BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

THOMAS L. MOORE, Petitioner, vs. CLACKAMAS COUNTY, Respondent, and KENT SEIDA, Intervenor-Respondent.	LUBA No. 94-252 FINAL OPINION AND ORDER

Appeal from Clackamas County.

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

No appearance by respondent.

James H. Bean and Thomas H. Cutler, Portland, filed the response brief and argued on behalf of intervenor-respondent. With them on the brief was Lindsay, Hart, Neil & Weigler.

LIVINGSTON, Referee; SHERTON, Chief Referee; GUSTAFSON, Referee, participated in the decision.

REMANDED 06/27/95

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

Opinion by Livingston.

NATURE OF THE DECISION

Petitioner appeals a decision of the Clackamas County hearings officer approving a conditional use permit for a golf driving range, clubhouse and snack bar.

MOTION TO INTERVENE

Kent Seida (intervenor) moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

This is the second time a county decision approving intervenor's application for a conditional use permit for a golf driving range on the subject property has been appealed to LUBA. In Moore v. Clackamas County, 26 Or LUBA 40, 41 (1993) (Moore I), we stated:

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

In the decision appealed in Moore I, the county hearings officer found the proposed golf driving range to be a conditional use in the RRFF-5 zone, subject to the requirements of Clackamas County Zoning and Development Ordinance (ZDO) 309.05(A). The hearings officer applied the provisions of ZDO 1002 and 1011, which address wetlands, but did not apply ZDO 1002.01(B) and (C), 1005.02(A)(3) or

1005.05(B)(3), explaining that none of these provisions "constitute approval criteria for this proposed use, [but] rather set forth various construction and development standards which will be generally addressed through the required Design Review process." Record A6-7.[1] In Moore I, we remanded the hearings officer's decision because we found it did not adequately explain why ZDO 1002.01(B) and (C), 1005.02(A)(3) and 1005.05(B)(3) did not apply to the proposal. Moore I, 26 Or LUBA at 44.

In Moore I we also found inadequate the hearings officer's findings under ZDO 1203.01(B) and (D) with respect to safety, glare, noise, and visual impacts.[2] Id. at 46-48.

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[1]The Moore I record has been incorporated into the record of the decision challenged in this appeal. References to the Moore I record are to "A ___." References to the record generated between the remand of Moore I and the decision challenged in this appeal are to "B ___."

[2]ZDO 1203.01 states, in relevant part:

> "The Hearings Officer may allow a conditional use, after a hearing conducted pursuant to Section 1300, provided that the applicant provides evidence substantiating that all the requirements of this Ordinance relative to the proposed use are satisfied, and demonstrates that the proposed use also satisfies the following criteria:
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> "* * * * *
>
> "B. The characteristics of the site are suitable for the proposed use considering size, shape, location, topography, existence of improvements and natural features.
>
> "* * * * *
>
> "D. The proposed use will not alter the character of the surrounding area in the manner which substantially limits, impairs, or precludes the use of surrounding

Finally, we found inadequate the evidence in support of a finding that the proposed golf ball striking area would be more than 300 yards from adjacent properties. Id. at 48.

On remand, the county limited its review to these issues. Record B2. Intervenor made various modifications to his proposal, including changing the location of the access onto Day Road, reorienting the driving tees, adding night lighting to the clubhouse, eliminating night-time golfing activities, and erecting perimeter netting. Record B3-4. After additional proceedings, the county again approved the application.

FIRST AND FIFTH THROUGH EIGHTH ASSIGNMENTS OF ERROR

These assignments of error all concern the application of ZDO Section 1000, the scope of which is governed by ZDO 1001.02(A).[3] ZDO 1001.02(A) lists several uses to which ZDO Section 1000 applies, including "commercial and industrial projects."[4] Petitioner contends the proposed golf driving range is a commercial project within the meaning of ZDO 1001.02(A). Based on that contention,

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> properties for the primary uses listed in the underlying district.
>
> "* * * * *"

[3]ZDO section 1000 contains, as subsections, ZDO 1001-1019.

[4]ZDO 1001.02(A) states:

> "The standards set forth in Section 1000 shall apply to major and minor partitions; subdivisions; commercial and industrial projects; multi-family and common-wall structures of three (3) or more dwellings. * * *"

petitioner argues the proposal fails to satisfy ZDO 1002.01(A), (B) and (C), 1002.02(C)(1)(d), 1005.02(A)(2) and (3), 1005.05(B)(3) and 1005.06(A).

