BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JUDY JORDAN, RENEE HIX
and JIM HIX,
Petitioners,

vs.

COLUMBIA COUNTY,
Respondent,

and

RAINIER ROD AND GUN CLUB,
Intervenor-Respondent.

LUBA No. 2001-152

FINAL OPINION
AND ORDER

Appeal from Columbia County.

David A. Nelson, Longview, WA, filed the petition for review and argued on behalf of petitioners. With him on the brief was the Nelson Law Firm, PLLC.

No appearance by Columbia County.

Thomas Johnson, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Kramer & Associates.

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

REVERSED 07/01/2002

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

Petitioners appeal a county decision granting site design review approval to reconstruct a clubhouse that was destroyed by fire.

MOTION TO INTERVENE

Rainier Rod & Gun Club (RRGC), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

RRGC was formed in 1934 and moved to the subject 14.62-acre parcel in 1949. The parcel is used by RRGC as "a private club, as a shooting range and firearm safety educational facility." Intervenor-Respondent's Brief 3. The property is improved with "a mobile home, a storage shed, a 'trap' house, a rifle range and parking lot." *Id.* The subject property is zoned Rural Residential (RR-5). Although RRGC's use of the property is not allowed in the RR-5 zone, RRGC's use of the property is protected under state statute and parallel county legislation as a nonconforming use.

Until December 31, 1990, a clubhouse was located on the property. RRGC explains:

> "The clubhouse was used for classes, club meetings and dinners, and was occasionally rented to others for social events. On December 31, 1990, the clubhouse was destroyed by a chimney fire." Intervenor-Respondent's Brief 4.

According to RRGC, it was told by the county that a replacement clubhouse would require a new septic system. That new septic system was installed and certified by the county as satisfactory on September 27, 1991.[1] Since the fire, social events on the subject property have been limited to those sponsored by RRGC. We understand RRGC to argue that except for non-RRGC social events, all activities that were carried out on the subject property prior

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[1]The mobile home and trap house that are currently located on the subject property are connected to the new septic system.

to the destruction of the clubhouse have continued since the clubhouse burned. Those activities have been carried out using the remaining facilities on the property.

RRGC asserts that it always intended to rebuild the clubhouse, because the remaining facilities are not well suited for all of the club activities that RRGC carries out on the property. Although the 1991 replacement of the septic system is the only actual construction that has occurred to begin rebuilding the clubhouse, RRGC has engaged in a number of fundraising activities over the years since the clubhouse burned. On March 1, 2001, over ten years after the clubhouse burned, RRGC filed the application that led to the challenged decision. The site design review approval that is challenged in this appeal is required for RRGC to obtain a building permit to reconstruct the clubhouse.

STANDARD OF REVIEW

RRGC argues that the deferential standard of review established by ORS 197.829(1) applies to the planning commission's decision. RRGC contends that the petition for review is fundamentally flawed because it does not recognize that under Court of Appeals' decisions that have applied that statute the planning commission's interpretation and application of the county zoning ordinance must be upheld unless it is "clearly wrong" or "beyond all colorable defense."[2] *deBardelaben v. Tillamook County*, 142 Or App 319, 324, 922 P2d 683 (1996).

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[2]ORS 197.829(1) provides:

> "The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
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> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
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> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
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> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

1 RRGC is wrong about the correct standard for review in this case for two reasons.
2 First, although the deferential standard of review set out at ORS 197.829(1) applies to "a
3 local government's interpretation of its * * * land use regulations," the Court of Appeals has
4 interpreted ORS 197.829(1) to be limited to review of local *governing body* interpretations of
5 local land use legislation. *Watson v. Clackamas County*, 129 Or App 428, 431-32, 879 P2d
6 1309, *rev den* 320 Or 407 (1994). The challenged decision was not rendered by the board of
7 county commissioners, and for that reason ORS 197.829(1) does not apply. Second, for the
8 reasons explained below, the questions presented in this appeal ultimately are questions of
9 state law, and local interpretations of state law are not entitled to deference on appeal.
10 *Forster v. Polk County*, 115 Or App 475, 478, 839 P2d 241 (1992).

