

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

3
4 FRIENDS OF THE METOLIUS, and)
5 TONI FOSTER,)
6)
7 Petitioners,)
8)
9 vs.)
10)
11 JEFFERSON COUNTY,)
12)
13 Respondent,)
14)
15 and)
16)
17 DAN RICHARTZ and CINDI RICHARTZ,)
18)
19 Intervenors-Respondent.)

LUBA No. 93-002
FINAL OPINION
AND ORDER

20
21
22 Appeal from Jefferson County.

23
24 Bill Kloos, Eugene, filed the petition for review and
25 argued on behalf of petitioners. With him on the brief was
26 Johnson & Kloos.

27
28 No appearance by respondent.

29
30 Steven W. Abel, Portland, filed the response brief and
31 argued on behalf of intervenors-respondent. With him on the
32 brief was Schwabe, Williamson & Wyatt.

33
34 KELLINGTON, Referee; SHERTON, Chief Referee; HOLSTUN,
35 Referee, participated in the decision.

36
37 REMANDED 06/08/93

38
39 You are entitled to judicial review of this Order.
40 Judicial review is governed by the provisions of ORS
41 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county order approving a
4 conditional use permit for development of "traveler's
5 overnight accommodations."

6 **MOTION TO INTERVENE**

7 Dan Richartz and Cindi Richartz, the applicants below,
8 move to intervene on the side of respondent. There is no
9 objection to the motion, and it is allowed.

10 **FACTS**

11 The subject property consists of 3.03 acres and is
12 designated and zoned Camp Sherman Resort Residential (CSRR).
13 The challenged decision describes the proposal as follows:

14 "[Intervenors] are requesting a conditional use
15 [permit] to permit modification of the Black Butte
16 Resort and RV Park consisting of six (6) cabins, a
17 manager's residence, two (2) large A-frame
18 buildings, two (2) mobile homes, and twenty-nine
19 (29) serviced recreational vehicle spaces. The
20 request is to replace all existing structures with
21 a new modified traveler's accommodation consisting
22 of fifteen (15) cabins. * * *." Record 4.

23 The county planning commission considered intervenors'
24 application. However, the planning commission's vote on a
25 motion to approve the application resulted in a tie. The
26 planning commission referred the application to the county
27 governing body, the county court. The county court
28 unanimously approved a motion to review the application on
29 its own motion. Thereafter, the county court conducted a de
30 novo public hearing and approved the application. This

1 appeal followed.

2 **INTRODUCTION**

3 Under the ninth assignment of error, we explain that it
4 is impossible to determine the extent of the documents the
5 county court intended to adopt as findings. The only
6 documents clearly adopted as findings in support of the
7 challenged decision are the county court's order itself
8 (Record 1-2), as well as the first set (Record 3-12) of two
9 sets of findings labeled as Exhibit A attached to that
10 order. Accordingly, for purposes of resolving the first
11 through eighth assignments of error, we rely only upon the
12 findings in the county court's order itself and in the first
13 Exhibit A to that order.

14 **FIRST ASSIGNMENT OF ERROR**

15 Petitioners argue that under Jefferson County Zoning
16 Ordinance (JCZO) 601,¹ the county court could only act on
17 the disputed application after the planning commission had
18 taken action on it, and the planning commission's referral
19 of the matter to the county court does not constitute taking
20 an "action." Further, petitioners argue that under
21 JCZO 904, entitled "Appeals," the county court could not
22 consider intervenors' application unless there was an appeal

¹JCZO 601 provides:

"A conditional use listed in this ordinance shall be permitted, altered or denied in accordance with the standards and procedures of this ordinance and this article by action of the Planning Commission."

1 from a decision of the planning commission. According to
2 petitioners, the county court lacked authority to consider
3 the matter because there was neither a decision by the
4 planning commission nor an appeal from the planning
5 commission to the county court.

6 Intervenor's argue these issues were not raised below
7 and under ORS 197.763(1) and 197.835(2),² and local code
8 provisions (discussed below), we are foreclosed from
9 reviewing them.

