

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county hearings officer's decision
4 approving a dwelling in conjunction with farm use.

5 **MOTION TO INTERVENE**

6 Donald Getner, the applicant below, moves to intervene
7 in this proceeding on the side of respondent. There is no
8 objection to the motion, and it is allowed.

9 **MOTION TO DISREGARD COUNTY'S RESPONSE**

10 This Board previously issued an order denying
11 petitioners' motion to take official notice of certain
12 documents. Testa v. Clackamas County, ___ Or LUBA ___ (LUBA
13 No. 93-098, Order on Motion Requesting Official Notice,
14 November 24, 1993). On November 27, 1993, petitioners filed
15 a motion asking this Board to disregard the county's
16 response to petitioners' motion requesting official notice,
17 because it was not timely filed.

18 Petitioners' motion to disregard the county's response
19 is denied without comment.

20 **FACTS**

21 The subject undeveloped 21.86 acre property is
22 designated Forest on the Clackamas County Comprehensive Plan
23 map and is zoned Transitional Timber, 20 acre district
24 (TT-20). A tributary of Cotton Creek crosses the southern
25 portion of the property.

26 Access to the subject property is from S. Hibbard Road.

1 The developed portion of this county road ends approximately
2 500 feet to the northeast of the subject property. The
3 location of the undeveloped portion of the county road
4 right-of-way is in dispute. However, an existing private
5 roadway begins at the end of the developed portion of
6 S. Hibbard Road and crosses the subject property, providing
7 access to parcels to the west. This private roadway was
8 built pursuant to an easement. Whether a portion of this
9 private roadway is located on the undeveloped S. Hibbard
10 Road right-of-way, and whether the easement allows the
11 private roadway to be used for traffic relating to
12 intervenor-respondent's (intervenor's) proposed farm
13 operation, are also matters of dispute.

14 Intervenor proposes to establish an operation for
15 breeding rheas and emus (ratites) on nine acres of the
16 property. Intervenor also proposes to establish ten acres
17 of woodlot on the property, growing Douglas fir, incense
18 cedar and western red cedar. The ratite breeding operation
19 would include an incubation-brooding barn with chick runs
20 and outdoor wire-fenced runs with attached wooden shelters
21 for adult birds.

22 **FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR**

23 Petitioners contend the county (1) failed to comply
24 with the criteria of Clackamas County Zoning and Development
25 Ordinance (ZDO) 401.04A; (2) failed to apply ZDO 403.01 to
26 the subject application; and (3) improperly accepted

1 additional evidence from the applicant below. We address
2 each issue separately below.

3 **A. ZDO 401.04A**

4 ZDO 403.04A(1) requires applications for principal
5 dwellings in conjunction with a farm use in a TT-20 zone to
6 satisfy the criteria of ZDO 401.04A.

7 **1. Farm Management Plan**

8 ZDO 401.04A requires the applicant for a principal
9 dwelling in conjunction with farm use to submit "a farm
10 management plan as provided under [ZDO] 401.10 and other
11 evidence as necessary to demonstrate that all the criteria
12 of [ZDO 401.04A(1) through (8)] are satisfied."
13 ZDO 401.10A(2) requires such farm management plans to
14 include:

15 "Soils tests or SCS OR-1 field data sheets or
16 similar information demonstrating the suitability
17 of the land for the proposed crop or pasture
18 uses." (Emphasis added.)

19 Petitioners contend the farm management plan submitted
20 by intervenor does not satisfy ZDO 401.10A(2) because it
21 does not include soils tests or SCS OR-1 field data sheets.
22 According to petitioners, evidence in the record shows a
23 need for such soils tests.

24 The county argues the above emphasized provision of
25 ZDO 401.10A(2) means that an applicant is not required to
26 submit soils tests or SCS OR-1 sheets, provided he or she
27 submits "similar information" adequate to demonstrate the

1 suitability of the soils on the subject property for the
2 proposed farm use. The county and intervenor (respondents)
3 contend intervenor submitted information concerning the
4 soils on the property, including the SCS classification,
5 description of characteristics, slope percentage, Douglas
6 fir site class and suitability for crop, pasture and timber
7 use. Record 392.

