BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OREGON COAST ALLIANCE,
*Petitioner*,

vs.

CURRY COUNTY,
*Respondent*,

and

ELK RIVER PROPERTY DEVELOPMENT, LLC,
*Intervenor-Respondent.*

LUBA No. 2015-006

FINAL OPINION
AND ORDER

Appeal from Curry County.

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

M. Gerard Herbage, County Counsel, filed a response brief and argued on behalf of respondent.

Nick Klingensmith, Eugene, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Bill Kloos.

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

REMANDED 05/15/2015

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**

Petitioner appeals a county board of commissioners' decision approving a conditional use permit for an 18-hole golf course, on property zoned for exclusive farm use (EFU).

**FACTS**

The subject property is the southerly 354-acre portion of a 1,008-acre tract, known as the Knapp Ranch, which is zoned EFU. The property is located between Highway 101 and the Pacific Ocean, and abuts the Port Orford urban growth boundary to the south and east. The property is situated on a bench that is elevated approximately 100 feet above the remainder of the Knapp Ranch to the north and the ocean to the west.

Intervenor-respondent (intervenor) proposes to construct an 18-hole golf course on approximately 198 acres of the 354-acre subject property, leased from Knapp Ranch. The golf course is a type known as "Scottish-style," meaning generally a course that is contoured and seeded with grasses maintained at various lengths, with no trees or other vegetation. In addition, intervenor proposes four accessory structures: (1) a 10,000-square-foot two-story clubhouse with a restaurant, lounge, pro shop, locker rooms, offices, and storage, (2) a 7,500-square-foot maintenance/storage facility, (3) a small reception or check-in facility, and (4) a small restroom/vendor's station on the course.

Intervenor submitted a geologic report that identified several geologic hazards on the property, including sea cliff erosion and coastal bluff retreat. The geologic consultant recommended several measures to reduce risk from these hazards.

The county planning commission approved the application. Petitioner appealed the planning commission decision to the county commissioners, who held a *de novo* hearing and, on January 15, 2015, issued the county's final decision approving the application. This appeal followed.

**FIRST ASSIGNMENT OF ERROR**

In three sub-assignments of error, petitioner argues that the county erred in failing to apply or in incorrectly applying comprehensive plan and code provisions that concern coastal shorelands and development within geologic hazard areas.

The subject property is bordered on the west by bluffs descending to the Pacific Ocean. In the area of the subject property, the county's comprehensive plan defines the coastal shoreland boundary for purposes of Statewide Planning Goal 17 (Coastal Shorelands) as the "top of the cliff." The county concluded that all proposed development would occur east of the "top of the cliff," and therefore no plan policies or regulations implementing Goal 17 apply. The first sub-assignment of error challenges that conclusion.

Curry County Zoning Ordinance (CCZO) 3.252 requires a geologic hazard assessment for development in "areas identified as geologic hazard areas[.]" The county concluded that no geologic hazard assessment was required, because the subject property is not identified as a geologic hazard area in the comprehensive plan. Nonetheless, intervenor submitted a geologic hazard assessment, which the county reviewed against the CCZO 3.252 criteria and approved. In the second and third sub-assignments of error, petitioner challenges the county's conclusions under CCZO 3.252.

**A. First Sub-Assignment of Error: Coastal Shoreland Boundary**

Petitioner argues that Curry County Comprehensive Plan Policy 15.3 requires that where the coastal shoreland boundary is defined as the top of the seacliff, the location of the boundary "will be modified on a case by case basis to be a specific line as defined by analysis of the cliff erosion geological hazard as required under the 'Development in Areas of Geologic Hazard' (Section 3.252) of the Zoning Ordinance." Accordingly, petitioner argues that Policy 15.3 requires the county to apply CCZO 3.252 to modify or more precisely locate the coastal shoreland boundary in the area of the proposed golf course development. Petitioner contends that, until the county has identified the precise location of the coastal shorelands boundary pursuant to a geologic hazards assessment prepared under CCZO 3.252, the county is in no position to conclude that development will not occur within the boundary, and thus in no position to conclude that comprehensive plan policies implementing Goal 17 do not apply to the proposed development. Further, petitioner argues that, although intervenor in fact submitted a geological hazard assessment that purports to comply with CCZO 3.252, that assessment does not locate the coastal shorelands boundary as required by CCZO Policy 15.3.

