BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DANIEL GUMTOW-FARRIOR
and CATHY GUMTOW-FARRIOR,
Petitioners,

vs.

CROOK COUNTY,
Respondent,

and

JASON BRONSON
and DAMON SHAEFER,
Intervenors-Respondent.

LUBA No. 2003-105

FINAL OPINION
AND ORDER

Appeal from Crook County.

Gary Abbott Parks, Lake Oswego, filed the petition for review and argued on behalf of petitioners.

Jeff M. Wilson, Crook County Counsel, Prineville, filed the response brief and argued on behalf of respondent.

Daniel Kearns, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Reeve Kearns, PC.

BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

REMANDED 11/19/2003

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioners appeal a county decision approving a conditional use permit for a commercial recreational park.

FACTS

The subject property includes 576 acres, located approximately two and one-half miles from the Prineville Reservoir. The property is accessed via a BLM easement to SE Juniper Canyon Road, a county road. The property is zoned Recreation Residential Mobile, 5-acre minimum lot size (RR(M)-5), a rural, nonresource zoning designation.

The property is currently undeveloped. The property's terrain is uneven, and there are several seasonal drainage ravines on the property. Property to the west, north and east is managed by BLM. Land to the south, and portions of property to the east and west are privately owned, and zoned RR(M)-5. Some of those privately owned parcels are developed with seasonal or year-round dwellings.

In early 2003, intervenors-respondent (intervenors) submitted an application for a conditional use permit to develop a commercial recreational park. As proposed, the subject property would be developed with (1) a motocross and all-terrain vehicle (ATV) track; (2) a mountain bike trail; (3) a running trail; and (4) an archery range. In the future, intervenors anticipate adding a camping area to the property. The motocross/ATV track will be located in the center portion of the property, and the other uses will be developed around that track.

Crook County permits "commercial recreation uses" as conditional uses in the RR(M)-5 zone. During the proceedings before the county planning commission and county court, petitioners and others argued that (1) the proposed use does not fall within the scope of a commercial recreation use; (2) the proposed use is not compatible with other uses allowed within the zone, particularly residential uses; (3) the RR(M)-5 zone is more of a residential

zone than a commercial recreational zone; and (4) the proposal does not satisfy all applicable approval criteria.

The planning commission held a hearing on the application, and approved the application with conditions. Petitioners and others appealed the planning commission's decision to the county court. The county court, after a hearing, denied petitioners' appeal and approved the application, adopting a modified version of the planning commission's decision and imposing additional conditions of approval. This appeal followed.

ALLEGATIONS OF PROCEDURAL ERROR

On its first motion to approve the application, the planning commission failed to achieve a majority vote in favor of the motion. On a second motion, the planning commission modified the terms of its approval. The second motion passed, and the application was approved. In their second assignment of error, petitioners contend that for planning commission proceedings, the county has chosen to follow Roberts Rules of Order in circumstances where the Crook County Zoning Ordinance (CCZO) procedures are silent with respect to voting. Petitioners cite Roberts Rules of Order Newly Revised, section 44 (Section 44), and argue that that section provides that the first vote must become the planning commission's final decision on the application.[1] Therefore, petitioners argue, all of the proceedings that occurred after that vote are a nullity, because they were based on the planning commission's second, and improper, vote to approve the application.

We assume that petitioners are correct that the county has chosen to follow the procedures set out in Roberts Rules of Order where the county's zoning ordinance is silent. However, we disagree with petitioners that Section 44 supports their argument that the planning commission could not vote a second time to approve intervenors' application.

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[1] Section 44 provides, in relevant part:

> "On a tie vote, a motion requiring a majority vote for adoption is lost, since a tie is not a majority. * * *"

Section 44 provides that the *motion* that is being considered fails, because a majority vote is not achieved. It says nothing with regard to a vote on a new motion. There is nothing that petitioners have cited to us that prevented the planning commission from considering another motion that could and, in this case did, achieve a majority vote.

The second assignment of error is denied.

CONSISTENCY WITH CCZO 3.070 (RR(M)-5 ZONE)

Petitioners argue that the county erred in concluding that intervenors' proposal qualifies as a conditional use in the RR(M)-5 zone. In addition, petitioners argue that the county's conclusion that the proposed recreational park is allowed in the RR(M)-5 zone is not supported by substantial evidence.

