LAND USE
BOARD OF APPEALS
SEP 8 4 13 PM '89

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRITZ and JOANN VON LUBKEN, and VON LUBKEN ORCHARDS, INC.,	)	
Petitioners,	)	
vs.	)	LUBA No. 89-023
HOOD RIVER COUNTY,	)	FINAL OPINION AND ORDER
Respondent,	)	
and	)	
BROOKSIDE, INC.,	)	
Intervenor-Respondent.	)	

Appeal from Hood River County.

Steven L. Pfeiffer, John Shurts and Nancy E. Duhnkrack, Portland, filed the petition for review and Steven L. Pfeiffer argued on behalf of petitioners. With them on the brief was Stoel Rives Boley Jones and Grey.

Sally A. Tebbet, Hood River, filed a response brief and argued on behalf of respondent.

B. Gil Sharp, Hood River, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Sharp and Durr.

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

REMANDED 09/08/89

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal the county's approval of a conditional use permit to construct a 169 acre golf course, clubhouse, restaurant and lounge.

MOTION TO INTERVENE

Brookside Inc., the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The 169 acre proposal includes 112.82 acres zoned exclusive farm use (EFU).[1] Portions of the property previously were used for pasture, forest and orchard use. The property includes Class II and IV soils subject to protection under Statewide Planning Goal 3 (Agricultural Lands).

Petitioners manage 50 acres of EFU zoned lands adjacent to, and in the vicinity of, the proposed golf course. One of petitioners' parcels of slightly less than five acres will be bordered by the proposed golf course on two sides, and a second ten acre parcel, which includes orchards, petitioners' house and other buildings, would be nearly surrounded by the golf course.

INTRODUCTION

Golf courses are allowed as conditional uses in the

[1]The balance of the property is zoned Residential, Rural Residential, Floodplain, Environmental Protection, and Airport Combining.

county's EFU zone.[2] Hood River County Zoning Ordinance (HRCZO) 7.40(M). There are no general conditional use standards in the HRCZO applicable to all conditional uses. Neither are there conditional use standards provided in the EFU zone specifically for golf courses.[3] However, Article 60, the administrative procedures article of the HRCZO, sets out procedures and standards for "administrative actions." As defined in the HRCZO, a conditional use permit is an administrative action. The burden of proof for an administrative action is specified in HRCZO 60.10 as follows:

> "The Burden of Proof is placed on the applicant seeking an action pursuant to the provisions of this ordinance. Unless otherwise provided for in this article such burden shall be to approve [sic]:
>
> "A. Granting the request is in the public interest; the greater departure from present land use patterns, the greater the burden of the applicant.
>
> "B. The public interest is best carried out by granting the petition for the proposed action, and that interest is best served by granting the petition at this time.
>
> "C. The proposed action is in compliance with the Comprehensive Plan.
>
> "D. The factors set forth in applicable Oregon law

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[2]The parties assign no significance to the fact portions of the 169 acres are zoned other than EFU.

[3]The EFU zoning district, like other zoning districts in the HRCZO, does provide specific approval criteria for certain conditional uses. For instance, the EFU zone provides approval standards for non farm dwellings (HRCZO 7.40(D)) and mobile homes for a dependent relative (HRCZO 7.40(J)). All other conditional uses in the EFU zone, including golf courses, are simply listed as a conditional use, without any reference to approval standards.

were consciously considered. Also, consideration will be given to the following factors:

"1. The characteristics of the various areas of the county.

"2. The suitability of the subject area for the type of development in question.

"3. Trends in land development.

"4. Density of development.

"5. Property values.

"6. The needs of economic enterprises in the future development of the county.

"7. Access.

"8. Natural resources.

"9. Public need for healthful, safe, and aesthetic surroundings and conditions.

"E. Proof of change in a neighborhood or community or mistake in the planning or zoning for the property under consideration are additional relevant factors to consider.

"In all cases, the hearings body or officer shall enter findings based upon the record before it, to justify its decision."

In their first three assignments of error, petitioners contend the respondent failed to adopt findings supported by substantial evidence identifying and demonstrating compliance with HRCZO 60.10 and the Hood River County Comprehensive Plan (Plan) standards applicable to the decision under HRCZO 60.10(C), _supra_.

FIRST ASSIGNMENT OF ERROR

"Respondent misconstrued the applicable law and acted in violation of state statutes, the statewide planning goals and respondent's own comprehensive plan by

approving an application for a conditional use permit in the exclusive farm use zone without addressing relevant portions of its mandatory comprehensive plan policies."

Petitioners identify several Policies, Strategies, and Land Use Designations and Standards (Standards) under Plan Goal 3 (Agricultural Lands) which petitioners claim are applicable to the county's decision and were not addressed by the county.[4] Petitioners cite the following:

"B. POLICIES:

"1. Agricultural land will be maintained for agricultural uses.

"* * * * *

"4. Efforts will be made to curb the decline in cropland acreage.

"5. Efforts will be made to curb the conversion of agricultural land to other uses.

"6. Agricultural lands and existing agricultural uses will be protected from incompatible uses.