Intervenor responds that the above-quoted language of Policy 15.3 was deleted by Ordinance 14-06, which was adopted on June 11, 2014, prior to the date the present conditional use permit application was filed. Therefore, intervenor argues, the deleted language does not apply to the present application. *See* ORS 215.427(3) (approval or denial of a permit application shall be based upon the standards and criteria that were applicable at the time the application was first submitted). Intervenor also argues that Ordinance 14-06 included LIDAR (light detection and ranging) images that illustrate the

county's understanding of where the coastal shoreland boundary is located, and that intervenor used the LIDAR images referenced in Ordinance 14-06 to ensure that all proposed golf course development is inland of the boundary.

We agree with intervenor that because the language in CCCP Policy 15.3 that petitioner relies upon was deleted and does not govern the present application, petitioner's arguments under the first sub-assignment of error do not provide a basis for reversal or remand.

**B. Second Sub-Assignment of Error: CCZO 3.252**

As noted, the county concluded that CCZO 3.252 does not apply directly to require a geological hazard analysis, because the subject property is not within an area identified in the county's comprehensive plan as a geologic hazard area. Petitioner does not dispute that the subject property is not located in an area that is identified in the comprehensive plan as a geologic hazard area. Nonetheless, petitioner contends that a CCZO 3.252 geologic hazard assessment is required, for three reasons.[1] Petitioner argues that the county erred in suggesting that a geologic hazard assessment was not required.[2]

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[1] The first reason is Policy 15.3, discussed above. The second is CCCP Policy 6, which requires a geologic hazard assessment for development within the coastal shorelands boundary of "seacliffs and coastal headlands in the county that are eroding as part of the natural coastal erosion process[.]" The third is language in CCZO 3.250, which describes the county's Natural Hazards overlay zone, and which petitioner argues should be read to require a geologic hazard assessment for certain areas that are not identified as hazard areas in the comprehensive plan.

[2] The county's findings state:

> "* * * As a threshold matter, the Board finds that the Applicant may have gone beyond what was required of it in this instance, as these standards [CCZO 3.252] apply to 'areas identified as

Because intervenor in fact submitted a geologic hazard assessment, and the county reviewed and approved the same, petitioner's dispute with the county's suggestion at Record 19-20 that an assessment may not have been required is a hypothetical dispute. In addition, below we address and reject petitioner's single challenge to the county's approval of the geologic hazard assessment. Therefore, resolution of petitioner's arguments that a geologic hazard assessment is required, and intervenor's responses and waiver challenges, would be advisory and pointless. Accordingly, we do not address those arguments.

**C. Third Sub-Assignment of Error: Geologic Hazard Assessment**

As explained, intervenor submitted a geologic hazards assessment, even though intervenor believed (and the county agreed) that no assessment was required. The assessment recommended certain measures be taken to reduce risk from geologic hazards on the property, particularly the sea cliffs. The measures include monitoring irrigation and ground saturation, and prohibiting golfers from approaching the cliff edge. The county found that the assessment satisfied the CCZO 3.252 criteria, and incorporated its suggested measures into the conditions of approval.

Under this sub-assignment of error, petitioner argues that the county misconstrued CCZO 3.252(1)(a) and (b), which provide:

> "* * * The geologic hazard assessment shall include one of the following:

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> geologic hazard areas,' and the subject property is not identified as a natural hazard area by the Curry County Comprehensive Plan." Record 19-20.

> "(a) A certification that the development activity can be accomplished without measures to mitigate or control the risk of geologic hazard to the subject property or to adjacent properties resulting from the proposed development activity[; or]
>
> "(b) A statement that there is an elevated risk posed to the subject property or to adjacent properties by geologic hazards that requires mitigation measures in order for the development activity to be undertaken safely and within the purposes of Section 3.250."

If the assessment results in the certification described in CCZO 3.252(1)(a), development activity may proceed without further review under CCZO 3.252. However, if the assessment results in the statement described in CCZO 3.252(1)(b), then the applicant must apply for and receive an administrative decision under other provisions of CCZO 3.252 "prior to any disturbance of the soils or construction." CCZO 3.252(3).

Petitioner argues that the measures the consultant recommended to reduce risk compel the conclusion that "there is an elevated risk posed to the subject property * * * by geologic hazards that requires mitigation measures in order for the development activity to be undertaken safely * * *," and therefore the county erred in concluding that the assessment resulted in the certification described in CCZO 3.252(1)(a) rather than the statement described in CCZO 3.252(1)(b).

