BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ADOLF EPPICH, VIDA EPPICH, PAUL GARSTKA, PATTY GARSTKA, PHILIP GARSTKA, KAYRON GARSTKA, JOHN ALTO, DOROTHY ALTO, SANFORD OWENS, JOHANNA OWENS, ED SKEETERS, RENNAE SKEETERS, PAUL HEINNEMAN, KAREN HEINNEMAN, MIKE WATSON, PATTI WATSON, HARRY GARSTKA, MARIAN GARSTKA, JOANNE BURKE, DENNIS GETMAN, LINDA GETMAN, DEBBIE SMITH, DAN RADKE and MADELANE RADKE,	LUBA No. 93-161
Petitioners,	FINAL OPINION AND ORDER
vs.	
CLACKAMAS COUNTY,	
Respondent,	
and	
JOAN CAIRNS and KENNETH CAIRNS,	
Intervenors-Respondent.	

Appeal from Clackamas County.

Paul R. Hribernick, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Black Helterline.

Stacy L. Fowler, Assistant County Counsel, Oregon City, filed a response brief and argued on behalf of respondent.

Joan Cairns and Kenneth Cairns, West Linn, filed a response brief and argued on their own behalf.

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

REMANDED 02/04/94

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioners appeal a county decision approving a conditional use permit for a school.

MOTION TO INTERVENE

Joan Cairns and Kenneth Cairns, the applicants below, move to intervene in this proceeding on the side of respondent. There is no opposition to the motion, and it is allowed.

MOTION TO STRIKE

Petitioners move to strike Appendices I, V and VI to Intervenors-Respondent's (Intervenors') Brief, arguing the items contained therein are not part of the local record in this appeal. Petitioners also move to strike certain portions of the text of Intervenors' Brief, because they refer to facts not in the record.

The items in Appendices I, V and VI are not part of the record, and intervenors identify no other basis on which this Board might consider them. The motion to strike Appendices I, V and VI to Intervenors' Brief is granted. The Board shall disregard any statements in Intervenors' Brief that are not supported by facts in the record.

FACTS

The subject 26 acre property is designated Agricultural on the Clackamas County Comprehensive Plan (plan) map and is zoned Exclusive Farm Use, 20 Acre District (EFU-20). The

subject property is currently in farm use, producing nursery stock. It is developed with a single family dwelling, two wells and several accessory structures, including a barn, a greenhouse, a potting shed and a shop building. Access to the subject property is from Ladd Hill Road, a county road that is adjacent to the property's southwest corner.[1]

Properties to the north, east and southeast of the subject property are also zoned EFU-20 and are generally in agricultural use. Properties to the west and southwest of the subject property are zoned Rural Residential Farm/Forest 5 Acres (RRFF-5) and are generally in rural residential use.

Intervenors-respondent (intervenors) propose to reside in the existing dwelling and operate a Montessori-type school on the subject property.[2] Intervenors propose to continue the existing nursery stock farm operation on the subject property, including use of the greenhouse and

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[1]The adequacy of access is a matter of dispute in this appeal. It appears from the record that the subject 26 acre parcel and the approximately 40 acre parcel adjoining it to the north (northern parcel) are the products of a partition. Record 213. The parcel to the north includes a strip of land along the western edge of the subject property. The existing driveway is located on that strip of land and provides access onto Ladd Hill Road. Id. Apparently, access to the subject property from Ladd Hill Road via this driveway is by means of an easement that has been or will be granted by the owners of the northern parcel. Record 39.

[2]Intervenors requested permission for a school of up to 40 students. The challenged decision, however, limits the school to 30 students, ages 5 to 18. Record 20; 289.

potting shed, as part of the school's learning environment.[3] Intervenors propose to use the barn as a covered play area for the students, and to convert the shop building to a school building. Intervenors also propose to construct a new building, similar in size to the existing shop building, for school use and a new theater/music/gymnasium building adjacent to the new school building.

On July 7, 1993, the county hearings officer held a public hearing on intervenors' application. On August 27, 1993, the hearings officer issued a decision approving the application, with conditions. On September 3, 1993, petitioners submitted a petition for rehearing. On September 13, 1993, the hearings officer issued an order denying petitioners' request for rehearing. This appeal followed.

PRELIMINARY ISSUE

The county contends that under ORS 197.763(1) and 197.835(2), petitioners are precluded from raising the issues addressed under their first, third, fourth and fifth assignments of error before LUBA, because these issues were not raised during the county proceedings.[4]

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[3]Only 1/2 acre of mature nursery stock will be removed to construct the new school buildings described in the text, infra. Record 19, 289.

