

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

3
4 H.T. REA FARMING CORP.,
5 *Petitioner,*

6
7 vs.

8
9 UMATILLA COUNTY,
10 *Respondent,*

11 and

12
13 EAST END ROD AND GUN CLUB,
14 *Intervenor-Respondent.*

15
16 LUBA No. 2014-077

17
18 FINAL OPINION
19 AND ORDER

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22 Appeal from Umatilla County.

23
24 Patrick M. Gregg, Pendleton, filed the petition for review and argued on
25 behalf of the petitioner. With him on the brief was Corey Byler and Rew, LLP.

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27 No appearance by Umatilla County.

28
29 Michael C. Robinson and Seth J. King, Portland, filed the response brief.
30 Seth King argued on behalf of the intervenor-respondent. With them on the
31 brief was Perkins Coie LLP.

32
33 BASSHAM, Board Member; HOLSTUN, Board Member, participated in
34 the decision.

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36 RYAN, Board Chair, concurring.

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38 REMANDED

02/19/2015

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

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NATURE OF THE DECISION

Petitioner appeals a county board of commissioners’ decision approving an expansion of an existing shooting range, on an 85-acre parcel zoned for exclusive farm use (EFU).

FACTS

Intervenor-respondent East End Rod and Gun Club (intervenor) operates a shooting range that, as of 2013, consists of a 500-yard rifle range, a pistol range, a shotgun range, and six existing structures. Intervenor leases the subject 85-acre EFU-zoned parcel, which is located approximately 1.5 miles east of the city of Milton-Freewater. The listed uses that are allowed in the EFU zone under subsections (1) and (2) of ORS 215.213 and 215.283 do not include shooting ranges or fire arms training facilities.¹ However, pursuant to ORS 197.770, a “firearms training facility” that was in existence on September 9, 1995, is allowed to continue operating.² That statute applies in all zoning districts, including the EFU zone.

¹ ORS 215.283(2)(c) authorizes, among other things, “[p]rivate parks, playgrounds, hunting and fishing preserves and campgrounds.” The county did not rely on ORS 215.283(2)(c) in the challenged decision.

² ORS 197.770 provides:

- “(1) Any firearms training facility in existence on September 9, 1995, shall be allowed to continue operating until such time as the facility is no longer used as a firearms training facility.
- “(2) For purposes of this section, a firearms training facility is an indoor or outdoor facility that provides training courses and issues certifications required:

1 Intervenor seeks to expand its existing shooting range to include five
2 additional structures. Intervenor applied to the county for (1) a determination
3 that the existing range qualifies as a “firearms training facility” that was in
4 existence on September 9, 1995, for purposes of ORS 197.770 and
5 implementing provisions of the county code, and (2) approval to expand the
6 range to include the five additional structures.

7 The county planning commission conducted a hearing on the application,
8 and approved it with twelve conditions. Both petitioner and intervenor
9 appealed the planning commission decision to the county board of
10 commissioners. Petitioner argued that the existing facility offered no training
11 and did not issue any certifications prior to September 9, 1995, and therefore
12 does not qualify as a “firearms training facility” for purposes of ORS 197.770.
13 The board of commissioners concluded that ORS 197.770 requires only
14 evidence of intent and capability to provide training and issue certifications,
15 not that such training or issuance of certificates took place prior to September
16 9, 1995. In the alternative, the commissioners found that intervenor had
17 provided training and issued certificates at the site prior to September 9, 1995.
18 The commissioners also rejected petitioner’s argument that ORS 197.770 does
19 not allow an existing firearms training facility to be expanded. The
20 commissioners approved the application, with modified conditions. This appeal
21 followed.

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- “(a) For law enforcement personnel;
 - “(b) By the State Department of Fish and Wildlife; or
 - “(c) By nationally recognized programs that promote shooting matches, target shooting and safety.”