CCZO 3.070(2) lists 13 conditional uses in the RR(M)-5 zone. The county approved the proposed recreational park as a "commercial recreation use" pursuant to CCZO 3.070(2)(B), which authorizes commercial recreation uses and provides a nonexclusive list of examples of commercial recreation uses.[2]

Petitioners concede that the CCZO 3.070(2)(B) list of uses that qualify as commercial recreation uses is not exclusive. Petitioners argue, however, the proposed commercial recreation park, especially the motocross/ATV aspect of intervenors' proposal, exceeds that which may be allowed under the category of "commercial recreation uses," as that term is used in CCZO 3.070(2)(B).[3] Petitioners emphasize that none of the commercial recreational

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[2] CCZO 3.070(2)(B) provides:

> "Commercial recreation use; including but not limited to stables, resort, gun club, travelers' accommodations, and recreational or organizational camp[s]."

[3] Petitioners also argue that the county adopted nothing more than a bare conclusion that motorcycle riding is a "recreational activity." Petitioners argue that that conclusion is not obviously true, and the county must adopt findings supported by substantial evidence to explain why the county believes such is the case. Petitioners do not explain why they believe that "motorcycle riding" is not a recreational activity, or why the county erred in reaching the conclusion that off-road motorcycle riding and racing like motocross is not a recreational activity. Because this argument is not sufficiently developed for our review, we do not consider it further. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

uses listed in CCZO 3.070(2)(B) include motorized elements. Petitioners argue that, as a result, the county may not expand the use category to allow uses, such as motocross, that clearly do not fall within the conditional use category. Petitioners argue that their view of the limited scope of uses allowed by CCZO 3.070(2)(B) is supported by Crook County Comprehensive Plan (CCCP) Recreational Policy 1, which clearly anticipates that non-motorized recreational activities be promoted over motorized recreational activities.[4]

The county and intervenors (respondents) respond that the county court did adopt findings that address why the county believes that CCZO 3.070(2)(B) allows the proposed commercial recreation park. Respondents point to findings where the county considered the relationship between CCZO 3.070(1)(D) which allows a "[p]ublic park, recreation area, community or neighborhood center" as a permitted use in the RR(M)-5 zone and concluded that CCZO 3.070(2)(B) is directed at *private* rather than public recreational developments. Given that contextual analysis, and the fact that other CCCP recreational policies, particularly CCCP Recreation Policies 3, 5 and 7, contemplate that motorized vehicles may play some role in the recreational use of land within the county, respondents argue that the county court's interpretation of its ordinance to allow uses such as the proposed commercial recreational park as a conditional use in the RR(M)-5 zone is entirely consistent with that zone.[5]

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[4] CCCP Recreational Policy 1 provides:

> "Energy consequences shall be considered by all recreation plans to the extent that non-motorized types of recreational activities shall be preferred over motorized activities. * * *"

[5] CCCP Recreational Policies 3, 5 and 7 provide:

> "3. Unique areas and potential recreation sites capable of meeting specific recreational needs shall be protected and acquired. * * *"
>
> "5. The development of recreation facilities by private enterprise shall be encouraged and governmental recreation plans coordinated with private developments."

The county's findings on this issue are set forth below:

> "Commercial recreational use includes but is not limited to stables, resort, gun club, travelers' accommodations, and recreational or organizational camps. This is a conditional use within the RR(M)-5 zone. The County distinguishes between public and commercial uses. A public park, recreational area, community centers, and other public uses necessary to serve the recreational residential needs for the area are permitted [outright under CCZO 3.070(1)(D).] Hiking, biking, archery, [and] riding of motorcycles on a track [are] all considered recreational. These uses provided by a private individual or firm for compensation and profit makes these a commercial recreational use." Record 163 (underlining in original).

From the county's perspective, the differentiation between what may be allowed as a commercial recreational use, and thus a conditional use rather than a use permitted outright, turns on the question of whether the proposed use is intended to make a profit for a private entity.[6] Fairly read, the county's findings conclude that motorized recreational activities may occur on property developed for public recreational purposes, and those same motorized activities may occur as a commercial recreation use as well. That interpretation is not inconsistent with the cited plan policies, which appear to contemplate that some recreational uses of property within the county include the use of motorized vehicles. ORS 197.829(1).[7]

> "7. * * * All recreational uses, including [off-road vehicle] uses specifically, shall minimize environmental degradation."

[6] The county court also adopted the following findings with respect to petitioners' arguments that the RR(M)-5 zone should not be interpreted to allow the motocross track as a "commercial recreation use":

> "* * * [Opponents claim] that because the [CCZO] does not specifically identify [a] motocross track as an allowable recreational use, the Commission may not approve such a use. This argument incorrectly presumes the existence of an omniscient county planning and ordinance development process which can foresee all possible uses of any given property, including the development of technologies and consumer trends which may give rise to changed circumstances following plan adoption. The comprehensive plan and zoning ordinance are not frozen in time. Uses not originally contemplated when the plan was developed but [are] still consistent with the 'recreational' designation of the zone are permissible, and the Planning Commission was well within its rights to interpret the zoning ordinance as it did. * * *" Record 9-10.

