BEFORE THE LAND USE HEARINGS OFFICER
OF CLACKAMAS COUNTY, OREGON

Regarding an Application for Authorization Of a Similar Use.	)	**Case File No. Z0487-17-I (Willamette United)**

A. SUMMARY

1. The owner is Foursquare Southlake Properties, LLC. The applicant is Willamette United Football Club, LLC.
2. The subject property is located at 1521 and 1541 Southwest Borland Road, Tualatin, OR 96062. The legal description is T2S R1E, Section 28D, Tax Lots 300, 400, 500, 600, and 700, W.M. The subject property is approximately 24 acres and is zoned RRFF-5 – Rural Residential Farm Forest 5-Acres.
3. On July 25, 2019, the Hearings Officer conducted a public hearing to receive testimony and evidence about the application.

B. HEARING AND RECORD HIGHLIGHTS

1. The Hearings Officer received testimony at the public hearing about this application on October 15, 2020. All exhibits and records of testimony are filed with the Planning Division, Clackamas County Department of Transportation and Development. At the beginning of the hearing, the Hearings Officer made the declaration required by ORS 197.763. The Hearings Officer disclaimed any *ex parte* contacts, bias, or conflicts of interest. The Hearings Officer stated that the only relevant criteria were those identified in the decision being appealed, that participants should direct their comments to those criteria, and failure to raise all arguments may result in waiver of arguments at subsequent appeal forums.
2. At the hearing, Planning Director Jennifer Hughes and county planner Glen Hamburg discussed the staff report and recommended approval of the similar use authorization.
3. Wendie Kellington, Ray Nelson, and Bob Edwards testified in support of the application.

4. A number of opponents testified in opposition to the application.

5. At the conclusion of the public hearing, the Hearings Officer left the record open for one week for the submission of new evidence, one additional week for responses to the new evidence, and one additional week for the applicant's final legal argument.

C. FACTS

The subject property is an approximately 24-acre parcel zoned RRFF-5. The property is located at 1521 and 1541 Southwest Borland Road (Borland Road), Tualatin, OR 96062, on the east side of Borland Road just south of the I-205 highway. The subject property was originally owned in conjunction with the Southlake Foursquare Church, which is directly north of the subject property. The subject property 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 properties; and to the west by Borland Road. There are more RRFF-5 zoned properties to the west of Borland Road. Willamette United Football Club (WU) seeks to develop and operate the use while leasing the property from Foursquare Southlake Properties. WU seeks to construct three outdoor artificial turf sports fields, an indoor turf fields, and an operational building containing 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 trials, an ecological observation station, runoff water retention ponds, and a septic field.[1]

There is quite the history to this case. Without getting bogged down in the details, WU initially sought to develop a somewhat similar proposal on nearby property on Stafford Road as a conditional use. That application was denied for various reasons, including that the requested use was not a potential conditional use in the RRFF-5 zone. Neighborhood Church, Z0289-16-C, October 26, 2016. In relevant part, I decided that the proposed use was not a "recreational use" under the RRFF-5 zone.[2] WU was not represented by counsel

[1] Those facts are taken from an earlier decision involving WU's conditional use permit application to develop the proposed use.

[2] As explained later, although the proposed use certainly appears at first blush to be a "recreational use," the Clackamas County Zoning and Development Ordinance (ZDO) makes a distinction between private recreational uses – which do not include "ball fields" and government owned recreational uses – which include ball fields. The RRFF-5 zone allows private recreational uses as potential conditional uses.

in the Neighborhood Church case. WU subsequently retained counsel and filed the application for a similar use authorization at issue in this case in 2017. That application was approved by the Planning Director. WU later filed an application for a conditional use permit for the proposed development, relying on the Planning Director's decision to satisfy the requirement that the proposed use was a potential conditional use in the underlying zone. Opponents subsequently filed an appeal with the Land Use Board of Appeals (LUBA) of the Planning Director's decision approving the similar use authorization from 2017. I subsequently approved the conditional use permit - similarly relying on the Planning Director's determination that the proposed use was a similar use to a recreational use that was a potential conditional use in the RRFF-5 zone. Willamette United, Z02176-19-C, November 15, 2019. LUBA subsequently remanded the Planning Director's similar use authorization decision on the ground that opponents were not given required notice. ___ LUBA ___ (LUBA No. 2019-063, June 8, 2019). LUBA also remanded the conditional use approval because it was impermissible to rely on the Planning Director's similar use authorization. *Jones v. Clackamas County*, ___ Or ___ (LUBA No. 2019-135, June 8, 2020). The Court of Appeals just affirmed LUBA's decision on the conditional use case. *Jones v. Willamette United Football Club*, 307 Or App 502 (2020).

After the Planning Director's approval of the similar use authorization was remanded, LUBA requested that the County take action on remand. On remand, the issues are: (1) whether the proposed use is allowed as a conditional use in the RRFF-5 zone outright as a "recreational use"; (2) whether the proposed use is allowed as a conditional use in the RRFF-5 zone outright as a "park"; and (3) whether the proposed use is a similar use to the "recreational uses" allowed as a conditional use in the RRFF-5 zone. The Planning Director found that the while many aspects of the proposed use constitute a "recreational use" or other allowable uses in the RRFF-5 zone the proposed ball fields were not a "recreational use." The Planning Director also found that multiple aspects of the proposed use do not constitute a "park." Finally, the Planning Director found that the proposed use (including the ball fields) was similar to a "recreational use" and therefore could be authorized as a similar use. This appeal followed.

