BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OREGON AVIATION WATCH and WASHINGTON COUNTY CITIZEN ACTION NETWORK,
Petitioners,

vs.

WASHINGTON COUNTY,
Respondent,

and

ROBERT D. JOSSY,
Intervenor-Respondent.

LUBA No. 2013-111

FINAL OPINION
AND ORDER

Appeal from Washington County.

Sean T. Malone, Eugene, filed the petition for review and argued on behalf of petitioners.

Jacquilyn Saito-Moore, Assistant County Counsel, Hillsboro, filed a joint response brief and argued on behalf of respondent.

David C. Noren, Hillsboro, filed a joint response brief and argued on behalf of intervenor-respondent.

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

AFFIRMED 04/03/2014

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 a county ordinance that adopts the Residential Airpark Overlay District (RAOD) and applies it to residentially zoned land adjacent to the Sunset Airstrip to allow residents to construct an aircraft hangar, tie-down areas, and taxiways.

FACTS

The Sunset Airstrip is a private airport located on 14 acres, and subject to the county's private use airport overlay district. The Sunset Airstrip airport includes a runway and a 16-lot subdivision developed with dwellings, known as Sunset Orchard Estates. The 16 existing dwellings are part of an airpark development, a type of community designed around an airport, where the residents can store their airplanes on their residential lots, and access the runway via easements.

Intervenor-respondent (intervenor) Robert D. Jossy owns 18 lots that adjoin the Sunset Airstrip airport, totaling 79 acres, that are within a Goal 3 (Agricultural Lands) exception area and zoned for rural residential use. Intervenor seeks to develop the 18-lot subdivision as a residential airpark development. However, county staff took the position that accessory development such as hangars would not be permitted in the base rural residential zones applied to intervenor's subdivision, because hangars would be at least in part accessory to the adjoining airport, and under county regulations accessory development must be located on the same property as the primary development.

On January 25, 2013, intervenor requested that the county initiate a legislative proceeding to adopt a new residential airpark overlay district, and

apply the new district to the 18-lot subdivision.[1] In relevant part, the new district would authorize as accessory uses to a dwelling on each of the 18 lots (1) an aircraft hangar, (2) tie-down pads, (3) aviation fuel storage, and (4) taxiways.

The county planning commission conducted hearings on the proposed legislation, and recommended approval. The county board of commissioners conducted hearings on the recommendation, and on October 22, 2013, adopted Ordinance 772, which adopts the new overlay district and associated text amendments to Policy 28 (Airports) of the county's comprehensive plan. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners contend that allowing aviation related development such as hangars, tie-down pads, and taxiways outside the boundary of the Sunset Airport violates the Airport Planning Act at ORS 836.600 *et seq.* and administrative rules implementing the Airport Planning Act.

Under ORS 836.608(2), the county must establish a boundary showing areas in airport ownership that are developed or committed to airport uses described in ORS 836.616(2). The latter statute provides that local governments shall authorize within airport boundaries customary aviation-related activities including "aircraft hangars, tie-downs," and "other activities incidental to the normal operation of an airport." Petitioners contend that in *Neighbors Against Apple Valley Expansion (NAAVE) v. Washington County*,

[1] Initially, intervenor proposed that the new overlay district also apply to four contiguous parcels that are zoned for resource use. This proposal was later removed from consideration, after objections from the Department of Land Conservation and Development.

59 Or LUBA 153, 162-63 (2009), LUBA held that ORS 836.616 does not authorize the county to approve airport uses, in that case a hangar, outside the county-designated boundaries of the airport. For the same reason, petitioners argue, the county can apply the RAOD to the subject 18-lot subdivision consistently with ORS 836.616 only if it expands the Sunset Airstrip boundary to include those lots.

The county and intervenor argue, and we agree, that petitioners have not demonstrated that applying the RAOD to the subject 18-lot subdivision to allow hangars, tie-downs and taxiways as accessory uses to dwellings is inconsistent with ORS 836.616 or any other statute or administrative rule. The *NAAVE* case involved a personal use airport on a parcel zoned for exclusive farm use, and a proposal to site a hangar for that personal use airport on a portion of the parcel that was outside the airport boundary. The present case concerns adjoining lots that are not in common ownership with the property inside the airport boundary, and that are subject to different zoning schemes. We disagree with petitioners that our holding in *NAAVE* or any statute or administrative rule cited to us prohibits the county from adopting a rural residential zone that allows hangars, tie-down pads, and taxiways as accessory uses to dwellings on lots in that residential zone.