8 We agree with the county that ZDO 401.10A(2) may be
9 satisfied by the submittal of soils information other than
10 soils tests or SCS OR-1 sheets. In this case, intervenor
11 did submit such other soils information, and petitioners do
12 not explain why that information is inadequate to allow the
13 county to determine the suitability of the subject property
14 for the proposed use.

15 This subassignment of error is denied.

16 **2. Existing Commercial Farm Use**

17 ZDO 401.04A provides in pertinent part:

18 " * * * A permanent principal dwelling may be
19 established in conjunction with an existing
20 commercial farm use on a preexisting legal lot of
21 record larger than five (5) acres in size, * * *
22 when the applicant * * * demonstrate[s] that all
23 the following criteria are satisfied:

24 "(1) The land is currently used for a commercial
25 farm use and such use will be continued or
26 intensified with the addition of a permanent
27 dwelling[.]

28 " * * * * " (Emphases added.)

29 Petitioners contend the challenged decision does not

1 comply with the above provisions because (1) the proposed
2 use is not a commercial farm use, and (2) the proposed farm
3 use is not required to be established before the farm
4 dwelling is placed on the property.

5 **a. Commercial Farm Use**

6 With regard to whether the proposed ratite farm
7 operation is a "commercial" farm use, the challenged
8 decision states:

9 "A more fundamental issue is whether raising emus
10 and rheas is in fact a commercial farm use.
11 [Intervenor] has submitted substantial evidence
12 that the proposed use is in fact a commercial farm
13 use. The record shows that there is an
14 international market for ratite products,
15 including feathers, leather and meat. There is
16 also a market, at least in the immediate future,
17 for ratite breeding stock. Based upon the fact[s]
18 that there is a market for ratite products
19 overseas, that breeding stock can be sold to
20 develop the industry in this country [and] that
21 significant net income can be derived from such a
22 use, * * * the proposed use is a commercial farm
23 as meant in the [ZDO]." Record 2.

24 Petitioners contend the county's determination that the
25 proposed ratite operation constitutes a "commercial" farm
26 use is not supported by substantial evidence in the record.
27 Petitioners argue almost all of the evidence in the record
28 pertains only to ostriches (another ratite), and not to emus
29 and rheas. Petitioners also argue the statement in the
30 above quoted findings that "breeding stock can be used to
31 develop the [ratite] industry in this country" is an
32 admission that there currently is no commercial market for

1 ratites in this country.

2 We have reviewed the evidence in the record cited by
3 the parties. Record 12-24, 39-40, 44-66, 127, 140, 185-88,
4 227-29, 236-37, 241-42, 244, 246-55, 261-64, 270-72, 279-85,
5 313-16, 322-35, 338, 349; Supp. Record 50-51, 53-55. Some
6 of this evidence refers solely to ostriches, as petitioners
7 maintain. However, other evidence refers to the existence
8 and development of international and domestic markets for
9 emus and rheas and their products (e.g. hides, meat, oil).
10 We agree with respondents there is sufficient evidence in
11 the record that a domestic market for the breeding of emus
12 and rheas currently exists, and that it is likely that a
13 domestic market for emu and rhea products will be
14 established as this fledgling agricultural industry
15 develops, to allow a reasonable person to conclude that the
16 proposed ratite operation is a "commercial farm use," as
17 that term is used in the ZDO.

18 This subassignment of error is denied.

19 **b. Existing Farm Use**

20 The challenged decision states:

21 "[ZDO 401.04A] requires that the land be currently
22 used for a commercial farm use * * *. The
23 property is not currently a commercial farm, but
24 with a condition of approval requiring
25 implementation of a farm use as specified in the
26 Matteo decision, this criterion can be met."¹

¹"Matteo decision" presumably refers to one or both of this Board's opinions in two cases that are discussed in more detail below.

