

1                                   BEFORE THE LAND USE BOARD OF APPEALS

2                                   OF THE STATE OF OREGON

3  
4 BOYD HIXSON, HELEN HIXSON,           )  
5 CAROL HAYNE, LINDA MULLENS,        )  
6 and LARRY COSBY,                    )  
7    )  
8                    Petitioners,        )

9  
10            vs.                            )

11    )  
12 JOSEPHINE COUNTY,                    )  
13    )  
14                    Respondent,        )

15  
16            and                            )

17    )  
18 LARRY HALL and KATHLEEN HALL,        )  
19    )  
20                    Intervenors-Respondent.        )

LUBA No. 93-060

FINAL OPINION  
AND ORDER

21  
22  
23            Appeal from Josephine County.

24  
25            James R. Dole, Grants Pass, filed the petition for  
26 review and argued on behalf of petitioners. With him on the  
27 brief was Schultz, Salisbury, Cauble & Versteeg.

28  
29            No appearance by respondent.

30  
31            Douglass Schmor, Medford, filed the response brief and  
32 argued on behalf of intervenors-respondent. With him on the  
33 brief was Brophy, Mills, Schmor, Gerking & Brophy.

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

37  
38                    REMANDED                                   10/28/93

39  
40            You are entitled to judicial review of this Order.  
41 Judicial review is governed by the provisions of ORS  
42 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal an order of the board of county  
4 commissioners approving an administrative permit for an  
5 oversized barn.

6 **MOTION TO INTERVENE**

7 Larry Hall and Kathleen Hall, the applicants below,  
8 move to intervene on the side of respondent in this appeal  
9 proceeding. There is no objection to the motion, and it is  
10 allowed.

11 **INTRODUCTION**

12 The subject property consists of 5.32 acres and is  
13 zoned Rural Residential (RR-5). The proposal is to  
14 construct an 8,000 square foot covered horse arena and barn  
15 on the subject property. There is no dispute that both a  
16 development permit and an administrative permit are required  
17 to construct the arena and barn.

18 In the petition for review, petitioners assume the  
19 challenged decision approves both a development permit and  
20 an administrative permit. However, the challenged decision  
21 purports only to approve an administrative permit. If the  
22 county intended to determine the proposal also satisfies  
23 standards applicable to development permits, it should have  
24 indicated that intention in its decision.<sup>1</sup> Therefore, we do

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<sup>1</sup>There are portions of the challenged decision which suggest the county may have believed that approval of the administrative permit also

1 not address petitioners' assignments of error, or portions  
2 thereof, relating to the proposal's compliance with county  
3 development permit approval standards, because no  
4 development permit was approved for the proposal.<sup>2</sup>

5 **ASSIGNMENTS OF ERROR**

6 Under the relevant portions of petitioners' assignments  
7 of error, petitioners contend the challenged decision fails  
8 to establish compliance with JCZO 15.228 and 15.229.  
9 JCZO 15.228 is entitled "Administrative Permits Authorized"  
10 and provides:

11 "Administrative permits are ministerial actions to  
12 provide a review of uses that are generally a  
13 benefit to the community but may cause an impact  
14 on surrounding property. To ensure that the uses  
15 authorized in various sections of this Ordinance  
16 will not be detrimental to established uses, the  
17 Planning Director shall review all requests for  
18 administrative permits. The Director may approve  
19 those requests that meet the intent and purpose of  
20 this section. Any decision of the Planning  
21 Director may be appealed to the Planning  
22 Commission or Hearings Officer." (Emphasis  
23 supplied.)

24 JCZO 15.229, entitled "Conditions for Granting an  
25 Administrative Permit," provides:

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constitutes approval of the development permit. Further, the arrangement of the record also suggests that the compiler of the record may have believed a development permit was approved. However, the words of the challenged decision state only that it approves an administrative permit.

<sup>2</sup>In this regard, the "development permit" issues include petitioners' arguments concerning setbacks, site review and erosion control standards under Josephine County Zoning Ordinance (JCZO) 8.040(3)(d), 1.006.176, 14.110 and 14.111 (setbacks); 15.219 (site review); and 14.130 (erosion control).

1 "No Administrative Permit \* \* \* shall be granted  
2 unless it can be shown that all of the following  
3 conditions exist:

4 "a. The authorization of the permit shall not be  
5 detrimental to the character of the adjoining  
6 land uses and will not infringe upon the  
7 continued uses of the adjacent land.

8 "b. The proposed use is consistent with the  
9 intent and purpose of the zone in which the  
10 property is located and will not exceed the  
11 physical capabilities of the land to support  
12 the proposal.

13 "c. The authorization of the permit will not have  
14 a significant detrimental impact on the  
15 neighborhood.

16 "d. The proposed use is authorized by an  
17 Administrative Permit in the zone in which  
18 the property is located."

