BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GEORGE DOUGLAS, Petitioner, and FRIENDS OF SAUVIE ISLAND, JIM VANN, SAUVIE ISLAND BOOSTERS and DENNIS GRANDE, Intervenors-Petitioner, vs. MULTNOMAH COUNTY, Respondent, and JEROME De GRAAFF, CAROLYN LEE DONNA MATRAZZO, BOB STEPHENS, JACK SANDERS and STUART SANDLER, Intervenors-Respondent.	LUBA No. 89-086 FINAL OPINION AND ORDER

Appeal from Multnomah County.

William T. Rhodes, Portland, filed a petition for review and argued on behalf of petitioner.

James T. Waldron, Portland, filed a petition for review and argued on behalf of intervenors-petitioner. With him on the brief was Schwabe, Williamson and Wyatt.

Laurence Kressel and John L. DuBay, Portland, filed a response brief on behalf of respondent. Laurence Kressel argued on behalf of respondent.

Elizabeth Newcomb, Portland, filed a response brief and argued on behalf of intervenors-respondent. With her on the

brief was Banks and Newcomb.

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

AFFIRMED 01/12/90

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

Petitioner and intervenors-petitioner (petitioners) challenge a Multnomah County Board of Commissioners order denying petitioner's request for community service use approval for inclusion of 55 acres of land in a previously approved golf course site located on Sauvie Island.

MOTIONS TO INTERVENE

Friends of Sauvie Island, Jim Vann, Sauvie Island Boosters and Dennis Grande move to intervene on the side of petitioner. There is no opposition to the motion, and it is allowed.

Jerome De Graaff, Carolyn Lee, Donna Matrazzo, Bob Stephens, Jack Sanders and Stuart Sandler move to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

FACTS

Petitioner's 55 acres are designated Exclusive Farm Use by the Multnomah County Comprehensive Plan (plan) and are zoned Exclusive Farm Use (EFU) by the Multnomah County Zoning Ordinance. Golf courses are allowed in the EFU zoning district as a conditional use. Multnomah County Code (MCC) .2012(A)(7).[1] MCC .2012(A) requires that conditional

[1]The Multnomah County Zoning Ordinance is codified at MCC section 11.15. In this opinion we cite only the four digit subsection numbers of MCC 11.15.

uses in the EFU zone be approved pursuant to MCC .7005 to .7030 (Community Service).

The criteria that must be satisfied for community service use approval are set forth at MCC .7015 as follows:

> "In approving a Community Service use, the approval authority shall find that the proposal meets the following approval criteria * * *:
>
> "(A) Is consistent with the character of the area;
>
> "(B) Will not adversely affect natural resources;
>
> "(C) Will not conflict with farm or forest uses in the area;
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> "(D) Will not require public services other than those existing or programmed for the area;
>
> "(E) Will be located outside a big game winter habitat * * *;
>
> "(F) Will not create hazardous conditions; and
>
> "(G) Will satisfy the applicable policies of the Comprehensive Plan.
>
> "* * * * *"

Additional facts are set forth in the planning commission's findings and intervenors-respondent's brief as follows:

> "'The character of Sauvie Island is, in the main, agricultural. A wide variety of field, row, horticultural nursery and livestock products are commercially grown on the Island. The area constitutes the largest coterminous agricultural area of Multnomah County. That fact was recognized in 1977 when the Comprehensive Framework Plan designated the majority of the Island as Exclusive Farm Use. The purpose of that classification was to preserve the best agricultural lands from inappropriate and incompatible development and to

> preserve the essential environmental characteristics and economic value of these areas. The intent of the classification was to establish areas for exclusive farm use with farm use and the growing and harvesting of timber as the uses permitted outright. In accord with State law, other uses were permitted as conditional uses.
>
> 'Sauvie Island is also utilized for a variety of recreational purposes. A significant portion of the northern part of the Island is owned and managed by the Oregon Department of Fish and Wildlife. That area, in addition to a few private gun clubs, is intensively used for hunting waterfowl. The banks of the Columbia River and Multnomah Channel are used throughout the year for either fishing, swimming and/or sunbathing. The moorages along the Multnomah Channel house motor and sailboats used for water sport purposes in the Channel and on the Columbia and Willamette Rivers. Joggers and cyclists use the roads on the Island for exercise purposes. Still others use the Island for sightseeing or visiting historical points, such as the Bybee-Howell House.'