The assessment concluded that "proposed development activity can be accomplished without measures to mitigate or control the risk of geologic hazards to the subject property or to adjacent properties," in part because the "proposed development would decrease erosion and storm water runoff" from the subject property, principally by planting stabilizing vegetation. Record 333. The county commissioners rejected petitioner's argument below, reading

CCZO 3.252(1)(a) and (b) together to the effect that there is an "elevated risk" of geological hazard only if the development causes the risk of geologic hazard to increase above its pre-development state.[3] Because the assessment

[3] The findings state:

> "[Petitioner] has argued that the best practices outlined in the report (such as monitoring irrigation, ground saturation, and prohibiting golfers from approaching the cliff's edge) must be viewed as 'mitigation measures,' in the meaning of CCZO 3.252(1)(b), and that the presence of 'mitigation measures' establishes that the geologic hazard assessment report implicitly includes a 'statement that there is an elevated risk posed to the subject property or to adjacent properties.' However, the Board does not interpret its code in the manner proposed by [petitioner]. There is no statement in the geologic hazard assessment report that the proposal would lead to elevated risk, and including a description of best practices as part of a thorough geologic hazard report is not the equivalent of a statement that there is an elevated risk.
>
> "In addition, CCZO 3.252(1)(a) speaks of mitigating or controlling the risk of geologic hazard to the subject property or to adjacent properties *resulting from* the proposed development activity. This standard does not require geologic hazard to be measured according to an absolute value; it requires measurement of the relative change in geologic hazard. In other words, would the proposed development result in the situation becoming more or less safe than it was to begin with? In light of the Applicant's geologic report, the pre-development situation includes actively eroding sea-cliff, embayments, and erosion-aggravating invasive gorse plants, and these existing conditions are likely to present greater geologic hazards than will exist on the property after the proposed management strategies are implemented, including re-vegetation with native plants, careful monitoring of irrigation saturation, and installation of a bioswale to detain surface runoff and discharge it in a controlled, non-erosive manner. The Board

concludes that, with proposed measures to decrease erosion etc., the geological risk would *decrease* from its pre-development state, the commissioners concluded that CCZO 3.252(1)(a) rather than (b) applies and is satisfied.

On appeal, petitioner challenges that interpretation, arguing that the measures recommended in the assessment constitute "mitigation" within the meaning of CCZO 3.252(1)(b), and are not merely "best practices" as the county's findings characterize them. Petitioner also disputes the commissioners' view that "elevated risk" as that term is used in 3.252(1)(b) is concerned with whether geologic risk is greater before or after development. Petitioner's arguments are difficult to follow, but we understand petitioner to argue that it makes no sense to compare the relative hazards present before and after development, where it is the development itself in proximity to a geologic hazard that increases risk, and relying on mitigation measures to reduce that increased risk below pre-development levels illustrates that there is "elevated risk" that requires mitigation and therefore the additional review required under CCZO 3.252(1)(b) and 3.252(3).

A governing body's interpretation of a local land use regulation must be affirmed unless the interpretation is inconsistent with the express language, purpose or policy underlying the regulation. ORS 197.829(1)(a)-(c).[4] Under

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> finds that the proposed development activity will result in a lower geologic hazard than currently exists on the subject property." Record 20.

[4] 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:

that deferential standard of review, LUBA must affirm the governing body's local code interpretation as long as the interpretation is "plausible." *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010). Here, we cannot say that the commissioners' interpretation to the effect that measures recommended in the assessment to reduce erosion do not constitute "mitigation" as that term is used in CCZO 3.252(1)(a) and (b) is inconsistent with the express language, purpose or policy underlying those code provisions, or implausible. Similarly, petitioner has not demonstrated that the commissioners' view that the "elevated risk" language of CCZO 3.252(1)(b) is concerned with situations where post-development geologic hazards exceed pre-development hazards is inconsistent with the express language, purpose or policy underlying those code provisions. The language of CCZO 3.252(1)(b) in context can be construed in multiple ways, and we cannot say that the commissioners' understanding of that text and context is implausible. Accordingly, we must affirm those interpretations.

The third sub-assignment of error is denied.

The first assignment of error is denied.

**SECOND ASSIGNMENT OF ERROR**

As explained, the proposed 198-acre golf course is a "Scottish-style" course, meaning that it lacks trees or other vegetation to act as buffers between fairways. As a result, the proposed course requires additional acreage for

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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[.]"

safety, compared to other styles of golf courses that provide trees and vegetation between fairways as buffers.

