BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARK YEAGER, JANICE RUSSNOGLE, M.D., PEGGY LYNCH, TIM BOYD, CAT NEWSHELLER, KIM GOLLETZ, DAN GOLLETZ, LINDA HARDISON, SCOTT SUNDBERG, MIKE LAHR, ANN LAHR, JANET OHMANN, JOE CROCKETT, DOUG POLLOCK, DARCIE HAMEL, KERRY SCHONING, JEAN TOWNES, DAVE VESELY and JOAN HAGAR,
Petitioners,

vs.

BENTON COUNTY,
Respondent,

and

PATRICK O'DELL and MARTI O'DELL,
Intervenors-Respondent.

LUBA No. 2001-185

FINAL OPINION
AND ORDER

Appeal from Benton County.

James V. B. Delapoer, Albany, filed the petition for review and argued on behalf of petitioners. With him on the brief was Long, Delapoer, Healy, McCann and Noonan, P.C.

No appearance by Benton County.

Edward F. Schultz, Albany, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief was Weatherford, Thompson, Ashenfelter and Cowgill, P.C.

BASSHAM, Board Member; HOLSTUN, Board Chair; BRIGGS, Board Member, participated in the decision.

AFFIRMED 04/18/2002

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal county approval of a conditional use permit to allow a "horse training and boarding facility" on land zoned Rural Residential (RR).

FACTS

The subject property is a 3.9-acre parcel zoned RR, developed with a primary dwelling and accessory structures. In May 2000, intervenors-respondent (intervenors) applied for and received county approval to construct a pole barn. The site plan for the pole barn stated that it would be used for residential purposes only. Intervenors constructed an 11,664-square foot pole barn that contains an indoor riding arena and 19 horse stalls. Shortly thereafter, neighbors complained to the county that intervenors were using the barn as a commercial horse stable. Planning staff investigated and sent intervenors a series of letters stating that, in staff's opinion, commercial use of the facility required a conditional use permit. The letters warned that a citation would be issued if the violation continued.

Intervenors then requested an interpretation of the county's code pursuant to Benton County Code (BCC) 51.205, to determine whether "a horse boarding operation and riding arena is an outright permitted use or a conditional use in the Rural Residential Zone." Record 283. Notice of the request was provided to owners of neighboring properties, pursuant to BCC 51.205(1).[1]

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[1]BCC 51.205 provides in relevant part:

> "The Planning Official is responsible for the administration of the [BCC]. In carrying out these duties, the Planning Official shall have the following powers:
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> "(1) The Planning Official shall provide the official interpretation of the [Benton County] Comprehensive Plan [(BCCP)] and [BCC]. Any member of the public may apply for a Planning Official's Interpretation of [the BCCP or BCC regarding] a specific property, project or issue. The Planning Official's Interpretation is an administrative land use action. The Interpretation shall be based on the [BCCP], the purpose and intent of the applicable code chapter(s), and any other information deemed relevant by the Planning Official. The interpretation cannot constitute a legislative act

On February 12, 2001, the county planning official issued an interpretation, denominated "Interpretation I-01-01," that concluded that the proposed facility is not a permitted farm use in the RR zone pursuant to BCC 63.105.[2] Interpretation I-01-01 also concluded that "[i]n the Rural Residential zone a horse facility exceeding personal use is a recreational facility which requires conditional use approval." Record 284. That opinion was based on an earlier county decision concluding that "[b]oarding of horses not in the landowner's ownership and riding those horses in an attached arena is a recreational use * * * subject to conditional use review." *Id.*

Intervenors appealed the planning official's interpretation to the planning commission, which held a hearing February 20, 2001, at which it voted to affirm the planning official. Intervenors then appealed the planning commission decision to the board of county commissioners (county commissioners), but withdrew that appeal prior to the scheduled hearing.

> effectively amending the [BCC or BCCP]. * * * [F]or questions of interpretation pertaining to specific properties or land areas, notice shall be provided to owners of neighboring properties as specified in BCC 51.610(1)(a) through (c). The decision is subject to appeal under the provisions of BCC 51.805 through 51.840. The application for an interpretation may be referred to the Planning Commission at the discretion of the Planning Official. If referred, the Planning Commission will consider the matter as a quasi-judicial land use action at a public hearing pursuant to BCC 51.705 through 51.725.
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> "(2) The Planning Official may approve a use not specifically listed in the [BCC] in any zone, provided that the use is substantially similar in character, scale, and impact to permitted uses in the zone, and is compatible with the purpose of the zone. However, if the use in question is specifically listed in another zone, the Planning Official shall not approve the use through this procedure."

