BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

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| TOM DECUMAN, Petitioner, vs. CLACKAMAS COUNTY, Respondent. | LUBA No. 92-191 |
| | FINAL OPINION AND ORDER |

Appeal from Clackamas County.

Jon S. Henricksen, Gladstone, filed the petition for review and argued on behalf of petitioner.

Gloria Gardiner, Assistant County Counsel, Oregon City, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 04/06/93

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 a county order denying his application for a conditional use permit for a golf driving range.

**FACTS**

The subject property is zoned General Agricultural District (GAD) and consists of 23 acres. The subject property is located immediately north of the Aurora State Airport. On June 1, 1992, petitioner applied for a conditional use permit to build a golf driving range on the subject property.[1] The hearings officer denied petitioner's application, and this appeal followed.

**FIRST ASSIGNMENT OF ERROR**

> "The county's decision that an existing Aurora State Airport plan, when implementing FAA regulations, would conflict with the proposed use was not supported by substantial evidence."

To approve a conditional use permit, Clackamas County

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[1]In DLCD v. Columbia County, ____ Or LUBA ____ (LUBA No. 92-147, December 9, 1992), we determined that where a local code does not define the term "driving range," it is appropriate to look to the dictionary definition of that term to ascertain its meaning. The dictionary definition of "driving range" establishes a golf driving range is not the equivalent of a golf course. As far as we can tell, the ZDO conditional use provisions allow only golf courses, not golf driving ranges, in the GAD zoning district. Nevertheless, the county apparently assumed that a golf driving range is the equivalent of a golf course for purposes of adopting the challenged decision. No party assigns error to this assumption. Because of our disposition of this appeal, we need not reach this issue. However, nothing in this opinion should be taken as expressing disagreement with our decision in DLCD v. Columbia County.

Zoning and Development Ordinance (ZDO) 1203.01(B) requires a determination that:

> "The characteristics of the site are suitable for the proposed use considering size, shape, location, topography, existence of improvements and natural features."

The county determined that petitioner's proposed golf driving range fails to satisfy ZDO 1203.01(B), because the proposed driving range would conflict with the Aurora State Airport (airport). Petitioner argues this determination is not supported by substantial evidence in the whole record. In this regard, petitioner contends the county erroneously relied upon a letter from the Oregon Aeronautics Division (OAD letter). Petitioner contends the OAD letter lacks evidentiary value because it relies upon the 1988 Aurora State Airport Master Plan (1988 ASAMP), which petitioner states was not adopted as part of Marion County's Comprehensive Plan.[2]

The OAD letter states the proposed golf driving range conflicts with the airport, because the 1988 ASAMP

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[2]As we understand it, the airport is currently entirely within Marion County, but the addition of a precision instrument approach will make part of the protected airport area extend into Clackamas County. While the subject property is in Clackamas County, it is immediately adjacent to and north of the airport. Petitioner relies upon our decision in Murray v. Marion County, ____ Or LUBA _____ (LUBA No. 91-187, May 19, 1992), slip op 5 n 4, in which we stated that the 1988 ASAMP had not been adopted as part of the Marion County Comprehensive Plan. However, our statement in Murray does not undermine the assumption in the OAD letter, which is dated August 4, 1992, that the 1988 ASAMP is effective and has been adopted by appropriate authorities.

identifies a portion of the subject property as a "future precision instrument approach surface and [that portion of the property] is within the [Runway Protection Zone]." Record 57. The OAD letter states that under applicable Federal Aeronautics Administration (FAA) standards, places of public assembly may not be located in such areas, and that the FAA considers the proposed accessory pro shop, snack bar and covered tee area to be "place[s] of public assembly." Id.

The county argues there is no evidence in the record to establish that the 1988 ASAMP was not adopted by the proper authorities at the time the Oregon Aeronautics Division submitted the OAD letter. Further, the county argues there is no evidence in the record to undermine the county's determination that the subject property is within a Runway Protection Zone.[3] Finally, regardless of whether the 1988 ASAMP has been adopted as part of the comprehensive plans of Marion or Clackamas County, the county argues that the OAD letter has evidentiary value because it establishes that the Oregon Aeronautics Division considers the proposal to be incompatible with the airport. We agree with the county.