11 **INTRODUCTION**

12 Under ORS 215.130(5), the "lawful use of any building, structure or land" may
13 continue, notwithstanding new or amended land use regulations that would prohibit the use
14 of the building, structure or land.[3] This right to continue to use nonconforming buildings or
15 structures and to put those buildings, structures or land to uses that are no longer allowed by
16 applicable land use regulations is not absolute, and may be lost if the use of those buildings,
17 structures or land is interrupted or abandoned. ORS 215.130(7)(a).[4] In cases where a

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[3]ORS 215.130(5) provides, in relevant part:

> "The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or [land use] regulation may be continued. * * * Except as provided in ORS 215.215, a county shall not place conditions upon the continuation or alteration of a use described under this subsection when necessary to * * * maintain in good repair the existing structures associated with the use. * * *"

Columbia County Zoning Ordinance (CCZO) 1506.1 parallels the ORS 215.130(5) requirement that nonconforming uses be allowed to continue and provides:

> "Continuation of Non-Conforming Uses or Structures: Except as provided in this section, a Non-Conforming Use or structure may be continued, even though it is not in conformity with the use, height, area, and all other regulations for the district in which it is located."

[4]ORS 215.130(7)(a) provides:

1 nonconforming use is destroyed by "fire, other casualty or natural disaster," a county may
2 allow the use or building to be restored or replaced. ORS 215.130(6).[5]

3 The county found RRGC's replacement of the septic system in 1991 was sufficient to
4 "commence" replacement of the clubhouse within one year, under ORS 215.130(6) and
5 CCZO 1506.6. In their first assignment of error, petitioners challenge that finding. The
6 county found that after replacement of the burned clubhouse commenced in 1991, RRGC's
7 efforts to replace the clubhouse were not subject to the ORS 215.130(7)(a) and CCZO 1506.4
8 requirement that a nonconforming use may not be resumed after it is interrupted or
9 discontinued. *See* n 4. Petitioners challenge that finding in their second assignment of error.
10 Finally, the county found that even if the interruption/discontinuance limitations imposed by
11 ORS 215.130(7)(a) and CCZO 1506.4 apply to replacement of the clubhouse, RRGC's
12 continued use of the subject property for club activities and continued efforts over the last
13 eleven years to raise money to complete replacement of the clubhouse were sufficient to

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> "Any use described in [ORS 215.130(5)] may not be resumed after a period of interruption or abandonment unless the resumed use conforms with the requirements of zoning ordinances or regulations applicable at the time of the proposed resumption."

CCZO 1506.4 parallels the ORS 215.130(7)(a) restriction on resuming nonconforming uses that are interrupted:

> "Reinstatement of a Discontinued Use: A Non-Conforming Use may be resumed if the discontinuation is for a period less than 1 year. If the discontinuance is for a period greater than 1 year, the building or land shall thereafter be occupied and used only for a conforming use."

[5]ORS 215.130(6) provides:

> "Restoration or replacement of any use described in [ORS 215.130(5)] may be permitted when the restoration is made necessary by fire, other casualty or natural disaster. *Restoration or replacement shall be commenced within one year from the occurrence of the fire*, casualty or natural disaster. If restoration or replacement is necessary under this subsection, restoration or replacement shall be done in compliance with ORS 195.260 (1)(c). (Emphasis added.)

CCZO 1506.6 parallels the ORS 215.130(6) protection for nonconforming uses that are destroyed by fire or other causes:

> "Rebuilding: When a building or structure is damaged by fire or any other cause beyond the control of the owner, it may be rebuilt."

continue clubhouse replacement without interruption or discontinuance since 1991. Petitioners challenge that finding in their third assignment of error.

