

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's approval of a golf
4 driving range as an outright permitted use in the county's
5 Woodlot Resource (WR) zone.

6 **MOTION TO INTERVENE**

7 Bob Leonhardt (Intervenor), the applicant below, moves
8 to intervene on the side of respondent. There is no
9 opposition to the motion, and it is allowed.

10 **FACTS**

11 Intervenor applied for a conditional use permit or,
12 alternatively, a similar use permit for a golf driving range
13 on a 40-acre parcel located in the Woodland Resource (WR)
14 zone.¹ Intervenor acknowledged in the application that a
15 golf driving range is not listed as a conditional use in the
16 WR zone, but argued that the proposed use is similar to a
17 firearms training facility, which is a listed conditional
18 use in the WR zone. Thus, intervenor argued the code
19 contemplates the proposed driving range as either a
20 conditional or similar use.²

¹The comprehensive plan designation for the subject property is Forest Resource. In 1996, this Board remanded the county's approval of a comprehensive plan and zone change for the subject property from Forest/WR to Rural Residential/Five Acre. Doob v. Josephine County, 31 Or LUBA 275 (1996).

²Josephine County Rural Land Development Code (RLDC) 60.060, entitled "Similar Uses", provides:

1 The planning director disagreed, determining that OAR
2 660-06-025 does not contemplate such a use in a forest zone,
3 and that there is no local authority to add such a use to
4 the list of conditional uses allowed under RLDC 46.030. He
5 also determined that the use does not qualify as a similar
6 use under RLDC 60.060.

7 On appeal, the board of commissioners (commissioners),
8 agreed that the use was not a conditional use under RLDC
9 46.030 or similar use under RLDC 60.060. They also
10 acknowledged in their findings that a golf driving range was
11 not listed in RLDC 65.120 as an outright permitted use in
12 the WR zone. Nonetheless, the commissioners determined that

"A. The Planning Director may rule that an unlisted use is an allowed use within a Zone if the following criteria are met:

- "1. The proposed use is not listed as a use (Permitted, Administrative Permit, Conditional Use or Temporary Use) in any other Zone;
- "2. The proposed use is similar to one or more listed uses. Uses are similar if their general activities are alike and the resulting impacts are similar in type and intensity; and
- "3. The request for a similar use is part of a specific development proposal for the Zone.

"B. The Planning Director shall review the similar use request as part of the specific development proposal which gives rise to it. If the development proposal includes more than one type of application, the highest level of review shall be used for all the applications including the proposed similar use. The similar use shall not be processed using a different type of review procedure than that required for the application package."

1 the proposed golf driving range is an outright permitted use
2 under one or more provisions of OAR 660-06-025 as well as
3 generally under RLDC 65.1. Accordingly, the commissioners
4 determined that "[t]here was no need for the applicant to
5 submit the requests for a Conditional Use or a Similar Use
6 for this [proposal]". Record 9.

7 Petitioner appeals the county's determination.

8 **ASSIGNMENT OF ERROR**

9 Petitioner challenges the county's determination that a
10 golf driving range is an outright permitted use in the WR
11 zone, as violating the county comprehensive plan and zoning
12 ordinance, as well as Statewide Planning Goal 4 and its
13 implementing rules.

14 The commissioners determined that the county
15 comprehensive plan Goal 2, Policies 1, 7 and 8, Goal 10,
16 Policy 1.A.2, and RLDC 65.1 applied to and supported their
17 determination. They also directly applied Statewide
18 Planning Goal 4 and provisions of OAR 660-06-025.³ The

³The county's decision describes the applicability of OAR 660-06-025 as follows:

"The Administrative Rule identifies uses that are allowed in forest zones that are in addition to forest practices and operations. It lists five 'general' types of uses as set forth in State Goal 4. OAR 660-06-025(1)(b) and Goal 4. These allow 'uses to conserve soil, water and air quality and to provide for fish and wildlife resources, agriculture and recreational opportunities appropriate in a forest zone.'

"OAR 660-06-025(2)(c) states that 'physical limitations [sic, alterations] to the land auxiliary to forest practices including, but not limited to, those made for the purposes of

1 county's decision states, in relevant part:

2 "The Applicant's submittal proposed a golf driving
3 range with a site plan showing a building and
4 parking lot impacting only an area of
5 approximately 3 percent of the land's total area.
6 The finding was made that this is intended to
7 conserve the resources cited in OAR 660-06-
8 025(1)(b) and (3)(a) to the maximum degree
9 possible while providing a recreational
10 opportunity and facility as cited in OAR 660-06-
11 025(1)(c) [sic]. A use authorized under OAR 660-
12 06-025(1)(b) is also subject to the standards in
13 State Goal 4. It is found that this application
14 meets this test as Goal 4 Guideline B.2. states
15 the 'Forest lands should be available for
16 recreation and other uses that do not hinder
17 growth.' The use of this land as a golf driving
18 range will not hinder growth of trees but rather
19 will enhance the growth through irrigation.

