BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CITY OF SHERWOOD,
Petitioner,

vs.

WASHINGTON COUNTY,
Respondent,

and

TUALATIN VALLEY SPORTSMEN'S CLUB,
Intervenor-Respondent.

LUBA No. 2000-021

FINAL OPINION
AND ORDER

Appeal from Washington County.

Derryck H. Dittman, Tigard, filed the petition for review and argued on behalf of petitioner. With him on the brief was Anderson & Dittman, LLP.

No appearance by Washington County.

Clark I. Balfour, Portland, filed the response brief. With him on the brief was Cable, Huston, Benedict, Haagensen & Lloyd, LLP. G. Frank Hammond, Portland, argued on behalf of intervenor-respondent.

BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

AFFIRMED 09/15/2000

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioner appeals a county decision to amend a land use permit by deleting a condition of approval relating to noise generated by shooting activities on a shooting range.

MOTION TO INTERVENE

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

FACTS

Intervenor is a 1,600-member shooting club. Approximately 2,200 other persons use the club for target shooting on nine firing ranges. According to intervenor, the membership and users include 424 law enforcement personnel, 38 private security officers and 1,800 members of the public. Intervenor has operated its shooting club on the same 159-acre property since 1944. The City of Sherwood (city) lies to the southwest of the subject property; the City of Tualatin lies to the northeast.

In 1992, intervenor applied for a comprehensive plan amendment to redesignate the property from Agriculture Forestry (AF-20), where the shooting club is a nonconforming use, to Exclusive Forest and Conservation (EFC), where the shooting range qualifies as a permitted firearms training facility. The cities of Sherwood and Tualatin objected to the proposed plan amendment, based on the impacts the shooting range would have on rapidly urbanizing areas near the subject property. Their objections related to noise impacts, injuries resulting from noise and other safety concerns. The cities eventually withdrew their objections when intervenor agreed to an "L-max of 60 [decibels] when measured from both the nearest noise-sensitive property within the Regional Urban Growth Boundary adjacent to the City of Tualatin and the nearest noise-sensitive property within the Regional Urban

Growth Boundary adjacent to the City of Sherwood."[1] Record 319.

The county hearings officer approved the plan amendment and included the negotiated 60-decibel noise limit as one of the application's conditions of approval. In 1993, the county issued a permit for a firearms training facility to intervenor, subject to the same noise limitation that was included in the plan amendment.

In 1995, the state legislature enacted ORS 166.170 through 166.175. The statutes limit local governments' authority to regulate firearms and impacts arising from their use. In 1996, the state legislature enacted ORS 467.131 through 467.138. These statutes limit the types of claims that may be made against owners and operators of shooting ranges based on "normal and accepted" activities on shooting ranges. In 1997, the legislature enacted ORS 166.176, which reestablishes some county authority to regulate the discharge of firearms.[2]

In 1999, intervenor applied for an amendment to the 1993 firearms training facility permit. Intervenor contended that the above-named statutes have the effect of preempting local regulation of shooting ranges, including the noise limitation condition contained in the 1993 permit. The county hearings officer agreed and deleted the condition. This appeal followed.

FIRST, SECOND AND THIRD ASSIGMENTS OF ERROR

In the city's first assignment of error, it argues that the 1993 permit condition limiting noise duplicates and implements the condition found in the 1992 comprehensive plan amendment. Deleting the use permit's condition of approval, the city argues, renders the permit inconsistent with the county's comprehensive plan. The city contends that no action

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[1]As we understand it, the condition requires that noise generated from shooting activities on the subject property should not register at more than 60 decibels as measured from the nearest residential property located within either the Tualatin or the Sherwood urban growth boundaries.

[2]The statutory history of the two legislative schemes makes it clear that the amendments to ORS chapter 467 were unrelated to the enactment and amendments to ORS chapter 166.

can be taken to modify the permit conditions until the county adopts a new comprehensive plan amendment that deletes the noise limitation condition.

Intervenor responds that the statutes discussed below preempt the county's authority to regulate firearms to such an extent that the 1992 comprehensive plan amendment condition is now unenforceable. Intervenor contends that, because the comprehensive plan noise limitation is unenforceable, no inconsistency results from deleting the parallel provision in the permit.[3]

If state legislation preempts the county's ability to regulate noise generated by the firearms training facility, then we agree with intervenor that deletion of the condition of approval from the permit is not inconsistent with the comprehensive plan text, because the plan text is contrary to statute and unenforceable. We therefore turn to the statutes to determine whether they preempt county authority to regulate the use of firearms in the way intervenor argues.

The statutes are a confusing series of "preemptions" and "restorations" of local authority to regulate various aspects of firearm use. We discuss them separately below in an attempt to explain how they operate to preempt the county's authority to impose the disputed condition.