[2]BCC 63.105 provides in relevant part:

> "The following uses are allowed in the Rural Residential Zone:
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> "(1) Farm or forest use.
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> "* * * * *
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> "(3) Residential home.
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> "(4) Day care for fewer than thirteen children."

In May 2001 intervenors applied for a conditional use permit for the proposed facility, as a "recreational facility" allowed as a conditional use in the RR zone. BCC 63.205.[3] Notice was sent to neighboring property owners, as well as to all persons who testified at the February 20, 2001 planning commission hearing regarding intervenors' appeal of the planning official's interpretation. The planning commission held a hearing June 19, 2001, and approved the requested conditional use permit as a recreational facility. Petitioners appealed the planning commission decision to the county commissioners. The county commissioners conducted a hearing September 4, 2001, and continued that hearing to September 25, 2001. On October 23, 2001, the county commissioners voted to deny the appeal, approving the conditional use permit to operate "a recreational facility (to include horse training and boarding facilities, education program, summer camps, and special events) in the Rural Residential zone." Record 1. This appeal followed.

ASSIGNMENT OF ERROR

Petitioners argue that the facility approved in the county's decision is not, as the county found, a "recreational facility" allowed as a conditional use in the RR zone. Instead, petitioners contend, the facility is a "commercial riding arena" that is not allowed at all in the RR zone. According to petitioners, the county's conclusion that the proposed facility is a "recreational use" was based solely on Interpretation I-01-01, the planning official's

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[3]BCC 63.205 provides in relevant part:

> "The following uses may be allowed in the Rural Residential Zone by conditional use permit approved by the Planning Official:
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> "(1) Park or recreational facility and greenway corridor acquisition.
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> "* * * * *
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> "(7) School.
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> "* * * * *
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> "(10) Day care center."

interpretation to that effect in the previous proceeding. Petitioners argue that the planning official's interpretation is wrong, was unlawfully adopted, and is not supported by substantial evidence. Further, petitioners argue, the county commissioners erred in the present application in relying on the planning official's interpretation rather than adopting an independent interpretation of the code. Petitioners contend that the planning official's interpretation is not immune from challenge in the present proceeding, because at least one of the petitioners was not a party to the prior proceedings before the planning official and planning commission that led to the disputed interpretation.

Intervenors respond that petitioners cannot, in the present proceeding, make a collateral attack on the correctness of the planning official's interpretation in the prior proceeding, or the manner in which that interpretation was adopted. On the merits, intervenors argue that the proposed facility is not properly characterized as a "commercial riding arena," and the county correctly approved it as a "recreational facility" allowed pursuant to BCC 63.205(1).

The findings supporting the county commissioners' decision address the planning official's interpretation, as follows:

> "The recreational facility will be a horse training and boarding facility for profit and will be used in conjunction with an educational program. Two special events are proposed each year. The testimony indicates that the events are intended to be events where children can show their family how they have improved in their horsemanship.
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> "An education program will be offered to children. * * * The program will be primarily after school but would also be available during the weekdays of the summer. It will be limited to 10 children, which is small in scale and is appropriately reviewed together with this application. Day care is permitted outright in RR zoning for fewer than 13 children. * * *
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> "* * * * *
>
> "In the Spring of 2000, the Planning Director reached the determination that a conditional use permit was required for the proposed facility. The Planning Director sent letters to the Applicants [(intervenors)]. The Applicants then sought an appeal of the Planning Director's interpretation of the ordinance.

> That appeal was heard by the Benton County Planning Commission. The majority of the opponents in this current appeal were also opponents of the Applicants in the appeal of the Planning Director's interpretation. The Applicants argue that the opponents in this current case were estopped from arguing the issue of whether or not the Planning Director's interpretation was correct because they had been involved in the previous case and had not appealed the decision.
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> "[Petitioner] Yeager took the position that he had not participated in that case and should therefore not be estopped. * * * After careful consideration of the arguments raised by Mr. Yeager, the Board finds that his arguments * * * have been resolved by the decision of the Benton County Planning Commission in the previous case. Mr. Yeager was not entitled to notice of the hearing in the previous case because he lives more than a mile from the subject property. * * *" Record 14-15.

The county commissioners' decision thus agrees with intervenors that the opponents to the conditional use permit application are precluded from disputing the correctness of the planning official's earlier interpretation.[4] However, apparently as an alternative, independent conclusion, the county commissioners address the opponents' arguments that the proposed facility is not allowed in the RR zone and conclude, for several reasons, that it is allowed:

> "A separate ground for rejecting the argument of Mr. Yeager and the opponents is that this application covers multiple uses. The use of the riding arena and stabling facility is part of an educational program. The educational component of the application is very similar to the day care facility which would be allowed as an outright use within the zone. It is also similar to a school, which is allowed as a conditional use. *Finally, it is also a recreational facility that is allowed as a conditional use. Similar facilities have been treated as such for the previous 12 years by the County*.