1 **FIRST ASSIGNMENT OF ERROR**

2 Under the first assignment of error, petitioner challenges the
3 commissioners’ interpretation that evidence of intent and capability to provide
4 training or issue certifications is sufficient to demonstrate that the facility
5 qualifies as a “firearms training facility” under ORS 197.770, and that evidence
6 that training occurred or certificates were issued prior to September 9, 1995 is
7 not necessary. Petitioner notes that ORS 197.770 defines a qualifying facility
8 as one that “*provides* training courses and issues certifications.” (Emphasis
9 added.) According to petitioner, the use of the active voice and present tense
10 suggests that to qualify as a “firearms training facility in existence on
11 September 9, 1995” that is allowed to “continue operating,” the facility must
12 actually provide the training and certifications specified in the statute prior to
13 September 9, 1995, in order to “continue operating” thereafter. Petitioner
14 contends that the mere capability of providing training or certifications, or the
15 intent to someday provide training or certifications, is insufficient.

16 We tend to agree with petitioner that in order to demonstrate that a
17 facility constitutes a “firearms training facility in existence on September 9,
18 1995,” the applicant must present evidence that the facility was a “firearms
19 training facility” on that date, *i.e.*, a facility that provided the training and
20 certifications of the type specified in the statute. ORS 197.770 specifies that a
21 qualifying facility may “continue operating” after September 9, 1995, which
22 suggests that the training facility must be both in existence and “in operation”
23 prior to that date.

24 However, we need not and do not resolve that issue, because the county
25 adopted alternative findings that intervenor’s facility had provided training and
26 issued certifications prior to September 9, 1995, and was therefore a “firearms

1 training facility” on that date.³ Petitioner does not acknowledge, or challenge,
2 those findings. To the extent that other portions of the petition for review
3 include challenges to the evidence supporting those findings, we agree with
4 intervenor that the county’s findings are supported by substantial evidence, *i.e.*,

³ The county’s findings state, in relevant part:

“The Board further finds that, even if ORS 197.770 requires that actual trainings and certifications occurred at the EERGC firearms training facility on or before September 9, 1995, the applicant has satisfied this requirement. As support for this conclusion, the Board relies upon the testimony of EERGC member Andy Millar in an affidavit dated August 8, 2013. In that affidavit, Mr. Millar stated that the EERGC obtained permission to use the Subject Property in 1992, that it conducted firearms trainings there on April 24, 1993, which resulted in certifications required by the ODFW being issued for participants, and that the EERGC continues to offer training programs resulting in certifications. Mr. Millar and four (4) other individuals also submitted letters attesting to organized clay pigeon shooting having occurred on the Subject Property since Spring 1994.

“As additional support for its conclusion, the Board relies upon the following: a letter from Janice Copple at the ODFW stating that Mr. Millar was a certified trainer as of January 12, 1994; testimony that Mr. Millar provided certification to an 11-year old young man at the EERGC in 1994; a letter from Terry Reynolds that he was enrolled in a firearms safety course in 1994 taught by Mr. Millar at the Subject Property; and copies of hunter safety cards dating back to 1994, submitted by Mr. Pressnall.

“In light of the substantial evidence discussed above, the Board finds that firearms trainings resulting in certifications were conducted on the Subject Property on or before September 9, 1995. The Board also finds that each of the specific instances of firearms training activities mentioned above occurred on the EERGC’s firearms training facility.” Record 18.

1 evidence that a reasonable person could rely upon to conclude that the facility
2 had provided training and issued certifications prior to September 9, 1995.
3 *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988).

4 Petitioner’s arguments under the first assignment of error do not provide
5 a basis for reversal or remand, and accordingly the assignment of error is
6 denied.

7 **SECOND ASSIGNMENT OF ERROR**

8 Under the second assignment of error, petitioner challenges the county’s
9 approval of the expansion of the existing facility to include five new structures.
10 According to petitioner, ORS 197.770 authorizes only the “continued
11 operation” of “the facility” as it existed on September 9, 1995, and does not
12 authorize expansion of such a facility. Petitioner contends that there is no
13 statute, administrative rule or code provision that authorizes expansion of an
14 existing firearms training facility in the county’s EFU zone.