[4]ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or

Petitioners argue that under ORS 197.835(2)(a),[5] they may raise new issues in this appeal because the county's notice of hearing, and the oral statement made at the beginning of the county public hearing, failed to comply with the requirements of ORS 197.763.

Our scope of review is limited by ORS 197.835(2) and 197.763(1) to issues raised during the local government proceedings, only where the local government complies with the requirements of ORS 197.763. Friends of the Metolius v. Jefferson County, 25 Or LUBA 411, 414, aff'd 123 Or App 256, adhered to 125 Or App 122 (1993).

ORS 197.763(3) provides in relevant part:

> "The notice [of hearing] provided by the [local government] shall:
>
> "* * * * *
>
> "(b) List the applicable criteria from the ordinance and the plan that apply to the application at issue;

> 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 * * * and the parties an adequate opportunity to respond to each issue."

ORS 197.835(2) provides that LUBA's scope of review is limited as follows:

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

[5]ORS 197.835(2)(a) provides that a petitioner may raise new issues before LUBA if "[t]he local government failed to follow the requirements of ORS 197.763."

"* * * * *" (Emphasis added.)

The challenged decision finds that several plan goals and policies are applicable to the subject application. Record 17-18. However, the county's notice of the July 7, 1993 public hearing does not list these plan goals and policies as applicable criteria.

The only identification of applicable criteria in the notice of hearing is the following entry:

> "Ordinance Criteria: [ZDO] Sections 1203, 401 and 805." (Emphasis in original.) Record 266.

The county argues that listing ZDO Section 1203 as an applicable criterion in the notice of hearing satisfies the requirement of ORS 197.763(3)(b) for listing applicable criteria from the plan, because ZDO 1203.01(E) requires conditional uses to comply with applicable plan goals and policies.[6]

Even if we assume that listing ZDO Section 1203 as an applicable criterion is the equivalent of listing ZDO 1203.01(E) as an applicable criterion, that simply provides notice that "applicable" plan goals and policies are approval criteria. It does not identify which plan goals and policies the county considers to be "applicable"

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[6]ZDO Section 1203 (Conditional Use) establishes criteria for approving a conditional use, or its alteration or expansion. ZDO 1203.01(E) requires that the proposed conditional use:

> "* * * satisfies the goals and policies of the Comprehensive Plan which apply to the proposed use."

criteria for the subject application, which is what ORS 197.763(3)(b) requires. Consequently, we agree with petitioners that the county failed to comply with ORS 197.763(3)(b).

In addition, ORS 197.763(5) provides in relevant part:

> "At the commencement of a hearing under a comprehensive plan or land use regulation, a statement shall be made to those in attendance that:
>
> "(a) Lists the applicable substantive criteria;
>
> "* * * * *"

The county does not contend a statement listing the applicable substantive criteria, as required by ORS 197.763(5)(a), was made at the beginning of the county's July 7, 1993 public hearing, and the transcript of that hearing in the record contains no such statement. Consequently, the county failed to comply with ORS 197.763(5)(a).

Because the county failed to comply with ORS 197.763(3)(b) and (5)(a), petitioners may raise issues in this appeal, irrespective of whether those issues were raised in the county proceedings.

SIXTH ASSIGNMENT OF ERROR

Petitioners state that after the hearing on the subject application before the hearings officer, they learned the hearings officer's residence is located approximately 600 feet from intervenors' current residence. Petitioners

contend the hearings officer erred by not disclosing at the outset of the public hearing that intervenors are his neighbors. According to petitioners, the hearings officer's failure to disclose this potential conflict at a time when it could have been addressed by the parties resulted in an unfair local decision making process. See Derry v. Douglas County, ___ Or LUBA ___ (LUBA No. 93-055, September 15, 1993).

Petitioners raised the issue of "Potential Ex Parte Contact [or] Conflict of Interest" in their request for rehearing. Record 9. In his order denying rehearing, the hearings officer responded as follows:

> "[Petitioners question] whether the Hearings Officer has been subject to improper ex-parte contact or has an undisclosed conflict of interest due to the fact that [intervenors] reside approximately 600 feet from the Hearings Officer in West Linn. The Hearings Officer is not acquainted with [intervenors], did not know which was their home prior to this proceeding and has had no conversation or contact with [intervenors], except during the public hearing. Were there a conflict of interest, it would have been disclosed and the Hearings Officer would have arranged for someone else to serve as the Hearings Officer on this application. * * *" Record 1.

