

DEC 22 4 04 PM '88

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

3 KELLOGG LAKE FRIENDS, an Oregon)
 non-profit corporation,)
 4)
 Petitioner,)
 5)
 vs.)
 6)
 CLACKAMAS COUNTY,)
 7)
 Respondent,)
 8)
 and)
 9)
 FIRST WESTERN SERVICE)
 10 CORPORATION,)
)
 11 Intervenor-Respondent.)

LUBA No. 88-061

FINAL OPINION
AND ORDER

12 Appeal from Clackamas County.

13 F. Blair Batson, Portland, filed the petition for review
14 and reply brief and argued on behalf of petitioner.

15 No appearance by respondent Clackamas County.

16 Mark J. Greenfield, Portland, filed a response brief and
17 argued on behalf of intervenor-respondent. With him on the
brief was Mitchell, Lang & Smith.

18 REMANDED 12/22/88

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

1 Opinion by Sherton.

2 NATURE OF THE DECISION

3 Petitioner appeals an order of the Clackamas County
4 Hearings Officer. The order approves (1) a Willamette River
5 Greenway conditional use (greenway) permit, (2) a floodplain
6 development permit, and (3) an exception to a Clackamas County
7 Zoning and Development Ordinance (ZDO) provision limiting
8 development on slopes 20% or greater, for a proposed 157 unit
9 multifamily development.¹

10 MOTION TO INTERVENE

11 First Western Service Corporation moves to intervene on the
12 side of respondent in this proceeding. There is no opposition,
13 and the motion is allowed.

14 MOTION TO FILE REPLY BRIEF

15 Intervenor-respondent's (respondent's) brief in this case
16 was filed November 4, 1988 and was received by LUBA and
17 petitioner on November 7. On November 15, the day before the
18 scheduled oral argument in this appeal, petitioner filed with
19 LUBA and delivered to intervenor a reply brief and a motion
20 requesting permission to file a reply brief.

21 Petitioner's motion requesting permission to file a reply
22 brief is submitted pursuant to OAR 661-10-039 and alleges that
23 respondent's brief raises new matters not addressed in the
24 petition for review. Petitioner argues its reply to those
25 matters would be both useful and appropriate for the resolution
26 of the appeal. Petitioner identifies the two issues addressed

1 in its reply brief as (1) whether a letter in the record from
2 the Oregon Department of Transportation (ODOT) is expert
3 testimony, and what evidentiary weight should be given to this
4 letter; and (2) whether respondent's brief identifies evidence
5 in the record which clearly supports the county's conclusion
6 that approval of a Greenway permit would be consistent with
7 ZDO 705.01.A. Petitioner points out that our rules establish
8 no deadline for the filing of a reply brief.

9 Respondent opposes the motion to file a reply brief.
10 Respondent argues that the motion and reply brief are untimely,
11 in that respondent had less than a full day before oral
12 argument in which to examine the reply brief and could give it
13 only a cursory review. Respondent argues that allowing a reply
14 brief to be filed the day before scheduled oral argument would
15 prevent it from having "reasonable time to prepare and submit
16 [its case] and a full and fair hearing" before the Board.
17 OAR 661-10-005. Respondent further contends that the motion is
18 deficient because it does not demonstrate a need to file a
19 reply brief, citing Martin v. City of Tigard, ___ Or LUBA ___
20 (LUBA No. 88-034; Order Denying Request to File Reply Brief,
21 August 17, 1988).

22 Respondent also argues that the reply brief does not
23 respond to new matters raised in respondent's brief. According
24 to respondent, the issue of the evidentiary value of the ODOT
25 letter was initially raised in the Petition for Review at 14.
26 Respondent also contends the portions of its brief identifying

1 evidence in the record which clearly supports the county's
2 conclusion that approval of a Greenway permit would be
3 consistent with ZDO 705.01.A are in response to petitioner's
4 charge that the county's decision should be remanded for
5 failure to adopt findings adequate to comply with ZDO 705.01.A.

6 Petitioner is correct that our rules do not establish a
7 deadline for the submission of a motion to file a reply
8 brief.² OAR 661-10-039. Also, we note that our rules do not
9 guarantee respondents any opportunity to respond to a reply
10 brief. Furthermore, at oral argument in this case, the Board
11 offered respondent the opportunity to request additional time
12 to respond to petitioner's reply brief in writing, and
13 respondent chose not to avail itself of this opportunity. In
14 these circumstances, we do not find that respondent's rights to
15 reasonable time to prepare and submit its case and a full and
16 fair hearing are prejudiced by allowing petitioner's reply
17 brief to be filed the day before oral argument.

18 With regard to the content of the reply brief, we agree
19 with respondent that the issue of the evidentiary value of the
20 ODOT letter was initially raised in the petition for review.
21 Respondent's argument on this issue is not "new matter" raised
22 in respondent's brief.

23 Petitioner has assigned as error the lack of findings in
24 the county's order demonstrating compliance with ZDO 705.01.A.
25 Under ORS 197.835(10)(b),³ even if the county's findings are
26 inadequate, we may affirm the decision if "the parties identify

1 relevant evidence in the record which clearly supports the
2 decision or a part of the decision." Respondent cites this
3 provision of the statute and attempts to identify such evidence
4 in its brief. Petitioner could not anticipate that respondent
5 would invoke this statutory provision or predict what evidence
6 in the record respondent would identify. Therefore, we agree
7 with petitioner that respondent's attempt to identify evidence
8 in the record which clearly supports a determination that
9 approval of the subject Greenway permit is consistent with
10 ZDO 705.01.A is "new matter" in respondent's brief.

11 OAR 661-10-039, n 2 supra, does not expressly state what
12 circumstances justify a reply brief, only that such a brief is
13 to be limited to addressing new matters raised in respondent's
14 brief. In Martin v. City of Tigard, supra, we stated that we
15 interpret this rule "to require petitioners to demonstrate a
16 need for a reply brief." We find that petitioner has done so
17 in establishing that respondent has replied to petitioner's
18 allegation of inadequate findings by attempting to identify in
19 its response brief, pursuant to ORS 197.835(10)(b), evidence
20 which clearly supports the challenged decision.⁴

21 Based on the foregoing, petitioner's motion to file a reply
22 brief is denied with regard to section II of the brief
23 (concerning the ODOT letter) and to references in sections I
24 and IV to the evidentiary value of the ODOT letter.
25 Petitioner's motion is granted with regard to section III of
26 the brief and the remainder of sections I and IV (which contain

1 petitioner's response to respondent's identification of
2 evidence supporting compliance with ZDO 705.01.A).

3 FACTS

4 Intervenor proposes to construct a 157-unit multifamily
5 dwelling complex on the subject property. The site is a 9.7
6 acre parcel, zoned High Density Residential (HDR), bordering
7 Kellogg Lake. The subject property is a combination of lake,
8 wetlands, creeks, wooded hillsides and some benched areas. It
9 contains an old, but well constructed and preserved, log
10 residence. Both Kellogg Lake and the subject property are
11 within the Willamette River Greenway.