OAR 660-033-0130(20) sets out standards and limitations that apply to approval of golf courses in an EFU zone, and describes a "golf course" in relevant part to include a regulation 18-hole golf course that is "generally characterized by a site of about 120 to 150 acres of land[.]" OAR 660-033-0130(20)(a).[5] In addition, OAR 660-033-0130(20)(c) prohibits "non-

[5] OAR 660-033-0130(20) provides, in relevant part:

> "'Golf Course' means an area of land with highly maintained natural turf laid out for the game of golf with a series of nine or more holes, each including a tee, a fairway, a putting green, and often one or more natural or artificial hazards. A 'golf course' for purposes of ORS 215.213(2)(f), 215.283(2)(f), and this division means a nine or 18 hole regulation golf course or a combination nine and 18 hole regulation golf course consistent with the following:
>
> "(a) A regulation 18 hole golf course is generally characterized by a site of about 120 to 150 acres of land, has a playable distance of 5,000 to 7,200 yards, and a par of 64 to 73 strokes;
>
> "(b) A regulation nine hole golf course is generally characterized by a site of about 65 to 90 acres of land, has a playable distance of 2,500 to 3,600 yards, and a par of 32 to 36 strokes;
>
> "(c) Non-regulation golf courses are not allowed uses within these areas. 'Non-regulation golf course' means a golf course or golf course-like development that does not meet the definition of golf course in this rule, including but not limited to executive golf courses, Par three golf courses, pitch and putt golf courses, miniature golf courses and driving ranges[.]"

regulation golf courses," which term it defines as "a golf course or golf course-like development that does not meet the definition of golf course in this rule, including but not limited to executive golf courses, Par three golf courses, pitch and putt golf courses, miniature golf courses and driving ranges."

Petitioner argues that the proposed Scottish-style golf course does not meet the definition of "golf course" at OAR 660-033-0130(20)(a), because it occupies 198 acres, which exceeds the "about 120 to 150 acres" that "generally" characterizes a regulation 18-hole golf course.

The county rejected that argument below, noting the qualifying language in the description: a golf course "*generally* characterized by a site of *about* 120 to 150 acres of land[.]" (Emphasis added.) The county also noted testimony that additional acreage is necessary in the present case due to steep slopes, the need to avoid wetlands, and conditions imposed to keep golfers away from bluff areas. Record 16. The county concluded that the proposed 198-acre golf course qualifies as a regulation 18-hole golf course described in OAR 660-033-0130(20)(a).

The meaning of administrative rule language is determined by analysis of its text, context and, if available, legislative history. *See Fritch v. Clackamas County*, 68 Or LUBA 184, 187-188, *aff'd*, 260 Or App 767, 320 P3d 675 (2014). We agree with the county and intervenor that OAR 660-033-0130(20)(a)'s description of a regulation 18-hole golf course that is "generally characterized by a site of about 120 to 150 acres of land" is not meant to impose a strict upper limit of 150 acres. The qualifications "generally" and "about" do not denote strict limits. The proposed Scottish-style course otherwise fits within the description of a regulation 18-hour golf course in terms of par and playable distance, and bears no resemblance to the examples

of non-regulation golf courses listed in OAR 660-033-0130(20)(c), such as executive or par 3 golf courses. The fact that it is a "Scottish-style" course with no vegetative buffers between the fairways does not demonstrate that it is not a "regulation" golf course within the meaning of OAR 660-033-0130(20). Petitioner has not demonstrated that the county erred in concluding that the proposed golf course qualifies as a regulation 18-hole golf course as that term is described in OAR 660-033-0130(20).

The second assignment of error is denied.

**THIRD ASSIGNMENT OF ERROR**

Under OAR 660-033-0120, Table 1, certain "Parks/Public/Quasi-Public" uses, including public or private schools, churches, public and private parks, community centers, and "[g]olf courses on land determined not to be high-value farmland," are allowed on EFU lands, subject to standards at OAR 660-033-0130(2).

OAR 660-033-0130(2)(a) as amended in 2010[6] provides:

> "*No enclosed structure with a design capacity greater than 100 people, or group of structures with a total design capacity of greater than 100 people, shall be approved* in connection with the use within three miles of an urban growth boundary, unless an exception is approved pursuant to ORS 197.732 and OAR chapter 660, division 4, or unless the structure is described in a master

[6] OAR 660-033-0130 was revised in 2010 in response to *Young v. Jackson County*, 58 Or LUBA 64 (2008), *aff'd* 227 Or App 290 (2009), which held that the previous version of the rule regulating assemblies on EFU land within three miles of an urban growth boundary treated churches and secular establishments unequally in contravention of the Federal Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 USC § 2000cc *et seq.* (2001). The rule was revised to add a broadly applicable limit on a structure's "design capacity" in order to treat churches and other uses equally.

