

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

COLLEEN SPIERING,)
)
Petitioner,)
)
and)
)
ROY MACMILLAN,)
)
Intervenor-Petitioner,) LUBA
No. 93-049)
vs.)
) FINAL OPINION
YAMHILL COUNTY,) AND ORDER
)
Respondent,)
)
and)
)
JEFF TWENGE,)
)
Intervenor-Respondent.)

Appeal from Yamhill County.

Colleen Spiering, Newberg, filed a petition for review and argued on her own behalf.

Roy MacMillan, Newberg, filed a petition for review and argued on his own behalf.

No appearance by respondent.

John E. Storkel, Salem, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Storkel & Grefenson.

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

REMANDED 08/06/93

1 You are entitled to judicial review of this Order.
2 Judicial review is governed by the provisions of ORS
3 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county order approving a
4 conditional use permit for a paintball game park.¹

5 **MOTIONS TO INTERVENE**

6 Roy MacMillan moves to intervene in this proceeding on
7 the side of petitioner. Jeff Twenge, an applicant below,
8 moves to intervene on the side of respondent. There are no
9 objections to the motions, and they are allowed.

10 **FACTS**

11 The subject property consists of 108 acres designated
12 Agriculture/Forestry Large Holding (AFLH) by the Yamhill
13 County Comprehensive Plan (plan) and zoned
14 Agriculture/Forestry (AF-20). In 1988, the county approved
15 a partition of the subject property, creating an 88.6 acre
16 parcel to the south (tax lot 2200) and a 19.7 acre parcel to
17 the north (tax lot 2201).² Record 10. In 1990, the county

¹The challenged decision describes the game of paintball as follows:

"[A] group of players (from 4 to 500) divide into two teams to play 'capture the flag.' The object of the game is to capture the other team's flag while protecting one's own. While trying to capture a flag, players try to eliminate opposing players by tagging them with a paintball expelled from a special CO₂ or air-powered paintgun." Record 5.

²In 1989, the county approved a partition of tax lot 2200, creating a new 20 acre parcel and, presumably, a remainder parcel of 68.6 acres. Record 10. However, the location of this partition is not included in the record. Therefore, for the purposes of this opinion, we treat the subject property as consisting of the 88.6 acre tax lot 2200 and the 19.7 acre tax lot 2201.

1 approved a forest dwelling on tax lot 2201. Record 11.
2 That dwelling is located in the northwest corner of tax lot
3 2201, and would not be used as part of the proposed
4 paintball game park.

5 The proposed paintball game park would consist of a 24
6 acre wooded area, including a southern portion of tax lot
7 2201 and the adjoining northern portion of tax lot 2200.
8 The proposed 24 acre site is entirely surrounded by the
9 remainder of the 108 acre subject property. Along its
10 northwest boundary, the 24 acre site comes closest to the
11 boundaries of the subject property, being separated from
12 Courtney Road by a strip of land approximately 100 feet in
13 width. Access to the proposed paintball game park will be
14 from Courtney Road. A stream runs through the southeast
15 portion of the proposed paintball game park site. Parts of
16 the subject property are used as pasture for livestock, and
17 the proposed paintball game park site has been used as
18 pasture for livestock in the past.

19 An area designated Very Low Density Residential and
20 zoned Very Low Density Residential - 2 1/2 Acre Minimum
21 (VLDR-2 1/2) adjoins the southeast corner of the subject
22 property. All other surrounding property is designated AFLH
23 and zoned AF-20. The area surrounding the subject parcel is
24 characterized by rural residential, small farm and woodlot
25 uses.

26 The proposed use includes a parking lot for the

1 paintball players, a portable sanitary facility, trails
2 through the woods, stream crossings and some small
3 structures (e.g. "tower," "tree fort," "castle") that are
4 used as part of the paintball game. The players will pay a
5 fee to the operator (intervenor-respondent) for use of the
6 facilities and equipment. Record 6.

7 The proposed activity has been taking place on the
8 subject property on weekends and some weekdays for several
9 months. After the county received complaints about the
10 activity, intervenor-respondent filed the subject
11 conditional use permit application on September 28, 1992.
12 Record 404. After holding a public hearing, the planning
13 commission's vote on a motion to approve the subject
14 application resulted in a tie. The planning commission then
15 voted to refer the matter to the board of county
16 commissioners. After a public hearing, the board of
17 commissioners adopted an order approving the conditional use
18 permit application with conditions. This appeal followed.

19 **SEVENTH ASSIGNMENT OF ERROR (INTERVENOR-PETITIONER)**

20 The conditional use permit application filed on
21 September 28, 1992 lists intervenor-respondent as the
22 applicant and Fred Capell as the owner of the subject
23 property. Record 404. Intervenor-petitioner states the
24 county subsequently allowed the application to be amended to
25 add Fred Capell as a joint applicant. Intervenor-petitioner
26 argues, however, that three other individuals, Edgar Capell,

1 Susan Capell and Keta Capell, also hold ownership interests
2 in the subject property. Intervenor-petitioner contends the
3 county erred in approving a conditional use permit for the
4 subject property without the consent of these three
5 co-owners.

6 Intervenor-petitioner identifies no plan, code or other
7 legal standard requiring that a conditional use permit
8 application be signed by all owners of the subject property,
9 or that the consent of all owners of the subject property be
10 obtained prior to issuance of a conditional use permit.
11 Where a petitioner fails to identify any applicable legal
12 standard that he or she contends is violated by an alleged
13 defect in the local government's decision, LUBA cannot grant
14 relief. Schellenberg v. Polk County, 22 Or LUBA 673 (1992);
15 Lane School District 71 v. Lane County, 15 Or LUBA 150, 153
16 (1986).

