

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

Appeal from Crook County.

Terrence B. O'Sullivan, Bend, filed the petition for review on behalf of petitioners. With him on the brief was Merrill, O'Sullivan, MacRitchie, Petersen & Dixon.

No appearance by respondent.

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

REMANDED 03/28/97

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 Petitioners appeal a decision of the Crook County court
4 granting conditional use approval for a game bird hunting
5 preserve and club.

6 **FACTS**

7 The subject property, which is zoned for exclusive farm
8 use (EF-2), consists of 600 acres of pasture and 40 acres of
9 tillable land adjacent to the Crooked River Highway. The
10 applicants below seek to create a hunting preserve on which
11 hunters will pay to have a number of birds released. The
12 birds will then be immediately hunted and shot. Two groups
13 of hunters will be invited to hunt on the site at one time,
14 with four to five hunters in each group. In addition to
15 hunting, participants will be allowed to shoot clay pigeons.

16 After a hearing, the planning commission approved the
17 application. Petitioners appealed to the county court,
18 which reviewed the application on the record, heard argument
19 and on August 28, 1996, also approved the application.

20 This appeal followed.

21 **FIRST ASSIGNMENT OF ERROR**

22 Petitioners contend that because the applicants are not
23 the owners of the subject property, they did not have
24 authority to file the application. Based on a statement in
25 the staff report, Record 113, referring to "the area to be
26 leased," petitioners contend that, at most, the applicants

1 are prospective lessees.

2 Crook County Zoning Ordinance (CCZO) 6.060 provides:

3 "The procedure for taking action on a conditional
4 use application shall be as follows:

5 "1. A property owner may initiate a request for a
6 conditional use * * *.¹ (Emphasis added.)

7 The challenged decision finds:

8 "The Ordinance definition of 'owner' is the 'owner
9 of the title to real or personal property or the
10 authorized agent thereof * * * [.]' Section
11 1.030(89). The Court finds that the County's
12 interpretation of 'owner' is that if a person
13 leases a piece of property for a use, that person
14 will be the 'authorized agent' of the owner as
15 shown by the lease. In this situation, the owner
16 of the ranch leased the property to be used for a
17 hunting preserve. This would make the applicant
18 the authorized agent of the owner for purposes of
19 making a land use application for a hunting
20 preserve. For example, if a person leased a
21 building for retail space and then that person
22 would make a[n] application for a store on the
23 leased property. [sic] The County would consider
24 the lessee the authorized agent of the owner for
25 purposes of the land use application.
26 Furthermore, if the land owner did not like the
27 use, or the use violated any terms of the lease,
28 he could terminate the lease and in doing so,

¹ORS 215.416(1) provides, in part:

"When required or authorized by the ordinances, rules and regulations of a county, an owner of land may apply in writing to such persons as the governing body designates, for a permit, in the manner prescribed by the governing body. * * *"
(Emphasis added.)

Petitioners do not base their argument on the statute, and it is not our function to supply petitioner with legal theories or to make petitioners' case for them. Deschutes Development v. Deschutes Cty., 5 Or LUBA 218 (1982).

1 terminate the use." Record 24. (Emphasis in
2 original.)

3 This Board is required to defer to a local governing
4 body's interpretation of its own enactment, unless that
5 interpretation is contrary to the express words, purpose or
6 policy of the local enactment or to a state statute,
7 statewide planning goal or administrative rule which the
8 local enactment implements. Gage v. City of Portland, 319
9 Or 308, 316-17, 877 P2d 1187 (1994); Clark v. Jackson County
10 (Clark), 313 Or 508, 514-15, 836 P2d 710 (1992). This means
11 we must defer to a local governing body's interpretation of
12 its own enactments, unless that interpretation is "clearly
13 wrong" or "so wrong as to be beyond colorable defense."
14 Zippel v. Josephine County, 128 Or App 458, 461, 876 P2d 854
15 (Zippel); Goose Hollow Foothills League v. City of Portland,
16 117 Or App 211, 217, 843 P2d 992 (1992).

17 In the context of a land use application, the county's
18 interpretation of the CCZO term "owner" to mean "authorized
19 agent" is not indefensible, and we defer to it.

20 The first assignment of error is denied.

21 **SECOND ASSIGNMENT OF ERROR**

22 Petitioners contend the finding that the applicants are
23 the lessees of the subject property is not supported by

1 substantial evidence.² There is no evidence in the record
2 of which we are aware that the applicants are the lessees of
3 the subject property. The only statement to that effect is
4 in the staff report at Record 113, but that statement is not
5 supported by a reference to any evidence.

6 The second assignment of error is sustained.

7 **THIRD ASSIGNMENT OF ERROR**

8 Petitioners contend the county misconstrued CCZO 6.020
9 and the Crook County Comprehensive Plan (CCCP) as to the
10 meaning of "demonstrated public need" and failed to make
11 adequate findings with respect to the requirement that uses
12 in agriculturally zoned lands have a minimal impact on
13 "livability." CCZO 6.020 provides, in relevant part:

14 "In judging whether or not a conditional use
15 proposal shall be approved or denied, the
16 Commission shall weigh the proposal's
17 appropriateness and desirability or the public
18 convenience or necessity to be served against any
19 adverse conditions that would result from
20 authorizing the particular development at the
21 location proposed and, to approve such use, shall
22 find that the following criteria are either met,
23 can be met by observance of conditions, or are not
24 applicable.