> plan adopted under the provisions of OAR chapter 660, division 34." (Emphasis added.)

Thus, under OAR 660-033-0120, Table 1, and OAR 660-033-0130(2)(a), a golf course, school, church or other listed "Quasi-public" use that is located within three miles of an urban growth boundary must include no enclosed structures or group of structures that exceed a "design capacity" of 100 people.

### A. OAR 660-033-0130(2)(a) "Design Capacity"

As noted, intervenor proposed and the county approved a two-story, 10,000-square-foot clubhouse, which includes a restaurant, lounge, pro shop, locker rooms, administrative offices and storage for golf carts, etc. In addition, the county approved a separate 7,500-square-foot maintenance/storage structure, and two other small structures.

Petitioner argues that the county erred in concluding that the proposed structures are consistent with the OAR 660-033-0130(2)(a) limitation on a structure or group of structures with a total "design capacity" of 100 people or less. In the proceedings before the county, the county understood petitioner to argue that "design capacity" is equivalent to the concept of "maximum occupancy," and that the county can approve the proposed use only if it finds that the total maximum occupancy of the 10,000-square-foot clubhouse and the 7,500-square-foot storage facility is no more than 100 persons.

The county concluded that "design capacity" is not the same as "maximum occupancy." The county's findings state:

> "* * * the Rule would have simply used the term 'maximum occupancy' if that is what it had meant, and that by using the term 'design capacity,' the drafters of the rule must have intended a concept of how many people the building was designed to accommodate, in light of the overall use proposed." Record 12.

The county also concluded that "'design capacity' is intended to invoke a more flexible concept than 'maximum occupancy,' and the Applicant has demonstrated that, under normal operation, the buildings will not be used to accommodate more than 100 people at any given time." Record 14-15. The "normal operation" language is based on intervenor's testimony that the maximum number of golfers an 18-hole course can accommodate is four golfers multiplied by 18 holes, or 72 golfers. Intervenor assumed an additional 16 to 32 golfers could be on the property either arriving to play or having completed play. Of that total number, intervenor stated that, assuming half are playing golf, the "number of golfers who might utilize the clubhouse facilities at one time would be approximately 50." Record 277.

Petitioner first argues that the county erred in interpreting OAR 660-033-0130(2)(a) to be satisfied based on the number of persons anticipated to use the structures "under normal operation," which petitioner suggests would allow oversized structures designed to accommodate more than 100 persons in other than "normal" circumstances. Petitioner argues that "design capacity" refers to the maximum number of people a structure is *designed* to accommodate, not the number of persons anticipated to use the structure at any one time.

We generally agree with petitioner that "design capacity" as used in OAR 660-033-0130(2)(a) is not determined based on the number of persons the developer anticipates are likely to *use* the structure at any given time, under normal circumstances. The phrase "design capacity" plainly denotes the capacity for human occupation that a structure is *designed* for. The focus of OAR 660-033-0130(2)(a) is on design capacity, not anticipated usage under

normal circumstances.[7] To illustrate the distinction, a restaurant designed to seat 150 patrons clearly would not comply with OAR 660-033-00130(2)(a), even if there is testimony that less than 100 patrons are likely to use it at any given time under normal circumstances.

The parties and the findings discuss at length whether "design capacity" as used in OAR 660-033-0130(2)(a) is equivalent to the concept of "maximum occupancy." The parties appear to agree that the concept of "maximum occupancy" concerns the maximum number of persons allowed in a structure under building and fire and safety codes. We understand that that number is determined based on variables including the number and size of fire exits, the width of egress corridors, etc., and is primarily concerned with ensuring that all occupants can exit the structure swiftly and safely in the event of an emergency. Although the intended use or design capacity of a structure presumably plays a role in determining maximum occupancy, and vice versa, we generally agree with intervenor that the two concepts are distinct. Depending on circumstances, the maximum occupancy of a structure as actually determined by the fire marshal or building official at the time building permits are obtained may be greater or less than the "design capacity" of the

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[7] Even if OAR 660-033-0130(2)(a) were written in a manner that focuses on anticipated usage of the clubhouse, it is not clear to us that "normal" circumstances would provide the appropriate benchmark for evaluating whether the golf course complies with the 100-person limitation. We understand petitioner to argue, and do not understand intervenor to dispute, that the golf course may sponsor tournaments or other events which could include tournament officials, guests, and spectators, in addition to the golfers. During such tournaments or events, it is easy to imagine that the total number of persons using the clubhouse could exceed 100 persons, particularly if the clubhouse is in fact designed to accommodate large capacities.

structure, which necessarily must be determined at an earlier point in time when the county approves the conditional use permit.