12 Kellogg Lake is a relatively long, narrow lake,
13 approximately 15 acres in area, extending in a northwest to
14 southeast direction. The northwest end of the lake, where its
15 outlet is located, is close to the Willamette River. Kellogg
16 Creek flows into the southeast end of the lake, which is over
17 half a mile inland from the Willamette River. The Willamette
18 River Greenway boundary, which generally parallels the river,
19 forms an "arm" extending inland to include Kellogg Lake and the
20 surrounding property. Thus, there is substantial property and
21 development located between the southern end of the lake and
22 the river that is not within the Willamette River Greenway.

23 A public hearing was held before the county hearings
24 officer on June 22, 1988. The hearings officer issued his
25 decision on July 13, 1988, and supplemented it with an addendum
26 on July 27, 1988. This appeal followed.

1 FIRST ASSIGNMENT OF ERROR

2 "In deciding that approval of the Greenway conditional
3 use permit was not required to be consistent with the
4 purpose stated in subsection 705.01.A, the county
5 misconstrued the applicable law, made insufficient
6 findings, and made a decision not supported by
7 substantial evidence in the whole record."

8 ZDO 705.03.C requires an applicant to show that approval of
9 a greenway permit is consistent with the purposes stated in
10 ZDO 705.01. One of the three purposes for the Willamette River
11 Greenway (WRG) district stated in ZDO 705.01 is:

12 "A. To protect, conserve, enhance and maintain the
13 natural, scenic, historical, agricultural,
14 economic and recreational qualities of lands
15 along the Willamette River."

16 The county's decision concludes that ZDO 705.01.A is not
17 applicable because the subject property is not "lands along the
18 Willamette River." The county's conclusion is based on the
19 following findings:

20 " * * * At its nearest point, the development
21 proposed through this application is located
22 approximately one-half mile from the Willamette
23 River. This measurement is attained through a direct
24 westerly measurement from the property to the river.
25 Between the property and the river is a considerable
26 amount of development that is neither identified as
being located within the boundaries of the Willamette
River Greenway nor subject to review under the
standards for development within the Greenway.
Measuring along Kellogg Lake, from the property under
consideration to the Willamette River, and within the
Willamette River Greenway boundary, the distance is
approximately 3,500 feet. The property under
consideration is a sufficient distance from the
Willamette River to preclude its inclusion in any
identification of lands along the Willamette River.
* * * " (Emphasis added.) Record 3-4.

1 A. Interpretation of ZDO 705.01.A

2 Petitioner argues that the county's conclusion, emphasized
3 above, is based on an improper construction of its ordinance.
4 Petitioner asserts that the language of ZDO 705.01.A was taken
5 directly from the overall "Goal" statement of Statewide
6 Planning Goal 15 (Willamette River Greenway), which is:

7 "To protect, conserve, enhance and maintain the
8 natural, scenic, historical, agricultural, economic
9 and recreational qualities of lands along the
10 Willamette River as the Willamette River Greenway."
11 (Emphasis added.)

12 Petitioner further argues that Goal 15.C.2, Boundary
13 Considerations and Requirements, provides that the Greenway
14 boundaries "shall include such lands along the Willamette River
15 as are necessary to carry out the purpose and intent of the
16 Willamette River Greenway * * * ." Petitioner concludes that
17 Goal 15 defines the Greenway, in toto, as "lands along the
18 Willamette River." Therefore, according to petitioner, it
19 follows that the "lands along the Willamette River" to which
20 ZDO 705.01.A refers include all lands within the Willamette
21 River Greenway boundaries.

22 Petitioner also contends that the application of
23 ZDO 705.01.A to all land within the Greenway boundaries is
24 clarified by ZDO 705.02.A, which states that the standards of
25 ZDO 705 "apply to all lands and water within the Willamette
26 River Greenway." According to petitioner, "it would be
illogical, unreasonable, and contrary to the purposes of
section 705 of the ordinance to limit subsection 705.01.A's

1 protections to areas of the Greenway within a certain distance
2 of the Willamette" River. Petition for Review 13.

3 Respondent replies that where an applicable ordinance
4 criterion contains plain, unambiguous language, then a local
5 government's decision simply must be consistent with that plain
6 language. According to respondent, the "lands along the
7 Willamette River" provision of ZDO 705.01.A is such plain,
8 unambiguous language. Thus, the decision that land one-half
9 mile away from the Willamette River is not "along the
10 Willamette River" is correct as a matter of law.
11 Intervenor-Respondent's Brief 5-6.

12 Respondent further argues that because the language of
13 ZDO 705.01.A is plain, there is no need to consider Goal 15 or
14 its legislative history in interpreting ZDO 705.01.A.
15 Respondent asserts the fact that the standards of ZDO 705
16 potentially apply to lands within the Greenway (ZDO 705.02.A)
17 does not mean that all standards contained in ZDO 705 are
18 applicable to all land included in the Greenway. Respondent
19 argues that ZDO 705.01.A applies only to those parts of the
20 Greenway that are also "lands along the Willamette River," and
21 that the subject property does not constitute such lands.
22 Therefore, according to respondent, the county properly found
23 that ZDO 705.01.A does not apply to the subject greenway permit.

24 We do not agree with respondent that the language of
25 ZDO 705.01.A is plain and unambiguous. The phrase "lands along
26 the Willamette River" does not clearly express how far inland

1 such lands extend.⁵ For example, this phrase could
2 theoretically be interpreted to include only land directly
3 adjacent to the river, land within a certain distance of the
4 river or any land within the Greenway.

5 The meaning of local legislation is a question of law which
6 must be decided by the court or other reviewing body to which
7 it is presented. McCoy v. Linn County, 90 Or App 271, 275, 752
8 P2d 323 (1988). Therefore, we must determine, as a question of
9 law, the correct interpretation of ZDO 705.01.A, particularly
10 with regard to the phrase "lands along the Willamette River."

11 When we interpret a provision of a comprehensive zoning
12 ordinance, we construe the ordinance as a whole and give effect
13 to its overall policy. Clatsop County v. Morgan, 19 Or App
14 173, 178, 526 P2d 1393 (1974). However, in this case,
15 respondent has cited us to no language in the ZDO or the
16 Clackamas County Comprehensive Plan (plan) which would support
17 its contention that "lands along the Willamette River," as used
18 in ZDO 705.01.A, should be interpreted to mean something less
19 than all lands included in the Willamette River Greenway.

20 When we review a local government's interpretation of
21 ambiguous terms in its own ordinance, we give appropriate
22 weight to that interpretation.⁶ However, where the county
23 ordinance provision was drafted to implement a state statute or
24 statewide planning goal, and adopts the statutory or goal
25 language without expressing an intent to deviate from the
26 statutory or goal intent, it is appropriate to construe the

1 ordinance provision consistently with the statute or goal.
2 McCaw Communications v. Marion County, ___ Or LUBA ___ (LUBA
3 No. 88-068; December 12, 1988), slip op 18; Goracke v. Benton
4 County, 12 Or LUBA 128, 135 (1984).

5 The overall "Goal" statement of Statewide Planning Goal 15
6 is virtually identical to the purpose statement of
7 ZDO 705.01.A.⁷ We agree with petitioner that when that
8 statement is construed together with the reference to "lands
9 along the Willamette River" in the Greenway boundary
10 requirements provision of section C.2 of Goal 15, the only
11 logical interpretation is that the overall goal of protecting,
12 conserving, enhancing and maintaining the six listed qualities
13 applies to all land included within the Greenway.