17 This assignment of error is denied.

18 **THIRD ASSIGNMENT OF ERROR (PETITIONER)**

19 Petitioner argues one of the county commissioners has
20 close personal and political ties to co-applicant Fred
21 Capell. Petitioner alleges they worked together closely on
22 a political committee seeking to place an initiative measure
23 on the ballot. Petitioner further argues that comments made
24 by this commissioner during the board of commissioners'
25 hearings and deliberation demonstrate bias in favor of
26 applicant Capell. Petitioner contends the commissioner's

1 failure to disclose his close relationship to applicant
2 Capell creates an appearance of impropriety. Petitioner
3 also contends that because of the county commissioner's
4 alleged bias in favor of applicant Capell, the commissioner
5 was unable to make a decision based on the evidence and
6 argument before him.³

7 We understand petitioner to contend she was denied the
8 impartial tribunal to which she is entitled under Fasano v.
9 Washington Co. Comm., 264 Or 574, 507 P2d 23 (1973).⁴ In
10 1000 Friends of Oregon v. Wasco Co. Court, 304 Or 76, 80-85,
11 742 P2d 39 (1987), the Oregon Supreme Court explained that
12 Fasano, and Oregon law in general, do not demand that local

³Intervenor-respondent contends petitioner has waived this issue because she did not object to the county commissioner's participation during the proceedings below. However, the petition for review alleges petitioner did not learn of the facts indicating a close personal and political relationship between the county commissioner and applicant Capell until after the challenged decision was made. Intervenor-respondent does not challenge this allegation. Neither does intervenor-respondent challenge any of the facts set out by petitioner concerning the relationship between the county commissioner and applicant Capell. Therefore, for the purposes of resolving this assignment of error, we assume the facts alleged by petitioner are true. Also, because petitioner was not aware of the facts which provide the basis for this assignment of error during the proceedings below, petitioner did not waive this issue by failing to object to the county commissioner's participation in the proceedings below. See Horizon Construction, Inc. v. City of Newberg, 114 Or App 249, 834 P2d 523 (1992).

⁴Petitioner also asserts that an impartial tribunal "is a basic requirement of due process under the federal constitution." Petition for Review 11. However, petitioner provides no legal argument in support of this assertion. LUBA has consistently held that it will not consider a claim of constitutional violation where the party raising such claim does not supply legal argument in support of her claim. Joyce v. Multnomah County, 23 Or LUBA 116, 118, aff'd 114 Or App 244 (1992); Torgeson v. City of Canby, 19 Or LUBA 511, 519 (1990); Chemeketa Industries Corp. v. City of Salem, 14 Or LUBA 159, 165-66 (1985).

1 decision makers in quasi-judicial land use proceedings
2 maintain the "appearance of impartiality" required of
3 judges. What is required of local decision makers is
4 "actual impartiality," the ability to make a decision based
5 on the argument and evidence before them, rather than on
6 prejudice or personal interest. In addition, this Board
7 has repeatedly stated that in order to establish actual bias
8 or prejudice on the part of a local decision maker, the
9 petitioner has the burden of showing the decision maker was
10 biased or prejudged the application and did not reach a
11 decision by applying relevant standards based on the
12 evidence and argument presented. Heiller v. Josephine
13 County, 23 Or LUBA 551, 554 (1992); Waite v. Marion County,
14 16 Or LUBA 353, 357 (1987); Oatfield Ridge Residents Rights
15 v. Clackamas Co., 14 Or LUBA 766, 768 (1986); Schneider v.
16 Umatilla County, 13 Or LUBA 281, 283-84 (1985).

17 We have reviewed the evidence in the record cited by
18 the parties regarding petitioner's claim that a county
19 commissioner was biased in favor of an applicant. We find
20 the commissioner's statements, and the fact that he
21 participated on a political committee with applicant Capell,
22 do not demonstrate the commissioner was biased, prejudged
23 the matter or did not make his decision based on the
24 evidence and argument presented.

25 This assignment of error is denied.

1 **FIRST ASSIGNMENT OF ERROR (PETITIONER)**

2 **FIRST AND SECOND ASSIGNMENTS OF ERROR (INTERVENOR-**
3 **PETITIONER)**

4 The challenged decision determines the proposed use is
5 allowable as a conditional use in the AF-20 zone as a
6 "park." In these assignments of error, petitioner and
7 intervenor-petitioner (petitioners) contend this aspect of
8 the county's decision violates both ORS 215.213(2)(e) and
9 Yamhill County Zoning Ordinance (YCZO) 403.03(D).⁵

10 **A. ORS 215.213(2)(e)**

11 There is no dispute that the AF-20 zoning district is
12 an exclusive farm use zone. Therefore, the provisions of
13 ORS 215.213 and 215.283 establishing the nonfarm uses that
14 are allowable on land zoned for exclusive farm use apply
15 directly to the county's decision.⁶ Schrock Farms, Inc. v.
16 Linn County, 117 Or App 390, 394, ___ P2d ___ (1992);
17 Forster v. Polk County, 115 Or App 475, 478, 839 P2d 241
18 (1992). ORS 215.213(2)(e) provides the following may be
19 established in an exclusive farm use zone:

20 "Community centers owned and operated by a
21 governmental agency or a nonprofit community

⁵Allegations made by petitioners under these assignments of error concerning violations of provisions of Statewide Planning Goals 3 (Agricultural Land) and 4 (Forest Lands) are addressed under intervenor-petitioner's sixth assignment of error, infra.

⁶Yamhill County has not amended its comprehensive plan or land use regulations to allow for the designation of marginal land under ORS 197.247. Therefore, under ORS 215.288(1), the county may apply either ORS 215.213(1) to (3) or 215.283 to its land zoned for exclusive farm use.

1 organization, hunting and fishing preserves,
2 parks, playgrounds and campgrounds."⁷ (Emphasis
3 added.)

4 Petitioners contend the term "parks," as used in
5 ORS 215.213(2)(e) does not include uses such as the proposed
6 paintball game park. Petitioners argue the intent of
7 ORS 215.213(2)(e) "is to allow community or governmental
8 facilities that serve the general public to use agricultural
9 and forestry lands for parks." Intervenor Petition for
10 Review 8. Petitioners further argue the intensity of the
11 proposed use (i.e. people shooting paintballs at each other
12 from castles and tree forts) does not fit a "park."
13 According to petitioners, the state does not allow private
14 parks for paintball games on agricultural or forest land,
15 but rather requires that they be provided for on nonfarm and
16 nonforest lands, as recreational facilities under Goal 8
17 (Recreational Needs).

18 The proper interpretation of state statutes is a
19 question of law for this Board to decide, and is not subject
20 to the limitations that Clark v. Jackson County, 313 Or 508,
21 836 P2d 710 (1992), places on this Board's review of
22 interpretations of local enactments. Forster v. Polk
23 County, supra.

