

1 BEFORE THE LAND USE BOARD OF APPEALS  
2 OF THE STATE OF OREGON  
3

4 JAMES DAVIS and KATHLEEN DAVIS,  
5 *Petitioners,*  
6

7 vs.  
8

9 POLK COUNTY,  
10 *Respondent.*  
11

12 LUBA No. 2008-150  
13

14 FINAL OPINION  
15 AND ORDER  
16

17 Appeal from Polk County.  
18

19 James Davis and Kathleen Davis, Dallas, filed the petition for review and argued on  
20 their own behalf.  
21

22 David Doyle, Dallas, filed the response brief and argued on behalf of respondent.  
23

24 BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.  
25

26 RYAN, Board Member, did not participate in the decision.  
27

28 REMANDED

12/09/2008  
29

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

**NATURE OF THE DECISION**

Petitioners appeal a decision denying their application for a motorcycle race track on land zoned Acreage Residential 5-acre minimum (AR-5).

**FACTS**

The subject property is a 3.18-acre parcel developed with petitioners' dwelling and a dirt motorcycle race track. A "motor race track" is a conditional use in the AR-5 zone, but petitioners built the track without first obtaining county approval. After neighbors complained, petitioners applied for conditional use approval. The application was deemed complete on March 11, 2008. The county hearings officer conducted a hearing and approved the application, with conditions. One condition required petitioners to "take appropriate measures to insure that no dust created from activities associated with the motor race track shall be allowed to leave the premises."<sup>1</sup> Record 102.

A neighbor appealed the decision to the board of commissioners, which held a public hearing and voted to sustain the appeal, denying the conditional use application because it is "not in harmony with the purpose and intent" of the AR-5 zone. Record 18. In particular, the commissioners found that dust from the race track would combine with dust from nearby farm zones, and thus fail to be in harmony with an AR-5 purpose statement indicating that the AR-5 zone is intended to be a buffer area between farm zones and urban lands.

This appeal followed.

**FIRST ASSIGNMENT OF ERROR**

Petitioners argue that the board of commissioners denied the conditional use application under a criterion that does not exist under the county's code.

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<sup>1</sup> In addition, the applicant proposed and the hearings officer imposed a number of other conditions that restrict times, dates, number of riders, etc., and that require a vegetative buffer.

1 A motor race track is a conditional use in the AR-5 zone. The AR-5 zone does not  
2 itself include any conditional use criteria, but instead subjects all conditional uses to the  
3 standards of Polk County Zoning Ordinance (PCZO) Chapter 119. PCZO 119.030 provides:

4 “The Hearings Officer \* \* \* shall hear and decide only those applications for  
5 conditional uses, their expansion or alteration, which are listed in this  
6 ordinance. The Hearings Officer \* \* \* shall decide whether or not the  
7 conditional use may be placed in the zone and may impose the conditions  
8 listed below, subject to the restrictions and provisions of this ordinance.”

9 PCZO 119.060 prescribes the conditions that the county may impose. PCZO 119.070 sets  
10 out the determinations that must be made in approving or denying a conditional use, and  
11 requires, among other things, a determination whether the conditional use “will be in  
12 harmony with the purpose and intent of the zone.”<sup>2</sup>

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<sup>2</sup> PCC 119.060 and 119.070 provide:

“**119.060. CONDITIONS.** The Hearings Officer or Planning Director may prescribe restrictions or limitations for the proposed conditional use, but may not reduce any requirement or standard which is specifically required by this ordinance to be included as a condition to the use. Any reduction or change of other requirements of the ordinance must be considered as varying the ordinance and must be requested as a concurrent variance request, as described in Section 119.050. The Hearings Officer or Planning Director shall impose conditions only after it has been determined that such conditions are necessary for the public health, safety or general welfare, or to protect persons working or residing in the area, or the protection of property or improvements in the area. The Hearings Officer or Planning Director may prescribe such conditions as are necessary to fulfill the purpose and intent of this ordinance.