Indeed, as the parties discuss, OAR 660-013-0040(1)(a), which implements the Airport Planning Act, provides that an airport boundary shall include "[e]xisting and planned runways, taxiways, aircraft storage (excluding aircraft storage accessory to residential airpark type development), maintenance, sales, and repair facilities." Thus, under OAR 660-013-0040(1)(a) an airport boundary need not include "aircraft storage" accessory to residential airport development. Petitioners argue that even if "aircraft storage"

includes hangars and tie-down pads, the rule plainly requires that "taxiways" be included within airport boundaries, and therefore the RAOD is inconsistent with OAR 660-013-0040(1)(a) because it allows taxiways outside the airport boundary.

Petitioners cite no basis in the rule or elsewhere to conclude that "aircraft storage" is talking about something other than hangars and tie-down pads, and on its face "aircraft storage" appears to include those uses. Thus, adopting a zone that allows hangars and tie-down pads as accessory to residential airpark development outside an airport boundary is clearly consistent with the rule.

With respect to "taxiways," we understand and the parties do not contend otherwise that the "taxiways" authorized on lots as accessory to dwellings under the RAOD mean paved or hardened driveways that allow the resident to move their airplane between the storage site and the airport. We do not believe that OAR 660-013-0040(1)(a) requires that such a driveway be included within the airport boundary. It is implicit in the OAR 660-013-0040(1)(a) exclusion for "aircraft storage accessory to residential airpark development" that aircraft stored outside the airport boundary be able to move between the storage site and the airport. The scope of that exclusion is significantly and pointlessly eroded if all driveways or similar surfaces on residentially developed property leading to the property owner's storage site (which may be a hangar located behind the dwelling) must be included within the airport boundary. Stated differently, the "taxiways" authorized on residential lots under the RAOD are not the type of "taxiways" that OAR 660-013-0040(1)(a) is concerned with. The "taxiways" the rule appears to be concerned with are airport surfaces intended to allow airplanes to safely maneuver onto the runway in preparation

for take-off or off the runway after landing, not driveways on nearby residentially developed lots.

In sum, petitioners have not demonstrated that the Airport Planning Act or its implementing administrative rule prohibits the county from applying the RAOD to the 18-lot subdivision without also extending the airport boundary.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Statewide Planning Goal 6 (Air, Water and Land Resources Quality) is to "maintain and improve the quality of the air, water and land resources of the state." Goal 6 further provides:

> "All waste and process discharges from future development, when combined with such discharges from existing developments shall not threaten to violate, or violate applicable state or federal environmental quality statutes, rules and standards. With respect to the air, water and land resources of the applicable air sheds and river basins described or included in state environmental quality statutes, rules, standards and implementation plans, such discharges shall not (1) exceed the carrying capacity of such resources, considering long range needs; (2) degrade such resources; or (3) threaten the availability of such resources."

Goal 6 requires that, in adopting a post-acknowledgment plan amendment to allow a particular use, the local government establish that there is a reasonable expectation that the use will also be able to comply with state and federal environmental quality standards that the use must satisfy in order to be built. *Friends of the Applegate v. Josephine County*, 44 Or LUBA 786, 802 (2003).

Petitioners argue that Ordinance 772 effectively expands airplane operations at the Sunset Airstrip, and therefore is subject to review under Goal 6 with respect to three types of "discharges": (1) increased lead pollution in the Hillsboro area airshed from leaded gas used in the engines of small private

planes, (2) storage of leaded aviation gas on residential properties, and (3) noise impacts on surrounding properties from flight operations at the airport.

A. Lead Pollution from Airplane Engines

Petitioners cite to evidence that lead levels over the Hillsboro Airport, which is located approximately four miles from the Sunset Airstrip, currently exceed the National Ambient Air Quality Standards threshold set by the federal Environmental Protection Agency (EPA), and also OAR 340-202-0130, the ambient air standard for lead established by the Oregon Department of Environmental Quality (DEQ). Because the Sunset Airstrip is part of the same airshed as the Hillsboro Airport, petitioners argue, the county must demonstrate that it is reasonable to expect that expanded use of the Sunset Airstrip will not violate state or federal ambient air standards for lead.