20 "The specific use of a golf driving range in a
21 Woodlot Resource zone was discussed at the
22 hearing. It was stated that not all potential
23 uses in specific zones were listed in the [RLDC]
24 when it was written and adopted, as not all

exploration, mining, commercial gravel extraction and processing, landfills, dams, reservoirs, road construction or recreational facilities;['] shall be allowed pursuant to the Forest Practices Act and State Goal 4. The finding of the Commissioners was that the physical alterations to the land in this application are permissible under OAR 660-06-025(2)(c) as they are for a recreational facility.

"OAR 660-06-025(3)(a) states that 'uses to conserve soil, air and water quality and to provide for wildlife and fisheries['] resource may be allowed outright on forest lands.'" Record 8.

The county's decision indicates that its direct application of Goal 4 and OAR 660-06-025 as approval criteria is premised on LDC 65.110, which provides that the Woodlot Resource zone "is consistent with Goal 4 for the preservation of forest lands," and LDC Section 10.080 which provides that "[w]hen Oregon Revised Statutes and Oregon Administrative Rules relating to land use are enacted, amended or repealed, mandatory state laws and rules shall apply from the time they are effective and shall be amended into this code at the earliest possible time." Record 7. It is unclear what rule provision the county found had not been amended into the code.

1 possible applications could be envisioned. This
2 was the policy of the County Commissioners when
3 the code was adopted. The impossibility of
4 reducing all possible uses to a code document was
5 discussed and referral was made to the Clark
6 County case that allows governing bodies to
7 interpret their rules.^[4]

8 "The finding was made that the applicant's
9 proposal would serve to preserve the soil and
10 water quality of the site by its design and that
11 irrigation and other enhancement features of the
12 plan would preserve and protect air quality. It
13 was further found that the golf driving range is
14 an appropriate recreational use as designed as no
15 trees or other significant resources are to be
16 removed or impacted. The finding of the
17 Commissioners was made that under the provisions
18 of OAR 660-06-025, State Goal 4 and [RLDC] section
19 65.1 this proposal should be allowed as an
20 outright use subject to the conditions of the
21 State Plan Review. There was no need for the
22 applicant to submit the requests for a Conditional
23 Use or a Similar Use for this[.]" Record 8-9.

24 The county's determination is incorrect as a matter of
25 law. Neither Goal 4 nor any provision of OAR 660-06-025
26 allows or contemplates a golf driving range as permitted use
27 in a forest zone. Nor can RLDC 65.120 be read consistent
28 with the goal and rule to contemplate such a use.

⁴The "Clark County case" to which the findings refer is rather presumably Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992), which, together with Gage v. City of Portland, 319 Or 308, 877 P2d 1187 (1994), requires this Board to defer to local governing bodies' interpretations of their own enactments. However, we owe no deference to governing body interpretations of Statewide Planning Goals or their implementing rules, nor can we affirm interpretations of local enactments that are contrary to the goals or rules. To the extent the county's decision applies OAR 660-06-025 directly or relies on the rule to interpret RLDC 65.120, its interpretation is owed no deference. Similarly, to the extent the county independently interprets RLDC 65.120 in a way that is contrary to the rule, the county's interpretation is owed no deference. ORS 197.829(1)(d).

1 First, a golf driving range is not a recreational use
2 auxiliary to forest practices under OAR 660-06-025(2)(c) and
3 RLDC 65.120.E.⁵ Under OAR 660-06-025(2)(c), an "auxiliary

⁵OAR 660-06-025(2) states, in relevant part:

"(2) The following uses pursuant to the Forest Practices Act (ORS Chapter 527) and Goal 4 shall be allowed in forest zones:

"* * * * *

"(c) Physical alterations to the land auxiliary to forest practices including, but not limited to, those made for purposes of exploration, mining, commercial gravel extraction and processing, landfills, dams, reservoirs, road construction or recreational facilities; and

"(d) For the purposes of section (2) of this rule 'auxiliary' means a use or alteration of a structure or land which provides help or is directly associated with the conduct of particular forest practice. An auxiliary structure is located on site, temporary in nature, and is not designed to remain for the forest's entire growth cycle from planting to harvesting. An auxiliary use is removed when a particular forest practice has concluded."

RLDC 65.120(E) lists, as an outright use:

"Temporary on-site structures and physical alterations to the land which are auxiliary to and used during the term of a particular forest operation or practice. Alterations include but are not limited to those made for the purposes of mineral exploration, mining, gravel extraction and processing, landfills, dams, reservoirs, road construction or recreational facilities:

"1. For the purposes of this subsection, 'auxiliary' means a use or alteration of a structure or land which provides help or is directly associated with the conduct of a particular forest practice. An auxiliary structure is locate don site, is temporary in nature, and is not designed to remain for the forest's entire growth cycle.