⁷Because the parallel provision in YCZO 403.03(D) is worded virtually the same as ORS 215.213(2)(e) and because we conclude, infra, that under ORS 215.213(2)(e) the proposed use is allowable as a "park" in an EFU zone, we need not consider whether the proposed use could also be allowed as a "private park" under ORS 215.283(2)(c) or a "park" under ORS 215.283(2)(d).

1 ORS chapter 215 does not include a definition of the
2 term "park," as used in ORS 215.213(2)(e). The dictionary
3 definition of "park" includes:

4 "* * * a tract of land maintained by a city or
5 town as a place of beauty or of public recreation
6 * * * a large area often of forested land reserved
7 from settlement and maintained in its natural
8 state for public use (as by campers or hunters) or
9 as a wildlife refuge * * * a large enclosed area
10 used for sports; esp: ball park." Websters' Third
11 New International Dictionary 1642 (1981).

12 The challenged decision cites three additional definitions
13 of the term "park" as follows:

14 "The second edition of The American Heritage
15 Dictionary defines park as, among other things:

16 "'1. An area of land set aside for
17 public use, as for recreation. 2. A
18 stadium or enclosed playing field; a
19 baseball park.'

20 "The Uniform Zoning Code (1991: International
21 Conference of Building Officials) defines park as:

22 "'A public or private area of land, with
23 or without buildings, intended for
24 outdoor active or passive recreation.'

25 "A Survey of Zoning Definitions (1989: American
26 Planning Association) suggests the following
27 definitions [of park]:

28 "'Any public or private land available
29 for recreational, educational, cultural,
30 or aesthetic use.'

31 "'An area open to the general public and
32 reserved for recreational, educational,
33 or scenic purposes.'" Record 6.

34 All of the above quoted definitions of park recognize a

1 tract of land set aside for public recreational use as a
2 "park." Neither these definitions, nor any provision in
3 ORS 215.213, excludes the concept of a privately owned and
4 managed recreational "park."⁸ The proposed paintball game
5 park satisfies this definition. Further, we see nothing in
6 ORS 215.213 that inherently limits the intensity of the uses
7 allowed thereunder. For instance, schools, churches, golf
8 courses and living history museums, allowed in EFU zones
9 under ORS 215.213(1)(a) and (b) and (2)(f) and (v), all may
10 involve gatherings of people as large as or exceeding those
11 proposed here. We conclude the proposed paintball game park
12 is potentially allowable in an EFU zone under
13 ORS 215.213(2)(e).

14 This subassignment of error is denied.

15 **B. YCZO 403.03(D)**

16 The AF-20 zone lists the following as a conditional
17 use:

18 "Community centers owned and operated by a
19 governmental agency or a nonprofit community
20 organization, and hunting and fishing preserves,
21 parks, playgrounds and campgrounds determined to
22 be a principal use of the property." (Emphasis
23 added.) YCZO 403.03(D).

24 Because we determine above that the proposed paintball game

⁸In fact, by adding the qualifying phrase "owned and operated by a governmental agency or a nonprofit community organization" only to the term "community centers," ORS 215.213(2)(e) implicitly recognizes that the other listed uses (i.e. "hunting and fishing preserves, parks, playgrounds and campgrounds") may be either publicly or privately owned and operated.

1 park is allowable in an EFU zone as a "park" under
2 ORS 215.213(2)(e), we need only consider the issue of
3 whether it is allowable as a conditional use in the county's
4 AF-20 zone under YCZO 403.03(D) to the extent that
5 YCZO 403.03(D) imposes more restrictive requirements than
6 ORS 215.213(2)(e). Forster v. Polk County, supra; Kenagy v.
7 Benton County, 115 Or App 131, 136 n 3, 838 P2d 1076 (1992).

8 **1. Park**

9 In addition to the arguments considered under the
10 preceding subassignment of error, petitioners contend the
11 county's interpretation of "park" in the challenged decision
12 is incorrect because the county failed to apply the
13 following definition of "park" set out in Yamhill County
14 Park Ordinance No. 196 (Park Ordinance), Section 3.2(b):

15 "[P]ark areas' means a parcel of land, or
16 reservoir or water impoundment area owned, leased,
17 controlled or administered by Yamhill County, for
18 recreation or open space purposes, which includes
19 such properties that the Board [of Commissioners]
20 may designate as a 'Park Area' and includes
21 Yamhill County forests, parks and recreation
22 areas."

23 Petitioners argue the proposed use of the subject property
24 does not satisfy this definition of "park" because the
25 county does not own, lease, control or administer the
26 property.

27 Petitioners also argue the county's interpretation of
28 "park" is inconsistent with the following summary finding
29 from the Parks and Recreation section of the county plan:

1 "The Oregon State Park Department, Yamhill County,
2 Chehalem Park and Recreation District, the school
3 districts and the Yamhill County cities provide a
4 variety and different levels of park and
5 recreation opportunities for County residents and
6 the transient population." Plan, p. 30.

7 According to petitioners, the county's interpretation and
8 application of the term "park" in the challenged decision is
9 inconsistent with the above plan finding because the
10 proposed paintball game park will be privately owned and
11 operated and will not provide a variety of park and
12 recreation opportunities.

13 Petitioners also contend the county's interpretation of
14 "park" is incorrect because the Recreational Commercial (RC)
15 zone specifically allows as a conditional use "private
16 recreational use such as zoo, racing circuit, motorcycle
17 hill climb, skydiving facility and similar uses."
18 YCZO 601.03(B). Petitioners argue this provision evidences
19 an intent that private recreational uses of the type
20 proposed here be allowed in the RC zone, not the AF-20 zone.
21 Petitioners also maintain the proposed use is consistent
22 with the purpose statement of the RC zone in YCZO 601.01,
23 rather than the purpose statement of the AF-20 zone in
24 YCZO 403.01.

25 This Board is required to defer to a local government's
26 interpretation of its own ordinances, unless that
27 interpretation is contrary to the express words, policy or
28 context of the local enactment. Clark v. Jackson County,

1 supra, 313 Or at 514-15. This means we must defer to a
2 local government's interpretation of its own enactments,
3 unless that interpretation is "clearly wrong." Goose Hollow
4 Foothills League v. City of Portland, 117 Or App 211, 217,
5 843 P2d 992 (1992); West v. Clackamas County, 116 Or App 89,
6 93, 840 P2d 1354 (1992).

