BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

MITCHELL JONES
and HAROLD K. LONSDALE,
Petitioners,

vs.

CLACKAMAS COUNTY,
Respondent,

and

WILLAMETTE UNITED FOOTBALL CLUB,
Intervenor-Respondent.

LUBA No. 2019-135

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Carrie A. Richter, Portland, filed the petition for review and argued on behalf of petitioners. With her on the brief was Bateman Seidel, P.C.

Nathan K. Boderman, Assistant County Counsel, Oregon City, filed a response brief and argued on behalf of respondent. With him on the brief was Stephen L. Madkour.

Wendie L. Kellington, Lake Oswego, filed a response brief and argued on behalf of intervenor-respondent. With her on the brief was Kellington Law Group PC.

RUDD, Board Chair; RYAN, Board Member; ZAMUDIO, Board Member, participated in the decision.

RYAN, Board Member, concurring.

REMANDED 06/08/2020

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

Opinion by Rudd.

NATURE OF THE DECISION

Petitioners appeal a county hearing officer's approval of a conditional use permit authorizing a sports facility on property zoned Rural Residential Farm Forest 5 (RRFF-5).

FACTS

Intervenor-respondent Willamette United Football Club (intervenor) seeks to develop a sports facility on a 24-acre property zoned RRFF-5 and located at 1521 Borland Road (Borland Road site). The Borland Road site is "bordered to the north by the Southlake Foursquare Church and I-205; to the east by the Tualatin River; to the south by other RRFF-5 [zoned] properties; and to the west by Borland Road." Record 2. Intervenor's proposed sports facility includes:

> "three outdoor artificial turf sports fields, an indoor turf training field, an operational building containing a group training room, a concessions area, restrooms, equipment storage, and staff offices. Other park facilities would include parking, an outdoor sports court, picnic area, barbeque area, playground, walking and jogging [trails], an ecological observation station, runoff water retention ponds, and a septic [field]." Record 2.

On April 11, 2019, intervenor applied for a conditional use permit (CUP) to develop and operate its sports facility on the Borland Road site (the CUP proceeding).

Prior to seeking county approval of the CUP for its sports facility, in 2017 intervenor sought an interpretation of the Clackamas County Zoning Ordinance (CCZO) to determine whether its proposed facilities are conditionally allowed

uses on the Borland Road site as uses similar to Recreational Uses. The planning director provided notice of intervenor's application to Community Planning Organizations but did not provide individualized notice to others, including petitioners. On December 13, 2017, the county planning director issued his decision that concluded that the proposed uses are similar uses to a Recreation Facility, and are conditionally allowed on any property zoned RRFF-5 (the Similar Use Determination). Record 5.

Petitioners own property within 500 feet of the subject property and received notice of the CUP application. Petitioners learned of the Similar Use Determination during the CUP proceedings. Petitioners appealed the Similar Use Determination to LUBA in LUBA No. 2019-063. In an opinion issued this date in *Jones v. Clackamas County*, ___ Or LUBA ___ (LUBA No 2019-063, June 5, 2020) (*Jones I)*, we remand the Similar Use Determination because we conclude that the county committed a procedural error in failing to provide notice to petitioners of intervenor's application required under the CCZO.

In his decision approving the CUP, the hearings officer concluded that "[b]ased on [the Similar Use Determination], the proposed use is listed as a conditional use in the zoning district in which the subject property is located." Record 6. The hearings officer also concluded that the other applicable approval criteria were met, and approved the CUP.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners' first assignment of error is that the hearings officer improperly construed the applicable law in concluding that the proposed use is allowed in the RRFF-5 zone. ORS 197.835(9)(a)(D) provides that LUBA shall reverse or remand a land use decision if it determines that the local government improperly construed the applicable law.