The rulemaking history of the 2010 rule amendment includes a discussion of these two concepts. Prior to the promulgation of the rule, several advisory committee meetings were held to discuss how to restrict buildings on EFU land used for assemblies within three miles of a UGB, without running afoul of RLUIPA.[8] As originally proposed, the draft amendments prohibited

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[8] The following transcription is from the audiotape of the April 13, 2010 advisory committee:

- Chair Greg Mcpherson (GM): "On design capacity * * * originally we were talking at our last meeting about permitted occupancy and * * * I had this impression that [for] any enclosed structure, that there would be some regulatory source that one would go to see what its permitted occupancy was * * *."

- Richard Whitman (RW): "* * * the last step of the permitting process is to get a certificate of occupancy and in terms of the development and building process and that certificate of occupancy for uses that involve assembly typically would include a maximum occupancy for the structure * * *"

- Unidentified Speaker "And part of that is the function of the fire department and how the building is constructed and how it deals with fire."

- RW: "So if you have more exits and more sprinklers, that may affect the occupancy * * * So that is what we are talking about. Using that occupancy rating as the number if you will * * *"

- Michael Morrissey (MM): "I think Katherine [Daniels], if she were here would say and * * * others would agree with her * * * that they didn't want to leave this to the end of the

process as an occupancy issue only but wanted design capacity upfront that was part of the conditional use process. And [I] admit the conversation has bounced back and forth and that is why we changed from occupancy to capacity."

•GM: "So the problem is that you don't know what the occupancy is going to be until it has gone through all of those hoops."

•RW: "That's true, although you would normally could have a pretty good idea because those code standards are pretty * * * clear and objective."

•Unidentified speaker: "If we are talking about a sub-2 use that had to go through a CUP process, then typically there would be a condition that would be placed on the conditional use that the capacity of the structure would not exceed 100. It would be a condition of approval, and then the occupancy would sit on top of that. And it would * * *"

•RW: "if it was less, then [the maximum occupancy] would control."

•GM: "For that structure, but that structure could be if the CUP said 100, it could actually be expanded at some point in time, up to the 100, but there would be a condition of approval that would be established on the conditional use permit."

•RW: "So is that what is intended by the permitted occupancy or permitted design?"

•MM: "Permitted design capacity, that's right. What he said * * *"

•GM: "I guess the only thought that occurs is that is there the potential that somebody would say that we don't want people to be rubbing elbows in this space, so this rather large meeting room that we are going to have, it's for 99 people; it's not for anything more than that, although it's an amount of space that would be consistent with gatherings of

"permitted occupancy" of greater than 100 persons. The advisory committee changed the language to "design capacity" in part to reflect the fact that permitted occupancy under building and fire and safety codes is determined at the building permit stage, but the county must determine compliance with OAR 660-033-0130(2)(a) earlier in the development process, at the time it approves the conditional use permit. The advisory committee also discussed circumstances where maximum occupancy under fire and safety codes may differ from "design capacity," and noted that a condition of approval may be necessary to limit occupancy to "design capacity" in circumstances where actual or permitted occupancy may be greater than 100 persons. Audio Recording, RLUIPA Rulemaking Advisory Committee, April 13, 2010 (mislabeled as December 9, 2009 in DLCD MP3 Audio file) (7:48-12:30).

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> a much larger size. Is there a risk that somebody would be able to design their own design capacity? Say that I am going to design this church or community meeting hall, or presentation space in the new park that is for 100 people * * * But in fact is huge."
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> •RW: "There is always that risk. This would be a condition of the land use approval so to the extent that somebody had a higher occupancy at a particular time above that it, it would be a potential enforcement matter for the local government or potentially third party enforcement actions." Audio Recording, RLUIPA Rulemaking Advisory Committee, April 13, 2010 (mislabeled as December 9, 2009 in DLCD MP3 Audio file) (7:48-12:30).