"The approximately 55 acres lies adjacent to an approved golf course site * * *. The additional acres would be incorporated into the golf course design. The area north of the additional acres is predominantly in agricultural production on the Douglas' farm. The site abuts areas used in nursery production, a peach orchard, pasture, woods and row crops. The peach orchard, nursery stock and wooded areas extend into the 55 acres proposed for inclusion in the golf course. * * *" Record 1025-1026.

"* * * In 1983, petitioner George Douglas filed an application for a community service designation and a conditional use permit in order to construct a 125 acre golf course on Sauvie Island.* * * Mr.

> Douglas's application was approved, with numerous conditions, by the Board of County Commissioners * * *. The Land Use Board of Appeals affirmed the Board's decision. [Taber v. Multnomah County, 11 Or LUBA 127 (1983).]
>
> "As of February 1989, no golf course facility had been constructed on the petitioner's property. At that time, petitioner applied for approval to expand by 55 acres the previously approved golf course site. In his application, petitioner characterized the previous approval as being for a '145 acre golf course site.' Petitioner's application asserted that the additional acreage was requested 'to redesign the course and provide more space between fairways, thereby diminishing potential injury to golfers from stray golf balls.' Petitioner did not request additional facilities or accessory uses.
>
> "The planning commission approved the expansion application, but after a de novo review, the Board of County Commissioners reversed the Planning Commission's decision and denied the application. This appeal followed." (Footnote and references to the record omitted.)[2] Intervenors-Respondent's Brief 4-5.

FIRST ASSIGNMENT OF ERROR

> "The Board of County Commissioners erred in failing to grant petitioner, George Douglas, his permit for community service designation on 55 acres in that; the doctrine of Res Judicata-

[2]In the omitted footnote, intervenors-respondent explain the original application in 1983 for community service approval for a golf course stated the application included approximately 125 acres. A subsequent survey disclosed the area shown in the 1983 application included 145 acres. Intervenors-respondent apparently maintain that since the county's approval in 1983 was for 125 acres, not 145 acres, petitioner has approval for only a 125 acre golf course. Although this issue was discussed below, it apparently was not resolved in the decision challenged in this appeal. Therefore, while we refer in this opinion to the golf course approved in 1983 as including 145 acres, that question is not before the Board, and we express no view as to the acreage approved by the county in 1983.

> Collateral Estoppel, properly applied would have conclusively found that petitioner's application satisfied all the code requirements for a community service designation."

Petitioner argues that under the Supreme Court's decision in North Clackamas School Dist. v. White, 305 Or 48, 750 P2d 485, modified 305 Or 468 (1988), res judicata and collateral estoppel apply to decisions of administrative bodies in appropriate circumstances. Petitioner argues res judicata and collateral estoppel apply to the county's decision in this case to require the county to approve his request for community service use approval for the 55 acre addition. As the Supreme Court explained in that case:

> "If a person has had a full and fair opportunity to litigate a claim to final judgment, most courts (including this one) hold that the decision on a particular issue or determinative fact is determinative in a subsequent action between the parties on the same claim (direct estoppel). See e.g. Waxwing Cedar Products v. Koennecke, 278 Or 603, 610, 564 P2d 1061, 1064-65 (1977); Bahler v. Fletcher, 257 Or 1, 4, 474 P2d 329, 331 (1970). The judgment generally is conclusive as well in a different action between parties as to issues actually litigated and determined in the prior action if their determination was essential to the judgment (collateral estoppel)." North Clackamas School Dist. v. White, supra at 50 (quoting from State Farm Fire & Cas. v. Reuter, 299 Or 155, 158, 700 P2d 236 (1985)).

Respondent contends petitioner's reliance on res judicata and collateral estoppel under this assignment of error is misplaced. Respondent argues res judicata and collateral estoppel only apply where "issues actually are

litigated and determined in the prior action * * *." Id. Respondent argues the county's 1983 decision was limited to a determination that the 145 acres at issue in that application met the applicable standards and was limited to the golf course proposed in that application. Respondent points out that MCC .7010(D) specifically provides any change in an approved community service use is subject to further hearings and approval by the county. Respondent's Brief 7.