CCZO 1203.03 sets forth the approval criteria applicable to conditional use permits. CCZO 1203.03(A) requires that "[t]he use [be] listed as a conditional use in the zoning district in which the subject property is located." CCZO Table 316-1 provides that:

> "**Recreational Uses,** including boat moorages, community gardens, country clubs, equine facilities, gymnastics facilities, golf courses, horse trails, pack stations, parks, playgrounds, sports courts, swimming pools, ski areas, and walking trails"

are conditionally allowed uses in the RRFF-5 zone. (Boldface in original.) CCZO Table 316-1 n 13 provides that uses deemed similar to Recreational Uses are also conditionally allowed in the RRFF-5 zone.

In May 2018, after the planning director issued the Similar Use Determination, the county amended the CCZO to add CCZO 106.01(B) (2018), which remains in effect, and now provides:

> "An authorization of a similar use is not a site-specific application, but rather it is a use-specific application. The decision on an application for authorization of a similar use is applicable to all land in the zoning district for which the request was made and is applicable only to the use described in the application." Record 530.

During the CUP proceeding, the parties disputed the legal import of the Similar Use Determination. Intervenor argued that the Similar Use Determination "essentially amended the [CCZO] to now include the proposed uses as similar uses to 'recreational uses,'" and that the principle of issue preclusion prevented participants from challenging the conclusion in the Similar Use Determination. Record 5-6. Intervenor also argued that the Similar Use Determination is a "final land use decision" that could not be collaterally attacked in the CUP proceeding.[1] *Id.*

Petitioners argued to the hearings officer that issue preclusion does not apply to the Similar Use Determination. The hearings officer reasoned that issue preclusion and collateral attack doctrines were not applicable or dispositive.[2]

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[1] As noted, after learning of the Similar Use Determination during the CUP proceeding, petitioners appealed that decision to LUBA in LUBA No. 2019-063, and that appeal was pending when the hearings officer made his decision. Record 5.

[2] The hearings officer found:

> "I tend to agree with opponents that issue preclusion alone would not bar me considering whether the proposed uses are similar uses to recreational uses. I also tend to agree with [intervenor] that the Planning Director's decision cannot be collaterally attacked in this proceeding. I also do not think opponents are trying to collaterally attack the Planning Director's decision or that [intervenor] is claiming issue preclusion. Finally, I am not going to consider whether the Planning Director's decision was correct. While that decision could have been appealed to me during the County appeal period, the decision is now before LUBA and it is for LUBA to

Instead, he concluded that the issue before him was whether *the terms of the CCZO* made the Similar Use Determination binding in the CUP proceeding. The hearings officer reasoned that CCZO 106.01(B) (2018) required him to conclude that that the sports facility was "listed as a conditional use" in the zone based on the Similar Use Determination. Record 6. Therefore, the hearings officer reasoned that he was not permitted or required to review the merits of the Similar Use Determination. The hearings officer did not independently evaluate whether the proposed uses are similar uses in the RRFF-5 zoning district.[3]

In their first assignment of error, petitioners argue that the hearings officer improperly construed the applicable law in relying upon the Similar Use Determination in his approval of the CUP. ORS 197.835(9)(a)(D). For the reasons set forth below, we agree.

> decide the merits. The question as I see it, is whether the Planning Director's decision is binding on me under the [CCZO]. [CCZO] 106.01(B) [2018] provides:
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> > "'An authorization of a similar use is not a site-specific application, but rather it is a use-specific application. The decision on an application for authorization of a similar use is applicable to all land in the zoning district for which the request was made and is applicable only to the use described in the application.'" Record 5.

No party challenges those conclusions in this appeal.

[3] Intervenor argued that the hearings officer could not make independent findings as to whether the sports facility was a similar use. Record 6.

