

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county order approving a
4 conditional use permit for a golf driving range.

5 **FACTS**

6 The subject property is an unimproved 56 acre parcel
7 zoned Rural Residential Farm Forest (RRFF-5). The westerly
8 end of the subject property has several trees, and the
9 balance of the property is a moderately sloping field. The
10 surrounding area contains various rural residential
11 developments.

12 The county planning department recommended approval of
13 the proposal and a public hearing was conducted before the
14 county hearings officer. After the public hearing, the
15 hearings officer approved the application, and this appeal
16 followed.

17 **FIRST ASSIGNMENT OF ERROR**

18 "There is a lack of evidence in the record to
19 support the County's finding that the proposed
20 development meets the requirements of ZDO
21 801.03(C) to provide a site plan including
22 existing and proposed improvements and other
23 information necessary to address the requirements
24 and conditions associated with the use."

25 Petitioner argues the application fails to include an
26 adequately detailed site plan. Specifically, petitioner
27 argues the site plan fails to contain sufficient evidence to
28 support approval of the application.

29 Clackamas County Zoning and Development Ordinance

1 (ZDO) 801.03(C) requires submission of a site plan.

2 ZDO 801.03(C) requires:

3 "A site plan of the property including existing
4 and proposed improvements and other information
5 necessary to address the requirements and
6 conditions associated with the use."

7 However, ZDO 801.03(C) does not require that the site plan
8 itself contain the evidence required to support approval of
9 the application.

10 The first assignment of error is denied.

11 **SECOND ASSIGNMENT OF ERROR**

12 "There is a lack of evidence in the record to
13 support the County's finding that the proposed
14 development meets the requirements of ZDO
15 813.01(A)(1) setback of principal buildings."

16 ZDO 813.01(A)(1) requires a 45 foot setback "for
17 principal buildings" from "any other lot in a residential or
18 rural district." The hearings officer determined the only
19 "principal building" associated with the proposal is the
20 club house for the driving range, and that the clubhouse is
21 more than 45 feet from other residential and rural
22 properties.

23 Petitioner argues the proposed perimeter fencing is a
24 "principal building" and that the 45 foot setback must be
25 measured from that fence to the nearest property line.
26 Petitioner contends that so measured, the perimeter fencing
27 on the subject property violates the 45 foot setback
28 requirement.

29 We agree with the county that the proposed clubhouse is

1 the only "principal building" on the subject property to
2 which the 45 foot setback set forth in ZDO 813.01(A)(1)
3 applies.

4 The second assignment of error is denied.

5 **THIRD ASSIGNMENT OF ERROR**

6 "There is a lack of evidence in the record to
7 support the County's finding that the proposed
8 development meets the requirements of ZDO
9 1002.01(B) and (C) to protect natural features
10 such as views and open space."

11 **FOURTH ASSIGNMENT OF ERROR**

12 "There is a lack of evidence in the record to
13 support the County's finding that the proposed
14 development meets the requirements of ZDO
15 1005.02(A)(3) to provide crime prevention and
16 security of persons and property."

17 **FIFTH ASSIGNMENT OF ERROR**

18 "There is a lack of evidence in the record to
19 support the County's finding that the proposed
20 development meets the requirements of ZDO
21 1005.05(B)(3) * * * requiring orientation of major
22 service activity areas away from the existing
23 residences."

24 Under these assignments of error, petitioner argues
25 various portions of ZDO Section 1000 are applicable approval
26 standards and that the challenged decision fails to either
27 apply those sections at all or to adequately apply those
28 standards.

29 Under the numbering system used in the ZDO, Section
30 1000 ("Development Standards") includes ZDO 1001 through
31 1015. Subsection A of ZDO 1001.02 ("Application of These
32 Standards") provides:

1 "The standards set forth in [ZDO] Section 1000
2 shall apply to major and minor partitions;
3 subdivisions; commercial and industrial projects;
4 multi-family and common-wall structures of three
5 (3) or more dwellings. Single family common wall
6 structures shall be subject to [certain listed
7 development standards in ZDO Section 1000.]"

