BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RON JOHNSON, ROGER DIRKX,
JAYNE MILLER, JIM MILLER, TOM SALTER,
DEANN LUKE, MONA BEATON, DONALD BEATON,
and OLYMPIC COAST INVESTMENT, INC.,
Petitioners,

vs.

MARION COUNTY,
Respondent,

and

WILLIAM CURTRIGHT and DAMA CURTRIGHT,
Intervenors-Respondents.

LUBA No. 2008-180

FINAL OPINION
AND ORDER

Appeal from Marion County.

Michelle M. Morrow, Salem, filed the petition for review and argued on behalf of petitioners. With her on the brief were Kenneth Sherman, Jr. and Sherman, Sherman, Johnnie & Hoyt, LLP.

Jane Ellen Stonecipher, County Counsel, Salem, filed a response brief and argued on behalf of respondent.

Tyler D. Smith, Canby, filed a response brief and argued on behalf of intervenors-respondents. With him on the brief were Tyler D. Smith PC, Mark D. Shipman and Saalfeld Griggs, PC.

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

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

REMANDED 03/04/2009

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 for a personal use airport.

FACTS

Intervenors own a large tract of land zoned Special Agriculture (SA), including a 213.2-acre parcel and several smaller parcels, developed with two dwellings. In 2001, intervenors obtained Federal Aviation Administration (FAA) approval for a personal use airport. At some point thereafter, intervenors constructed a 40-foot wide, 1750-foot long paved runway across two of their parcels, in a roughly north-south orientation. The Oregon Department of Aviation (ODA) gave the runway final approval in 2007, conditioned on obtaining county land use approval. In August 2007, intervenors applied to the county to approve the personal use airport.

The subject property is located on a plateau that is 300 to 400 feet higher in elevation than property to the south, east and west, but lower than property to the north. Surrounding properties are zoned SA, Acreage Residential (AR) or Exclusive Farm Use (EFU) and developed with a mix of residential and agricultural uses. A large equestrian center is located to the south, under the departure flight path recommended by the FAA. To the north is a SA-zoned parcel owned by petitioner Olympic Coast Investment, Inc., developed with a large dwelling. The northern end of the runway is located 20 feet from the property line and approximately 700 feet from petitioner's dwelling. A six-foot high fence is located on the property line.

A personal use airport is permitted in the SA zone under Marion County Rural Zoning Ordinance (MCZO) 137.050(g) and ORS 215.283(2)(h), subject to conditional use

criteria at MCZO 137.060(a).[1] The county planning director approved the personal use airport on September 12, 2007, which approval was appealed to the county hearings officer. On February 15, 2008, the hearings officer denied the application, based on insufficient evidence regarding the impact of the runway on surrounding lands. Intervenors appealed to the county board of commissioners, which held a hearing and approved the application, with conditions. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners challenge the evidentiary support for the county's finding that the proposed personal use airport is consistent with Marion County Comprehensive Plan (MCCP) Transportation Policy 1, which provides: "[a]irports and airstrips shall be located in areas that are safe for air operations and should be compatible with surrounding uses." In addition, petitioners contend that the county erred in finding that the Airport Planning Rule at OAR chapter 660, Division 013, does not apply to the proposed personal use airport.

A. Safe for Air Operations

The county found, based primarily on the FAA and ODA reports and approvals, that the airport is "safe for air operations" for purposes of MCCP Transportation Policy 1.[2]

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[1] MCZO 137.060(a) provides, in relevant part:

> "The following criteria apply to all conditional uses in the SA zone:
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> "(1) The use will not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding lands devoted to farm or forest use. * * *.
>
> "* * * * *
>
> "(4) Any noise associated with the use will not have a significant adverse impact on nearby land uses."

[2] The county found:

> "The Board finds that MCCP Transportation [Policy 1] is satisfied by the evidence in the record. The [ODA], pursuant to ORS 836.095 and OAR 738-020-0035, inspected the applicants' airstrip, surrounding properties, air craft, air space, and traffic patterns and concluded that the proposed use will 'conform to minimum standards of safety and that safe

Petitioners argue that the FAA and ODA reports and approvals do not constitute substantial evidence that the proposed airport is safe for air operations under Policy 1. According to petitioners, the county has an independent responsibility under Policy 1 to evaluate airport safety.