7 Except for the "principal use" provision discussed
8 separately below, YCZO 403.03(D) is worded virtually
9 identically to ORS 215.213(2)(e). The challenged decision
10 indicates the county does not interpret the term "park" in
11 YCZO 403.03(D) any more restrictively than ORS 215.213(2)(e)
12 requires. Record 5-8. The county's interpretation is not
13 contrary to the words, context or policy of the YCZO or
14 county comprehensive plan.

15 The plan finding cited by petitioners simply recognizes
16 that a variety of public entities currently provide parks
17 and recreation services to county residents. It does not
18 establish that a privately owned operation cannot constitute
19 a "park" under YCZO 403.03(D). That the proposed paintball
20 game park could be allowed as a private recreation use in
21 the RC zone does not mean it cannot be allowed as a "park"
22 in the AF-20 zone. See Sarti v. City of Lake Oswego, 106
23 Or App 594, 809 P2d 701 (1993) (use can be allowed as a
24 "dance studio" in one zone and as a "cultural facility" in
25 another zone). Finally, the Park Ordinance establishes
26 administration and enforcement regulations for the use of

1 forests, parks and recreational areas owned or controlled by
2 the county. It is not a part of the YCZO. The county's
3 interpretation of "park," as used in YCZO 403.03(D), need
4 not be consistent with the definition of "park areas" in the
5 Park Ordinance.

6 This subassignment of error is denied.

7 **2. Principal Use of the Property**

8 YCZO 403.03(D) allows, as a conditional use in the
9 AF-20 zone, parks that are "determined to be a principal use
10 of the property." Petitioners contend the challenged
11 decision misinterprets this provision and, under a correct
12 interpretation, the proposed paintball park would not
13 satisfy this requirement of YCZO 403.03(D).

14 Petitioners point out that YCZO 202 (Definitions)
15 defines "principal use" as "the primary use of a lot or
16 parcel, which may be either a permitted or conditional use."
17 Petitioners argue that under this definition and Smith v.
18 Clackamas County, 313 Or 519, 836 P2d 716 (1992), a
19 determination of a "principal use" must be based on the
20 primary use of the entire subject parcels, not just the 24
21 acre area proposed to be used as a paintball game park.
22 Petitioners also argue the county's 1990 decision approving
23 a forest dwelling on tax lot 2201 established that the
24 principle use of the subject parcels is forestry.
25 Petitioners contend this prevents the county from now
26 determining that a paintball game park is a principle use of

1 the subject property.

2 **a. Interpretation**

3 The challenged decision addresses petitioners'
4 arguments concerning the correct interpretation of this
5 provision of YCZO 403.03(D) at length. Record 9-13. The
6 county explains:

7 "The * * * legislative intent behind the phrase
8 'principle use of the property' is consistent with
9 allowing a park on land which is primarily used
10 for farm or forest use in the AF-20 zone. The
11 * * * purpose of the phrase was to distinguish
12 activities which require a conditional use from
13 activities which only amounted to 'personal use'
14 of property by the owner and therefore [did not
15 require] a conditional use permit.

16 "To illustrate, the section that lists 'park' also
17 lists, among other things, 'hunting and fishing
18 preserves.' The 'principal use' language was used
19 to differentiate the use of property for hunting
20 by the owner and the owner's friends for instance,
21 as opposed to use of the property by the general
22 public or members of an organized hunting preserve
23 club. The former is a permitted use, the latter a
24 conditional use.

25 "In the case of the paintball [game] park, if the
26 owner simply used the land for paintball games
27 with personal friends, this would not require a
28 conditional use permit. The conduct of a business
29 operation, in which the general public is invited
30 to participate for a fee in organized paintball
31 game activities on a regular basis, is not
32 strictly personal use. It becomes the principle
33 use of the property, and as such a conditional use
34 permit is required.

35 "The Board [of Commissioners] also finds
36 unpersuasive the argument that the County must
37 consider the entire property [rather than the
38 affected 24 acres] in determining the principal
39 use. [T]he entire parcel issue was considered in

1 Clark v. Jackson County, [supra]. This case dealt
2 with the use of [EFU] statutory language
3 (regarding the unsuitability of land for farm use
4 in connection with nonfarm dwelling requests) in a
5 context not required by the statute (approval of a
6 quarry). * * * Smith v. Clackamas County,
7 [supra,] dealt with the same statutory language
8 * * * in relation to a nonfarm dwelling request.
9 The [Oregon] Supreme Court found that in the Smith
10 case the county is required to consider the entire
11 parcel, but that the same standard does not apply
12 in Clark, partly because the [EFU] statute does
13 not require such a finding for a quarry.

14 "In the case of the paintball game park, there are
15 no review standards [required] in the [EFU]
16 statute, so consideration of the entire parcel[s]
17 is not required if the Board [of Commissioners] so
18 interprets [YCZO 403.03(D)]." Record 9-10.

19 The decision goes on to explain why the county interprets
20 the YCZO to allow a conditional use permit to be approved
21 for a portion of a parcel, rather than an entire parcel.
22 Record 10-11.

23 The interpretation of "a principal use of the
24 property," as that phrase is used in YCZO 403.03(D),
25 expressed by the county above is reasonable and within the
26 interpretive discretion afforded the county by Clark, supra.
27 While the general definition of "principal use" given in
28 YCZO 202 may suggest a different interpretation of that
29 term, as argued by petitioners, there are differences in
30 wording between the YCZO 202 definition and the phrase used
31 in YCZO 403.03(D) that support the county's interpretation
32 of the phrase used in YCZO 403.03(D). For instance, the
33 YCZO 202 definition refers to "the primary use of a lot or

1 parcel," whereas YCZO 403.03(D) refers to "a principal use
2 of the property." This supports a determination that the
3 phrase "a principal use of the property," as used in
4 YCZO 403.03(D), may be interpreted differently than
5 "principal use" as defined in YCZO 202.

6 **b. Effect of Forest Dwelling Approval**

7 The challenged decision addresses petitioners'
8 arguments that prior approval of a forest dwelling on tax
9 lot 2201 precludes the county from determining that the
10 proposed paintball game park is "a principal use of the
11 property" in part as follows:

12 "[T]here is no inherent conflict between allowing
13 a park as a conditional use and allowing a farm or
14 forest dwelling in the AF-20 zone. The farm or
15 forest activities are the primary purpose of the
16 underlying AF-20 zone and are not necessarily
17 inconsistent with multiple use of the farm or
18 forest land as a park.