15 As the sole authority to approve the proposed expansion, the county
16 relied on direct application of OAR 660-033-0130(2)(c), part of a Land
17 Conservation and Development Commission (LCDC) administrative rule that
18 implements Statewide Planning Goal 3 (Agricultural Land), and which governs
19 uses of agricultural land. Record 21-23. OAR 660-033-0130(2)(c) authorizes
20 counties to approve on agricultural land the “maintenance, enhancement, or
21 expansion” of certain “existing facilities,” including an ORS 197.770 firearms
22 training facility, subject to specified standards.⁴ However, for the reasons

⁴ OAR 660-033-0130(2) provides, in relevant part:

“(a) No enclosed structure with a design capacity greater than
100 people, or group of structures with a total design

1 below, we generally agree with petitioner that the county cannot rely on OAR
2 660-033-0130(2)(c) to approve the proposed expansion of intervenor’s facility.
3 To understand why, we must set out the administrative rule in context, and the
4 county’s implementation of OAR 660-033-0120(2)(c).

5 **A. ORS 197.770 does not authorize expansion**

6 Before turning to the rule, however, we agree with petitioner that ORS
7 197.770 does not itself authorize expansion of an existing firearms training
8 facility. The meaning of ORS 197.770 is a matter of statutory interpretation,
9 resolved by analysis of its text, context and legislative history. *See PGE v.*
10 *Bureau of Labor and Industries*, 317 Or 606, 610-612, 859 P2d 1143 (1993) *as*
11 *modified by State v. Gaines*, 346 Or 160, 172, 206 P3d 1042 (2009) (to
12 determine legislative intent, a court first examines a statute’s text and context,
13 and may consider legislative history to the extent it deems appropriate. If the
14 legislature’s intent is still unclear, the court may resort to general maxims of
15 statutory construction).

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 * * * .

“(b) Any enclosed structures or group of enclosed structures described in subsection (a) within a tract must be separated by at least one-half mile. * * *

“(c) Existing facilities wholly within a farm use zone may be maintained, enhanced or expanded on the same tract, subject to other requirements of law, but enclosed existing structures within a farm use zone within three miles of an urban growth boundary may not be expanded beyond the requirements of this rule.”

1 Petitioner is correct that the text of ORS 197.770 does not provide for
2 the expansion of an existing firearms training facility. The statute is silent
3 regarding the expansion of such a facility. Nothing in the text of the statute
4 *prohibits* expansion of an existing facility, if authorized and consistent with
5 other applicable law. However, ORS 197.770 itself does not authorize
6 expansion, or even speak to it.

7 That understanding of the text is supported by the legislative history
8 available to us. ORS 197.770 originated as House Bill (HB) 2876. The bill
9 was drafted in response to a particular issue: conflicts between an existing gun
10 club in Sherwood, Oregon, and more recent housing development near the
11 property. Tape Recording, House Floor Debate, HB 2876, May 15, 1995, Tape
12 140, Side B. The apparent purpose of the bill was to allow existing firearms
13 training facilities to continue in operation even where the use was either not
14 specifically allowed by, or prohibited by, local zoning ordinances.

15 Petitioner notes that during a Senate committee meeting on HB 2876, the
16 question was asked whether ORS 197.770 would allow the siting of new
17 firearms training facilities. The response was that “new ranges, new
18 construction would have to comply with provisions in existence at the time and
19 go through the process. This is just simply for things that are there and have
20 been there.” Record 293-94. Tape Recording, Senate Water and Land Use
21 Committee Public Hearing, HB 2876, May 18, 1995, Tape 147 Side A. In
22 addition, as noted by petitioner, and explained in *Conrady v. Lincoln County*,
23 260 Or App 115, 129, 316 P3d 413 (2013), during the House floor debate on
24 HB 2876, the bill’s carrier Representative Adams clarified that the bill
25 specifically referred to those facilities in existence and did not include
26 expansion of existing facilities. Representative Adams stated that “[HB 2876]

1 would not include expansions. It's firearms facilities in existence." Tape
2 Recording, House Floor Debate, HB 2876, May 15, 1995, Tape 140, Side B.

3 Based on that legislative history, petitioner argues that it is clear that
4 ORS 197.770 is intended to allow only continued operation of a firearms
5 training facility that were in operation on September 9, 1995, and that the
6 statute does not authorize the expansion of such firearms training facilities.
7 Instead, as explained at the May 18, 1995, Senate Water and Land Use
8 Committee Public Hearing, "new construction" at an existing facility "would
9 have to comply with provisions in existence at the time and go through the
10 process." Therefore, the question presented here is whether there is some other
11 source of authority in an applicable statute, administrative rule or code
12 provision that authorizes expansion of an existing firearms training facility in
13 an EFU zone. The only source of authority applied by the county, and cited to
14 us by the parties, is OAR 660-033-0130(2)(c). We turn next to the
15 administrative rule and its context.