D. DISCUSSION

ZDO Table 316-1, among other things, lists the potential conditional uses in the RRFF-5 zone. The applicant argues that its proposed use is a permitted conditional use under Table 316-1. That analysis only involves ZDO Table 316-1. The applicant also argues that even if its proposed use is not specifically listed as a permitted conditional use that it is similar to a conditional use permitted by ZDO Table 316-1. As discussed later, in order to authorize a similar use, a similar use authorization must be approved pursuant to ZDO 106.02. ZDO 106.02 further provides that the similar use authorization is made using the Interpretation procedures of ZDO 1308.02. The Planning Director's decision goes through all of the applicable procedures and standards. Many of the Planning Director's findings are not challenged. I have reviewed the Planning Director's decision and I agree with those findings. Therefore, I adopt and incorporate the Planning Director's findings and conclusions in this decision.

A preliminary issue involves the way the Planning Director's addressed the applicant's request. As discussed, the proposed use has many distinct parts, such as indoor courts, outdoor ball fields, buildings, etc. The Planning Director addressed each constituent part of the proposed use independently and determined whether it was allowed as a particular permitted or conditional use or as similar to a particular permitted or conditional use. Opponents argue that it was improper for the Planning Director to split the proposed use up into different parts. The Planning Director's decision states:

> "The ZDO does not limit the number of recreational uses that may be conducted on property in the RRFF-5 District. Multiple recreational uses can be operated together or separately on the same property, by the same or separate parties, on a for-profit or non-profit basis, all so long as the ZDO approval criteria are satisfied.
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> "In their September 1 letter, Carrie Richter writes in opposition to the application, 'Nothing in the record suggests that any of these similar uses will operate independently from the remainder.' That is not a requirement for finding that any of the Applicant's suggested uses are similar to those in the table that they identify. The ZDO does not prohibit recreational uses on the basis of being operated together or independently, however that could even be defined. For example, the same property could be developed with a country club, a golf course, a swimming pool, and an equine facility (all of which are explicitly listed recreational uses permitted in the RRFF-5 District), provided that the conditional use approval criteria are met." Planning Director Decision 9-10.

I agree with the Planning Director.

1. Whether the Proposed Use is a Recreational Use

WU argues that the proposed use, including the ball fields, is a "recreational use" and therefore an allowed conditional use. According to WU, because the proposed use is an allowed conditional use there is no need for an authorization of a similar use. ZDO Table 316-1 provides the types of uses allowed in the RRFF-5 zone. "Recreational Uses" are listed as conditional uses and are defined as:

> "* * * 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." (Emphases added.)[3]

The Planning Director found that the while most of the proposed use constitutes a recreational use or other allowed use that the proposed ball fields are not a recreational use:

> "In some instances in the ZDO's tables of uses, a use is listed, followed by 'such as' and a list of example uses that the listed use includes. In other instances, the table of uses lists a use, but follows it with the term 'including' and a list of uses that the listed use includes. This convention is employed throughout the various tables of uses, and both phrases are used in the same tables. It is clear that the authors of the ZDO consciously chose these two separate terms, 'such as' and 'including', to serve two separate purposes. 'Such as' is used in the ZDO to provide a nonexclusive list of examples; 'including' is used to provide an exclusive list of the only things that the listed use includes. Therefore, in the absence of a similar use authorization, the listing of recreational uses in Table 316-1 only allows the list of specific uses that follow it.
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> "The list of recreational uses in Table 316-1 does not include a use that inarguably encompasses all of the Applicant's proposed components (e.g., office spaces, concessions, equipment storage, ball fields). Therefore, Staff finds that the Applicant has not demonstrated that the ZDO expressly provides for their use, overall, as a listed recreational use allowable in the RRFF-5 District as a conditional use without authorization of a similar use. There are also components of the overall use that are not expressly listed as recreational uses in Table 316-1. It is the decision of the Planning Director to **deny** the Applicant's request for their use, and all components of the use, to constitute a recreational use allowable in the RRFF-5 District as a conditional use without authorization of a similar use." Planning Director Decision 15-16 (bold

[3] As discussed later, Footnote 11 provides that "[u]ses similar to this may be authorized pursuant to Section 106."

in original).

The rules for statutory construction in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), as modified by *State v. Gaines* 346 Or 160, 206 P3d 1042 (2009), apply to the construction of local ordinances. *City of Hillsboro v. Housing Development Corp.*, 61 Or App 484, 489, 657 P2d 726 (1983); *Lincoln Loan Co. v. City of Portland*, 317 Or 192, 199, 855 P2d 151 (1993). The purpose of construing a legislative enactment, is to discern the intent of the governing body that adopted the language. *PGE*, 317 Or at 610; ORS 174.020. To discern the intent of the governing body, the decision maker examines both the text and context of the ordinance. *PGE*, 317 Or at 610. The decision maker then considers legislative history and accords it the weight he deems appropriate. *Gaines*, 356 Or at 172; ORS 174.020(3). When interpreting a provision, a decision maker is not to insert what has been admitted, or to omit what has been inserted. *PGE*, 317 Or at 611; ORS 174.010. Words of common usage should typically be given their plain, natural, and ordinary meaning. *Id*. Context includes other provisions of the same ordinance and other related ordinances. *Id*.[4]

The Planning Director explains that under the ZDO, when the word "including" is used it means an exclusive list while the words "such as" refer to nonexclusive lists. While the applicant points out that the use of the word "includes" usually means a nonexclusive list, this case appears to be different. The Planning Director's decision provides an excellent explanation for why "including" refers to an exclusive list. Furthermore, the Planning Director explained during the public hearing that she was involved in the drafting of the distinction between "including" and "such as" and that "including" was indeed used to signal exclusive lists while "such as" was used to refer to nonexclusive lists. While her testimony is not exactly legislative history, it is institutional knowledge that is extremely persuasive.[5] I agree with the Planning Director that potential conditional uses under "recreational uses" is an exclusive list as set out in Table 316-1. As the footnote makes clear, any uses that are not specifically listed but are similar to the listed recreational uses may be authorized as a similar use.