Intervenor argues in response that ZDO Section 1000 does not apply to the proposed golf driving range because the development standards of ZDO Section 1000 apply only to the uses specifically listed in ZDO 1001.02(A). The only listed use for which a golf driving range might qualify is "commercial project." Intervenor contends the challenged decision correctly determines the proposed golf driving range is not a commercial project within the meaning of ZDO 1001.02(A). See Tylka v. Clackamas County, 22 Or LUBA 166, 180-81 (1991). Intervenor also notes that in West v. Clackamas County, 23 Or LUBA 558, aff'd 116 Or App 89 (1992), LUBA accepted the county's determination that a golf course is not a commercial project within the meaning of ZDO 1001.02(A).

Whether the county erred in failing to apply the ZDO Section 1000 provisions cited by petitioner depends on whether the county was correct in determining the proposed driving range is not a "commercial project" under ZDO 1001.02(A). We begin with the definition of "commercial." The decision in Moore I states:

> "Subsection 309.05(A)(7) of the ZDO lists commercial recreational uses exceeding the limits of subsection 309.03(F) as a conditional use in the RRFF-5 zoning district * * *. Subsection 309.05(A)(10) lists service recreational * * *

> uses as a conditional use in the RRFF-5 zoning district * * *.[5]
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> "The proposed golf driving range is a conditional use which exceeds the limits of subsection 309.03(F) because it is intended for the purpose of obtaining a commercial profit. The proposed use also [is a] service recreational use listed in subsection 813.01(A) as it is a private, commercial recreational use and facility." (Emphases added.) Record A2.

The challenged decision expresses a different position regarding the nature of the proposed golf driving range. Without any supportive findings, the decision quotes ZDO 1001.02(A) and then simply states:

> "The proposed use is not a partition, a subdivision, a commercial or industrial project, or a residential structure. Therefore, the standards of Section 1000 are not applicable to this proposed use." Record B4.

In both Moore I and West, we gave the challenged decisions the deference we thought was required by Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992). That influenced our discussion of the hearings officer's interpretation of the word "commercial." After our decisions in Moore I and West, the Oregon Supreme Court held, in Gage v. City of Portland, 319 Or 308, 860 P2d 282 (1993), that the interpretive deference required by Clark applies only to interpretations of local enactments by local

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[5]ZDO 309.05(A) lists a number of conditional uses and states that approval of any "shall not be granted unless the proposal satisfies the criteria under Section 1203, the applicable provisions of Section 800, and all other requirements of this Ordinance."

governing bodies.[6] Now we review a hearings officer's interpretation to determine whether it is reasonable and correct. McCoy v. Linn County, 90 Or App 271, 752 P2d 323 (1988).

Our review is confined to the record of the appealed decision. ORS 197.830(13)(a); 19th Street Project v. City of The Dalles, 20 Or LUBA 440 (1991). We cannot rely on the determination in West that a certain proposed golf course is not a commercial use to support a determination in this case that the proposed golf driving range is not a commercial use.[7]

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[6]ORS 197.829 was enacted to codify Clark, but was not in effect when this Board made the decision reviewed in Gage. Nevertheless, the Court of Appeals has stated that it will interpret ORS 197.829 to mean what the Supreme Court, in Gage, interpreted Clark to mean. Watson v. Clackamas County, 129 Or App 428, 431-32, 879 P2d 1309, rev den, 320 Or 407 (1994).

[7]In its decision following the appeal of LUBA's decision in West, the Court of Appeals observed that an "understanding that a privately-operated, profit-making golf course is 'commercial' makes more abstract sense than the hearings officer's contrary conclusion." West v. Clackamas County, 116 Or App 89, 92, 840 P2d 1354 (1992). The court continued:

> "We emphasize that this is not a situation where other provisions of the local legislation are clearly relevant to and demonstrative of the linguistic meaning, policy, purpose or context of the provision that the local decision-maker is interpreting. Rather, the ordinance contains a grab bag of provisions that, arguably, are equally relevant and that equally support the various meanings for which the parties contend and that the decision-maker found. Where that state of absolute or near equipoise exists, the selection from the grab bag is for the local deciding entity to make. We also note that the more distant from equipoise the interpretive options or the linguistic support for the local government's interpretation becomes, the greater the burden on the local government to support its interpretation in its findings and