“**119.070. FINDINGS OF THE HEARINGS OFFICER OR PLANNING DIRECTOR.**

“Before granting a conditional use, the Hearings Officer or Planning Director shall determine:

- “(A) That he or she has the power to grant the conditional use.
- “(B) That such conditional use, as described by the applicant, will be in harmony with the purpose and intent of the zone.
- “(C) That such conditional use, as described by the applicant, complies with any specific provisions for such a use as provided by the zone or by Section 119.150.
- “(D) That the imposition of conditions is deemed necessary for the public health, safety or welfare, or to protect the health or safety of persons working or residing in the area, or for the protection of property or improvements in the neighborhood.”

1           The board of commissioners denied the proposed race track under PCZO 119.070(B),  
2 finding that the track is not “in harmony with the purpose and intent” of the AR-5 zone. We  
3 discuss below petitioners’ specific challenges to the county’s findings regarding the purpose  
4 and intent of the AR-5 zone. Under the first assignment of error, however, petitioners only  
5 argue that PCZO 119.070(B) is not an “approval criterion” under which the county may deny  
6 a conditional use application. According to petitioners, the considerations listed at  
7 PCZO 119.070 are merely “part of a list of conditions county officials must affirm as part of  
8 the decision maker’s process for granting a conditional use under the [PCZO]. It is not a list  
9 of denial criteria.” Petition for Review 5.

10           However, it is clear under PCZO 119.030 that the county may deny a conditional use  
11 application (“shall decide whether or not the conditional use may be placed in the zone”).  
12 PCZO 119.070 both authorizes imposition of conditions *and* requires a finding that the  
13 proposed use will be in harmony with the purpose and intent of the underlying zone.  
14 PCZO 119.070(B) is clearly an approval criterion under which the county could deny the  
15 proposed motorcycle race track, if it adopts a sustainable finding that the proposed use is not  
16 in harmony with the purpose and intent of the AR-5 zone.

17           The first assignment of error is denied.

18           **SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR**

19           PCZO 128.510 lists seven purposes of the AR-5 zone.<sup>3</sup> The board of commissioners’  
20 decision concluded that the proposed race track is not in harmony with one of the seven

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<sup>3</sup> PCZO 128.510 provides:

“**PURPOSE.** It is the purpose and function of the Acreage Residential - 5 acre (AR-5) zone  
to:

“(A) Provide for the best use of the land based on the location, inherent limitations and  
ability to serve the functional needs of the area.

1 purposes of the AR-5 zone. PCZO 128.510(B) states that one purpose of the AR-5 zone is to  
2 “[p]rovide larger acreage homesites which will be a buffer area between farm zones and  
3 higher density urban and urbanizing areas, thus reducing the conflicts between residential use  
4 and usual and normal farming practices.”

5 The board of commissioners found that:

6 “\* \* \* [T]he dust associated with the proposed motor race track would have a  
7 significant negative impact on surrounding property owners. During the  
8 public hearings held by the Board of Commissioners on June 25, 2008, the  
9 applicant, James Davis, indicated that he would not be able to contain all of  
10 the dust associated with the proposed motor race track on the subject property.  
11 As such, the Board finds that the motor race track would compound the dust  
12 impacts that are associated with normal farming practices on surrounding  
13 resource zoned properties. The property would therefore fail to act as a buffer  
14 between the resource zones to the west, south and east of the subject property  
15 and the higher density residential neighborhoods located in the City of Dallas  
16 to the north of the subject property. The Board concludes that the proposed  
17 motor race track would not comply with [PCZO] 128.510(B), and would  
18 therefore not be in harmony with the purpose and intent of the [AR-5] zone.”  
19 Record 18.

20 Petitioners argue that denying the proposed race track because it generates dust is  
21 essentially a collateral attack on PCZO 128.530(H), which expressly permits a motor race

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“(B) Provide larger acreage homesites which will be a buffer area between farm zones and higher density urban and urbanizing areas, thus reducing the conflicts between residential use and usual and normal farming practices.

“(C) Provide for the orderly growth of the urban areas so that as urbanization occurs, the supporting community will be able to afford the increased capital investments required for services to and within the new urban area and the costs of maintenance of utility facilities, rebuilding of arterial streets, protective services and desired social services.

“(D) To provide for the efficient, redivision of acreage subdivisions which may occur in the area.

“(E) To promote the pre-planning of future important streets in the area.

“(F) To meet the needs of a segment of the population for non-urban, non-farm acreage homesites.

