

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the Josephine County
4 Board of Commissioners approving a development permit for a
5 motorcycle racetrack on land zoned Forest Commercial (FC).

6 **MOTION TO INTERVENE**

7 Jack Sauer and Josephine Sauer filed a motion to
8 intervene on the side of respondent in this appeal
9 proceeding. Petitioner does not object to the motion, and
10 it is allowed.

11 **FACTS**

12 The subject property is 77 acres in size and zoned FC.
13 The property is located 1/4 mile from the intersection of
14 Reeves Creek Road and the Redwood Highway, and is close to
15 the community of Kerby. Petitioner's residence is located
16 on property adjacent to the proposed racetrack.
17 Petitioner's property is at a slightly higher elevation than
18 the proposed racetrack.

19 Beyond this, the facts are confusing.

20 The county planning director sent a letter to
21 intervenors-respondent (intervenors). Record 202. The
22 letter states that motocross racing is allowed on the
23 subject property under a provision of the FC zoning district
24 listing "outdoor recreational activities and related support
25 services" as a permitted use, subject to obtaining a
26 development permit. Id. Intervenors subsequently applied

1 for a development permit to establish a motorcycle racetrack
2 on the subject property. While intervenors' application is
3 not included in the record, the record documents indicate
4 that the proposal includes concession stands, ticket booths
5 and portable toilets, as well as extensive motorcycle
6 tracks. Record 205-206.

7 The application was reviewed by the county's site
8 review committee.¹ The site review committee approved the
9 proposal but determined that certain conditions of approval
10 should be imposed. The conditions of approval included a
11 condition regarding compliance with Department of
12 Environmental Quality (DEQ) rules regarding dust and noise,
13 and a condition regarding the materials to be used for the
14 surface of parking and access areas serving the racetrack.

15 Intervenors appealed the site review committee's
16 decision to the hearings officer. That appeal was limited
17 to the condition regarding the surface of the parking and
18 access areas. On September 10, 1990, the hearings officer
19 issued a decision determining that the conditions regarding
20 the surface of the parking and access areas were properly
21 imposed. Record 253. Intervenors appealed the hearings
22 officer's September 10, 1990 decision to the board of
23 commissioners. On April 10, 1991 the board of commissioners

¹The site review committee consists of the planning director, building safety director, public works director, health officer and fire marshall or their designees. Josephine County Zoning Ordinance (JCZO) 15.217.

1 adopted a decision titled "ROAD SURFACE DECISION," reversing
2 the hearings officer's determination that the parking and
3 access area surfaces must be composed of certain materials.

4 During the time the above activity was taking place
5 regarding the "Road Surface Decision," the county was
6 conducting separate proceedings on other aspects of the site
7 review committee's decision and on a subsequent decision of
8 the planning director to issue a development permit for the
9 proposed racetrack. These other proceedings are styled by
10 the county as proceedings on the "Development Permit."

11 On August 12, 1990, petitioner appealed "[t]he planning
12 director's decision to allow motorcycle races in the FC zone
13 as an 'outdoor recreational activity,'" and also the site
14 review committee decision and the planning director's
15 subsequent decision to issue a development permit for the
16 proposed use. Record 215. On October 24, 1990, the
17 hearings officer held a hearing on petitioner's appeal. On
18 November 14, 1990, the hearings officer issued a decision on
19 petitioner's appeal, and concluded that a motorcycle
20 racetrack is a permitted use in the FC zone. Record 220.
21 However, the hearings officer remanded the decision to the
22 planning director on the basis that the site review
23 committee's condition of approval regarding the DEQ noise
24 and dust requirements had not been satisfied. Record 221.

25 On November 26, 1990, intervenors appealed the November
26 14, 1990 hearings officer decision to the board of

1 commissioners. The basis for intervenors' appeal to the
2 board of commissioners was their dissatisfaction with the
3 hearings officer's decision to remand the approval of the
4 development permit for the proposed racetrack due to
5 noncompliance with the condition concerning DEQ
6 requirements. On April 10, 1991, after a public hearing,
7 the board of commissioners adopted a decision titled
8 "DEVELOPMENT PERMIT," in which it determined that the
9 condition of approval regarding compliance with DEQ noise
10 and dust abatement standards had been satisfied.

11 Thereafter, petitioner filed an appeal with this Board.
12 Petitioner's notice of intent to appeal identifies the
13 "Development Permit" decision as the appealed decision, but
14 an unsigned copy of the "Road Surface Decision" was attached
15 to the notice of intent to appeal.

