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BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON

THOMAS L. MOORE, )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
CLACKAMAS COUNTY, )  
 )  
Respondent. )  
 )

LUBA No. 93-086  
  
FINAL OPINION  
AND ORDER

Appeal from Clackamas County.

Thomas L. Moore, West Linn, filed the petition for review and argued on behalf of petitioner.

Michael E. Judd, Oregon City, filed the respondent's brief and argued on behalf of respondent.

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

REMANDED 09/29/93

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

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county order approving a  
4 conditional use permit for a golf driving range.

5 **FACTS**

6 The subject property is an unimproved 56 acre parcel  
7 zoned Rural Residential Farm Forest (RRFF-5). The westerly  
8 end of the subject property has several trees, and the  
9 balance of the property is a moderately sloping field. The  
10 surrounding area contains various rural residential  
11 developments.

12 The county planning department recommended approval of  
13 the proposal and a public hearing was conducted before the  
14 county hearings officer. After the public hearing, the  
15 hearings officer approved the application, and this appeal  
16 followed.

17 **FIRST ASSIGNMENT OF ERROR**

18 "There is a lack of evidence in the record to  
19 support the County's finding that the proposed  
20 development meets the requirements of ZDO  
21 801.03(C) to provide a site plan including  
22 existing and proposed improvements and other  
23 information necessary to address the requirements  
24 and conditions associated with the use."

25 Petitioner argues the application fails to include an  
26 adequately detailed site plan. Specifically, petitioner  
27 argues the site plan fails to contain sufficient evidence to  
28 support approval of the application.

29 Clackamas County Zoning and Development Ordinance

1 (ZDO) 801.03(C) requires submission of a site plan.

2 ZDO 801.03(C) requires:

3 "A site plan of the property including existing  
4 and proposed improvements and other information  
5 necessary to address the requirements and  
6 conditions associated with the use."

7 However, ZDO 801.03(C) does not require that the site plan  
8 itself contain the evidence required to support approval of  
9 the application.

10 The first assignment of error is denied.

11 **SECOND ASSIGNMENT OF ERROR**

12 "There is a lack of evidence in the record to  
13 support the County's finding that the proposed  
14 development meets the requirements of ZDO  
15 813.01(A)(1) setback of principal buildings."

16 ZDO 813.01(A)(1) requires a 45 foot setback "for  
17 principal buildings" from "any other lot in a residential or  
18 rural district." The hearings officer determined the only  
19 "principal building" associated with the proposal is the  
20 club house for the driving range, and that the clubhouse is  
21 more than 45 feet from other residential and rural  
22 properties.

23 Petitioner argues the proposed perimeter fencing is a  
24 "principal building" and that the 45 foot setback must be  
25 measured from that fence to the nearest property line.  
26 Petitioner contends that so measured, the perimeter fencing  
27 on the subject property violates the 45 foot setback  
28 requirement.

29 We agree with the county that the proposed clubhouse is

1 the only "principal building" on the subject property to  
2 which the 45 foot setback set forth in ZDO 813.01(A)(1)  
3 applies.

4 The second assignment of error is denied.

5 **THIRD ASSIGNMENT OF ERROR**

6 "There is a lack of evidence in the record to  
7 support the County's finding that the proposed  
8 development meets the requirements of ZDO  
9 1002.01(B) and (C) to protect natural features  
10 such as views and open space."

11 **FOURTH ASSIGNMENT OF ERROR**

12 "There is a lack of evidence in the record to  
13 support the County's finding that the proposed  
14 development meets the requirements of ZDO  
15 1005.02(A)(3) to provide crime prevention and  
16 security of persons and property."

17 **FIFTH ASSIGNMENT OF ERROR**

18 "There is a lack of evidence in the record to  
19 support the County's finding that the proposed  
20 development meets the requirements of ZDO  
21 1005.05(B)(3) \* \* \* requiring orientation of major  
22 service activity areas away from the existing  
23 residences."

24 Under these assignments of error, petitioner argues  
25 various portions of ZDO Section 1000 are applicable approval  
26 standards and that the challenged decision fails to either  
27 apply those sections at all or to adequately apply those  
28 standards.

29 Under the numbering system used in the ZDO, Section  
30 1000 ("Development Standards") includes ZDO 1001 through  
31 1015. Subsection A of ZDO 1001.02 ("Application of These  
32 Standards") provides:

1 "The standards set forth in [ZDO] Section 1000  
2 shall apply to major and minor partitions;  
3 subdivisions; commercial and industrial projects;  
4 multi-family and common-wall structures of three  
5 (3) or more dwellings. Single family common wall  
6 structures shall be subject to [certain listed  
7 development standards in ZDO Section 1000.]"