10 Our scope of review is limited to issues raised below
11 only where the requirements of ORS 197.763 are observed.
12 ORS 197.835(2)(a). Petitioners identify various ways in
13 which the county's notices of hearing were deficient under
14 ORS 197.763(3). Petitioners also contend the county staff
15 report was not available seven days prior to the first local
16 evidentiary hearing, in contravention of ORS 197.763(4)(b).

17 Intervenor's do not argue that the local notices of

²ORS 197.763(1) provides:

"An issue which may be the basis for an appeal to [LUBA] 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 * * * and the parties an adequate opportunity to respond to each issue."

ORS 197.835(2) provides that LUBA's scope of review is limited as follows:

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

1 hearing comply with ORS 197.763(3) or that the local staff
2 report was available as required by ORS 197.763(4)(b).
3 Therefore, under ORS 197.835(2), petitioners may raise
4 issues before this Board regardless of whether those issues
5 were raised below.

6 JCZO 6.15 provides the following local "raise it or
7 waive it" requirement:

8 "Any objections [to jurisdiction, procedure,
9 notice or qualifications] not raised prior to the
10 close of oral testimony are waived."

11 While local governments are free to adopt code
12 provisions governing local proceedings, such local
13 requirements do not limit our review. See Tice v. Josephine
14 County, 21 Or LUBA 371, 376 (1991). Accordingly, we may
15 review petitioners' arguments under this assignment of
16 error.

17 JCZO 904 provides in relevant part:

18 "A person may appeal to the County Court from a
19 decision or requirement made by the Planning
20 Commission.

21 "* * * * *

22 "B. The County Court * * * may review a lower
23 decision upon its own motion after giving 10
24 days notice to the parties involved in the
25 decision, and if such review is initiated
26 within 15 days of receipt of notice of said
27 lower decision.

28 "* * * * *

29 "E. The procedure, public notice, and type of
30 hearing for an appeal or review shall be in
31 the same manner as required for the original

1 application." (Emphases supplied.)

2 JCZO 904 provides for appeals, as well as reviews by
3 the county court on its own motion, of lower level
4 decisions. The county court, on its own motion, decided to
5 review the disputed application based on the planning
6 commission's tie vote on a motion to approve the application
7 and the planning commission's decision to forward the
8 application to the county court.³ Record 82. We see
9 nothing inconsistent with JCZO 904, or any other provision
10 of the JCZO, in the county court's use of JCZO 904 as a
11 mechanism to make a decision on the merits of the subject
12 application.⁴

13 The first assignment of error is denied.

14 **SECOND AND FOURTH ASSIGNMENTS OF ERROR**

15 Petitioners make three arguments under these
16 assignments of error. First, petitioners argue the county
17 erroneously concluded that the proposal constitutes a
18 "traveler's accommodation." Second, petitioners contend the
19 findings are inadequate because the county failed to address

³There is no dispute that if we determine that the county court properly took review of the matter on its own motion pursuant to JCZO 904, then its review was timely.

⁴Because the county committed no error in reviewing the matter, we need not address intervenors' contention that if the county court erred by conducting a review, that error was procedural and petitioners failed to object to that error below. However, we note that we doubt whether such an error could properly be classified as "procedural" in nature. See Century 21 Properties, Inc. v. City of Tigard, 99 Or App 435, 783 P2d 13 (1989).

1 a relevant issue petitioners raised below concerning whether
2 the proposal will result in "dwelling units" subject to JCZO
3 density limitations. Related to the second issue is
4 petitioners' third argument that the county must apply
5 density provisions applicable to single family dwelling
6 units because the proposal will result in the approval of
7 fifteen clustered single family dwelling units. We address
8 these issues separately below.

9 **A. Traveler's Accommodations**

10 JCZO 105 provides the following definition of
11 "traveler's accommodations":

12 "An establishment having rooms or apartments
13 rented or kept for rent on a daily or weekly basis
14 to travelers or transients for a charge or fee
15 paid or to be paid for rental or use of
16 facilities."

17 The challenged decision determines the proposal is
18 "traveler's accommodations," as follows:

19 "* * * The definition of Traveler's Accommodations
20 includes not only existing use of the property,
21 but also the modified use as proposed by
22 [intervenors].