"7. Agricultural land and uses will be separated from nonfarm related land uses.

"C. STRATEGIES:

"* * * * *

"2. Conversion of rural agricultural land to land for other uses shall be based on condideration of the following factors.

"a) Environmental, energy, social and economic consequences.

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[4]"Policies," "Strategies," and "Land Use Designations and Standards" are defined terms in the Plan. We discuss the meaning and legal effect of these provisions, infra.

"b) Demonstrated need consistent with Land Conservation and Development goals.

"c) Unavailability of an alternative suitable location for the requested use.

"d) Compatibility of the proposed use with related agricultural land.

"e) The retention of Class I, II, III, and IV soils.

"* * * * *

"D. LAND USE DESIGNATIONS AND STANDARDS:

"1. Accepted farming practices defined by ORS 215.203 (2) are permitted to take place in areas designated "Farm" on the Plan Map and as "Exclusive Farm Use" on the zoning map.

"2. Non-farm uses permitted by ORS 215.213(2) and (3) shall be minimized to allow for maximum agricultural productivity.

"3. Single family dwellings other than those permitted as accessory uses to farm use are allowed provided they meet the prescribed conditions set forth in ORS 215.213(3).

"4. Farm-related uses designed to sort, box and store (i.e., cold storage) agricultural products are permitted.

"5. Forestry and open spaces are compatible with and are permitted in agricultural lands.

"6. One primary residence will be allowed per lot or parcel. The minimum size for new lots or parcels shall be 20 acres.

"7. The County Zoning Ordinance will be amended to allow golf courses as a conditional use in the Exclusive Farm Use (EFU) Zone.

"8. Accepted farming practices except feed lots are permitted to take place in areas designated as "Scenic Protection" on the

zoning maps. (Applies to the Columbia Gorge area.)

"9. Development will not occur on lands capable of sustaining accepted farming practices.

"10. Redevelopment and improvement of existing communities and other developed area(s) is favored over development which will utilize existing agricultural lands.

"* * * * *" Plan 9-11; Petition for Review Appendix B.

Petitioners contend Policies B(1), B(4), B(5), B(6) and B(7) are violated by the county's decision because

> "* * * (1) the decision allows agricultural land to be taken out of agricultural use and converted to the nonfarm use of a golf course and (2) the incompatible use is approved at a location immediately adjacent to and surrounding productive orchard lands despite evidence in the record demonstrating the likelihood of conflicts between the uses * * *." Petition for Review 9.

Petitioners point out the county failed to address these Policies, although petitioners argued below that these Policies are applicable criteria the county was required to address.

Petitioners similarly argue the county erred by failing to adopt findings addressing Strategy C(2), quoted _supra_. In addition, petitioners contend the county's decision is silent concerning Plan Goal 3 Standards, ten of which are quoted _supra_. Petitioners contend Standard D(2), requiring that nonfarm uses "shall be minimized to allow for maximum agricultural productivity," is violated. Petitioners further note Standard D(9) proscribes development "on lands capable of sustaining accepted farming practices" and Standard D(10) provides "[r]edevelopment and improvement of existing communities and

other developed area(s) is favored over development which will utilize existing agricultural lands," and the county failed to address either of these Standards in its findings.

The county and intervenor-respondent (respondents) contend the Policies, Strategies and Standards cited by petitioners were never intended to be applied as approval criteria for conditional use permits in the EFU zone. Respondents emphasize the specific authorization for golf courses in the EFU zone in Standard D(7). As we understand it, respondents contend Standard D(7) constitutes a legislative determination that golf courses may be allowed in the EFU zone notwithstanding other Policies, Strategies and Standards under Plan Goal 3. Respondents complain that if the Policies, Strategies, and Standards cited by petitioners are applied as mandatory approval standards in the manner petitioners suggest, the intent to allow golf courses in the EFU zone expressed in Standard D(7) would be a nullity.

Although the cited Plan Policies, Strategies, and Standards are written in mandatory language, and petitioners asserted below that that they are mandatory approval criteria, the county did not apply them as mandatory approval criteria and there is nothing in the county's decision explaining why they are not mandatory approval criteria.

We find little in the wording or context of the cited Plan provisions or the definitions provided elsewhere in the Plan to support respondents' contention that the county is not required

to look past the explicit provision in Standard D(7) allowing golf courses in the EFU zone in determining Plan compliance. While that may have been the county's intent in adopting Standard D(7), we are cited to no explanatory findings or legislative history to that effect, and the language of Standard D(7) does not itself suggest such an overriding effect was intended. Furthermore, the definitions in the Plan do not support respondents' arguments that Policies, Strategies and Standards are not to be applied as mandatory approval criteria.