19 Petitioners' specific arguments are discussed separately  
20 below.

21 **A. JCZO 15.228**

22 Petitioners contend the above emphasized provision of  
23 JCZO 15.228 requires the county to determine the proposal's  
24 public benefits outweigh its public detriments. Petitioners  
25 argue there is no evidence in the record that the proposed  
26 use will have any public benefits. Petitioners raised this  
27 issue below, and the challenged decision contains no  
28 interpretation of the applicability of JCZO 15.228 as an  
29 approval criterion.

30 Intervenor's argue JCZO 15.228 is not worded as an  
31 approval standard, and infer from the lack of discussion in  
32 the decision that the county did not consider it to be one.

1           In other cases, we have applied principles of ordinance  
2 construction and concluded that provisions like the  
3 emphasized portion of JCZO 15.228 are not approval  
4 standards, and provide no basis for reversal or remand of a  
5 local government's decision.    See Bennett v. City of  
6 Dallas, 17 Or LUBA 450 (1989), aff'd 96 Or App 645 (1989).  
7 Thus, if a local government were to interpret a provision  
8 like JCZO 15.228 as not containing mandatory approval  
9 standards, it is likely we would defer to such an  
10 interpretation.<sup>3</sup> Clark v. Jackson County, 313 Or 508, 936  
11 P2d 710 (1992).  However, in view of the very deferential  
12 standard of review explained in Clark, and this Board's  
13 inability to interpret local legislation in the first  
14 instance, Weeks v. City of Tillamook, 117 Or App 449, 454,  
15 844 P2d 914 (1992), we may not assume the county interprets  
16 JCZO 15.228 not to impose an applicable, mandatory standard.  
17 Gage v. City of Portland, 123 Or App 269, \_\_\_\_ P2d \_\_\_\_  
18 (1993).  Moreover, petitioners raised the interpretative  
19 issue below concerning JCZO 15.228, and the county was  
20 obliged to respond to it and explain in its decision the  
21 extent to which JCZO 15.228 applies to the proposal.  See  
22 Norvell v. Portland Area LGBC, 43 Or App 849, 853, 604 P2d

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<sup>3</sup>However, we note that JCZO 15.228 also provides the county may "approve those requests that meet the intent and purpose of this section," i.e. JCZO 15.228.  This language supports the interpretation suggested by petitioners and, if the county made such an interpretation, it is likely we would be required to defer to it as well.

1 896 (1979). Because the county failed to do so, we must  
2 sustain this subassignment of error.

3 **B. JCZO 15.229(a) and (c)**

4 Petitioners argue the evidence in the whole record does  
5 not support the county's determinations of compliance with  
6 JCZO 15.229(a) and (c), quoted supra.

7 JCZO 15.229(a) and (c) impose subjective standards  
8 requiring determinations of whether the proposal will have  
9 certain undesirable, detrimental effects on adjacent uses or  
10 the neighborhood. This Board may not reweigh the evidence  
11 and substitute its judgment for that of the county  
12 concerning the proposal's compliance with these standards.  
13 1000 Friends of Oregon v. Marion County, 116 Or App 584,  
14 588, 842 P2d 441 (1992). Further, we note that petitioners  
15 place a great deal of stock in the county's failure to  
16 compare the impacts associated with a smaller barn, against  
17 the impacts associated with the proposed building, to  
18 determine whether a smaller barn would have fewer  
19 detrimental impacts. However, nothing to which we are cited  
20 requires the county to make such a comparison. Thus, the  
21 fact that the county may not have considered evidence of the  
22 results of such a comparison persuasive is not dispositive.

23 We have reviewed the evidence in the record cited by  
24 the parties concerning the proposal's compliance with JCZO  
25 15.229(a) and (c). We conclude a reasonable decision maker  
26 could conclude the proposal satisfies JCZO 15.229(a) and

1 (c), as the county did here.

2 This subassignment of error is denied.

3 **C. JCZO 15.229(b)**

4 As we understand it, petitioners argue the proposal  
5 exceeds the physical capability of the subject property  
6 because the soils are highly erodible. However, the  
7 challenged decision determines it is feasible to construct  
8 the proposed building on the subject property, conditions  
9 the issuance of the administrative permit on the  
10 implementation of certain erosion control measures and  
11 requires approval of an Erosion and Sediment Control Plan  
12 prior to issuance of a development permit. Record 17.  
13 Further, intervenor cites evidence in the record from a  
14 "recognized erosion control expert" to the effect that if  
15 certain measures are employed, erosion control will be  
16 effective. Intervenors' Brief 14.

17 We have reviewed the evidence in the record cited by  
18 the parties and conclude a reasonable decision maker could  
19 determine that adequate erosion control measures are  
20 feasible for the proposal and that the proposal satisfies  
21 JCZO 15.229(b).

22 This subassignment of error is denied.

23 The county's decision is remanded.