1 Record 2.

2 The decision also imposes the following condition:

3 "Pursuant to the Matteo decision, the farm use
4 must be substantially implemented prior to
5 issuance of residential building permits. For the
6 purpose of this decision, 'substantially
7 implemented' shall mean that [intervenor] shall
8 complete the first three years of the submitted
9 [farm management] plan. This includes the
10 described improvements for the bird runs, etc., as
11 well as ground preparation and planting of the
12 incense cedar." Record 5.

13 Petitioners maintain the ZDO 401.04A provisions quoted,
14 supra, require that a farm dwelling be established "in
15 conjunction with an existing commercial farm use" and that
16 the land where the farm dwelling is located be "currently
17 used for a commercial farm use." (Emphases added.)
18 Petitioners contend these provisions require that a
19 commercial farm use be established on the subject property
20 before a dwelling is placed on the property. Petitioners
21 argue the challenged decision does not comply with these
22 requirements because it allows a dwelling to be placed on
23 the property when the proposed farm use is only
24 "substantially implemented." Record 5.

25 **(1) Introduction**

26 The TT-20 zone qualifies as an exclusive farm use (EFU)
27 zone. ORS 215.283 applies directly to land uses in EFU
28 zones. Schrock Farms, Inc. v. Linn County, 117 Or App 390,
29 394, 844 P2d 253 (1992); Forster v. Polk County, 115 Or App
30 475, 478, 839 P2d 241 (1992). The county is authorized to

1 allow the proposed farm dwelling in an EFU zone by
2 ORS 215.283(1)(f), which provides that "dwellings * * *
3 customarily provided in conjunction with farm use" may be
4 allowed in an EFU zone. OAR 660-05-030(4) provides in
5 relevant part:

6 * * * ORS 215.283(1)(f) authorize[s] a farm
7 dwelling in an EFU zone only where it is shown
8 that the dwelling will be situated on a parcel
9 currently employed for farm use as defined in
10 ORS 215.203. Land is not in farm use unless the
11 day-to-day activities on the subject land are
12 principally directed to the farm use of the land.
13 Where land would be principally used for
14 residential purposes rather than farm use, a
15 proposed dwelling would not be 'customarily
16 provided in conjunction with farm use' * * *. At
17 a minimum, farm dwellings cannot be authorized
18 before establishment of farm uses on the land
19 * * *."2

20 In Hayes v. Deschutes County, 23 Or LUBA 91, 98-99
21 (1992), we interpreted OAR 660-05-030(4) as follows:

22 * * * OAR 660-05-030(4) must be construed in its
23 entirety. The second and third sentences of this
24 section of the rule provide guidance on how to
25 determine whether a proposed dwelling is
26 'customarily provided in conjunction with farm
27 use,' as required by ORS 215.213(1)(g) or
28 215.283(1)(f). Newcomer [v. Clackamas County], 94
29 Or App 33, 38-39, 764 P2d 927 (1988)
30 (Newcomer II)). They refer to the 'day-to-day
31 activities on the subject land' and to 'whether
32 land would be principally used for residential

²OAR Chapter 660, Division 5 was repealed on August 7, 1993. OAR 660-33-160(2). However, approval or denial of the subject farm dwelling permit application is required to be "based upon the standards and criteria that were applicable at the time the application was first submitted." ORS 215.428(3). The application was filed on December 29, 1992, when OAR 660-05-030(4) was an applicable standard. Record 386.

1 purposes rather than for farm use.' (Emphasis
2 added.) We believe these sentences require
3 consideration of the farm use which the proposed
4 dwelling is contended to be customarily provided
5 in conjunction with.