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[4]It is unclear from the findings whether the county commissioners were relying on the planning official's interpretation in Interpretation I-01-01, or the planning commission's decision approving that interpretation. The latter document, if one exists, is not in the present record. *See Yeager v. Benton County*, ___ Or LUBA ___ (LUBA No. 2001-185, Order, January 18, 2002) (denying petitioners' record objection that sought to add the record before the planning official and planning commission in the prior proceeding to the record in the current proceeding). There is also some confusion over whether the interpretation the county commissioners relied upon is that contained in the staff letters sent to intervenors prior to their application for an interpretation, rather than the planning official's or planning commission's interpretation. Given our conclusion, below, that the county commissioners independently interpreted the county's code to conclude that the proposed use is a "recreational facility" allowed in the RR zone, we need not resolve the issues petitioners raise regarding which interpretation the county commissioners relied on.

> "The opponents argued that the size of the horse arena facility is too large. Benton County has no regulation on the size of barns or horse arenas in any of its zones. The Board reviewed photographs of other barns and structures in the immediate area. * * * The issue in this case is whether or not the facility itself could be used for commercial purposes. If the structure could be used for only private purposes, then no permit would be required from Benton County.
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> "Conclusion: The proposed uses of a horse training and boarding facility, special events, and an education program will not seriously interfere with uses on adjacent property, the character of the area, or the purpose of the RR zone. The proposed uses shall [not] place an undue burden on any public improvements, facilities, utilities or services. * * * *The proposed use is properly treated as a recreational facility, with components similar to a school and daycare center, and is properly reviewed as a conditional use*." Record 15-16 (emphasis added).

Contrary to petitioners' view of the decision, it appears that the county's decision contains an independent interpretation of the county's code, not based on the planning official's interpretation.

Because the county's decision takes that approach, we turn first to whether the county commissioners' interpretation is reversible under the standard of review we must apply to a governing body's interpretation of local provisions. ORS 197.829(1);[5] *Clark v. Jackson*

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[5]ORS 197.829(1) provides in relevant part:

> "(1) [LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
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> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation; [or]
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation;
>
> "* * * * *
>
> "(2) If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct."

County, 313 Or 508, 836 P2d 710 (1992). We do so because, even if petitioners are correct that the planning official's interpretation is flawed or the county commissioners' reliance on that interpretation constitutes error, that error would provide no basis for reversal or remand unless the county commissioners' independent interpretation of the code is also reversible. *See Hard Rock Enterprises v. Washington County*, 36 Or LUBA 106, 119 (1999) (where a local government's approval rests on independent alternative grounds, petitioner must successfully challenge each of those alternative grounds in order to obtain reversal or remand of the decision); *Port Dock Four, Inc. v. City of Newport*, 36 Or LUBA 68, 75-76 (1999) (challenge to a finding of compliance with a local provision provides no basis to reverse or remand where petitioner fails to challenge an alternative finding that the provision does not apply). For the reasons discussed below, our review of the county commissioners' alternative conclusion is dispositive.

Under ORS 197.829(1) and *Clark*, the pertinent question is whether we can say "that no person could reasonably interpret the [local] provision in the manner that the local [governing] body did." *Huntzicker v. Washington County*, 141 Or App 257, 261, 917 P2d 1051 (1996). That deferential standard of review applies to both express and implicit interpretations of local provisions, if the interpretations are adequate for review. *Alliance for Responsible Land Use v. Deschutes Cty.*, 149 Or App 259, 266-67, 942 P2d 836 (1997). Only if necessary interpretations are absent or inadequate for review may LUBA interpret the local provision in the first instance. *Id.* at 265; ORS 197.829(2).

Here, petitioners argue that the county's interpretation that the proposed use is a "recreational facility" allowed in the RR zone is not adequate for review.[6] Petitioners argue that the county simply concludes, without any explanation, that the proposed use is a

[6]Petitioners' interpretational arguments are directed at the planning official's conclusion in Interpretation I-01-01 that the proposed use is a "recreational facility," but we assume petitioners would advance the same arguments against the county commissioners' independent interpretation.

"recreational facility." That conclusory interpretation, petitioners argue, is not adequate for review. *See O'Neal v. Deschutes County*, 126 Or App 47, 49-50, 867 P2d 532 (1994) (a bare recitation that certain criteria do not apply to the proposed use is not an interpretation adequate for review).

