BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON NEW

WASHINGTON COUNTY FARM BUREAU, Petitioner, vs. WASHINGTON COUNTY, Respondent, and RON MACK, FOREST E. BUMP, ROSEMARY BUMP, KENNETH A. BUMP, and ELLEN P. BUMP, dba WILKESBORO JOINT VENTURE, Intervenors-Respondent.	LUBA No. 90-154 FINAL OPINION AND ORDER

Appeal from Washington County.

Scott O. Pratt, Portland, and Barry L. Adamson, Lake Oswego, filed the petition for review. Scott O. Pratt argued on behalf of petitioner.

David C. Noren, Hillsboro, filed a response brief on behalf of respondent.

Lawrence R. Derr, Portland, filed a response brief and argued on behalf of intervenors-respondent.

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

REMANDED 03/29/91

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioner appeals an order of the Washington County Board of Commissioners granting approval for a golf course on land zoned Exclusive Farm Use (EFU).

MOTION TO INTERVENE

Ron Mack, Forest E. Bump, Rosemary Bump, Kenneth A. Bump, and Ellen P. Bump, dba Wilkesboro Joint Venture, filed a motion to intervene. There is no objection to the motion, and it is allowed.

FACTS

Intervenors-respondent (intervenors) applied for permission to construct an 18 hole golf course on 158 acres of EFU zoned land. In addition to the golf course, the proposal includes a club house, pro shop, driving range and lakes.

The subject land is currently in farm use. It is adjacent to the city limits of the City of Banks, and lies 25 miles west of the City of Portland. Farming activity is conducted on land located to the northwest, north and east of the subject property. There is residential development to the south of the property.

The hearings officer denied intervenors' application, and intervenors appealed to the board of commissioners. The board of commissioners reversed the decision of the hearings officer and approved the proposal. This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "The county did not find that the proposed use would not 'interfere seriously with accepted farming practices' on adjacent farms.
>
> "The county did not find that the intervenors' promise to implement the use of a 'waiver' program was a 'clear and objective' condition."

Under Washington County Community Development Code (CDC) 340-4.1, golf courses may be permitted in the EFU zone "when required findings as listed in Section 340-4.2 are provided." CDC 340-4.2 provides in relevant part, as follows:

> "Required Findings:
>
> "(A) The proposed use is compatible with farm uses described in Oregon Revised Statutes, Chapter 215."
>
> "(B) The proposed use does not interfere seriously with 'accepted farming practices' as defined in ORS 215.203(2)(c) on adjacent lands devoted to farm use.
>
> "* * * * *
>
> "(D) The proposed use will not:
>
> > "(1) force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or
> >
> > "(2) significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.
>
> "An applicant may demonstrate that these standards for approval will be satisfied through the imposition of conditions. Any conditions imposed shall be clear and objective.

"* * * * *"

Petitioners argue the county's findings are inadequate to establish compliance with CDC 340-4.2.A, B and D. We address the challenged decision's compliance with each of these standards below.

A. CDC 340-4.2.A.

Petitioner contends the county erroneously determined that compliance with CDC 340-4.2.B and D (quoted supra), necessarily establishes compliance with the compatibility requirement of CDC 340-4.2.A.[1]

The county's order is structured such that it addresses compliance with CDC 340-4.2.A after analyzing whether the other CDC 340-4.2 standards are satisfied. However, the challenged order does contain specific findings addressing the proposal's compliance with CDC 340-4.2.A. Record 24.

Petitioner does not explain why these findings are erroneous. This subassignment of error is denied.

B. CDC 340-4.2.B and CDC 340-4.2.D.

The county's decision states that findings complying with CDC 340-4.2.D necessarily also comply with CDC 340-4.2.B. Record 10. In addition, the county imposed

---

[1]CDC 106-37 defines the term "compatible" as follows:

> "Capable of existing together in harmony; capable of orderly, efficient integration and operation with other elements in a system considering building orientation, privacy, lot size, buffering, access and circulation."