Petitioners are correct that the county must evaluate airport safety, but petitioners do not explain why the FAA and ODA reports and approvals are not substantial evidence supporting a finding that the airport is safe for air operations for purposes of Policy 1. Both agencies issued their reports and approvals in order to evaluate the proposed airport's safety, and both agencies are experts on aviation safety. A reasonable decision maker could rely on the agency reports and approvals to conclude that the proposed airport is safe for air operations.

Petitioners also note that the ODA report recommended that planes using the airstrip take off and land to the south, to avoid higher terrain, homes and trees north of the runway. The county imposed a condition of approval requiring that "[t]he airport should be approached from the south for take-offs and landings as much as possible consistent with safe flying conditions." Record 26. We understand petitioners to argue that any landings or take-offs that might occur to the north would necessarily be unsafe, and therefore the airport violates Policy 1. However, while it may be the case that takeoffs and landings to the north are relatively less safe than takeoffs and landings to the south, petitioners cite no evidence suggesting that takeoffs and landings to the north would be inconsistent with the Policy 1

> air traffic patterns could be worked out for such proposed airport and for all existing airport and approved airport sites in its vicinity,' and approved the proposed private airport. *See* ORS 836.095. Additionally, the [FAA] inspected the subject property on September 24, 2001, after examining the existing and contemplated traffic patterns of neighboring airports, existing or proposed man-made objects, and natural objects in the area, the proposal would 'not be contrary to the safe and efficient use of airspace by aircraft.' The board will limit the use of the airport to the three planes [for which the] dimensions of the airstrip are adequate in length according to the ODA inspection. Based on information provided by the applicants and their representative, the ODA inspection report and approval, the FAA inspection report and approval, the board finds that the applicants have satisfied the requirement that the airport be safe." Record 9-10.

requirement that the airport be "safe for air operations." This subassignment of error is denied.

B. Airport Planning Rule

OAR chapter 660, Division 013 is the Airport Planning Rule (APR). OAR 660-013-0010(1) recites that the rule "implements ORS 836.600 through 836.630 and Statewide Planning Goal 12 (Transportation)." ORS 836.600 through 836.630 are part of the Airport Protection Act and are statutes that, petitioners concede, apply only to airports that existed in 1994. By its terms, the Airport Protection Act does not authorize or control the siting of new airports under ORS chapter 197 and 215. ORS 836.630(1).

Nonetheless, petitioners argue that the APR also implements Statewide Planning Goal 12, and the rule is written more broadly than the Airport Protection Act to impose obligations on local governments that approve new personal use airports authorized under ORS 215.283(2)(h). The county therefore erred, petitioners argue, in failing to apply the APR. Specifically, petitioners contend that the county should have applied an airport safety overlay zone required by OAR 660-013-0070(1).[3] Petitioners attach a copy of Exhibit 2 referenced in OAR 660-013-0070(1)(b) to their petition for review, and argue that takeoffs and landings to and from the north would violate the 20 to 1 approach surface depicted on that exhibit.

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[3] OAR 660-013-0070(1) provides:

> "A local government shall adopt an Airport Safety Overlay Zone to promote aviation safety by prohibiting structures, trees, and other objects of natural growth from penetrating airport imaginary surfaces.
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> "(a) The overlay zone for public use airports shall be based on **Exhibit 1** incorporated herein by reference.
>
> "(b) The overlay zone for airports described in ORS 836.608(2) shall be based on **Exhibit 2** incorporated herein by reference.
>
> "(c) The overlay zone for heliports shall be based on **Exhibit 3** incorporated herein by reference."

Intervenors respond in part that petitioners have not identified any APR standards that must be applied to approval of a new personal use airport under ORS 215.283(2)(h).[4] We agree. The only specific APR provision petitioners cite is OAR 660-013-0070(1), which sets out three types of overlay zones that must be applied to three types of airports (public use airports, private airports described in ORS 836.608(2), and heliports). Petitioners acknowledge that the proposed personal use airport does not fall within any of those three categories, but argues that OAR 660-013-0070(1) imposes a broad mandate for local governments to adopt an airport safety zone for all airports, and that the three listed types of airports and overlay zones are simply examples. However, read as a whole it is clear that OAR 660-013-0070(1) requires safety overlay zones only for the three listed types of airports. Because the proposed personal use airport is not among the three listed types of airports, petitioners' arguments under OAR 660-013-0070(1) and the APR do not provide a basis for reversal or remand. This subassignment of error is denied.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners challenge the county's finding that the proposed airstrip is "compatible with surrounding uses," under MCCP Transportation Policy 1. According to petitioner, the county erred in relying solely on compliance with other approval criteria to conclude that the airstrip is compatible.[5] Petitioners contend that the other approval criteria relied upon are

