing
3 petitioner's argument in the first instance.

4 The essence of petitioner's second assignment of error is that DCC
5 18.12.040 requires hierarchical application of (A), (B), and (C) and that DCC
6 18.12.040(A) applies. Accordingly, petitioner argues, the hearings officer erred
7 in applying DCC 18.12.040(B) to find that the boundary between the two zones
8 follows property lines. Petition for Review 20-21, 30-33.

9 We review the hearings officer's construction of DCC 18.12.040 to
10 determine whether it is correct. *McCoy v. Linn County*, 90 Or App 271, 275, 752
11 P2d 323 (1988). We reject petitioner's construction of DCC 18.12.040 as
12 "hierarchical." Nothing in the text of DCC 18.12.040 suggests that it is
13 hierarchical or sequential. Rather, (A) or (B) each apply to a different set of
14 circumstances.⁶ DCC 18.12.040 requires the hearings officer to determine
15 whether the boundary line between the RR-10 zone and the F-2 zone "is indicated
16 [on the original ordinance with map exhibit contained in the official county
17 records] as following a street, alley, canal or railroad right of way" or if the

⁵ Petitioner cites ORS 197.835(9)(a)(D), but we understand the assignment of error to simply restate petitioner's argument before the county as support for its position that responsive findings were required and inadequate findings require remand. Petition for Review 8.

⁶ DCC 18.12.040(C) is not at issue in this appeal.

1 boundary line between the RR-10 and F-2 zones “follows or approximately
2 coincides with” a section line, lot or property ownership line. If the 1979 Map
3 boundary line is indicated as following a street right of way, the zoning district
4 boundary line follows the street right of way. If the 1979 Map boundary line
5 follows a lot or property ownership line, the zoning boundary line follows such
6 lot line.

7 Petitioner argues that the boundary line between the two zones is indicated
8 on the 1979 Map as following Highway 97, and that hearings officer improperly
9 construed DCC 18.12.040 in not concluding that the 1979 Map depicts the
10 boundary line as following Highway 97. ODOT responds, and we agree, that the
11 hearings officer correctly construed DCC 18.12.040. In alternative findings, the
12 hearings officer evaluated the 1979 Map and found that the 1979 Map shows the
13 Trail Area in the RR-10 zone:

14 *“In the alternative, and assuming there is a discrepancy between the*
15 *two versions of the Zoning Map, I find that the original mylars also*
16 *depict Parcel 1 [the Trail Area] as being in the RR-10 zone. The*
17 *basis for that alternative conclusion is set forth below.*

18 “ * * * * *

19 “The Applicant and other participants in this proceeding
20 acknowledge that the original Zoning Map lacks precision and that,
21 due to various factors (width of the tape used, scale of the map), the
22 mylars can be difficult to interpret. The Code contemplates this
23 difficulty, however, and provides guidance on how to determine the
24 location of a particular zone. Specifically, DCC 18.12.040 states that
25 ‘[u]nless otherwise specified, zone boundaries are section lines,
26 subdivision lines, lot lines, center lines of street or railroad rights of

1 way, water courses, ridges or rimrocks, other readily recognizable
2 or identifiable natural features, or the extension of such lines’
3 (emphasis added). No participant has submitted any information to
4 the record describing the zone boundaries using a metes or bounds
5 description, or submitted evidence indicating that the zone
6 boundaries in this area are ‘otherwise specified’ to follow a feature
7 that is not listed in the Code. I further note the presence of other
8 features the Code contemplates as zone boundaries, such as section
9 lines and railroad rights of way, but which the zoning boundary does
10 not appear to follow, and which the participants do not rely on to
11 support their arguments. *Thus, the question to resolve is whether the*
12 *line between the RR-10 zone and the F-2 zone in this area on the*
13 *Zoning Map is intended to follow lot lines (the Applicant’s position)*
14 *or is intended to follow the center line of Highway 97 (Windlinx’s*
15 *position).*