19 "* * * There is no conflict between allowing the
20 public use of a game preserve or park on the
21 property while at the same time requiring [that]
22 the private use of the dwelling on the property be
23 by someone engaged in the farm or forest
24 activities on the property.

25 "[The forest dwelling provisions of the YCZO do
26 not require] that the principal use of the entire
27 parcel must be for forest use * * *. [YCZO]
28 401.06 states that the day to day activities of
29 the occupant must be principally directed to
30 forest use. The forest dwelling [provisions are]
31 silent regarding how much of the property must be
32 in forest use, or whether the entire parcel must
33 be used exclusively for forest use. The forest
34 dwelling [provisions], and the approval granted
35 thereunder, did not prohibit other nonforest
36 activities or multiple uses from taking place.

1 The forest dwelling approval was not conditioned
2 on exclusive forest use of the entire tract, nor
3 was it required otherwise that the [dwelling] unit
4 be removed if no longer needed for the forest use
5 of the land, or if forest use of the land were to
6 cease." (Emphasis in original.) Record 12.

7 The county goes on to conclude that the approval of a forest
8 dwelling on tax lot 2201 does not "prevent a compatible
9 conditional use, such as [the proposed paintball game] park,
10 from being established on the same property along with the
11 forest use." Id.

12 We agree with the county. As explained in the
13 preceding section, we defer to the county's interpretation
14 of "a principle use of the property," as used in
15 YCZO 403.03(D). Under this interpretation, the proposed
16 paintball game park may satisfy YCZO 403.03(D) without being
17 the sole use of the entire parcels upon which it will be
18 located. Petitioners do not identify any provision of the
19 YCZO prohibiting the approval of a nonforest conditional use
20 on a portion of a parcel on which a forest dwelling is
21 located. Neither do petitioners demonstrate that the 1990
22 county decision approving a forest dwelling on tax lot 2201
23 imposed any requirement inconsistent with subsequent
24 approval of a conditional use permit to use a portion of
25 this parcel as a park.⁹ We, therefore, conclude that the

⁹Our review of this issue is somewhat hampered by the fact that the 1990 county decision approving a forest dwelling on tax lot 2201 does not appear to be in the record, or at least no party has indicated where it is located in the record. However, petitioners do not challenge the county finding,

1 county's 1990 decision approving a forest dwelling on tax
2 lot 2201 does not prevent approval of the subject
3 conditional use permit under YCZO 403.03(D).

4 This subassignment of error is denied.

5 These assignments of error are denied.

6 **FIFTH ASSIGNMENT OF ERROR (INTERVENOR-PETITIONER)**

7 Intervenor-petitioner contends the county erred by
8 failing to address the requirements of ORS 215.296, which
9 provides, in relevant part:

10 "A use allowed under ORS 215.213(2) * * * may be
11 approved only where the local governing body * * *
12 finds that the use will not:

13 "(a) Force a significant change in accepted farm
14 or forest practices on surrounding lands
15 devoted to farm or forest use; or

16 "(b) Significantly increase the cost of accepted
17 farm or forest practices on surrounding lands
18 devoted to farm or forest use."

19 Intervenor-respondent contends that under
20 ORS 197.763(1) and 197.835(2), petitioner cannot raise this
21 issue before the Board, because it was not raised during the
22 proceedings below.

23 ORS 197.835(2) provides, in relevant part:

24 "Issues [raised before LUBA] shall be limited to
25 those raised by any participant before the local
26 hearings body as provided by ORS 197.763. * * *"

27 ORS 197.763(1) provides:

quoted in the text, that the 1990 forest dwelling approval was not
conditioned upon the entire parcel remaining exclusively in forest use and,
therefore, we accept this statement as true.

1 "An issue which may be the basis for an appeal to
2 [LUBA] shall be raised not later than the close of
3 the record at or following the final evidentiary
4 hearing on the proposal before the local
5 government. Such issues shall be raised with
6 sufficient specificity so as to afford the
7 governing body * * * and the parties an adequate
8 opportunity to respond to each issue." (Emphasis
9 added.)

10 Additionally, in Boldt v. Clackamas County, 107 Or App 619,
11 813 P2d 1078 (1991), the court of appeals made it clear that
12 the purpose of ORS 197.763(1) is to prevent unfair surprise,
13 and that under the language emphasized above, an issue is
14 waived where the issue is not sufficiently raised below to
15 enable a reasonable decision maker to understand the nature
16 of the issue. ODOT v. Clackamas County, 23 Or LUBA 370, 375
17 (1992).

18 At oral argument, intervenor-petitioner contended he
19 raised the issue of compliance with ORS 215.296 in his
20 testimony before the planning commission at Record 299.
21 With regard to impacts of the proposed use on agricultural
22 activities and lands, intervenor-petitioner's testimony
23 provides:

24 "* * * I would like to clarify, and object to[,]
25 portions of the staff report. On page 5, the
26 staff comments there has been no clarification of
27 the negative effects on the adjacent farm lands.
28 On my farm, the losses include livestock and hay.
29 I know of at least one other farm that has
30 incurred losses.

31 "A helicopter flying at 25 feet stampeded my herd
32 of pregnant cows. I will not go into the gory
33 details, but I did sustain losses.

1 "* * * * *

2 "Section IIA of the comprehensive plan requires
3 the [county] to preserve the agricultural lands.
4 This activity does nothing to preserve the
5 agricultural * * * lands. In fact it destroys
6 [them]. * * *" Record 299.

7 The above-quoted testimony does not refer to
8 ORS 215.296 by its statutory citation, title or any
9 recognized abbreviation for either. Further, it does not
10 employ any of the operative terms of ORS 215.296(a) or (b),
11 such as "force a significant change in" or "significantly
12 increase the cost of" accepted farm practices. Page 5 of
13 the staff report, to which intervenor objected in the above-
14 quoted testimony, addresses plan Agricultural Lands
15 Policy 2(a) and makes no mention of ORS 215.296.
16 Record 360. Under these circumstances, we do not believe a
17 reasonable local decision maker would have understood from
18 this testimony that compliance with ORS 215.296 was raised
19 as an issue.

20 Accordingly, we agree with intervenor-respondent that
21 this issue has been waived, and we do not consider it
22 further. This assignment of error is denied.