We understand petitioners to argue the hearings officer should have disclosed that he lives in close proximity to intervenors, because this fact raises the possibility of ex parte contacts or bias by the hearings officer. With regard to ex parte contacts, petitioners are correct that where a county decision maker fails to disclose an ex-parte

contact until after the evidentiary record is closed, ORS 215.422(3) is violated, and the challenged decision must be remanded. Horizon Construction, Inc. v. City of Newberg, 114 Or App, 253-54, 834 P2d 523 (1992) (interpreting parallel statute applicable to cities); Derry v. Douglas County, supra, slip op at 8-9. However, unlike in the cited cases, here there is no admission by the decision maker or other evidence, either in the record or offered to this Board through a motion for evidentiary hearing pursuant to ORS 197.830(13)(b), that an ex parte contact occurred.

With regard to petitioners' allegations of bias, we have repeatedly stated that to establish actual bias or prejudgment on the part of a local decision maker, petitioners have the burden of showing the decision maker was biased or prejudged the application and did not reach a decision by applying relevant standards based on the evidence and argument presented. Spiering v. Yamhill County, 25 Or LUBA 695, 702 (1993); Heiller v. Josephine County, 23 Or LUBA 551, 554 (1992); Schneider v. Umatilla County, 13 Or LUBA 281, 283-84 (1985). Petitioners have not met that burden here.

The sixth assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

ZDO Section 202 contains definitions of "school,

commercial" and "school, private."[7] ZDO 401.06(B)(1) lists "public or private schools" as permissible conditional uses in the EFU-20 zone, but not "commercial schools."

Petitioners contend the proposed school is a "commercial school," as defined by ZDO 202 and, therefore, cannot be allowed in the EFU-20 zone. Petitioners argue the challenged decision fails to interpret the relevant ZDO provisions concerning this issue. Petitioners further argue that this Board cannot supply the missing interpretation. Weeks v. City of Tillamook, 117 Or App 449, 844 P2d 914 (1992).

The county does not dispute petitioners' contention that "commercial schools" are not allowed in the EFU-20 zone. However, the county points out the challenged decision refers to the proposed school as a "private school," and argues the record shows the proposed use satisfies the ZDO definition of "school, private."

Under Gage v. City of Portland, 123 Or App 269, ___ P2d ___, adhered to 125 Or App 119 (1993), and Weeks v. City of Tillamook, supra, 117 Or App at 453-54, this Board is

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[7]Those definitions are:

"SCHOOL, COMMERCIAL: A building where instruction is given to pupils in arts, crafts or trades, and operated as a commercial enterprise as distinguished from schools endowed and/or supported by taxation.

"SCHOOL, PRIVATE: Includes private kindergartens, nurseries, play schools, and church-related schools." ZDO 202.

required to review a local government's interpretation of its enactments and may not interpret the local government's enactments in the first instance. Additionally, to be reviewable by LUBA, a local government's interpretation of its plan or code must be provided in the challenged decision or the supporting findings, not in the local government's brief. Eskandarian v. City of Portland, ___ Or LUBA ___ (LUBA No. 93-012, October 15, 1993), slip op 15; Miller v. Washington County, 25 Or LUBA 169, 179 (1993).

The challenged decision does refer to the proposed use as a "private school." Record 13. However, the decision does not interpret the ZDO Section 202 definitions of "school, commercial" and "school, private," or explain why application of those definitions to the facts in this case leads to the conclusion that the proposed school is a private school. Consequently, we must remand the challenged decision to the county to adopt the required interpretation.

The first assignment of error is sustained.

SECOND AND THIRD ASSIGNMENTS OF ERROR

Petitioners contend the challenged decision fails to establish that road access to the subject property complies with the following conditional use permit approval standards:

"* * * * *

"B. The characteristics of the site are suitable for the proposed use considering size, shape, location, topography, existence of

improvements and natural features.

"C. The site and proposed development is [sic] timely, considering the adequacy of transportation systems, public facilities and services existing or planned for the area affected by the use.

"* * * * *" ZDO 1203.01.

A. Findings

Petitioners contend the county's findings are inadequate because they do not state that ZDO 1203.01(B) and (C) will be satisfied by the proposed use. See McCoy v. Linn County, 16 Or LUBA 295, 313-14, aff'd 90 Or App 271 (19988). Petitioners also argue this deficiency is not remedied by the county's reliance on conditions to ensure these standards are satisfied, because compliance with the conditions imposed by the challenged decision will not be determined in a proceeding with notice and an opportunity for public comment.