We understand respondent to argue that the ultimate issue to be determined in the decision challenged in this appeal is whether 55 additional acres of EFU zoned land should be added to the 145 acres approved for use as a golf course in 1983. Although the approval standards are nearly identical to the standards applied in the 1983 decision, and the property here is located adjacent to the property at issue in 1983, respondent contends neither the property, the parties, nor the issues presented in this case are the same and, therefore, res judicata and collateral estoppel do not apply.

We agree with respondent. Although the specific factual findings and findings applying the facts to the relevant approval standards for the 55 acre addition may in some respects present questions or issues that are similar to those addressed in the 1983 decision, they are not the

same.[3] Furthermore, the property and parties are different in this appeal. The county's 1983 decision does not bind the county in this decision to make similar factual findings or reach the same decision it reached in 1983.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "The Board of County Commissioners erred in failing to grant petitioner, George Douglas, his permit for community service designation on 55 acres in that; the doctrines of Stare Decisis and Equitable Estoppel, properly applied require the County Board to issue a reasoned departure from its previous community service designation approval, CS 11-83; when the Board failed to find clear error in CS 11-83, the previous findings will be, as a matter of law, controlling and the permit must be granted."

Petitioner contends that stare decisis[4] requires that once a court determines principles and applies principles of

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[3]As the county correctly notes, one code provision relied upon by the county in denying the request was not applied in 1983 and, therefore, the issue of compliance with that standard could not have been decided in 1983.

[4]"Stare decisis" is defined in Blacks Law Dictionary (5th Ed.) as follows:

> "Policy of courts to stand by precedent and not to disturb settled point. Doctrine that, when court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases, where facts are substantially the same; regardless of whether the parties and property are the same. Under doctrine a deliberate or solemn decision of court made after argument on question of law fairly arising in the case, and necessary to its determination, is an authority, or binding precedent in the same court, or in other courts of equal or lower rank in subsequent cases where the very point is again in controversy. * * *" (Citations omitted.) Id. at 1261.

law in a given fact situation, those principles should be applied in the same way in future cases where the facts are substantially the same. Petitioner contends that respondent should be bound by stare decisis in its quasi-judicial decision making.

Like respondent, we have some difficulty understanding how stare decisis could provide a basis for reversal or remand of the county's decision.[5] We also agree with respondent that it appears that petitioner essentially reasserts his res judicata theory under this assignment of error. Further, it is not clear what legal principle petitioner argues the county decided in 1983, but failed to follow in 1987. As noted above, although factual similarities may exist, there are significant differences in the facts. The request at issue in this appeal is for the addition of different property to the property previously granted community service use approval.

As respondent correctly notes, the county decision makes it clear that the county viewed the 1983 request (i.e., should there be a 145 acre golf course approved where there is no existing golf course) to present a significantly

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[5]We note that ORS 183.482(7)(b)(B) provides the Court of Appeals is to remand state agency contested case orders where the court finds the agency's exercise of discretion is "[i]nconsistent with * * * an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency * * *." The statutes governing our scope of review of local government land use decisions do not contain a similar provision. See ORS 197.835.

different question than the question presented in this appeal (i.e., given the existence of approval for a 145 acre golf course, should there be a 55 acre expansion). In these circumstances, even if failure of a local government to follow stare decisis could provide a basis for reversal or remand, petitioner does not show such a basis for reversal or remand exists in this case.

The second assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

> "The Board of County Commissioners erred in failing to provide an impartial hearing in that three commissioners failed to reveal significant ex parte contacts which prejudiced petitioners [sic] case unfairly and significantly."

SEVENTH ASSIGNMENT OF ERROR

> "Three members of the county board erred when the [sic] convened a public meeting in Salem, Oregon sometime between the May 9, 1989 hearing on petitioners [sic] application and the June 6, 1989 [hearing] and had occasion to discuss matters relating to this petition without the presence of the parties."