16 **B. OAR 660-033-0130(2)(c).**

17 Table 1 of OAR 660-033-0120 lists all uses allowed as permitted or
18 conditional uses on agricultural land. Most of the listed uses are expressly
19 authorized by the EFU statutes at ORS 215.213 and 215.283. Those statutes
20 set out two categories of uses. Category 1 uses at ORS 215.213(1) and
21 215.283(1) are uses permitted as of right in the EFU zone, and counties cannot
22 adopt additional restrictions on Category 1 uses or deny such uses based on
23 local regulations. *Brentmar v. Jackson County*, 321 Or 481, 900 P2d 1030
24 (1995). However, LCDC has delegated authority to adopt additional
25 restrictions on Category 1 uses allowed under ORS 215.213(1) and 215.283(1),
26 even if those restrictions prohibit uses of agricultural land that the statutes

1 otherwise allow in the EFU zone. *Lane County v. Land Conservation and*
2 *Development Commission*, 325 Or 569, 581, 942 P2d 278 (1997).

3 Category 2 uses are set out at ORS 215.213(2) and 215.283(2), and are
4 uses that a county may allow in the EFU zone, subject to standards set out in
5 ORS 215.296 and OAR 660-033-0130, and subject to additional restrictions or
6 standards that the county may choose to impose.

7 As noted, firearms training facilities are neither Category 1 nor 2 uses
8 listed in the EFU statutes. Instead, the only statutory authority for a county to
9 allow an existing firearms training facility to continue in an EFU zone is ORS
10 197.770.

11 LCDC has implemented ORS 197.770 as it applies to agricultural lands
12 by listing “[f]irearms training facility as provided for in ORS 197.770” among
13 “Parks/Public/Quasi-Public” uses in OAR 660-033-0120, Table 1. In turn, the
14 county has implemented ORS 197.770 and OAR 660-033-0120, Table 1 by
15 adopting UCDC 152.059(E), which allows as a permitted use in the county
16 EFU zone the “[c]ontinuation of a firearms training facility in existence on
17 September 9, 1995, and meeting the intent and purposes in ORS 197.770(2)
18 and as provided in [UCDC] 152.617(II)(5).” UCDC 152.617(II)(5) is part of a
19 code section providing standards for permitted uses in the county EFU zone
20 and the county Grazing/Farm (GF) zone.⁵

⁵ UCDC 152.617(II)(5) largely repeats the language of ORS 197.770:

“Firearms Training Facility. Any firearms training facility in existence on September 9, 1995, shall be allowed to continue operating until such time as the facility is no longer used as a firearms training facility. (For purposes of this section a FIREARMS TRAINING FACILITY is an indoor or outdoor

1 Returning to Table 1, the table designates a “firearms training facility” as
2 an “R2” use, which requires some explanation.⁶ OAR 660-033-0120 describes
3 the meaning of the “R” designation:

4 “Use may be allowed, after required review. The use requires
5 notice and the opportunity for a hearing. Minimum standards for
6 uses in the table that include a numerical reference are specified in
7 OAR 660-033-0130. Counties may prescribe additional limitations
8 and requirements to address local concerns.”

9 OAR 660-033-0120(4) explains that the “#” designation means the
10 “[n]umerical references for specific uses shown in the table refer to the
11 corresponding section of OAR 660-033-0130. * * *” Hence, the “R2”
12 designation means that a firearms training facility as provided for in ORS
13 197.770 is allowed subject to county review, and subject to the standards set
14 out in OAR 660-033-0130(2).

15 As noted, OAR 660-033-0130(2) sets certain size and density limits on
16 uses within three miles of an urban growth boundary. *See* n 4. As relevant
17 here, OAR 660-033-0130(2)(c) provides that “[e]xisting facilities wholly
18 within a farm use zone may be maintained, enhanced or expanded on the same
19 tract, subject to other requirements of law[.]” *Id.* Thus, OAR 660-033-
20 0130(2)(c) and OAR 660-033-0120, Table 1, together authorize the county to
21 approve the expansion of an existing firearms training facility recognized under

facility that provides training courses and issues certifications
required for law enforcement personnel, by the State Department
of Fish and Wildlife, or by nationally recognized programs that
promote shooting matches, target shooting and safety.)”