[7] ORS 197.829(1) provides:

The fifth subassignment of error of the first assignment of error is denied.

COMPLIANCE WITH CCZO 6.020

Petitioners challenge the county's conclusion that intervenors' proposal satisfies CCZO 6.020(2), (4) and (5).[8]

"The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:

"(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

"(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

"(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

"(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

[8] CCZO 6.020 provides in relevant part:

"In judging whether or not a conditional use proposal shall be approved or denied, the Commission shall weigh the proposal's appropriateness and desirability of the public convenience or necessity to be served against any adverse conditions that would result from authorizing the particular development at the location proposed and, to approve such use, shall find that the following criteria are either met, can be met by observance of conditions, or are not applicable.

"* * * * *

"2. Taking into account location, size, design and operation characteristics, the proposal will have a minimal adverse impact on the (A) livability, (B) value and (C) appropriate development of abutting properties and the surrounding area compared to the impact of development that is permitted outright.

"* * * * *

"4. The proposal will preserve assets of particular interest to the County.

"5. The applicant has a bona fide intent and capability to develop and use the land as proposed and has some appropriate purpose for submitting the proposal, and is not motivated solely by such purposes as the alteration for property values for speculative purposes."

A. CCZO 6.020(2)(A) (Minimal Adverse Impact on Livability)

Petitioners argue that the proposed recreational park will have an adverse effect on livability as that term is used in CCZO 6.020(2)(A). *See* n 8. Specifically, petitioners contend that the proposed motocross track will generate dust and noise that will adversely affect nearby residential uses. Petitioners also argue that the conditions of approval that the county adopted to minimize the impact will not be effective.

1. Dust

The planning commission found that, by imposing conditions of approval that require intervenors to (1) design and construct the proposed motocross track to minimize erosion; (2) retain natural vegetation; and (3) apply dust suppressants to the track to minimize dust, dust impacts will be minimized, and will not affect livability.[9] The county court imposed an additional condition of approval that requires intervenors to comply with OAR chapter 340, division 208 in order to satisfy CCZO 6.020(2)(A).[10]

Petitioners argue that the county erred in using OAR chapter 340, division 208 as the standard for measuring whether the impact of dust has been adequately addressed. First,

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[9] The planning commission's findings state, in relevant part:

> "* * * The use of various materials in the construction of the track, the appropriate use of water, and the maintenance of maximum native shrubs, grasses, and trees will mitigate [the dust] issue." Record 171.

[10] The county court found:

> "The [County Court] finds that [petitioners'] concerns about dust creation are not adequately addressed by the Planning Commission in its final decision. However, [intervenors] submitted relevant data regarding this issue, and an additional condition imposed by the [County Court] can adequately mitigate this issue." Record 9.

The relevant condition of approval requires:

> "[Intervenors] shall control dust in accordance with OAR 340, Division 208 through application of water, water-retaining organics and/or dust suppressants as needed, including but not limited to calcium chloride, emulsified resins, pine tar dust binder, molasses and water, and other environmentally friendly, engineered products." Record 17.

petitioners argue that the administrative rule is not aimed at dust generated by the use of motorized vehicles on a motocross track.[11] Petitioners argue:

> "[In] the absence of any County criteria for dust control, it is not possible for the County to have made a finding on livability as it applies to dust. While there is plenty of discussion throughout the record in respect to dust and dust control, no evidence was received on any legal criterion for dust control. In the absence of any evidence in respect to a legal criterion, no finding of fact is possible. Consequently, the County made its decision without adequate findings and without substantial evidence in the whole record on the legal criteria [that] might apply. There are no applicable criteria so it is impossible for the County to make a finding on the issue of livability as that requirement pertains to dust. In the absence of a finding on the issue of livability as that requirement applies to dust, and given the impossibility of making any such finding, the decision must be reversed." Petition for Review 14.

We understand petitioners to argue: (1) dust generated by the proposed motocross track will adversely affect livability; (2) the livability standard does not impose a numerical ceiling for addressing impacts from dust; (3) the county could not adopt OAR chapter 340, division 208 as a mechanism to address dust impacts in its final decision approving the proposed recreational park; and (4) because the county could not rely on OAR chapter 340, division 208 to address dust impacts, the county may not approve an application for a use that generates dust.