8 The challenged decision states the provisions of ZDO  
9 Section 1000 are not applicable approval standards:

10 "[Petitioner] set[s] forth various provisions from  
11 Section 1000 of the ZDO, and argue[s] that the  
12 proposed development does not meet each of those  
13 development standards. A review of the cited  
14 provisions shows that none constitute approval  
15 criteria for this proposed use. They do \* \* \* set  
16 forth various construction and development  
17 standards which will be generally addressed the  
18 required Design Review process." Record 6-7.

19 However, the findings preceding those quoted above, state:

20 "The provisions of Sections 1002 and 1011 of the  
21 ZDO \* \* \* set forth development standards for  
22 wetlands, lands within 100 feet of wetlands and  
23 land which constitutes a recharge [area] for  
24 wetlands. There is substantial evidence of the  
25 existence of wetlands on the subject property.  
26 Conditions of approval require that a wetlands  
27 delineation be submitted for \* \* \* Division of  
28 State Lands review and approval, and further  
29 require that wetland resources be protected in  
30 accordance with the standards of Sections 1002 and  
31 1011 through site specific Design Review. With  
32 these conditions of approval, these development  
33 standards will be met." Record 6.

34 We are required to defer to a local government's  
35 interpretation of its own code, so long as the  
36 interpretation is not clearly contrary to the express words,  
37 policy or purpose of the local enactment. Clark v. Jackson  
38 County, 313 Or 508, 836 P2d 710 (1992). The court of

1 appeals has made it clear, that in close cases, we must err  
2 on the side of deferral. Friends of the Metolius v.  
3 Jefferson County, \_\_\_\_ Or App \_\_\_\_, \_\_\_\_ P2d \_\_\_\_  
4 (September 22, 1993); Reusser v. Washington County, 122 Or  
5 App 33, \_\_\_\_ P2d \_\_\_\_ (1993). However, the court has also  
6 made it clear that the local interpretation expressed in the  
7 challenged decision must be adequate for review. Weeks v.  
8 City of Tillamook, 117 Or App 449, 454, 844 P2d 914 (1992).

9 Here, the above interpretation does not explain why the  
10 provisions of ZDO Section 1000 are inapplicable to the  
11 proposal, and the reason why the county interprets the ZDO  
12 in this manner is not clear. Specifically, the challenged  
13 decision does not explain whether the standards of  
14 ZDO Section 1000 are inapplicable because the proposal is  
15 not a listed development activity, or whether the provisions  
16 of ZDO Section 1000, while containing applicable standards,  
17 simply do not apply until the design review stage of local  
18 review for the proposal.<sup>1</sup> Further, the above quoted  
19 findings can be read to suggest that the wetland protection  
20 standards of ZDO Section 1000 are currently applicable to  
21 the approval of the subject conditional use permit.  
22 However, if this is the case, the findings do not explain  
23 why some ZDO Section 1000 standards are applicable at the  
24 conditional use permit approval stage, and others only apply

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<sup>1</sup>In either case, the county should identify and explain the applicable ZDO provisions which support its interpretation.

1 at the design review approval stage. Compare Tylka v.  
2 Clackamas County, 22 Or LUBA 166, 180-81 (1991) (county  
3 interpretation that ZDO Section 1000 standards do not apply  
4 to any development that is not specifically listed in  
5 ZDO 1001.02), with West v. Clackamas County, 23 Or LUBA 558,  
6 aff'd 116 Or App 89 (1992) (LUBA deferred to county  
7 decision denying an application for a golf course on the  
8 basis of noncompliance with ZDO Section 1000 standards.)

9 The third, fourth and fifth assignments of error are  
10 sustained.

11 **SIXTH ASSIGNMENT OF ERROR**

12 "There is a lack of evidence in the record to  
13 support the County's finding that the proposed  
14 development meets the requirements of ZDO  
15 1203.01(B) ensuring site characteristics are  
16 suitable for the proposed use."

17 **SEVENTH ASSIGNMENT OF ERROR**

18 "There is a lack of evidence in the record to  
19 support the County's finding that the proposed  
20 development meets the requirements of ZDO  
21 1203.01(D) to ensure the proposed use will not  
22 alter the character of the surrounding area to the  
23 impairment of uses listed in the underlying  
24 district and ZDO 1005.02(A)(2) siting and design  
25 for compatibility with surrounding neighborhood."

