BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JERRY C. REEVES, Petitioner, vs. WASHINGTON COUNTY, Respondent, and TUALATIN VALLEY SPORTSMAN CLUB, Intervenor-Respondent.	LUBA No. 92-181 FINAL OPINION AND ORDER

Appeal from Washington County.

Jeffrey L. Kleinman, 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, Hillsboro, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Bisbee & Stockton.

HOLSTUN, Referee; SHERTON, Chief Referee; KELLINGTON, Referee, participated in the decision.

AFFIRMED 02/08/93

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a county decision approving a comprehensive plan map change from Exclusive Agriculture and Forest District (AF-20) to Exclusive Forest and Conservation District (EFC).[1]

MOTION TO INTERVENE

Tualatin Valley Sportsman Club (TVSC), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

TVSC owns and operates a private gun club on the subject property located in a rural area of Washington County.[2] The facilities on the subject property include shooting ranges for TVSC's 1600 members.[3] The property affected by the challenged decision includes approximately 220 acres.

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[1]Washington County uses one map for both planning and zoning purposes. The AF-20 District is an exclusive farm use zone under ORS 215.203 et seq, adopted by the county to implement Statewide Planning Goal 3 (Agricultural Lands). Washington County Community Development Code (CDC) 344-1. The EFC District implements Statewide Planning Goal 4 (Forest Lands). CDC 342-1.

[2]The subject property is rural because it is not located within an urban growth boundary (UGB). See 1000 Friends of Oregon v. LCDC (Curry County), 301 Or 447, 724 P2d 268 (1986). However, although the subject property is located outside the Portland Metropolitan Area UGB, it is in close proximity to the UGB, and there is residential development near the subject property.

[3]The facility also provides firearms training to a variety of nonmember organizations such as the Boy Scouts.

TVSC's gun club facility was established in 1944, long before the property was first subject to restrictive land use regulations. TVSC's facility became a nonconforming use in 1984, when the AF-20 designation previously applied to the property was amended to qualify as an exclusive farm use zone. The AF-20 zone does not allow gun club facilities as a permitted use.

Beginning in 1962, TVSC was granted a series of conditional use permits for its facility. TVSC's nonconforming facility remains subject to conditions imposed by these prior conditional use permits, and the facility's compliance with those conditions is subject to review every five years pursuant to the county's Type III procedures.[4]

A "firearms training facility," is a permitted use in the EFC zone, under Type II procedures. Petitioner contends that TVSC's only reason for seeking the change in the plan map designation from AF-20 to EFC is to make its existing facility a use subject to Type II procedures and, thereby, avoid being subject to reviews every five years under Type III procedures.

FIRST ASSIGNMENT OF ERROR

"Respondent misconstrued the applicable law and

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[4]The CDC identifies four different types of procedures. The Type II and Type III procedures are relevant in this appeal. The Type II procedure requires notice and an opportunity for comment, but does not require a public hearing. The Type III procedure requires a public hearing. In addition, more exacting approval standards apply to Type III decisions.

> failed to make adequate findings supported by substantial evidence as to whether the use in question is urban or rural under Goal 14."

Under Statewide Planning Goal 14 (Urbanization), urban uses may not be permitted outside an acknowledged UGB, unless an exception to Goal 14 is justified. 1000 Friends of Oregon v. LCDC (Curry County), 301 Or 447, 724 P2d 268 (1986); Hammack and Associates, Inc. v. Washington County, 16 Or LUBA 75, 79, aff'd 89 Or App 40 (1987). Petitioner contends TVSC's gun club facility is an urban use and that the challenged decision improperly allows that use to continue as a permitted use on rural land, in contravention of Goal 14.