"waiver" conditions of approval to establish the proposal's compliance with CDC 340-4.2.B and D.[2]

Before turning to the merits of petitioner's contentions under this assignment of error, we first address the county's argument under ORS 197.763(1) and ORS 197.835(2) that petitioner is precluded from raising certain

---

[2]The relevant conditions of approval state:

> "1. Signs will be posted on the course informing golfers that by using the course they are agreeing to accept the consequences of accepted farming practices on surrounding farm land, including effects of dust, smoke and spray, and waive their right to make any claim against a farmer for such practices. A similar statement will be printed on the course scorecards. The printed and posted materials will also inform golfers that parking in the adjacent public roadways is not permitted. The green fee receipt will contain the waiver and a place for the golfer's signature. The receipt will be at least a two part form so that the Applicant will retain the original with the golfer's signature and the golfer will retain a copy. Every golfer will be required to sign such a receipt. The Applicant will make informative materials available to the golfers explaining the nature of surrounding farm practices including the potential for conflict with dust, spray and smoke.
>
> "2. The course operator is required to notify farmers adjacent to course boundaries that it will cooperate with their field burning and aerial application activities so that to the greatest extent possible, there will not be golfers on the course in locations that could be affected by those activities. Farmers are encouraged to advise the operator of the proposed time and nature of the activities and cooperate in scheduling. Early morning tee times may be restricted until after aerial application has occurred. If wind conditions at the time field burning may occur present a possibility of smoke from field burning drifting onto the course, golfers will be warned of the potential for field burning. The operator will refund green fees to any golfer who terminates play because of effects of accepted farm practices on surrounding farm land." Record 26-27.

issues because it did not raise them below.[3] Those issues are whether CDC 340-4.2.B and D are properly interpreted as having substantially similar requirements, and whether the "waiver" conditions of approval are clear and objective.

The county argues the applicant submitted proposed findings for approval of the golf course, and those findings introduced the disputed interpretation of CDC 340-4.2.B and D. The county states that the applicant's proposed findings were available to all parties prior to the appeal hearing.[4] The county contends because petitioner was aware of the applicant's proposed findings, petitioner should have known the county might interpret CDC 340-4.2.B and D as imposing essentially the same requirements. The county contends that under ORS 197.763(1) petitioner was obliged to respond to that issue below to preserve the right to raise it in an

---

[3]ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the board shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised with sufficient specificity so as to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

In relevant part, ORS 197.835(2) limits our review as follows:

> "(2) Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.763. * * *"

[4]However, the county does not argue that the disputed interpretation of CDC 340-4.2.B and D was discussed by any of the parties during any of the proceedings below.

appeal to this Board.

Petitioner argues it was not required to address the correctness of the interpretation of CDC 340-4.2.B and D ultimately adopted by the county, because that interpretation had not been adopted at the time of the appeal hearing. Additionally, petitioner contends that the issue regarding whether "waiver" conditions of approval could satisfy CDC 340-4.2.B and D, was raised below.

We stated in Boldt v. Clackamas County ___ Or LUBA ___ (LUBA No. 90-147, March 12, 1991), that the purpose of the "raise it or waive it" requirement of ORS 197.763(1) is to prevent the unfair surprise that would result if a petitioner failed to raise issues locally and then raised those issues for the first time at LUBA. Additionally, we stated that ORS 197.763(1) does not require petitioners to have presented precisely the same arguments during the local proceeding that they present at LUBA.

We agree with petitioner that it was not required to respond to the interpretation of CDC 340-4.2.B and D advanced in the applicant's proposed findings. That interpretation was apparently not discussed by any of the parties during the local proceedings, and the only adopted findings at the time of the appeal hearing were the appealed findings of the hearings officer. The hearings officer's findings suggested CDC 403-4.2.B and D contain discrete requirements, and that the proposal violated both of those

requirements. Under these circumstances, petitioner could not reasonably have known that the county would adopt the disputed interpretation of CDC 340-4.2 B and D. Consequently, there was no issue for petitioner to raise below in this regard. We also agree with petitioner that the issues contained in this assignment of error regarding the "waiver" conditions of approval, were adequately raised below.