Petitioner contends one county commissioner, on June 6, 1989, revealed that he had been approached by a state senator concerning the application during a meeting in Salem. Petitioner complains that two other commissioners received notes expressing opposition to the proposal from the same state senator, but failed to disclose they had received the notes until a June 20, 1989 meeting of the board of commissioners concerning the application.

Petitioner further complains that the commissioner who disclosed the ex parte contact on June 6, 1989, failed to disclose at that time another ex parte contact from a Multnomah County Circuit Court Judge and that there was an illegal public meeting of the board of county commissioners on this matter held in Salem.

Respondent points out petitioner concedes that before taking action at the final hearing in this matter, all three of the commissioners he alleges had ex parte contacts with the state senator disclosed those contacts. The ex parte contact with the judge was also disclosed at the June 20, 1989 hearing. Respondent contends petitioner does not explain what more was required concerning the ex parte contacts.

Regarding petitioner's claim that a public meeting was held in Salem by the county commissioners, respondent notes petitioner cites no evidence to support his claim.

As far as we can tell, the ex parte contacts petitioner complains of were disclosed. Petitioner's claim of an illegal public meeting in Salem is not developed in his brief and petitioner cites no evidence in support of the claim. Accordingly, the sixth and seventh assignments of error are denied.

THIRD ASSIGNMENT OF ERROR

> "The board of commissioners failed to properly state the applicable law regarding the Comprehensive Plan Framework Polices [sic] and

thereafter failed to apply the applicable law to the substantial evidence presented at the hearings."

FOURTH ASSIGNMENT OF ERROR

"The board of county commissioners erred in failing to consider all substantial evidence contained in the whole record regarding the following ordinance considerations:

"(a) Consistency with area character

"(b) Effects on Natural Resources

"(c) Applicable Comprehensive Plan Policies.

"The county board should have issued findings based upon substantial evidence in the whole record on the following ordinance considerations:

"(d) Conflict with farm or forest use

"(e) Public Services

"(f) Big Game Wildlife Habitat

"(h) Hazardous Conditions.

"Therefore the findings on d thru [sic] h are inadequate as a matter of law."

FIFTH ASSIGNMENT OF ERROR

"The board of county commissioners erred in denying petitioner's community service designation application in that a proper finding of fact describing the appropriate weight given to the material evidence actually offered would have resulted in a finding of substantial evidence satisfying every ordinance consideration and would have caused the adoption of the planning staff

report of February 27, 1989."[6]

Under these assignments of error, petitioners challenge the county's bases for determining noncompliance with the plan and MCC on several grounds. We address issues raised by petitioners concerning our scope of review before turning to petitioners' challenges concerning specific plan and MCC provisions.

A. Scope of LUBA Review

l. Evidentiary Support

Petitioners' challenges under these assignments of error are based, in large part, on their challenges to the evidentiary support for the county's findings that several applicable approval criteria are not met by the application. We, therefore, clarify at the outset the nature of the requirement in ORS 197.835(7)(a)(C) that this Board reverse or remand local government land use decisions if those decisions are not supported by substantial evidence in the whole record.

As the Oregon appellate courts have explained on numerous occasions, substantial evidence is evidence a reasonable person would rely upon in reaching a decision. City of Portland v. Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984); Bay v. State Board of Education,

[6]We also consider under these assignments of error, arguments presented by intervenors-petitioner under their first through sixth assignments of error.

233 Or 601, 605, 378 P2d 558 (1974); Van Gordon v. Oregon State Board of Dental Examiners, 63 Or App 561, 567, 666 P2d 276 (1983); Braidwood v. City of Portland, 24 Or App 477, 480, 546 P2d 777 (1976). Where the evidence is conflicting, reasonable persons may disagree. In some circumstances, reasonable persons could reach contrary conclusions based on the same conflicting evidence. City of Portland v. Bureau of Labor and Ind., supra.

In performing its review function to determine whether a decision is supported by substantial evidence, this Board does not replicate the function of the local government decision maker and may not substitute its judgment for that of the local government simply because this Board would have adopted a different finding or reached a different conclusion. Younger v. City of Portland, 305 Or 346, 360, 752 P2d 262 (1988). Where this Board concludes, based on all of the evidence in the record, that a reasonable person could have adopted the findings and reached the conclusions adopted by the local government, we will affirm the local government's decision, regardless of its choice between conflicting, but supported, findings or conclusions. We affirm the local government decision in such circumstances even though a reasonable person could also have adopted different findings and reached different conclusions based on the evidence in the record. Id.