Even if the county's interpretation is adequate for review, petitioners argue, it is wrong. Petitioners contend that the proposed use is properly characterized as a "commercial riding arena," which is not among the uses permitted or conditionally permitted in the RR zone. Therefore, petitioners reason, the county can allow the proposed use in the RR zone only if the county determines, pursuant to BCC 51.205(2), that it is "substantially similar in character, scale, and impact to permitted uses in the zone[.]" *See* n 1. However, petitioners argue that the county cannot approve the proposed use as one "similar" to permitted uses in the zone under BCC 51.205(2), because that procedure is available only if the proposed use is not "specifically listed in another zone." *Id*. According to petitioners, "riding arenas" are specifically listed as commercial uses allowed in conjunction with farm use, as conditional uses in the exclusive farm use (EFU) zone.[7] Therefore, petitioners argue, BCC 51.205(2) prohibits the county from allowing the proposed use in the RR zone.

We disagree with petitioners that the county commissioners' interpretation is inadequate for review. It is clear from the above-quoted findings that the county commissioners agree with the planning official and planning commission that the proposed use constitutes a "recreational facility." The county commissioners' decision also refers to previous county decisions, presumably the same ones cited by the planning official, that conclude that horse facilities exceeding personal use are "recreational facilities" in the RR zone. The decision rejects arguments that the facility is too large, and concludes that the

[7]BCC 55.205 lists the conditional uses allowed in the EFU zone, including "[c]ommercial activity in conjunction with farm use, including wineries * * *, riding arenas, and seed and fertilizer sales." BCC 55.205(1).

proposed facility is consistent with adjacent uses, the character of the area and the purpose of the RR zone. Viewed in this context, the county commissioners' interpretation is more than a bare conclusion. The county commissioners clearly view a horse facility that exceeds personal use, that allows children to ride and learn about riding horses, and that does not seriously interfere with adjacent uses, the character of the area and the purpose of the RR zone, to be a facility that falls within the scope of a "recreational facility" allowed in the RR zone. Petitioners do not explain why a more specific articulation of the county commissioners' understanding of its code is necessary to resolve the issue before us.

On the merits, petitioners have not persuaded us that the county commissioners' interpretation of BCC 51.205 is reversible under ORS 197.829(1) and *Clark*. Petitioners' view of the permissible meaning of "recreational facility" is primarily based on limits imposed by BCC 51.205(2) on the planning official's approval of a use that is not specifically listed in the applicable zone, but that is found to be "substantially similar" to a listed use. BCC 51.205 describes the planning official's interpretative powers. It is not clear to what extent, if any, BCC 51.205 governs the exercise of the county commissioners' interpretative powers. Even if BCC 51.205 does apply, however, the county commissioners' interpretation was that the proposed horse facility *is* a recreational facility; the county commissioners did not determine that the proposed facility is "substantially similar" to a recreational facility.[8] The limitation that petitioners rely upon applies only to determinations that a non-listed use is "substantially similar" to a listed use under BCC 51.205(2); it does not apply to an interpretation that a proposed use falls within the scope of a listed use, pursuant to BCC 51.205(1).

[8]The county commissioners' findings do conclude that components of the proposed facility are similar to day-care facilities or schools, which are listed uses in the RR zone. Petitioners do not challenge those determinations.

Petitioners also argue that the county's interpretation so varies from the text of the code that it constitutes a "legislative act effectively amending the code[.]" BCC 51.205(1); *see also Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 218, 843 P2d 992 (1992) (to amend legislation *de facto* or to subvert its meaning in the guise of interpretation is not permissible). We disagree. The term "recreational facility" is a broad, undefined term that can be reasonably understood to include an array of recreational facilities, including the proposed horse boarding and training facility. That the county's code lists "riding arenas" as a commercial use in conjunction with farm use in the EFU zone, and that the proposed use includes a riding arena, does little to demonstrate that the proposed use cannot be a "recreational facility" allowed in the RR zone. *See Sarti v. City of Lake Oswego*, 106 Or App 594, 597, 809 P2d 701 (1991) (the broad term "cultural facilities" allowed in one zone can include private dance schools, even though private dance schools are expressly provided for in other zones). A reasonable person could interpret the term "recreational facility" as used in BCC 63.205(1), as the county did here, to include the proposed horse boarding and training facility. We conclude that the county commissioners' interpretation is not inconsistent with the text, purpose or underlying policy of the county's code, or "clearly wrong." *Goose Hollow Foothills League*, 117 Or App at 217. Therefore, we must affirm that interpretation.

Because we affirm the county commissioners' alternative, and dispositive, conclusion that the proposed facility is a recreational facility allowed in the RR zone, petitioners' other arguments under this assignment of error do not provide a basis for reversal or remand. Petitioners' assignment of error is denied.

The county's decision is affirmed.