23 "* * * * *

24 "The definition of use as a traveler's
25 accommodation is complied with in that the County
26 Court specifically finds that the structures are
27 arranged and designed as cabins for traveler's
28 accommodations. The limitations on their
29 occupancy are specifically intended to comply with
30 the traveler's accommodation definition of
31 [JCZO 105].

32 "* * * * *

1 "* * * The site in question is currently being
2 used as a traveler's accommodations, motel and/or
3 private campground. * * * It should be noted
4 that the use is not being changed, only alteration
5 of the existing Traveler's Accommodation
6 consisting of a twenty-nine (29) space RV park,
7 six (6) motel cabins and two (2) mobile homes to
8 the proposed 14 unit Traveler's Accommodation * *
9 *." Record 5-6.

10 While a condition of approval allows owners of the
11 proposed cabins to occupy them for up to 36 days per year,
12 that condition does not necessarily establish that the
13 cabins are not traveler's accommodations. Record 27. The
14 challenged decision interprets JCZO 105 as not excluding
15 from the definition of traveler's accommodation such a de
16 minimis occupation by an owner. This interpretation is not
17 clearly contrary to the express words, policy or context of
18 JCZO 105 and, therefore, we must defer to the county's
19 interpretation. Clark v. Jackson County, 313 Or 508, 515,
20 836 P2d 710 (1992).

21 The first subassignment of error is denied.

22 **B. Single Family Dwellings/Density**

23 Petitioners argue the challenged decision fails to
24 address a relevant issue they raised below: that the density
25 standards for single family dwellings in the CSRR zoning
26 district are applicable to, and violated by, approval of the
27 proposal. See Norvell v. Portland Area LGBC, 43 Or App 849,
28 853, 604 P2d 896 (1979). Petitioners also argue that the
29 proposal meets the JCZO definition of "dwelling units."

1 According to petitioners, under JCZO 1001,⁵ regardless of
2 whether the proposal also constitutes traveler's
3 accommodations, the county must apply to it the density
4 restrictions applicable to single family dwellings.

5 The challenged decision contains findings specifically
6 addressing the issues raised by petitioners. Accordingly,
7 petitioners' contentions that the decision fails to address
8 these issues provides no basis for reversal or remand of the
9 challenged decision.

10 Further, the challenged decision states:

11 "A dwelling unit * * * may cover all types of
12 traveler's accommodations, motels, private
13 campground and similar uses. Defining the minimum
14 size of a dwelling unit does not preclude cabins
15 from being approved as traveler's overnight
16 accommodations in the CSRR Zone. * * * The Camp
17 Sherman Appendix [to the comprehensive plan]
18 further contemplates [that] dwelling units in the
19 form of single-family residence, lodge or motel
20 units, whether full or part-time use, are all
21 included within the definition of a dwelling unit
22 [which] is contemplated by that zone. * * *.

23 " * * * * *

24 "[T]he use proposed for the cabins is as * * *
25 traveler's accommodations, regardless of whether
26 the cabins are clustered or incorporated into one
27 building. Further, the JCZO specifically provides
28 criteria for approval of a traveler's

⁵JCZO 1001 provides as follows:

"Where the conditions imposed by a provision of this ordinance are less restrictive than comparable conditions imposed by any other provisions which are more restrictive, the more restrictive shall govern."

1 accommodation. In this regard, [the] specific
2 minimum parcel [size] for traveler's accommodation
3 [is] two acres * * *.^[6] The parcel in question is
4 3.03 acres.

5 * * * * *

6 * * * The County Court further finds that the
7 site * * * currently contains a stick-built
8 residence, two (2) permanent mobile homes, six (6)
9 permanent cabins, two (2) large A-frame buildings,
10 and twenty-nine (29) RV spaces of which eighteen
11 (18) are fully serviced with sewer and water and
12 electricity. The County Court finds that not only
13 does the requested conditional use permit comply
14 with the minimum parcel standard, it is also a
15 reduction in the density of the current use of the
16 property * * *" Record 5-7.