14 Given that the language of ZDO 705.01.A corresponds to that
15 of the goal, and that we are aware of no other county plan or
16 ordinance provisions or county legislative history which
17 indicates an intent that the phrase "lands along the Willamette
18 River" in ZDO 705.01.A refer to less than the area to which the
19 same phrase in Goal 15 applies, we interpret "lands along the
20 Willamette River" in ZDO 705.01.A to include all land within
21 the Greenway.⁸ The county erred in concluding that
22 ZDO 705.01.A is not applicable to the subject site.

23
24 B. Alternative Determination of Compliance with
ZDO 705.01.A

25 The county findings concluding that ZDO 705.01.A is not
26 applicable to the subject site, quoted supra, are followed by:

1 " * * * The file also contains a response from the
2 State of Oregon, Department of Transportation, River,
3 which is responsible for the Willamette River Greenway
4 program. It advises that this project would have no
adverse impact on the Willamette River Greenway."
Record 4.

5 Petitioner argues that if the above-quoted findings
6 referring to the ODOT letter are interpreted as an alternative
7 conclusion of compliance with ZDO 705.01.A, they are not
8 adequate as findings. They merely state a conclusion
9 unsupported by findings of fact. Furthermore, petitioner
10 contends the ODOT letter does not demonstrate that approval of
11 the proposed development is consistent with ZDO 705.01.A.
12 According to petitioner, there is no evidence in the record to
13 support such a decision.

14 Respondent argues that the findings quoted above show that
15 the county determined, in the alternative, that the proposed
16 development is consistent with ZDO 705.01.A, based on testimony
17 from ODOT that the project would have no adverse impacts on the
18 Greenway. According to respondent, ODOT's testimony
19 constitutes expert testimony, which the hearings officer found
20 credible and, therefore, must be considered to be "substantial
21 evidence." Respondent claims that petitioner has not shown why
22 a reasonable person could not accept as true the testimony of
23 the state agency with regulatory authority over the Greenway.
24 According to respondent, that ODOT's evidence might be called
25 "conclusory" is of no significance, as a local government may
26 rely on conclusory evidence from an expert.

1 We do not believe that the county made a determination, in
2 the alternative, that the proposed development complies with
3 ZDO 705.01.A. The statements cited as allegedly constituting
4 such a determination are actually descriptions of evidence (the
5 ODOT letter), not a statement of facts the county found to be
6 true. Horacek v. Yamhill County, ___ Or LUBA ___ (LUBA
7 No. 88-052; October 19, 1988), slip op 4; Hershberger v.
8 Clackamas County, 15 Or LUBA 401, 403 (1987); Norvell v.
9 Portland Area LGBC, 43 Or App 849, 852-855, 604 P2d 896 (1979).

10 Since the challenged statements are not findings of
11 compliance with ZDO 705.01.A, no purpose would be served by
12 determining whether or not they are supported by substantial
13 evidence. DLCD v. Columbia County, ___ Or LUBA ___ (LUBA No.
14 87-109; March 15, 1988), slip op 7; McNulty v. City of Lake
15 Oswego, 14 Or LUBA 366, 373 (1986).

16
17 C. Evidence Clearly Supporting a Determination of
Compliance with ZDO 705.01.A

18 Finally, respondent argues that even if this Board
19 determines that ZDO 705.01.A is applicable and that the
20 county's findings based on the ODOT letter are inadequate to
21 demonstrate compliance, there still would be no basis for
22 reversal or remand of the decision because the record contains
23 relevant evidence which clearly supports the county's
24 decision. ORS 197.835(10)(b). Respondent cites evidence in
25 the record which it contends clearly demonstrates compliance
26 with ZDO 705.01.A. Respondent also cites findings in other

1 parts of the decision which it contends establish compliance
2 with ZDO 705.01.A, and points out that petitioner did not
3 challenge the evidentiary support for these findings.

4 Petitioner replies that identifying findings in other parts
5 of the decision does not satisfy the requirement of
6 ORS 197.835(10)(b) for identification of relevant evidence in
7 the record which clearly supports the decision. Petitioner
8 argues that such findings are not themselves evidence, citing
9 City of Salem v. Families for Responsible Govt, 64 Or App 238,
10 249, 668 P2d 395 (1983).

11 Petitioner also argues that the evidence which respondent
12 identifies fails to clearly support a conclusion of compliance
13 with ZDO 705.01.A. Petitioner argues that the one evidentiary
14 fact specifically discussed by respondent, that the proposed
15 apartment complex would cover less than 26% of the site,
16 leaving over 74% in open space, does not address the impact of
17 the project on the site's Greenway scenic qualities.
18 Petitioner contends that percentage of lot coverage is not
19 synonymous with impact on scenic qualities.

20 Petitioner also points out the only other evidence
21 respondent cites, reports by respondent's experts, are simply
22 cited in their entirety without identification of any specific
23 facts or conclusions in those reports indicating the proposed
24 development would be consistent with ZDO 705.01.A. Petitioner
25 cites other expert reports in the record which it contends
26 clearly support a decision that the proposed project is not

1 consistent with protecting the natural and scenic Greenway
2 qualities of the site. Petitioner argues that in considering
3 whether the parties identify evidence in the record which
4 clearly supports the county's decision, we must consider all
5 relevant evidence identified in the record, including that
6 which does not support the county's decision.

7 The county erroneously determined that ZDO 705.01.A is not
8 applicable to the subject site (see sections A and B above).
9 Therefore, the only way respondent can possibly avoid remand of
10 the decision is if, pursuant to ORS 197.835(10)(b), it
11 identifies evidence in the record which clearly supports a
12 determination of compliance with ZDO 705.01.A.⁹

13 We agree with petitioner that it is not sufficient for
14 respondent to identify findings in other parts of the decision
15 which (1) support a conclusion of compliance with ZDO 705.01.A,
16 and (2) have not been challenged by petitioners for lack of
17 evidentiary support. What ORS 197.835(10)(b) specifically
18 requires is the identification of evidence in the record which
19 supports the county's decision.

20 In this case, neither respondent nor petitioner has cited
21 any evidence in the record which identifies the historical,
22 agricultural, economic or recreational qualities of the subject
23 site or establishes the effects of the proposed development on
24 such qualities. Furthermore, the evidence cited does not
25 clearly identify the scenic qualities of the site or the
26 impacts of the proposed complex on those qualities.¹⁰

1 Finally, the parties identify conflicting expert evidence
2 in the record with regard to the geologic, wetland, and fish
3 and wildlife habitat characteristics of the site and the impact
4 of the proposed development on those characteristics. Record
5 189-193, 197-198, 199-202, 361-365, 366-374, 375-392, 393-398,
6 821-835. In applying ORS 197.835(10)(b), we must consider all
7 relevant evidence which the parties identify in the record.
8 Cf Younger v. City of Portland, 305 Or 346, 358, 752 P2d 262
9 (1988). In view of the conflicting, credible expert evidence
10 identified in the record relevant to the site's natural
11 qualities and the proposed development's impacts, we cannot say
12 that the evidence "clearly supports" a determination that the
13 proposed use will protect, conserve, enhance and maintain the
14 natural qualities of the site.