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[4] Intervenors also argue that the APR applies only to airports described in the Airport Protection Act, and therefore has no applicability at all to new airports or airports constructed after 1994. We need not resolve that broader issue, because we agree with intervenors that petitioners have not cited any specific APA provision that applies to the proposed personal use airport.

[5] The county found:

> "The evidence in the record also supports a finding that the airport is compatible with the surrounding uses. * * * The concerns for potential conflicts generally related to offensive noise generated from the planes, safety concerns caused by flight patterns, and local birds, fire danger, erosion, and water runoff.

directed at different concerns than compatibility, and consequently the county's findings fail to establish that the airstrip is compatible with surrounding uses. For example, petitioners argue that the surrounding area analysis that the county relied upon in part is directed only at MCZO 137.060(a)(1) and evaluates only impacts on farm practices on parcels over 15 acres in size. According to petitioners, the analysis does not evaluate impacts on the numerous small parcels in the area developed with single family dwellings. Petitioners argue that the county's findings identify no specific evidence in the record supporting a finding that the airport is compatible with surrounding residential uses.

Intervenors dispute that the surrounding area analysis was limited to impacts on farm practices on large parcels and did not consider impacts on small parcels in the area developed with single family dwellings. In any case, intervenors argue, the surrounding area analysis is only part of the evidence the county relied upon. Intervenors contend that the compatibility standard in Policy 1 is a general, undefined standard, and that the county's approach in finding that the proposed use is compatible with surrounding uses based on expressly incorporated findings addressing a number of more specific criteria is adequate to explain why the county believes that the general compatibility standard is met.

"The findings below address the opponents' concerns and establish that the proposed use is compatible with surrounding uses. Specifically, the board finds that the substantial evidence in the whole record demonstrates: the proposed use is safe; the proposed use will not significantly change or increase the cost of surrounding farm uses; fire protection and other rural services are adequate; the use will not have a significant adverse impact on watersheds, groundwater, fish and wildlife habitat, soil and slope stability, air and water quality; any noise associated with the use will not have a significant adverse impact on nearby land uses; and the use will not have a significant adverse impact on potential water impoundments identified in the Comprehensive Plan, and not create significant conflicts with operations included in the Comprehensive Plan Inventory of significant mineral and aggregate sites. (Findings 13, 16, 20-29 are hereby incorporated herein). Therefore, the combined effect of the referenced findings in this decision is that they also establish that the proposed use is compatible because there is no identifiable unacceptable impact caused by the proposed use on the surrounding properties. The board interprets the mandatory approval criteria, when viewed as a whole, to ensure that the conditional use is in fact compatible with the surrounding properties because compatibility in this context is the positive restatement that all unacceptable impacts are sufficiently mitigated or avoided." Record 10.

The county clearly adopted the view that there is no need to independently assess compatibility in this case, because a number of other specific mandatory approval criteria that were applied are intended to ensure that the proposed use is in fact compatible with the surrounding uses and "compatibility in this context is the positive restatement that all unacceptable impacts are sufficiently mitigated or avoided." Record 10. Petitioners do not challenge that interpretation or explain why it is reversible under the somewhat deferential scope of review we apply to a governing body's interpretation of local comprehensive plan or code provisions. ORS 197.829(1); *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003). Accordingly, petitioners' arguments under this assignment of error do not provide a basis for reversal or remand.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

OAR 660-013-0020(1), part of the APR, defines an "airport" as the "strip of land used for taking off and landing aircraft" and "all adjacent land used in connection with the aircraft landing or taking off from the strip of land * * *." OAR 738-005-0010(47), part of ODA's administrative rules, defines the term "control" when "used in reference to runway approach-departure zones" to refer to "ownership through fee or easement or existence of appropriate zoning." Citing to these two administrative rules, petitioners contend that the applicable regulations require that the owner of a personal use airport own or control all land under the flight paths used for take-off and landing. Petitioners argue that this requirement is not met in the present case, because the northern end of the runway is only 20 feet from adjoining property not owned or controlled by the applicant.