We have frequently stated that a local government may demonstrate compliance with an approval criterion by determining the proposal can comply with the criterion, if certain conditions are imposed, and relying on the imposition of those conditions to ensure compliance. Foland v. Jackson County, 18 Or LUBA 731, 779, aff'd 101 Or App 632 (1990), aff'd 311 Or 167 (1991); McCoy v. Linn County, supra, 16 Or LUBA at 301; Sigurdson v. Marion County, 9 Or LUBA 163, 176 (1983). Where a local government's initial proceedings satisfy any state and local requirements for

notice and hearing, conditions imposed in this manner to ensure compliance with applicable standards may include conditions requiring that specific technical solutions to identified development problems be submitted to, and reviewed and approved by, the local government's planning and engineering staff, in a process without notice and hearing.[8] Meyer v. City of Portland, 67 Or App 274, 280 n 3, 678 P2d 741, rev den 297 Or 82 (1984); Rhyne v. Multnomah County, supra, 23 Or LUBA at 447; Bartles v. City of Portland, 20 Or LUBA 303, 310 (1990).

The county findings addressing ZDO 1203.01(B) and (C), respectively, with regard to access state:

> "The location of the property is suitable for this use. * * * Area residents opposed to this request have argued that the location of the access to this site on a bend in Ladd Hill Road is an unsuitable characteristic, both because of limited sight distance at that access and because the hilly, curving nature of Ladd Hill Road causes it to be dangerous during periods of inclement weather. As to the sight distance argument, County traffic personnel have reviewed this request and determined that adequate sight distance can be achieved with constructed modifications to the access. This expert opinion is the best evidence in the record as to this

[8]This situation is different from instances where a local government defers a determination concerning compliance with an applicable approval standard to a later stage of the process, in which case the local government must ensure that the later approval process to which the decision making is deferred provides any statutory or locally required notice and hearing. McKay Creek Valley Assoc. v. Washington County, 24 Or LUBA 187, 198 (1992), aff'd, 118 Or App 543, rev den 317 Or 272 (1993); Rhyne v. Multnomah County, 23 Or LUBA 442, 448 (1992); Holland v. Lane County, 16 Or LUBA 583, 596-97 (1988).

issue, and is accepted * * *. Conditions of approval will require that [intervenors] complete those improvements necessary to achieve adequate sight distance at the access driveway onto the subject property. As to the dangerous nature of Ladd Hill Road, conditions of approval will require that the school utilize only mini-vans or half-size school buses for student transportation. There is no reason to believe that these vehicles will be subject to more danger than other vehicles currently using Ladd Hill Road. Indeed, hazardous driving conditions caused by ice or snow on the road will undoubtedly result in the cancellation of school activities, such as occurs at all other schools within the larger area. * * *" (Emphasis added.) Record 13-14.

"* * * The small amount of additional traffic reasonably expected to be generated by this use is within the capacity of Ladd Hill Road and connecting roadways. Conditions of approval will require that [intervenors] complete improvements at the access point onto Ladd Hill Road to assure adequate sight distance at that access, allowing safe access onto and from the subject property." (Emphasis added.) Record 14-15.

The challenged decision also imposes the following conditions concerning access safety:

"2. A Street Cnstruction [sic] and Encroachment Permit must be obtained from [the county Department of Transportation and Development (DTD)] for all required access driveway improvements. [Intervenors] must submit a plan prepared by an engineer registered in the State of Oregon for all required driveway improvements. * * *

"3. The access driveway shall be improved as required by DTD to obtain adequate sight distance in each direction from the access.

"4. Legal access, including the area for required improvements to the access, shall be verified in writing by a title insurance company.

> "5. The school shall use only mini-vans or one-half size school buses for student transportation." Record 19.

As shown by the above quoted findings, the challenged decision does not defer a determination of compliance with ZDO 1203.01(B) and (C) with regard to access to the subject property. Rather, the decision determines that the proposed use can comply with ZDO 1203.01(B) and (C), if certain conditions are imposed, and imposes the conditions required to ensure compliance. These conditions include a requirement that a plan for the improvements necessary to solve the identified sight distance problem be prepared by a registered engineer and submitted to, and reviewed and approved by, the county planning and engineering staff. The county determined, in a proceeding satisfying state and local requirements for notice and hearing, that the proposed use, as conditioned, will comply with the applicable approval standards. Therefore, compliance with such approval conditions may be determined by the county technical staff, without notice or hearing. Meyer v. City of Portland, supra; Rhyne v. Multnomah County, supra.