> "DEFINITIONS
>
> "A. GOALS: Goals are intended to define what is to be the ideal situation; what is to be sought for. A Goal is also a desired condition or circumstance toward which the planning effort is directed; a 'destination' which is by nature generalized; used to give direction and indicate intention.
>
> "B. POLICIES: Policies are intended to be broad statements providing direction for public decisions concerning the goal. They are a means of moving toward a goal without limiting the method or approach to a single course of action.
>
> "C. STRATEGIES: Strategies are intended to set forth the means for implementing the plan, i.e., adoption of regulations, special studies etc.
>
> "D. LAND USE DESIGNATIONS AND STANDARDS: Land Use Designations and Standards are intended to define the extent of development and provide broad standards for such development in a given area.
>
> "When goals, policies, strategies, and use designations and standards or other County directives are used to implement a specific Statewide Goal requirement, mandatory language ('shall' and 'will') is used. When mandatory statements are used they become legally binding to land use decisions.

"* * * * *

"Some goals, policies, strategies, and land use designations and standards are broad statements and do not directly relate to Goal implementations, consequently discretionary terms ('should' and 'ought') are used." (Emphasis added.) Plan Policy Document at 2.

We find nothing in the above quoted Plan language to support respondents' position that Policies, Strategies and Standards are not mandatory approval criteria.[5] Although we have concluded in different circumstances that general plan policies and objectives are not properly interpreted as mandatory approval criteria, see e.g., Bennett v. City of Dallas, ___ Or LUBA ___ (LUBA No. 88-078, February 7, 1989), aff'd 96 Or App 645 (1989),[6] the language quoted and emphasized

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[5]In fact, although the county claims Strategies such as those set forth in Strategy C(2) should not be interpreted to impose mandatory approval standards, the county cites Strategies under the Plan Economy Goal as examples of mandatory approval standards. In both cases the strategies are written in mandatory terms and appear to be mandatory approval criteria. The county also contends Strategies, and we assume Policies as well, should be interpreted to apply only to decisions such as plan amendments or zone changes. While such an interpretation might be good planning policy, the definitions of "Policies" and "Strategies" quoted and emphasized above do not support such an interpretation.

[6]In Bennett we explained:

"* * * plan policies in acknowledged comprehensive plans may or may not be approval criteria applicable to a specific land use decision depending on their context and how they are worded. Pardee v. City of Astoria, ___ Or LUBA ___ (LUBA Nos. 88-049/88-050/88-051, December 14, 1988); Hummel v. City of Brookings, 13 Or LUBA 25, 35 (1985); McCoy v. Tillamook County, 14 Or LUBA 108, 110-111 (1985).

"Local governments may or may not make it clear in their plan and land use regulations how their plan goals and policies apply to such decisions as variances, conditional uses, plan and zone changes, etc. See Miller v. City of Ashland, ___ Or

above indicates to the contrary that Plan Policies, Strategies, and Standards written in mandatory language are mandatory approval standards applicable to land use decisions.[7]

LUBA ___ (LUBA No. 88-038, November 22, 1988) slip op 23. Frequently, as in the present case, they do not. In such instances, this Board must determine whether the plan policies at issue constitute approval criteria applicable to the land use decision at issue." Bennett v. City of Dallas, supra, slip op at 8.

[7]Respondents' argue that application of provisions such as Standard D(9) as mandatory approval standards would produce an unreasonable result. While it may be that literal application of the Standard D(9) prohibition of development on lands capable of sustaining accepted agricultural practices renders the explicit provision for golf courses in EFU Zones in Standard D(7) a nullity, we believe the resolution of this possible conflict in Plan language is for the county to make in the first instance. As we explained Mental Health Division v. Lake County, ___ Or LUBA ___ (LUBA No. 89-004, July 16, 1989) slip op at 8:

> "* * * the interpretation of local ordinance provisions is a question of law. McCoy v. Linn County, [90 Or App 271, 275-276, 752 P2d 323 (1988)]; Gordon v. Clackamas County, [73 Or App 16, 20-21, 698 P2d 49 (1985)]. However, it is the local government which, in the first instance, should interpret its own enactments. Fifth Avenue Corporation v. Washington Co., 282 Or 591, 599, 581 P2d 50 (1974). Although our acceptance or rejection of a local government's interpretation of its own enactment is determined by whether we believe that interpretation to be correct, we do consider the local government's interpretation in our review, and give some weight to it if it is not contrary to the express language and intent of the enactment. McCoy v. Linn County, supra; Sevcik v. Jackson County, [___ Or LUBA ___, (LUBA No. 87-087, May 23, 1988]."

We also note that under ORS 215.213(3)(b) and 215.283(3)(d) nonfarm dwellings are required to be located on land generally unsuitable for farm use. It is not uncommon for counties to simply apply the standards applicable to nonfarm dwellings to all nonfarm uses allowed in their EFU zone, including the requirement that the nonfarm use be located on land generally unsuitable for farm use, even though the statutes leave the standards to be applied to such nonfarm uses to the county. We may not assume, as respondents suggest, that the county could not have intended such a severe constraint on golf courses in the EFU zone when it adopted Standard D(9). See McCaw v. Marion County, 96 Or App 552, 555, __P2d ___ (1989) (LUBA is to construe ambiguous language in statutory and county EFU zone provisions to be "consistent with the overriding policy of preventing 'agricultural land from being diverted to non-agricultural use.'").