Petitioner's challenge to the county's ultimate interpretation of CDC 340-4.2.B and D, and the issues regarding the proposed "waiver" conditions of approval, do not unfairly surprise the county, and petitioner is not precluded under ORS 197.763(1) from raising them in this appeal proceeding.

We turn to the merits of petitioner's arguments.

Petitioner complains the county erroneously concluded that findings of compliance with CDC 340-4.2.D necessarily establish compliance with CDC 340-4.2.B, and because the county so concluded, it erroneously failed to adopt findings of compliance with CDC 340-4.2.B.

While the issues the county must address under CDC 340-4.2.B and D overlap, we agree with petitioner that those two standards are not the same.[5] Accordingly,

[5]By way of example, petitioner points out that while the possibility of golfers and other people entering nearby farms in search of golf balls may not significantly increase the cost of farming or significantly change the manner of conducting farming on adjacent lands, it could seriously

findings of compliance with CDC 340-4.2.D may or may not be adequate to satisfy CDC 340-4.2.B. Nevertheless, a local government may rely upon findings addressing one standard to demonstrate compliance with another standard, provided the particular findings are adequate to demonstrate compliance with both. Stefan v. Yamhill County, ___ Or LUBA ___ (LUBA No. 90-124, March 12, 1991), slip op 28.

While the county's decision states the adoption of findings of compliance with CDC 340-4.2.D necessarily establishes compliance with CDC 340-4.2.B, the county also adopted a three part analysis for analyzing the proposal's compliance with both standards.[6] Further, the county proceeded to adopt detailed findings following that three part analysis (Record 10-21) and adopted a set of conclusions with regard to the proposal's compliance with both CDC 340-4.2.B and D. (Record 21-22). Accordingly, the county did adopt findings that CDC 340-4.2.B is satisfied,

---

interfere with such farming enterprises. Similarly, petitioner notes that the county's order anticipates that the farmers will "cooperate" with the golf course operator and inform the course operator of "the proposed time and nature of the activities and cooperate in scheduling." Record 19. While such cooperation may not increase the cost of farming practices employed by the farmer, the necessity of doing so may significantly interfere with the farm enterprise.

[6]In its findings, the county described the three part analysis as follows:

> "Compliance with [CDC 340-4.2.B and D] involves three steps: 1) identification of the adjacent and surrounding area; 2) description of the farm and forest uses and farm and forest practices in the area; 3) analysis of the impacts of the proposed use on those uses and practices." Record 10.

notwithstanding that the county also stated in its order that findings only addressing CDC 340-4.2.D would suffice.

Alternatively, petitioner offers three reasons why the county's findings are inadequate to demonstrate compliance with CDC 340-4.2.B and D. First, petitioner contends that the county improperly relied on conditions of approval to demonstrate compliance with CDC 340-4.2.B. According to petitioner, while CDC 340-4.2.D explicitly permits compliance to be attained through the imposition of conditions, CDC 340-4.2.B does not authorize a determination of compliance to be based on conditions of approval.

We disagree. Both CDC 202-3.1 and 340-4 explicitly envision the imposition of conditions to establish compliance with approval standards.[7] Accordingly, imposition of conditions of approval does not of itself render the findings inadequate to demonstrate compliance

---

[7]CDC 202-3.1 provides:

> "Type III actions involve development or uses which may be approved or denied, thus requiring the exercise of discretion and judgment when applying the development criteria contained in this Code or the applicable Community Plan. Impacts may be significant and the development issues complex. Extensive conditions of approval may be imposed to mitigate impacts or ensure compliance with this Code and the Comprehensive Plan." (Emphasis supplied.)

CDC 340-4 provides:

> "The uses permitted in section 340-4.1 may be permitted subject to the applicable standards as set forth in Article IV and as may be further conditioned by the Review Authority and when required findings as listed in Section 340-4.2 are provided." (Emphasis supplied.)

with CDC 340-4.2.B.

Second, petitioner argues the county failed to adopt findings explaining why the "waiver" conditions it imposed in finding compliance with CDC 340-4.2.B and D are clear and objective, as is required by CDC 340-4.2.D.