We conclude that the hearings officer improperly construed CCZO 106.01(B) (2018) in determining that he was bound by the Similar Use Determination and was consequently prohibited from independently determining whether the sports facility is a use allowed in the RRFF-5 zone as a similar use. The hearings officer erred in relying on CCZO 106.01(B) (2018) to conclude that the Similar Use Determination "essentially amended" the CCZO. Record 5. CCZO 106.01(B) (2018) was not in effect in 2017 when the planning director made the Similar Use Determination, and the hearings officer erred in relying on that new CCZO provision to conclude that the Similar Use Determination applied county-wide to all land in the RRFF-5 zoning district, and "essentially amended" the CCZO. Record 5. CCZO 106.01(B) (2018) cannot be used as a tool to recast the 2017 Similar Use Decision into a decision of county-wide applicability.[4]

Petitioners also argue that the hearings officer was not bound by the Similar Use Determination because it was not an applicable "standard[] [or] criteria" set forth in the CCZO pursuant to the requirement found in ORS 215.416(8)(a) that:

> "Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning

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[4] In addition, as we explained in *Jones I*, (1) intervenor's application for an interpretation was specific to the Borland Road site, and (2) nothing in the 2017 version of the CCZO authorized the planning director to issue a decision that applied to all property zoned RRFF-5. ___ Or LUBA ___ (LUBA No 2019-063, June 5, 2020).

> ordinance or other appropriate ordinance or regulation of the county and which shall relate approval or denial of a permit application to the zoning ordinance and comprehensive plan for the area in which the proposed use of land would occur and to the zoning ordinance and comprehensive plan for the county as a whole."

Petitioners argue:

> "As an initial matter, there is the problem that the Similar Use determination, even if it complied with all of the [CCZO] required procedures, did not–and could not–serve as an applicable standard because it is not contained within the County zoning ordinance. Under ORS 215.416(8)(a), review of a permit may be evaluated only against those standards set forth in the zoning ordinance.[] Although a similar use determination may be authorized by the [CCZO], the decision itself is not contained within the [CCZO] and was not adopted by 'ordinance or regulation.'" Petition for Review 7 (footnote omitted).

It is undisputed that the CUP is a statutory permit to which ORS 215.416(8)(a) applies. We agree with petitioners that the Similar Use Determination issued by the planning director in December 2017 is not a "standard" or "criteria" set forth in the CCZO. The Similar Use Determination is an interpretation of a criterion. It is not the criterion.[5]

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[5] Intervenor also argues that the Similar Use Determination "became the evidentiary nexus establishing that the proposed recreational uses are allowed conditional uses and, so, satisfy ZDO 1203.03(A)." Intervenor's Response Brief 24-25. However, to the extent the Similar Use Determination is properly viewed as evidence, petitioners should have been allowed to rebut that evidence. Without any opportunity to provide evidence to rebut intervenor's argument that the sports facility is a similar use to a Recreation Facility, a situation could result where applications are bifurcated and persons potentially adversely affected by a similar use decision would be without an opportunity to participate in a meaningful way on the fundamental question of whether a use is similar.

Finally, petitioners restate their arguments made in *Jones I* that if the Similar Use Determination applied county-wide, it was a *de facto* amendment of the CCZO, and consequently a post acknowledgement plan amendment (PAPA) that failed to comply with the PAPA procedures in ORS 197.610 to 197.625. However, because we conclude above that the hearings officer improperly relied on CCZO 106.01(B) (2018) to conclude that the Similar Use Determination applied county-wide rather than only to the Borland Road site identified in intervenor's application, we need not address petitioners' argument that the Similar Use Determination was a *de facto* amendment of the CCZO.

The first assignment of error is sustained, in part.

SECOND AND THIRD ASSIGNMENTS OF ERROR

In addition to requiring a determination that the proposed use is listed as a conditional use in the underlying zone, CCZO 1203.03 requires that an applicant for a CUP establish that the:

> "[P]roposed use will not alter the character of the surrounding area in a manner that substantially limits, impairs or precludes the use of surrounding properties for the primary use allowed in the zoning district(s) in which surrounding properties are located." CCZO 1203.03(D).

Petitioners' second and third assignments of error allege that the hearings officer's findings of compliance with this criterion fail to adequately address traffic and noise issues raised below.

A. Second Assignment of Error

In their second assignment of error, petitioners argue that:

> "This decision is faulty because the Hearings Officer failed to consider how the significant increase in traffic particularly on weekends would interfere with the movement of farm equipment and access to the nearby Ek farmstand and other nearby farms, at levels that will substantially limit and impair those uses." Petition for Review 18.