17 We interpret these findings to determine that
18 "traveler's accommodations" as used in JCZO 105 may include
19 structures that otherwise constitute single family
20 dwellings. However, these findings also determine that
21 regardless, traveler's accommodations need only comply with
22 standards applicable to them, and not with standards
23 applicable to single family dwellings, including density
24 standards. In this regard, we do not believe the standards
25 applicable to "traveler's accommodations" are "comparable"
26 to the standards applicable to single family dwellings.
27 Accordingly, JCZO 1001 does not require that the standards
28 applicable to single family dwellings be applied to
29 traveler's accommodations. In sum, the county's

⁶The minimum parcel size standard in the CSRR zone for uses other than single-family dwellings and duplexes is two acres. JCZO 307(F).

1 interpretation expressed in its decision that the proposal
2 constitutes traveler's accommodations, and is only subject
3 to standards applicable to traveler's accommodations, is not
4 clearly contrary to the express words, policy or context of
5 the JCZO, and we defer to it.

6 This subassignment of error is denied.

7 The second and fourth assignments of error are denied.

8 **THIRD ASSIGNMENT OF ERROR**

9 Under this assignment of error, petitioners contend the
10 proposal constitutes an urban level of use in a rural area
11 and, therefore, to approve the proposal, an exception to
12 Statewide Planning Goal 14 (Urbanization) is required.

13 The challenged decision does not approve a plan
14 amendment or zone change. The county regulations governing
15 the approval of traveler's accommodations are acknowledged
16 by the Land Conservation and Development Commission. In
17 O'Mara v. Douglas County, ____ Or LUBA _____ (LUBA No.
18 92-166, March 10, 1993), slip op 7-8, this Board rejected
19 arguments identical to those presented here, as follows:

20 "* * * Once the county's plan and regulations are
21 acknowledged, the acknowledged plan and land use
22 regulations, not the statewide planning goals,
23 apply to permit decisions such as the one at issue
24 here. ORS 197.175(2)(d); Byrd v. Stringer, 295 Or
25 311, 316-17, 666 P2d 1332 (1983); Keudell v. Union
26 County, 19 Or LUBA 394, 400 (1990). Because the
27 county land use decision challenged in this
28 proceeding is not 'an amendment to an acknowledged
29 comprehensive plan or land use regulation or a new
30 land use regulation,' we have no authority to
31 reverse or remand the county's decision for

1 failure to comply with the statewide planning
2 goals. ORS 197.835(3) and (4); Highway 213
3 Coalition v. Clackamas County, 17 Or LUBA 256, 263
4 (1988)."

5 The third assignment of error is denied.

6 **FIFTH AND SIXTH ASSIGNMENTS OF ERROR**

7 Petitioners contend the challenged decision approves a
8 subdivision and a planned unit development (PUD), but fails
9 to apply the standards applicable to subdivisions or planned
10 unit developments.

11 The challenged decision determines the following:

12 "The County Court finds from the record that there
13 is no evidence that would indicate that the
14 property will be divided into four or more lots or
15 into eleven or more undivided interests as part of
16 this proposal. The record specifically indicates
17 that the applicant intends to comply with any
18 applicable requirements of the State of Oregon and
19 Jefferson County in the event of subsequent
20 division of the land or interest therein results
21 in additional criteria being applicable."⁷ Record
22 5.

23 As far as we can tell, the challenged decision approves
24 only a conditional use permit for traveler's accommodations
25 which include 15 individual cabins. We do not understand

⁷The statement is at odds with the following findings included in the staff report (Exhibit B):

"* * * [T]he operational characteristics [of the proposal] will include individual ownership of the 14 traveler's accommodations which will be subject to lease or rent agreements that will be managed by a Rental Agreement." Record 23.

However, as we explain under the ninth assignment of error, we do not consider Exhibit B to be part of the county's findings.

1 the challenged decision to approve a PUD or a subdivision of
2 land.⁸ If the county wishes to grant such approval in the
3 future, then it must then apply its subdivision and PUD
4 regulations, as well as applicable provisions of state law.