Neither of the two cited administrative rule definitions embody any requirement that a personal airport owner own or control land under the take off and landing flight paths. Because petitioners fail to cite to the source of any such requirement, the arguments under this assignment of error do not provide a basis for reversal or remand.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

As noted, MCZO 137.060(a)(1) requires a finding that the proposed use "will not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding lands devoted to farm or forest use." The county found compliance with MCZO 137.060(a)(1), based primarily on a surrounding area analysis submitted by the applicants. Petitioners argue that the analysis is flawed and that the record does not support a finding of no significant change in, or increase in cost of, accepted farm practices. In particular, petitioners cite to testimony from operators of nearby equestrian centers that noise from low-flying aircraft has scared their horses and adversely affected and required changes to their operations.

Intervenors respond, and we agree, that petitioners have not demonstrated that the surrounding area analysis is inadequate or flawed in any material way. The analysis reviews a 2,405-acre study area, and devotes 73 pages to describing the farm and forest practices on lands within the area. Record 288-361. If the analysis has any material flaws, petitioners have not identified them.

With respect to impacts on farm practices, including on the nearby equestrian centers, the county found:

> "The proposed use, as conditioned, is not a significant noise source because the evidence in the record indicates that the average annual daily noise level [is] 55 [decibels] as measured at the property's boundary line. This level of noise is less than the noise created by a diesel truck being driven at 40 mph at 50 feet away, a passenger car at 65 mph at 25 feet away, and an air conditioning unit at 100 feet away.
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> "The numbers of flights are limited to 20 takeoffs and landings per month, which will ensure an infrequent and occasional use. Additionally, the nature of the takeoffs and landings is that the plane's engine(s) will only be powered for ten minutes and only at full capacity for 90 seconds while located on the airstrip. The applicants have also voluntarily limited themselves to conditions of approval that will require the applicants to modify their approach and landing patterns as much as possible, which the ODA inspection stated was

> feasible, so that the flight patterns will be above the surrounding farms and largely above the applicants' own property.
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> "* * * * *
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> "* * * Testimony from a neighbor who owned an equestrian facility stated that they instructed their clients to delay either mounting or dismounting their horses until after the planes had finished landing or taking off. This testimony does reflect an impact; however, it is not significant and is sufficiently mitigated by the conditions of approval. The conditions of approval limit the proposed use to infrequent use. These flights involve 10 minutes of engine use and only 90 seconds of full engine use. The infrequent nature and short duration of the proposed use (see above) as required by the conditions of approval will sufficiently mitigate the identified impact so as not to be significant and not increase costs associated with horse training." Record 15-17.

Petitioners disagree with the county's finding that impacts on neighboring equestrian uses are "not significant" and have been mitigated by conditions of approval. Petitioners cite to testimony from a stable owner north of the property, who related that one of her colts became frightened by a low-flying aircraft and injured itself against a fence. Record 497-98. Petitioners also cite to testimony from the owner of the equestrian stable south of the property that "our horses can be frightened by aircraft approaches, landings and takeoffs." Record 211.

Intervenors respond, and we agree, that petitioners have not demonstrated that the county's findings regarding impacts on neighboring equestrian uses are inadequate or not supported by substantial evidence. Intervenors cite to evidence that the area in general experiences a large volume of air traffic, from nearby airports and from sight-seeing flights to view the so-called Cruz Mansion owned by petitioner Olympic Coast Investment, Inc. The stable owner to the north could not identify whether the low-flying plane that frightened her colt belonged to intervenor. Record 497. Similarly, intervenors note that the owners of the equestrian center south of the property have stated they do not object to the personal use airport, as long as it is limited to personal use, and have not identified any adverse impact or change to their equine operation, other than advising guests to delay either mounting or

dismounting their horses until after the planes had finished landing or taking off. We agree with intervenors that the evidence cited to us does not establish that the county erred in concluding that, as mitigated by conditions, impacts on equestrian operations in the area are not significant.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioners challenge the county's findings with respect to three noise-related standards.