Respondents argue initially that Goal 6 is concerned with discharges of pollutants by the approved future development itself, and is not concerned with other discharges from other sources that the development may trigger. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101, 113 (1995) (Goal 6 applies to discharges from a proposed shopping mall, but not to secondary discharges such as additional emissions from vehicles traveling to and from the shopping mall). According to respondents, the hangars, tie-down pads and taxiways that Ordinance 772 authorizes as accessory uses to airpark dwellings have no discharges in themselves, and therefore Ordinance 772 does not implicate Goal 6.

Despite the broad language of *Marcott Holdings, Inc.*, it may be possible that secondary discharges associated with development, such as vehicle emissions, could implicate Goal 6, but only if the state or federal environmental regulation that applies to the proposed development or the particular discharge

at issue so provide. As we held in *Friends of the Applegate*, Goal 6 requires that the county determine that the proposed development will be able to comply with state and federal environmental quality standards that the use must satisfy in order to be built. In other words, Goal 6 is concerned with state or federal environmental standards that apply directly to regulate the discharges of the proposed development. For example, at issue in *Friends of the Applegate* were federal Clean Water Act and Endangered Species Act standards that would apply directly to the discharges of the proposed mining operation.

In the present case, petitioners have identified no state or federal environmental regulations or permit requirements that would apply to approval of hangars, tie-down pads, or taxiways. For that matter, petitioners have not identified any state or federal environmental regulations that would apply to approval of additional small aircraft flight operations at Sunset Airstrip. That there exist state and federal ambient air standards for lead within an airshed does not mean that those regulations directly regulate discharges of development within that airshed. OAR 340-202-0050(2) states that ambient air standards "are not generally used to determine the acceptability or unacceptability of emissions from a specific source of air contamination." Petitioners have not explained why (or how) the cited ambient air standards for lead will apply directly to the proposed hangars, tie-down pads and taxiways, or any associated discharges from small aircraft engines, or cited to any state or federal environmental regulations that would apply. Accordingly, petitioners have not demonstrated that the county's decision implicates Goal 6 with respect to ambient air lead pollution. This sub-assignment of error is denied.

B. Storage of Leaded Aviation Gas

Ordinance 772 also authorizes a dwelling owner to store aviation gas on the residential lot, as an accessory use to the dwelling. Petitioners argue that Goal 6 applies to that proposed use. Although it is not clear, petitioners appear to argue that stored fuel might spill, and such spillage might constitute a "discharge" for purposes of Goal 6. If that is petitioners' argument, petitioners have not established that accidental spillage of fuel would constitute a "discharge" under Goal 6. In any case, petitioners identify no state or federal environmental standards that would apply to storage or spillage of aviation fuel on the subject property. This sub-assignment of error is denied.

C. Noise from Airplane Operations

Petitioners argue that the county failed to demonstrate that noise discharges from small airplanes at the Sunset Airstrip are reasonably likely to comply with DEQ noise standards.

Respondents argue that petitioner does not cite any applicable DEQ noise regulations that govern the hangars, tie-down pads, and taxiways authorized on residential lots under Ordinance 772. We generally agree. As explained below, DEQ has regulations that set standards for noises generated at airports. We assume, without deciding, that those standards might apply to noise generated by airplanes using a taxiway, for example, authorized under Ordinance 772. However, even under that assumption, petitioner has not demonstrated that Ordinance 772 is inconsistent with Goal 6 or that further county review is necessary.

Petitioners cite first to OAR 340-035-0035, which is part of a DEQ rule providing noise control regulations for industry and commerce. Respondents point out that, as the relevant terms are defined at OAR 340-035-0015(24),

industrial and commercial noise means noise "generated by a combination of equipment, facilities, operations, or activities employed in the production, storage, handling, sale, purchase, exchange, or maintenance of a product, commodity, or service" and that definition does not appear to include noises generated by airplanes.