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[11] OAR chapter 340 addresses fugitive air emissions. OAR 340-208-0210 prohibits fugitive emissions that create a nuisance, providing in relevant part:

> "(2) No person may cause or permit * * * a road to be used, [or] constructed, * * * or any equipment to be operated, without taking reasonable precautions to prevent particulate matter from becoming airborne. Such reasonable precautions may include, but not be limited to the following:
>
> "(a) Use, where possible, of water or chemicals for control of dust in the demolition of existing buildings or structures, construction operations, the grading of roads or the clearing of land;
>
> "(b) Application of asphalt, oil, water, or other suitable chemicals on unpaved roads, materials stockpiles, and other surfaces which can create airborne dusts[.]"

There is nothing in the county ordinance that petitioners have identified that prevents the county from relying on a standard such as OAR 340-208-0210 to ensure that dust from the motocross track will not affect livability on adjacent and surrounding lands within the meaning of CCZO 6.020(2)(A). We do not agree with petitioners that OAR chapter 340, division 208 is inapplicable to dust that becomes airborne as a result of the use of the motocross track. Fairly read, the rule requires that roads be maintained in a manner that prevents nuisances caused by airborne particulates. The methods required by rule to minimize the creation of airborne particulates include the types of dust suppressants that the county identified in its final decision. Therefore, petitioners' argument that the county may not rely on OAR chapter 340, division 208 to ensure that CCZO 6.020(2)(A) is met with respect to dust does not provide a basis for reversal or remand.

Petitioners also argue that the county erred in relying on the existence of water as a potential dust suppressant. Petitioners contend that there is no evidence in the record that the property has enough water or water rights to develop a water source that will be adequate to suppress dust. Petitioners argue that there is evidence in the record that the property has some water rights, but that those rights are limited to agricultural uses, and may not be used for recreational purposes. Finally, petitioners argue that the county erred in not requiring that the proposed motocross track be watered at specific intervals and intensities, in order to ensure that the livability standard is met with respect to dust.

Respondents respond that the county court recognized that the planning commission's dust suppression condition would not be enough to adequately suppress dust. As a result, respondents argue, the county court adopted the condition in its final decision (1) requiring intervenors to suppress dust in accordance with OAR chapter 340 division 204, and (2) allowing more than one method of dust suppression to ensure that the standard is met. In addition, intervenors argue that petitioners have not demonstrated that any of the methods

approved by the county, alone or in combination, will be inadequate to ensure that dust is suppressed.

We agree with respondents. The fact that there may not be enough water available to the property to allow intervenors to use watering as its sole method of dust suppression does not mean that one or more of the methods approved by the county would not be effective.

Finally, with respect to dust impacts, petitioners argue that the county's approval violates CCCP Recreational Policy 7, which provides:

> "No recreational use shall be allowed to exceed the carrying capacity of the air, water and land resources of a recreational area. All recreational uses, including [off-road vehicle] uses specifically shall minimize environmental deterioration."

According to petitioners, the county approved a use that will use more than the maximum amount of water than is allocated to the property under the state's water allocation scheme. In addition, petitioners point to evidence that if water is not available on-site, intervenors will seek to purchase water from off-site sources and have the water delivered to the property. Petitioners argue that this evidence demonstrates that the proposed recreational park "exceed[s] the carrying capacity of the * * * water * * * resources" of the area in violation of Recreational Policy 7.

We are not entirely sure that petitioners' interpretation of Recreational Policy 7 is plausible. Recreational Policy 7 is aimed at preserving the carrying capacity of the "recreational area" and not simply the subject property. Even if petitioners' do provide a plausible interpretation of Recreational Policy 7, it is clear that the county did not adopt that interpretation. Rather, the county concluded that the proposal is consistent with Recreational Policy 7 so long as the proposed uses do not degrade the resource.[12] The county considered

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[12] The county's findings state, in relevant part:

> "Dust does need to be controlled and is regulated as per OAR [Chapter] 340, [division] 208. The use of a clay base in the design of the track was presented as one method to minimize both dust and erosion. The engineer for the applicant testified that 0.1 inches or more of water

petitioners' argument that there is an insufficient amount of water on the property to adequately suppress dust and imposed conditions of approval requiring intervenors to use alternative, non-water based dust suppressants or to obtain additional water from off-site sources. The county's interpretation of Recreational Policy 7 is not inconsistent with the text and context of that policy. Therefore, petitioners' argument provides no basis for reversal or remand.