6 "In addition, the fourth sentence states 'farm
7 dwellings cannot be authorized before
8 establishment of farm uses on the land,' citing
9 Matteo [v. Polk County, 11 Or LUBA 259 (1984)
10 (Matteo I)³. We believe the fourth sentence does
11 not simply restate the requirement established by
12 the first sentence. Although it certainly could
13 be clearer, because the fourth sentence refers to
14 establishment of 'farm uses,' rather than 'farm
15 use as defined in ORS 215.203,' and cites
16 Matteo I, the 'farm uses' referred to, like those
17 referred to in the second and third sentences, are
18 the farm uses which the proposed dwelling would be
19 customarily provided in conjunction with. Thus,
20 OAR 660-05-030(4) does not allow approval of a
21 dwelling customarily provided in conjunction with
22 farm use where the farm use that the dwelling
23 would be customarily provided in conjunction with
24 does not yet exist on the subject property.
25 * * *". (Footnote omitted; final emphasis added.)

26 Additionally, in Forster, supra, 24 Or LUBA at 482, we
27 explained that ORS 215.283(1)(f) and OAR 660-05-030(4)
28 together require that a county determine the amount of farm
29 use with which a dwelling is customarily provided, and do
30 not allow a county to approve placement of a farm dwelling
31 on the subject property until that level of farm use exists
32 on the property.

³We also emphasized in Hayes v. Deschutes County that Matteo I requires that "the farm use to which the [proposed farm] dwelling relates must be existing," and that neither Newcomer II, nor the administrative history of OAR 660-05-030(4) cited therein, indicates any intent to overrule Matteo I. Forster v. Polk County, 24 Or LUBA 476, 481 n 7 (1993).

1 Here, the county has incorporated the requirements of
2 ORS 215.283(1)(f) into ZDO 401.04A(2), which requires that a
3 proposed farm dwelling be "customarily incidental to the
4 type of farm use proposed." The county's findings
5 addressing ZDO 401.04A(2) state:

6 "[ZDO 401.04A(2) requires] that a dwelling be
7 customarily incidental to the proposed use, and
8 that the property be occupied by [a] farm operator
9 whose day-to-day activities [are] directed towards
10 managing the farm. [Intervenor] has submitted
11 evidence indicating that the animals need to be
12 fed and watered three times a day, and that the
13 farm operator is needed to assist in hatching,
14 incubation, and weighing, and that an on-site
15 resident is needed for security purposes because
16 of the value of the birds. Based upon these
17 facts, [the county concludes] the day-to-day
18 activities of the resident will be primarily
19 oriented to the management of the farm operation,
20 and that a residence is customarily incidental to
21 such an operation. * * *"⁴ Record 3.

22 The above findings essentially state a dwelling would
23 customarily be provided in conjunction with the proposed
24 ratite operation at the time the birds themselves are placed
25 on the property. The condition imposed by the county,
26 quoted above, allows building permits for the proposed
27 dwelling to be issued when intervenor has completed three
28 years of his farm management plan. According to that
29 management plan, at the end of three years intervenor will
30 have cleared 4 1/2 acres for the ratite operation, built

⁴Petitioners do not challenge the county's determination of compliance with ZDO 401.04A(2) or the adequacy of the quoted findings addressing ZDO 401.04A(2).

1 nine runs for adult birds (six runs per acre), installed
2 water to the runs, built the incubation barn (including
3 hatchers, incubators and chick runs) and moved one trio and
4 one pair of proven breeder birds into the runs on the
5 property. Record 407-09.

6 This means that the farm use in conjunction with which
7 a dwelling is customarily provided will be established prior
8 to placement of a dwelling on the property and, therefore,
9 ORS 215.283(1)(f) and OAR 660-05-030(4) are satisfied. What
10 we must determine is whether the provisions of ZDO 401.04A
11 and 401.04A(1), quoted above, referring to current and
12 existing commercial farm use of the property require
13 something more than the statute and rule and, if so, whether
14 ZDO 401.04A and 401.04A(1) are satisfied.

15 **(2) ZDO 401.04A and 401.04A(1)**

16 The challenged decision interprets the provisions of
17 ZDO 401.04A and 401.04A(1) requiring current and existing
18 commercial farm use of the subject property to be satisfied
19 where a farm management plan for the proposed commercial
20 farm use has been "substantially implemented." Under the
21 challenged decision, this must occur before a building
22 permit for a farm dwelling is issued.⁵ Record 2, 5.
23 Petitioners offer no reason to believe these code provisions

⁵The challenged decision interprets "substantially implemented" to require completion of three years of intervenor's farm management plan. Record 5. What completion of three years of that farm management plan requires is described in the previous section.