⁶ Table 1 distinguishes between uses on high-value farmland and uses on all
other types of agricultural land. As far as we can tell, those distinctions make
no difference in the present case.

1 ORS 197.770 on land within three miles of an urban growth boundary, subject
2 to the standards in the rule and whatever additional standards the county may
3 choose to adopt.⁷

4 One other salient point must be made about the administrative rule,
5 before turning to petitioner’s arguments. OAR 660-033-0120, Table 1, lists
6 “firearms training facility as provided for in ORS 197.770” among the category
7 of “Parks/Public/Quasi-Public” uses. As relevant here, Table 1 designates
8 seven other “Parks/Public/Quasi-Public” uses as being subject to OAR 660-
9 033-0130(2), including: (1) public or private schools, (2) churches and
10 cemeteries, (3) private parks, (4) public parks, (5), community centers, (6) golf
11 courses, and (7) living history museums. Thus, the administrative rule
12 authorizes counties to approve expansion of those seven existing facilities on
13 lands within three miles of an urban growth boundary. As explained below, the
14 county has expressly amended its development code to allow expansion of
15 these seven Parks/Public/Quasi-Public uses listed in Table 1, but has not
16 amended its development code to allow expansion of a firearms training facility
17 in the EFU zone.

⁷ We note that OAR 660-033-0130(18)(a) includes a similarly worded provision providing in relevant part that “[e]xisting facilities wholly within a farm use zone may be maintained, enhanced or expanded on the same tract, subject to other requirements of law.” As we understand it, one difference between OAR 660-033-0130(2)(c) and OAR 660-033-0130(18)(a) is that the former applies to agricultural lands within three miles of an urban growth boundary, while the latter is not so limited. Table 1 does not designate OAR 660-033-0130(18)(a) as applying to an ORS 197.770 firearms training facility. Thus, it appears that LCDC has chosen to authorize counties to approve the expansion of an ORS 197.770 firearms training facility on EFU lands only on lands within three miles of an urban growth boundary.

1 **C. Petitioner’s Arguments**

2 Petitioner’s arguments regarding OAR 660-033-0130(2)(c) and the
3 county’s implementation of that rule are as follows:

4 “If ORS 197.770, which is the only basis upon which a firearms
5 training facility can be located on EFU zoned land, does not
6 permit expansion, then an administrative rule cannot broaden the
7 scope of the statute. And, even if OAR 660-033-0120 permits
8 expansion, the UCDC still must authorize expansion and, as noted
9 above, it does not authorize expansion of a firearms training
10 facility on EFU-zoned land.” Petition for Review 18-19.

11 Earlier in the Petition for Review, petitioner argues:

12 “Here, the narrow basis upon which a firearms training facility is
13 permitted in an EFU zone is through ORS 197.770, which does
14 not address expansion. Indeed, to read expansion into ORS
15 197.770 would require a violation of the principles of statutory
16 construction because one would need to add words to the statute.
17 Similarly, to argue that Umatilla County can authorize expansion
18 through UCDC 152.617(II)(5), when Umatilla County failed to
19 create a local ordinance that affirmatively permits expansion, runs
20 afoul of the same rule of statutory construction. Indeed, reaching
21 such a conclusion requires inserting into UCDC 152.617(II)(5) the
22 very language that is not present in ORS 197.770—authority for
23 expansion. Put another way: Umatilla County cannot say that the
24 UCDC authorizes expansion when the UCDC is itself silent on the
25 issue of expansion in an EFU zone.” Petition for Review 17-18.

26 We understand the foregoing to raise two issues. First, whether OAR
27 660-033-0130(2)(c) is inconsistent with ORS 197.770, or exceeds the scope of
28 LCDC’s authority, because it provides for expansion of an existing firearms
29 training facility on EFU land, and neither ORS 197.770 nor any other statute
30 authorizes such expansion. Second, whether the county’s choice not to amend
31 the UCDC to expressly provide for expansion of an existing firearms training

1 facility in the EFU zone means the county cannot directly apply OAR 660-033-
2 0130(2)(c) to approve the expansion.