25 "1. The proposal will be consistent with the
26 Comprehensive Plan and the objectives of the
27 zoning ordinance and other applicable

²The failure of both the county and the applicant to appear in this proceeding renders more difficult our review of petitioners' evidentiary challenges.

1 policies and regulations of the County.^[3]

2 "2. Taking into account location, size, design
3 and operation characteristics, the proposal
4 will have minimal adverse impact on the (A)
5 livability, (B) value and (C) appropriate
6 development of abutting properties and the
7 surrounding area compared to the impact of
8 development that is permitted outright.

9 "** * * * " (Emphasis added.)

10 **1. Demonstrated Public Need**

11 Petitioners contend the challenged decision incorrectly
12 applies the comprehensive plan requirement that "non-
13 agricultural development in the rural areas shall be based,
14 whenever possible, upon a demonstrated public need." CCCP

15 47. The decision emphasizes the "whenever possible"

16 limitation and states, "it is not possible to determine that
17 there is a public need as it is not possible to measure an
18 individual['s] desire to hunt." Record 22. The decision
19 quotes a county commissioner as saying the hunting preserve
20 will satisfy the need of long-time hunters who are faced

³The CCCP includes the following in the section stating agricultural lands objectives and agricultural policies:

"* * * that non-agricultural development in the rural area
shall be based, wherever possible, upon a demonstrated public
need; and in all cases, such development shall avoid conflicts
with the agricultural community." CCCP 48.

In the petition for review, petitioners quote additional CCCP provisions pertaining to livability, but as these provisions were not treated as approval standards by the county and petitioners do not assign error to the county's failure to treat the provisions as approval standards, we do not address them.

1 with a shortage of pheasants. *Id.*

2 The decision treats the "demonstrated public need"
3 standard as a mandatory standard, and under Clark and ORS
4 197.829(1), we must defer to the county's choice of relevant
5 criteria. deBardelaben v. Tillamook County, 142 Or App 319,
6 325, 922 P2d 683 (1996). We understand the decision to say
7 that because it is impossible to measure an individual's
8 need to hunt, showing compliance with the "demonstrated
9 public need" standard is impossible, and the standard is
10 therefore satisfied because it requires compliance only
11 "whenever possible." What is missing is an interpretation
12 that equates the need of an individual or of individuals to
13 public need. That interpretation is arguably implicit in
14 the application of the standard, but we will not defer to
15 implicit interpretations. See DLCD v. Clatsop County, ____
16 Or LUBA ____ (LUBA No. 95-163, April 1, 1996), slip op 6.
17 ORS 197.829(2) permits us, in cases where a local government
18 fails to interpret a provision of its comprehensive plan, to
19 make our own determination of whether a local government
20 decision is correct. However, because we must remand in any
21 event, we decline to make an interpretation of public need
22 in the first instance.

23 **2. Livability**

24 The challenged decision interprets "livability" with
25 respect to development in agricultural areas as "measured
26 through impacts on the land through traffic, air quality,

1 trespassing, animal impacts and noise." Record 22. The
2 decision finds there will be noise impacts, but they will
3 not affect livability because (1) "it is a shooting
4 operation shooting at a limited number of birds"; (2) there
5 are buffer zones; (3) the property is distant from other
6 property; (4) the proposed shooting operation is shotgun
7 only; and (5) the time for hunting is limited. Record 22.
8 The findings appear to be based on testimony by one of the
9 applicants found at Record 15-16.

10 Petitioners challenge the evidentiary basis for the
11 findings. Petitioners point to evidence in the record that
12 the area is a "natural echo chamber" and that noise can be
13 heard at distances in excess of 10 miles. Record 36, 38,
14 52. Petitioners argue, without citation to the record, that
15 the proposed hunting area is separated from the property of
16 some of the petitioners by only the width of a road and a
17 canal.

18 Substantial evidence is evidence upon which a
19 reasonable person would rely in reaching a decision. City
20 of Portland v. Bureau of Labor and Ind., 298 Or 104, 119,
21 690 P2d 475 (1984); Douglas v. Multnomah County, 18 Or LUBA
22 607, 617 (1990). Where the evidence is conflicting, if a
23 reasonable person could reach the decision the county made,
24 in view of all the evidence in the record, LUBA will defer
25 to the county's choice between conflicting evidence.
26 Mazeski v. Wasco County, 28 Or LUBA 178, 184 (1994), aff'd

1 133 Or App 258, 890 P2d 455 (1995).

2 We have reviewed the evidence cited by petitioners and
3 portions of the record that appear to support the findings.
4 Record 36-37, 38, 52. It is clear there will be some noise
5 impacts on petitioner Nash and perhaps the other
6 petitioners. How significant those impacts will be is in
7 dispute. However, in part because of the highly subjective
8 nature of the livability standard, we conclude the county's
9 finding that the proposed hunting preserve will have a
10 minimal impact on livability is supported by substantial
11 evidence.

12 The third assignment of error is sustained, in part.

13 The county's decision is remanded.