15 We conclude the record does not contain evidence which
16 clearly supports a determination of compliance with
17 ZDO 705.01.A.

18 The first assignment of error is sustained.

19 SECOND ASSIGNMENT OF ERROR

20 "In finding and concluding that the proposed
21 structures do not have to comply with the setback
22 requirements of subsection 705.03E, the county
23 improperly construed the applicable law, made
insufficient findings, and made a decision not
supported by substantial evidence in the whole record."

24 ZDO 705.03 sets out five "Standards for Intensification or
25 Change of Use, or Development Within the Greenway." Subsection
26 705.03.E provides:

1 "All structures shall observe a minimum setback
2 between 100 and 150 feet from the mean low water
3 level. The setback shall be determined by evaluation
4 of the criteria stated in subsection 705.03D.
5 Residential lots of record and water dependent uses
6 unable to meet this requirement shall be exempt from
7 this setback."

8 The county interprets ZDO 705.03.E as not applying to the
9 proposed project, primarily because it interprets "mean low
10 water level" as used in ZDO 705.03.E to refer only to the
11 Willamette River itself, not to tributaries of the Willamette
12 River or other bodies of water which happen to be included
13 within Willamette River Greenway boundaries. Record 6. The
14 key county findings state:

15 " * * * to correctly interpret the meaning of the
16 language "mean low water level" as contained in
17 Sub-section 705.03E and Policy 10.3 of the
18 Comprehensive Plan, all of the provisions set forth
19 within Section 705, Policy 10.0 to 10.3 of the
20 Comprehensive Plan (Page 15-16) and Policy 15 of the
21 Comprehensive Plan must be read together. When this
22 is done, the Hearings Officer finds that the plain
23 language supports the staff position that "mean low
24 water level" refers to the Willamette River and not to
25 any other body of water that may be included within
26 the boundaries of the Willamette River Greenway.
Water Resources Policy 10.0 requires the county to
designate Principle River Conservation Corridors for a
number of rivers, including the Willamette river. It
further provides that such corridor width 'will be
one-quarter mile from mean low water level [sic
except] on each side of the Willamette River, where
the width is defined by the Willamette River Greenway
boundaries, urban and rural.' Inclusion of Kellogg
Lake within the boundaries addresses the "width" of
the corridor only. It allows that "width" to extend
more than one-quarter mile from the mean low water
level of the Willamette River. However, it does not
impose a separate mean low water level for Kellogg
Lake or Kellogg Creek, to be applied to this
development. The siting protection techniques set
forth within Policy 10.2 of the Comprehensive Plan
clearly referred to protecting the Willamette River

1 rather than any other bodies of water that might be
2 included within the Willamette River Greenway.
3 Additionally, the language of Sub-section 705.03E
4 requires that the setback be determined by evaluation
5 of the criteria stated in Sub-section 705.03D. Those
6 criteria make specific reference to preservation of
7 filter or buffer strips of natural vegetation along
8 the "river bank" referring to the Willamette
9 River."¹¹ Record 6.

10 Petitioner presents four arguments as to why the county's
11 interpretation of ZDO 705.03.E, as explained in the
12 above-quoted findings, is incorrect. We will examine each
13 argument separately.

14 A. Application of ZDO 705.02.A

15 ZDO 705.02.A provides that the standards of ZDO 705 "apply
16 to all lands within the Willamette River Greenway." According
17 to petitioners, it therefore follows that the setback
18 requirements of ZDO 705.03.E are applicable to the proposed
19 development, and all proposed structures must be set back
20 between 100 and 150 feet from the mean low water level of
21 Kellogg Lake.¹²

22 Respondent agrees that the standards of ZDO 705 apply to
23 the subject site. However, respondent maintains that this does
24 not mean that every provision of ZDO 705 expresses a standard
25 applicable to all land within the Greenway.

26 There is no dispute that under ZDO 705.02.A the standard of
ZDO 705.03.E, like other standards of ZDO 705, is potentially
applicable to the subject property. However, whether or not
ZDO 705.03.E has any effect on the subject property depends on
whether the term "mean low water level," as used therein is

1 correctly interpreted as "mean low water level of Kellogg
2 Lake," as well as "mean low water level of the Willamette
3 River". ZDO 705.02.A does nothing to settle this issue.

4 This subassignment of error is denied.

5
6 B. Inconsistency with the Purposes and Policies of
the Plan and Ordinance

7 Petitioner agrees with the county that the term "mean low
8 water level" in ZDO 705.03.E is ambiguous. Petitioner also
9 agrees that it is appropriate to look at all relevant plan and
10 ordinance provisions in determining the meaning of
11 ZDO 705.03.E. However, petitioner argues the county's
12 interpretation of ZDO 705.03.E, together with WR Policies 10.0
13 and 10.2 and ZDO 705.03.D, as not requiring a setback from
14 Kellogg Lake is unreasonable and inconsistent with the purposes
15 and policies of the plan and WRG district.

16 1. WR Policy 10.0

17 "Designate Principal River Conservation Areas along
18 the corridors of the Clackamas River, Sandy/Salmon
19 Rivers, Molalla/Pudding Rivers, Tualatin River, and
20 Willamette River. The corridor width will be
21 one-quarter mile from mean low water level on each
side except the Willamette River where the width is
defined by the Willamette River Greenway boundaries,
urban and rural." (Emphasis added.)

22 Petitioner disagrees with the county's interpretation of
23 "mean low water level" in the above-quoted policy as referring
24 only to the level of each of the principal rivers referred to
25 in the policy. Petitioner also disagrees with the county's
26 conclusion that including Kellogg Lake within the Willamette

1 River Greenway only extended the "width" of the Greenway
2 corridor and did not create a separate corridor relating to the
3 "mean low water level" of Kellogg Lake (see findings quoted
4 supra under this assignment of error; Record 6).

5 Petitioner argues that it is obvious from an examination of
6 the plan's Greenway map that the "width" of the Greenway
7 corridor along the Willamette was not expanded. Rather,
8 petitioner claims the profile of the Greenway, with an arm
9 extending out to include Kellogg Lake and Creek, indicates that
10 "a separate Greenway corridor was extended down the lake and
11 creek away from the river." Petition for Review 19.

12 Petitioner also argues that ORS 390.318 provides that the
13 boundaries of the Greenway shall include land on each side of
14 each channel of the Willamette. Therefore, according to
15 petitioner, when the river is divided into more than one
16 channel, lands along each channel must be protected by a
17 separate Greenway corridor following each channel. Petitioner
18 additionally argues the legislative history of the county
19 comprehensive plan supports the conclusion that including
20 Kellogg Lake within the Willamette River Greenway was intended
21 "to extend a separate Greenway corridor." Petition for
22 Review 20.¹³

23 Respondent argues that "mean low water level," as used in
24 WR Policy 10.0, clearly refers to the mean low water level of
25 each principal river identified in the policy. Respondent
26 maintains the fact that Kellogg Lake and Creek are included

1 within the Willamette River Greenway boundary does not render
2 the term "mean low water level" applicable to the level of
3 Kellogg Lake.