We do not foreclose the possibility that the county might be able to explain why, notwithstanding the above quoted and empahasized language in the plan definitions section, the Policies, Strategies and Standards written in mandatory language are not mandatory approval criteria applicable to individual conditional use permit decisions. Neither do we foreclose the possibility that the county could adopt findings demonstrating compliance with the Policies, Strategies and Standards petitioners cite. However, in the absence of an explanation by the county of how it interprets the Plan Policies, Strategies and Standards and the above quoted Plan definitional language, and why, based on such interpretations, the conditional use satisfies those Plan requirements, we must agree with petitioners that the county's decision should be remanded for application of these Plan Policies, Strategies and Standards.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

> "Respondent misconstrued the applicable law and acted in violation of state statutes and its comprehensive plan and implementing ordinance by failing to identify and apply the standards governing the application for a conditional use permit."

Petitioners argue the county failed to properly identify and apply the provisions of HRCZO 60.10 as the criteria applicable to this proceeding.[8] With regard to identification

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[8]ORS 215.416(9) provides as follows:

"Approval or denial of a permit shall be based upon and

of the applicable criteria, petitioners complain the planning commission simply applied six factors without explaining whether or why the factors constituted the applicable approval criteria.[9] Petitioners further argue the county erred by failing to identify the provisions of HRCZO 60.10 as the controlling approval criteria prior to issuance of the board of commissioners' final decision. Record 3.

Petitioners next argue that the county's findings are inadequate demonstrate compliance with HRCZO 60.10. According to petitioners, HRCZO 60.10(A) and (B) require that the county find the proposal "is in the public interest" and that "[t]he public interest is best carried out by granting the petition for the proposed action, and that interest is best served by granting the petition at this time." Petitioners argue the county's findings are inadequate to show compliance with these

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accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."

[9]According to petitioners, the six factors applied by the planning commission are as follows:

"1. Character of the area will be retained.

"2. The use will not be detrimental to adjacent lands and uses.

"3. Hazardous conditions will be mitigated.

"4. The use will not adversely affect natural resources.

"5. Rural services exist.

"6. Comprehensive plan compliance." Petition for Review 16.

requirements. Petitioners also refer to their arguments under the first assignment of error and contend the county failed to demonstrate compliance with HRCZO 60.10(C), which requires that the proposed use comply with the comprehensive plan.[10] Finally, petitioners contend the county's findings are inadequate to address the nine factors in HRCZO 60.10(D) quoted above in the introduction to this opinion.

We address each of petitioners' contentions separately below.

A. Failure to Identify Approval Criteria

It is not disputed that the county identified the provisions of HRCZO 60.10 as the applicable approval criteria in its final decision. Although it would perhaps have been less confusing if the county had correctly identified the applicable criteria in the HRCZO sooner in the local proceedings, we are cited to no legal requirement that the county do so.[11] ORS

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[10]Petitioners' arguments under the first assignment of error can be read to suggest petitioners view HRCZO 60.10 as inadequate to constitute standards for nonfarm uses as required by ORS 215.213(2) and 215.283(2). See J.R. Golf Services, Inc. v Linn County, 5 Or LUBA 81, 90 (1982), rev'd on other grounds 62 Or App 360 (1983). Petitioners do not, however, explain why HRCZO 60.10 is inadequate to provide the standards for nonfarm uses in the county's EFU zone required by ORS 215.213(2) and 215.283(2), and we reject that portion of petitioners' argument under this assignment of error.

[11]ORS 215.416(8) does require that "[a]pproval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county * * *." HRCZO 60.10 is part of the county's zoning ordinance. Although the six factors identified by the planning commission do not appear to be part of the county's zoning ordinance or other county land use regulations, those factors were not the approval criteria applied by the board of commissioners in making the county's final decision.

215.416(9) simply requires that the county identify the relevant criteria in its final decision.

This subassignment of error is denied.

B. Public Interest

HRCZO 60.10(A) requires that the county find that its approval of the conditional use permit is in the public interest. Although the county adopted no findings expressly addressing this standard, intervenor-respondent (intervenor) does identify findings in the board of commissioners' decision and findings of the planning commission, planning staff and the applicant, incorporated by reference into the board of commissioners' decision, which explain that development of a golf course has been a county priority for several years and is needed for, among other reasons, economic diversification.

Petitioners do not explain why these findings are inadequate to show compliance with the generally worded public interest criterion of HRCZO 60.10(A).

This subassignment of error is denied.

C. Alternatives and Timing

Under HRCZO 60.10(B), the county is required to find the public interest is best served by the proposed action and that the public interest is best served by approving the proposed action at this time.