A. ORS 166.170 Preempts County Authority to Regulate Firearms

ORS 166.170 adopts a broad preemption of local authority to regulate firearms in any way.[4] Under ORS 166.170, unless some other statute grants the county authority to regulate the disputed private shooting range, that authority is preempted.

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[3]The Washington County Code requires that deletions to the comprehensive plan follow the same procedures that were followed when the text proposed to be deleted was adopted. In this case, a deletion of the comprehensive plan noise limitation requirement would have to be approved by the planning commission and board of commissioners.

[4]ORS 166.170 provides, in relevant part:

B. ORS 166.171 Restores Some County Authority to Regulate Discharge of Firearms

ORS 166.171(1) restores county authority to "regulate, restrict or prohibit the discharge of firearms within [its] boundaries."[5] However, ORS 166.171(2) provides that the restored county regulatory authority granted by ORS 166.171(1) does not include authority to regulate, among other things, a "private shooting range." When ORS 166.171(1) and (2) are read together, they do not grant the county authority to regulate the disputed shooting range.

C. ORS 166.176 Limits the Preemptive Effect of ORS 166.170 and 166.171

ORS 166.176(1) begins by restoring county authority to regulate, restrict or prohibit firearms or to adopt county legislation that establishes a procedure for doing so, provided such county legislation was "in effect on November 2, 1995."[6] ORS 166.176(1) would

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> "(1) Except as expressly authorized by state statute, the authority to regulate in any matter whatsoever the * * * use of firearms or any element relating to firearms * * * is vested solely in the Legislative Assembly.
>
> "(2) Except as expressly authorized by state statute, no county * * * may enact civil or criminal ordinances, *including but not limited to zoning ordinances*, to regulate, restrict or prohibit the * * * use of firearms or any element relating to firearms * * *. Ordinances that are contrary to this subsection are void." (Emphasis added.)

[5]ORS 166.171 provides, in relevant part:

> "(1) A county may adopt ordinances to regulate, restrict or prohibit the discharge of firearms within [its] boundaries. [However,]
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> "(2) Ordinances adopted under [ORS 166.171(1)] may not apply to or affect:
>
> "* * * * *
>
> "(d) A person discharging a firearm on a public or private shooting range, shooting gallery or other area designed and built for the purpose of target shooting."

[6]ORS 166.176 provides, in relevant part:

> "(1) Nothing in ORS 166.170 or 166.171 is intended to preempt, invalidate or in any way affect the operation of any provision of a county ordinance that was in effect on November 2, 1995, to the extent that the provision:

appear to authorize the disputed conditions, which were adopted in 1992 and 1993. However, ORS 166.176(2) specifically limits the authority granted by ORS 166.176(1) so that it does not include authority to regulate an "area designed and built for the purpose of target shooting." When ORS 166.176 is read with ORS 166.170 and 166.171, the preemption imposed on county regulation of "target shooting" by ORS 166.170 remains.[7]

D. ORS 467.131, and 467.133 and 467.136: Limitation on Liability

The city contends that the county has "express" authority that is required under ORS 166.170 to regulate target shooting noise on intervenor's property, by virtue of ORS 467.133. To understand that statute, it must be read with ORS 467.136. Both statutes are set out below:

ORS 467.136 provides, in relevant part:

> "Any local * * * ordinance or regulation now in effect * * * that makes a shooting range a nuisance or trespass or provides for its abatement as a nuisance or trespass is invalid with respect to a shooting range *for which no action or claim is allowed under ORS 467.131 and 467.133*." (Emphasis added.)

ORS 467.133 provides, in relevant part:

> "The owner [or] operator * * * of a * * * shooting range in this state shall not be subject to any action for nuisance and no court in this state shall enjoin the use or operation of such shooting range on the basis of noise or noise pollution so long as:
>
> "(1) *The allegation results from the normal and accepted activity on the shooting range*;

> "(a) Established a procedure for regulating, restricting or prohibiting the discharge of firearms; or
>
> "(b) Regulated, restricted or prohibited the discharge of firearms.
>
> "(2) [ORS 166.176(1)] does not apply to ordinances regulating, restricting or prohibiting the discharge of firearms on a shooting range * * * or other area designed and built for the purpose of target shooting."

[7]The parties agree that the activities conducted on the property fall in the category of "target shooting" as that term is used in the statutes.