4 Respondent points out that ORS 390.318(1) expressly refers
5 to the "low water line" on "each side of each channel of the
6 Willamette River." (Emphasis added.) The statute does not
7 refer to the mean water line of tributaries to the Willamette.
8 Respondent also points out that the Planning Background Report
9 cited by petitioner identifies Kellogg Creek as a tributary to
10 the Willamette River. Respondent argues that whether this
11 tributary has open space value has no relevance to the
12 interpretation of the setback provision of ZDO 705.03.E, which
13 remains applicable only to the "mean low water level" of
14 principal rivers.

15 We agree with the county and respondent that the term "mean
16 low water level," as used in WR Policy 10.0, is clearly
17 intended to refer only to the "mean low water level" of the
18 principal rivers identified in this policy. The shape of the
19 Willamette River Greenway boundary including Kellogg Lake and
20 portions of Kellogg Creek does not create a separate principal
21 river conservation area (PRCA) for the Kellogg Lake/Creek
22 corridor. Kellogg Lake and Creek are simply part of the
23 Willamette River Greenway.¹⁴

24 ORS 390.318(1) does nothing to alter this interpretation.
25 The term "low water line," as used therein explicitly refers
26 only to channels of the Willamette River, not to its

1 tributaries.

2 We, therefore, agree with the county that the meaning of
3 "mean low water level" in WR Policy 10.0 supports the county's
4 interpretation of the same phrase in the setback provision of
5 ZDO 705.03.E to apply only to the Willamette River and not to
6 other bodies of water within the Willamette River Greenway.

7 2. WR Policy 10.2

8 "Manage development in all Principal River
9 Conservation Areas according to the following siting
performance criteria:

10 "a. Maintain vegetative fringe areas along the river
11 free of structures, grading and tree cutting
activities (see Policy 3.0). * * *

12 " * * * * *

13 "c. Limit residential structure height to 35 feet and
14 use vegetative fringe to screen from the river
primary and accessory structures.

15 " * * * * *

16 "e. Screen commercial/industrial structures (except
17 water-dependent or water related uses), parking
and/or loading, and storage areas from view from
18 the river and orient signs away from the river."
(Emphasis added.)

19 Petitioner disagrees with the county that the above-quoted
20 references to "river" in WR Policy 10.2 indicate an intention
21 to protect only the Willamette River, and not other bodies of
22 water included in the Willamette River Greenway.

23 Petitioner points out that while the plan contains five
24 policies for designated PRCAs (WR Policies 10.0-10.4) it also
25 has an additional nine policies which apply specifically to the
26 Willamette River Greenway (WR Policies 15.0-15.9). Petitioner

1 argues that the structure of these policies does not support
2 the county's conclusion as to the effect of the references to
3 "river" in WR Policy 10.2.

4 Petitioner contends that WR Policy 15.5¹⁵ incorporates by
5 reference the general siting criteria of WR Policy 10.2 and the
6 specific setback requirements for all PRCAs set out in
7 WR Policy 10.3.¹⁶ Petitioner argues WR Policy 10.3 requires
8 that all structures "be set back not less than 100 feet from
9 'mean low water level' without reference to 'the river.'"
10 Petition for Review 24. Petitioner argues it is this policy,
11 which does not refer to "river," that is implemented by
12 ZDO 705.03.E.

13 Petitioner further argues that the setback requirement is
14 the "backbone of the Greenway's protective policy." Petition
15 for Review 25. Petitioner points out that the setback
16 requirement is even set out in Goal 15 itself as a distinct
17 management requirement.¹⁷ According to petitioner, if the
18 greenway setback requirement does not apply to development
19 along the shores of Kellogg Lake, it is difficult to understand
20 why the county included Kellogg Lake in the Greenway.

21 We agree with petitioner that WR Policy 10.3 applies to the
22 Greenway and ZDO 705.03.E implements WR Policy 10.3. However,
23 we do not agree that the setback required by WR Policy 10.3
24 clearly must apply to development along the shores of Kellogg
25 Lake. WR Policy 10.3 and ZDO 705.03.E share the same ambiguity
26 in that both use the term "mean low water level" without

1 indicating to what body or bodies of water it refers. Thus,
2 our comments on petitioner's arguments regarding the
3 interpretation of ZDO 705.03.E apply equally to the
4 interpretation of WR Policy 10.3.

5 WR Policy 10.2, which sets out siting performance criteria
6 for PRCAs, expresses concern for protecting the principal river
7 only, not other bodies of water that may be included in the
8 PRCA. Thus, we conclude that the intent of WR Policy 10.2
9 supports the county's interpretation of "mean low water level,"
10 as used in the setback provisions of WR Policy 10.3 and
11 ZDO 705.03.E, to apply only to the Willamette River, and not to
12 Kellogg Lake.

13 C. ZDO 705.03.D

14 "An Extraordinary Exception or conditional use shall
15 be granted only if the applicant shows that the
16 request will result in the preservation of a filter or
17 buffer strip of natural vegetation along the river
bank. The depth of this buffer strip need not exceed
150 feet, and shall be determined by consideration of
the following:

- 18 "1. the character of the use or development;
19 "2. the width of the river;
20 "3. steepness of the terrain;
21 "4. type and stability of the soil, and
22 "5. the type and density of the existing
23 vegetation." (Emphasis added.)

24 ZDO 705.03.E requires that an appropriate minimum setback
25 distance between 100 and 150 feet from "mean low water level"
26 be determined by evaluating the above-quoted criteria of

1 ZDO 705.03.D. Petitioner disagrees with the county's
2 conclusion that the reference to "along the river bank" in
3 ZDO 705.03.D supports its interpretation of ZDO 705.03.E's
4 setback provision as applying only from the Willamette River
5 itself.

6 Petitioner argues that the county's failure to amend the
7 references to "river" in ZDO 705.03.D to include "lake" and
8 "creek" when Kellogg Lake and Creek were included in the
9 Greenway does not indicate that the county did not intend the
10 provisions of ZDO 705.03.D to apply to the lake and creek.
11 Petitioner also argues that the county's interpretation of the
12 effect of the term "river" in ZDO 705.03.D is inconsistent with
13 its conclusion that ZDO 705.01.B, 705.03.C.2 and 705.04.A are
14 applicable to development on the shores of Kellogg Lake.

15 Since the setback from "mean low water level" required by
16 ZDO 705.03.E must be determined on the basis of the criteria in
17 ZDO 705.03.D, it is reasonable to conclude that the references
18 to "river" in ZDO 705.03.D support an interpretation of
19 ZDO 705.03.E as requiring a setback only from "mean low water
20 level" of the Willamette River and not from Kellogg Lake.¹⁸

21 We conclude that the county's interpretation of the setback
22 provision of ZDO 705.03.E is consistent with and supported by
23 other relevant provisions of the county's plan and WRG
24 district. We, therefore, deny this subassignment of error.

25 C. Intent to Apply Setback Requirement to Kellogg Lake

26 Petitioner claims one of its members was "one of the

1 original forces behind getting Kellogg Lake included within the
2 Greenway." Petition for Review 30. This member testified that
3 a major reason for putting Kellogg Lake in the Greenway "was
4 for the setback clause in the Greenway provisions." Record
5 546-547. According to petitioner, this testimony is the only
6 direct evidence on the issue of whether ZDO 705.03.E's setback
7 requirement applies to development on the shores of Kellogg
8 Lake.