A. MCCP Noise Policy 3

MCCP Noise Policy 3 provides:

> "All developments that are noise sources shall comply with applicable DEQ [Department of Environmental Quality] standards. When new major highways, airports, racing facilities and commercial and industrial developments are proposed, the County shall consult with DEQ to ensure that applicable sound regulations are satisfied."

The county found that Noise Policy 3 does not apply, because in 1991 the legislature withdrew all funding for implementing and administering the DEQ noise program, and by administrative rule DEQ has suspended that program.[6] Petitioners argue, however, that the DEQ regulations remain on the books, even if the DEQ noise program has been suspended,

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[6] The county's findings state:

> "Because the Oregon Legislature has suspended enforcement of DEQ noise standards and administration of DEQ noise applications, including issuance of noise variances, the Board finds that the requirement to comply with DEQ standards and confer with DEQ is no longer applicable as required by OAR 340-035-0045 in its entirety. Specifically, the Board rejects that the applicants must demonstrate compliance with any noise standard, submit a Noise Impact Boundary or Noise Abatement Program and Methodology for review, or meet any other requirement contained in OAR 340-035-0045.
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> "The Board's finding is consistent with the plain text of * * * Noise Policy 3 because the requirement was for compliance with 'applicable DEQ standards' and 'applicable sound regulations.' The legislature's 'suspension' negates, at least temporarily, the applicability of the DEQ standards and regulations. Similarly, until DEQ resumes its consultation services the public, there is no reason to require a futile attempt to 'consult.' * * *." Record 12.

and that Noise Policy 3 unambiguously requires that all noise sources comply with the DEQ standards. According to petitioners, the legislature's suspension of the DEQ noise program simply suspended the procedural aspects of the program. The substantive standards remain, and local governments are free to require compliance with them. Petitioners contend that the county has, via Noise Policy 3, adopted by reference the DEQ standards as the county's own.

Intervenor responds that the county's interpretation of Noise Policy 3 is consistent with its text and should be affirmed under ORS 197.829(1). We agree. While petitioners' preferred interpretation is perhaps plausible, the county's contrary interpretation is equally or more plausible. As written, Noise Policy 3 presumes that there are "applicable" DEQ noise regulations. Nothing in the policy suggests that the county intended to adopt suspended and therefore inapplicable DEQ noise regulations as the county's own. This subassignment of error is denied.

B. Ordinance 1190

The county has its own separate noise ordinance, Ordinance 1190, that is not codified as part of the county's zoning or development regulations. Ordinance 1190 generally prohibits any person from producing sound that exceeds certain defined thresholds, at certain times, and as measured in defined ways. The county found that Ordinance 1190 is essentially a general performance standard that applies to many activities, but one that does not function as a conditional use approval criterion. The county notes that the Noise Ordinance specifically excludes noise generated by activities that are conducted in accordance with a conditional use approval, from which the county concludes that it is the MCCP and MCZO noise standards that provide the applicable conditional use approval criteria with respect to noise.[7]

[7] The county found, in relevant part:

> "Marion County Ordinance 1190 [Noise Ordinance] is not a mandatory approval criterion for conditional use applications. The Noise Ordinance is a generally applicable ordinance in the

Petitioners argue that the Noise Ordinance is applicable to the conditional use application in conjunction with MCZO 137.060(a)(4), which as discussed below requires that any noise associated with the proposed conditional use not have an adverse impact on nearby land uses. According to petitioners, the Noise Ordinance effectively defines what level of noise would constitute an "adverse impact" for purposes of MCZO 137.060(a)(4). Because the runway already exists, petitioners argue, the county could and should have required the applicant to demonstrate compliance with MCZO 137.060(a)(4) by demonstrating that the noise generated by the airport complies with the Noise Ordinance. Finally, petitioners argue that the county erred in relying on the exclusion in the Noise Ordinance for activities pursuant to a conditional use permit, because that exclusion only applies once a conditional use permit is approved.