16 Intervenor moved to dismiss the appeal of the Road
17 Surface Decision on several bases, among them intervenors'
18 contention that the Road Surface Decision is a separate
19 county decision, an appeal of which requires an additional
20 appeal fee and deposit for costs.² During a telephone
21 conference with the parties, petitioner indicated the issue
22 she was concerned with was the underlying decision to allow
23 the racetrack, and that she was not interested in further

²The record submitted by the county ostensibly includes the record of all of the proceedings on the application for a motorcycle racetrack, including the proceedings leading to the "Road Surface Decision" and the "Development Permit" decision.

1 pursuing arguments concerning the "Road Surface Decision."
2 This Board did not grant the motion to dismiss. However, we
3 stated the following in our order on the motion to dismiss:

4 "We disagree with intervenors' assumption that it
5 is clear for purposes of an appeal to this Board,
6 that the county made two separate decisions -- one
7 being the Road Surface Decision and another being
8 the Development Permit decision. As far as we can
9 tell, the orders on the 'Road Surface' matter and
10 the 'Development Permit' matter stemmed from one
11 application submitted below. After initial county
12 decisions to approve the development permit with
13 conditions, separate appeals were filed by
14 petitioner and intervenors. While the county
15 conducted separate proceedings on intervenors'
16 appeal of the condition of approval concerning the
17 [parking and access area] surface for the proposed
18 racetrack and petitioner's appeal of the
19 development permit, it appears that the
20 development permit could not be issued without a
21 county decision regarding the Road Surface
22 Decision. Accordingly, we do not believe it is
23 appropriate to dismiss any portion of this appeal
24 proceeding. See Dyke v. Clatsop County, 97 Or App
25 670, 775 P2d 331, rev den 308 Or 592 (1989).
26 Nevertheless, as stated in the June 17, 1991
27 conference call with the parties we will give
28 effect to the parties' agreement that they not be
29 required to argue and brief, and the Board is not
30 required to address, issues concerning the Road
31 Surface Decision." Tice v. Josephine County ___
32 Or LUBA ___ (LUBA No. 91-043, Order on Motion to
33 Dismiss, June 19, 1991), slip op 3.

34 **ASSIGNMENTS OF ERROR**

35 In her assignments of error petitioner contends, among
36 other things, that a motorcycle racetrack is not a permitted
37 use in the county's FC zoning district. She points out that
38 motorcycle racetracks are specifically permitted in the
39 county's Tourist Commercial District, but are not

1 specifically listed as a use permitted in the county's FC
2 district.

3 Intervenor claim that because petitioner failed to
4 appeal the hearings officer's November 14, 1990 "Development
5 Permit" decision to the board of commissioners, the board of
6 commissioners only considered the issues which intervenors
7 raised in their appeal statement. Intervenor argue that
8 under these circumstances, petitioner waived her right to
9 raise the issue of whether a motorcycle racetrack is a
10 permitted use in the FC zone in an appeal to this Board,
11 under ORS 197.830(2) and ORS 197.763(1).³

12 We do not believe that petitioner's failure to appeal
13 the hearings officer's decision remanding the "Development
14 Permit" decision to the planning director affects our scope
15 of review.⁴ ORS 197.830(2) outlines this board's scope of

³ORS 197.830(2) provides:

"Issues shall be limited to those raised by any participant
before the local hearings body as provided by ORS 197.763.
* * *"

ORS 197.763(1) provides:

"An issue which may be the basis for an appeal to the board
shall be raised not later than the close of the record at or
following the final evidentiary hearing on the proposal before
the local government. Such issues shall be raised with
sufficient specificity so as to afford the governing body,
planning commission, hearings body or hearings officer, and the
parties an opportunity to respond to each issue." (Emphasis
supplied.)

⁴Further, we do not see why the board of commissioners' scope of review
was necessarily limited to only those issues raised in intervenors' appeal
statement. We are cited to no JCZO provision, and we find none, which

1 review. It states that our scope of review is limited to
2 issues "raised" during local proceedings, pursuant to the
3 provisions of ORS 197.763.⁵ ORS 197.763(1) read together
4 with ORS 197.830(2), provides a two step analysis for
5 determining the circumstances under which an issue is
6 "raised" locally for purposes of an appeal on that issue to
7 this Board. First, ORS 197.763(1) provides that issues
8 which might be the basis for an appeal to this Board must be
9 raised locally "no later than the close of the record at or
10 following the final evidentiary hearing on the proposal
11 before the local government." ORS 197.763(1).