9 Respondent replies that we must disregard this evidence.
10 Respondent argues that a petitioner "may not manufacture
11 legislative history after the fact." Intervenor-Respondent's
12 Brief 26.

13 Petitioner appears to argue that its member's testimony
14 constitutes legislative history upon which we may rely in
15 determining the intent of ZDO 705.03.E. However, after the
16 fact testimony from persons involved in the legislative process
17 concerning their opinion as to what legislators intended when
18 they enacted legislation is incompetent for the purpose of
19 determining legislative intent. DLCD v. Yamhill County, ___ Or
20 App ___ (LUBA No. 88-089; Order on Motion to Dismiss,
21 November 23, 1988); Murphy v. Nilsen, 19 Or App 292, 296, 527
22 P2d 726 (1974).

23 This subassignment of error is denied.

24 D. Zoning Density and Strict Construction

25 After concluding, on the basis of the findings quoted supra
26 at the beginning of the discussion under this assignment of

1 error, that ZDO 705.03.E is not applicable to the proposed
2 development, the county adds that "this interpretation is
3 further supported, if need be," by the county's application of
4 HDR zoning to the site and by the rule of law that zoning
5 ordinances are to be strictly construed. Petitioner disagrees
6 with the county's conclusion that these two factors support its
7 interpretation of ZDO 705.03.E.

8 The county's findings on zoning density and strict
9 construction of zoning ordinances are not essential to its
10 interpretation of ZDO 705.03.E. The county's order clearly
11 states that it interprets ZDO 705.03.E as not applying to the
12 subject property without considering these two factors.
13 Furthermore, petitioner does not argue that the high density
14 zoning of the property and rule of strict construction compel a
15 different interpretation of ZDO 705.03.E, only that they do not
16 support the county's interpretation. Thus, if we conclude the
17 county's interpretation of ZDO 705.03.E is correct, without
18 relying on these two factors, petitioner's arguments under this
19 subassignment of error would provide no basis for altering our
20 conclusion.

21 The county's interpretation of "mean low water level" in
22 ZDO 705.03.E to refer only to the level of the Willamette
23 River, and not that of other bodies of water within the
24 Willamette River Greenway, is reasonable and consistent with
25 other related plan and ordinance provisions. We have been
26 shown nothing in the county's decision or in its plan or

1 ordinance, or their legislative history, which is inconsistent
2 with this interpretation. We, therefore, conclude that the
3 county's interpretation of ZDO 705.03.E as not requiring a
4 setback of structures from Kellogg Lake is correct.

5 The second assignment of error is denied.

6 THIRD ASSIGNMENT OF ERROR

7 "In finding that the proposed structures complied with
8 the 35-foot height limitation, the county improperly
9 construed the applicable law, made insufficient
findings, and made a decision not supported by
substantial evidence in the whole record."

10 A. Interpretation of ZDO 705.04.A

11 ZDO 705.04, which lists activities prohibited in the WRG
12 district, includes the following:

13 "A. Residential structures and structures accessory
14 to residential structures exceeding a height of
thirty-five (35) feet are prohibited."

15 In addition, ZDO 202, Definitions, includes the following
16 definition of "building or structure height:"

17
18 "The term 'height of building' shall be deemed to mean
19 the vertical distance from the average elevation of
20 the finished grade adjacent to the structure to the
highest point of the structure * * * ."

21 Petitioner argues ZDO 705.04.A implements WR Policy 10.2.c:

22 "Manage development in all Principal River
23 Conservation Areas according to the following siting
performance criteria:

24 " * * * * *

25 "c. Limit residential structure height to 35 feet and
26 use vegetative fringe to screen from the river
primary and accessory structures."

1 Petitioner argues it is clear from WR Policy 10.2.c that
2 the purpose of the height limitation is "to obscure residential
3 structures from the water's view." Petition for Review 31.
4 Petitioner further argues that ZDO 202's definition of
5 "building or structure height" should not apply to the 35-foot
6 height limitation for structures in the Greenway because that
7 limitation is intended to protect scenic views from the
8 waterway. According to petitioner, the interpretation of
9 ZDO 705.04.A to incorporate ZDO 202's definition is contrary to
10 the purpose of the ordinance and should be reversed.

11 The plan does not define "structure height," used in
12 WR Policy 10.2.c. However, even assuming that WR Policy 10.2.c
13 is intended to protect views from Kellogg Lake (see section B.2
14 of the second assignment of error), we do not find ZDO 202's
15 "building or structure height" definition inconsistent with
16 WR Policy 10.2.c. Assuming the purpose of WR Policy 10.2.c
17 includes protection of views from Kellogg Lake, measuring
18 "structure height" from the average elevation of the adjacent
19 finished grade is not necessarily inconsistent with that
20 purpose. Also, ZDO 705.04.A itself makes no mention of views
21 or waterways. Therefore, there is no basis for finding the
22 county erred in interpreting ZDO 705.04.A to require
23 application of ZDO 202's "building or structure height"
24 definition.

25 This subassignment of error is denied.

26 //

1 B. Adequacy of Findings

2 In applying ZDO 705.04.A, the county adopted the following
3 findings:

4 " * * * In reviewing the site section analysis
5 submitted by the applicant, structures proposed
6 through this application do appear to exceed 35 feet
7 in height. However, the definition for building or
8 structure height, as set forth in Section 202 of the
9 ZDO, defines 'height of building' to mean 'the
10 vertical distance from the average elevation of the
11 finished grade adjacent to the structure to the
12 highest point of the structure.....' While the
13 portion of the buildings under consideration through
14 this application facing Kellogg Lake do exceed a
15 height of 35 feet, given the slopes of the property
16 and the identified finished grade, the height of the
17 structures, as it is defined under Section 202, does
18 not exceed 35 feet. A condition of approval will
19 insure that final Design Review approval assures that
20 no structure exceeds 35 feet in height as defined by
21 Section 202 and as shown by Exhibit No. 11 to this
22 file. This requirement is satisfied." Record 7.

23 The county also imposed the following condition on its
24 approval of the proposed development:

25 "In using the definition of 'building or structure
26 height', found under Section 200 [sic] of the ZDO, no
structure shall be in excess of 35 feet." Record 32.

 Petitioner argues the county's decision that ZDO 705.04.A
is satisfied by the proposed structures is not supported by
adequate findings. According to petitioner, the application of
ZDO 705.04.A and 202's definition of "building or structure
height" requires the county to determine the height of each
proposed structure. Furthermore, petitioner argues that to
determine the height of a proposed building consistent with
these ordinance provisions the county must (1) show the average
elevation of the finished grade adjacent to the structure; and

1 (2) measure the vertical distance from that average elevation
2 to the structure's highest point. Petitioner points out the
3 county did not make such findings for each of the proposed
4 buildings.

5 Respondent argues that it was sufficient for the county (1)
6 to find that ZDO 705.04.A's 35-foot height limitation can be
7 satisfied by the proposed structures; and (2) to impose a
8 condition mandating that all structures comply with this
9 limitation. Respondent contends the county may rely on a
10 condition to meet an ordinance standard if it determines that
11 the condition will ensure that the standard is met. According
12 to respondent, that is what the county did in this instance.