23 **SECOND ASSIGNMENT OF ERROR (PETITIONER)**

24 In this assignment of error petitioner challenges the
25 county's determination of compliance with three conditional
26 use permit approval standards, YCZO 1202.02(B) (consistency
27 with applicable plan goals and policies), (D)
28 (noninterference with use of surrounding properties), and

1 (F) (compatibility with existing uses and other allowable
2 uses). Petitioner initially notes that the burden of
3 demonstrating compliance with applicable approval standards
4 is on the proponent. Fasano v. Washington Co. Comm., supra.
5 Petitioner also notes that YCZO 1202.02 provides that a
6 conditional use permit may be approved "upon adequate
7 demonstration by the applicant" that the proposed use
8 satisfies all relevant criteria. (Emphasis by petitioner.)
9 Petition for Review 5.

10 Petitioner apparently infers from Fasano, and the above
11 quoted provision of YCZO 1202.02, that in order for the
12 subject conditional use permit to be approved, sufficient
13 evidence to support a determination of compliance with
14 YCZO 1202.02(B), (D) and (F) (as well as other applicable
15 standards) must be found in the application itself or in
16 statements made by the applicants themselves. Petitioner
17 then attempts to demonstrate that these sources do not
18 provide sufficient evidence to support the decision, and
19 argues that because the county approved the subject permit
20 in the absence of sufficient evidence from the applicants,
21 we must conclude that the county failed to properly place
22 the burden of proof on the applicants.

23 The challenged decision contains extensive findings
24 addressing the requirements of YCZO 1202.02(B), (D) and (F).
25 Record 13-16, 18-21, 26-29. In this assignment of error,
26 petitioner does not challenge the county's interpretation of

1 these code provisions or the adequacy or completeness of any
2 of the findings addressing these provisions. With regard to
3 petitioner's evidentiary challenges, we are authorized to
4 reverse or remand a challenged decision on evidentiary
5 grounds only when there is not substantial evidence in the
6 whole record to support the decision. ORS 197.835(7)(a)(C).
7 Petitioner's arguments that the application and the
8 applicants' statements do not provide sufficient evidence to
9 support the decision do not provide a basis for reversal or
10 remand.¹⁰ Finally, petitioner identifies nothing, and we
11 are aware of nothing, in the challenged decision indicating
12 the county improperly shifted the burden of proof below.

13 This assignment of error is denied.

14 **FOURTH ASSIGNMENT OF ERROR (PETITIONER)**

15 **FOURTH ASSIGNMENT OF ERROR (INTERVENOR-PETITIONER)**

16 YCZO 1202.02(F) establishes the following approval
17 standard for conditional use permits:

18 "The use is or can be made compatible with
19 existing uses and other allowable uses in the
20 area."

21 In these assignments of error, petitioners challenge
22 both the county's use of YCZO 1202.02(F) as an approval
23 standard and the evidentiary support for the county's

¹⁰We address petitioner's and intervenor-petitioner's arguments that certain aspects of the county's determinations of compliance with YCZO 1202.02(D) and (F) are not supported by substantial evidence in the record, or are otherwise in error, under petitioner's fourth and intervenor-petitioner's third and fourth assignments of error, infra.

1 determination of compliance with YCZO 1202.02(F) with regard
2 to noise.

3 **A. ORS 215.416(8)**

4 Petitioners argue the county's approval of the subject
5 conditional use permit is invalid because the county's use
6 of YCZO 1202.02(F) as an approval standard does not comply
7 with ORS 215.416(8).

8 **1. Waiver**

9 Intervenor-respondent concedes he raised this issue
10 below (Record 210), but argues that petitioners should not
11 be able to raise this issue before LUBA because petitioners
12 did not raise this issue below.

13 ORS 197.835(2) states that issues raised before LUBA
14 "shall be limited to those raised by any participant before
15 the local hearings body as provided by ORS 197.763."
16 (Emphasis added.) As explained above, the purpose of the
17 waiver provisions of ORS 197.763 is to prevent unfair
18 surprise to the local government decision maker and enable
19 the decision maker to respond to relevant issues in its
20 decision. This purpose is served so long as any participant
21 has sufficiently raised an issue below. Therefore, so long
22 as some participant raised this issue of compliance with
23 ORS 215.416(8) below, which intervenor-respondent concedes,
24 petitioners may raise this issue before LUBA.

25 **2. Standards and Criteria**

26 ORS 215.416(8) provides:

1 "Approval or denial of a permit application shall
2 be based on standards and criteria which shall be
3 set forth in the zoning ordinance or other
4 appropriate ordinance or regulation of the county
5 and which shall relate approval or denial of a
6 permit application to the zoning ordinance and
7 comprehensive plan for the area in which the
8 proposed use of land would occur and to the zoning
9 ordinance and comprehensive plan for the county as
10 a whole."

11 Petitioners argue the term "compatible" is not defined
12 in the YCZO or in case law. Petitioners contend this makes
13 YCZO 1202.02(F) so vague as to be meaningless. According to
14 petitioners, this means the county's approval of the subject
15 permit was not based on standards and criteria set out in
16 the YCZO, as required by ORS 215.416(8) and should be
17 reversed. We understand petitioners to argue that the
18 "compatibility" requirement of YCZO 1202.02(F) is so vague
19 and uncertain as not to be allowable as a criterion or
20 standard for permit approval under ORS 215.416(8).

21 ORS 214.416(8) requires that permit approval standards
22 and criteria set out in local regulations inform interested
23 parties of the basis on which an application will be
24 approved or denied. See Lee v. City of Portland, 57 Or App
25 798, 802-03, 646 P2d 662 (1982) (interpreting parallel
26 provisions of ORS 227.173(1) applicable to cities). The use
27 of "compatibility" as an approval standard is widespread in
28 state land use statutes, statewide planning goals and local
29 land use regulations. We recognize that the determination
30 of compatibility between uses is an inherently subjective

1 determination. Corbett/ Terwilliger/Lair Hill Neigh. Assoc.
2 v. City of Portland, ___ Or LUBA ___ (LUBA No. 92-208,
3 July 16, 1993), slip op 20. However, an ordinance that
4 imposes compatibility as a permit approval criterion,
5 without additional explanatory standards to give specificity
6 to the term, adequately informs interested parties of the
7 basis on which an application will be approved or denied.
8 Marineau v. City of Bandon, 15 Or LUBA 375, 378 (1987).
9 Therefore, use of YCZO 1202.02(F) as a permit approval
10 standard does not violate ORS 215.416(8).