The challenged decision does not explain why the finding in Moore I that the golf driving range "is a private, commercial recreational use and facility" was replaced with the current finding that the proposed use is not a commercial project. Notwithstanding our freedom under McCoy, supra, to interpret the ordinance ourselves, we prefer to give that opportunity to the county in the first instance. As we said in Mental Health Division v. Lake County, 17 Or LUBA 1165, 1176 (1989):

> "[I]t is the local government which, in the first instance, should interpret its own enactments. Fifth Avenue Corp. v. Washington Co., 282 Or 591, 599, 581 P2d 50 (1974). Although our acceptance or rejection of a local government's interpretation of its own enactment is determined by whether we believe that interpretation to be correct, we do consider the local government's interpretation in our review, and give some weight to it if it is not contrary to the express language and intent of the enactment. McCoy v. Linn County, supra, Sevcik v. Jackson County, [16 Or LUBA 710, 713 (1988)]."

We therefore remand the challenged decision to permit the county to adopt findings in support of the interpretation and application of ZDO 1001.02(A).[8]

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conclusions becomes with corresponding effects on what the appealing party must show to demonstrate error." Id at 93.

In West, the Court of Appeals believed Clark obliged it to defer to the county's interpretation. Without the constraints imposed by Clark, and given the freedom to interpret ZDO 1001.02(A) itself, it seems possible and even likely that the Court of Appeals would find the proposed driving range to be a "commercial project."

[8]If, on remand, the hearings officer determines the proposed golf driving range is a commercial project, then the relevant provisions of

The first and fifth through eighth assignments of error are sustained.

SECOND ASSIGNMENT OF ERROR

Petitioner contends the development proposal was so altered from its original form, in response to petitioner's suggestions, that some persons became entitled to additional notice under ORS 197.763. Petitioner reasons that the last-minute modifications to the development proposal entitle some persons to certain procedural safeguards.[9]

We are authorized to reverse or remand a challenged decision because the decision maker failed to follow applicable procedural requirements only if that failure "prejudiced the substantial rights of the petitioner." ORS 197.835(7)(a)(B). Petitioner does not contend he failed to receive notice of the county's proceedings on remand or that his substantial rights were prejudiced by the proceedings

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ZDO Section 1000 must be applied. In that regard, we note our remand in Moore I was limited to ZDO 1002.01(B) and (C), 1005.02(A)(3) and 1005.05(B)(3). Unresolved issues, which may be considered in a local government proceeding on remand from LUBA and raised in a subsequent appeal to LUBA from a local decision on remand, include (1) issues presented in the first appeal that LUBA either sustains or does not consider, and (2) issues that could not have been raised in the first LUBA appeal. Beck v. Tillamook County, 313 Or 148, 154, 831 P2d 678 (1992); Louisiana Pacific v. Umatilla County, 28 Or LUBA 32, 35 (1994). We leave it to the hearings officer to determine in the first instance whether changes in the proposal made after remand justify petitioner's raising ZDO 1002.01(A), 1002.02(C)(1)(d), 1005.02(A)(2), 1005.06(A) or any other ZDO provisions not raised in Moore I.

[9]It is not clear from petitioner's discussion of the second assignment of error whose procedural rights petitioner is trying to protect, but it is clear at least that petitioner does not contend his own procedural rights were denied.

followed by the county on remand.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner contends there is a lack of substantial evidence in the whole record to support the county's finding that the modified proposal for a golf driving range satisfies the requirements of ZDO 1203.01(B). ZDO 1203.01(B) requires the county to determine that "[t]he characteristics of the site are suitable for the proposed use considering size, shape, location, topography, existence of improvements and natural features."

Based on a publication of the Golf Course Development Department of the National Golf Foundation, the decision finds that a "typical" driving range is approximately 300 yards in length by 100 yards in width, and contains a recommended minimum of 10 to 20 acres. Record B5. The decision also finds the subject property is larger than required for a typical driving range layout, leaving a substantial buffer area on all sides. Id. In response to petitioner's fear of errant golf balls, the decision imposes a condition that intervenor install containment netting and vegetation as necessary.[10] Record B7.

