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

J.C. REEVES CORPORATION,)
)
Petitioner,)
)
vs.)
)
WASHINGTON COUNTY,)
)
Respondent,)
)
and)
)
TUALATIN VALLEY SPORTSMEN'S CLUB,)
)
Intervenor-Respondent.)

LUBA No. 95-043
FINAL OPINION
AND ORDER

Appeal from Washington County.

William C. Cox, Portland, filed the petition for review and argued on behalf of petitioner.

David C. Noren, Assistant County Counsel, Hillsboro, filed a response brief and argued on behalf of respondent.

Clark I. Balfour, Portland, filed a response brief and argued on behalf of intervenor-respondent.

LIVINGSTON, Chief Referee; HANNA, Referee, participated in the decision.

REMANDED 04/25/96

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

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the county board of
4 commissioners granting the Tualatin Valley Sportsmen's Club
5 (TVSC) special use approval as a firearms training facility
6 in the Exclusive Forest and Conservation (EFC) zone.

7 **MOTION TO INTERVENE**

8 TVSC moves to intervene on the side of the respondent.
9 There is no objection to the motion, and it is allowed.

10 **FACTS**

11 TVSC owns and operates a private gun club on
12 approximately 220 acres located in a rural area just beyond
13 the Portland Metropolitan Area UGB. The gun club was
14 established in 1944, well before the property was first
15 subject to restrictive land use regulations. TVSC's
16 facility became a nonconforming use in 1984, when the AF-20
17 designation previously applied to the property was amended
18 to qualify as an exclusive farm use zone. The AF-20 zone
19 does not presently allow gun club facilities as a permitted
20 use.

21 Beginning in 1962, TVSC was granted a series of
22 conditional use permits for its facility. TVSC's
23 nonconforming facility remains subject to conditions imposed
24 by these prior conditional use permits, and the facility's
25 compliance with those conditions is subject to review every
26 five years under the county's Type III procedures, which

1 require a public hearing.

2 Because of limitations on expansion resulting from its
3 nonconforming use status, TVSC has pursued a strategy over
4 several years aimed at becoming a conforming use again. In
5 1992, TVSC initiated and was granted a comprehensive plan
6 amendment from AF-20 to EFC. Petitioner in this proceeding
7 appealed to LUBA in that proceeding as well. See Reeves v.
8 Washington County, 24 Or LUBA 483 (1993) ("Reeves I"). The
9 county's decision was affirmed.

10 In June 1993, TVSC applied for special use approval as
11 a firearms facility, which, if granted, would allow it to
12 achieve its goal of becoming a conforming use. The county
13 treated the application as one both for special use approval
14 and for the required five-year review of conditions.¹

15 In June 1994, the county hearings officer denied the
16 special use approval and imposed certain conditions on
17 continuation of the nonconforming use. Both TVSC and
18 opponents appealed the hearings officer's decision to the
19 county board of commissioners, which heard the appeals on
20 the record.

¹As explained by a county planner:

"[E]ven though [TVSC is] seeking approval as a conforming use, it is nevertheless necessary for the review of conditions information to be submitted. In the event that the gun club is not approved as a firearms training facility in whole or in part, the club's conditional use approval would continue to be valid as a nonconforming use. Additionally, unless the previous conditions are removed by the Hearings Officer, the review continues to be required." Record 759.

1 On December 27, 1994, the board of commissioners
2 granted the special use approval, thereby reversing the
3 hearings officer with respect to that aspect of the
4 application, and upheld the hearings officer as to the
5 nonconforming use, with certain modifications to the
6 conditions imposed.

7 Petitioner appeals only the granting of the special use
8 approval.

9 **FIRST ASSIGNMENT OF ERROR**

10 Petitioner contends the county improperly failed to
11 review under the Statewide Planning Goals (goals) its
12 determination that TVSC is a firearms training facility.
13 Petitioner relies on a statement in 1000 Friends v. Jackson
14 County, 79 Or App 93, 98, 718 P2d 753, rev den 301 Or 445
15 (1986) that when a comprehensive plan map is amended, the
16 amendment may create secondary effects that are inconsistent
17 with the goals. Petitioner argues:

18 "Since the County argued and [LUBA], in [Reeves
19 I], agreed that no application for a Firearms
20 Training Facility was before the County at the
21 time of the comprehensive plan change to EFC, the
22 only opportunity to determine whether the Firearms
23 Training Facility designation is: (a) compatible
24 with Washington County's own comprehensive plan;
25 (b) compatible with surrounding jurisdiction's
26 [sic] comprehensive plans; (c) allows an urban use
27 in a rural area; or (d) otherwise in compliance
28 with comprehensive planning rules, should have
29 been during the subject request for [firearms
30 training facility] status." Petition for
31 Review 10.