“(G) To provide for the above, yet not adversely affect fish and wildlife resources and habitat areas, natural areas, and scenic areas.”

1 track in the AR-5 zone as a conditional use. We understand petitioners to argue that any  
2 motor race track will generate some dust and that it is almost impossible to prevent at least  
3 some dust from leaving the property, even after taking all reasonable minimization efforts.  
4 Therefore, petitioners argue, under the county’s reasoning no race track could ever be  
5 approved in the AR-5 zone. In addition, petitioners note that the AR-5 zone permits a  
6 number of conditional uses that typically generate dust or other emissions that would seem to  
7 be inconsistent with urban uses, including feed lots, rendering plants, sand and gravel mining  
8 and processing, solid waste disposal sites, riding clubs and stables, rodeo grounds, etc.  
9 PCZO 128.530.

10 Petitioners also challenge the county’s finding that the motor race track is not in  
11 harmony with the PCZO 128.510(B) purpose to “[p]rovide larger acreage homesites which  
12 will be a buffer area between farm zones and higher density urban and urbanizing areas[.]”  
13 The county attributed to petitioner James Davis a statement that “he would not be able to  
14 contain all the dust associated with the proposed motor race track on the subject property”  
15 and concluded therefore that the track would “compound dust impacts” from farming  
16 practices on resource parcels in the area.<sup>4</sup>

17 Petitioners argue that the alleged statement simply acknowledges that it is a physical  
18 impossibility to prevent all dust from leaving petitioners’ property, and does not support a

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<sup>4</sup> Petitioners initially argue that the alleged statement is not found in the record. The county responds by quoting the following portions of petitioner James Davis’ testimony during the June 25, 2008 hearing,:

“The other thing that I was talking about with the dust is that the wording on [the hearings officer’s condition] says ‘no dust can leave the property.’ That’s an impossibility.”

“So the ‘no’ word is one that I am primarily concerned with on that particular issue. I can minimize as much as I can minimize but zero is not, is not attainable.”

“So the ‘no’ is kind of [a] little misleading. I will, I will do everything that I can do but I cannot create a miracle. I mean I cannot build a bubble over my property to stop dust \* \* \* There’s going to be some dust \* \* \*.” Response Brief 7-8, quoting Record 58 (CD audio recording) at 43:20 to 44:50.

1 conclusion that whatever level of dust escapes the property despite minimization efforts will  
2 “compound dust impacts” from farming practices or that any cumulative dust would be  
3 inconsistent with the buffering function of petitioners’ AR-5-zoned property. Petitioners  
4 argue:

5 “The generation of dust by the motor race track is separate and distinct from  
6 dust generated by normal farming practices. The remedy for motor race track  
7 generated dust is to condition approval of the proposed track with a dust  
8 abatement provision with clear standards, not denial of the race track use on  
9 the grounds that the racetrack property will become a net exporter of  
10 particulates instead of a passive recipient of particulates [from nearby farms].  
11 To attempt to shoehorn dust generation from a track into a de facto  
12 rationalization and justification for denying [the] motor race track, because it  
13 fails to be a net agricultural dust buffer, makes no legal sense.

14 “Whether the motor race track generates dust beyond what is generated by  
15 adjacent farm practices has nothing to do with the buffering requirements of  
16 PCZO 128.510(B). Any particulates generated by local farm use will  
17 continue to be deposited on [petitioners’] property. \* \* \*” Petition for  
18 Review 12-13.

19 The county responds that the county commissioners correctly understood PCZO  
20 128.510(B) to require that a conditional use in the AR-5 zone not cause an increase in dust  
21 impacts on nearby urban uses, over and above that caused by nearby farm uses. Because  
22 petitioner stated that he cannot comply with the condition to prevent *all* dust generated by the  
23 race track from leaving the subject property, the county argues, the commissioners’ finding  
24 that the race track is not in harmony with the PCZO 128.510(B) buffer requirement is  
25 supported by substantial evidence.