5 The fifth and sixth assignments of error are denied.

6 **SEVENTH ASSIGNMENT OF ERROR**

7 One of the applicable standards for the approval of a
8 conditional use permit requires a determination that the
9 proposal complies with the comprehensive plan (plan).
10 JCZO 602(A). Under this assignment of error, petitioners
11 argue the county erroneously determined that denial of the
12 proposal would violate the plan. Petitioners also argue
13 that the proposal will not provide a "choice of housing
14 types." Petition for Review 20.

15 The challenged decision includes findings that the
16 proposal complies with the plan as well as with the Camp
17 Sherman Appendix to the plan. Record 8-9. While there are
18 findings that denial of the proposal would violate the plan,
19 we fail to understand how those findings, even if they are
20 erroneous, would provide a basis for reversal or remand of
21 the challenged decision. Further, petitioners do not
22 explain whether the plan requires a "choice of housing

⁸Whether the county's finding that there is no evidence to support a determination that a division of land is proposed, is itself supported by substantial evidence in the whole record, makes no difference to our determination here. The fact is, the challenged decision only approves a conditional use permit. It does not approve a division of land or a PUD.

1 types," or how the challenged decision violates the plan in
2 this regard. Petitioners' arguments under this assignment
3 of error are insufficient to provide a basis for reversal or
4 remand of the challenged decision.

5 The seventh assignment of error is denied.

6 **EIGHTH ASSIGNMENT OF ERROR**

7 "County approval was not explicitly conditioned
8 upon compliance with the proposed site plan,
9 landscaping plan, or building design plans. As a
10 result, all findings of compliance with decision
11 criteria that rely on these plans are not
12 supported by adequate findings or by substantial
13 evidence in the whole record."

14 Under this assignment of error, petitioners argue the
15 challenged decision fails to clearly establish what it
16 approves. Specifically, petitioners argue the challenged
17 decision fails to condition the approval of the proposal on
18 compliance with any specific plans.

19 Intervenors contend that under JCZO 602, the challenged
20 decision approves their "proposal" and that their "proposal"
21 includes the plans they submitted to the county.

22 JCZO 602 provides as follows:

23 "To determine whether a conditional use proposal
24 shall be approved or denied, the [county] shall
25 find that the following criteria are met, are not
26 able to be met, or are not applicable." (Emphasis
27 supplied.)

28 We interpret the challenged decision to approve
29 intervenors' proposal, which means that it approves
30 intervenors' proposal as it was submitted by them to the

1 county.

2 The eighth assignment of error is denied.

3 **NINTH ASSIGNMENT OF ERROR**

4 Under this assignment of error, petitioners argue the
5 challenged decision fails to establish with sufficient
6 certainty the documents that are adopted as findings in
7 support of the challenged decision. In addition,
8 petitioners argue the county's findings fail to address
9 several relevant issues they raised below. Norvell v.
10 Portland Area LGBC, supra.

11 One of the relevant standards for the approval of a
12 conditional use permit is JCZO 307(E)(3), which provides:

13 "The proposed use must be in harmony with the
14 natural environment and result in a minimum number
15 of conflicts with existing development."

16 Further, JCZO 602(B) requires a determination that:

17 "Taking into account location, size, design and
18 operational characteristics, the proposal will
19 have a minimal adverse impact on the (a)
20 livability, (b) value, and (c) appropriate
21 development of abutting properties and the
22 surrounding area compared to the impact of the
23 development that is permitted outright."

24 Petitioners identify three issues they raised below
25 that are relevant to these standards, and which are not
26 addressed in the county's findings. Those issues are as
27 follows:

28 "This use, like the adjacent similar development,
29 does not fit with the homey, slightly haphazard
30 atmosphere of the community. Appropriate
31 development is existing style, which is an

1 alternative to Black Butte [Ranch] and Sun River.
2 [The proposed use is] out of character for a
3 small-scale, low-key community.

4 "Development will add to the traffic congestion
5 and safety risk to bikers from increased
6 development. The same traffic impacts pose risks
7 for school children.

8 * * * * *

9 "Year-round use of the site may impact big game,
10 which move through the area in a north/south
11 direction, following the river, in the off
12 season."⁹ (Record citations omitted.) Petition
13 for Review 33.