Based on that rulemaking history, it is reasonably clear that "design capacity" and "maximum occupancy" are similar, but distinct concepts.[9] At the time of conditional use permit approval, the county may approve the permit only if it finds that the total "design capacity" of all enclosed structures will not exceed 100 persons. To make that finding a design of some sort is likely a prerequisite. That finding also likely requires evidentiary support in the form of testimony of the architect or building designer, and calculations or explanations establishing the designed capacity of the structure. As explained above, the design capacity may well be a different number than the number of persons anticipated to actually use the structure at a given time, and would likely be a different number than the maximum number of persons who could use the structure consistent with building and fire codes. To use the example of a church, a proposed church would violate OAR 660-033-0130(2)(a) if it were designed to accommodate 150 worshipers, even if the applicant anticipates that the structure will be occupied at any one time by no more than 100 persons. Conversely, a church with a design capacity of 50 persons complies with OAR

[9] An additional distinction may involve the persons who are counted toward "design capacity" and "maximum occupancy" limits. Because maximum occupancy is focused on safety rather than functional capacity, it presumably is concerned with establishing limits that would allow *all* occupants, including employees, waiters, cooks, etc., to exit the structure swiftly and safely. By contrast, "design capacity" as used in OAR 660-033-0130(2)(a) may be focused on the number of persons seated or assembled for the intended purpose, and therefore may not necessarily take into account employees, servers, cooks, etc. who are present only to provide services to those assembled. As intervenor noted below and on appeal, the term "design capacity" as used in other contexts, for example regulations governing prison capacity, focuses on the number of beds and accommodations for prisoners, not the total number of persons in the building including guards, etc.

660-033-0130(2)(a), even if due to the number of fire exits, width of aisles and other variables the building official decides to certify the structure for maximum occupancy of 101 persons.

We recognize that imposing a maximum "design capacity" standard, without defining that term, places the county in a difficult position unless there is an accepted manner of determining "design capacity" among architects and other building design professionals. The rulemaking history that makes it reasonably clear that "design capacity" is not the same thing as maximum building occupancy is not a great deal of help in determining what "design capacity" is. For whatever reason, LCDC elected not to attempt to define the concept of "design capacity," so the county is left to determine the "design capacity" of the proposed structures without that definition.

To assist in that task somewhat, we note that OAR 660-033-0130(2)(a) is focused on the design capacity for *people*, and under OAR 660-033-0120, Table 1, the 100-person limitation is applied only to structures that are intended for certain quasi-public uses that involve various kinds of gatherings or assemblies (e.g. churches, schools, community centers). Consequently, we believe that any structures that are not designed primarily for human occupancy or for purposes of assembly need not be evaluated. For that reason, we agree with county and intervenor that at least the portion of the 7,500-square-foot maintenance/storage shed devoted to storage and repair of golf carts, etc., need not be counted toward the 100-person design capacity limitation.

Similarly, in the circumstance of a multi-function facility such as the proposed clubhouse, we believe that areas of the clubhouse intended for storage of golf carts, etc., and not intended primarily for human occupancy or for purposes of assembly also need not be counted toward the 100-person

design capacity limitation. However, all areas or structures designed primarily for human occupancy or assembly, including the restaurant and lounge, must be designed for a cumulative capacity of 100 persons or less.

In the present case, the county relied upon intervenor's testimony regarding how many golfers would likely use the golf course and clubhouse at any given time in normal circumstances to conclude that fewer than 100 golfers would be using the clubhouse at any one time, and therefore the "design capacity" of the clubhouse would not exceed 100 persons. As discussed above, estimates of how many persons are likely to use a structure at one time under normal or typical circumstances are not sufficient to establish the "design capacity" of the structure, for purposes of OAR 660-033-0130(2)(a). The record apparently does not include any testimony from an architect or other building designer regarding the design capacity of the restaurant, lounge, and other areas and structures intended for human occupancy or assembly. As we understand it, the clubhouse has not yet been designed, and there are no plans or other specific information in the record regarding the design or capacity of the restaurant, lounge, and other areas of the clubhouse or other structures. It may well be that plans of some sort, beyond the general description of the proposed clubhouse at Record 279, will be needed for an architect or building designer to provide testimony or other evidence to establish that the proposed buildings do not have a "total design capacity of more than 100 people." Absent such plans, testimony and information, the county has no basis on which to determine that the proposed structures comply with OAR 660-033-0130(2)(a).