Intervenor responds, and we agree, that the county's interpretation that the Noise Ordinance is not an applicable conditional use approval standard is not reversible under ORS 197.829(1). While the exclusion cited by the county would apply only after the conditional use permit is granted, that such an exclusion exists supports the county's view that the applicable approval standards with respect to noise are those in the MCCP and MCZO. The exclusion would never operate if the Noise Ordinance were applied as part of the conditional use permit approval standards, because any use that generated noise in excess of thresholds set out in the Noise Ordinance would be denied a permit. Petitioners have not demonstrated that the county's interpretation is reversible under the somewhat deferential standard of review we must apply to a governing body's interpretation of local code

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same manner as all health and safety regulations or criminal laws. Even though all county citizens must comply with the ordinance, it is not a land use applicant's burden of proof to establish compliance with the Noise Ordinance prior to receiving conditional use [approval]. As the findings above specify, [the MCCP] and [MCZO] 136.060(a) already regulate the impact of noise. The board's interpretation that the Noise Ordinance is not intended to supersede the applicable use criterion is supported by Section 7(1) of the Noise Ordinance, which specifically excludes sounds generated by activities that are conducted in accordance with a conditional use approval." Record 21.

language. ORS 197.829(1); *Church*, 187 Or App at 523-25. This subassignment of error is denied.

C. MCZO 137.060(a)(4)

As noted, MCZO 137.060(a)(4) requires a finding that "[a]ny noise associated with the use will not have a significant adverse impact on nearby land uses." To demonstrate compliance with that standard, intervenors submitted a 24-hour noise study by a consultant, at two sites on the property closest to noise-sensitive residences. The noise study concluded that noise generated by the airport would not exceed 55 decibels, less than the noise generated by a truck driving at 40 miles per hour 50 feet away. Based on the noise study, the county concluded that the level of noise generated by the airport would not have significant adverse impacts, particularly given the infrequent use of the runway and the short duration of engine noise during takeoff and landing.

Petitioners contend that the noise study does not comply the methodologies required by either DEQ regulations or the Noise Ordinance. However, as explained above, neither of those regulations or methodologies apply. The only substantive criticism petitioners advance of the noise study or the county's findings under MCZO 137.060(a)(4) is an assertion that the study apparently measured noise at a location behind a single family dwelling on a neighboring parcel, which placed the dwelling between the noise source and measuring device and thus failed to accurately measure noise at the property line. However, intervenors contend that petitioners are mistaken on this point. Intervenors appear to be correct. Record 391 (noise study describing location of the measuring points as intervenors' property line to the north and east). It is true that the noise study includes a map depicting the location of the measuring sites, indicating that one site is located on the north boundary of petitioner Olympic Coast Investment, Inc.'s parcel, which would place petitioner's house between the measuring device and the airstrip, and a considerable distance from the airstrip. Record 395. However, the map is almost certainly mistaken. The text of the noise study indicates that the

measuring site was located on intervenors' north and east property boundaries, between the airstrip and the nearest houses. Record 391. Accordingly, this subassignment of error is denied.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Under the sixth assignment of error, petitioners challenge two conditions of approval, conditions 12 and 13.

Condition 12 states that the "average annual daily noise level of sound issuing from the airport shall be kept to 55 [decibels] or below." Record 25. Petitioners contend that this condition merely restates the applicable approval criterion, namely Noise Policy 3, which incorporates the DEQ standard of 55 decibels. We understand petitioner to argue the county cannot substitute the condition of approval for a finding that the disputed airport will comply with the approval criterion. However, as explained above, neither Noise Policy 3 nor the DEQ standards are approval criteria.

Condition 13 states that "[t]he airport should be approached from the south for take-offs and lands as much as possible consistent with safe flying conditions." Record 26. Petitioners argue that this condition is entirely discretionary and will not prevent intervenors from taking off or landing from the north, over the nearest dwellings. If takeoffs or landings from the south are not consistent with safe flying conditions, the pilot may simply disregard the condition. Petitioners also argue that Condition 13 is not feasible, in that both takeoffs and landings are typically into the wind, and unless the wind shifts 180 degrees it is not likely that on the same flight the plane can both takeoff and land using the south approach.