16 *“The 1979 Zoning Map depicts the centerline of Highway 97 as a*
17 *dark, curved line. The tape on the mylar sheets does not appear to*
18 *have a direct relationship to that line. Instead, except for the*
19 *northern portion where the tape crosses the right-of-way line, the*
20 *tape appears to follow property boundaries as described by the*
21 *participants. In other areas on the exhibits in the record, the tape*
22 *appears to follow section lines. Understanding that the width and*
23 *location of the tape is not always consistent, but looking to the*
24 *entirety of the zoning boundary as it is depicted on this portion of*
25 *the Zoning Map, I find it more likely than not that the zoning*
26 *boundary, as indicated by the tape, was intended to follow lot lines*
27 *rather than the centerline of the highway. If the County intended to*
28 *follow the centerline of the highway, one might expect to see the*
29 *tape adhered closer to the black right-of-way line, or even cover that*
30 *line since it is the centerline of that street. I also note that no other*
31 *zone boundary in this area of the Zoning Map appears to key off of*
32 *the Highway 97 centerline. Of all the features the Code*
33 *contemplates as a boundary line, the lot lines to the east of the*
34 *highway right-of-way, rather than the centerline of the highway or*
35 *any other feature, offer the most likely explanation for the*
36 *boundary’s location.*

37 “Windlinx asserts that if the boundary line does not follow the

1 centerline of Highway 97 that the result would be multiple unusable
2 strips of land between Highway 97 and private property to the east
3 of the highway. As the Applicant notes, however, those areas are not
4 unusable if they are zoned RR-10. The evidence in the record
5 indicates that the entire area between the Highway 97 centerline and
6 the private property to the east is part of the Highway 97 right-of-
7 way. As such, that area can be used for right-of-way purposes as
8 long as it is consistent with the applicable provision of the Code.
9 Indeed, the participants appear to agree that there are more uses
10 possible for such areas if they are zoned RR-10 than if they are
11 zoned F-2. It is therefore just as likely that the County intended to
12 have only one zone apply to the Highway 97 right-of-way as it is
13 that it intended to have two different zones, and therefore allow
14 different sets of uses, apply to the same right of way. Regardless of
15 the intent, the bulk of the right-of-way comprising Parcel 1 contains
16 the RR-10 designation, and the line between that zone and the F-2
17 zone adheres to property boundaries more closely than it does to the
18 Highway 97 centerline.

19 “Based on the foregoing, *I find that the Zoning Map, both the analog*
20 *version and the electronic version*, depicts Parcel 1 as being zoned
21 RR-10.” Record 53-55 (underlining in original; italics added).

22 The hearings officer evaluated the 1979 Map and concluded that the boundary
23 line was *not* indicated as following the street right of way (DCC 18.12.040(A))
24 and *does* follow property lines (DCC 18.12.040(B)). The findings quoted above
25 adequately explain why the hearings officer reached that conclusion after
26 studying the 1979 Map.

27 The hearings officer also adopted alternative findings that attempted to
28 explain in detail the relationship between the 1979 Map, the 1992 Maps and the
29 GIS Maps. Record 52-53. As noted, petitioner and ODOT do not agree regarding
30 the parentage of the 1992 Maps and the GIS Maps. Although petitioner’s

1 argument is not entirely clear, we understand petitioner to argue, again, that the
2 hearings officer improperly construed DCC 18.12.040 because that provision is
3 hierarchical, and that their decision regarding the relationship between the
4 various maps is not supported by substantial evidence in the record. Petition for
5 Review 23-25, 28-29.

6 However, the alternative findings that explain the relationship between the
7 various maps are not necessary to the hearings officer's decision because the
8 hearings officer adopted findings that evaluated only the 1979 Map and applied
9 DCC 18.12.040 to conclude that the boundary line follows lot lines and not the
10 centerline of Highway 97. Accordingly, we need not address petitioner's
11 challenges to those alternative findings.

12 The second assignment of error is denied.

13 **THIRD ASSIGNMENT OF ERROR**

14 A "Class III road or street project" is an outright permitted use in the RR-
15 10 zone. DCC 18.60.020(F). In its application, ODOT took the position that the
16 project is a "Class III road or street project" that DCC 18.60.020 allows as an
17 outright permitted use in the Trail Area.