This subassignment of error is denied.

B. Evidence

Petitioners contend the county's determination of compliance with ZDO 1203.01(B) and (C) with regard to access safety is not supported by substantial evidence in the record. Petitioners specifically argue there is no evidence

in the record concerning the adequacy of sight distance for making a left turn from Ladd Hill Road onto the access driveway. Petitioners also argue there is no evidence that the access will be safe in snow and ice conditions. Petitioners further argue there is no evidence in the record that the conditions imposed to ensure compliance with ZDO 1203.01(B) and (C) can be met.

1. Lancaster Letter

Petitioners' evidentiary arguments rely, in part, on a letter to petitioners' attorney from Tom R. Lancaster, P.E., dated September 3, 1993 (Lancaster letter). Record 10A. This letter was attached to petitioners' request for rehearing. However, at oral argument, petitioners conceded that if the hearings officer rejected the request for rehearing without considering the evidence in the Lancaster letter, the Lancaster letter would not be part of the evidentiary record supporting the challenged decision.

The hearings officer's order denying petitioners' request for rehearing states, in pertinent part:

> "* * * The Hearings Officer has reviewed the request and finds that [petitioners point] out no error in applied law that would result in a change of the decision, nor [do they] point out any evidence which could not reasonably have been presented at the public hearing which would likely result in a change of the decision.
>
> "[Petitioners rely] on 14 issues in support of this Request for Rehearing. At least some of those issue statements require response. [Three issues] relate to the requirement that adequate

> sight distance be obtained at the access onto Ladd Hill Road to assure safe vehicle movement into and from the subject property. Contrary to the assertions of [petitioners,] Conditions of Approval #2 and #3 will have the effect of requiring DTD approval of the sight distance at the access, both from the access and from Ladd Hill Road at the access point." Record 1.

The above quoted portions of the hearings officer's order indicate he considered the Lancaster letter only for the limited purpose of determining whether to grant petitioners' request for rehearing. That request was denied, and the order denying rehearing does not amend or add to the hearings officer's earlier decision with regard to adequacy of access to and from the subject property. We therefore agree with the county that the Lancaster letter is not part of the evidentiary record supporting the challenged decision to approve the subject conditional use permit.[9] See Burkey v. Clackamas County, 17 Or LUBA 369, 373 n 2 (1989); Consolidated Rock Products v. Clackamas County, 17 Or LUBA 1047, 1049 (1989); compare Warner v. Clackamas County, 22 Or LUBA 220, 223-24 (1991) (where order denying rehearing specifically analyzes and comments on weight of evidence submitted with a request for rehearing, LUBA will consider that evidence in reviewing evidentiary support for

[9]The Lancaster letter was submitted to the county in support of petitioners' request for rehearing. Therefore, it is part of the local record and, presumably, could be considered in reviewing a challenge to the hearings officer's decision to deny the request for rehearing. However, petitioners make no such challenge.

the challenged decision).

2. Substantial Evidence

Substantial evidence is evidence a reasonable person would rely on 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, 233 Or 601, 605, 378 P2d 558 (1963); 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). A reasonable person would rely on conditions to ensure that an approval standard will be satisfied if there is substantial evidence in the record that it is feasible for the proposed use to satisfy those conditions. Kenton Neighborhood Assoc. v. City of Portland, 17 Or LUBA 784, 805 (1989). Additionally, where we conclude a reasonable person could reach the decision made by the local government, in view of all the evidence in the record, we defer to the local government's choice between conflicting evidence. Younger v. City of Portland, 305 Or 356, 360, 752 P2d 262 (1988); Angel v. City of Portland, 22 Or LUBA 649, 659, aff'd 113 Or App 169 (1992); Wissusik v. Yamhill County, 20 Or LUBA 246, 260 (1990); Douglas v. Multnomah County, 18 Or LUBA 607, 617 (1990).

We have reviewed the evidence on the access safety issue cited by the parties. Record 26, 39, 55, 64-65, 69-72, 84-87, 123-24, 208-09, 213, 234E, 234J, 235, 258.