In sum, we agree with the county and intervenor that "design capacity" as that term is used in OAR 660-033-0130(2)(a) is not equivalent to "maximum

occupancy" as that term is used in building and fire codes. To the extent petitioner argues otherwise under this assignment of error, we reject those arguments. However, we agree with petitioner that the county misconstrued OAR 660-033-0130(2)(a) in concluding that "design capacity" can be determined based on the applicant's representations regarding how many persons are likely to use the structure under normal operation of the golf course.

**B. Contingent Condition of Approval**

As noted, the county adopted a contingent condition of approval that applies only if LUBA concludes that "design capacity" should be interpreted to be synonymous with "maximum occupancy." The contingent condition of approval basically requires all structures to have a cumulative maximum occupancy of no more than 100 persons, as determined by uniform building and fire codes. Petitioner challenges that condition of approval in the second sub-assignment of error. However, as we understand it, that contingent condition of approval becomes active only if LUBA concludes that "design capacity" means the same as "maximum occupancy." As explained above, we conclude that "design capacity" as used in OAR 660-033-0130(2)(a) is not synonymous with "maximum occupancy" as that term is used for purposes of building and fire codes.

Because LUBA has not concluded that "design capacity" and "maximum occupancy" are synonymous terms, the contingency triggering the condition of approval has not occurred. Therefore, we do not see that the contingent condition of approval is a basis to avoid remand for the county to correctly apply OAR 660-033-0130(2)(a). For the same reason, we see no point in addressing petitioner's challenges to the contingent condition of approval, or

intervenor's arguments that those challenges are waived, or intervenor's arguments on the merits. We do not reach those issues.[10]

The third assignment of error is sustained, in part.

**FOURTH ASSIGNMENT OF ERROR**

At oral argument, petitioner withdrew the fourth assignment of error, and therefore we do not consider that assignment of error.

**FIFTH ASSIGNMENT OF ERROR**

ORS 215.296(1) and CCZO 7.040(16)(a) require a finding that the proposed conditional use "will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agricultural or forest land." Intervenor proposes to obtain irrigation water for the golf course from several sources, including a transfer of a portion of the water rights owned by Knapp Ranches, the underlying land owner.

Petitioner argues that the record does not include evidence regarding how much water would need to be transferred from Knapp Ranches, and whether there would remain sufficient water to irrigate the ranches' fields. Intervenor responds that the record includes testimony from a Knapp Ranches representative that, in exchange for a partial transfer of irrigation rights,

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[10] We also note that because the county did not impose a condition of approval that limits occupancy of the buildings to no more than 100 persons at a time we need not determine whether such a condition of approval might suffice to ensure compliance with OAR 660-033-0130(2)(a) even if there is evidence in the record that buildings with a design capacity of 100 or less can in fact accommodate more than 100 persons at a time. Some of the rulemaking history quoted earlier in this opinion can be understood to suggest that such an approach would be sufficient to ensure a design capacity that is not "greater than 100 persons," with any violation of the 100-person limit that does occur becoming an enforcement issue.

intervenor would help the ranch upgrade its existing irrigation system, making it more efficient and productive. The representative anticipated no negative impacts to farming practices or costs. The county found that the ranch would "continue to irrigate in much the same fashion as [it has] previously, albeit more economically and with fewer stoppages from equipment malfunction." Record 24. The county concluded that the partial transfer of water rights would not cause a significant change in the ranch's costs or practices. Record 24-25.

We agree with intervenor that the record includes substantial evidence supporting the county's conclusion that a transfer of water rights would not force a significant change in farm practices or significantly increase farm costs, notwithstanding that the amount of water to be transferred, if any, has not yet been determined. Petitioner offers no basis other than speculation to suppose that Knapp Ranches would sell too much water to intervenor and undermine its ability to irrigate its lands. The letter from the Knapp Ranches representative is substantial evidence supporting the county's findings that any water transfer that occurs will not force a significant change in farm practices or significantly increase farm costs.

The county's findings also note testimony that the golf course could alternatively obtain some or all of the water needed for irrigation from groundwater or from storage of winter surface flows, citing local well logs to demonstrate that an adequate supply of groundwater is available. Petitioner argues that the county failed to adopt findings addressing the impact of any new groundwater rights on surrounding farm uses. However, petitioner offers no reason to believe that new groundwater rights could impact the priority of any nearby farms that rely on groundwater for irrigation, or otherwise force a significant change in such farms' costs or practices. Absent a more developed

argument, petitioner has not demonstrated that the county's findings are inadequate or unsupported by substantial evidence.

The fifth assignment of error is denied.

The county's decision is remanded.