The challenged decision is one to deny the proposed

[3]Apparently, under the Oregon Aeronautics Division's analysis stated in the OAD letter, a Runway Protection Zone is applied as a matter of federal law, once property is determined to be within a particular aircraft approach area. As we understand it, the particular aircraft approach area here is the precision aircraft approach which the Oregon Aeronautics Division believes will be implemented at the airport.

driving range. It is well established that to overturn a denial decision, on evidentiary grounds, an applicant must establish as a matter of law that a reasonable decision maker could only believe the applicant's evidence, or could only approve the application. Jurgenson v. Union County Court, 42 Or App 505, 600 P2d 1241 (1979); Consolidated Rock Products v. Clackamas County, 17 Or LUBA 609, 619 (1989); Morley v. Marion County, 16 Or LUBA 385, 393 (1987); McCoy v. Marion County, 16 Or LUBA 284, 286 (1987); Weyerhauser v. Lane County, 7 Or LUBA 42, 46 (1982). Even if the challenged decision were not a denial, the challenged determination of noncompliance with ZDO 1203.01(B) is supported by substantial evidence in the whole record. See Douglas v. Multnomah County, 18 Or LUBA 607 (1990). Applying the more demanding test traditionally applied to our review of denial decisions, petitioner clearly fails to demonstrate that, as a matter of law, the proposal complies with ZDO 1203.01(B).

The first assignment of error is denied.

**SECOND ASSIGNMENT OF ERROR**

> "The county erred in concluding that the proposed use would be in conflict with any applicable FAA restrictions and, therefore, should require denial of the use."

This assignment of error is an alternative to the first assignment of error. Here, petitioner argues that assuming the 1988 ASAMP is effective and relevant, the county erred

in agreeing with the OAD letter and concluding that the proposal violates FAA requirements related to the placement of netting and to places of public assembly.

**A. Netting**

Petitioner argues he can adjust the height of certain nets to be used in conjunction with the proposal to comply with FAA requirements.

While the county could have imposed conditions limiting the proposal as suggested by petitioner, we agree with the county that it was not required to impose conditions and then approve the proposed use, as conditioned. Simonson v. Marion County, 21 Or LUBA 313, 325 (1991).

This subassignment of error is denied.

**B. Places of Public Assembly**

Petitioner disagrees with the county's determination that the covered tee and parking areas to be constructed as part of the proposed use are considered places of public assembly under FAA requirements.[4] Petitioner argues that places of public assembly should only include completely enclosed areas accommodating the public and should not include outdoor activities like parking lots and covered tee areas. In this regard, petitioner cites testimony below

[4]Petitioner offered to move the pro shop and snack bar outside of the runway protection zone and contends that with these modifications to the proposal, it may be approved. We note that, as discussed above, the county was under no obligation to impose conditions to enable it to approve the proposal.

relating a telephone conversation between petitioner's representative and an FAA representative, in which the FAA representative is alleged to have agreed with petitioner's interpretation of the places of public assembly standard.

We note the county was free to disregard or give little weight to petitioner's allegation of a telephone conversation with FAA officials in which petitioner alleges the FAA officials stated their disagreement with the interpretation of applicable requirements proffered in the OAD letter. There was no way for the county to have determined with any certainty what question was asked of the FAA, whether the FAA was aware of the OAD's letter interpretation, or what the FAA actually said and in what context the statement was made.

We believe the county was entitled to rely on the Oregon Aeronautics Division position that covered tee and parking areas may not be located within the Runway Protection Zone, because they are places of public assembly.

This subassignment of error is denied.

**C. Waiver**

Petitioner asserts that he could probably secure a waiver from the FAA requirements applicable to places of public assembly, as they apply to the covered tee and parking areas. However, the fact that petitioner might be eligible for a waiver, begs the question. As the proposal is currently configured, as explained above, the covered tee

and parking areas are within the Runway Protection Zone; and the county properly determined those areas are currently protected by FAA requirements as places of public assembly.

This subassignment of error is denied.

The second assignment of error is denied.

**THIRD ASSIGNMENT OF ERROR**

> "The county erred in concluding that the proposed use conflicts - on balance - with comprehensive plan goals to the extent the proposed use should be denied."

Petitioner argues the county's findings are inadequate to establish the proposal fails to comply with ZDO 1203.01(E), concerning the proposal's compliance with county comprehensive plan goals and policies. However, under the first assignment of error, we sustain the county's determination that the proposal fails to comply with ZDO 1203.01(B), another applicable approval standard. Because the challenged decision is one to deny the proposed development, the county need only adopt findings, supported by substantial evidence, demonstrating that one or more standards are not met. Garre v. Clackamas County, 18 Or LUBA 877, aff'd 102 Or App 123 (1990). Accordingly, no purpose is served in reviewing the adequacy of the county's findings of the proposal's noncompliance with ZDO 1203.01(E).

The county's decision is affirmed.