Petitioners assign substantial significance in their

arguments under these assignments of error to findings of fact adopted by the county in its 1983 decision reviewed by this Board in Taber v. Multnomah County, supra. Similarly, petitioners repeatedly point out that the planning staff recommended approval of petitioner Douglas's request and the planning commission found petitioner Douglas's application complied with all applicable approval criteria. Petitioners urge this Board to find the board of county commissioners should have entered similar findings and conclusions.

However, with the above described understanding of our review function, the facts that (1) the county found certain facts and reached a decision in 1983 that was affirmed on appeal to this Board, and (2) the planning staff supported petitioner Douglas's request and the planning commission adopted findings that would support approval, are of limited significance. At most, they show this Board concluded in 1984 that reasonable persons could adopt the findings of fact and reach the conclusions adopted by the county in granting community service use approval for a 145 acre golf course. The planning commission's findings and recommendations may or may not be supported by substantial evidence but, even if they are, that does not necessarily mean the county commissioners' contrary findings and conclusions are not also based on substantial evidence in the whole record.

2. Denial

A second important aspect of the current appeal is that the decision challenged is a denial of a request for land use approval. Petitioners fault the county in several instances for not adopting findings explaining how the application does comply with certain of the above quoted approval criteria. Petitioners point out the planning commission found those standards were met, and the board of commissioners did not dispute those findings in its decision reversing the planning commission's decision.

In denying a request for land use approval, a local government need not adopt findings discussing the standards that are satisfied; it need only adopt findings demonstrating that one or more mandatory approval criteria are not met. Baughman v. Marion County, ___ Or LUBA ___ (LUBA No. 88-117, April 12, 1989), slip op 5-6; Van Mere v. City of Tualatin, ___ Or LUBA ___ (LUBA No. 88-006, May 2, 1988), slip op 23; Kegg v. Clackamas County, 15 Or LUBA 239, 244 (1987); Weyerhaeuser v. Lane County, 7 Or LUBA 42, 46 (1982). Further, in challenging on evidentiary grounds the county's determination that applicable approval standards are not met, petitioners must demonstrate that the applicant carried his burden to demonstrate compliance with those standards as a matter of law. See Jurgenson v. Union County, 42 Or App 505, 510, 600 P2d 1241 (1979); Consolidated Rock Products, Inc. v. Clackamas County, ___ Or

LUBA ___ (LUBA No. 88-090, April 10, 1989), slip op 13.

3. Adequacy of Findings

Petitioner, and to a lesser extent intervenors-petitioner, claim the county's findings are inadequate because they do not describe certain evidence presented by petitioner or explain why the county did not rely on petitioner's evidence.

As noted earlier in this opinion, our review of the evidentiary record supporting the county's decision extends to the entire evidentiary record, including evidence offered by petitioner that contradicts the county's decision. However, as respondent correctly notes, the county is required to identify in its findings the facts it relied upon in reaching its decision, ORS 215.416(9); it is not required to explain why it chose to balance conflicting evidence in a particular way or to identify evidence it chose not to rely upon. Kellogg Lake Friends v. City of Milwaukie, ___ Or LUBA ___ (LUBA No. 88-022, June 24, 1988), slip op 15; Ash Creek Neighborhood Ass'n v. City of Portland, 12 Or LUBA 230, 236-238 (1984). It may be in certain circumstances that a local government will improve its chances on appeal to this Board if it explains why certain evidence that would lead to different findings and a different decision was not relied upon. However, such findings are not necessary so long as LUBA can conclude that a reasonable decision maker could decide as the local

government did in view of all of the evidence, both that supporting the decision and that detracting from the decision.

We reject petitioners' assertions that the county's findings are defective for failing to discuss evidence that was not relied upon or to explain why the county did not assign controlling weight to petitioner's evidence.

We turn to petitioners' arguments concerning specific approval standards with the above described principles governing our review in mind.