18 DCC 18.04.030 defines "road and street project" as "the construction and
19 maintenance of the roadway, bicycle lane, sidewalk *or other facility related to a*
20 *road or street*. Road and street projects shall be a Class I, Class II or Class III
21 project." DCC 18.04.030 defines "Class III Project" as "a modernization, traffic

1 safety improvement, maintenance, repair or preservation of a road or street” for
2 which “no land use permit is required.”

3 DCC 18.04.030 defines “road or street” as “a public or private way created
4 to provide ingress or egress to one or more lots, parcels, areas or tracts of land.”
5 DCC 18.04.030 lists examples of “road or street” including “(C) ‘Bicycle route’
6 means a right of way for bicycle traffic.”⁷ During the proceedings below,
7 petitioner argued that the project is not a “road and street project” because the
8 definition of a road and street project includes only a bicycle lane, and because
9 the definition only identifies a “bicycle route,” which petitioner argues is one that
10 is used for bicycles only. Petitioner argues that the project does not qualify as a
11 “bicycle route” because it will be used by bicycles as well as pedestrians, joggers,
12 skaters and other non-motorized travelers.

13 Petitioner argued that the project is instead a “multi-use path,” which is not
14 listed as a permitted use in the RR-10 zone and which petitioner argues is
15 therefore not allowed in the RR-10 zone. DCC 18.04.030 defines “multi-use
16 path” as “a path physically separated from motor vehicle traffic by an open space
17 or barrier and either within a highway right-of-way or within an independent

⁷ DCC 18.04.030 defines “bicycle route” to mean “a segment of a bikeway system designated with appropriate directional and information markers by the jurisdiction having authority.” “Bikeway” is defined to include “any road, path or way which in some manner is specifically designated as being open to bicycle travel, regardless of whether such facility is designated for the exclusive use of bicycles or is shared with other transportation modes.”

1 right-of-way. The multi-use path is used by bicyclists, pedestrians, joggers,
2 skaters and other non-motorized travelers.”

3 The hearings officer concluded that the project could be classified as either
4 a multi-use path or a road or street project, but that its qualification as a multi-
5 use path did not preclude its qualification as a Class III road and street project:

6 “Windlinx is correct that the Project appears to fall within the
7 definition of a multi-use path. DCC 18.04.030 defines ‘multi-use
8 path’ as ‘a path physically separated from motor vehicle traffic by
9 an open space or barrier and either within a highway right-of-way
10 or within an independent right-of-way. The multi-use path is used
11 by bicyclists, pedestrians, joggers, skaters and other non-motorized
12 travelers.’ Using the description of the Project provided by the
13 Applicant, the Project is a multi-use path under this definition: (1) it
14 will be a path; (2) it will be physically separated from motor vehicle
15 traffic; (3) it will be within a highway right-of-way; and (4) it will
16 be used by bicycles and other non-motorized travelers.

17 “Whether or not the Project can be characterized as a multi-use path,
18 however, is not the end of the inquiry. Windlinx’s specific argument
19 is that the definition of ‘road or street project’ must be interpreted to
20 exclude multi-use paths from that definition, which logically means
21 that the definition also does not include multi-use paths.
22 “Specifically, Windlinx makes the following statements in support
23 of its interpretation:

24 “[T]he definition of a road and street project in DCC
25 18.04.030 includes only a bike lane which is part of the actual
26 road or street’

27 “‘The only bike facility included in the definition [of road or
28 street project] is a bicycle lane.’