We agree with the county and intervenor that the county is not required to adopt findings explaining why conditions imposed under CDC 340-4.2.D are "clear and objective." Rather, CDC 340-4.2.D simply requires that any conditions imposed to satisfy that standard be "clear and objective."

Finally, we understand petitioner to argue the conditions of approval quoted supra at n 2 are not "clear and objective" as required by CDC 340-4.2.D.

The phrase "clear and objective" is not defined in the CDC. However, in other contexts, the phrase "clear and objective" has been interpreted to mean that the inquiry does not require the exercise of "any significant factual or legal judgment." Flowers v. Klamath County, 98 Or App 384 (1989) rev den 308 Or 592; Doughton v. Douglas County, 82 Or App 444, 728 P2d 887 (1986), rev den 303 Or 74 (1987).

With regard to condition 1, it is not clear how broad the "waiver" is to be.[8] It is not clear who will be

[8]It is unclear whether this condition (1) provides the specific language to be placed on signs, scorecards, and green fee receipts, or (2) simply articulates the general manner of the golf course's operation with regard to the adjacent and surrounding farmers, and leaves it to the applicant to formulate, and put into practice, the general requirements for "waivers" on signs, scorecards and fee receipts. The former would be a "clear and

required to sign such "waivers." For example, it is neither clear nor objective who is to be considered a "golfer."[9] Further, it is not clear just what right to "make any claim against a farmer" it is that is to be waived. Finally, it is not clear or objective what "informative materials" are to be provided to "golfers."

With regard to condition 2, we believe that it is also not clear and objective as required by CDC 340-4.2.D. For example, it is neither clear nor objective what kind of notice is to be provided to farmers adjacent to course boundaries, or what kind of "cooperation" the course operator is to inform adjacent farmers will be provided. It is neither clear nor objective what "golfers" or "locations" the condition refers to, or what "potentially affected" means in this context.

We conclude the "waiver" conditions are neither clear nor objective as required by CDC 340-4.2. In addition, because the "waiver" conditions are not clear and objective,

---

objective" requirement in that the applicant would be directed to employ the specific language contained in the condition. In other words, no legal or factual judgment would be required to decide what language must be placed on signs, score cards and fee receipts. However, the latter would not be "clear and objective" because determining what language to employ in a "waiver" requires the exercise of a great deal of legal judgment, and such language can take many forms. Additionally, the particular language used in any given waiver will impact the nature, scope and legal effect of the waiver.

[9]In view of the purpose the "waiver" is intended to serve, golfers could include those persons who are actively playing the game of golf, people who finish golfing and are simply relaxing on the grounds or shopping in the pro shop, as well as spectators or other nongolfing guests.

the findings are inadequate if they rely upon the "waiver" conditions as a means to to satisfy CDC 340-4.2.D.

Intervenor next argues that the county's findings determine that the proposal complies with CDC 340-4.2.D (and with CDC 340-4.2.B as well), regardless of the disputed "waiver" conditions of approval. Essentially, intervenor relies on findings regarding the experiences of other golf courses near other farm land. These findings state that other golf and farm operators coexist without interference to the farm uses or without changing the manner in which the particular farmers in those cases go about their business.[10]

We disagree with intervenor. The findings identify several potential conflicts between the proposed golf course and the surrounding and adjacent farmers. They conclude that all the identified potential conflicts are either "non-existent or eliminated by conditions".[11]

---

[10]Intervenor also cites findings stating that the farmers affected by the proposed golf course already limit their operations due to the proximity of the City of Banks and nearby residential development.

[11]The findings state in this regard:

> "* * * Based upon the concerns expressed and this information the Board reaches these conclusions with respect to [CDC 340-4.2.B and D].
>
> "a. The only potential conflicts between the golf course usage and surrounding farming practices that have not either been shown to be non-existent or eliminated by conditions are the possible effects of exposure to smoke, dust and spray. * * *
>
> "* * * * *" Record 21.