32 Comprehensive plan amendments, including plan map

1 amendments, are reviewable for goal compliance under
2 ORS 197.835. 1000 Friends v. Jackson County, supra; Ludwick
3 v. Yamhill County, 72 Or App 224, 696 P2d 536, rev den 299
4 Or 443 (1995). However, the challenged decision does not
5 approve a plan map amendment. The property was zoned EFC at
6 the time of application. Under the Washington County
7 Community Development Code (CDC) 342-3.1(F), a firearms
8 training facility is a use permitted through a Type II
9 procedure in the EFC zone.

10 If petitioner had wanted to challenge, on the basis of
11 secondary effects, the plan amendment rezoning the subject
12 property to EFC, it should have made the necessary showing
13 prior to Reeves I. It did not. As we said in Reeves I:

14 "Petitioner offers no explanation for why the
15 challenged comprehensive plan amendment [to EFC]
16 has secondary effects on the plan's continued
17 compliance with Goal 14. Petitioner's entire
18 argument concerning Goal 14 under this assignment
19 of error is based on his erroneous assumption that
20 the challenged decision in some way approves the
21 existing gun club facility use of the property.
22 To the extent petitioner argues the challenged
23 decision violates Goal 14 because the EFC District
24 potentially allows 'urban' firearms training
25 facilities, we reject the argument. Even if the
26 acknowledged EFC District would allow approval of
27 an urban fire arms training facility, a question
28 we need not decide here, that issue was present
29 when the EFC District provisions were acknowledged
30 pursuant to ORS 197.251 or 197.625 and may not be
31 revisited in this appeal." Id. at 487. (Emphasis
32 added; citation and footnote omitted.)

33 Having failed prior to Reeves I to make the necessary
34 explanation concerning secondary effects as they relate to

1 Goal 14 or any other goal, petitioner cannot attack the plan
2 amendment now.

3 The first assignment of error is denied.

4 **THIRD ASSIGNMENT OF ERROR**

5 Petitioner contends the county violated Goal 2 in
6 granting the requested special use approval without
7 coordinating with other affected jurisdictions and Metro.
8 However, as discussed under the first assignment of error,
9 the goals, including the Goal 2 coordination requirement, do
10 not apply directly to the challenged approval.

11 The third assignment of error is denied.

12 **SIXTH ASSIGNMENT OF ERROR**

13 Petitioner contends that the definition of "firearms
14 training facility" adopted by the county board of
15 commissioners in connection with the requested special use
16 approval should not have been applied prior to
17 acknowledgment by the Land Conservation and Development
18 Commission (LCDC).

19 "Firearms training facility" is one of the uses listed
20 in OAR 660-06-025(4)(m) that may be allowed on forest lands,
21 subject to the review standards in OAR 660-06-025(5).² As

²OAR 660-06-025(5) provides, in relevant part:

"A use authorized by section (4) of this rule may be allowed provided the following requirements or their equivalent are met. These requirements are designed to make the use compatible with forest operations and agriculture and to conserve values found on forest lands:

1 noted above, the county permits firearms training facilities
2 in the EFC zone. The term is undefined in both OAR Chapter
3 660 and the CDC.³

4 The challenged decision states:

5 "The Board recognizes that neither the state

"(a) The proposed use will not force a significant change in,
or significantly increase the cost of, accepted farming
or forest practices on agriculture or forest lands;

"(b) The proposed use will not significantly increase fire
hazard or significantly increase fire suppression costs
or significantly increase risks to fire suppression
personnel; and

"* * * * *"

³The 1995 legislature adopted the following definition of "firearms
training facility" in ORS 197.770, which states:

"(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:

"(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."