B. Agricultural Land Area Policy

Under subsection G of MCC .7015, quoted in full above under the statement of facts, petitioner is required to demonstrate the proposal complies with "applicable plan policies," including, inter alia, the county's agricultural land area policy. Below, we first address petitioners' arguments that the county erroneously construed the agricultural land area policy and then address petitioners' arguments that the county's findings are not supported by substantial evidence.

1. Interpretation

The county's agricultural land area policy provides in part:

"* * * * *

> "The purpose of the Agricultural Land Area Classification is to preserve the best agricultural lands from inappropriate and

incompatible development and to preserve the essential environmental characteristics and economic value of these areas.

"The intent of this classification is to establish these areas for exclusive farm use with farm use and the growing and harvesting of timber as primary uses.

"* * * * *

"THE COUNTY'S POLICY IS TO RESTRICT THE USE OF THESE LANDS TO EXCLUSIVE AGRICULTURE AND OTHER USES, CONSISTENT WITH STATE LAW, RECOGNIZING THAT THE INTENT IS TO PRESERVE THE BEST AGRICULTURAL LANDS FROM INAPPROPRIATE AND INCOMPATIBLE DEVELOPMENT.

"STRATEGIES

"A. The following strategies should be addressed as part of the Community Development Ordinance:

"1. The Zoning Code shall include an Exclusive Farm Use Zone, consistent with ORS 215.213, and with:

"a. A base minimum lot size appropriate to commercial agriculture for the particular crops and geographic area of the County;

"b. Provisions for allowing farm uses as primary uses, not conditional uses.

"c. Provision for non-farm uses as conditional uses prescribed by ORS 215.213.

"* * * * *"

Petitioners argue ORS 215.213 and the MCC explicitly recognize that although agricultural land is to be protected through EFU zones, golf courses are a permitted nonfarm use

of agricultural lands, so long as applicable approval criteria are satisfied. Petitioners contend that ORS 215.213 and the MCC explicitly recognize that some agricultural land must be removed from production to allow construction of golf courses in the EFU zone.

Petitioners make two additional points. First, although petitioners recognize the proposed 55 acre golf course expansion would "occupy approximately one third of an existing productive peach orchard, some fields in nursery stock and pasture, and a large wooded area of deciduous and coniferous trees," petitioners claim the proposed golf course use of the property will be similar to the existing agricultural uses. Record 1100. A portion of the existing orchard and nursery stock uses will not be disturbed, and existing grasslands will continue in agricultural use in the sense grass will continue to be grown in conjunction with the golf course use.

As a second point, petitioners argue it is significant that the property will remain zoned EFU and, should the proposed golf course use not be built or cease to exist, the property would remain available for agricultural use.[7]

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[7]Intervenors-petitioner also make an argument suggesting the agricultural land area policy is satisfied as a matter of law if the standards for community service use approval are met. However, the argument is circular because, as noted earlier in this opinion, one of the criteria that must be satisfied for community service use approval is that applicable plan policies, including the agricultural land area policy, are satisfied.

The county's findings addressing the agricultural land area policy are as follows:

> "The applicant's proposal would result in significant additional acreage being removed from agricultural production in order to develop a '<u>safer more attractive</u>' golf course. As discussed above in Section II, under the circumstances, we find this an inadequate justification to override the policy objective of preserving agricultural land in large blocks for farm use." (Emphasis in original.) Record 11.

The additional findings referenced in the above findings are as follows:

> "* * * in its 1983 decision, the Board approved removing approximately 125 acres from agricultural use to develop an 18 hole golf course. As indicated in the Planning Commission's decision regarding the current application, the average 18 hole golf course in Oregon is 130 to 160 acres. Thus, when the Board approved the 1983 golf course application, it was approving a smaller-than-average golf course.
>
> "Moreover, the Board imposed numerous conditions intended to ensure that this course was developed in a manner consistent with the rural-agricultural character of Sauvie Island. These conditions included the requirement that the parking lot be a gravel, and not a paved, surface, that the driving range not be lighted, that certain limitations be imposed on the size, seating capacity, menus, and operating hours of the restaurant, and that the tennis courts requested by the applicant not be built.
>
> "The current application proposes development of a 200 acre golf course, which is larger than the average [golf] course in Oregon. The applicant asserts that the additional acreage is needed for safety reasons. At the hearing before the Planning Commission, his counsel commented that the architects engaged to design the proposed

course were 'frankly scared to design a course on less than 200 acres because of liability purposes.' * * *

"The applicant's position was undermined, however, by his counsel's subsequent statements to the Board that the developer would proceed with the golf course whether or not the additional acreage was approved.