8 The challenged decision states the provisions of ZDO
9 Section 1000 are not applicable approval standards:

10 "[Petitioner] set[s] forth various provisions from
11 Section 1000 of the ZDO, and argue[s] that the
12 proposed development does not meet each of those
13 development standards. A review of the cited
14 provisions shows that none constitute approval
15 criteria for this proposed use. They do * * * set
16 forth various construction and development
17 standards which will be generally addressed the
18 required Design Review process." Record 6-7.

19 However, the findings preceding those quoted above, state:

20 "The provisions of Sections 1002 and 1011 of the
21 ZDO * * * set forth development standards for
22 wetlands, lands within 100 feet of wetlands and
23 land which constitutes a recharge [area] for
24 wetlands. There is substantial evidence of the
25 existence of wetlands on the subject property.
26 Conditions of approval require that a wetlands
27 delineation be submitted for * * * Division of
28 State Lands review and approval, and further
29 require that wetland resources be protected in
30 accordance with the standards of Sections 1002 and
31 1011 through site specific Design Review. With
32 these conditions of approval, these development
33 standards will be met." Record 6.

34 We are required to defer to a local government's
35 interpretation of its own code, so long as the
36 interpretation is not clearly contrary to the express words,
37 policy or purpose of the local enactment. Clark v. Jackson
38 County, 313 Or 508, 836 P2d 710 (1992). The court of

1 appeals has made it clear, that in close cases, we must err
2 on the side of deferral. Friends of the Metolius v.
3 Jefferson County, ____ Or App ____, ____ P2d ____
4 (September 22, 1993); Reusser v. Washington County, 122 Or
5 App 33, ____ P2d ____ (1993). However, the court has also
6 made it clear that the local interpretation expressed in the
7 challenged decision must be adequate for review. Weeks v.
8 City of Tillamook, 117 Or App 449, 454, 844 P2d 914 (1992).

9 Here, the above interpretation does not explain why the
10 provisions of ZDO Section 1000 are inapplicable to the
11 proposal, and the reason why the county interprets the ZDO
12 in this manner is not clear. Specifically, the challenged
13 decision does not explain whether the standards of
14 ZDO Section 1000 are inapplicable because the proposal is
15 not a listed development activity, or whether the provisions
16 of ZDO Section 1000, while containing applicable standards,
17 simply do not apply until the design review stage of local
18 review for the proposal.¹ Further, the above quoted
19 findings can be read to suggest that the wetland protection
20 standards of ZDO Section 1000 are currently applicable to
21 the approval of the subject conditional use permit.
22 However, if this is the case, the findings do not explain
23 why some ZDO Section 1000 standards are applicable at the
24 conditional use permit approval stage, and others only apply

¹In either case, the county should identify and explain the applicable ZDO provisions which support its interpretation.

1 at the design review approval stage. Compare Tylka v.
2 Clackamas County, 22 Or LUBA 166, 180-81 (1991) (county
3 interpretation that ZDO Section 1000 standards do not apply
4 to any development that is not specifically listed in
5 ZDO 1001.02), with West v. Clackamas County, 23 Or LUBA 558,
6 aff'd 116 Or App 89 (1992) (LUBA deferred to county
7 decision denying an application for a golf course on the
8 basis of noncompliance with ZDO Section 1000 standards.)

9 The third, fourth and fifth assignments of error are
10 sustained.

11 **SIXTH ASSIGNMENT OF ERROR**

12 "There is a lack of evidence in the record to
13 support the County's finding that the proposed
14 development meets the requirements of ZDO
15 1203.01(B) ensuring site characteristics are
16 suitable for the proposed use."

17 **SEVENTH ASSIGNMENT OF ERROR**

18 "There is a lack of evidence in the record to
19 support the County's finding that the proposed
20 development meets the requirements of ZDO
21 1203.01(D) to ensure the proposed use will not
22 alter the character of the surrounding area to the
23 impairment of uses listed in the underlying
24 district and ZDO 1005.02(A)(2) siting and design
25 for compatibility with surrounding neighborhood."

26 Under these assignments of error, petitioner argues the
27 challenged decision fails to include adequate findings of
28 compliance with ZDO 1203.01(B) and (D) and is not supported

1 by substantial evidence in the whole record.² We address
2 these arguments separately below.

3 **A. Adequacy of Findings**

4 ZDO 1203.01(B) and (D) require the proposal to satisfy
5 the following:³

6 "The characteristics of the site are suitable for
7 the proposed use considering size, shape,
8 location, topography, existence of improvements
9 and natural features."