OAR 660-06-025(4)(m) and CDC 342-3.1(F) were adopted, and the challenged
decision was made, before ORS 197.770 became law. The parties did not
address ORS 197.770 in their briefs, which were filed in late September and
early October 1995, or at oral argument in January 1996. ORS 197.770(1)
limits the application of the definition in ORS 197.770(2), and it is
unclear that even if its application were not specifically limited, the
definition would apply to TVSC's request for classification as a special
use firearms training facility. See ORS 215.428(3); East Lancaster
Neighborhood Assoc. v. City of Salem, 139 Or App 333, 337-39, ___ P2d ___
(1996).

1 administrative rule nor CDC Section 342 defines
2 'firearms training facility,' although
3 correspondence from [Department of Land
4 Conservation and Development] staff states that
5 'firearms training' would need to be an activity
6 that 'is more than incidental to other club
7 functions.' While the Board concurs in this
8 analysis, it believes a more detailed definition
9 of 'firearms training facility' will assure that
10 the subject use and any other applications for
11 approval of firearms training facilities meet the
12 intent both of the state administrative rule and
13 CDC Section 342." Record 12.

14 The definition of "firearms training facility" stated
15 in the challenged decision is:

16 "A firearms training facility is a use of land
17 and/or structures where a significant amount of
18 activity is in providing a wide variety of ranges
19 for firearms education, safety, and marksmanship
20 proficiency and operated according to a code of
21 safety rules. Education and marksmanship
22 proficiency is met by regularly conducting
23 hunter's safety or training courses, including
24 those sponsored by government agencies such as the
25 Oregon Department of Fish & Wildlife; clinics or
26 courses for firearms safety and home safety;
27 National Rifle Association or other certification
28 classes; activities for law enforcement training
29 or licensing requirements for employment purposes;
30 junior programs for minors; training for or
31 hosting local or regional competitions and
32 individual training for safety and marksmanship
33 proficiency.

34 "In considering whether a use is a firearms
35 training facility, and the operating conditions to
36 be applied, the County will take into account the
37 safety rules, range configurations, natural and
38 topographical conditions of the site, impact on
39 adjoining uses, documented safety problems and
40 response to complaints of neighbors or
41 governmental bodies with a legitimate interest in
42 the method and conduct of the facility's
43 operation. The County, at the time of firearms

1 training facility designation or thereafter
2 through periodic review, if periodic review is a
3 condition, may provide such conditions as
4 appropriate to balance the interests of neighbors,
5 governmental entities, and the facility." Record
6 14. (Emphasis added.)

7 The county has not amended an acknowledged land use
8 regulation by stating this definition. It has instead made
9 an interpretation that is apparently intended to guide the
10 board of county commissioners in the future. That this
11 interpretation was not made prior to reduction of the
12 challenged decision to writing is not a basis for remand. A
13 local government's articulation of required interpretations
14 often is not available in the exact form in which those
15 interpretations are ultimately adopted until the final
16 written decision and findings are adopted. See Salem-Keizer
17 School Dist. 24-J v. City of Salem, 27 Or LUBA 351, 368
18 (1994).

19 The sixth assignment of error is denied.

20 **SECOND ASSIGNMENT OF ERROR**

21 In addition to stating the contention that we deny
22 under the sixth assignment of error, petitioner contends the
23 county's interpretation of "firearms training facility" is
24 deficient because it "fails to indicate that firearms
25 training must be more than incidental to other club
26 functions." Petition for Review 11.

27 Because the term "firearms training facility" is used
28 in a state regulation and merely restated in the CDC, we may

1 not defer to the county's interpretation. See Forster v.
2 Polk County, 115 Or App 475, 478, 839 P2d 241 (1992); Testa
3 v. Clackamas County, 29 Or LUBA 383, 389, aff'd 137 Or App
4 21, rev den 322 Or 420 (1995).

5 We also may not defer to the Department of Land
6 Conservation and Development (DLCD) deputy director's
7 opinion that

8 "allowing the expansion of the [TVSC] would be
9 consistent with the Goal 4 rule if this facility
10 (1) provides for firearms training as an activity
11 that is more than incidental to other club
12 functions; and (2) can upon review satisfy the
13 requirements [of] OAR 660-06-025(5) as restated in
14 [the CDC]." Record 844-45.