[4] My thanks to Ms. Kellington for providing the summary of the rules for statutory construction laid out in this paragraph.

[5] I would reach the same conclusion without the Planning Director's testimony, but her testimony further supports that conclusion.

Even if the list after "including" could be considered a nonexclusive list, as I explained in Neighborhood Church, the fact that the ZDO makes a distinction between sports courts, parks, and ball fields demonstrates that ball fields are not included in the potential conditional uses for the RRFF-5 zone. I repeat that analysis here for convenience:

> "While at first blush ball fields such as the proposed soccer, football, and lacrosse fields might seem to be recreational uses, the ZDO Table 316-1 description of recreational uses is fairly specific. The closest use listed in ZDO Table 316-1 is sport courts. Sport courts, however, imply an actual court – like a basketball court or a tennis court.[6] I do not think ball fields constitute a sports court. Furthermore, ZDO Table 316-1 also has a category of uses called 'recreational uses, government owned.'[7] ZDO Table 316-1 defines 'recreational uses, government owned' as including:
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> > "[A]mphitheaters; arboreta; arbors, decorative ponds, fountains, gazebos, pergolas, and trellises; *ball fields*; bicycle and walking trails; bicycle parks and skate parks; equine facilities; boat moorages and ramps; community buildings and grounds; community and ornamental gardens; courtyards and plazas; fitness and recreational facilities, such as exercise equipment, gymnasiums, and swimming pools; horse trails; miniature golf, putting greens, and *sports courts*; pack stations; *parks*; picnic areas and structures; play equipment and playgrounds; nature preserves and wildlife sanctuaries; ski areas; tables and seating; and similar recreational uses." (Emphasis added.)
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> "As the emphasized language makes clear, the drafters of the ZDO knew how to distinguish between ball fields, sports courts, and parks. If ball fields were a subset of sports courts or parks there would be no need to separately list ball fields under the definition of recreational uses, government owned. As the drafters of the ZDO included ball fields in the definition of recreational uses, government owned but did not include ball fields under the definition of recreational uses, presumably the drafters of the ZDO did not intend for ball fields to be allowed as conditional uses in RRFF-5 zones." Neighborhood Church 5.

While I do not think I am bound by the decision in Neighborhood Church, and the applicant was not represented by counsel in that case, I continue to believe that it is the correct analysis. While I sympathize with WU's position that ball fields should be

[6] While there are numerous definitions for "court," the most applicable provides "a specially prepared space, usually quadrangular and often enclosed or roofed, for playing any of several ball games, as basketball, handball, tennis, squash, etc." Wester's New World Dictionary.
[7] "Recreational uses, government owned" are permitted uses in the RRFF-5 zone.

considered recreational uses and that ball fields should not be treated differently than the listed recreational uses, that seems to be how the ZDO is set up. I agree with the Planning Director's decision that the proposed ball fields are not recreational uses for purposes of a conditional use permit under Table 316-1.[8]

Opponents challenge the Planning Director's decision that the proposed basketball and volleyball courts are recreational uses for purposes of a conditional use permit under Table 316-1. The Planning Director decided that the proposed basketball and volleyball courts are "sports courts" which are listed as recreational uses in the RRFF-5 zone. Opponent Wyndham Hill Estates Homeowners Association (Wyndam Hill) argues that the proposed "basketball courts and volleyball courts are not expressly listed within [ZDO] Table 316-1 * * *." As far as I can tell, Wyndam Hill does not explain why it thinks basketball courts and volleyball courts are not sports court. I do not see that there is any doubt that basketball and volleyball are sports and that those sports are played on a court – that is why they are called basketball and volleyball courts in the first place. I agree with the Planning Director that basketball and volleyball courts are sports courts.

Opponent Mitch Jones (Jones) argues that while basketball courts and volleyball courts in general are sports courts that the recreational use of sports courts for purposes of Table 316-1 contemplates a much smaller impact than the proposed sports courts. The Planning Director decided:

> "Table 316-1 also expressly identifies sports courts as an allowable recreational use in the RRFF-5 District.
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> "In their September 1, 2020, letter, Carrie Richter[9] argues that this clear listing does not include those that may be envisaged for future development by the Applicant. They state, 'a basketball court in a private backyard for family use or 'sports court' is entirely different than a basketball court used to host NBA games or 'recreation sports facility.'' Whether or not that's the case, it is irrelevant to this decision. Sports

[8] To the extent the legislative history is helpful, it supports the Planning Director's position. When the amendments to the ZDO were made in 2015, the Planning Commission decided to remove references to for profit and commercial permitted uses in favor of uses that did not distinguish between commercial and non-commercial uses. The Planning Commission recommendation stated: "Replace a general reference to 'commercial recreational uses' with a list of recreational uses permitted as a conditional use (and a separate listing for campgrounds). Authorization of similar uses will be available for uses that aren't listed." This tends to confirm the Planning Director's contention that the list of recreational uses in current Table 316-1 is an exclusive list.