1 must be interpreted to provide more protection to EFU zoned
2 land than is required by the statute and administrative rule
3 discussed above.

4 Clark v. Jackson County, 313 Or 508, 836 P2d 710
5 (1992), requires us to defer to a local government's
6 interpretation of its own regulations, so long as that
7 interpretation is not inconsistent with the express language
8 of the regulation or its purpose or policy. 1993 Oregon
9 Laws, chapter 792, section 43, basically codifies the Clark
10 v. Jackson County decision, with the exception that we are
11 not required to defer to a local government's interpretation
12 of its regulations if that interpretation is contrary to a
13 state statute, statewide planning goal or administrative
14 rule which the regulations implement.

15 We believe the county's interpretation of these code
16 provisions is within the interpretive discretion afforded
17 the county by Clark v. Jackson County and 1993 Oregon Laws,
18 chapter 792, section 43, so long as its interpretation of
19 the relevant code provisions does not provide less
20 protection to EFU zoned land than what is required by
21 ORS 215.283(1)(f) and OAR 660-05-030(4). As explained in
22 the previous section, we believe the amount of existing farm
23 use on the subject property prior to the issuance of
24 building permits required by the challenged decision
25 satisfies ORS 215.283(1)(f) and OAR 660-05-030(4) and,
26 therefore, we defer to the county's interpretation of

1 ZDO 401.04A and 401.04A(1).

2 This subassignment of error is denied.

3 **3. Parcel Size**

4 ZDO 401.04A(4) establishes the following criterion for
5 approval of a farm dwelling:

6 "The lot is as large as the acreage supporting the
7 typical (median) commercial farm unit in the area
8 (within a one-mile radius of the subject
9 property), or the land supports a commercial farm
10 use of a greater intensity (such as a nursery)
11 than commercial farms in the area, and the acreage
12 is comparable to commercial farms of the same
13 use[.]" (Emphasis in original.)

14 Petitioners contend the county failed to properly
15 identify the median size of commercial farm units in the
16 area within one mile of the subject property. Petitioners
17 argue the record contains no evidence supporting the
18 county's determination that six commercial farms exist
19 within this area. According to petitioners, there is only
20 one commercial farm unit within this area.

21 The challenged decision interprets ZDO 401.04A(4) as
22 follows:

23 "[ZDO 401.04A(4)] requires that the subject
24 property be as large as the acreage supporting the
25 median commercial farm unit in the area.
26 Alternatively, [ZDO 401.04A(4)] can be satisfied
27 if the proposed use is a more intensive use than
28 that on commercial farms in the area, and is
29 comparable in size to similar uses. * * *"
30 (Emphasis added.) Record 3.

31 The county proceeded to determine the subject property is
32 not as large as the median commercial farm unit in the area,

1 but does satisfy the alternative standard of being more
2 intensive than the typical field crop, livestock and
3 Christmas tree commercial farm uses in the area and
4 comparable in size to similar commercial ratite operations.
5 Id.

6 We agree with the county that ZDO 401.04A(4) sets out
7 alternative standards. The first alternative requires a
8 determination of the size of the median commercial farm unit
9 in the area. However, the county did not rely on the first
10 alternative in determining that the proposed farm dwelling
11 complies with ZDO 401.04A(4). In addition, petitioners do
12 not contest the county's findings that the proposed use is
13 of a greater intensity than the typical commercial farm uses
14 in the area and comparable to other commercial ratite
15 operations, as required by the second alternative.
16 Consequently, petitioners' argument provides no basis for
17 reversal or remand.

18 This subassignment of error is denied.

19 **4. Appropriate Location**

20 ZDO 401.04A(5) establishes the following criterion for
21 approval of a farm dwelling:

22 "The lot is appropriately located to support the
23 commercial farm use, as described in the farm
24 management plan, considering the following [three]
25 factors[.]"