That evidence includes a memorandum to the planning director by a member of the county transportation planning staff indicating that access will be adequate if the driveway entry is raised "by at least one foot to enable drivers to see over the vertical curve to the south," the driveway entrance is widened to commercial standards and the driveway itself is widened to 20 feet. Record 55. The subsequent staff report by the planning director acknowledges letters from area residents arguing the access is unsafe, states the county Transportation Planning and Technical Services divisions have identified a need to improve sight distance and widen the access, but recommends denial because "it is not possible to determine if [intervenors] have sufficient legal access to allow such improvements." Record 258. A subsequent memorandum to the planning director from another transportation staff member states that a sight distance of 400 feet in either direction is required, makes recommendations for improvements similar to those recommended in the first memorandum, and echoes the planning director's concerns regarding the adequacy of intervenor's legal access. Record 208-09. This memorandum also suggests imposing conditions to achieve safe access, including those later imposed as conditions 2 through 4, quoted in the text, supra. Finally, the record includes testimony by intervenors' attorney that intervenors' legal access is adequate for the proposed use and a letter from the attorney

for the owners of the property on which the access driveway is located. Record 69-72, 39. That letter states the property owners will agree to allow use of the access for the proposed school, and will allow intervenors to make the improvements required by the county, if the school use is limited to a Montessori-type school with no more than 40 students. Record 39.

Although there is also conflicting evidence in the record, the record contains evidence that certain improvements to the access driveway will provide adequate access for the proposed use, and that it is feasible for intervenors to construct such improvements. Based on this evidence, a reasonable person could conclude that, with imposition of conditions requiring necessary access improvements, the characteristics of the site with regard to access are suitable for the proposed use (as required by ZDO 1203.02(B)) and the proposed use is timely considering the adequacy of the transportation system serving the property (as required by ZDO 1203.01(C)).

This subassignment of error is denied.

The second and third assignments of error are denied.

FOURTH ASSIGNMENT OF ERROR

ZDO 401.06(B)(1) lists the following as a conditional use in the EFU-20 zone:

"Public or private schools including all buildings

essential to the operation of a school."[10]

Petitioners argue that in order to approve a private school under ZDO 401.06(B)(1), the county must find that all buildings proposed to be used for, or constructed on the subject property for, the school are essential to school operations. Petitioners argue the challenged decision includes no such findings. Petitioners further argue the record shows the proposed theater/music/gymnasium building is not essential to the operation of the proposed school, because intervenors propose to begin school operations before the theater/music/gymnasium building is built. Record 289.

The challenged decision does not interpret ZDO 401.06(B)(1) with regard to the meaning of the phrase "including all buildings essential to the operation of a school" and its applicability to the facts of this case. We may not supply that interpretation in the first instance.[11] Gage v. City of Portland, supra; Weeks v. City of Tillamook, supra.

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[10]ORS 215.283 lists the uses that counties are authorized to allow in their EFU zones. We note ZDO 401.06(B)(1) is worded identically to ORS 215.283(1)(a), except that the statute has a comma after the word "schools." We also note the statute was amended in 1985 to add the phrase "including all buildings essential to the operation of a school." Or Laws 1985, ch 811, § 7.

[11]We note, however, that under recent legislation, the county may not interpret a provision of its land use regulations in a manner contrary to a state statute that the land use regulation provision implements. ORS 197.829.

The fourth assignment of error is sustained.

FIFTH ASSIGNMENT OF ERROR

Petitioners contend the challenged decision fails to address the following applicable plan provisions:

Water Resources Goal 3; Policy 21.0
Agricultural Policies 1.0 and 3.0
General Transportation Goal 1
Roadways Policy 16.0
Transit Policy 9.0
Pedestrian and Bikeways Policies 3.0 and 9.0
Noise and Air Quality Policy 4.0
Public Facilities Goals 1, 2 and 5; Policies 14.0, 17.0,
19.0 and 20.0
Public Services Goal 4; Policies 6.0 and 15.0

Petitioners also argue the decision fails to address applicable provisions of ZDO Section 1000 (Development Standards).

The parties agree that the challenged decision does not address the above listed plan and ZDO provisions. However, the county argues that this is not error, because none of the cited plan and ZDO provisions are approval standards applicable to the subject conditional use permit application.

Regardless of whether we might find the interpretations of the relevant plan and ZDO provisions as not being approval criteria for the subject application expressed in the county's brief defensible, we must remand the challenged decision to the county to interpret those plan and ZDO provisions in the first instance. Gage v. City of Portland,

supra; Eskandarian v. City of Portland, supra.

The fifth assignment of error is sustained.

The county's decision is remanded.