The difficulty with petitioner's argument is that the challenged decision itself approves neither the existing nonconforming use of the property nor any proposed future use. Compare Shaffer v. Jackson County, 17 Or LUBA 922 (1989) (plan and zoning map amendments adopted specifically to allow asphalt batch plant); Kaye v. Marion County, ___ Or LUBA ___ (LUBA Nos. 92-007 and 92-010, July 13, 1992) (zoning map change and permit approval for golf course and planned unit development). The challenged decision simply approves a change in the plan map designation from AF-20 to EFC. The existing nonconforming gun club facility may or may not be determined in the future to be a "firearms training facility." If not, the existing facility will continue to be a nonconforming use. If so, it may be

permitted as a Type II use in the EFC zone. In either event, the challenged decision specifically makes no determinations concerning the nature of the existing facility.

Because the challenged decision simply replaces one rural plan map designation with another rural plan map designation and does not purport to approve any particular present or future use of the property, we do not see that an exception to Goal 14 is required.[5] We recognize that all statewide planning goals apply when an acknowledged comprehensive plan is amended. 1000 Friends v. Jackson County, 79 Or App 93, 97, 718 P2d 753, rev den 301 Or 445 (1986). However, in 1000 Friends v. Jackson County the court made two important points concerning the manner in which the statewide planning goals apply to postacknowledgment plan amendments. First, some goal issues in an appeal challenging a postacknowledgment plan amendment may present questions that either were or should have been raised prior to acknowledgment and, therefore, are foreclosed by acknowledgment. Id. at 98 ("[An] amendment

[5]As respondent correctly notes, in the more common situation where resource land outside a UGB is redesignated for a proposed nonresource use, an exception to Goal 3 or 4 may be required. Such exceptions generally must be justified based on the proposed use. See e.g. ORS 197.732(1)(c)(B) and (C); OAR 660-04-020, 660-04-022. In addition, because the justification for such exceptions depends on allowing a specific use, Goal 14 may be implicated. However, the county's decision to plan and zone the subject property for forest use under Goal 4 rather than for agricultural use under Goal 3 does not require an exception to Goal 3. See OAR-660-05-010(5); 660-06-015(2).

may give rise to no goal problems independent of those that assertedly preexisted its adoption[.]") Such issues may not be revisited in a subsequent challenge to a postacknowledgment plan amendment. The court's second point limits or qualifies its first point. Even when a postacknowledgment plan amendment simply amends a comprehensive plan to replace one acknowledged plan map designation with another acknowledged plan map designation, there may be "secondary" effects associated with such an amendment that implicate one or more statewide planning goal requirements. Where such is the case, the goal issues implicated by the "secondary" effects must be addressed in approving the plan amendment.

Petitioner offers no explanation for why the challenged comprehensive plan amendment has secondary effects on the plan's continued compliance with Goal 14. Petitioner's entire argument concerning Goal 14 under this assignment of error is based on his erroneous assumption that the challenged decision in some way approves the existing gun club facility use of the property. To the extent petitioner argues the challenged decision violates Goal 14 because the EFC District potentially allows "urban" firearms training facilities, we reject the argument. Even if the acknowledged EFC District would allow approval of an urban fire arms training facility, a question we need not decide here, that issue was present when the EFC District

provisions were acknowledged pursuant to ORS 197.251 or 197.625 and may not be revisited in this appeal.[6] 1000 Friends v. Jackson County, supra, 79 Or App at 98.

The first assignment of error is denied.[7]

SECOND ASSIGNMENT OF ERROR

> "Respondent erred in failing to give notice that Goal 14 was applicable in this proceeding."

Petitioner contends respondent erred by failing to list Goal 14 as an applicable standard in the notice of local proceedings.

For the reasons already explained under our discussion of the first assignment of error, we do not agree with petitioner that Goal 14 is violated by the challenged decision. Moreover, petitioner presented his Goal 14 arguments below and, therefore, was not prejudiced by the county's failure to list Goal 14 as a potentially applicable criterion. Smith v. City of Portland, 22 Or LUBA 485, 487

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[6]Respondent and intervenor-respondent request that we go further and determine that because the EFC zone was adopted in compliance with LCDC's recent amendments to its Goal 4 rule, it may be assumed that any of the uses identified as permissible under the Goal 4 rule are permissible on rural lands under Goal 14. We need not and do not reach that question in this appeal.