"The applicant's assertions regarding the need to expand the golf course to 200 acres are insufficient to justify removal of the additional acreage from farm use. * * *" (Emphasis in original.) Record 8-9.

We agree with petitioners that the county's reading of its agricultural land area policy to permit it to balance the applicant's desire for additional acreage to develop a safer, more attractive golf course against the policy favoring preservation of agricultural lands in large parcels requires a somewhat expansive reading of the policy. However, the policy clearly states that farm uses, not nonfarm uses, have preferred status in the EFU zone, and it is the county's policy to encourage preservation of agricultural lands in large blocks for agricultural use. Therefore, although the balancing test applied by the county is not explicitly required by the policy, we conclude it is within the spirit and intent of the policy and is a correct application of the policy.[8]

[8]In sustaining the county's understanding of its policy to allow such balancing, we note the appellate courts have made it clear in analogous circumstances that land use regulations allowing nonfarm uses in EFU zones "must be construed, to the extent possible, as being consistent with the

2. Evidentiary Support

We turn to petitioners' challenges to the evidentiary support for the county's findings concerning its agricultural land area policy.

Petitioners dispute the evidentiary support for the above-quoted county findings that the average 18 hole golf course in Oregon is 130 to 160 acres and that a 200 acre course would be larger than average. Petitioners also contend the county improperly discounted the safety and potential liability concerns that support the requested 55 acre addition.

The planning staff report includes a review of golf course size requirements. Two general golf course design publications cited by staff indicate that an 18 hole golf course requires "150 acres" and "100 to 150 acres." Record 1107. The staff report also lists a number of Oregon golf courses that vary greatly in size. Two 9 hole courses listed include 62 and 69 acres respectively. The five 18 hole courses listed range from 130 acres to 320 acres. The single 36 hole course listed includes 320 acres. The planning staff report states:

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overriding policy of preventing 'agricultural land from being diverted to non-agricultural use.'" McCaw Communications, Inc. v. Marion County, 96 Or App 552, 555, ___ P2d ___ (1989) (quoting from Hopper v. Clackamas County, 87 Or App 167, 172, 741 P2d 921 (1987), rev den 304 Or 680 (1988)).

The county's interpretation of the policy is also consistent with its interpretation of MCC .2020 concerning lot sizes for conditional uses, discussed infra under the eigth assignment of error.

> "* * * most 18 hole facilities are developed on sites of 130 to 160 acres, though some notable exceptions are the Broadmoor and Takatee courses with 220 and 320 acres respectively. The different sizes can be attributed to several variables; whether the courses are developed in urban or rural settings and the amount of natural areas and water features within the site are likely explanations. Individual designers also vary in terms of their site area requirements; some are noted for more random designs which cover larger sites. Applicant has provided a supplemental report * * * which describes several different reasons justifying the requested 200-acre golf course size. The application explains the need for additional acreage as a safety issue (distance between fairways); a technological issue (improved golf ball and golf club technologies); and design issue (newer courses with more random designs and extensive water features). * * *" Record 1108.

The staff report concludes by recommending approval of the 55 acre addition. The exhibit cited by staff is petitioner Douglas's application, dated February 1989. As petitioners correctly note, that application includes evidence that newer golf courses with wider separation between fairways and other design features to enhance safety and aesthetics cover more than 145 acres.

The evidence in the record concerning golf course sizes is conflicting, and we conclude a reasonable person could find as the county did. We also conclude we are presented with insufficient bases to question the county's dismissal of petitioner Douglas's safety concerns as a basis for adding the requested 55 acres. In essence, the county found the safety concerns were not credible in view of the

existence of many golf courses containing less than 200 acres and petitioner Douglas's representation that the golf course would be built in any event.[9]

We conclude the findings that the agricultural land area policy is violated by the proposal are adequate and supported by substantial evidence in the record. We therefore deny the portions of petitioner's third, fourth, and fifth assignments of error challenging the county's decision that the policy is violated, as well as intervenors-petitioner's fourth assignment of error.