26 Under these assignments of error, petitioner argues the  
27 challenged decision fails to include adequate findings of  
28 compliance with ZDO 1203.01(B) and (D) and is not supported

1 by substantial evidence in the whole record.<sup>2</sup> We address  
2 these arguments separately below.

3 **A. Adequacy of Findings**

4 ZDO 1203.01(B) and (D) require the proposal to satisfy  
5 the following:<sup>3</sup>

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

10 "The proposed use will not alter the character of  
11 the surrounding area in a manner which  
12 substantially limits, impairs or precludes the use  
13 of surrounding properties for the primary uses  
14 listed in the underlying district."

15 Petitioner argues safety is a relevant consideration  
16 under these standards and that the challenged decision  
17 mistakenly concludes there are no points from which golf  
18 balls are to be hit (striking areas) less than 300 yards  
19 from adjacent properties. Petitioner also argues that glare  
20 from night-time security lighting will interfere with  
21 adjacent residential uses. In addition, petitioner argues  
22 that the noise from automobiles associated with the proposal  
23 will substantially interfere with the residential use of his

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<sup>2</sup>Petitioner also repeats arguments asserted above concerning the proposal's compliance with provisions of ZDO Section 1000. However, we state above that the challenged decision fails to adequately interpret the applicability of ZDO Section 1000. Therefore, no purpose is served by reviewing the decision for compliance with ZDO Section 1000 here.

<sup>3</sup>Some of petitioner's findings challenges concerning ZDO 1203.01(B) and (D) are raised by petitioner in other assignments of error. To simplify, we address those arguments here.



1 property. Finally, petitioner argues that no vegetative  
2 screening between the proposed driving range and adjacent  
3 properties will be required.

4 The challenged decision acknowledges the relevancy of  
5 these issues and contains the following findings:

6       "\* \* \* The applicant's plan calls for location of  
7 the striking area and other improvements to be  
8 located more than 300 yards from the closest point  
9 on the objecting neighbors' properties. Concerns  
10 based on the potential of a tee area near the  
11 eastern end of the subject property are misplaced,  
12 as the applicant has agreed to locate all tee  
13 areas at the westerly end of the property, and  
14 conditions of approval will require that this be  
15 the case. Additionally, the record establishes  
16 that [sic] is existing vegetative screening and  
17 fencing to lessen any loss of privacy. A  
18 condition of approval does require Design Review  
19 of this development, with specific attention to  
20 include perimeter landscaping and fencing to  
21 mitigate visual impacts and prevent trespass. Any  
22 loss of privacy to surrounding residential  
23 properties will be minimal. Possible trespass is  
24 not seen as a problem.

25 "Glare from proposed night-time lighting of this  
26 facility posed a potential impact. The applicant  
27 has agreed not to install night-time lighting,  
28 except as is required for security purposes. A  
29 condition of approval will require this.

30 "Noise will be generated by the driving range  
31 activity and by traffic. It will not be  
32 significant and will be mitigated through the  
33 design review process." Record 4-5.

34 These findings are adequate to explain that the  
35 striking areas will be more than 300 yards from adjacent  
36 properties. However, the findings do not determine that  
37 this distance complies with ZDO 1203.01(B) and (D). On

1 remand, the county should explain in its decision how a  
2 distance of 300 yards from the adjacent properties satisfies  
3 ZDO 1203.01(B) and (D).

4 The findings concerning visual impacts are inadequate  
5 to establish the proposal will not substantially limit or  
6 impair the use of surrounding properties for residential  
7 use. The decision does not state that visual impacts from  
8 the proposal will be insubstantial. Rather, the findings  
9 suggest the proposal will cause visual impacts that should  
10 be mitigated, and rely upon conditions of approval to  
11 establish compliance with ZDO 1203.01(D). However, the  
12 conditions of approval do not require vegetative screening  
13 for the proposed use. Specifically, the only condition of  
14 approval concerning vegetative screening simply requires the  
15 proposal to go through a design review process which  
16 considers:

17 "Perimeter and other landscaping necessary to  
18 mitigate visual and noise impacts." Record 7.

19 In sum, the relied upon condition does not require any  
20 particular level of screening. Therefore, it is impossible  
21 to determine whether the vegetative screening ultimately  
22 approved for the proposal will comply with ZDO 1203.01(D).

23 The findings concerning night-time lighting appear to  
24 assume that night-time lighting will substantially interfere  
25 with nearby residential uses. However, the decision allows  
26 night-time lighting "for security purposes," without  
27 explaining how this lighting satisfies ZDO 1203.01(D). We

1 conclude the findings fail to determine whether the  
2 night-time security lighting will "substantially limi[t],  
3 impai[r] or preclud[e] the use of surrounding properties for  
4 the primary uses listed in the underlying district," as  
5 required by ZDO 1203.01(D).