[7]In his third assignment of error, petitioner similarly argues the challenged decision authorizes an urban use of rural agricultural land (the existing gun club facility) in violation of Goal 3, which requires that such land be zoned for exclusive farm use. As explained in our discussion of the first assignment of error, we do not agree that the challenged decision makes any final determination concerning continuation of the existing gun club facility, and we therefore do not consider the third assignment of error further.

(1991); Hoffman v. City of Lake Oswego, 20 Or LUBA 64, 78 (1990).

The second assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

> "Respondent misconstrued the applicable law and failed to make adequate findings supported by substantial evidence in finding that the application herein complied with Goal 4."

LCDC's Goal 4 administrative rule lists "firearms training facilit[ies]" as a use allowable in a forest zone outside a UGB.[8] OAR 660-06-025(4)(m). Petitioner contends the rule is inconsistent with Goal 4's mandate to protect forest lands.

LCDC's administrative rule is not the subject of review in this proceeding, and this Board is not empowered to invalidate LCDC administrative rules. DLCD v. Coos County, ___ Or LUBA ___ (LUBA No. 92-103, October 9, 1992); Oregonians in Action v. LCDC, 19 Or LUBA 107, aff'd 103 Or App 35 (1990).

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

> "Respondent misconstrued the applicable law and failed to make adequate findings supported by substantial evidence in determining that the application herein complies with statewide planning Goal 12 and County Transportation Plan Policy 9."

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[8]OAR 660-06-020 provides that Goal 4 and the Goal 4 rule only apply outside UGBs.

The challenged decision cites Transportation Plan Policy 9, Implementing Strategy 9.1 as an applicable criterion. That strategy states that "[d]evelopment likely to generate a high volume of traffic should be discouraged from locating on Minor Collectors that also serve residential areas."

Tonquin Road, a minor collector, provides access to the property. Access to Tonquin Road is provided by Tualatin-Sherwood Road to the north of the property and Grahams Ferry Road to the southeast. The Transportation Plan indicates that the average number of daily trips on a minor collector should not exceed 1500. The findings supporting the decision determine that a 1991 traffic count on Tonquin Road, between the access to the existing gun club facility and Tualatin-Sherwood Road to the north, showed an average of about 500 daily trips. The findings specifically recognize that this 1991 traffic count does not show how many trips might have been made to the existing gun club via Grahams Ferry Road and Tonquin Road. However, the findings state that the 1991 count between the existing gun club and Tualatin-Sherwood Road "indicates that the present level of traffic on the road, which includes traffic from the gun club, is well within the guidelines for a Minor Collector road." Record 113.

Petitioner's argument under this assignment of error is limited to a substantial evidence challenge. Specifically,

petitioner argues that because there is no traffic count on Tonquin Road south of the gun club entrance, the finding that traffic on Tonquin Road is well within the guidelines for a minor collector is not supported by substantial evidence.

As noted above, the challenged findings explicitly recognize that the only traffic count relied on was taken north of the gun club entrance. However, the findings take the position that a count showing an average of 500 daily trips on Tonquin Road north of the gun club entrance supports a finding that the average daily trips on Tonquin Road are within the 1500 daily trips standard. While a second count south of the gun club entrance would have improved the evidentiary support for the ultimate conclusion, there is no suggestion in the evidentiary record that trips to the gun club via Grahams Ferry Road and Tonquin Road cause the 1500 average daily trips standard to be exceeded.