2. Noise

Petitioners challenge the county's findings that conclude, as conditioned, the proposed recreational park will not generate noise that will affect livability on adjacent and surrounding properties. Petitioners contend that there is no credible evidence in the record regarding the amount of noise that is likely to be generated by 40-60 motorcycles, nor is there evidence in the record that the proposed methods of noise minimization, including the siting of the motocross facilities at the center of the property, and testing noise generated by individual motorcycles prior to allowing the motorcycles access to the motocross track, will be sufficient to reduce the noise generated by the use of the motocross track overall. Petitioners also argue that the conditions of approval that the county adopted with respect to noise do not address other noise generators, such as noise from vehicles traveling over internal roads, parking/loading, or from spectators viewing competitions.

Intervenors respond that the county imposed conditions of approval to limit the effect of noise on neighboring properties. First, intervenors state, the county imposed a condition of approval that limits the amount of noise that may be generated to no more than 60 dBA when

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everyday for the entire track could be used for dust control. There is an exempt use from a groundwater well of 5,000 gal[lons] per day, with an even higher usage for domestic use. There is a letter from a local long time well driller in the area that identifies the difference in well strata areas with those of the opposition that is supported by recorded well logs showing depths and volume of water submitted to the Water Resource Department. Other options for dust control can [include] purchasing water from the City of Prineville, Ochoco Irrigation District, or Central Oregon Irrigation District." Record 168.

measured from the property line of the nearest noise sensitive, *i.e.* residential, use.[13] Second, intervenors point to a condition of approval that limits the number of motorcycles that may be operated at one time to 40 and limits the number of on-road vehicles to 300.[14] Third, intervenors point to a condition of approval that requires annual review of the conditions of approval to ensure that the noise standards are adequate to protect the livability on adjacent and nearby properties.[15] According to intervenors, those conditions of approval address petitioners' concerns, provide identifiable performance standards and are based on substantial evidence, including a noise study produced by the Crook County Environmental Health Department that estimated the noise levels that will be generated by the operation of different numbers of motorcycles. We agree.

The third subassignment of error of the first assignment of error is denied.

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[13] The relevant condition of approval provides:

> "The maximum noise levels to adjacent noise sensitive uses (residences) shall not exceed 60 dBA. All motorized vehicles shall be muffler tested prior to [use and shall meet] the OAR chapter 340 standards of not greater than 99 dBA on a stationary test of 20 inches from the muffler. * * * There shall be no engine startup in the general parking area; running engines shall be allowed only in the 'pit area' and on track. Except to the degree that the foregoing conditions are more stringent, [intervenors] shall comply with all other standards [set out] in OAR 340-035-0040(1) through (10) [pertaining to noise emission standards.]" Record 18 (underlining omitted.)

[14] The relevant condition of approval provides:

> "No more than 40 off-road, motorized vehicles are to be on any given track or combination of tracks at any one given time period, and no more than 300 on-road vehicles are to be permitted on the property at any given time." Record 18-19 (underlining omitted.)

[15] That relevant condition of approval provides:

> "Because this is a new type of conditional use in the experience of the county, and because of the concerns expressed by the surrounding property owners, the [County] Court concurs with the [planning commission's] imposition of a condition for regular review of this decision. Following one full year of operation, the [planning commission] shall review this decision annually during two consecutive years. The purpose of such review shall be to determine, after accepting public testimony and testimony provided by [intervenors], whether conditions imposed need to be modified or deleted. * * *" Record 20 (underlining omitted.)

B. CCZO 6.020(2)(B)(Minimal Adverse Impact on Neighboring Property Values)

Petitioners argue that the county's findings are inadequate to demonstrate that the proposed recreational park will have a minimal adverse impact on neighboring property values. *See* n 8. According to petitioners, the county relied on testimony from the county assessor to conclude that the standard is met. Petitioners contend that that testimony is equivocal and does not establish that the proposed recreational park will have a minimal impact on property values. Petitioners point to testimony from petitioners and other opponents, including a local realtor, that adjacent property values would be adversely affected by the proposed park. Petitioners argue that the county's decision does not address this evidence, and that the opponents' evidence demonstrates, as a matter of law, that the standard is not met.

Intervenors respond that there is testimony and evidence in the record from persons who own property near a similar recreational park in Eastern Washington, and that evidence tends to show that such a park will have either a positive or a neutral effect on property values.

The planning commission found:

> "The [planning commission] received comments from local property owners claiming a loss of value. A local realtor also stated that it is obvious that there will be a loss of value as a result of the proposal. Thos in support claimed the opposite would be true—that persons wanting to be close to such a facility would pay the market price for the property. The [planning commission] * * * received a letter from the Chief Appraiser of the Crook County Assessor's Office stating that it is not possible to estimate the impact to value until the facility was operating and there were sales to base a conclusion upon. Absent any other more definitive evidence, the Assessor's [O]ffice[']s] letter is believed to be the most credible." Record 169.