Testimony presented to the hearings officer included concerns surrounding "congestion[ ] impacting the movement of farm vehicles and the willingness of customers to visit and participate in farm[ ] driven activities." Record 1338-39. Petitioners argued below that "Traffic from this project is substantial and when traffic congestion is great from the project more people will decide to forego patronizing farm stands[.]" Record 1507. Other arguments related to traffic included that farmers "have peak harvest times such as the fall with pumpkin harvest and holly cutting bringing more farming equipment on the road," and that daily egg customers who visit the farms could have their ability to enter a farm driveway impeded. Record 2322.

Findings must identify the applicable criteria, the facts relied upon and the reason the facts lead to the conclusion as to whether the criteria are met. *Heiller v. Josephine County*, 23 Or LUBA 551 (1992). We agree with respondents. The hearings officer's findings are adequate.

The hearings officer concluded that:

> "The traffic impact analysis (TIA) provided by [intervenor's] traffic engineer is extremely thorough and detailed. The TIA was even

> revised at the request of County transportation staff to address concerns relating to tournament events. * * * [Intervenor's] traffic expert's TIA and County transportation staff's review of the TIA are more persuasive than opponent's anecdotal objections." Record 9.

The hearings officer explained that he did:

> "not see that the proposed increase in traffic would substantially limit or impair residential or farm uses. The area already experiences fairly heavy traffic. This would not be a situation where an area went from very little traffic to very heavy traffic. The proposed use would only add somewhat to the already existing traffic." Record 13.

The hearings officer recognized that opponents had documented farm uses in the area but concluded that:

> "As there is already fairly heavy traffic in the area, the animals are certainly used to the noises and disturbances from traffic. I do not think that some additional traffic would impair the existing farm uses any more than the existing traffic does. I also do not think the additional traffic would limit the type or scope of farm uses in any way. I do not see any reason the same current farm activities could not occur with the proposed increase in traffic." Record 13-14.

The hearings officer concluded that he saw no reason that "the same current farm activities could not occur with the proposed increase in traffic." Record 14. As a result, the proposed use would not impair the uses in violation of CCZO 1203.03(D). The findings identify the relevant criteria, facts and the hearings officer's reasoning and are adequate.

The second assignment of error is denied.

B. Third Assignment of Error

In their third assignment of error, petitioners argue that the decision fails to include adequate findings concerning the base line noise generation

assumptions relied upon by intervenor's noise expert. Petitioners argue that the hearings officer's decision does not address petitioner Jones' detailed objections that noise readings from a Portland United Soccer tournament set the appropriate baseline, given concerns raised by petitioner Jones, "a degreed engineer" "qualified to evaluate the scientific and mathematical assumptions within the noise analysis[.]"[6] Petition for Review 19-20. We agree with respondents that the hearings officer's findings are adequate to address petitioner Jones' testimony:

> "Finally, opponents argue that noise from the proposed use–particularly cheering and official's whistles–would substantially limit or impair residential and farm uses. [Intervenor's] sound expert submitted a very detailed sound study as well as additional information in response to testimony from opponents. Opponents raised a number of challenges to [intervenor's] sound expert's qualifications, methodologies, and conclusions. I have reviewed opponents' challenges, and I do not find any of them to be more persuasive than the sound expert's analysis. The sound expert is clearly more than qualified, and he explains all of his methodologies and conclusions in great detail. The September 10, 2019 response from the sound expert to opponent's comments is extremely persuasive, and I agree with his analysis contained in that response. In fact, the sound expert's sound study and additional responses is the most through and comprehensive sound study I have ever reviewed." Record 15.

The September 10, 2019 response from the sound expert specifically responded to petitioner Jones' comments and concluded that the sound expert was more qualified. We agree with respondents that the hearings officer's findings

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[6] Petitioner Jones challenged the data collection and calculations conducted by intervenor's noise engineer.

identified the relevant criteria, the facts relied upon and why the facts supported his conclusion. The hearings officer's findings are adequate.