15 This opinion, which was given in response to a private
16 inquiry after the adoption of OAR 660-06-025(4)(m) itself,
17 is neither a formal rule interpretation nor administrative
18 history. See Sensible Transportation v. Washington County,
19 28 Or LUBA 375, 377 (1994).

20 Petitioner does not question the obvious premise that a
21 firearms training facility is a facility where firearms
22 training occurs. Rather, petitioner contends that because
23 firearms training is only a part of the activities that
24 occur at TVSC, TVSC should not be viewed as a firearms
25 training facility allowed under OAR 660-06-025(4)(m).
26 Petitioner relies on the factual findings and reasoning of
27 the county hearings officer:

28 "As the history of the club demonstrates, the club
29 facilities have been developed over the years to
30 serve its members, who enjoy shooting activities.

1 The Hearings Officer, however, finds the
2 Applicant's suggestion, that all activities are
3 training activities, and therefore it is a
4 Firearms Training Facility, disingenuous.
5 Hopefully, the more the members engage in a
6 shooting activity the better they will be, just as
7 [a] golfer, at a golf club, hopefully improves
8 with practice. In the latter case this would not
9 convert a golf club to a golf training center, nor
10 does practice convert a shooting club to a
11 Firearms Training Center [sic]. Much like other
12 recreational clubs, the Club has over the years
13 let non members use its facilities, including
14 local law officers, because they have no
15 equivalent facility in the area. Laudably and
16 because of the very nature of loaded guns, the
17 Club's programs includes [sic] safety and training
18 sessions. Likewise, other recreational clubs may
19 have safety programs, depending on the sport
20 involved. The Hearings Officer finds that the
21 Applicant is a Shooting Club, which is a permitted
22 use in the AF-5, AF-10 Districts." Record 635.

23 Since we may not defer to either the county's or the
24 DLCD deputy director's interpretations, we must ourselves
25 determine what falls within the classification "firearms
26 training facility," which is one of the locationally
27 dependent uses listed in OAR 660-06-025(4).

28 The inclusion of specific uses in the rule tends to
29 imply an intent to exclude related uses not mentioned. See
30 Lafferty v. Newbry, 200 Or 685, 690, 268 P2d 589 (1954).
31 Because OAR 660-06-025(4) specifically enumerates
32 locationally dependent uses which may occur in a forest
33 zone, we do not consider it appropriate to expand the list
34 to include shooting clubs. We agree with petitioner that
35 the county's requirement that a significant amount of

1 firearms training occur at a firearms training facility is
2 not demanding enough under OAR 660-06-025(4)(m), because it
3 places no limitation on other activities not directly
4 related to or justified by firearms training. While some
5 activities incidental to firearms training may occur, the
6 predominant activity -- the reason for the facility's
7 existence -- must be that specified by the rule before a
8 firearms training facility can be said to exist. See
9 Greuner v. Lane County, 109 Or App 160, 818 P2d 959 (1991)
10 (county regulations that allow dog boarding, breeding or
11 selling in an exclusive farm use zone cannot be extended to
12 allow dog training that is more than incidental to the
13 allowed uses).⁴

14 The second assignment of error is sustained.

15 **FOURTH ASSIGNMENT OF ERROR**

16 Petitioner contends the board of county commissioners
17 violated petitioner's right to due process and a fair and

⁴Under this assignment of error, petitioner makes a secondary (and unrelated) argument based on OAR 660-06-025(6) which provides:

"Nothing in this rule relieves governing bodies from complying with other requirement[s] contained in the comprehensive plan or implementing ordinances such as the requirements addressing other resource values (e.g. Goal 5) which exist on forest lands."

Petitioner contends the challenged decision contains no findings "addressing the other resource values and how they will be affected by the Gun Club's presence." Petition for Review 15. However, since petitioner does not identify any applicable provisions in the county comprehensive plan or implementing ordinances that have not been addressed, this contention provides no basis for reversal or remand.

1 impartial hearing by permitting the county sheriff to
2 present new evidence at the appeal hearing on the record
3 that closing TVSC would cost the county \$2,000,000 either
4 for additional training time or for the construction of
5 replacement practice ranges.⁵ Petitioner alleges the county
6 commissioners rejected its request for a continuance to
7 allow cross-examination and rebuttal testimony.