[9] Carrie Richter is Mitch Jones' attorney.

courts accessory to a dwelling or other primary use would be an accessory use, a different listing in Table 316-1 entirely. Sports courts that are not accessory to a primary use can be permitted as conditional uses in the RRFF-5 District, per Table 316-1. As explained previously, the listing for this particular use is not inherently limited to sports courts of any certain size, number, or occupancy. The impacts of any actual proposed sports court(s) on its surrounding neighborhood, and whether their development and use is consistent with Comprehensive Plan policies for the RRFF5 District, are required by the ZDO to be evaluated separately under a conditional use permit application. The fact that a sports court may be very busy, that it is run as a business, or that there may be other sports courts on the same property does not mean it is not a sports court.

"In their September 1 letter, Richter also argues the term 'sports court', as an expressly listed conditional use in the RRFF-5 District, has 'a built in character and intensity limitation'. They do not define what those terms mean. They also do not point to any text of Table 316-1 or the remainder of the ZDO limiting conditionally-approvable sports courts – that are already subject to Subsection 1203.03 – to those that also meet some other undefined 'built in character and intensity limitation' standard.

"Richter also argues that the listing for 'sports court' as a conditional use in Table 316-1 is limited to those with 'a natural grass or hard surface open space area occasionally used for uncoordinated, impromptu pick-up basketball or baseball games.' There is no such limitation in Table 316-1, elsewhere in the ZDO, or the Comprehensive Plan. Nothing in the County's regulations limits the types of sport courts allowable as a conditional use in the RRFF-5 District to those only used for games played at the spur-of-the-moment, without set teams, on some undefined limited basis. The plain language of Table 316-1, duly adopted by the BCC and acknowledged by the state as consistent with the Comprehensive Plan, allows any type of sports court as a conditional use. Whether any particular sports court or courts is consistent with the Comprehensive Plan goals and policies for the RRFF5 District is evaluated under separate criteria under a separate permit review process.

"In their decision in Z0289-16-C (a conditional use permit referred to as the Neighborhood Church decision), the County's Hearings Officer cited Webster's New World Dictionary as the 'most applicable' definition of a 'court': 'a specially prepared space, usually quadrangular and often enclosed or roofed, for playing any of several ball games, as basketball, handball, tennis, squash, etc.' Sports courts are listed as one form of allowable recreational uses in the RRFF-5 District, and that term is clearly not limited to any particular sport. Basketball and volleyball are both sports.

> "Therefore, it is the decision of the Planning Director to recognize that a basketball/volleyball court is a recreational use allowable as a conditional use in the RRFF-5 District without approval of an authorization of similar use." Planning Director Decision 16-17.

The Planning Director explains that there is nothing in Table 316-1 that limits sports courts to uncoordinated, impromptu pick-up games. I agree with the Planning Director. I do not see anything in the text or context of the applicable ZDO provisions that would limit the scope of sports courts as conditional uses to such a casual level. As the Planning Director explains, the time for considering whether the intensity of any proposed sports courts is too great is at the conditional use stage.

Finally, WU argues that the proposed use meets the definition of "active recreational area" in ZDO 202 so it must also be a recreational use for purposed of Table 316-1. ZDO 202 defines "Active Recreational Area" as "[a]n area such as a park, sports field, or golf course, where turf lawn provides a playing surface that is dedicated to active play."[10] The Planning Director decided:

> "The Applicant has asserted that their proposed use and its components effectively comprise an 'active recreational area', as that term is defined in ZDO Section 202, Definitions, to be 'an area such as a park, sports field, or golf course, where turf provides a playing surface that is dedicated to active play.' But that is not relevant to this application.
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> "Despite having a definition in the ZDO, an 'active recreational area' is a use that is not specifically listed as either permitted, accessory, limited, conditional, or prohibited in any zoning district. The term is used not in any table of uses, but rather in sections of the ZDO prescribing certain access and landscaping. In other words, Section 202 doesn't specifically provide for active recreational areas as any allowable or prohibited land use in any zone; the purpose of the definition in that section is to define what instances of this type of use, if it happens to occur in any zone, have to meet certain access and landscaping standards.
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> "That doesn't mean that the facilities and activities that might be included in an active recreational area are necessarily prohibited in any zone; indeed even though the term 'active recreational area' as defined in ZDO Section 202 is not itself a listed allowable land use, its components often are. Table 316-1 states that parks and golf courses are allowable as conditional uses in the RRFF-5 District, as are uses similar to listed recreational uses that may include turf playing surfaces. Where

[10] Although this is not why WU cites the definition, it does lead further support to the proposition that the ZDO considers parks and sports fields to be distinct uses.

there is turf providing a playing surface dedicated to 'active play', it may constitute an 'active recreational area' as defined in Section 202 and therefore may be subject to certain access and landscaping standards.

"The Applicant's proposed use includes components that do not appear to meet the definition of an 'active recreational area', such as the concessions, indoor equipment storage, jogging/walking paths, playground, covered picnic area, and parking. But that does not mean they cannot be permitted as conditional uses in the RRFF-5 District, because it's Table 316-1 that lists what is allowable in the RRFF-5 District, and that list includes certain recreational uses, support uses, and uses found similar to them." Planning Director Decision 11.