As we have explained on numerous occasions, substantial evidence is evidence a reasonable person would accept as adequate to support a conclusion. Carsey v. Deschutes County, 21 Or LUBA 118, 123 (1991); Douglas v. Multnomah County, 18 Or LUBA 607, 617 (1990). Absent some indication in the record that the information provided by the traffic count at a single location is an unreliable indicator of the number of daily trips on Tonquin Road, we agree with

respondents that a reasonable person could rely on the evidentiary record in this case to conclude that Transportation Plan Policy 9, Implementing Strategy 9.1 is satisfied.[9]

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

> "Respondent misconstrued the applicable law and failed to make adequate findings supported by substantial evidence with respect to the applicant's compliance with Washington County Rural/Natural Resource Plan Policy 1, Implementing Strategy (p)(8)."

Rural/Natural Resource Plan Policy 1, Implementing Strategy (p)(8) provides as follows:

> "[Plan map amendments] from [AF-20] to Exclusive Farm Use or [EFC] shall be based upon:
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> "* * * * *
>
> "B. Findings that the subject land is:
>
> "I. in farm or forest use;
>
> "II. on farm or forest [tax] deferral;
>
> "III. agricultural [or] forest land as defined by LCDC Goal 3 or Goal 4; or
>
> "IV. compatible with surrounding land

[9]The decision states the findings challenged under this assignment of error are adopted to demonstrate compliance with Statewide Planning Goal 12 (Transportation). Petitioner refers to Goal 12 in his assignment of error, but does not offer any specific argument that the challenged findings are inadequate to demonstrate compliance with particular provisions of Goal 12. We therefore do not consider Goal 12 further under this assignment of error.

uses."[10]

The challenged decision is supported by findings concerning the nature of the soils on the subject property. Record 15, findings 1 through 5. Petitioner does not challenge the adequacy of these findings to demonstrate compliance with item B(III). Neither does petitioner challenge the evidentiary support for those findings. The challenged decision also includes findings that the majority of the property "is in forest deferral for tax purposes." Record 15, finding 6. Petitioner does not challenge the adequacy of these findings to demonstrate compliance with item B(II) above. Neither does petitioner challenge the evidentiary support for those findings.

The following finding appears to have been adopted to demonstrate compliance with item B(I) above:

> "5. Approximately 616,290 board feet of Douglas fir has been harvested from [the] subject property since 1975. The subject property has a history of small scale commercial forest management." Record 15.

Petitioner does not contend that finding 5 is inadequate to demonstrate compliance with item B(I), but does argue the finding is not supported by substantial evidence in the record. Therefore, petitioner argues, the county may not

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[10]The county apparently interprets Washington County Rural/Natural Resource Plan Policy 1, Implementing Strategy p(8)(B) as requiring that either all of items I through III are satisfied or that item IV is satisfied. No party questions that interpretation.

rely on finding 5 to support its ultimate conclusion that "[t]he subject property is in compliance with [Rural/Natural Resource Plan] Policy 1[, Implementing Strategy] (p)(8) because the subject land is in forest use, having a history of timber harvest and sales." Petition for Review 10.

Petitioner is correct that a report discussing timber management of the property, cited elsewhere in the decision as providing evidentiary support for the challenged finding, is not included in the record. However, intervenor identifies a memorandum in the record in which the applicant's attorney states the property "has been actively managed as a woodland having a history of timber harvest and sales[.]" Record 81. Intervenor points out this testimony was not refuted below. Intervenor also cites the minutes of the the board of county commissioners' July 21, 1992 meeting, which reflect testimony concerning "active forest management activities" on the subject property.

We conclude the challenged finding is supported by substantial evidence.[11]

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

"Respondent misconstrued the applicable law and

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[11]While the record does not include evidence of the precise number of board feet of timber harvested from the property, determining the precise number of board feet of timber harvested does not appear to be required under Rural/Natural Resource Plan Policy 1, Implementing Strategy (p)(8)(B)(I).

> failed to make adequate findings supported by substantial evidence with respect to the applicant's compliance with Goal 5 and Washington County Rural/Natural Resource Plan Policies 7, 10 and 11."