The county did not adopt findings expressly addressing HRCZO 60.10(B). Intervenor cites findings adopted by the county addressing other approval considerations. Intervenor-

Respondent's Brief 12. Those findings discuss the need for a golf course and discuss the suitability of the site for use as a golf course. Unlike the general public interest criterion in HRCZO 60.10(A), HRCZO 60.10(B) requires that the county both consider the planned facility in context with other possible ways to satisfy the public interest and consider whether the timing of the requested approval is appropriate. Some of the findings intervenor cites generally address some, but not all, aspects of these considerations required by HRCZO 60.10(B). However, the cited findings are inadequate to demonstrate compliance with HRCZO 60.10(B) because they lack the factual and legal specificity necessary to address this criterion.[12]. See Peyton v. Washington County, 96 Or App 37, 39, ___ P2d ___ (1989).

This subassignment of error is sustained.

D. Conformance with the Plan

Except as discussed infra under the third assignment of error, and for the reasons explained under the first assignment of error, the county's findings addressing the Plan provisions cited by petitioners are not sufficient to demonstrate either compliance with HRCZO 60.10(C) or that the cited Plan provisions

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[12]For example, one of the findings cited by intervenor states "[e]xpansion of the existing county 9 hole golf course would also require conversion of EFU or Forest lands." Record 431. This finding is not adequate to establish that the requested action is superior to expansion of the existing golf course, much less to establish that the public interest is best served by allowing the proposed action.

are not applicable approval criteria.

This subassignment of error is sustained.

E. Consideration of Factors

HRCZO 60.10(D) requires that "consideration will be given" to the nine "factors" listed in that subsection. See Introduction, supra. Unlike HRCZO 60.10(A), which is written as a mandatory approval standard, the nine entries under HRCZO 60.10(D) are termed "factors" which the county is directed to consider.

Again, while the county did not adopt findings expressly addressing the nine factors, intervenor cites findings adopted by the county which address these general factors. Intervenor-Respondent's Brief 13-14. Petitioners do not explain why these findings are inadequate to demonstrate consideration of these factors.

This subassignment of error is denied.

The second assignment of error is sustained in part.

THIRD ASSIGNMENT OF ERROR

> "Respondent misconstrued the applicable law and acted in violation of its comprehensive plan and implementing ordinance by failing to adopt findings supported by substantial evidence to address applicable criteria, failing to adopt findings on relevant issues raised by petitioners and by adopting findings which are not supported by substantial evidence."

The only challenge raised under the third assignment of error and not already addressed in our discussion of the first two assignments of error is petitioners' argument that the

county's findings that the proposed golf course will be compatible with and adequately buffered from adjoining agricultural uses and lands are inadequate and are not supported by substantial evidence in the record.

Petitioners contend Plan Goal 3 Policies B(6) and B(7) and Strategies C(2)(c) and (d) impose a requirement that the county find the proposed golf course will be compatible with adjoining agricultural lands and uses. Assuming the cited Plan provisions impose mandatory approval standards (see our discussion under the first assignment of error), we agree.[13] For purposes of this assignment of error, we assume HRCZO 60.10(C) and the cited Plan standards impose a requirement that the county find the proposed golf course will be compatible with adjoining agricultural land and uses.

Petitioners contend they submitted evidence to the county demonstrating likely conflicts between the proposed golf course and petitioners' orchard operation as follows:

> "(1)* * * a letter from the von Lubkens explaining how the site-specific conditions relating to this proposal -- primarily the fact that significant portions of the petitioners' orchards will be encircled by the golf course -- make it imposssible for the golf course to be compatible with their operations; (2) letters from four other orchardists in the Hood River Valley commenting on the potential management problems for the von Lubkens if the course were constructed at this particular location and configuration; (3) an analysis

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[13]Petitioners also cite a number of other Plan and HRCZO provisions which they contend also impose a requirement of compatibility. We disagree; those provisions either suggest more general considerations or impose different, albeit related, standards.

from the von Lubkens' equipment supplier and management consultant summarizing the orchard air drainage problems faced by the petitioners if buffering is constructed at this location; (4) a letter from the von Lubkens' insurance agent noting the increased premiums and potential unavailability of insurance that they face due to the increased risk of liability; (5) a letter from the petitioners' aerial sprayers stating that after viewing the layout of the proposed course in relation to petitioners' orchards, they could no longer aerial spray the orchard; (6) a letter from the Oregon Agricultural Aviation Association noting that FAA regulations would not permit aerial sprayers to pass over golf courses, which means, given the layout of the petitioners' orchards and the proposed course, that such critical farm management activities by petitioners are precluded." (Citations to the Record omitted.) Petition for Review 22-23.