ZDO 1203.01(B) focuses on the physical characteristics

[10]Petitioner contends further that the development proposal will require a large water containment pond. However, petitioner's citations to the record do not support this contention.

of the subject site itself. The decision concludes the site is appropriate for the proposed use, based on the dimensions of the property and its physical characteristics. The fact that petitioner reaches a different conclusion is not a basis for reversal or remand. While a local government is required to identify in its findings the facts it relies upon in reaching its decision, it is not required to explain why it chose to balance conflicting evidence in a particular way, or to identify evidence it chose not to rely on. Angel v. City of Portland, 22 Or LUBA 649, 656-57, aff'd 113 Or App 169 (1992); Ash Creek Neighborhood Ass'n v. City of Portland, 12 Or LUBA 230, 236-38 (1984).

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner contends there is a lack of substantial evidence in the whole record to support the county's finding that the modified proposal for a golf driving range satisfies the requirements of ZDO 1203.01(D), which requires a determination that:

> "The proposed use will not alter the character of the surrounding area in the [sic] manner which substantially limits, impairs, or precludes the use of surrounding properties for the primary uses listed in the underlying district."

In Moore I, 26 Or LUBA at 46, we remanded to the county for findings on potential lighting, visual, safety and noise impacts from the proposed use. As stated above, the challenged decision addresses safety impacts by imposing a

condition requiring vegetation and netting. Record B7. The decision addresses lighting impacts by imposing a condition prohibiting outdoor lighting, except for shielded security lighting for the clubhouse only. Record B8. These conditions adequately address petitioner's concerns related to safety and lighting impacts.

With respect to visual impacts, the hearings officer made general findings pertaining to landscaping, trees, the clubhouse, the parking area, and the constructed driving range. Record B6. With respect to netting, the hearings officer found:

> "Required netting and the poles which support that netting will potentially interfere with some vistas. These impacts are minimal when viewed against the large area of the subject property." Record B6.

Petitioner points to evidence and calculations in the record showing the safety netting will have to be up to 105-130 feet high at some points. Record B51, B63-64.

Local government findings of compliance with an applicable approval standard must identify the facts relied upon, and explain why those facts support a conclusion that the standard is met. Testa v. Clackamas County, 26 Or LUBA 357, 370 (1994). The county's conclusion that the netting will have minimal impacts is unacceptably conclusory. It is not supported by any findings concerning how much netting is

required or how high the netting must be.[11]

With respect to noise, the decision includes findings addressing vehicular traffic, human interaction, and golf ball striking. These findings are adequate, with two exceptions. First, the decision does not address at all an allegation made by petitioner that mechanical ball-collecting equipment will create so much additional noise that it will be incompatible with adjoining rural residential uses and therefore will not satisfy the requirements of ZDO 1203.01(D). Record B127, B150, B197. Findings must address and respond to specific issues, raised in the proceedings below, that are relevant to compliance with applicable approval standards.[12] Hillcrest Vineyard v. Bd. of Comm. Douglas Co., 45 Or App 285, 293, 608 P2d, 201 (1980); Norvell v. Portland Area LGBC, 43 Or App 849, 853, 604 P2d 896 (1979); McKenzie v. Multnomah County, 27 Or LUBA 523, 544-45 (1994); Heiller v. Josephine County, 23 Or LUBA 551, 556 (1992).

Second, the record contains a wide range of estimates

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[11]We question whether the area of the subject property itself is even relevant to the visual impacts of netting on neighboring properties. It seems more appropriate to consider how the size and location of the netting would affect particular properties on the perimeter of the subject property.

[12]Petitioner raises several new issues in his brief, including the possibility of excessive dust and the potential for unspecified "deviant night time behaviors" in the parking lot. As these issues were not raised during the county proceedings, we do not consider them here. ORS 197.763(1).

of the amount of traffic the golf driving range will generate. On the one hand, intervenor estimated the number of cars at fewer than 91 cars per day. On the other hand, petitioner provided calculations supporting an estimate of 600-1200 cars per day. Record B30-32. The decision does not state what evidence the county found persuasive. As a result, the county's finding as to traffic noise is unacceptably conclusory. Testa, supra.

Because the challenged decision does not adequately explain the grounds for the county's conclusions regarding visual impacts related to netting and noise related to traffic and ball collecting, we are unable to resolve petitioner's evidentiary challenge to the county's decision on these grounds. On remand, the county must adopt findings, supported by substantial evidence in the record, sufficient to demonstrate compliance with ZDO 1203.01(D) concerning these issues.

The fourth assignment of error is sustained, in part.

The county's decision is remanded.