The county court found that the planning commission's choice of evidence among the conflicting evidence in the record was reasonable. Record 7.

CCZO 6.020(2)(B) requires that the county find that the proposed recreational park will have no more than a minimal adverse impact neighboring property values. The planning commission never adopted such a finding. Instead, the planning commission's findings (1) acknowledge the opponents' testimony that surrounding property values would decline if the proposal is approved; (2) acknowledge that supporters testified that property values would not decline; and (3) acknowledge that the county stated that it was not possible to estimate the impact on surrounding property values until the proposal is built. Findings that simply acknowledge the evidence that was submitted and do not include a finding of compliance with the ultimate legal standard are inadequate. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). The planning commission's findings are particularly inadequate in this case, because they seem to embrace the testimony of the assessor, who testified that it was not possible to determine whether the proposal will have more than a minimal adverse impact on neighboring property values. If the planning commission embraced the assessor's testimony over the testimony of the supporters, that is effectively a finding that the applicant failed to carry his burden of proof concerning impact on property values under CCZO 6.020(2). The county court's decision does not correct the planning commission's error, because it mistakenly reads the planning commission's findings to adopt the supporter's testimony as factual, and simply adopts the planning commission's choice of evidence. Record 7.

Although we agree with petitioners that the county's findings concerning property values under CCZO 6.020(2)(B) are inadequate, we disagree with petitioners that only their evidence may be believed. As intervenors point out, there is other evidence in the record that lends support to the conclusion that the proposed park will have neutral or positive effects on neighboring property values. Therefore, remand is appropriate to allow the county to consider all evidence directed at CCZO 6.020(2)(B) and adopt adequate findings addressing that criterion.

The first subassignment of error of the first assignment of error is sustained.

C. CCZO 6.020(2)(C) (Minimal Adverse Impact on the Appropriate Development of Neighboring Properties)

CCZO 6.020(2) requires the county to consider the impact of the proposed use as compared to uses that may be permitted outright. Petitioners argue that, with respect to CCZO 6.020(2)(C), the county failed to adopt findings that address whether the proposed recreational park would have fewer adverse impacts when compared with *each* use that may be permitted outright.[16]

Intervenors respond that only one issue was raised below with respect to possible adverse impacts on neighboring properties, and that issue dealt with the effect the proposed park's water consumption would have on neighboring wells. Intervenors point to findings where the planning commission considered that testimony, but concluded that the amount of water that would be used to operate the park would be less than would be allocated for and consumed by residential dwellings located on five-acre lots that could be created by subdividing the subject property.[17]

The impact of the proposed use on water supplies was not the only issue raised by opponents with respect to this criterion. Opponents also testified that the proposed use would generate more traffic and noise than would be permitted by uses allowed outright. The planning commission responded to those issues by concluding that anticipated effects were

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[16] Petitioners also argue that the findings are inadequate because they fail to consider the "impact of the proposed use on any future uses which might not be developed in the zone because of the existence of the proposed use." Petition for Review 24. Petitioners do not explain why they believe that CCZO 6.020(2)(C) imposes such a requirement, and we do not see that it does. Therefore, we do not consider that argument further.

[17] The county found, in relevant part:

> "The [County] Court finds that [petitioners'] assertion that the Planning Commission failed to consider [the] impact of the proposed development compared to development that is permitted outright is error. In fact, the Planning Commission specifically consider[ed] the impact of water usage of the proposed conditional use compared to water use of residential construction which would be permitted outright. The fact that the Commission chose to rely on [intervenors'] objective data testimony and to reject generalized neighborhood statements of concern is within its discretion. * * *" Record 7-8.

no worse that what could be allowed in public parks and recreation areas, which are permitted uses within the RR(M)-5 zone.[18]

The county implicitly interpreted CCZO 6.020(2) to be met if the proposed use would have the same or less intense adverse impacts than the permitted uses that would generate the same types of adverse impacts. The county compared the water use impact of the proposed recreational park with the water use impact of a residential subdivision. The county compared the impacts of traffic and noise generated by the proposed recreational park with the potential traffic and noise impacts that could be generated by public recreational facilities. After making those comparisons, the county concluded that the proposed recreational park will not create greater adverse impacts than those permitted uses. The county's interpretation is not inconsistent with the text of CCZO 6.020(2)(C) or the purpose underlying that standard. Therefore, we must affirm the county's interpretation. ORS 197.829(1). *See* n 7. As to petitioners' findings challenge, the county's findings, as a whole, are adequate to address CCZO 6.020(2)(C) as the county interpreted that standard.