The county found that compliance with Condition 13 is feasible and "supports the finding that the noise impact on the surrounding parties is not significant."[8] Thus, Condition

[8] The county found:

13 appears to play some role in minimizing noise impacts, in the county's view. Petitioners' argument appears to presume that only a total prohibition on takeoffs and landings to the north would be sufficient to ensure compliance with MCZO 137.060(a)(4). However, the county clearly did not view compliance with MCZO 137.060(a)(4) to require a prohibition on takeoffs and landings to the north. As we understand the county's findings, Condition 13 plays a modest role in the county's finding of compliance with MCZO 137.060(a)(4). Condition 13 is apparently intended only to prompt more takeoffs and landings to the south than to the north, which compared to having no condition at all will likely reduce noise impacts on dwellings to the north to some extent. Petitioners have not demonstrated that Condition 13 must play a more robust or mandatory role, in order for the county to find compliance with MCZO 137.060(a)(4) or any other applicable approval criteria.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

ORS 215.283(2)(h) provides for a personal use airport in an EFU zone, which the statute defines as "an airstrip restricted, except for aircraft emergencies, to use by the owner, and, on an infrequent and occasional basis, by invited guests, and by commercial aviation activities in connection with agricultural operations." Intervenors proposed approximately 10-20 takeoffs and landings per month, which the county found to be "infrequent and occasional." At several points in the decision, the findings cite and rely on the proposal for no more than 20 flights per month to address compliance with several approval criteria,

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> "[T]he flight patterns of the airplanes will be predominantly limited to the applicants' own property. Opponents assert that the board does not have the authority to independently restrict or regulate flight patterns as it violates federal law. The applicants have consented to the conditions of approval, and therefore the board has the authority to enforce this condition even if it could not independently require such a condition of approval. Thus, condition of approval 13 is enforceable and does restrict the flight patterns in a manner that is consistent with the ODA inspection report and opponents' requests, which stated such flight patterns were possible and would help limit the noise impact on surrounding uses (the ODA inspector found that only the homes to the north will get noise during takeoffs and possibly on landings). Therefore, the condition of approval is feasible and supports the finding that the noise impact on the surrounding parties is not significant." Record 20.

including the noise standard at MCZO 137.060(a)(4). The findings appear to suggest that the county intended to impose a condition of approval limiting flights to no more than 20 per month.[9]

However, the only condition on this point is Condition 7, which states that "the use of the airport is limited to use solely by [intervenors] and, on an infrequent and occasional basis, by invited guests." None of the explicit conditions of approval limit the number of flights to 20 per month, or even to an infrequent and occasional basis. That limitation is expressly applied only to intervenors' guests, consistent with the language of ORS 215.283(2)(h).

Under the seventh assignment of error, petitioners argue that the county erred in failing to impose a condition limiting the number of flights by intervenors and their guests to 20 per month. According to petitioners, the county clearly relied on the proposed 20 flights per month in order to find compliance with several approval criteria, and therefore the county was required to impose a condition to ensure that no more than 20 flights per month occur.

Intervenors respond that the county commissioners intentionally chose not to impose a numerical cap on flights, because they did not want opponents counting the number of flights and claiming violations of the conditions of approval. According to intervenors, no condition of approval limiting the number of flights is necessary to comply with any

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[9] For example, one finding states:

> "* * * The applicants only request 20 monthly takeoffs and landings to be used by the owner and invited guests except in the case of emergency. The Board finds this amount is infrequent and occasional in this case. * * * The conditions of approval, expressly and by implication, limit the frequency of the takeoffs and landings to less than one per day, which constitutes occasional or infrequent. Moreover, this interpretation is consistent with the text of ORS 215.283(2)(h), as it was intended to allow invited guests and commercial agricultural air traffic, which in many instances could occur at least daily. Therefore, as conditioned, this application satisfies ORS 215.283(2)(h)." Record 14.

At another point, the findings state:

> "* * * [T]he airport is limited in scope by the conditions of approval to infrequent and occasional use solely by [intervenors] and by invited guests. * * *" Record 22.

approval criteria, and therefore the county did not err in imposing such a condition of approval.

As we read the findings, the county clearly considered the proposed limit of 20 flights per month to be an important factor in its findings of compliance with several approval criteria. For example, in addressing the noise standard at MCZO 137.060(a)(4), the county listed as the second reason for compliance the fact that "the numbers of flights are limited to infrequent and occasional use, an average of 20 flights per month." Record 20. As noted, the findings strongly suggest in several places that the county intended to impose a condition of approval to that effect. The commissioners may have later changed their mind on that point, as intervenors suggest, but the findings still read as if such a condition were intended. We conclude that remand is necessary for the county to either amend its findings to clarify that the number of flights per month is not a significant basis for finding compliance with applicable approval criteria, or impose a condition of approval limiting the number of flights per month.

The seventh assignment of error is sustained.

The county's decision is remanded.