26 Petitioners are correct that the AR-5 zone allows a number of conditional uses that  
27 inherently create dust or other emissions that seem likely to conflict with nearby urban uses.  
28 Under the county’s apparent view of PCZO 128.510(B), it seems highly unlikely that any of  
29 those uses, including the proposed motor race track, could ever be approved in the AR-5  
30 zone. It is unlikely, for example, that any conceivable set of conditions could prevent *all*  
31 dust from leaving the site of a sand and gravel mining and processing use. It also seems

1 unlikely that any conceivable set of conditions could prevent *all* dust from leaving the site of  
2 a motorcycle race track, unless the site happened to be much larger than the minimum 5-acre  
3 size allowed in the AR-5 zone. That significantly undercuts the county’s apparent view that  
4 a conditional use in AR-5 zone that causes an increase in the same types of externalities  
5 created by farm uses, no matter how slight, is not permitted in the AR-5 zone.

6 Further, we agree with petitioners that there is no obvious connection between the  
7 role the subject property plays in buffering urban uses from farm-related dust impacts and the  
8 dust created by the motor race track. The decision does not explain what that buffering  
9 function is with respect to farm dust. However, as petitioners observe, it presumably  
10 involves creating distance between urban uses and farm activities that generate dust, so that  
11 farm-generated airborne dust will settle on the subject property instead of reaching urban  
12 uses. In theory, the subject property continues to perform that function with or without the  
13 proposed race track, and the fact that the race track generates some level of non-farm related  
14 dust that may leave the property and reach urban lands would appear to have nothing to do  
15 with that function.

16 Finally, we note that the AR-5 zone allows “farm uses” on the subject property *as an*  
17 *outright permitted use*. PCZO 128.520(B). It is difficult to reconcile the county’s apparent  
18 view that no conditional use of the property is permitted that would generate *any* dust that  
19 leaves the property, based on a purpose that AR-5 zoned property should function as a buffer  
20 between urban uses and farm uses that generate dust, with the fact that the AR-5 zone allows  
21 unrestricted farm use of the subject property, no matter how dusty, as an outright permitted  
22 use. If a AR-5 property that separates urban lands and farm lands is developed with farm  
23 uses that generate just as much dust as the farm uses on resource-zoned lands, that AR-5  
24 property would not function as a dust buffer in any practical sense. The county does not  
25 appear to have considered this feature of the AR-5 zone as context in reaching its conclusion  
26 that the disputed race track should be denied if it would generate *any* off-site dust impacts.



1 See *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993) (first  
2 level of analysis in determining the meaning of a statute is to examine its text and context).

3 However, the possibility that some AR-5 property might be developed with dusty  
4 farm uses does not necessarily mean that the county is precluded from considering whether  
5 the off-site dust impact of a proposed conditional use in the AR-5 zone is of such a  
6 magnitude that it would prevent the AR-5 zoned property to serve its desired purpose as a  
7 buffer. We therefore leave open the possibility that the county could require that conditional  
8 uses in the AR-5 zone must generate less dust than farm uses, so as to preserve at least some  
9 of the dust buffer function apparently envisioned by PCZO 128.510(B), notwithstanding that  
10 the AR-5 zone allows unrestricted development of dusty farm use. There is nothing  
11 inherently inconsistent with allowing farm uses in the AR-5 zone to be dustier than  
12 conditional uses. However, given the possibility under the PCZO that AR-5 zoned land can  
13 be fully developed with farm uses that can generate unrestricted amounts of dust, the  
14 county's apparent position that conditional uses in the AR-5 zone are inconsistent with the  
15 buffer function envisioned by PCZO 128.510(B) if *any* dust generated on-site by the  
16 conditional use will travel off-site to adjoining urban lands is simply untenable.

17 LUBA must affirm a governing body's interpretation of a local code provision, unless  
18 the interpretation is inconsistent with the express language, purpose or policy underlying the  
19 code provision. ORS 197.829(1).<sup>5</sup> In applying that statute, we consider whether the

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<sup>5</sup> ORS 197.829(1) provides, in relevant part:

“[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:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]”

1 county's interpretation is consistent with the text of PCZO 128.510(B) and relevant textual  
2 provisions. For the reasons explained above, we do not believe the county has adequately  
3 considered relevant context. We agree with petitioners that the county has not articulated a  
4 sufficient basis, or a sustainable interpretation of the relevant code provisions, to support  
5 denial of the proposed race track on the grounds that is not in harmony with the purpose of  
6 the AR-5 zone to buffer urban uses from farm uses.