13 Once a local government decides that a proposed use can
14 comply with applicable criteria, the local government may rely
15 on the imposition of conditions to achieve such compliance, so
16 long as it finds the conditions imposed are sufficient to
17 insure the criteria will be met. McCoy v. Linn County, ___
18 Or LUBA ___ (LUBA No. 87-046; December 15, 1987), slip op 7,
19 aff'd 90 Or App 271, 752 P2d 323 (1988); Sigurdson v. Marion
20 County, 9 Or LUBA 163, 176 (1983). Here, the county has
21 determined (1) the proposed structures can comply with the 35
22 foot height limitation of ZDO 705.04.A; and (2) its condition
23 of approval guarantees that final design review approval¹⁹
24 will assure that the structures comply with ZDO 705.04.A. No
25 more is required of the county's findings.

26 This subassignment of error is denied.

1 C. Substantial Evidence

2 Petitioner argues that the county's findings of compliance
3 with ZDO 705.04.A are not supported by substantial evidence.
4 Petitioner argues that a diagram referred to in the county's
5 findings, which shows a three-story structure as having a
6 height of 35 feet in comparison to the average adjacent
7 finished grade ("Exhibit 11"; Record 634), does not constitute
8 substantial evidence. According to petitioner, Exhibit 11 is
9 deficient because (1) it does not indicate which of the
10 proposed structures it represents or whether it represents a
11 composite of all proposed structures; (2) it does not explain
12 how the "average elevations" of the high and low ends of the
13 finished grade were computed; and (3) for the upper end of the
14 adjacent finished grade, it relies on elevation of the grade at
15 the road which runs behind the structure, rather than elevation
16 of the grade at the structure itself.²⁰

17 Respondent argues that Exhibit 11 does show that the
18 proposed structures can satisfy ZDO 705.04.A. Respondent also
19 points to other evidence in the record, including a staff
20 report, staff testimony and testimony by applicant's
21 architect. Record 850b-851, 428-429, 465, 599. The report and
22 testimony contain statements that all of the proposed
23 structures will meet the height limitation established by
24 ZDO 705.04.A and 202.

25 Substantial evidence is evidence which a reasonable mind
26 could accept as adequate to support a conclusion. Braidwood v.

1 City of Portland, 24 Or App 477, 480, 546 P2d 777, rev denied
2 (1976). See also, Younger v. City of Portland, supra;
3 Christian Retreat Center v. Comm. for Wash. Co., 28 Or App 673,
4 679, 560 P2d 1100, rev denied (1977). We find that a
5 reasonable person would accept Exhibit 11,²¹ the county staff
6 report and the testimony by county staff and applicant's
7 architect as an adequate basis for concluding that the proposed
8 structures will satisfy the height limitation of ZDO 705.04.A
9 and 202.

10 This subassignment of error is denied.

11 The third assignment of error is denied.

12 The county's decision is remanded.

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FOOTNOTES

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3 ¹ Petitioner's assignments of error challenge only the
4 approval of the Willamette River Greenway conditional use
5 permit.

6 ² OAR 661-10-039 provides in its entirety:

7 "A reply brief may not be filed unless permission is
8 first obtained from the Board. A reply brief shall be
9 confined solely to new matters raised in the
10 respondent's brief. A reply brief shall have a gray
11 cover."

12 ³ ORS 197.835(10)(b) provides:

13 "Whenever the findings are defective because of
14 failure to recite adequate facts or legal conclusions
15 or failure to adequately identify the standards or
16 their relation to the facts, but the parties identify
17 relevant evidence in the record which clearly supports
18 the decision or a part of the decision, the board
19 shall affirm the decision or the part of the decision
20 supported by the record and remand the remainder to
21 the local government, with direction indicating
22 appropriate remedial action."

23 ⁴ Respondent's argument implies that petitioner must
24 establish the need for a reply brief solely on the basis of its
25 motion to file a reply brief. However, although it would be
26 desirable to have the need for a reply brief fully explained
in petitioner's motion, we will also consider petitioner's oral
argument in support of its motion in determining whether
petitioner has demonstrated a need for a reply brief.

27 ⁵ Tides Association v. City Council of Seaside, 92 Or App
28 446, ___ P2d ___ (1988), one of the cases cited by respondent
29 as supporting its position that a decision must be consistent
30 with plain language in an ordinance, provides an instructive
31 contrast. In that case, the ordinance language which the court
32 found to be plain and unambiguous prohibited the erection of

1 structures on "all lands lying westward from * * * Hermosa
2 Park, Mountain View Addition and Cartwright Park and extending
3 westward to the Pacific Ocean at the line of ordinary low water
4 mark * * * ." (Emphasis added.) Id. at 448. Thus, that
5 ordinance was explicit as to how far the land subject to its
6 prohibition extended.

6 We give more weight to the local government's
7 interpretation if that interpretation is based on legislative
8 history to which the local government has peculiar access.
9 McCoy v. Linn County, 90 Or App at 276. However, in this case,
10 none of the parties have cited any county ordinance legislative
11 history which could shed light upon the "lands along the
12 Willamette River" provision of ZDO 705.01.A.

13 We note respondent has cited an excerpt from proposed
14 findings by the Department of Land Conservation and Development
15 (DLCD) in an acknowledgment proceeding conducted pursuant to
16 ORS 197.251. Those findings quote a letter from the county to
17 ODOT discussing the City of Milwaukie's motivations for
18 including the city's portions of Kellogg Lake within the
19 Greenway. Intervenor-Respondent's Brief App-2. We do not
20 regard these statements as constituting legislative history
21 with regard to the county's adoption of ZDO 705.01.A.

7 The final "as the Willamette River Greenway" phrase of the
8 Goal 15 "Goal" statement was not incorporated by the county
9 into ZDO 705.01.A. However, the parties do not argue, and we
10 do not find, that this is a significant distinction between the
11 Goal 15 and WRG district purpose statements. Since Goal 15
12 covers the overall adoption and establishment of a Willamette
13 River Greenway program, it is reasonable that once such a
14 program has been adopted, the purpose statement need not
15 include the phrase "as the Willamette River Greenway."

8 We do not decide in this case that the county could not,
9 consistent with Goal 15, adopt a WRG district purpose statement
10 which expresses an intent that the "lands along the Willamette
11 River" whose natural, scenic, historical, agricultural,
12 economic and recreational qualities will be protected are less
13 than all the land within the Greenway boundaries, only that the
14 county has not done so in its current ordinance.

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Because of our disposition of this subassignment, we need not determine in this case whether the identification of evidence in the record which clearly supports a determination of compliance with an applicable criterion authorizes us to affirm that portion of a local government's decision if the local government's error was in improperly construing the applicable criterion, as opposed to failing to support its conclusion of compliance with the criterion with adequate findings.

10

We note that respondent cites us to testimony by its architect recognizing that the site "has some scenic qualities." Record 458. However, the architect does not describe those qualities or the effects of the proposed development further, except to say that "the project was designed to fit with the site." *Id.* As previously noted, there is also evidence that 74% of the site will remain in open space. Record 462. This evidence does not clearly support a determination that the scenic quality of the site will be protected, conserved, enhanced and maintained.