The fourth subassignment of error of the first assignment of error is denied.

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[18] The planning commission's findings state, in relevant part:

> "Testimony * * * revealed that a residential subdivision could utilize more water [than] this application; a subdivision is an outright permitted use in the zone. * * *" Record 168.
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> "Traffic: Testimony from the opposition cited increased traffic as a potential problem. * * * The [planning commission] feels the evidence shows that any additional traffic would not impact the capacity to Juniper Canyon Road. It would further not impact the area when considering the other uses permitted as * * * outright use[s], including public recreation areas, community centers, public parks, etc." Record 169-170.
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> "Noise: * * * The information and issues with noise have been with the motocross operation and not with the BMX, hiking and running track[s], or the archery range. If this analysis was made with those uses permitted outright, such as public parks and recreational areas, the issue of noise under this section would not be considered." Record 170-171.

D. CCZO 6.020(4) (Preservation of Assets of Particular Interest to the Community)

Petitioners argue that the county's findings with respect to CCZO 6.020(4) are inadequate. Intervenors respond that petitioners failed to raise any issue regarding compliance with CCZO 6.020(4) below and, therefore, petitioners have waived the right to challenge the county's findings with respect to CCZO 6.020(4) before LUBA.

We have held that where a party has an opportunity to raise the issue of whether an applicable criterion is satisfied, that issue must be raised during the local proceedings or it is waived. *Miles v. City of Florence*, 44 Or LUBA 411, 416 (2003), *rev'd on other grounds*, __ Or App __, __ P3d __ (November 13, 2003); *DLCD v. City of Warrenton*, 40 Or LUBA 88, 95-96 (2001). Petitioners do not point to any part of the county's record where an issue with respect to CCZO 6.020(4) was raised. Accordingly, it is waived.

The second subassignment of error of the first assignment of error is denied.

E. CCZO 6.020(5) (Bona Fide Intent and Capability to Develop Property)

The county concluded that intervenors had demonstrated that CCZO 6.020(5) is satisfied, relying on intervenors' testimony that they had the financial resources, the business experience and access to adequate liability insurance to develop the recreational park as proposed. *See* n 8. In their third assignment of error, petitioners challenge that conclusion, arguing that no reasonable decision maker would have relied on intervenors' unsupported testimony to conclude the standard is met. According to petitioners, intervenors' evidence suggests that intervenors have no business plan, little independent financial backing, and rely on family connections to obtain insurance, all of which indicates that intervenors do *not* have the capability to successfully develop the subject property as proposed.

The county responds that the county relied on testimony from the applicants that (1) they have experience running a business and have been involved in sports-related businesses; (2) they have personal financial assets that may be used to develop the park; (3) although the park will be insured through a relative's insurance agency, the insurance company itself will

hold the policy and will perform its own independent assessment to verify the risks that may be involved in the development and operation of the park. The county asserts that opponents presented no testimony that tends to undermine intervenors' testimony, and therefore, the county could rely on that testimony even if it was not supported by financial information of the type and detail that petitioners allege is necessary to satisfy the standard. The county contends that the uncontroverted evidence is substantial evidence that a decision maker could reasonably rely on.

In addition, the county points to a condition of approval that requires intervenors to submit additional financial information to the county to demonstrate their financial commitment to the project.[19] The county contends that the condition of approval honors intervenors' request that such financial information be kept private, to protect the privacy of intervenors' financial status and to prevent competitors from using that information to intervenors' disadvantage.

We agree with the county that intervenors' uncontroverted testimony is adequate to demonstrate that CCZO 6.020(5) is met. That standard does not, as petitioners argue, require a demonstration that intervenors' proposal will succeed or is based on a proven, conservative business model. The county could find, as it did here, that intervenors are committed to developing the property as proposed, and have made arrangements to finance and insure the business. Those findings and the evidence those findings are based on are adequate to show

[19] The condition of approval states:

> "Prior to commencing operations, [intervenors] shall submit to the County Planning Department a statement from a registered Certified Public Accountant or qualified representative of a Small Business Development Center, Oregon Economic and Community Development Department, Central Oregon Intergovernmental Council Finance Department or other qualified business-development agency[,] certifying that said individual or agency has reviewed [intervenors'] business plan, financial statements and this decision and that in the opinion of said individual or agency [intervenors have] the finance ability to execute and capacity to continually operate the proposed facility." Record 19-20 (underlining omitted.)

that intervenors have a bona fide interest in the project and are capable of bringing it to fruition, as CCZO 6.020(5) requires.