FIRST ASSIGNMENT OF ERROR

Petitioners contend that RRGC did not commence replacement of the clubhouse within one year, as required by ORS 215.130(6), because (1) replacing the septic system is insufficient to commence replacement of the clubhouse and (2) RRGC has never obtained a building permit to replace the clubhouse.[6]

Although the facts are not entirely clear, RRGC contends that the county informed it that replacement of the clubhouse would also require that the septic system be replaced. Petitioners do not dispute that contention. Given the essential functional relationship between the septic system and the clubhouse, we believe replacement of the septic system in 1991 was sufficient to commence replacement of the clubhouse. That the septic system may not have been damaged by the fire, as petitioners allege, does not affect that conclusion. The critical question is whether the county required that the new clubhouse must include a new septic system, and there is no dispute that the county imposed such a requirement.

In support of their argument that a building permit is absolutely required to commence replacement of the clubhouse, petitioners rely principally on *Twin Rocks Watseco v. Sheets*, 15 Or App 445, 516 P2d 472 (1973). In *Twin Rocks* the Court of Appeals considered whether securing a building permit to construct an apartment building was adequate to establish a vested right to construct the apartment building, notwithstanding a change in zoning after the building permit was issued.[7] The Court of Appeals concluded

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[6]Although CCZO 1506.6 does not specify that replacement of a nonconforming structure that is destroyed by fire must commence within one year, ORS 215.130(6) does, and the more restrictive statutory provision therefore controls.

[7]The applicant in that case filed the apartment building permit application shortly after an application to rezone the property was filed, and with knowledge of that pending rezoning application. The building permit was issued, but before construction of the apartment building commenced the property was rezoned, and the new zoning did not allow apartment buildings.

"that the minimum necessary to establish a nonconforming use is a building permit plus substantial action thereon, and that a building permit, standing alone, is insufficient to do so." 15 Or App at 451. From this language, petitioners reason that RRGC could not have commenced replacement of the burned clubhouse without first obtaining a building permit, which they have never done.

The ultimate question in determining the existence of a vested right is whether construction has both commenced and proceeded sufficiently under existing land use regulations that a change in land use regulations will not be allowed to apply to prohibit completion of construction of a use that was permitted when construction commenced. *Clackamas Co. v. Holmes*, 265 Or 193, 197, 508 P2d 190 (1973). The relevant question under ORS 215.130(6) is whether replacement of the nonconforming clubhouse commenced within one year. Although the question presented in *Twin Rocks* and the question at issue in this assignment of issue are different, the above-quoted language from *Twin Rocks* could be read to require, by analogy, that a building permit is an essential prerequisite to *commence* replacement of the clubhouse under ORS 215.130(6). Whatever merit petitioners' argument may have in other circumstances where a building permit is required to perform the act that commences replacement of a nonconforming use, it is without merit in this case. As we have already explained, we agree with RRGC that installation of a new septic system was sufficient to commence replacement of the clubhouse. As far as we can tell, no building permit was required to install that septic system. Because there was no legal requirement for a building permit to install the septic system, it follows that a building permit could not be an essential prerequisite to commence replacement of the clubhouse in this case.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

We next turn to petitioners' argument that even if replacement of the clubhouse was commenced in 1991 with the replacement of the septic system, ORS 215.130(7)(a) and

CCZO 1506.4 require that replacement of the clubhouse nevertheless must have continued without any period of interruption or discontinuance of more than one year. *See* n 4. This argument, like the one presented in the first assignment of error, presents a question of state law. The ORS 215.130(7)(a) requirement that a nonconforming use that is interrupted may not resume after that interruption is a statutory requirement. CCZO 1506.4 simply restates the statutory prohibition and sets the length of the required period of interruption that will operate to bar resumption of a nonconforming use.