Petitioners do not dispute that the county adopted findings concluding the proposed use would would be compatible with adjoining agricultural uses, including petitioners' orchard.[14]

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[14]The findings are as follows:

"The board considered the planning commission order and record, the limited new evidence presented by the appellant pursuant to the appellant's request stated in its January 5, 1989, appeal, and the applicant's rebuttal evidence to the new evidence presented by the appellant. In its new evidence the appellant contended that its use of agricultural chemicals on its adjacent orchard by either ground or aerial application would result in drift onto the neighboring property creating potential danger to golfers and increased liability exposure for the appellant, that buffers between the golf course and its orchard would restrict air drainage, that aerial spray application would be impossible with golfers nearby, that insurance costs would increase and that its land would decline in value as an orchard. The applicant rebutted this evidence with contentions that the timing of most spray applications in early morning and evening will limit conflicts, that a properly pruned and maintained vegetative buffer will stop ground spray drift and allow adequate air drainange, that the existing orchards adjacent to the golf courses in Hood River and Yakima areas have never experienced claims for injury or damage to a golfer due to orchard management practices and have not experienced difficulty in obtaining insurace coverage or insurance costs higher than other orchards, that willing buyers exist for appellant's orchard as orchard property, and

Intervenor notes that in La Pine Pumice v. Deschutes County, 13 Or LUBA 242, 248 (1985), LUBA interpreted a county land use regulation requirement that geothermal resources be allowed "only where their compatibility with surrounding land uses can be demonstrated with certainty" as not imposing a requirement that there be no impacts at all. Intervenor contends the county's findings of compatibility are adequate, and cites the following evidence supporting the county's findings:

> "Verbal testimony from Chuck Thompson, orchardist, that with buffers a neighboring golf course wouldn't change his farming practices as a whole and that the existing Hood River Golf Course has been bordered by orchards on 3 sides without apparent problems and that removal of some brush will improve air flow.
>
> "Letter from neighboring orchardist Tom Hasegawa, that no major problems are foreseen that would affect fruit production or farm practices.
>
> "Letter from orchardist F. Borchard Von Lubken, petitioner Fritz Von Lubken's father, that spraying near the golf course will be no more problem than spraying near the county roads.

> that orchard management practices can be safely conducted in a wide range or situations. The Board resolves these conflicts in favor of applicant.
>
> "* * * * *
>
> "* * * The existing record and new evidence establish that the appellant will be able to conduct all normal orchard management practices on its orchard property. In particular a properly pruned and maintained vegetative buffer will allow air drainange and will stop ground spray drift. An additional condition concerning closure of the golf course during aerial spray applications will avoid aerial drift conflicts. The appellant's own evidence indicates its farming operation is relatively non-hazardous. The evidence as a whole indicates appellant will be able to obtain insurance coverage similar to other orcharding operations. No other specific orchard management practices have been identified which might be restricted by an adjacent golf course." Record 2-4.

"Submittal by petitioners' witness Howard F. Hauff, that windbreaks provide trees with protection from wind and that 'properly pruned windbreaks allow the air to flow through and to help mix colder low level air with warmer air above as it passes through,' and 'A properly maintained windbreak acts somewhat like a wind machine * * * affording a little extra protection for the updrift area of the orchard.'

"Verbal testimony of Fritz von Lubken, that he is unaware of any liability claims filed against orchardists conducting normal farming practices.

"Letter from Don Larson, spray applicator, that aerial spray application of an orchard next to a golf course is feasible and that toxic sprays should not be applied by air near schools or houses.

"Letter from Robert Cyr, course superintendent of Westwood Golf Course, that neighboring a 1200 acre orchard for 21 years has never resulted in a complaint and that normal orcharding practices are even conducted on fruit trees on the golf course.

"Letter from Robert Robillard, course superintendent of Yakima Country Club, that his course borders an orchard and has for over 30 years without golfer complaints regarding orchard practices.

"Letter from Victor Bassani, orchardist, that he has operated his orchard next to a golf course for 22 years without problems.

"Photo Board showing Hood River county Schools located by orchards.

"Letter from John and Edna Robinson, that as operators of the Hood River Golf Course surrounded by orchards that spraying was never a problem, including aerial application.

"Verbal testimony of Gil Sharp, that the Hood River Golf Course has been surrounded by orchards for over 60 years without significant affects on either the orchards or the golf course in regards to normal orchard practices.

"Letter from Glenn and Polly Marsh, orchardists and owners for 40 years of the orchard being converted to the golf course, that describes drainage patterns on the property and that drainage of air will not be a

1 problem for petitioners, that describes the normal spray practices in the area, and that aerial spray is applied next to golf courses.

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3 "Letter from Michael Whitmore, landscape architect, that a well designed buffer will not create air drainage problems and will assist in controlling overspray drift.

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5 "Letter from David Martin, applicant, that Mr. Decker, petitioners' aerial sprayer, does now spray by air by

6 the Hood River Golf Course and that proper buffering will not restrict air drainage on petitioners'

7 property.

8 "Letter from Roger Short, applicant, that investigation shows no liability claims or insurance

9 unavailability for orchards next to golf courses, and that local insurance agents show no claims for

10 personal injury liability due to orchard practices.

11 "Letter from Norman Stone, orchardist, that describes normal spray practices in the Hood River area and that

12 a properly buffered golf course would have no major effect on orchard practices." (Citations to the Record

13 omitted.) Intervenor-Respondent's Brief 17-19.

14 Petitioners contend the county's findings do not respond

15 completely to petitioners' concerns about their ability to

16 continue past farming practices (principally aerial spraying) on

17 their property. Petitioners' particular concern is with regard

18 to the five and ten acre parcels that adjoin and are essentially

19 surrounded by the proposed golf course.