11

The Water Resources chapter of the county comprehensive plan includes Policies 1.0 through 20.0. Policies 10.0 through 10.4 provide generally for designation and regulation of five Principal River Conservation Areas (PRCAs), including one for the Willamette River. Policies 15.0 through 15.9 apply only to the Willamette River Design Plan and Greenway. Only Water Resources policies are at issue in this appeal. Therefore, although the county's decision and the parties cite these plan policies in various ways, we will cite them as "WR Policies."

12

Petitioner's second assignment of error refers only to ZDO 705.03.E. However, in a footnote to the section of its argument addressing the impact of ZDO 705.02.A, petitioner states:

"All arguments regarding subsection 705.03E's setback requirements apply with equal force to subsection 705.03D's vegetative buffer requirement. The county found the latter was also inapplicable to the subject property. R. 5. All references to 705.03E's setback requirements therefore include 705.03D's vegetative requirements." Petition for Review 14, n 1.

1 By this footnote, petitioner apparently attempts to argue
2 that ZDO 705.02.A has the effect of making the vegetative
3 buffer requirement of ZDO 705.03.D, as well as the setback
4 requirement of ZDO 705.03.E, applicable to development on the
5 shores of Kellogg Lake. However, nowhere in its argument under
6 this subassignment of error does petitioner discuss the
7 language of ZDO 705.03.D or the relationship between
8 ZDO 705.02.A and 705.03.D. We will not supply petitioner with
9 argument or make petitioner's case for it. Deschutes
10 Development v. Deschutes Cty., 5 Or LUBA 218, 220 (1982).
11 Therefore, we do not treat the first subassignment of
12 petitioner's second assignment of error as challenging the
13 county's interpretation and application of ZDO 705.03.D.

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9 Petitioner quotes a draft county Planning Background Report
10 which refers to Kellogg Creek as a significant open space
11 corridor. Petitioner also cites statements from DLCD proposed
12 findings on the county's acknowledgment request and a City of
13 Milwaukie Draft Comprehensive Plan. Petitioner concludes these
14 statements show Kellogg Lake was included in the Greenway "to
15 be preserved as a green and open corridor * * * not to expand
16 the width of the corridor along the Willamette." Petition for
17 Review 21.

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15 Furthermore, the legislative history of the county
16 comprehensive plan to which we are referred by petitioner
17 consists only of a reference to Kellogg Creek as a significant
18 open space corridor. Such a reference does not compel the
19 conclusion that the county intended to treat the Kellogg Creek
20 corridor as a separate PRCA by its inclusion in the Willamette
21 River Greenway. We also note that we do not consider DLCD
22 proposed findings in an acknowledgment proceeding (see n 6,
23 supra) or legislative history of the City of Milwaukie's
24 comprehensive plan to be legislative history of the county's
25 comprehensive plan.

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22 WR Policy 15.5 provides in relevant part:

23 " * * * For all other uses, change of use,
24 modifications and intensifications, require Willamette
25 River Greenway Conditional Use approval and compliance
26 with provisions of the design plan and Policy 10.2
(see Policy 10.3)."

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2 16

WR Policy 10.3 provides in relevant part:

3 "Require a minimum setback of not less than 100 feet
4 or more than 150 feet from mean low water level for
5 all structures, except water-dependent uses. * * * "
(Emphasis added.)

6 17

7 Goal 15.C.3.k requires that local government plans and
8 implementation measures provide for the following:

9 "Greenway setback -- A setback line will be
10 established to keep structures separated from the
11 river in order to protect, maintain, preserve and
enhance the natural, scenic, historic and recreational
qualities of the Willamette River Greenway * * * "
(Emphasis added.)

12 Thus, we note that it appears clear Goal 15 requires only
13 that structures be set back from the Willamette River and not
from other bodies of water included in the Greenway.

14 18

15 We do not find inconsistency between the county's
16 interpretation of ZDO 705.03.D and ZDO 705.01.B, 705.03.C.2 and
17 705.04.A with regard to the effect of the term "river."
18 ZDO 705.01.B requires maintenance of "the integrity of the
19 Willamette River by minimizing erosion, promoting bank
20 stability and maintaining and enhancing water quality and fish
and wildlife habitats." The county concluded it must address
the issues of erosion, water quality and fish and wildlife
habitat with regard to the proposed development because of
possible impacts of the proposed development on the river.
Record 4.

21 ZDO 705.03.C.2 provides that a greenway permit will be
22 approved only if "where necessary, public access has been
23 provided to and along the river." The county found it is not
24 necessary or possible to provide public access through the
25 subject property to the river. Record 5. It also stated that,
26 "in order to protect the wetland area, it is not reasonable or
possible to provide public access to Kellogg Lake on the
subject property." Id. We do not interpret this latter
statement as a definitive indication that the county
interpreted "river" in ZDO 705.03.C to include Kellogg Lake.
Since the county found public access to Kellogg lake could not
be provided, and yet approved the greenway permit, it must have

1 reasoned either that such access was not "necessary" or was not
2 required by ZDO 705.03.C.2.

3 Finally, ZDO 705.04.A states that structures exceeding a
4 height of 35 feet are prohibited in the WRG district. This
5 provision makes no reference to "river." We, therefore, fail
6 to see how the county's application of this height restriction
7 to the subject property can be inconsistent with its
8 interpretation of the effect of the use of "river" in other
9 provisions of the WRG district.

10

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11 Petitioner has not challenged the county's conclusion that
12 the proposed project will be required to go through a final
13 design review process, or that such process will be an adequate
14 mechanism for assuring that the final design of the proposed
15 structures satisfies ZDO 705.04.A's height limitation.
16 Petitioner has simply argued that the county must make final
17 determinations on the finished grade elevation and vertical
18 extension of each proposed structure at the time it approves a
19 greenway permit.

20

20

21 Petitioner also argues that the height calculation shown on
22 Exhibit 11 does not comply with ZDO 202's definition of
23 structure height. Petitioner claims that the average elevation
24 of the adjacent grade must be calculated first, and then the
25 distance between that elevation and the highest point of the
26 structure determined. The calculation shown on Exhibit 11
27 first determined the distance from both the low and high ends
28 of the adjacent grade to the highest point of the structure,
29 and then averaged the two distances. We note that the two
30 methods of calculation are mathematically equivalent:

$$31 \quad X - \frac{(A + B)}{2} = \frac{(X - A)}{2} + \frac{(X - B)}{2}$$

32 A = low end of adjacent finished grade
33 B = high end of adjacent finished grade
34 X = highest point of the structure

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36 With regard to petitioner's concerns about Exhibit 11, we
37 think it clear from the testimony and report cited that this
38 diagram is intended merely to be illustrative of the typical
39 proposed three-story structure and the means by which building
40 height is to be determined by the county. We concluded under
41 the previous subassignment of error that the county could

1 determine compliance with ZDO 705.04.A based on finding that
2 the proposed structures can comply with the height limitation,
3 together with imposition of a condition assuring such
4 compliance. We believe reliance on the illustrative diagram,
5 together with supporting expert testimony, is appropriate in
6 this case. We note that the diagram's reference to elevation
7 at a "road" is appropriate in this instance, as the diagram
8 depicts the upper elevation of the finished grade adjacent to
9 the structure as the same as the elevation of the road.

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