10 "The proposed use will not alter the character of
11 the surrounding area in a manner which
12 substantially limits, impairs or precludes the use
13 of surrounding properties for the primary uses
14 listed in the underlying district."

15 Petitioner argues safety is a relevant consideration
16 under these standards and that the challenged decision
17 mistakenly concludes there are no points from which golf
18 balls are to be hit (striking areas) less than 300 yards
19 from adjacent properties. Petitioner also argues that glare
20 from night-time security lighting will interfere with
21 adjacent residential uses. In addition, petitioner argues
22 that the noise from automobiles associated with the proposal
23 will substantially interfere with the residential use of his

²Petitioner also repeats arguments asserted above concerning the proposal's compliance with provisions of ZDO Section 1000. However, we state above that the challenged decision fails to adequately interpret the applicability of ZDO Section 1000. Therefore, no purpose is served by reviewing the decision for compliance with ZDO Section 1000 here.

³Some of petitioner's findings challenges concerning ZDO 1203.01(B) and (D) are raised by petitioner in other assignments of error. To simplify, we address those arguments here.

1 property. Finally, petitioner argues that no vegetative
2 screening between the proposed driving range and adjacent
3 properties will be required.

4 The challenged decision acknowledges the relevancy of
5 these issues and contains the following findings:

6 "* * * The applicant's plan calls for location of
7 the striking area and other improvements to be
8 located more than 300 yards from the closest point
9 on the objecting neighbors' properties. Concerns
10 based on the potential of a tee area near the
11 eastern end of the subject property are misplaced,
12 as the applicant has agreed to locate all tee
13 areas at the westerly end of the property, and
14 conditions of approval will require that this be
15 the case. Additionally, the record establishes
16 that [sic] is existing vegetative screening and
17 fencing to lessen any loss of privacy. A
18 condition of approval does require Design Review
19 of this development, with specific attention to
20 include perimeter landscaping and fencing to
21 mitigate visual impacts and prevent trespass. Any
22 loss of privacy to surrounding residential
23 properties will be minimal. Possible trespass is
24 not seen as a problem.

25 "Glare from proposed night-time lighting of this
26 facility posed a potential impact. The applicant
27 has agreed not to install night-time lighting,
28 except as is required for security purposes. A
29 condition of approval will require this.

30 "Noise will be generated by the driving range
31 activity and by traffic. It will not be
32 significant and will be mitigated through the
33 design review process." Record 4-5.

34 These findings are adequate to explain that the
35 striking areas will be more than 300 yards from adjacent
36 properties. However, the findings do not determine that
37 this distance complies with ZDO 1203.01(B) and (D). On

1 remand, the county should explain in its decision how a
2 distance of 300 yards from the adjacent properties satisfies
3 ZDO 1203.01(B) and (D).

4 The findings concerning visual impacts are inadequate
5 to establish the proposal will not substantially limit or
6 impair the use of surrounding properties for residential
7 use. The decision does not state that visual impacts from
8 the proposal will be insubstantial. Rather, the findings
9 suggest the proposal will cause visual impacts that should
10 be mitigated, and rely upon conditions of approval to
11 establish compliance with ZDO 1203.01(D). However, the
12 conditions of approval do not require vegetative screening
13 for the proposed use. Specifically, the only condition of
14 approval concerning vegetative screening simply requires the
15 proposal to go through a design review process which
16 considers:

17 "Perimeter and other landscaping necessary to
18 mitigate visual and noise impacts." Record 7.

19 In sum, the relied upon condition does not require any
20 particular level of screening. Therefore, it is impossible
21 to determine whether the vegetative screening ultimately
22 approved for the proposal will comply with ZDO 1203.01(D).

23 The findings concerning night-time lighting appear to
24 assume that night-time lighting will substantially interfere
25 with nearby residential uses. However, the decision allows
26 night-time lighting "for security purposes," without
27 explaining how this lighting satisfies ZDO 1203.01(D). We

1 conclude the findings fail to determine whether the
2 night-time security lighting will "substantially limi[t],
3 impai[r] or preclud[e] the use of surrounding properties for
4 the primary uses listed in the underlying district," as
5 required by ZDO 1203.01(D).