We agree with intervenor that these findings are relevant to whether the proposed golf course will meet the standards of CDC 340-4.2.B and D. However, we also believe that they are not adequate to establish whether this particular golf course will satisfy these standards. The challenged order identifies as potentially serious conflicts, potential liability to the area farmers resulting from a variety of types of claims from persons on the golf course grounds who are exposed to the drift of substances from accepted farming practices. The findings make it reasonably clear that the "waiver" conditions are an important reason why the county believes, that despite the concerns, CDC 340-4.2.B and D are satisfied. Specifically, finding 36 of the challenged order states, in relevant part:

> "* * * * *
>
> "e. The waiver program imposed by the Applicant on golfers which involves multiple notices, proof of acceptance by the golfer and education as to the significance of the waiver, is likely to prevent claims when and if contacts occur and is calculated to assure the effectiveness of the waiver if a claim is nevertheless made. The majority of the farmers surrounding the site have responded positively to these measures. None have concluded that they will be forced to significantly change or increase the cost of their practices.
>
> "f. In summary, the Board finds that the only change in practice that the farmers should experience, but will not be forced into, is giving notice to the golf course operator of the timing and nature of their aerial

> spraying and field burning operation and cooperation with scheduling. There is a possibility, although limited, that in spite of these measures a golfer will come into contact with smoke, dust or spray. Given the history on other courses and in this area and the waiver measures invoked, the potential for the contact leading to a claim against a farmer is even more limited. Because of the waiver, any claim made would be unsuccessful. The golf course will not force a significant change in the accepted farm practices on surrounding lands nor will it increase the cost of those practices." Record 22-23.

In the absence of the conditions of approval regarding "waiver," the findings cited by intervenor do not establish that the potential conflicts identified in the challenged order will neither (1) "interfere seriously with" the farming practices occurring on the land "adjacent" to this particular course (CDC 340-4.2.B), nor (2) "force a significant change in" or "significantly increase the cost of" accepted farming practices on the land "surrounding" this particular course (CDC 340-4.2.D).

This subassignment of error is sustained, in part.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

> "The burden of producing evidence never shifts to the opponent.
>
> "Evidence of what has or has not happened to different people in different places under different circumstances is not evidence that is sufficient to fulfill the intervenors' obligation to affirmatively demonstrate the absence of serious or substantial impact to the adjacent farmers in this case."

> "The fact that some farmers on adjacent farms feel that they could live with a proposed golf course does not suffice as proof that no adjacent farms will suffer serious or substantial involuntary impairment of normal farming practices.
>
> "The intervenors' promise that they will utilize an as-yet-unprepared and untested 'waiver' that they expect will insulate adjacent farms from liability for customary farming practices is not a substitute for substantial evidence in the record.
>
> "The assumed fact the farmers on adjacent property could coordinate or alter their customary farming practices so as to accommodate a nonfarm 'special use' does not constitute evidence sufficient to support an ultimate finding that no material, involuntary impact on farming practices will occur."

Petitioner alleges that the challenged findings of compliance with CDC 340-4.2.A are not supported by substantial evidence. Petitioner also alleges the county improperly shifted the burden to petitioner to establish the proposal does not comply with relevant approval standards. Finally, petitioner argues certain findings are inadequate, and lack sufficient evidentiary support, to establish compliance with CDC 340-4.2.B and D.

We briefly address these contentions below.

A. CDC 340-4.2.A

Petitioner argues that the challenged findings of compliance with CDC 340-4.2.A are not supported by substantial evidence.

We determined under the first assignment of error that the county adopted findings of compliance with CDC 340-

4.2.A, and that petitioner did not explain why those findings are inadequate. Similarly, petitioner does not make any specific challenge to the evidentiary support for the county's determination of compliance with this criterion. We will not review a general allegation that findings are not supported by substantial evidence. McCoy v. Linn County, 16 Or LUBA 295 (1987), aff'd 90 Or App 271, 752 P2d 323 (1988).

This subassignment of error is denied.