The third assignment of error is denied.

COMPLIANCE WITH CCZO 3.070(10)(B) (CLOSE PROXIMITY TO RECREATIONAL RESOURCE)

CCZO 3.070(10) applies to conditional uses located within RR(M)-5 zones. It provides, in relevant part:

> "Limitations on Conditional Uses. In addition to the standards and conditions that may be attached to the approval of conditional uses as provided by [CCZO] Article 6, the following limitations shall apply to conditional uses in a RR(M)-5 zone:
>
> "* * * * *
>
> "(B) An application for a Conditional Use in the RR(M)-5 Zone may be denied if the applicant fails to demonstrate that a location in close proximity to the recreation resource to be served is essential to the public interest and to the full development of the recreation resource."

The county found that

> "* * *[T]his criter[ion] does not appear to be relevant given that the motocross track and the recreation resource are dependent upon one another. Additionally, since this zone is the only one that provides for this type of activity * * * evidence does support this criter[ion.]" Record 164.

Petitioners argue that the county's findings neither explain what this criterion requires, nor identify the facts the county relies upon to conclude that the standard is met. Petitioners argue that there is nothing in the decision or the record that explains (1) what the county believes the "recreation resource" is; (2) whether the proposed use must be in close proximity to that recreation resource; (3) why the conditional use is essential to the public interest; and (4) why the proposed conditional use is essential to the full development of the recreation resource.

The county responds that the planning commission found that the zone itself is the "recreation resource" identified in CCZO 3.070(10)(B). The county explains that the

RR(M)-5 zone is the only zone that allows the type of use proposed by intervenors and, therefore, the planning commission concluded that it is in the public interest to develop the RR(M)-5 zone in a way that allows the range of recreational uses, both public and private, contemplated in the comprehensive plan.

Intervenors provide a substantially different explanation of the planning commission's findings. According to intervenors, the planning commission interpreted CCZO 3.070(10)(B) to not apply to the proposed recreation park. Even if it did apply, intervenors argue that CCZO 3.070(10)(B) does not impose a mandatory approval standard. According to intervenors, CCZO 3.070(10)(B) merely authorizes the county to deny an application for a conditional use in the RR(M)-5 zone if the county believes that another type of development in close proximity to the recreational resource would better serve the public interest.

As the explanations from respondent and intervenors demonstrate, it is not clear from the county's decision whether the county believes CCZO 3.070(10)(B) applies to the proposed recreation park and, if it applies, what CCZO 3.070(10)(B) requires. We agree with petitioners that the findings that the planning commission adopted are inadequate with respect to CCZO 3.070(10)(B).

The sixth subassignment of error of the first assignment of error is sustained.

IMPACT OF PROPOSED USE ON DEVELOPMENT OF NEIGHBORING PROPERTIES

Petitioners argue in their fourth assignment of error that the county failed to address an issue that was raised with respect to how the county should analyze the impacts of the proposed use on surrounding properties. According to petitioners, there is evidence in the record that at least 39 residences are located within one mile of the subject property and that, over time, the RR(M)-5 zone has evolved to a rural residential zone rather than a recreational zone. Petitioners argue that the county's decision does not address the impact the proposed

recreational park will have on the use of the RR(M)-5 zone as a predominantly rural residential zone.

Respondents counter that petitioners do not identify any approval standard that requires the county to consider the types of development that have occurred within the RR(M)-5 zone over time and to deny a use that might be otherwise permitted in the zone simply because the characteristics of the development that has occurred in the zone is more residential than recreational. In the absence of such an approval criterion, respondents argue, the county's failure to address the issues petitioners raise does not provide a basis for reversal or remand.

A land use decision must respond to specific issues that are raised below that are relevant to compliance with applicable approval standards. *Rouse v. Tillamook County*, 34 Or LUBA 530, 536 (1998); *Collier v. Marion County*, 29 Or LUBA 462, 466 (1995). Where a petitioner seeks remand because the challenged decision fails to include findings to address specific issues raised below, the petitioner must explain why the issues raised are relevant to an applicable approval standard. *ONRC v. City of Oregon City*, 29 Or LUBA 90, 109 (1995). Here, petitioners do not identify an approval criterion that requires consideration of the evolving nature of development within the zone, nor do petitioners explain why issues regarding the limited number of nonresidential recreational uses in the zone affect the county's determination that the proposed use satisfies the county's conditional use criteria.

The fourth assignment of error is denied.

The county's decision is remanded.