I agree with the Planning Director's analysis of "Active Recreational Use."

I agree with the Planning Director that while other aspects of the proposed use are expressly listed in ZDO Table 316-1 as allowable conditional or other uses, the proposed ball fields are not expressly listed in ZDO Table 316-1 as permissible conditional uses, but are nonetheless potentially allowable as a conditional use if found similar to one or more expressly listed conditional uses through the similar use authorization process.

2. Whether the Proposed Use is a Park Recreational Use

As discussed earlier, ZDO Table 316-1 includes "parks" as one of the specifically listed recreational uses that is a conditional use in the RRFF-5 zone. WU argues that the proposed use, including the ball fields, is a "park" and therefore an allowed conditional use. The Planning Director decided that the proposed use does not constitute a "park" for purposes of ZDO Table 316-1:

"Staff also finds that neither the use in total, nor all of its components on their own, clearly constitute a park, as that term is used in ZDO Table 316-1 and applicable to the RRFF-5 District. The ZDO does not have a definition of 'park', so Staff has dictionary definitions for guidance. Staff has not found, nor has the Applicant provided, any dictionary definition of a park that would inarguably include multiple privately-owned and operated artificial turf fields, an operational building providing indoor athletic training and office space, and indoor artificial training spaces with indoor turf. Staff has found no dictionary definition clearly identifying all components of the Applicant's proposed use, including its office space, indoor storage space, covered picnic area with a BBQ pit, or parking area, as a 'park' on their own either. Therefore, it is the decision of the Planning Director to deny the Applicant's request that their proposed use, and all separate components of it, be found to be a park expressly allowed as a conditional use in the RRFF-5 District

without an authorization of similar use." Planning Director Decision 16.

The Planning Director stated that WU had not provided any dictionary definitions that would include all of the aspects of the proposal or their constituent parts. WU responds that it provided numerous definitions of "park" that would include the proposed uses and the ball fields, in particular. WU cites *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).[11] In *Spiering*, LUBA provided a long list of dictionary definitions of "park," ranging from "a large area often of forested lands reserved from settlement and maintained in its natural state for public use * * * or as a wildlife refuge" to "a stadium or enclosed playing field; a baseball park." *Id*. at 704.[12] "Park" is rather amorphous term. As the definitions provided by LUBA and the myriad examples of parks provided by the parties demonstrate, "park" can mean almost any outdoor area. The parties provide examples of parks that are small, totally undeveloped areas as well as huge, commercial athletic parks. Forest Park in Portland and Fenway Park in Boston are both parks I suppose, but they do not seem to be very much the same thing. Names are funny things, however, particularly where sports are involved. Fenway Park seems to be much more than merely a park. Soldier Field seems to be much more than merely a field. Madison Square Garden does not seem to be a garden at all.[13]

Given the vast scope of "parks," if the question in a vacuum were whether the proposed use could be a park, it would be difficult say that it was not at least like some other parks. As discussed earlier, however, the ZDO makes a distinction between ball fields, sports courts, and parks. If for purposes of ZDO Table 316-1 ball fields were included in park uses then there would be no need to list ball fields as separate uses. WU cites *Burgermeister v. Tillamook County*, 73 Or LUBA 291 (2016) and *Western Land & Cattle, Inc. v. Umatilla County,* 230 Or App 202, 214 P3d 68 (2009) for the proposition that a "negative inference" may not be drawn from the fact that the ZDO specifically allows ball fields in one section while not allowing them as conditional uses in the RRFF-5 zone.

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[11] Although Ms. Kellington did not write the opinion in *Spiering*, she was one of the referees who participated in the decision.

[12] LUBA concluded that a paintball park was potentially allowable as a "park." *Id*. at 704-05.

[13] For those of you who do not waste as much time watching sports as I do: Fenway Park is where the Boston Red Sox of Major League Baseball Play; Soldier Field is where the Chicago Bears of the National Football League play; and Madison Square Garden is where the New York Knicks of the National Basketball Association and the New York Rangers of the National Hockey League play.

While both cases held that it was permissible for a local government to approve an application when there was a negative inference that a use was not allowed in the zone at issue because the use was listed as an allowed use in another zone, neither case held that the proposed use was a specifically permitted use. In both cases, the applicant was proceeding under the theory that the proposed use (that was allowed in other zones but not the zone at issue) was *similar* to the uses allowed in the zone at issue and the ordinance allowed for such similar uses. LUBA explained that

> "* * * the county did not intend, by authorizing a particular use category in one zone but not authorizing that use category in a second zone, to preclude the possibility of approving that particular use category in the second zone, it if is similar to the uses that are listed in the second zone." *Burgermeister*, 73 Or LUBA at 297 (quoting LUBA's decision in *Western Land & Cattle, Inc. v. Umatilla County*, 58 Or LUBA 295, 302 (2009)).

I do not believe that *Burgermeister* or *Western Land & Cattle, Inc.* prevents drawing a negative inference that because ball fields are listed as permitted recreational uses for government owned property but not for privately owned property that they are not permitted conditional uses in the RRFF-5 zone. *Burgermeister* and *Western Land & Cattle, Inc.* would prevent drawing a negative inference to determine that the ball fields could not be *similar* to the listed recreational uses in the RRFF-5 zone and approved as a similar use authorization.[14] As discussed later, I do not draw that negative inference in addressing that issue. While it is a close question, I agree with the Planning Director that the proposed use and uses are not a park for purposes of Table 316-1.