14 These relevant issues are not addressed by the
15 challenged decision. Moreover, it is virtually impossible
16 to determine the extent of the documents the county adopted
17 as its findings in support of the challenged decision. The
18 order signed by the county court states it is:

19 "ORDERED that the Findings and Decision contained
20 in Exhibit 'A,' and the Findings of Fact and
21 Conclusions of Law contained in the Staff Report,
22 Exhibit 'B,' be adopted for approval * * *."
23 Record 1.

24 Exhibit A, at Record 3-12 (first Exhibit A), in turn
25 states:

26 "See Exhibit 'A' attached hereto and by this
27 reference incorporated herein." Record 3.

⁹As to the balance of the issues petitioners contend are not adequately addressed by the challenged decision, intervenors cite findings adequately addressing those issues. Petitioners' substantial evidence challenge concerning the issues they argue are not adequately addressed in the decision, is not sufficiently developed to warrant review. See Eckis v. Linn County, 110 Or App 309, 313, 821 P2d 1127 (1991) and Territorial Neighbors v. Lane County, 16 Or LUBA 641, 657 (1988).

1 This apparently refers to a second Exhibit "A" which is
2 located at Record 13-17.

3 At the end of the first Exhibit "A" is the following
4 statement:

5 "[T]he Jefferson County Planning Director has
6 prepared specific conditional use findings and
7 conclusions. To the extent such conditional use
8 findings and conclusions are not inconsistent with
9 those specifically provided for in these findings
10 and decision, the conditional use Findings And
11 Conclusions, attached hereto as Exhibit 'B,' are
12 incorporated herein and adopted as findings and
13 conclusions of the Jefferson County Court."
14 (Emphasis supplied.) Record 12.

15 The Exhibit B referred to in both the county court order and
16 the first Exhibit A is a staff report at Record 18-28.
17 However, the county court's order adopts the findings in
18 Exhibit B unconditionally, whereas Exhibit A contains the
19 above emphasized qualification. In addition, the first
20 Exhibit A states:

21 "In support of its application, in addition to
22 oral testimony, the applicant has submitted a
23 complete notebook of written testimony. This
24 notebook, including the findings set forth herein,
25 is adopted by the County Court and its contents
26 incorporated by reference, in support of the
27 County Court's approval of this application."
28 Record 4.

29 The "notebook" referred to in this finding is apparently an
30 unnumbered, construction paper bound document composed of
31 approximately 70 pages of materials.

32 Beyond the county court's order itself, and the
33 findings in the first Exhibit A relied upon in earlier

1 portions of this decision, it is not possible to determine
2 from the above what documents and portions thereof the
3 county court intended to adopt as part of the challenged
4 decision. On remand, the county should address the relevant
5 issues identified above, and clearly identify what findings
6 it adopts to support its decision.

7 Finally, we note that adequate findings to support
8 determinations of compliance with JCZO 602(B) require the
9 county to identify a particular area for consideration;
10 identify the livability characteristics of that area,
11 determine the value and appropriate development of both
12 properties abutting the subject property and in the
13 identified area; and determine the proposal's impacts on
14 those features and characteristics. The county must
15 determine the proposal will result in no more than a minimal
16 adverse impact on the livability, value and appropriate
17 development of the identified area, when compared to the
18 impacts of development permitted outright.

19 In addition, to determine compliance with JCZO
20 307(E)(3), the county must identify an area for
21 consideration, identify the natural environment and existing
22 development in the identified area and determine the
23 proposal's impacts on these features. The county must then
24 determine the proposal is in harmony with the natural
25 environment in the identified area, and determine that the
26 proposal will result in only a minimum number of conflicts

1 with existing development in that area. Findings along
2 these lines that are supported by substantial evidence in
3 the whole record are what JCZO 307(E)(3) and 602(B) demand.
4 See Benjamin v. City of Ashland, 20 Or LUBA 256 (1990);
5 Murphey v. City of Ashland, 19 Or LUBA 182, aff'd 103 Or App
6 238 (1990).

7 The ninth assignment of error is sustained.

8 The county's decision is remanded.