3 Intervenor responds to the first argument by arguing that petitioner has
4 not demonstrated that the authorization to expand a firearms training facility at
5 OAR 660-033-0130(2)(c) is inconsistent with ORS 197.770, or otherwise
6 exceeds LCDC’s authority. Intervenor argues that LCDC has broad rule-
7 making authority and may adopt rules that are broader than or vary from the
8 authorizing language found in the statute, as long as such rules are not
9 inconsistent with the authorizing statute. Response Brief 15, quoting *NE*
10 *Medford Neighborhood Coalition v. City of Medford*, 53 Or LUBA 277, 287,
11 *aff’d* 214 Or App 46, 162 P3d 1059 (2007). *See also Lane County v. Land*
12 *Conservation and Development Commission, supra* at 581-83 (LCDC does not
13 exceed its authority in adopting rules that restrict or even prohibit uses
14 otherwise permitted on EFU-zone land under ORS 215.213(1), in order to
15 protect high-value farmland). Because ORS 197.770 is silent regarding
16 expansion, intervenor argues, an administrative rule providing for expansion is
17 not inconsistent with the statute.

18 Intervenor responds to the second argument by arguing that UCDC
19 152.617(II)(5), which repeats the language of ORS 197.770, is also silent
20 regarding expansion of an existing firearms training facility. Intervenor
21 contends that UCDC 152.617(II)(5) “does not expressly prohibit expansions of
22 existing firearms training facilities within the same tract,” and that the UCDC
23 can be interpreted consistently with the administrative rule to allow the city to
24 approve an expansion of a firearms training facility. Response Brief 19.

25 We need not and do not resolve the parties’ arguments regarding whether
26 OAR 660-033-0130(2)(c), in authorizing counties to approve the expansion of

1 an existing firearms training facility as provided in ORS 197.770, exceeds
2 LCDC's authority. That is because we agree with petitioner's second argument,
3 which is essentially that the county's decision not to implement OAR 660-033-
4 0130(2)(c) by amending its code to provide for the expansion of an existing
5 firearms training facility in the EFU zone means that the county cannot rely on
6 direct application of OAR 660-033-0130(2)(c) to authorize the expansion.

7 With one conspicuous exception, the county has implemented OAR 660-
8 033-0120, Table 1, and OAR 660-033-0130(2)(c), by adopting language into
9 the UCDC that expressly authorizes the expansion of the relevant
10 Parks/Public/Quasi-Public uses listed in Table 1: (1) public or private schools,
11 (2) churches and cemeteries, (3) private parks, (4) public parks, (5), community
12 centers, (6) golf courses, and (7) living history museums. UCDC 152.059(B);
13 UCDC 152.060.⁸ The exception is for ORS 197.770 firearms training facilities.
14 Nothing in the UCDC expressly or impliedly authorizes the county to approve
15 the expansion of an existing firearms training facility in the EFU zone.

16 The unmistakable conclusion is that in implementing OAR 660-033-
17 0130(2)(c) with respect to the uses listed in OAR 660-033-0120, Table 1, the
18 county provided for the expansion of existing churches, parks, etc., but chose
19 not to provide for expansion of an existing firearms training facility.

⁸ UCDC 152.059(B) provides that “[e]xisting church facilities may be maintained, enhanced or expanded on the same tract without an exception.” UCDC 152.060 applies to all Category 2 conditional uses allowed in the EFU zone, including private parks, public parks, golf courses, community centers, living history museums, and schools, and provides that “[e]xisting uses classified as conditional uses and listed in this section may be expanded subject to administrative review and subject to the requirements listed in OAR 660, Division 033.” Firearms training facilities are subject to neither of these provisions.

1 That conclusion is even clearer when zones other than the county’s EFU
2 zone are considered. As petitioner notes, the county’s GF zone allows a new
3 “firearms training facility” to be established as a conditional use. UCDC
4 152.085(HH).⁹ Notably, UCDC 152.085 expressly allows expansion of
5 existing conditional uses allowed in the GF zone, including firearms training
6 facilities.¹⁰ Thus, in the GF zone, the county has expressly chosen to allow the
7 expansion of an existing firearms training facility that is established as a
8 conditional use under UCDC 152.085. There is no similar provision for an
9 ORS 197.770 firearms training facility in either the EFU or GF zones.