3. Whether the Proposed Use is Similar to a Recreational Use

The original application that was approved by the Planning Director and eventually remanded by LUBA involved whether the proposed use constitutes a similar use to the listed recreational uses in Table 316-1. As discussed earlier, a footnote to Table 316-1 states that "[u]ses similar to [the listed recreational uses] may be authorized pursuant to Section 106, Authorization of Similar Uses." ZDO 106.02(A) provides that authorization of a

[14] In both cases the local government chose not to draw a negative inference, and LUBA and the Court of Appeals upheld that choice. I am not sure that necessarily means that a local government could not choose to apply a negative inference if it wanted to, particularly with the deferential standard of ORS 197.829(1)(a).

similar use is an interpretation that is processed under the Interpretation provisions of ZDO 1308. ZDO 106.02(E) provides:

> "If a use is found to be similar to a primary, accessory, limited, or conditional use, it shall be subject to the same approval criteria, review process, dimensional standards, and development standards as the use to which it is found to be most similar."

The only question at issue is whether the proposed use is similar to a listed recreational use. Before turning to that question there are some preliminary matters to address.

Opponents argue that in determining whether the proposed use is similar to a listed recreational use that provisions of the comprehensive plan are applicable. The Planning Director explained why the comprehensive plan is not applicable to this question:

> "In their September 1, 2020, letter, Carrie Richter also states, 'the Planning Director must interpret the uses permitted in the RRFF-5 zone in a way that is consistent with the comprehensive plan policies these uses implement'. They do not define what the threshold is for being 'consistent' with the Comprehensive Plan, nor do they identify where that is a requirement for approving an authorization of similar use or explain whether, when, why, or how their suggested standard is to be applied differently than that of ZDO Subsection 1203.03(E).
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> "The RRFF-5 District is a type of 'exception' land. Exception lands are those for which the County has already obtained approval from the state to exclude them from its required inventory of protected agricultural and forest lands, typically because of historic commitments to other uses (e.g., residential, commercial, or industrial uses), the size of the parcels, and other factors.
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> "ZDO Section 316, with its list of allowable uses, dimensional standards, approval requirements, and opportunities for similar use determinations, implements County Comprehensive Plan goals and policies for areas zoned RRFF-5. ZDO Section 316 has been duly adopted by the Board of County Commissioners (BCC) and has already been acknowledged by the state as consistent with these goals and policies, as has Section 106 with its criteria for authorization of similar uses and Section 1203 with its requirements for conditional uses.
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> "Some may feel that a term for an allowed use is too broad and would potentially allow for undesirable uses in areas of their concern; nonetheless, the terms and approval requirements, as well as the County's zoning map for RRFF-5 areas, are what have been adopted as

appropriate for the RRFF-5 District and have been acknowledged as consistent with the Comprehensive Plan.

"One detached single-family dwelling per lot of record is a primary use in the RRFF-5 District, per Table 316-1. The ZDO does not limit the size of that dwelling in terms of total square footage, meaning it could potentially have any number of bedrooms and bathrooms. The County does not (and cannot) require a review of each proposed dwelling unit to determine whether its size is consistent with the Comprehensive Plan goals and policies for the RRFF-5 District, because the generally stated use – without any inherent size limit – has already been determined to be consistent with the Comprehensive Plan goals and policies.

"The general listing of *recreational uses* in the same table also does not have any inherent size limit, as discussed above. However, Subsection 1203.03(E), which is applicable to all conditional uses, even those that are already expressly listed in a table of uses, requires a separate analysis of whether the particular scale of a proposed conditional use and its impacts on a particular neighborhood is consistent with applicable Comprehensive Plan goals and policies before the proposal can actually be developed on a property.

"Therefore, a conditional use approved consistent with these existing provisions is, by definition, consistent with the County's Comprehensive Plan.

"In their September 1 letter, Richter also states, 'The question for the 'similar use' determination is whether the text and context of [ZDO Table 316-1], as they implement the Rural Comprehensive Plan designation, are furthered by the interpretation [the Applicant] requests.' Staff disagrees that this is the question to be determined in this application. The questions to be answered here are those asked by the Applicant, which are whether their proposed use or its components are similar to one or more recreational uses or their support uses, as listed in the Table 316-1 and its Footnote 18 and, alternatively, whether the use or all of their components are explicitly a 'park' or 'recreational use' allowed without a similar use determination. The ZDO criteria for approval of an authorization of similar use do not include any requirement that the proposed use be found to 'further' any goal or policy in the Comprehensive Plan." Planning Director's Decision 10-11.

Opponents renew their argument that the comprehensive plan is an applicable approval criterion or that the interpretation must be consistent with the comprehensive plan. I agree with the Planning Director. There is nothing in any of the applicable provisions involving authorization of a similar use in the RRFF-5 zone that implies, let alone requires, that that the comprehensive plan is somehow applicable to the question of whether the

proposed use is similar to recreational uses. In any event, I agree with the Planning Director that comprehensive plan provisions have no bearing on whether the proposed use is similar to recreational uses.