12 The second part of ORS 197.763(1) defines how and
13 before whom issues are to be raised locally. It provides
14 that issues must be raised with "sufficient specificity so
15 as to afford the governing body, planning commission,
16 hearings body or hearings officer, and the parties an
17 adequate opportunity to respond to each issue." (Emphases
18 supplied.) Thus ORS 197.763(1) requires that issues need
19 only be raised before one of the listed local decision
20 makers, and be raised adequately for the parties and the
21 local decision maker to respond to those issues. Issues
22 raised in this manner are preserved for an appeal to this

limits the board of commissioners' review to issues raised in an appeal statement.

⁵ORS 197.763 also provides certain procedural requirements which must be followed by the county in order to take advantage of the "raise it or waive it" provisions. However, there is no issue in this appeal regarding whether the county properly observed the requirements of ORS 197.763.

1 Board.

2 Petitioner raised the issue of whether a motorcycle
3 racetrack is a permitted use in the county's FC zone in the
4 proceedings before the hearings officer. Further, the
5 hearings officer made a determination on that issue.
6 Accordingly, the issue of whether a motorcycle racetrack is
7 a permitted use in the FC zone was raised before the
8 hearings officer, and petitioner may raise the issue in this
9 appeal proceeding.⁶

10 We turn to the merits of petitioner's contention that a
11 racetrack is not a use which is permitted in the county's FC
12 zone.

13 The hearings officer determined a motorcycle racetrack
14 is a permitted "Outdoor Recreational Activit[y]" in the FC
15 zone under JCZO 3.020(3). Record 221. The board of
16 commissioners adopted the findings and decision of the
17 hearings officer concerning the development permit. Record
18 8.

19 The JCZO contains no definition of the phrase "outdoor
20 recreational activit[y]." In these circumstances, it is
21 well established that where county ordinance provisions
22 correspond to those in a state statute or a statewide
23 planning goal, it is appropriate to interpret those

⁶Intervenors do not contend that this issue was not raised with sufficient specificity to give the parties and the hearings officer an adequate opportunity to respond to it.

1 ordinance provisions consistently with available authority
2 for interpreting the relevant statute or goals. J and D
3 Fertilizers v. Clackamas County, ___ Or LUBA ___ (LUBA
4 No. 90-073, September 20, 1990), aff'd 105 Or App 11 (1990),
5 rev den 311 Or 261 (1991), slip op 4 n 4; Joseph v. Lane
6 County, ___ Or LUBA ___ (LUBA No. 89-048, September 11,
7 1989), slip op 14; Kellogg Lake Friends v. Clackamas County,
8 17 Or LUBA 277, 285 (1988), aff'd 96 Or App 536, rev den 308
9 Or 197 (1989); Goracke v. Benton County, 12 Or LUBA 128, 135
10 (1984). Further, the interpretation of local ordinances is
11 a question of law which must be decided by this Board and,
12 while some deference is due a local government's
13 interpretation of its own ordinances, it is ultimately this
14 Board's responsibility to determine the correct
15 interpretation of disputed code provisions. McCoy v. Linn
16 County, 90 Or App 271, 275-276, 752 P2d 323 (1988).

17 The county's FC zone was adopted to comply with Goal 4
18 as it existed prior to the February, 1990 Land Conservation
19 and Development Commission (LCDC) amendments to that goal.
20 The purpose of the county's FC zone is as follows:

21 "The [FC zone] is intended to implement the Goals
22 and Policies of the [Comprehensive Plan] by
23 conserving and protecting lands for forest uses.
24 This chapter is designated to provide a
25 classification for commercial forest lands in
26 private ownerships and for public lands
27 administered by forest management agencies,
28 encourage the management of commercial forest
29 lands as a stable timber base, and to conserve
30 natural resources by reducing hazards. Land that
31 has an internal rate of return of 4.0 or higher

1 will generally be placed in this classification.
2 This zone is consistent with Statewide Planning
3 Goal 4 for conservation of forest lands."
4 (Emphasis supplied.) JCZO 3.010.

5 The FC zone lists several permitted uses. Among them are
6 "Outdoor recreational activities and related support
7 services," and "Similar Uses, subject to [JCZO] 15.227."
8 JCZO 3.020(3) and (4).