We understand petitioners to argue that OAR 340-035-0035 standards for industry and commercial noises do apply to airplane noises at Sunset Airstrip, because OAR 340-035-0035(5)(j) exempts from the requirements of the rules "[s]ounds generated by the operation of aircraft and subject to pre-emptive federal regulation." We understand petitioner to argue that airplane operations at Sunset Airstrip are not preempted by federal regulation, and therefore the exemption does not apply, and the industry and commercial noise standards therefore control. Putting aside the question of federal preemption, we agree with respondents that petitioners have not demonstrated that the standards for industry and commercial uses apply to airplane operations at Sunset Airstrip. The exemption at OAR 340-035-0035(5)(j) indicates that some industrial and commercial uses can involve aircraft operations, but that does not mean that all aircraft operations are industrial or commercial uses subject to OAR 340-035-0035.

As respondents point out, the DEQ noise regulations include a specific rule, OAR 340-035-0045, that supplies noise regulations for airports. OAR 340-035-0045(2) sets an airport noise criterion of 55 decibels as an annual average for day-night operations. Generally, compliance with this criterion is evaluated and monitored by means of a "noise impact boundary." However, for existing non-air carrier airports such as Sunset Airstrip, OAR 340-035-0045 provides only a process to deal with complaints about noise, under which DEQ

can require the operator to submit information reasonably necessary for the calculation of the noise impact boundary. OAR 340-035-0045(3)(b). The county found no noise complaints on record regarding Sunset Airstrip. Record 105. We understand petitioners to argue that Goal 6 requires the county adopt findings addressing whether, in the event of future complaints, the Airstrip will be able to comply with the process set out in OAR 340-035-0045(3)(b). We disagree with petitioners, for several reasons. Most obviously, as respondents point out, administration and enforcement of the DEQ noise rule has been suspended since 1991. OAR 340-035-0110. That problem aside, the complaint-driven process set out OAR 340-035-0045(3)(b) for airports like the Sunset Airstrip is not the kind of state environmental regulation that can be meaningfully evaluated for purposes of Goal 6, when a local government adopts a comprehensive plan amendment such as Ordinance 772. Petitioners do not suggest, and we cannot imagine, any way the county could possibly evaluate whether there is a "reasonable expectation" that airplane noises associated with uses allowed under Ordinance 772, or all noises associated with the airport itself for that matter, would pass muster under the OAR 340-035-0045(3)(b) process, in the event of a future complaint. Stated differently, Goal 6 does not require the county to engage in meaningless speculation regarding how DEQ would resolve a future noise complaint.

This sub-assignment of error is denied.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners contend that Ordinance 772 is inconsistent with three county comprehensive plan policies.

A. Policy 4

Washington County Comprehensive Plan (WCP) Policy 4 states that "[i]t is the policy of Washington County to maintain or improve existing air quality."

The county adopted a finding addressing WCP Policy 4, stating that "[t]he RAOD does not require the siting of hangars or storage of aircraft on any of the lots within its boundaries. Notwithstanding, the county is not primarily responsible for air quality and property owners will be required to be consistent with requirements of other agencies, such as DEQ." Record 105.

Petitioners repeat their arguments under Goal 6 and the DEQ standards for ambient lead levels, arguing that the county's above-quoted finding fails to explain how the introduction of additional lead pollution into the airshed under the RAOD will "maintain or improve existing air quality" as required by WCP Policy 4.

Respondents argue that Policy 4 simply restates Goal 6 as it applies to air quality, and requires no more than Goal 6 requires with respect to compliance with DEQ standards. Because petitioners do not identify any DEQ air quality standards that apply to the aircraft storage uses authorized by Ordinance 772, respondents argue, no further demonstration is required under Policy 4. Respondents also note that, because the adoption of Ordinance 772 was a legislative decision, findings are not generally required, although "there must be enough in the way of findings or accessible material in the record of the legislative act to show that applicable criteria were applied and that required considerations were indeed considered." *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n 6, 38 P3d 956 (2002).

Petitioners seem to take the position that Policy 4 imposes on the county an obligation independent of Goal 6 and DEQ's requirements, to "maintain or improve existing air quality," and the finding and record are insufficient to explain how the RAOD is consistent with that independent obligation. The above-quoted finding seems to take a contrary position, that the county is not primarily responsible for air quality issues, at least those associated with aircraft storage allowed under the RAOD, and it seems to rely on other agencies' requirements, such as DEQ, to ensure compliance with Policy 4. Thus framed, the question is primarily one of the meaning of Policy 4.