Opponents argue that the issue of whether the proposed use is similar to recreational uses was decided in the Neighborhood Church case. In Neighborhood Church, I stated:

> "Although I think ZDO Table 316-1 establishes that ball fields are not allowed conditional uses in the RRFF-5 zone as recreational uses, even if the applicant attempted to proceed under the provisions for authorizing similar uses, I think the applicant would not succeed. Under ZDO 106.02 a proposed conditional use could be authorized under the standards for the use that the proposed use is 'most similar' to. As WHE argues, the most similar use is listed in ZDO Table 510-1. Included as a permitted use in the Urban Commercial and Mixed Use Zoning District is 'Recreational Sports Facilities, which is defined as:
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> > "Recreational Sports Facilities for such sports as basketball, dance, gymnastics, martial arts, racquetball, skating, *soccer*, swimming, and tennis. These facilities may be used for any of the following: general recreation, instruction, practice, and competitions.' (Emphasis added.)
>
> "Recreational sports facilities are not allowed in the RRFF-5 zone, so even if the applicant attempted to proceed under ZDO 106.02, the proposed use would not be a potential conditional use in the RRFF-5 zone. The proposed use is not listed as a conditional use in the zoning district in which the subject property is located. Therefore, ZDO 1203.03(1) is not satisfied.

Initially, this was clearly dicta. Secondly, this was also speculative. I specifically stated that the applicant was not proceeding under a similar use authorization. I also stated that I *thought* they would be unsuccessful if they did. I was hardly making a definitive decision on this issue. There was no need to make such a decision because the applicant was not proceeding under that method and had not addressed the issue. In retrospect, I probably should have left that part out, as I only included it because opponents raised the issue.[15] Thirdly, while the applications certainly involve some of the same aspects they are not the identical. Fourthly, the applicant in Neighborhood Church was not represented by counsel and was unprepared to respond to the legal issues raised by opponent's counsel,[16]

[15] If I recall correctly, the applicant did not even respond to this argument from opponents.
[16] Ms. Richter also represented opponents in the Neighborhood Church case.

while in the present case WU has outstanding legal representation. Finally, even if some stock were to be put into what I thought about this issue in Neighborhood Church, I have a different understanding of the similar use authorization process than I did then. In over six years working with the County, this is the only similar use authorization case I have been involved in. I assumed in Neighborhood Church that the process was to identify what listed use the use at issue was most similar to and then see if that use was allowed in the zone at issue. As the Planning Director's explains, the County treats similar uses differently. Under the County's understanding, proposed similar uses may be similar to multiple types of uses, not just the one it is most similar to. So even if Neighborhood Church had some precedential value, I would change my opinion.

Turning to the crux issue of whether the proposed ball fields are similar to a listed recreational use, the parties provide different definitions of "similar." WU states that "similar" means "having characteristics in common: strictly comparable" and "alike in substance or essential: corresponding." Opponents state that "similar" means "very much alike." My dictionary defines "similar" as "nearly but not exactly the same or alike; having a resemblance." Webster's New World Dictionary, Second College Edition (1970) 1327. I do not think "similar" is particularly confusing or a term of art. I think everyone understands what "similar" means, the question is how similar is similar enough.

The Planning Director did not specifically define "similar" but found that the proposed ball fields are similar to the listed recreational uses:

> "The Applicant has represented that these turf fields will be used for football, lacrosse, baseball, and softball. The fields for these sports are outdoor facilities of varying sizes specifically designed for certain physical recreational activities, as are playgrounds, sports courts, swimming pools, ski areas, and walking trails, which are all listed Recreational Uses in Table 316-1. Like volleyball courts, basketball courts, and tennis courts often are, the applicant's proposed turf fields will be located outside. The fields would be used for athletic games that do not require mechanized equipment, just like sports courts and golf courses. Their appearance and function will not be substantially different than any park that includes multiple ball fields, of which there are many in Clackamas County, as demonstrated in the record. Indeed, the record shows that it is common for parks to include multiple ball fields, and parks owned and maintained by Clackamas County itself attract large numbers of users for multiple forms of outdoor recreational activity.

> "A facility that is primarily used for formal, instructor-led speed and agility training may be a school, which cannot be found to be similar to Recreational Uses because schools are regulated as a special use in Section 805. However, because the Applicant represents that speed and agility trainings would take place outside, and because it is not uncommon for coaching and instruction of athletic skills to occur at facilities designed primarily for and to complement recreational sport activities, the speed and agility training the Applicant explains would occur on these turf fields is considered similar to allowed recreational uses, to the extent that such trainings take place on/at an approved park, sports court or field, or other facility primarily used for allowed recreational uses.
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> " * * * * *
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> "Ball fields may not be the same as sports courts, but for all of the above reasons, Staff finds that the outdoor turf fields proposed by the Applicant and used for the various activities described in the record are nonetheless similar to sports courts, the many parks that include multiple ball fields, and golf courses." Planning Director's Decision 19-20.