7 As a final matter, under the second assignment of error petitioners argue that the  
8 county erred in failing to address whether the proposed race track is in harmony with all  
9 seven of the purposes listed in PCZO 128.510. According to petitioners, the county must  
10 address each of the seven purposes and determine whether the proposed conditional use, on  
11 balance, is consistent with those purposes. Petitioners argue that the proposed race track is  
12 in harmony with at least six, if not seven, of the listed purposes.

13 The county does not respond to this argument. Petitioner may be correct that  
14 PCZO 119.070(B) requires the county to consider each of the purposes listed at PCZO  
15 128.510. On the other hand, it is arguable that a proposed conditional use must be in  
16 harmony with all seven purposes, and failure to be in harmony with one purpose is therefore  
17 a sufficient basis to deny the proposed use, without considering the remaining purposes.  
18 Because remand is necessary in any event, the county should consider this issue on remand  
19 and adopt any necessary interpretative findings.

20 The second, third and fourth assignments of error are sustained.

21 **FIFTH ASSIGNMENT OF ERROR**

22 ORS 215.427(1) provides that for permit applications within an urban growth  
23 boundary the county must take final action within 120 days after the application is deemed  
24 complete. For applications involving land outside an urban growth boundary, the deadline is  
25 150 days. PCZO 111.250(C) states that "Polk County shall take final action on an

1 application for a permit \* \* \* within 120 days after the application is deemed complete  
2 \* \* \*.”

3 The board of commissioner’s final decision was issued more than 120 days but less  
4 than 150 days from the date the application was deemed complete. Citing  
5 PCZO 111.250(C), petitioners argue that the board of commissioners’ decision is thus  
6 “moot,” with the apparent effect that the hearings officer’s decision becomes the county’s  
7 final decision.

8 The county responds that the subject property is not within an urban growth  
9 boundary, and therefore the applicable deadline is 150 days, notwithstanding that  
10 PCZO 111.250(C) refers only to a 120-day deadline.

11 PCZO 111.250 includes no provisions referring to a 150-day deadline for decisions  
12 involving land outside urban growth boundaries. It is not clear whether the county simply  
13 neglected to implement the provisions of ORS 215.427(1) that set out a 150-day deadline for  
14 decisions involving land outside urban growth boundaries, or whether the county made a  
15 policy choice to voluntarily burden itself with a 120-day deadline, even for property outside  
16 urban growth boundaries. However, even if the latter is the case, petitioners have not  
17 established that the legal consequence of exceeding the 120-day deadline under PCZO  
18 111.250(C) is that the board of commissioners’ decision becomes “moot.”

19 For purposes of the 120 and 150 day deadlines in ORS 215.427(1), the statute  
20 prescribes a specific remedy: the applicant may either elect to continue with the application  
21 process or can choose to file a petition for a writ of mandamus to compel the county to issue  
22 an approval of the application. ORS 215.429(1), (4). Petitioners apparently elected to  
23 continue with the application process. Nothing in PCZO 111.250 or elsewhere in the code  
24 suggests that the county intended that the consequence of violating the 120-day deadline in  
25 PCZO 111.250(C) is that any county decision rendered thereafter becomes “moot” or

1 otherwise without effect, much less that the hearings officer's underlying decision  
2 automatically becomes the county's final decision.

3 The fifth assignment of error is denied.

4 **SIXTH ASSIGNMENT OF ERROR**

5 The minutes of the board of commissioners' July 23, 2008 meeting state that "[t]he  
6 Board placed observations from their site visit into the record." Record 20. There follows a  
7 four paragraph summary of the commissioners' verbal descriptions of their site visit  
8 observations. Petitioners appear to argue that there must be other evidence of the  
9 commissioners' observations beyond that four paragraph summary that is not in the record,  
10 but should be part of the record.

11 The county responds that the four paragraph summary in the minutes is the sum total  
12 of the commissioners' site visit observations, and to the extent petitioners argue that there is  
13 other evidence missing from the record, it is too late now to file a record objection. We  
14 agree with the county.

15 The sixth assignment of error is denied.

16 The county's decision is remanded.