While there may be problems with the county's derivative view of Policy 4, petitioners have not demonstrated that that view is inconsistent with the text, purpose or underlying policy of Policy 4, or is otherwise reversible under the deferential standard of review we must apply to a governing body's interpretations of comprehensive plan language. ORS 197.829(1); *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010). Policy 4 echoes the language of Goal 6, to "maintain and improve" air quality, and we cannot say that the limited understanding of Policy 4 expressed in the county's findings is implausible, or that petitioners' view that Policy 4 imposes an (unstated) obligation independent of Goal 6 is the only plausible interpretation.

This sub-assignment of error is denied.

B. Policy 28, Implementing Strategies (c) and (f)

WCP Policy 28 is entitled "Airports," and states that it is the county's policy to "protect the function and economic viability of existing public use airports, while ensuring public safety and compatibility between airport uses and surrounding land uses for public use airports identified by the Oregon Department of Aviation." Ordinance 772 added text to Policy 28 to allow

residential airpark development in a Residential Airpark Overlay District, including two new implementing strategies, (g) and (h).

Petitioners argue that the RAOD is inconsistent with two unamended implementing strategies, (c) and (f). Strategy (c) states that the county will "[w]ork with airport sponsors to coordinate with the Federal Aviation Administration (FAA) in promoting FAA-registered flight patterns and FAA flight behavior regulations in order to protect the interests of County residents living near airports." Petitioners argue that the record includes no indication that the county coordinated with the FAA in approving Ordinance 772. According to petitioners, coordination is necessary because an agreement exists between the Hillsboro Airport and the owner of Sunset Airstrip that, petitioners argue, is inconsistent with FAA regulations.

Respondents argue, and we agree, that Strategy (c) does not directly require coordination with the FAA, but only that the county "work with airport sponsors" to coordinate with the FAA to promote FAA-registered flight patterns and FAA flight behavior regulations. More to the point, petitioners do not explain why Ordinance 772, which merely authorizes hangars, tie-downs and taxiways" on property adjoining the Sunset Airstrip, implicates Strategy (c). As far as petitioners have demonstrated, the aircraft storage authorized by Ordinance 772 has nothing to do with promoting FAA-registered flight patterns or FAA flight behavior regulations. As to the agreement between Hillsboro Airport and the owners of the Sunset Airstrip, petitioners do not bother to explain what Ordinance 772 has to do with that agreement, or vice versa.

Strategy (f) states that the county will "[d]iscourage future development of private landing fields when they are in proximity to one another, or where they are near other public airports and potential airspace conflicts are

determined to exist by the FAA or [Oregon Department of Aviation]." Petitioners argue that the RAOD is inconsistent with Strategy (f) because it increases aviation activity in an already crowded airspace. However, as respondents note, Strategy (f) is concerned with "future development of private landing fields." Ordinance 772 has nothing to do with future development of private landing fields. Ordinance 772 has to do with development of residential property adjacent to a private landing field. Petitioners' arguments under Strategies (c) and (f) do not provide a basis for reversal or remand. These sub-assignments of error are denied.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

The Sunset Airport is subject to a license issued by the Oregon Department of Aviation (DOA) that includes a condition of approval that limits easement access to the airstrip to no more than 25 dwellings. As noted, the Sunset Airport currently is developed with 16 dwellings with easement access to the airport. Petitioners argue that Ordinance 772 is inconsistent with that DOA license condition of approval, because it authorizes aircraft storage facilities on 18 additional residential lots, and presumably those dwellings will also enjoy easements to access the airport.

Respondents argue that the possibility that the 18 additional residential lots might be developed in violation of the DOA license for Sunset Airport implicates no statewide planning goal, comprehensive plan provision or land use regulation, and that petitioners have not demonstrated that that possibility provides a basis for remand.

We agree with respondents. The current DOA license is limited to 25 easements, but petitioners offer no reason to believe that the license cannot be

amended to allow additional easements to access the airport or that no more than 25 easements will be granted, with the result that some of the 18 lots will not be granted easements. Even if the DOA license is not or cannot be amended, the act of applying the RAOD to the subject 18 lots does not violate the license. The DOA condition of approval would be violated only if, sometime in the future, more than 25 easements are granted. In that event, DOA has the authority to revoke the license. ORS 836.110. In any event, petitioners have not demonstrated that either the license or the statutes governing DOA licenses constitute goal, plan provision or land use regulations that must be applied or considered in approving the RAOD.

The fourth assignment of error is denied.

The county's decision is affirmed.