26 Petitioners contend the county failed to properly consider
27 each of the three factors ZDO 401.04A(5) requires to be

1 considered in determining whether the subject property is
2 appropriately located to support the proposed use.

3 **a. Water Availability**

4 ZDO 401.04A(5)(a) requires the county to consider the
5 following:

6 "Soil type, topography, climate, water
7 availability, and existing buildings or
8 improvements[.]" (Emphasis added.)

9 The challenged decision states:

10 "This area is not within any area identified by
11 the [Oregon] Water Resources Dept. as an area of
12 concern. Any use[s] of water which exceed 'exempt
13 uses' as indicated in ORS 537.545 will require an
14 appropriate permit to be applied for. The record
15 indicates that a well water supply can likely be
16 found within 230 feet, and that such a well would
17 produce adequate water for the [proposed] use."
18 (Emphasis added.) Record 4.

19 Petitioners contend the above emphasized finding is not
20 supported by substantial evidence in the whole record.
21 Petitioners argue the county's determination of compliance
22 with ZDO 401.04A(5)(a) is improperly based on an estimate of
23 water availability, rather than on proof that sufficient
24 water is available.⁶ Petitioners also argue the county
25 failed to consider that the number of ratites on intervenor'

⁶Petitioners also contend that proof of water availability is required because the county's farm management plan application form states "[i]f irrigation is required, please state the source of water and provide proof of water availability." Supp. Record 56. However, this application form has not itself been adopted by the county as part of its land use regulations and, therefore, statements on the form are not approval standards for the challenged decision.

1 property and, therefore, the demand for water, will increase
2 over time.

3 Respondents argue ZDO 401.04A(5)(a) requires only that
4 the proposed farm use be "appropriately located" in an area
5 where water is available, not that a well be drilled prior
6 to approving a farm dwelling. Intervenor further argues the
7 record contains a well water report determining that based
8 on "other wells in the area, a good water supply can be
9 found between 126' and 230'." Record 286. Intervenor
10 points out petitioners do not challenge the expertise of the
11 company that prepared the report or its conclusion, they
12 simply argue that ZDO 401.04A(5)(a) requires definite
13 "proof" of water availability.

14 We agree with respondents the county need not interpret
15 ZDO 401.04A(5)(a) to require that a test well be drilled to
16 produce positive "proof" of water availability. We have
17 reviewed the evidence in the record cited by the parties.
18 Record 148-49, 286, 396-400. In addition to the well report
19 mentioned above, the evidence includes estimates of the
20 water requirements of the proposed farm dwelling and ratite
21 operation. Based on this evidence, a reasonable person
22 could conclude that the subject property "is appropriately
23 located to support the [proposed] commercial farm use,"
24 considering water availability, as required by
25 ZDO 401.04A(5)(a).

26 This subassignment of error is denied.

1 **b. Farm Practices**

2 ZDO 401.04A(5)(b) requires the county to consider the
3 following:

4 "Cultivation, irrigation, harvesting spraying,
5 fertilizing, and other farm practices associated
6 with the [proposed farm] use[.]" (Emphasis
7 added.)

8 The challenged decision states:

9 "The property must also be suitably located in
10 light of cultivation, irrigation, harvesting,
11 spraying, fertilizing and other farm practices
12 associated with the [proposed farm] use. The
13 proposed ratite operation will involve having the
14 animals in confined areas and runs, and as such,
15 any farm practices associated with the presence of
16 the animals will be limited. This criterion is
17 met." Record 4.

18 Petitioners argue the county's finding that farm
19 practices associated with the proposed ratite operation will
20 be "limited" is a conclusion with no support in the record.
21 Petitioners specifically argue the county failed to address
22 the issues they raised below concerning whether the subject
23 property is appropriate for the proposed ratite operation,
24 considering the practices that will be used for disposing of
25 animal manure and dead animals. Supp. Record 51-52.