29 “‘Intuitively, a road or street project can only involve
30 something that is defined as a road or street’

1 “The definition of road or street ‘does include a bicycle route
2 and that use is exclusive to bicycle use’

3 “Windlinx’s interpretation of the definitions of ‘road and street
4 project’ is narrower than and inconsistent with, the text and context
5 of the Code. First, while the definition of ‘road and street project’
6 expressly includes a ‘bike lane’, a bike lane is only one type of bike
7 facility, and that is not the only language in this Code provision that
8 can apply to other bike facilities. As noted above, a ‘road and street
9 project’ expressly includes any ‘other facility related to a road or
10 street.’ Thus, a bike facility that is not a ‘bike lane’ can still qualify
11 as a ‘road or street project’ as long as it relates to a road or street.
12 For the same reason, Windlinx’s statement that a ‘road or street
13 project’ can only involve something that is itself a road or street is
14 inconsistent with the Code language. That is, Windlinx’s
15 interpretation would have the effect of removing the phrase ‘related
16 to’ from the definition and replacing it with new language, such that
17 the Code would read, as revised by Windlinx, ‘...or other facility
18 related to that is a road or street.” Record 59 (underlining and
19 strikethrough in original).

20 The hearings officer also concluded that the project is a “road or street
21 project” because it is an “other facility related to a road or street.”

22 “Windlinx’s characterization of the definition of ‘road or street’ is
23 also counter to the plain text of the Code. Windlinx acknowledges
24 that the definition of ‘road or street’ includes a Bicycle Route as an
25 example, but incorrectly states that a Bicycle Route must be
26 exclusive to bicycle use, which the Project is not. Neither definition
27 of ‘Bicycle Route’ in the Code requires such a facility to be
28 exclusive for bicycles. To the contrary, the stand-alone definition of
29 that phrase describes it as part of a ‘bikeway’ system, and the
30 definition of a ‘bikeway’ expressly states that such a facility does
31 not need to be used exclusively by bicycles.

32 “Finally, the mere absence of ‘multi-use path’ in the definition of
33 ‘road and street project’, in this case, does not serve to exclude
34 multi-use paths from that definition. The Code separately defines

1 many other road or street facilities (e.g., alley, arterial, bicycle route,
2 collector, cul-de-sac, and local street), none of which are expressly
3 included in the definition of ‘road and street project’. Under
4 Windlinx’s interpretation, the separate definitions of those facilities,
5 coupled with their absence in the definition of ‘road and street
6 project’, would serve to prevent those facilities from being included
7 in a ‘road or street project’. The only facilities that would qualify as
8 a ‘road and street project’ would be a ‘roadway’, ‘bicycle lane’, or
9 a ‘sidewalk’. In the absence of an interpretation by the County’s
10 Board that the Code is intended that way, I find Windlinx’s
11 interpretation to be unreasonable. Even if that interpretation is
12 reasonable, a more reasonable interpretation is that the phrase ‘other
13 facility related to a road or street’ includes all facilities related to a
14 road or street whether or not they are defined elsewhere in the Code.
15 In summary, the Project involves the construction of a facility that
16 is related to a road or street. As such the Project is a ‘road or street
17 project’ under the Code regardless of whether it is characterized as
18 a bicycle route, a bikeway, or a multi-use path.” Record 59-60.

19 In its third assignment of error, petitioner reprises its arguments presented
20 below that the project is not a “road and street project” and is a “multi-use path,”
21 and argues that the hearings officer improperly construed the applicable DCC
22 provisions. For the reasons explained in the hearings officer’s findings quoted
23 above and at Record 58-60, we reject petitioner’s argument and conclude that the
24 hearings officer’s construction of the applicable DCC provisions was correct.
25 *McCoy*, 90 Or App at 275.

26 Also in its third assignment of error, petitioner argues that the hearings
27 officer failed to adopt findings explaining why the project is a Class III project.
28 Petition for Review 40-41. The hearings officer adopted two pages of single-
29 spaced findings addressing why the project is a Class III project and agreed with
30 ODOT based on the evidence in the record that the project “modernizes and

1 improves the safety of Highway 97 even though it may also serve other purposes
2 in areas other than the [Trail Area]" because it includes construction of a
3 separated facility for bicycles and pedestrians in the Highway 97 right-of-way
4 that modernizes the facility and improves safety for vehicles and other users of
5 the right-of-way. Record 60-61. Petitioner does not acknowledge or challenge
6 these findings.

7 The third assignment of error is denied.

8 The county's decision is remanded.