The third assignment of error is denied.

The decision is remanded.

Ryan, Board Member, concurring.

I agree with the resolution of this appeal and the rationale for sustaining the first assignment of error. I write separately to emphasize that if we reached the issue of whether a similar use decision issued either pursuant to *former* CCZO 106 or pursuant to CCZO 106.01(B) (2018) amounts to a *de facto* amendment of the CCZO to add to the list of uses allowed in the RRFF-5 zone without compliance with the statutes that apply to post acknowledgement plan amendments (PAPA) at ORS 197.610 to 197.625, I would sustain the first assignment of error on that additional basis.

The county's position is that a similar use decision issued either pursuant to *former* CCZO 106, or pursuant to CCZO 106.01(B) (2018), "effectively 'list[s]'" the use that is the subject of the similar use decision as a use allowed in the applicable zone for purposes of CCZO 1203.03(A). Respondent's Brief 4-5. As such, the county continues, whether the use that is the subject of the similar use decision is allowed in the zone is not subject to challenge by participants in a subsequent conditional use proceeding, or to independent evaluation by the decision maker in that proceeding, because the similar use decision has preclusive effect. In my view, that position is inconsistent with Oregon's land use laws that

govern amendments to an acknowledged comprehensive plan or land use regulation, for two reasons.

First, the single way for a local government to amend the text of its comprehensive plan and land use regulations outside of periodic review is through compliance with the procedures for adopting a PAPA at ORS 197.610 to 197.625. Oregon law does not provide a quasi-judicial path to amend the text of the plan or code to "list" additional uses in a zone, or recognize as effective an amendment of the text of a comprehensive plan provision or land use regulation that does not comply with those statutes. Rather, such a decision would be what the Supreme Court and Court of Appeals have called a "*de facto*" amendment of the CCZO without compliance with the requirements of PAPA statutes. *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 218, 843 P2d 992 (1992) (citing *1000 Friends of Oregon v. Wasco County Court*, 299 Or 344, 703 P2d 207 (1985) and *West Hills & Island Neighbors v. Multnomah Co.*, 68 Or App 782, 683 P2d 1032, *rev den*, 298 Or 150 (1984)) ("[T]o amend legislation *de facto* or to subvert its meaning in the guise of interpreting it, is not a permissible exercise."). To accept the county's position would allow the county to treat the similar use as a use allowed in a zone, but without ever *actually listing* that use anywhere in the text of the CCZO.

Second, and perhaps more importantly, the inherent procedural flaws associated with how the county processes an application for a similar use decision, flaws that we discuss in detail in *Jones I*, render untenable the county's

position that a similar use decision will have a preclusive effect in later proceedings because the CCZO has been "essentially amended." Record 5. The similar use decision is processed under the county's quasi-judicial procedures for interpretations. As we explained in *Jones I*, those procedures provide for little or no notice to any interested persons of either the request for a similar use decision or of a decision under CCZO 106.01(B) (2018) that is "applicable to all land in the zoning district for which the request was made."

Finally, it is true that we have held that the county does have the inherent authority to *interpret, or reinterpret*, a provision of its land use regulations during a quasi-judicial proceeding on an application for site design review, as long as that reinterpretation is not a product of a design to act arbitrarily. *Bemis v. City of Ashland*, 48 Or LUBA 42, 58-59 (2004), *aff'd*, 197 Or App 124, 107 P3d 83, *rev den,* 339 Or 66 (2005) (citing *Alexanderson v. Clackamas County*, 126 Or App 549, 869 P2d 873, *rev den*, 319 Or 150 (1994)). However, in my view, in interpreting or reinterpreting a provision of its land use regulations during a quasi-judicial proceeding, the county may not foreclose a party participating in that quasi-judicial proceeding from providing testimony and argument regarding the interpretation or reinterpretation by arguing that the proposed interpretation or reinterpretation was previously made in a quasi-judicial similar use proceeding for which notice was not given to adversely affected parties.

For the above reasons, I would additionally sustain that portion of the first assignment of error.