Petitioner identifies Rural/Natural Resource Plan Policies which require protection of mineral and aggregate resources (Policy 7), designated natural areas (Policy 11), and fish and wildlife habitat (Policy 10). Petitioner contends the county failed to adopt findings demonstrating how its decision complies with these policies.[12]

Contrary to petitioner's argument, the county did adopt findings addressing the above plan policies. Record 16-17. Those findings essentially conclude the EFC District will offer more protection for the resources identified in the cited plan policies than the current AF-20 District designation offers. Petitioner offers no argument explaining why those findings are inadequate to demonstrate that the challenged plan map amendment is consistent with the cited policies.

The seventh assignment of error is denied.

EIGHTH ASSIGNMENT OF ERROR

> "Respondent erred in setting out findings and conclusions affecting the determination of whether the club's use is a firearms training facility, in

[12]Petitioner also points out these resources are protected under Statewide Planning Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources), but offers no specific argument that Goal 5 requires greater protection that the cited plan policies. We therefore do not separately consider petitioner's argument that Goal 5 is violated.

> spite of having reserved said determination for a later proceeding."

As noted earlier in this opinion, the county expressly did not make a determination that the existing gun club facility qualifies as a firearms training facility under the EFC District. The county concluded a new and separate proceeding would be required in the future to make such a determination.

Petitioner argues that the county nevertheless adopted a number of findings and conclusions that could be binding on the county in such future proceedings.[13]

Respondent argues the findings and conclusions identified by petitioner under this assignment of error "are extraneous to the review criteria for the plan amendment [and] are not a basis for remand." Respondent's Brief 10. Respondent further argues the challenged findings "would not be binding on subsequent proceedings regarding the status of a proposed firearms training facility," and intervenor joins in that argument.

We agree with respondent and intervenor that the challenged findings and conclusions are surplusage and that they would not be binding in any future proceeding conducted by the county to determine whether the existing gun club qualifies as a firearms training facility. See Nelson v.

[13]Petitioner specifically identifies findings 24, 26, 28 and 29 and conclusions J and P.

Clackamas County, 19 Or LUBA 131, 139-40 (1990).

The eighth assignment of error is denied.

NINTH ASSIGNMENT OF ERROR

> "Respondent erred in ordering a Type III procedure for the club's subsequent development review, while exempting the club from the denial criteria set out in [CDC] 403-4.20 * * *."

If the existing gun club facility is determined in the future to be a firearms training facility, under the EFC District approval for expansion of that facility could be granted under Type II procedures. In approving the requested EFC plan map designation for the subject property, the county imposed a condition that such a request for expansion, if it occurs in the future, will be required to follow Type III procedures rather than Type II procedures.[14] However, the condition also provides that an approval criterion that would be applicable under the Type III procedures (but not under Type II procedures) will not apply.[15] Simply stated, the condition imposes Type III procedures and standards where they would not otherwise apply, but deletes one of those Type III standards. The net result is a condition that imposes more exacting procedural requirements than the county otherwise would be required to

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[14]As explained earlier in this decision, Type III procedures are more extensive and additional approval criteria are imposed. See n 4, supra.

[15]That standard is CDC 403-4.20, which requires denial of a Type III approval in certain circumstances.

apply if the existing facility is found, in the future, to be a firearms training facility and a request to expand the facility is made.

Petitioner contends the county has no authority to establish such a hybrid procedure.

Respondent argues the CDC explicitly provides that the county may impose conditions of approval if the applicant consents. Here, the condition simply imposes additional procedural requirements that must be followed if the existing gun club facility is found in the future to be a firearms training facility and if there follows a request to allow expansion of that facility. Respondent contends there is no possible prejudice to any party's substantial rights in imposing such additional procedures where the applicant consents to such additional procedures. We agree with respondent.

The ninth assignment of error is denied.

The county's decision is affirmed.