20 Although it is true, as petitioners argue, that their

21 evidence is more focused on the particular problems that may be

22 incurred due to the specific configuration of petitioners' farm,

23 intervenor cites evidence in the record generally addressing

24 petitioners' concerns. The county addressed in its findings the

25 issues petitioners raised. The county concluded that with

26 proper buffering petitioners' concerns regarding spraying would

be addressed satisfactorily without creating unacceptable air drainage problems. We conclude the county's findings are adequate to explain why the county determined the proposed golf course will be compatible with petitioners' orchard operation.[15]

We also conclude the evidence in the record, viewed as a whole, is sufficient to allow a reasonable person to conclude that the proposed use will be buffered from and compatible with adjoining agricultural uses and lands. Braidwood v. City of Portland, 24 Or App 477, 480, 546 P2d 777 (1976). The evidence cited by intervenor and the evidence cited by petitioners is conflicting believable evidence, and the choice of which evidence the county chooses to believe properly lies with the county. See Younger v. City of Portland, 305 Or 346, 360, 752 P2d 262 (1988).

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

> "Respondent misconstrued the applicable law and acted in violation of its comprehensive plan and implementing ordinance by issuing a decision that improperly delegated discretionary decisionmaking and fact finding to a future time without proper preliminary findings or standards."

Petitioners recognize that if a local government properly

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[15]The county is not, as petitioners suggest, required to match the detail of petitioners' evidence on each and every point raised by petitioners. The findings need not address and resolve every conflict in the evidence. See Ash Creek Neighborhood Ass'n v. Portland, 12 Or LUBA 230, 237-238 (1984).

determines that applicable criteria are met, it may impose appropriate conditions as a means of assuring actions necessary to achieve compliance with those criteria are carried out. See e.g., Kenton Neighborhood Assn. v. City of Portland, ___ Or LUBA ___ (LUBA No. 88-119, June 7, 1989) slip op 24; Vizina v. Douglas County, ___ Or LUBA ___ (LUBA No. 88-014, August 26, 1988) slip op 17; Margulis v. City of Portland, 4 Or LUBA 89, 96-98 (1981). However, petitioners contend the county must first adopt findings demonstrating the proposed use will satisfy the criteria.

Petitioners contend the county failed to adopt adequate findings showing the proposal will be compatible with, and adequately separated from, petitioners' orchard operations. Without such findings, petitioners contend imposition of conditions designed to further those objectives constitutes an improper delegation of those decisions.

Under the third assignment of error, we concluded the county's findings concerning compatibility are adequate. In those findings, the county also determined the golf course would be adequately buffered (i.e. separated) from adjoining orchard uses. Therefore, the conditions imposed by the county, to the extent they were intended to assure compliance with compatibility and buffering requirements, are proper. Meyer v. City of Portland, 67 Or App 274, 282, 678 P2d 741, rev den, 297 Or 82 (1984) (as long as local government finds required solutions are available, technical details of particular

1 solutions can be deferred to the city's experts).[16]

2 The fourth assignment of error is denied.

3 FIFTH ASSIGNMENT OF ERROR

4 "Respondent violated its own procedural rules when it
5 allowed the applicant to submit evidence into the record after the record was closed, thereby prejudicing petitioners' substantial rights."

6 In petitioners' appeal of the planning commission's
7 decision in this matter to the board of commissioners,
8 petitioners requested that the board of commissioners hear the
9 appeal de novo and allow additional written evidence and
10 testimony. The board of commissioners denied petitioners'

11

12

13 [16]The conditions specifically challenged by petitioners are as follows:

14 "C. The applicant will retain a qualified golf course designer or a landscape architect to prepare a final comprehensive plan showing all uses approved in A. above
15 including buffering adjacent to farm lands. The plan to be reviewed and approved by the Planning Commission. The
16 person retained will ensure the project is implemented according to the Comprehensive Plan.

17 "* * * * *

18 "J. Buffers will be provided adjacent to all lands in agricultural use pursuant to the requirements of the
19 County's Buffer Requirements (Article 50) of the Hood River County Zoning Ordiance. The professional golf
20 course designer will also assist in providing measures to ensure protection of adjacent agricultural lands and not
21 create management problems for adjacent orchardists." Record 15-16.

22 The application reviewed by the county includes a conceptual plan which
23 indicates buffers are to be provided where the golf course adjoins petitioners' property. The county found, based on the evidence submitted by the applicant, that it is feasible to buffer the golf course from
24 petitioners' adjoining orchards and to construct the golf course so that it will be compatible with petitioners' orchards. The above conditions simply
25 require that final plans be developed in accordance with those findings, and are not improper delegations of decision making responsibility. <u>Meyer</u>
26 <u>v. City of Portland</u>, <u>supra</u>.

request for a de novo hearing, but allowed petitioners' request to submit additional evidence, provided that evidence was submitted not later than seven days before the board of commissioners' hearing on February 21, 1989.