The parties provide copious amount of argument and examples regarding various types of courts, fields, parks, and stadia regarding whether the proposed ball fields are similar to sports courts. Opponents argue that the proposed ball fields are of much greater impact than typical sports courts so therefore the uses cannot be similar. As the Planning Director explained, however, the intensity of the use is not relevant to the inquiry. Even if the intensity of the three proposed ball fields is as intense as opponents allege, that would hardly be any greater than the impact of dozens (or more) basketball or tennis courts. All the listed uses are capable of lesser or greater intensity magnitudes. As I see it, the question is whether the use of an outdoor ball field is similar to the use of a sports court. WU proposes to have football, lacrosse, soccer, and softball games take place on the fields.[17] Sports courts definitely include basketball, volleyball, and tennis games. While opponents make much of the distinction between indoor and outdoor sports and sports played on certain surfaces, I do not see that it is that clear cut. While football, lacrosse, soccer, and softball are generally played outdoors – they can all also be played indoors. Similarly, basketball, volleyball, and tennis can all both be played indoors or outdoors. The surfaces the sports can be played on are also variable. Football, lacrosse, soccer, and softball are all

[17] Not all sports refer to their contests as "games" but for ease of reference I will use games to apply to all sports.

played on grass as well as turf (soccer is sometimes played on hard courts). While basketball is generally played on wooden floors or other hard surfaces like concrete or asphalt, volleyball and tennis are often played on other surfaces such as grass, clay, or sand. Both ball fields and sports courts are places where people compete in sports – from pick-up to organized leagues. While it is certainly a subjective test, under all the definitions of similar, I think ball fields and sports courts are more alike than they are unlike each other due to the commonality of sports. I do not see the fact that the type of enclosure or surface renders the uses dissimilar. While reasonable minds can differ, people playing individual or team sports on a court seems awfully similar to people playing individual or team sports on a field. I agree with the Planning Director that the ball fields are similar uses to sports courts and may be authorized as a similar use that is potentially approvable as a conditional use in the RRFF-5 zone.

The Planning Director also decided that the indoor futsal courts and group training room were similar to sports courts:

> "Futsal is a form of indoor soccer. Unlike a sports court for basketball, volleyball, handball, or squash, the Applicant's proposed futsal 'courts' would not be played on a hard surface. Despite this difference, the activities played on the proposed futsal 'court' would be competitive athletic games played with multiple players at once in a prepared, defined, quadrangular space, without reliance on mechanical equipment (e.g., racecars). Like sports courts are allowed to be and often are, the proposed futsal courts would be indoors. Like sports courts commonly do, the futsal courts would have spaces for audience viewing. The futsal 'court' would have substantial structural components, just like a ski resort, swimming pool, country club, and gymnastics facility. Gymnastics facilities, ski areas, and swimming pools often have areas set aside for training. For these reasons, Staff finds the indoor training space component of the Applicant's proposed use to be similar to one or more recreational uses listed in Table 316-1." Planning Director's Decision 21-22.

Opponents argue that the proposed futsal courts are not similar to sports courts. While many of the issues in this case have plausible arguments on both sides, this one seems very straightforward to me. Futsal courts are extremely similar to sports courts. In fact, there is a very good argument that futsal courts *are* sports courts. While the proposed sports courts are apparently going to be indoor turf, the international standards for futsal involve a hard playing surface like a basketball court, and the official court size is slightly

larger than a basketball court. As discussed earlier, I do not see that the type of surface is of significant importance in distinguishing between various uses. In any event, even if the proposed futsal courts are not sports courts, they are as similar to sports courts as anything I could imagine. I agree with the Planning Director that the futsal courts are similar uses to sports courts and may be authorized as a similar use that is potentially approvable as a conditional use in the RRFF-5 zone.

4. Conclusion

The Planning Director's decision is very thorough and very persuasive. While I have expanded on her decision and addressed some arguments that were made after her decision was issued, I agree with the findings and conclusions in the decision. In any event, while I agree with the Planning Director's decision, I reached that conclusion from reviewing the evidence and arguments myself not by merely taking her word for it. In conclusion, I agree with the Planning Director that the ball fields do not constitute a recreational use or park use that may be approved as an outright permitted conditional use in the RRFF-5 zone. I also agree with the Planning Director that the ball fields and futsal courts may be approved as a conditional use in the RRFF-5 as an authorized similar use.[18] The Planning Director's decision is **AFFIRMED**.

DATED this 24th day of November, 2020.

Fred Wilson
Clackamas County Hearings Officer

APPEAL RIGHTS

Any party disagreeing with this decision may appeal it to the Board of County Commissioners (Board). An appeal must include a completed County Appeal Form (available at www.clackamas.us/planning/supplemental.html) and a $250.00 filing fee and must be received by the Planning and Zoning Division by close of business on the last day to appeal this decision, which is December 7, 2020. Close of business is 4:00 p.m., Monday

[18] I express no opinion on what if any impact LUBA and the Court of Appeals decisions in WU's conditional use case may have on authorizations of similar uses.

through Thursday, and 3:00 p.m. on Friday. However, due to the COVID-19 pandemic, our office is open limited hours. Please consult www.clackamas.us/planning for our current hours of in-office operation. Appeal requests may be submitted in person during these limited office hours. Appeals may also be submitted by email or US mail. Any party or parties appealing this decision may withdraw their appeal at any time prior to a final decision by the Board. A party wishing to maintain individual appeal rights may file an individual appeal and pay the $250.00 fee, even if an appeal by another party or parties has been filed.

The Board may choose to review this decision of the Hearings Officer on appeal but is not required to do so.

If the Board denies a request for review, it will do so in writing. Notice of the denial will be given pursuant to Subsection 1307.13(E)(1) of the Zoning and Development Ordinance. If the Board denies a request for review, the decision of the Hearings Officer will stand as the final decision of the County, and the period for appeal to the Oregon Land Use Board of Appeals will commence on the date of mailing of the Board's denial of review.

This decision by the Hearings Officer will be effective the day after the appeal deadline noted above, provided an appeal to the Board is not filed before that deadline.