6 Finally, the findings concerning noise impacts of the
7 proposal are inadequate. Those findings contain a simple
8 conclusion that noise from the proposal will not be
9 substantial and that noise impacts will be mitigated through
10 the subsequent design review process. Essentially, the
11 findings relegate the determination of compliance with the
12 ZDO 1203.01(D) standard, as it relates to noise, to a mere
13 consideration during the design review process. The problem
14 with this approach is that ZDO 1203.01(D) contains standards
15 which are admittedly applicable to the proposal at the
16 conditional use permit approval stage. The findings must
17 either explain why it is permissible to defer the
18 determination of compliance with ZDO 1203.01(D), concerning
19 the noise impacts of the proposal, until design review or
20 identify the contemplated noise impacts from the proposal
21 and explain how those impacts will be mitigated to comply
22 with ZDO 1203.01(D).

23 Finally, petitioner argues the county's findings that
24 proposed perimeter fencing will not pose a substantial
25 interference with the use of his property "required
26 substantial conjecture in face of the opposition testimony."

1 Petition for Review 17. However, that the standards of
2 ZDO 1203.01 require the county to make subjective
3 determinations, or that there was opposition to the
4 proposal, does not provide a basis for reversal or remand of
5 the decision.

6 This subassignment of error is sustained, in part.

7 **B. Evidentiary Support**

8 Substantial evidence is evidence a reasonable person
9 could rely upon to support a conclusion. Younger v. City of
10 Portland, 305 Or 346, 752 P2d 262 (1988).

11 Petitioner cites evidence in the record (the
12 applicant's site plan) showing that at least some of the
13 golf ball striking areas are proposed to be closer than 300
14 yards from nearby properties. The county cites no evidence
15 undermining this evidence. It is relatively clear from the
16 challenged decision that a distance between striking areas
17 and adjacent properties of at least 300 yards is relied upon
18 to support the county's conclusion that the proximity
19 between striking areas and nearby properties poses no
20 substantial safety problem. Because the record lacks
21 evidentiary support for the findings that the nearest golf
22 ball striking area is more than 300 yards from adjacent
23 properties, those findings are not supported by substantial
24 evidence in the whole record.

25 The balance of petitioner's evidentiary challenges go
26 to the evidentiary support for findings that, as we explain

1 above, are inadequate. No purpose is served by reviewing
2 the evidentiary support for inadequate findings, and we
3 decline to undertake such review.

4 This subassignment of error is sustained, in part.

5 The sixth and seventh assignments of error are
6 sustained, in part.

7 **EIGHTH ASSIGNMENT OF ERROR**

8 "There is a lack of evidence in the record to
9 support the County's finding that the proposed
10 development meets the requirements of ZDO
11 1203.01(E) to satisfy the goals and policies of
12 the Comprehensive Plan which apply to the proposed
13 use."

14 Petitioner contends the challenged decision fails to
15 establish compliance with the Clackamas County Comprehensive
16 Plan (plan), as required by ZDO 1203.01(E). ZDO 1203.01(E)
17 requires:

18 "The proposal satisfies the goals and policies of
19 the Comprehensive Plan which apply to the proposed
20 use."

21 Petitioner does not identify particular plan provisions
22 allegedly violated by the proposal. Rather, he states there
23 are several "issues" that are not addressed in the
24 challenged decision.

25 The challenged decision discusses how the proposal
26 complies with the plan. The challenged decision then states
27 the following concerning the plan "issues" specifically
28 raised by petitioner:

29 "[Petitioner] refer[s] to certain 'Issues'
30 discussed in the introductory section of the Land

1 Use Chapter of the plan. These issues do not
2 constitute approval criteria, and are not even
3 aspirational goals. These issues merely set a
4 frame of reference for adoption of the ensuing
5 Goals and Policies." Record 6.

6 We have reviewed the introductory section of the Land
7 Use Chapter of the plan and defer to the county's
8 interpretation of those provisions as not constituting
9 approval standards applicable to the proposal. Such an
10 interpretation of those provisions is not clearly contrary
11 to the words, policy or context of the words used in that
12 portion of the plan. Clark v. Jackson County, supra.

13 The eighth assignment of error is denied.

14 The county's decision is remanded.