26 Findings must identify relevant approval standards,
27 identify the facts relied upon, and explain why those facts
28 support a conclusion that the standard is met. Wethers v.
29 City of Portland, 21 Or LUBA 78, 87 (1991). With regard to
30 ZDO 401.04A(5)(b), the county's findings simply state the
31 conclusion that the farm practices associated with the

1 proposed farm operation will be "limited." They fail to
2 identify the "limited" farm practices that will be used or
3 explain why the subject property is appropriately located
4 for such practices. Additionally, the county's findings
5 must address and respond to specific issues relevant to
6 compliance with applicable approval standards that were
7 raised in the proceedings below. Norvell v. Portland Area
8 LGBC, 43 Or App 849, 853, 604 P2d 896 (1979); Heiller v.
9 Josephine County, 23 Or LUBA 551, 556 (1992). Here,
10 petitioners' concerns regarding the practices to be used in
11 disposing of animal manure and dead animals were raised
12 below and should be addressed in the county's findings.

13 This subassignment of error is sustained.

14 **c. Marketing and Delivery Systems**

15 ZDO 401.04A(5)(c) requires the county to consider
16 "[m]arketing capabilities and delivery systems." The
17 challenged decision states:

18 "[ZDO 401.04A(5)(c)] deals with the adequacy of
19 marketing and delivery systems from the subject
20 property. [Petitioners] argue that the roadway to
21 the subject property is inadequate to handle the
22 traffic flow from this operation, and that it is a
23 private easement which does not allow commercial
24 uses. [Intervenor] has submitted various
25 documents to support the position that [the
26 existing roadway] is a private easement, but a
27 review of the evidence * * * indicates that this
28 is a county road by virtue of a County Court order
29 dated December 6, 1916. The road appears to be
30 one of the many roads which are not maintained by
31 the County, but it does appear adequate for the
32 proposed use. The materials submitted by
33 [intervenor] suggest that the proposed use will

1 involve the sale of only a few birds at any one
2 time, and [therefore] the existing roadway is
3 adequate for this use. * * *" Record 4.

4 Petitioners contend there is no public road access to
5 the subject property. According to petitioners, the
6 evidence in the record indicates the developed county road
7 ends approximately 500 feet from the subject property, and
8 it is the private easement roadway which traverses the
9 subject property, not the county road. Petitioners further
10 argue the county improperly failed to address the issue they
11 raised below concerning whether the easement in question may
12 be used for traffic to and from a commercial farm operation.

13 Respondents concede the developed portion of S. Hibbard
14 Road ends approximately 500 feet from the subject property.
15 Intervenor argues, however, that the undeveloped S. Hibbard
16 Road right-of-way abuts the subject property and, therefore,
17 intervenor may "improve the right-of-way at his own expense
18 to provide an 'improved' access to his property."
19 Intervenor's Brief 4. Intervenor further argues
20 ZDO 401.04A(5)(c) does not require direct access from a
21 public road and is satisfied because the easement roadway
22 provides access to the subject property.

23 The above findings indicate that in determining the
24 adequacy of marketing and delivery systems from the subject
25 property for the proposed commercial farm use, the county
26 relied on the existing roadway that provides direct access
27 to the subject property being a county road. However, we

1 are not cited to any evidence in the record supporting this
2 finding, and the parties agree the developed portion of the
3 county road does not reach the subject property.⁷ Although
4 the parties agree that the private easement roadway crosses
5 the subject property, the county did not base its
6 determination of compliance with ZDO 401.04A(5)(c) on use of
7 the private easement, and did not address the issue raised
8 by petitioners below concerning restrictions on use of the
9 easement for commercial farm purposes. We therefore agree
10 with petitioners that the challenged decision fails to
11 establish the subject property is appropriately located to
12 support the proposed commercial farm use, considering
13 marketing and delivery systems.

14 This subassignment of error is sustained.

15 **5. Effects on Agricultural Uses/Productivity**

16 ZDO 401.04A(6) and (7) establish the following criteria
17 for approval of a farm dwelling:

18 "(6) Development of a dwelling site will not
19 adversely affect or limit the existing or
20 potential farm uses in the area; and

21 "(7) Development of a dwelling site will not
22 substantially reduce the agricultural
23 productivity of the property."