The notice of the board of commissioners' hearing stated in part:

> "This hearing will be restricted to a review of the Planning Commission record; EXCEPT additional testimony as requested by the appellant in the appeal dated January 5, 1989, will be allowed and this additional testimony must be submitted in writing to the office of the Hood River County Board of Commissioners, Hood River County Courthouse, Hood River, Oregon, not later than seven days prior to the hearing. A copy of the additional testimony will be made available to interested persons. <u>The portion of the hearing pertaining to this new testimony will be heard in accordance with rules and procedures for de novo hearing</u>." (Emphasis added.) Record 103.

Petitioners contend that they submitted evidence within the time limit specified in the above quoted notice. The evidence submitted by petitioners was presented to the board of commissioners, and the board was advised that no other evidence was submitted in accordance with the above quoted notice. Petitioners complain that at the February 21, 1989 board of commissioners' hearing, the applicant was allowed to submit additional evidence, notwithstanding the applicant's failures to submit the evidence seven days before the February 21, 1989 hearing, as required by the notice, or to request in advance of the hearing[17] that such evidence be accepted. Petitioners argue

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[17]Section 3.46 of the board of commissioners' hearings procedures

1 their substantial rights were prejudiced by this error because
2 they were denied a fair opportunity to analyze and prepare a
3 response to the applicant's evidence.

4 Respondents argue the board of commissioners' rules
5 governing hearings for appeals from planning commission
6 decisions explicitly provide that if new evidence such as that
7 submitted by petitioners is received, other parties must be
8 given an opportunity for rebuttal, and that right of rebuttal
9 includes the right to submit rebuttal evidence. Respondents
10 cite Section 3.49 of the board of commissioners' procedural
11 rules, which provides:

12 "If new testimony or evidence is received, the proponent, opponent, and other persons with standing
13 shall be allowed to testify as pertains to the new evidence or testimony and shall be allowed to cross-
14 examine and to rebut."

15 Respondents also dispute petitioners' suggestion that the
16 applicant waived its right under Section 3.49 to present
17 rebuttal evidence by not submitting a request to do so seven
18 days in advance of the board of commissioners' hearing. The
19 county argues the right under Section 3.49 to submit rebuttal
20 evicence did not even arise until the petitioners' evidence was

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provides as follows:

22 "Unless the Board of Commissioners determines that there is new
23 evidence or testimony, no testimony will be heard."

24 Petitioners read Section 3.46 of the board of commissioners' hearings procedures together with the notice of the board of commissioners' hearing
25 to impose a requirement that the applicant submit the evidence it wished to submit seven days in advance of the hearing or at least request the right
26 to do so within that time limit, so that all parties would be advised of what might be submitted and when.

1 "received."

2 We agree with the county that Section 3.49 allows the
3 submittal rebuttal evidence. Section 3.49 gave the applicant
4 the right to "testify as pertains to the new evidence" and to
5 "cross-examine and rebut such new evidence." The cross-
6 examination allowed by Section 3.49 could easily produce
7 rebuttal evidence, and the testimony "as pertains to the new
8 evidence" allowed by Section 3.49 could also include rebuttal
9 evidence. Furthermore, neither the notice of hearing nor
10 Section 3.46 required the applicant to advise the board of
11 commissioners in advance of the February 21 hearing that it
12 wished to submit evidence to rebut the evidence submitted by
13 petitioners. We, therefore, conclude the county did not violate
14 its procedural rules by accepting the applicant's rebuttal
15 evidence at the February 21, 1989 hearing.

16 The fifth assignment of error is denied.

17 SIXTH ASSIGNMENT OF ERROR

18 "Respondent misconstrued the applicable law and acted in violation of state statutes and its comprehensive
19 plan and implementing ordinance by approving the development of a restaurant by the applicant, a use
20 not allowed in the EFU zone."

21 Petitioners argue that the restaurant and lounge approved
22 as part of the county's decision are not uses allowed in the EFU
23 zone. Petitioners point out that even if the county could
24 approve the restaurant and lounge as incidential or accessory
25 uses, the county adopted no findings establishing that the
26 approved restaurant and lounge will be incidential or accessory

to the golf course. See Taber v. Multnomah County, 11 Or LUBA 127 (1984); cf. Craven v. Jackson County, ___ Or ___ (August 29, 1989)(upholding interpretation of "commercial activities that are in conjunction with farm use" to include a winery tasting room and sale of winery souveniers).

Without conceding that the restaurant and lounge could not be approved as accessory uses to the golf course, the county concedes its findings and the evidence in the record are insufficient to establish that such is the case. Intervenor suggests that "[i]f the county erred it was in not specifying size and service limitations." Intervenor-Respondent's Brief 22. Intervenor suggests, incorrectly, that such considerations may deferred to a later date.

In Taber v. Multnomah County, 11 Or LUBA at 135, we concluded a restaurant could be approved as a use accessory and incidental to a golf course. However, in that opinion we noted the county imposed a number of conditions limiting the scope and nature of the restaurant. Here the county imposed no such limitations and adopted no findings establishing that the restaurant and lounge are properly viewed as an incidential or accessory use to the golf course.

The sixth assignment of error is sustained.

The county's decision is remanded.