B. Burden of Proof

The county made the following determination in its findings:

> "* * * When [an approval] standard is a negative, the party with the burden of proof must produce evidence sufficient to have the necessary inferences drawn in his favor. At that point, the opposing party must either produce evidence rebutting the first party's evidence or lose. The burden of proof or burden of persuasion never shifts to the opponent, but the burden of producing evidence may shift. The Applicant's evidence of lack of golfer initiated lawsuits against farmers is the type of evidence that could justify a conclusion that no significant change in farm practices will be forced. When the Applicant has presented sufficient evidence to justify that conclusion, he is entitled to prevail unless opponents present contrary evidence." (Citations omitted.) Record 16.

Citing Platt v. City of Hillsboro, 16 Or LUBA 151, 154 (1987), petitioner states an applicant does not satisfy its burden of establishing compliance with CDC 340-4.2.B and D "by offering 'evidence' that the applicant has been unable

to document historical instances of [adverse impacts on farming practices] in other situations." Petition for Review 23. Petitioner suggests that the county shifted the burden of proof and required opponents to produce evidence that the relevant approval standards would be violated by the proposal, rather than requiring the applicant to provide evidence that each approval standard was satisfied.

We do not believe the findings indicate the county shifted the burden to petitioner, as it contends. The findings indicate the county believed the applicant submitted adequate evidence to conclude the relevant approval standards were met, and that petitioner did not produce evidence adequate to undermine that conclusion. We see nothing wrong with the county's understanding of the applicant's burden. Stefan v. Yamhill County, supra, slip op at 9.

This subassignment of error is denied.

C. CDC 340-4.2.B and D.

Regarding CDC 340-4.2.D, petitioner claims the findings of compliance with CDC 340-4.2.D are not supported by substantial evidence in the whole record. However, we determined above that the findings are inadequate to establish compliance with CDC 340-4.2.D. No purpose is served in reviewing the evidentiary support for inadequate findings. Moorefield v. City of Corvallis, ___ Or LUBA ___ (LUBA No. 89-045, September 28, 1989), slip op 32; DLCD v.

Columbia County, 16 Or LUBA 467, 471 (1988).

Petitioner makes several arguments in addition to those contained under the first assignment of error regarding the inadequacy of certain of the county's findings of compliance with CDC 340-4.2.B, and contends that many of the findings of compliance with CDC 340-4.2.B are not supported by substantial evidence in the whole record.

Petitioner's arguments under this assignment of error do not specify whether petitioner is challenging the decision's compliance with CDC 340-4.2.B or D or both. Rather, petitioner cites particular findings and argues these findings have certain deficiencies. In articulating what those deficiencies are, petitioner measures compliance against "standards" which combine the crucial language from both CDC 340-4.2.B and D, but does not clearly identify which standard is at issue. In addition, the findings that petitioner challenges address both CDC 340-4.2.B and D, so that it is impossible to tell which standard petitioner believes the findings address inadequately.

Because we determine supra, that the "waiver" conditions of approval are essential to the determination of compliance with CDC 340-4.2.D, and that the findings of compliance with CDC 340-4.2.D are inadequate, we must remand the challenged decision in any event.[12] On remand the

[12]With regard to compliance with CDC 340-4.2.B, we note in Champion International v. Douglas County, 16 Or LUBA 132, 146-147 (1987), we

county can identify which findings and conditions address CDC 340-4.2.B, which address CDC 340-4.2.D, and which address both standards.[13]

The second assignment of error is denied.

The county's decision is remanded.

---

concluded that similar waivers imposed to preclude property owners from engaging nearby forest operators in litigation based on damages which might be associated with forest operations are not, by themselves, sufficient to comply with a standard requiring that dwellings not seriously interfere with forest practices on adjacent lands. In addition, in view of our determination supra, that the proposed "waiver" conditions are not clear and objective, we do not consider whether such waivers may be relied upon by the county to comply with CDC 340-4.2.D.

[13]Once the county identifies which findings and conditions relate to which standards, then in the event of a subsequent appeal to this Board, it will be possible to evaluate the parties' arguments concerning the adequacy of and evidentiary support for particular findings addressing identified standards of approval.