8 The county and TVSC respond that (1) the sheriff's
9 appearance was actually for the Washington County Sheriff's
10 Department, which appeared through various representatives
11 at earlier stages in the proceedings; and (2) the board of
12 county commissioners specifically found that the sheriff's
13 testimony was not relevant to its determination that TVSC is
14 a firearms training facility.

15 The notice given prior to the appeal hearing states the
16 hearing "shall be limited to the record of the hearings
17 officer." It continues: "Only those persons who submitted
18 oral or written testimony at the public hearing before the
19 hearings officer (parties) may be heard by the Board."
20 Record 602. CDC 205-3.1 provides:

21 "The following persons, or their authorized
22 representatives, may participate during the
23 comment period or public hearing:

⁵The minutes of the county board of commissioners' December 13, 1994 meeting reflect only that the sheriff testified that "there is no other place in Washington County to practice this [shooting] skill other than at [TVSC]." Record 106.

1 "* * * * *

2 "D. At a public hearing on appeal, any person who
3 made an appearance of record in the prior
4 proceeding."

5 The sheriff was authorized by CDC 205-3.1 to
6 participate in the hearing before the board of county
7 commissioners. He was an "authorized representative" of the
8 Washington County Sheriff's Department, which had appeared
9 during earlier proceedings through other authorized
10 representatives.

11 There seems to be no dispute the sheriff presented new
12 evidence, whether relevant or not. In support of its claim
13 it was denied due process, petitioner relies on CDC 205-5,
14 which states:

15 "Subject to the specific standards and limitations
16 set forth in this Code, the following procedural
17 entitlements shall be provided at the public
18 hearing:

19 "205-5.1 A reasonable opportunity for those
20 persons entitled to notice or who may be
21 adversely affected or aggrieved by the
22 decision to present evidence;

23 "205-5.2 A reasonable opportunity to cross-
24 examine witnesses, including staff,
25 provided that right is asserted at the
26 first reasonable opportunity. Staff
27 similarly shall be entitled to
28 reasonable cross-examination of
29 witnesses;

30 "205-5.3 A reasonable opportunity for rebuttal of
31 new material;

32 "* * * * *"

1 We agree with petitioner that as a general rule, after
2 allowing new evidence, even at a hearing on the record, the
3 board of county commissioners is required by CDC 205-5 to
4 provide an opportunity for rebuttal. However, we also agree
5 with the statement in the challenged decision that the
6 sheriff's testimony, whether the version described by
7 petitioner or the version reflected in the record, is
8 irrelevant to the decision the commissioners had to make.
9 Furthermore, the board of commissioners could choose to
10 exclude the sheriff's statement under CDC 205-7.2, which
11 provides:

12 "Cumulative, repetitious, immaterial or irrelevant
13 evidence may be excluded. * * * Evidence may be
14 received subject to a later ruling regarding its
15 admissibility. Erroneous admission [of] evidence
16 shall not invalidate or preclude action unless
17 shown to have prejudiced the substantial rights of
18 a party." (Emphasis added.)

19 The challenged decision expressly states the board of
20 county commissioners did not rely on the sheriff's
21 testimony, which the commissioners found not relevant.
22 Record 49. Petitioner has not shown, as it must under CDC
23 205-7.2, that its substantial rights were prejudiced by the
24 sheriff's testimony.

25 The fourth assignment of error is denied.

26 **FIFTH ASSIGNMENT OF ERROR**

27 Petitioner contends the county failed to make required
28 findings addressing various safety concerns raised during
29 the hearings process. Findings must address and respond to

1 specific issues, raised in the proceedings below, that are
2 relevant to compliance with applicable approval standards.
3 Hillcrest Vineyard v. Bd. of Comm. Douglas Co., 45 Or App
4 285, 293, 608 P2d, 201 (1980); Norvell v. Portland Area
5 LGBC, 43 Or App 849, 853, 604 P2d 896 (1979). However,
6 petitioner has not identified applicable approval standards
7 concerning safety that the county's findings fail to address
8 and has therefore provided no basis for reversal or remand.

9 The fifth assignment of error is denied.

10 The county's decision is remanded.