⁷We need not determine whether the county could have based its determination of compliance with ZDO 401.04A(5)(c) on a finding that the undeveloped portion of the S. Hibbard Road right-of-way abuts the subject property, as intervenor contends, because the county did not make such a determination. Further, we note the county did not impose any condition requiring that intervenor improve such undeveloped right-of-way.

1 Petitioners contend the county's findings addressing
2 these standards are inadequate because they fail to consider
3 (1) the subject property was in timber until recently clear
4 cut, (2) the effect of the proposal on existing and
5 potential timber uses of the subject property and the area,
6 or (3) the loss of the subject property's timber
7 productivity.

8 The challenged decision indicates the county does not
9 interpret ZDO 401.04A(6) and (7) to require consideration of
10 effects on existing or potential timber uses in the area or
11 the timber productivity of the subject property. Record 4.
12 The county's interpretation of ZDO 401.04A(6) and (7) is not
13 clearly contrary to the words, policy or purpose of these
14 provisions, and we must defer to it. Clark v. Jackson
15 County, supra, 313 Or at 514-15.

16 This subassignment of error is denied.

17 **B. ZDO 403.01**

18 ZDO 403.01 (entitled "Purpose") sets out the purpose of
19 the TT-20 zoning district. Petitioners contend the
20 challenged decision erroneously fails to demonstrate the
21 proposal complies with ZDO 403.01. Petitioners further
22 argue the evidence in the record would not support a
23 determination of compliance with ZDO 403.01.

24 Under Gage v. City of Portland, 123 Or App 269, ___ P2d
25 ___ (1993), and Weeks v. City of Tillamook, 117 Or App 449,
26 453-54, 844 P2d 914 (1992), this Board is required to review

1 a local government's interpretation of its code and may not
2 interpret the local code in the first instance.
3 Additionally, to be reviewable by LUBA, a local government's
4 interpretation of its regulations must be provided in the
5 challenged decision or the supporting findings, not in the
6 local government's brief. Eskandarian v. City of Portland,
7 ___ Or LUBA ___ (LUBA No. 93-012, October 15, 1993),
8 slip op 15. Therefore, although we might agree with the
9 county's argument in its brief that ZDO 403.01 is not an
10 approval standard for the subject farm dwelling application,
11 because the challenged decision itself does not interpret
12 ZDO 403.01, we must remand the decision for the county to
13 interpret ZDO 403.01 in the first instance.

14 This subassignment of error is sustained.

15 **C. Additional Evidence from Applicant**

16 The challenged decision states:

17 "A public hearing was held * * * on April 7, 1993
18 * * *, at which time testimony and other evidence
19 was received. The record was left open until
20 April 14, 1993 for the opponents to submit
21 additional information, and until April 21, 1993
22 for [intervenor] to respond to the opponents'
23 additional submissions. * * *" Record 1.

24 Petitioners' argument, in its entirety, is:

25 "The county failed to comply with these
26 instructions when it accepted 'Additional
27 Evidence' from [intervenor's attorney] (Record,
28 pages 011-066) and entered said evidence in the
29 record." Petition for Review 12.

30 Petitioners do not explain how the county failed to

1 comply with the above quoted "instructions."⁸ Additionally,
2 petitioners do not explain how the procedures followed by
3 the county violated an applicable legal standard, or why the
4 county's failure to follow the required procedures
5 prejudiced petitioners' substantial rights.
6 ORS 197.835(7)(a)(B). Petitioners' argument is
7 insufficiently developed to provide a basis for reversal or
8 remand. Deschutes Development v. Deschutes Cty., 5 Or LUBA
9 218, 220 (1982).

10 This subassignment of error is denied.

11 The first, second and third assignments of error are
12 sustained, in part.

13 The county's decision is remanded.

⁸We note the record indicates the material in question was received by the county on April 14, 1993. Record 11.