11 This subassignment of error is denied.

12 **B. Noise**

13 The challenged decision includes the following findings
14 concerning compliance of the proposed paintball game park
15 with the compatibility requirement of YCZO 1202.02(F) with
16 regard to noise:

17 "The most frequently cited compatibility issue is
18 noise. Most of the objection comes from the
19 [paintball] participants making noise such as
20 shouting (including cursing) and cheering, but gun
21 discharge and whistles have also been
22 objectionable. The two nearest neighbors (Holmes
23 and Deitz) do not object. * * * The fact that
24 the nearest residents have testified that noise is
25 not a problem persuades the [county] that the
26 noise is not incompatible.

27 "The county found less convincing the testimony
28 from opponents that the noise travels up and down
29 the creek valley and therefore impacts them more
30 than individuals who reside closest to the
31 property. The [county] is persuaded that the
32 noise [from the paintball game] is akin to the
33 sounds one might expect to hear emanating from a

1 playground * * * and is not offensive. The other
2 major objectionable noise came from helicopters,
3 but helicopters will not be used again." Record
4 27.

5 Petitioner contends the county's determination of
6 compliance with YCZO 1202.02(F) with regard to noise is not
7 supported by substantial evidence in the whole record.
8 Petitioner contends any testimony by Holmes is undermined by
9 evidence in the record that Holmes is a tenant of applicant
10 Capell. Record 120, 122. Petitioner also contends Deitz is
11 not the nearest neighboring property owner. Petitioner
12 cites testimony in the record from neighboring property
13 owners, some purporting to own and reside on property
14 adjoining the subject property, stating that noise from the
15 paintball games is disturbing and objectionable. Record 61,
16 64, 149, 177, 178, 183, 190, 207, 209, 299, 315, 326, 339.

17 Intervenor-respondent replies:

18 "[The Board of Commissioners] clearly reviewed all
19 the evidence. (Record 26-29) In its order, it
20 specifies the conflicting evidence, particularly
21 on the issue of noise, and chose to believe the
22 proponent's evidence carried the greater weight.
23 The rationale for its choice is set out and is
24 reasonable. It found that the noise from the
25 [paintball games] did not limit, impair or prevent
26 the existing uses of the area and was similar to
27 that coming from a playground. Id. at 27.

28 * * * * *

29 "The Board [of Commissioners] weighed all the
30 evidence in the record and evaluated the
31 substantiality of each item. Therefore, it met
32 the criteria of the substantial evidence test."
33 Intervenor-Respondent's Brief 16-17.

1 Under ORS 197.835(7)(a)(C), we are authorized to
2 reverse or remand a challenged decision if it is not
3 supported by substantial evidence in the whole record. In
4 Younger v. City of Portland, 305 Or 346, 358, 752 P2d 262
5 (1988), the supreme court explained this means that we must
6 consider all the evidence in the record to determine whether
7 the evidence supporting the challenged decision, viewed
8 together with "countervailing evidence," would allow a
9 reasonable local government decision maker to make the
10 challenged decision. However, we rely on the parties to
11 provide us with record citations to the supporting or
12 countervailing evidence on which their argument depends.
13 "LUBA is not required to search through the record, looking
14 for evidence with which the parties are presumably already
15 familiar." Eckis v. Linn County, 110 Or App 309, 313, 821
16 P2d 1127 (1991).

17 We have reviewed the evidence cited by the parties.¹¹
18 As explained above, the evidence consists of testimony that
19 noise from the paintball games is disturbing and
20 objectionable. We are not cited to the testimony by Holmes
21 or Deitz referred to in the challenged findings, or to any
22 evidence in the record that those individuals are the
23 "nearest neighbors" to the proposed paintball game park. We

¹¹In this case, that means the evidence cited by petitioners, because intervenor-respondent provides no citations to evidence in the record to support the part of the county's decision challenged under this assignment of error.

1 are cited to no evidence supporting the finding that
2 helicopters will not be used again in connection with the
3 paintball games. We are cited to no evidence whatsoever in
4 support of the challenged findings and, therefore, must
5 conclude they are not supported by substantial evidence in
6 the record.

7 This subassignment of error is sustained.

8 Petitioner's and intervenor-petitioner's fourth
9 assignments of error are sustained, in part.

10 **THIRD ASSIGNMENT OF ERROR (INTERVENOR-PETITIONER)**

11 YCZO 1202.02(D) establishes the following approval
12 standard for conditional use permits:

13 "The proposed use will not alter the character of
14 the surrounding area in a manner which
15 substantially limits, impairs, or prevents the use
16 of surrounding properties for the permitted uses
17 listed in the underlying zoning district[.]"
18 (Emphasis added.)

19 **A. Identification of Surrounding Area/Properties**

20 As a preliminary issue, intervenor-petitioner contends
21 the challenged decision fails to properly identify the
22 "surrounding area" and "surrounding properties" that must be
23 considered in determining compliance with YCZO 1202.02(D).
24 Intervenor-petitioner argues the county improperly
25 identified the surrounding area as not extending beyond the
26 subject 108 acre property. According to intervenor-
27 petitioner, this means that in some places the "surrounding
28 area" is limited to 100 feet from the border of the 24 acre

1 proposed paintball game park site. Intervenor-petitioner
2 maintains that at least all properties abutting the subject
3 108 acre property should be included in the consideration
4 required by YCZO 1202.02(F), as indicated by the use of the
5 term "surrounding properties" in that standard.

6 We agree with intervenor-petitioner that in order to
7 determine compliance of the proposed use with
8 YCZO 1202.02(F), the county must first properly identify the
9 "surrounding area"/ "surrounding properties" to be
10 considered. In this regard, the challenged decision makes
11 it clear that the county does not interpret "surrounding
12 area"/"surrounding properties" to include the rural
13 residential VLDR-2 1/2 zoned area adjoining the subject
14 property to the southeast:

15 "The * * * rural residential uses need not be
16 considered where the subject property lies wholly
17 within the AF-20 zone. [T]he VLDR 2.5 zone is
18 beyond the 'underlying district' (the AF-20 zone)
19 required to be considered by [YCZO] 1202.02(D)
20 * * *, and therefore need not be considered under
21 [YCZO] 1202.02(D). The Board [of Commissioners]
22 interprets [YCZO 1202.02(D)] as only requiring
23 consideration of uses within the same zoning
24 district because a reasonable construction of the
25 ordinance provides that the conditional use is
26 required to be compatible with the purpose of the
27 underlying zoning district, rather than all nearby
28 zoning districts." Record 19.