6 Finally, the findings concerning noise impacts of the  
7 proposal are inadequate. Those findings contain a simple  
8 conclusion that noise from the proposal will not be  
9 substantial and that noise impacts will be mitigated through  
10 the subsequent design review process. Essentially, the  
11 findings relegate the determination of compliance with the  
12 ZDO 1203.01(D) standard, as it relates to noise, to a mere  
13 consideration during the design review process. The problem  
14 with this approach is that ZDO 1203.01(D) contains standards  
15 which are admittedly applicable to the proposal at the  
16 conditional use permit approval stage. The findings must  
17 either explain why it is permissible to defer the  
18 determination of compliance with ZDO 1203.01(D), concerning  
19 the noise impacts of the proposal, until design review or  
20 identify the contemplated noise impacts from the proposal  
21 and explain how those impacts will be mitigated to comply  
22 with ZDO 1203.01(D).

23 Finally, petitioner argues the county's findings that  
24 proposed perimeter fencing will not pose a substantial  
25 interference with the use of his property "required  
26 substantial conjecture in face of the opposition testimony."

1 Petition for Review 17. However, that the standards of  
2 ZDO 1203.01 require the county to make subjective  
3 determinations, or that there was opposition to the  
4 proposal, does not provide a basis for reversal or remand of  
5 the decision.

6 This subassignment of error is sustained, in part.

7 **B. Evidentiary Support**

8 Substantial evidence is evidence a reasonable person  
9 could rely upon to support a conclusion. Younger v. City of  
10 Portland, 305 Or 346, 752 P2d 262 (1988).

11 Petitioner cites evidence in the record (the  
12 applicant's site plan) showing that at least some of the  
13 golf ball striking areas are proposed to be closer than 300  
14 yards from nearby properties. The county cites no evidence  
15 undermining this evidence. It is relatively clear from the  
16 challenged decision that a distance between striking areas  
17 and adjacent properties of at least 300 yards is relied upon  
18 to support the county's conclusion that the proximity  
19 between striking areas and nearby properties poses no  
20 substantial safety problem. Because the record lacks  
21 evidentiary support for the findings that the nearest golf  
22 ball striking area is more than 300 yards from adjacent  
23 properties, those findings are not supported by substantial  
24 evidence in the whole record.

25 The balance of petitioner's evidentiary challenges go  
26 to the evidentiary support for findings that, as we explain

1 above, are inadequate. No purpose is served by reviewing  
2 the evidentiary support for inadequate findings, and we  
3 decline to undertake such review.

4 This subassignment of error is sustained, in part.

5 The sixth and seventh assignments of error are  
6 sustained, in part.

7 **EIGHTH ASSIGNMENT OF ERROR**

8 "There is a lack of evidence in the record to  
9 support the County's finding that the proposed  
10 development meets the requirements of ZDO  
11 1203.01(E) to satisfy the goals and policies of  
12 the Comprehensive Plan which apply to the proposed  
13 use."

14 Petitioner contends the challenged decision fails to  
15 establish compliance with the Clackamas County Comprehensive  
16 Plan (plan), as required by ZDO 1203.01(E). ZDO 1203.01(E)  
17 requires:

18 "The proposal satisfies the goals and policies of  
19 the Comprehensive Plan which apply to the proposed  
20 use."

21 Petitioner does not identify particular plan provisions  
22 allegedly violated by the proposal. Rather, he states there  
23 are several "issues" that are not addressed in the  
24 challenged decision.

25 The challenged decision discusses how the proposal  
26 complies with the plan. The challenged decision then states  
27 the following concerning the plan "issues" specifically  
28 raised by petitioner:

29 "[Petitioner] refer[s] to certain 'Issues'  
30 discussed in the introductory section of the Land

1           Use Chapter of the plan.   These issues do not  
2           constitute approval criteria, and are not even  
3           aspirational goals.   These issues merely set a  
4           frame of reference for adoption of the ensuing  
5           Goals and Policies."   Record 6.

6           We have reviewed the introductory section of the Land  
7           Use Chapter of the plan and defer to the county's  
8           interpretation of those provisions as not constituting  
9           approval standards applicable to the proposal.   Such an  
10          interpretation of those provisions is not clearly contrary  
11          to the words, policy or context of the words used in that  
12          portion of the plan.   Clark v. Jackson County, supra.

13          The eighth assignment of error is denied.

14          The county's decision is remanded.