1 activity" is one that "supports the primary activity or
2 enables the primary activity to occur." State ex rel
3 Jackson Creek Sand Co. v. Jackson County, 147 Or App 577,
4 582, __ P2d __ (1997). The proposed driving range would be
5 the primary and only use of the property; no forest
6 practices have been proposed. The county's finding that
7 irrigation of the golf course would encourage tree growth
8 does not convert a golf driving range into a forest
9 practice. In addition, the driving range is not a
10 "temporary feature," designed to be "removed when a
11 particular forest practice has concluded." OAR 660-06-
12 025(2)(d); RLDC 65.120.E. The proposed driving range will
13 not support or enable a forest practice, and is not an
14 auxiliary recreational use simply because its irrigation may
15 encourage tree growth.

16 Second, the proposed driving range is not a use "to
17 conserve soil, air and water quality" under OAR 660-06-
18 025(3)(a) or RLDC 65.120.C.⁶ It is a use to provide a place

An auxiliary structure is removed when a particular
forest practice has concluded."

⁶OAR 660-06-025(3)(a) states:

"(3) The following uses may be allowed outright on forest
lands:

"(a) Uses to conserve soil, air and water quality and to
provide for wildlife and fisheries resources[.]"

RLDC 65.120.C. states as an outright use in the WR zone:

"C. Uses to conserve soil, air and water quality and
watershed management."

1 to hit golf balls. That there may be some incidental
2 "conservation" benefits does not bring the driving range
3 within the uses allowed under OAR 660-06-025(3)(a) or RLDC
4 65.120.C. We agree with DLCD's explanation of the rule as
5 stated in its agency brief:

6 "To come within the rule, the purpose of the use
7 must be for conservation; a development that may
8 provide incidental conservation benefits would not
9 meet the language or intent of the rule. The
10 county's interpretation of OAR 660-06-025(3)(a)
11 would permit any use on forest land as long as the
12 use provided some incidental benefit to soil, air
13 and water. Such an interpretation is inconsistent
14 with the language of the rule and would undermine
15 the fundamental purpose of Goal 4 and the Goal 4
16 rules, which is to conserve forest lands." DLCD
17 Agency Brief 6-7.

18 Finally, the decision states that the proposed driving
19 range is allowed under OAR 660-06-025(1)(b), either as a
20 "conservation use" or a "recreational opportunity."⁷ It is

⁷OAR 660-06-025(1) states:

"(1) Goal 4 requires that forest land be conserved. Forest lands are conserved by adopting and applying comprehensive plan provisions and zoning regulations consistent with the goals and this rule. In addition to forest practices and operations and uses auxiliary to forest practices, as set forth in ORS 527.722, the Commission has determined that five general types of uses, as set forth in the goal, may be allowed in the forest environment, subject to the standards in the goal and in this rule. These general types of uses are:

** * * * *

"(b) Uses to conserve soil, air and water quality and to provide for fish and wildlife resources, agriculture and recreational opportunities appropriate in a forest environment;

1 not. As DLCD explains:

2 "OAR 660-06-025(1) lists five 'general types of
3 uses' that may be allowed on forest lands by
4 comprehensive plan provisions and zoning
5 regulations 'subject to the standards in the goal
6 and this rule.' This general listing is
7 implemented by the list of specific uses in OAR
8 660-06-025(2) through (5) and 660-06-027. No
9 where in that list is a use that could be
10 construed as including an intensive non-forest
11 related recreational use such as a golf driving
12 range. A use proposed in a forest zone must be
13 found within the list of specific uses: 'OAR 660-
14 06-025(1) does not provide independent authority
15 for allowing a use in a forest zone that is not
16 authorized' by the more specific rules. Pacific
17 Rivers Council, Inc. v. Lane County, 26 Or LUBA at
18 332 n 8. A use not allowed by OAR 660-06-025(2)
19 through (5) or OAR 660-06-027 may not be allowed
20 on forest land without a goal exception." DLCD
21 Agency Brief 8.

22 We agree. OAR 660-06-025(1) does not authorize a golf
23 driving range in a forest zone.

24 Because the county's decision to allow a golf driving
25 range as an outright permitted use in its WR zone violates
26 Goal 4, OAR 660-06-025 and the county's code, we need not
27 consider further the county's conclusion that the use is
28 allowed under its comprehensive plan. Under no
29 circumstances can a golf driving range be considered an
30 outright permitted use in the WR zone.

31 Petitioner's assignment of error is sustained.

32 The county's decision is reversed.

"* * * * *"