29 As far as we can tell, intervenor-petitioner does not
30 specifically challenge the county's decision to exclude the
31 VLDR-2 1/2 zoned area from consideration as part of the
32 "surrounding area" under YCZO 1202.02(D). In any case, we

1 believe the above-quoted interpretation of YCZO 1202.02(D),
2 as not requiring consideration of property in a different
3 zoning district from that of the property which is the
4 subject of a conditional use permit application, is within
5 the interpretive discretion allowed the county under Clark,
6 supra.

7 Thus, the county interprets YCZO 1202.02(D) to require
8 consideration of only AF-20 zoned property as part of the
9 "surrounding area"/"surrounding properties." In this case,
10 not only the subject property, but also the properties
11 adjoining it in every direction save to the southeast are
12 zoned AF-20. However, we cannot determine from the
13 challenged decision which of these AF-20 zoned properties
14 the county includes within the "surrounding area" required
15 to be considered by YCZO 1202.02(D). For instance, in one
16 place the findings addressing YCZO 1202.02(D) state the
17 "bordering property" consists of the subject 108 acre
18 property "except at the county road." Record 18-19. These
19 findings also refer to noise impacts that carry "beyond the
20 Capell property." Record 19. In another place, the
21 YCZO 1202.02(D) findings refer to impacts on other uses "in
22 the surrounding AF-20 zone." Id.

23 In conclusion, we agree with the county that it may
24 exclude consideration of the VLDR-2 1/2 zoned property
25 adjoining the subject property to the southeast from
26 consideration under YCZO 1202.02(D), and limit its

1 consideration to AF-20 zoned property. However, the county
2 has failed to identify the AF-20 zoned property that it
3 believes constitutes the "surrounding area"/"surrounding
4 properties" to which YCZO 1202.02(D) applies. Until the
5 county does so, we cannot determine whether the county
6 properly applied YCZO 1202.02(D) in making that
7 determination.¹²

8 Intervenor-petitioner's third assignment of error is
9 sustained.

10 **SIXTH ASSIGNMENT OF ERROR (INTERVENOR-PETITIONER)**

11 **A. ORS 215.416(4)**

12 ORS 215.416(4) states that a permit application "shall
13 not be approved if the proposed use of the land is found to
14 be in conflict with the [county] comprehensive plan * * *."
15 Intervenor-petitioner argues the county erred by failing to
16 find that the proposed use is consistent with the plan
17 Agricultural Lands Goal and Forest Lands Goal.¹³

18 The challenged decision identifies two plan policies as

¹²Intervenor-petitioner also argues that the county's findings under YCZO 1202.02(D) with regard to certain types of alterations to the surrounding area, including noise, changes in property values, fire danger and impacts on farming, are inadequate or not supported by substantial evidence in the record. However, until the county properly identifies the surrounding area to be considered under YCZO 1202.02(D), we cannot resolve these issues.

¹³Intervenor-petitioner also makes a general reference to noncompliance with "policies of the Plan," but does not identify any specific plan policies. Intervenor Petition for Review 30. Consequently, intervenor-petitioner's allegation is not sufficiently developed for review.

1 the only plan provisions applicable to allowing the proposed
2 use and addresses those policies. Record 13, 15.
3 Therefore, the decision implicitly finds the plan
4 Agricultural Lands Goal and Forest Lands Goal are not
5 standards applicable to the challenged conditional use
6 permit decision.¹⁴

7 It is well established that not every provision in a
8 comprehensive plan is an approval standard for development
9 permits. Goodrich v. Jackson County, 22 Or LUBA 434, 437
10 (1991); Bennett v. City of Dallas, 17 Or LUBA 450, aff'd 96
11 Or App 645 (1989); McCoy v. Tillamook County, 14 Or LUBA
12 108, 110-11 (1985). Here, the plan Agricultural Lands and
13 Forest Lands Goals are worded as aspirations, rather than
14 approval standards. Additionally, the introduction to the
15 plan provides:

16 "* * * Goals are general directives or
17 achievements toward which the County wishes to go
18 in the future. Policies are more specific

¹⁴The plan Agricultural Lands Goal states:

"To conserve Yamhill County's farm lands for the production of crops and livestock and to ensure that the conversion of farm land to urban use where necessary and appropriate occurs in an orderly and economical manner." Plan, p. 15.

The plan Forest Lands Goal states:

"To conserve and manage efficiently the County's forest and range resources, thereby ensuring a sustained yield of forest products, adequate grazing areas for domestic livestock, habitat for fish and wildlife, protection of forest soils and watershed[s], and preservation of recreational opportunities." Plan, p. 17.

1 statements of action to move the County towards
2 attainment of the goals. These policies are used
3 in daily decision-making or in the development of
4 ordinances by the County." Plan, p. 1.

5 The county acted well within its interpretive discretion in
6 concluding the plan Agricultural Lands Goal and Forest Lands
7 Goal are not approval standards for the challenged decision.

8 This subassignment of error is denied.

9 **B. Statewide Planning Goals**

10 Intervenor-petitioner contends the challenged decision
11 violates Statewide Planning Goals 3, 4, 6 and 8. However,
12 the county's plan and land use regulations have been
13 acknowledged by the Land Conservation and Development
14 Commission (LCDC) as complying with the statewide planning
15 goals. After acknowledgment, local government permit
16 decisions are governed by the acknowledged plan and
17 regulations, not the statewide planning goals.¹⁵
18 ORS 197.175(2)(d); Foland v. Jackson County, 311 Or 167, 807
19 P2d 801(1991); Byrd v. Stringer, 295 Or 311, 666 P2d 1332
20 (1983).

21 This subassignment of error is denied.

22 This assignment of error is denied.

23 The county's decision is remanded.

¹⁵Intervenor-petitioner does not identify any amendments to Goals 3, 4, 6 or 8, or new or amended LCDC rules implementing these goals, that might apply directly to the challenged decision pursuant to ORS 197.646.