10 Like EFU zone, the GF zone allows as a *permitted* use the
11 “[c]ontinuation of a fire arms training facility in existence on September 9,
12 1995 and meeting the intent and purposes in ORS 197.770(2) * * *.” UCDC
13 152.084(E). Like the EFU zone, UCDC 152.084 does not provide for
14 expansion of an ORS 197.770 firearms training facility, although it expressly

⁹ UCDC 152.085(HH) presumably implements OAR 660-006-025(4)(n), which authorizes counties to allow the establishment of a new firearms training facility on forest lands, subject to conditional use standards. The GF zone appears to be a mixed farm/forest zone, and therefore may allow uses that are authorized on forest lands under Statewide Planning Goal 4 (Forest Lands) and its implementing rule, OAR 660-006-0025.

¹⁰ UCDC 152.085 provides, in relevant part:

“In the GF Zone, the following uses may be permitted conditionally via administrative review * * *. Existing uses classified as conditional use and listed in this section may be expanded subject to administrative review and subject to the requirements listed in this section, except expansions on a parcel or tract meeting the definition of high value farmland will not be permitted.”

1 allows for expansion of other permitted uses, such as churches. This context
2 makes it even clearer that the county has deliberately chosen not to allow an
3 ORS 197.770 firearms training facility to be expanded in the EFU zone.

4 UCDC chapter 152 is acknowledged to comply with the statewide
5 planning goals and administrative rules. ORS 197.175(2)(d) provides that if
6 the county's comprehensive plan and land use regulations have been
7 acknowledged, the county shall make land use decisions in compliance with its
8 acknowledged plan and land use regulations.¹¹ The county's acknowledged
9 land use regulations do not provide for expansion of an ORS 197.770 firearms

¹¹ ORS 197.175(2) provides, in relevant part:

“Pursuant to ORS chapters 195, 196 and 197, each city and county in this state shall:

“(a) Prepare, adopt, amend and revise comprehensive plans in compliance with goals approved by the commission;

“(b) Enact land use regulations to implement their comprehensive plans;

“(c) If its comprehensive plan and land use regulations have not been acknowledged by the commission, make land use decisions and limited land use decisions in compliance with the goals;

“(d) If its comprehensive plan and land use regulations have been acknowledged by the commission, make land use decisions and limited land use decisions in compliance with the acknowledged plan and land use regulations; and

“(e) Make land use decisions and limited land use decisions subject to an unacknowledged amendment to a comprehensive plan or land use regulation in compliance with those land use goals applicable to the amendment.”

1 training facility in the EFU zone. Moreover, that omission is not mere silence
2 regarding expansion, as evidenced by the fact that the county used the authority
3 granted by OAR 660-033-0120, Table 1, and OAR 660-033-0130(2)(c) to
4 expressly provide for expansion of other Parks/Public/Quasi-Public uses in the
5 EFU zone, and that the county has expressly provided in the GF zone for
6 expansion of existing non-ORS 197.770 firearms training facilities.

7 Neither the county’s decision nor intervenor identifies a legal basis in
8 these circumstances for the county to directly apply OAR 660-033-0130(2)(c)
9 to approve expansion of intervenor’s existing ORS 197.770 firearms training
10 facility. The closest the decision comes is a finding that, although the county
11 *could have* adopted an express prohibition on expanding an ORS 197.770
12 firearms training facility, the county has not done so, and therefore “state law,
13 including the provisions of OAR 660-033-0120 and -130, apply directly to the
14 Application.” Record 23.

15 However, that finding has it backward. OAR 660-033-0130(2)(c)
16 authorizes a county to amend its land use regulations to *provide* for the
17 expansion of certain existing facilities, including an ORS 197.770 firearms
18 training facility.¹² The county adopted amendments that implement OAR 660-

¹² ORS 197.646(1) requires local governments to amend their land use regulations to implement “new requirements” in a goal, statute or administrative rule, and unless and until a local government does so, the new requirement applies directly to the local government’s land use decisions, pursuant to ORS 197.646(3). However, no party argues that OAR 660-033-0130(2)(c)’s authorization to allow expansion of certain existing facilities is a “new requirement” within the meaning of ORS 197.646(1) and (3). It is not a “requirement” at all, but rather an authorization for the county to amend its legislation to provide for expansion of certain facilities, subject to the rule’s standards and whatever additional standards or restrictions the county wishes to