> "(2) The owner [or] operator * * * complied with any applicable noise control law or ordinance existing at the time construction of the shooting range began or no noise control law or ordinance was then existing; and
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> "(3) The allegation results from activity occurring between 7 a.m. and 10 p.m. or conducted for law enforcement training purposes." (Emphasis added.)[8]

ORS 467.136 preempts local regulations that make shooting ranges a nuisance or trespass on the basis of activities for which ORS 467.131 and 467.133 grant immunity. We have some question as to whether the fact that ORS 467.136 is a *partial* preemption (based on the immunity granted under ORS 467.131 and 467.133) necessarily means that local regulations that are not preempted by ORS 467.136 may be viewed as expressly authorized, thereby avoiding preemption under ORS 166.170. However, even if we assume that ORS 467.131, 467.133 and 467.136 expressly authorize local governments to regulate noise from shooting ranges in certain circumstances, we do not agree that petitioner has demonstrated the challenged condition falls within the circumstances where regulation is authorized under those statutes.

According to the city, all the 1993 permit condition of approval does is establish the noise level that is "normal and accepted" within the meaning of ORS 467.131(1) and 467.133(1). The city contends that the condition of approval does not regulate the discharge of firearms at a shooting range in a way that prohibits the number of users, or the types of weapons that may be discharged. Rather, the city argues that the condition establishes a normal and accepted range for noise generated by the shooting activities. Therefore, the city argues, an action is allowed under ORS 467.131 and 467.133 for noise levels that exceed that "normal and accepted" range. That being the case, the city argues, any ordinance that prohibits such noise levels is valid, pursuant to ORS 467.136.

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[8]ORS 467.131 provides substantially similar "civil or criminal" immunity for owners and operators of shooting ranges from actions based upon "an allegation of noise or noise pollution."

Intervenor responds that the "normal and accepted activity" referred to in ORS 467.131(1) and 467.133(1) pertains to the activity—*target shooting*—and not the noise generated by that activity. In intervenor's view, so long as the activity is commonly understood to occur at a target shooting facility, and target shooting undoubtedly is, the county cannot enact regulations or impose conditions of approval that have the effect of imposing liability for noise pollution based on those normal and accepted activities.

The intended scope of the phrase "normal and accepted activity" is reasonably clear from the text and context of the relevant statutes. *See PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993) (examination of the text and context of a statute is the first level of analysis for determining legislative intent). We agree with intervenor's argument that the "normal and accepted activity on the shooting range" that is referred to in ORS 467.131(1) and 467.133(1) encompasses "activity" rather than the noise generated by that activity. In other words, so long as the "activity" on the shooting range is the type of "activity" that normally occurs on shooting ranges, it is beyond the scope of local noise ordinances.

Contextual support for this interpretation of ORS 467.131 and 467.133 is supplied by ORS 467.020, which provides:

> "*Except as provided in ORS 467.131 and 467.133*, no person may emit, cause the emission of, or permit the emission of noise in excess of the levels fixed therefor by the Environmental Quality Commission * * *." (Emphasis added.)

Fairly read, this statute permits those persons that fall under the exemptions provided for in ORS 467.131 and 467.133 to emit noise that would otherwise exceed noise levels established by the Environmental Quality Commission. If shooting impacts are not subject to noise level limits established by the Environmental Quality Commission, it stands to reason that limitations on noise established by a local ordinance are not allowed by virtue of ORS 467.131(1) and 467.133(1).

No one disputes that target shooting is a normal and accepted shooting range activity. Therefore, under ORS 467.136, except as provided by ORS 467.131 and 467.133, local governments may not adopt or enforce ordinances or regulations that make such activity on a shooting range a "nuisance or trespass," no matter how noisy that target shooting may be. For the reasons explained above, we agree with intervenor that ORS 467.131 and 467.133 do not authorize the county to impose the challenged condition. Therefore, the challenged condition is preempted by ORS 166.170 and 467.136, and the county did not err by deleting the condition from the condition of approval contained in the 1993 conditional use permit.

F. Constitutional Challenges

1. Impairment of Contract

In the second assignment of error, the city alleges that it withdrew its objection to intervenor's 1992 plan amendment based on intervenor's agreement to limit the noise generated by the shooting activity. The city contends that the background of this agreement is set out in the record in a letter from the City of Tualatin's planning director and a Washington County staff memorandum generated at the time the conditions were imposed on the comprehensive plan amendment. Record 48-51; 62-65. The city points to the condition of approval in both the comprehensive plan amendment and the use permit as evidence of the terms of that agreement. According to the city, the imposition of the noise level limitation constitutes a contract between the city and intervenor. If, as we have found, the state statutes preempt the imposition of the agreed-upon condition, then the city argues that the preemption unconstitutionally impairs that contract, in contravention of Article I, section 10, of the United States Constitution and Article I, section 21, of the Oregon Constitution.[9]

[9]Article I, section 10, of the United States Constitution provides, in relevant part, that "[n]o state shall * * * pass any * * * Law impairing the Obligation of Contracts * * *."