9 Prior to February 5, 1990, Goal 4 identified "outdoor
10 recreational activities and related support services and
11 wilderness values compatible with these uses," as a forest
12 use.⁷ The language employed in JCZO 3.020(3) is nearly
13 identical to the above quoted Goal 4 language.

14 In Teamsters v. Hood River Cty., 2 LCDC 83 (1979), the
15 phrase "outdoor recreational activities and related support

⁷As amended February 5, 1990, Goal 4 states that "recreational opportunities appropriate in a forest environment" are forest uses. Further, LCDC adopted OAR 660-06-025(1) interpreting Goal 4, effective February 5, 1990, which rule states, in part:

"* * * the Commission has determined that five general types of uses * * * may be allowed in the forest environment * * *. These general types of uses are:

"* * * * *

"(b) * * * recreational uses appropriate in a forest environment.

"* * * * *."

We note that, while not applicable until periodic review (OAR 660-06-003(2)), the amendments to Goal 4 and OAR 660-06-025(1) regarding permitted recreational uses in a forest zone strongly support an interpretation that in a forest zone only those recreational uses with a relatively low impact on the forest environment are contemplated.

1 services * * *" was interpreted as not including tennis
2 courts, a swimming pool and a skiing rope tow. Further, it
3 was determined that commercial activities related to these
4 activities, such as a delicatessen, restaurant and lounge,
5 were not reasonably interpreted to be "related support
6 services." Id. The LCDC hearings officer concluded:

7 "The stated purpose of [Goal 4] is to preserve
8 forest lands for the production of trees. With
9 the recognition that certain 'outdoor'
10 recreational activities are not necessarily
11 inconsistent with wood fiber production, the Goal
12 permits these, together with 'related support
13 services * * * .[']

14 "It is one thing to erect a shelter for hikers and
15 skiers, or outdoor lavatory facilities or drinking
16 fountains. It is quite another to build a
17 hotel-resort with a delicatessen, restaurant,
18 lounge and retail stores. The former are
19 contemplated by Goal 4. The latter are not." 2
20 LCDC at 98.

21 In addition, Goal 4 has been interpreted to include "some
22 minimal recreational use." Eyerly v. Jefferson County, 5 Or
23 LUBA 45 (1982). (Emphasis supplied.)

24 These cases recognize that there is a limit to the
25 types of outdoor recreation activities allowable as an
26 "outdoor recreational activity" as that phrase is used in
27 Goal 4. The limitation on "outdoor recreational activities"
28 under Goal 4 stems from the very purpose that lands
29 designated as forest lands are designed to serve. Proposed
30 recreational uses which dominate and change the character of
31 the forest environment are not considered "outdoor

1 recreational activities" even though such proposed uses do
2 provide, in a broad sense, "outdoor recreation."

3 We do not believe it is a correct interpretation of
4 JCZO 3.020(3), or the identical language in Goal 4, that a
5 motorcycle racetrack is an "outdoor recreational
6 activit[y]." Such an interpretation would not be consistent
7 with the purposes which JCZO 3.010 states the county's FC
8 zone is designed to serve. Further, a motorcycle racetrack,
9 and the proposed accessory structures and activities,
10 certainly do nothing to preserve or protect the land for
11 forest uses under Goal 4, which the FC zone is designed to
12 implement. Additionally, we do not believe that concession
13 stands, ticket booths and portable toilets to support a
14 racetrack, are correctly interpreted as "related support
15 services" to an "outdoor recreational activit[y]" within the
16 meaning of JCZO 3.020(3) or Goal 4.

17 Finally, we conclude a motorcycle racetrack could not
18 be approved in the FC zone under the JCZO 3.020(4) "similar
19 uses" category. JCZO 15.227 states the following:

20 "The Planning Director may rule that a use, not
21 specifically named as an allowed use in a district
22 shall be included among the allowed uses if the
23 use is in the same general type and is similar to
24 the allowed uses. This Section, however, does not
25 authorize the inclusion, in a district where it is
26 not listed, of a use specifically listed in
27 another district, unless an amendment to the zone
28 is processed. * * *" (Emphasis supplied.)

29 No amendment to the FC zone was requested or processed, and
30 motorcycle racetracks are specifically listed as a

1 conditionally permitted use in the county's Tourist
2 Commercial zone. JCZO 10.025(1).

3 Because the challenged decision approving a motorcycle
4 racetrack as a permitted use in the FC zone is erroneous as
5 a matter of law, no purpose would be served in reviewing
6 petitioner's remaining assignments of error.

7 The county's decision is reversed.

8