Because we sustain this basis for denial, we do not address the remaining arguments concerning other bases for denial in petitioner's third, fourth and fifth assignments of error and intervenors-petitioner's first through sixth assignments of error. Baughman v. Marion County, supra; Van Mere v. City of Tualatin, supra; Kegg v. Clackamas County, supra; Weyerhaeuser v. Lane County, supra.

EIGHTH ASSIGNMENT OF ERROR[10]

> "There is no substantial evidence in the whole record that the 55-acre addition combined with the 145 acres already approved will not meet the minimum lot size for conditional uses or community service uses in an EFU zone."

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[9]Petitioner Douglas did note that if the golf course is to be constructed on 145 acres, fencing or other design features may be needed to protect golfers on parallel fairways from errant golf balls, and these design features would make the golf course less attractive.

[10]The eighth assignment of error is actually intervenors-petitioner's seventh assignment of error.

MCC .2020(A) specifies lot sizes for conditional uses in the EFU zone as follows:

> "The minimum lot size for a conditional use * * * shall be based upon:
>
> "(1) The size needs of the proposed use;
>
> "(2) The nature of the proposed use in relation to its impact on nearby properties; and
>
> "(3) Consideration of the purposes of this district."

The county found the proposed expansion of the golf course to 200 acres was not needed, relying in part of the existence of a number of other golf courses operating on less acreage. The county found expansion of the golf course to include property not needed was "inconsistent with the land use objectives for [the EFU] district, i.e., preservation of agricultural lands in large blocks and minimizing non-agricultural uses." Record 12.

Intervenors-petitioner point out the lot size standard in MCC .2020 states it is a minimum lot size requirement. Intervenors-petitioner argue MCC .2020 is not properly applied as a maximum lot size limitation in the EFU zone.

We do not believe it is appropriate to interpret the code language as intervenors-petitioner suggest. Reading MCC .2020 as a whole, we do not interpret the word "minimum" as an expression of intent to preclude the county from imposing maximum limits on the amount of land a nonfarm use

may occupy.[11] Certainly nothing in the three MCC .2020 standards themselves precludes decisions establishing both maximum and minimum lot sizes. In addition, the statutory scheme clearly disfavoring nonfarm uses in EFU zones could be frustrated if application of the factors listed in MCC .2020 could not result in such maximum limits. For example, under intervenors-petitioner's interpretation of MCC .2020, it would not preclude a golf course developer from including hundreds of acres of agricultural land in a golf course for purely aesthetic reasons. The interpretation of MCC .2020 advanced by intervenors-petitioner conflicts sharply with the clear statutory purpose in ORS 215.243, reflected in the county's plan and the MCC, to limit the impacts of nonagricultural uses in EFU zones.

We conclude the county correctly applied MCC .2020 to limit the proposed golf course expansion to the amount of land needed to construct a golf course, considering the overall purpose of the EFU zone to protect agricultural lands. As we explained earlier in this opinion, we also find the county's findings that the additional acreage is

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[11]Even if MCC .2020 can be literally interpreted as intervenors-petitioner suggest, literal interpretations are not appropriate where they frustrate the purpose evident in the statutory scheme in which the interpreted provisions appear. Here we do not believe the word minimum must be interpreted to preclude establishing a maximum lot size to ensure the minimum amount of agricultural land is converted to nonagricultural use. See Johnson v. Star Machinery Co., 270 Or 694, 706, 530 P2d 72 (1974) ("[A] thing may not be within the letter of the statute and yet be within the intention of its makers.")

not needed for a golf course, in view of the corresponding loss of agricultural land that would be required, are supported by substantial evidence in the record.

The eighth assignment of error is denied.[12]

The county's decision is affirmed.

[12]As we have already sustained the county's decision to deny the application based on its agricultural land area policy, our decision that the lot size requirement of MCC .2020 provides an adequate basis for denial is a separate basis for affirming the county's decision.