Article I, section 21, of the Oregon Constitution provides, in relevant part, that "[n]o * * * law impairing the obligation of contracts shall ever be passed * * *."

Determining whether a law of the state violates the Contracts Clause of Article I, section 21, of the Oregon Constitution requires two steps: first, we must determine whether a contract exists to which the person asserting an impairment is a party; and second, we must determine whether a statute has impaired the obligations under that contract. *Eckles v. State of Oregon*, 306 Or 380, 396-97, 760 P2d 846 (1988). In making these determinations, we apply standard principles of contract law. *Hughes v. State of Oregon*, 314 Or 1, 17 (1992) ("the first step in an Article I, section 21, Contract Clause analysis is to determine whether a contract exists to which the person asserting an impairment is a party.").[10]

For a contract to exist, there must be an agreement between parties that establishes the rights and obligations between them. Here, we cannot say that a 1992 letter from the City of Tualatin's planning director and a Washington County planning staff memorandum setting out the circumstances surrounding the compromise between the cities of Tualatin and Sherwood and intervenor constituted an unambiguous offer by the city to enter into a contract that consequently required the county to impose a 60-decibel noise limit. The city has not shown that there was an intent to contract, or that the city's actions required intervenor to honor its obligation to minimize noise generated from its activities or face an action for breach.

Because there is no contract to impair we need not address whether the enactment of ORS 166.170, 166.171 and 467.136, by retroactively nullifying most local regulations regarding target shooting, has the effect of unconstitutionally impairing preexisting contracts regarding noise generated by target shooting activities.

Petitioner's impairment of contract challenge is rejected.

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[10]From the city's arguments, it is not quite clear whether the city is arguing that the agreement is solely between the cities of Sherwood and Tualatin and intervenor, or whether the county, as the entity imposing the condition of approval, is also party to the contract. If the latter is the case, the city has a higher burden, because unless the county's legislation—in this case, the 1993 permit decision—unambiguously expresses an intent to contract, a contract will not be inferred. *Hughes*, 314 Or at 17.

2. Limitations on Remedies

In its third assignment of error, the city argues that the legislature's action in adopting ORS 467.131 through 467.136 unconstitutionally deprived the city and its citizens of a remedy for injury to persons or property. According to the city, if it is prevented from receiving a remedy for injury done to it as a result of the normal activities on the property, *i.e.*, target shooting, then the statutes violate Article I, section 10, of the Oregon Constitution.[11]

Article I, section 10, of the Oregon Constitution allows the state legislature to alter or abolish a cause of action so long as an injured party is not left entirely without a remedy. *Hale v. Port of Portland*, 308 Or 508, 523, 783 P2d 506 (1989). The remedy need not be precisely of the same type; it is enough that the remedy is a substantial one. *Id.* Here, the legislature determined that the county could not adopt ordinances that have the effect of making owners and operators of target shooting facilities subject to nuisance and trespass suits for noise pollution as a result of their "normal and accepted activit[ies]." ORS 467.136. In addition, a court may not provide injunctive relief as a remedy for the "normal and accepted activit[ies]." ORS 467.133.

Even if petitioner is correct that the immunity provisions of ORS 467.131 and 467.133 violate the Oregon Constitution's remedies clause, that infirmity does not implicate the limited preemption provisions of ORS 467.136, much less the total preemption provisions of ORS 166.170 through 166.176. Those preemption provisions stand even if the immunity provisions of ORS 467.131 and 467.133 are invalid. Thus, the county's decision eliminating its noise restriction based on the total and limited preemptions would not be disturbed by finding the immunity provisions of ORS 467.131 and 467.133 unconstitutional and, therefore, such a finding would not provide an independent basis for reversal or remand.

[11]Article I, section 10, of the Oregon Constitution provides, in relevant part, that "every man shall have remedy by due course of law for injury done him in his person, property or reputation."

That being the case, it would be inconsistent with sound principles of judicial review to determine the constitutionality of ORS 467.131 and 467.133.

Moreover, petitioner has not demonstrated that the preemptive provisions of ORS 467.136 and ORS 166.170 through 166.176, and the county's actions in response, in themselves affect the availability or scope of petitioner's remedies. If petitioner convinces a circuit court that the immunity provisions of ORS 467.131 and 467.133 are unconstitutional, then petitioner can maintain an action against the noise generated by target shooting at the gun club under common law theories of nuisance and trespass. Petitioner may no longer be able to rely upon the county's noise limitation as evidence that the gun club's actual decibel levels constitute nuisance or trespass, but the county's elimination of that limitation does not prevent petitioner from demonstrating, based on actual decibel levels and other evidence, that the gun club's noise constitutes a nuisance or trespass. We therefore do not consider petitioner's Article I, section 10 challenge further.

The county's decision is affirmed.