1 033-0130(2)(c), and in so doing chose *not* to provide for expansion of an ORS
2 197.770 firearms training facility in the EFU zone. That the county has not
3 adopted an express *prohibition* on expansion of an ORS 197.770 firearms
4 training facility does not mean that the administrative rule somehow applies
5 directly to authorize such an expansion. As explained, the county’s
6 implementation of OAR 660-033-0130(2)(c) is acknowledged to comply with
7 the administrative rule, and therefore pursuant to ORS 197.175(2)(d) the
8 county must apply the UCDC, not the administrative rule, to land use decisions.
9 Because the UCDC does not provide for expansion of an ORS 197.770
10 firearms training facility, the county cannot approve such an expansion unless
11 and until it amends the UCDC to so provide.

12 The second assignment of error is sustained.

13 **CONCLUSION**

14 We have denied the first assignment of error challenging the recognition
15 of intervenor’s facility as an existing ORS 197.770 firearms training facility,
16 but sustained the second assignment of error challenging the county’s approval
17 of an expansion of that facility. Therefore remand is necessary for the county to
18 deny the proposed expansion.

19 The county’s decision is remanded.

20 Ryan, Board Chair, concurring.

21 I concur with the majority opinion because for the reasons explained in
22 the majority opinion I agree with the majority that we need not resolve the

adopt. Even if OAR 660-033-0130(2)(c) is viewed as a “new requirement” for purposes of ORS 197.646(1) and (3), the county complied with ORS 197.646(1) by adopting code amendments to implement the rule. Because the county complied with ORS 197.646(1), ORS 197.646(3) does not operate to make the rule directly applicable to the county’s land use decisions.

1 parties' arguments regarding whether OAR 660-033-0130(2)(c), in authorizing
2 counties to approve the expansion of an existing firearms training facility as
3 provided in ORS 197.770, exceeds LCDC's authority. I write separately
4 because on the state of the briefing in this appeal, petitioner's argument that
5 LCDC exceeded its authority in authorizing expansions of firearms training
6 facilities on EFU-zoned lands is arguably the better one.

7 Petitioner argues that ORS 197.770, which is the only statutory basis
8 upon which a firearms training facility can be located on EFU-zoned land, does
9 not permit expansion of a facility, and I agree with petitioner. The express
10 language of the statute does not permit or prohibit expansion. But the
11 legislative history supports a conclusion that the legislature did not intend, in
12 enacting ORS 197.770, to allow firearms training facilities as they existed on
13 September 9, 1995 to be expanded.

14 OAR 660-033-0130(2), however, allows counties to approve the
15 expansion of firearms training facilities on certain EFU-zoned land. Petitioner
16 argues that LCDC exceeded its authority in adopting the rule, because the rule
17 is inconsistent with the only statute that allows firearms training facilities on
18 EFU land in the first place.

19 It is true that in *Lane County v. Land Conservation and Development*
20 *Commission*, 325 Or 569, 581, 942 P2d 278 (1997), the Supreme Court
21 explained that LCDC has authority to adopt additional *restrictions* on uses
22 allowed in the EFU zone. But neither *Lane County* nor any other opinion or
23 statute cited by intervenor supports the counterpoint to that conclusion: that
24 LCDC has authority to allow uses on EFU land that are inconsistent with the
25 uses authorized in statute. Even assuming without deciding that LCDC has
26 some authority to allow uses that arguably go beyond the uses specified in the

1 statutes governing uses on EFU-land, here, only one statute, ORS 197.770,
2 allows this particular use on EFU land at all, and the legislative history of that
3 statute makes clear that the legislature did not intend to allow expansions of
4 existing firearms training facilities. Accordingly, absent identification of any
5 other source of authority for LCDC to authorize expansion of firearms training
6 facilities that are authorized on EFU land only by virtue of ORS 197.770, I tend
7 to agree with petitioner that LCDC exceeded its authority in adopting the
8 portion of the rule authorizing expansions of “firearms training facilit[ies] as
9 provided in ORS 197.770.”