The challenged decision takes the position that ORS 215.130(7)(a) and CCZO 1506.4 apply to continuation of nonconforming uses but do not apply to replacement of structures that are accessory to nonconforming uses and destroyed by fire. The challenged decision takes the position that RRGC's replacement of the destroyed clubhouse is controlled exclusively by CCZO 1506.6, and that provision does not limit the length of time that it may take to replace a nonconforming structure that has burned. *See* n 5.

To the extent the challenged decision takes the position that ORS 215.130(7)(a) and CCZO 1506.4 do not require that replacement of the clubhouse must be *completed* within one year, we agree. We also agree with the county that ORS 215.130(7)(a) and CCZO 1506.4 do not expressly impose a requirement that replacement of a nonconforming structure, once that replacement commences within the one-year deadline imposed by ORS 215.130(6), continue to completion without any interruptions that exceed one year in length. However, for the reasons explained below, we conclude that ORS 215.130(7)(a) and 215.130(6) together impose that requirement.

We concluded in *Fountain Village Dev. Co. v. Multnomah County*, 39 Or LUBA 207 (2000), *rev'd and remanded in part, aff'd in part* 176 Or App 213, 31 P3d 458 (2001), *pet for rev pending*, that ORS 215.130(7)(a) prohibits interruption of efforts to establish a vested right to complete initial construction of a nonconforming use:

> "In our view, vested rights, like nonconforming use rights, may be lost where the holder fails to diligently exercise those rights. Nonconforming uses, in

> which category we include vested rights, are disfavored, because they exist in derogation of governing zoning ordinances and comprehensive plans. *Fraley v. Deschutes County*, 32 Or LUBA 27, 31 (1996); *Clackamas Co. v. Port. City Temple*, 13 Or App 459, 462, 511 P2d 412 (1973). We can conceive of no reason why a vested right should be treated more favorably than a nonconforming use with respect to the duration of that right or the requirement for diligent exercise. If petitioner's view were correct, the holder of a vested right is in a considerably more secure position than the holder of a nonconforming use, even though the latter may have invested far more capital to complete the use, and may have more to lose if that use is terminated. Further, under petitioner's view, the holder of a vested right can allow the land or structure to sit idle for an extended, perhaps unlimited, period of time, while the owner of a nonconforming use must employ the land or structure even under adverse economic conditions, to avoid loss of that right through discontinuance. Petitioner has not identified any reason in law or policy for such disparate results. As discussed above, a vested right is simply the right to complete development of a nonconforming use. Consequently, we conclude that vested rights are subject to the requirement that the holder diligently exercise those rights: *i.e.* that the holder continue development of the nonconforming use and not abandon or discontinue efforts to complete development of the use." 39 Or LUBA at 223-24 (footnote omitted).[8]

Similarly, in this case we can see no reason why RRGC, as the owner of a nonconforming clubhouse should have to continue its use of the clubhouse without interruptions of more than one year, under ORS 215.130(7)(a) and CCZO 1504.4, but following destruction of that clubhouse by fire should be allowed to commence replacement of the clubhouse within one year and thereafter indefinitely interrupt or discontinue replacement without losing its right to replace the clubhouse. The challenged decision erroneously concludes that ORS 215.130(7)(a) and CCZO 1504.4 do not apply to RRGC's efforts to construct a replacement clubhouse.

The second assignment of error is sustained.

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[8] Although our decision in *Fountain Village* was remanded on other grounds, the Court of Appeals agreed with the reasoning that is quoted in the text:

> "We agree with LUBA that there is no reason to afford the 'inchoate' entitlement to a use greater protection from loss than the actual use would ultimately enjoy. * * *" 176 Or App at 224.

THIRD ASSIGNMENT OF ERROR

The final question is whether RRGC's continuing efforts to raise funds to pay the cost of rebuilding the clubhouse, along with its continued use of the subject property and the remaining structures for gun club activities, were sufficient to avoid interruption or discontinuance of replacement of the clubhouse under ORS 215.130(7)(a) and CCZO 1504.4 so that RRGC's right to seek site review approval to complete replacement of the clubhouse has not been lost through interruption or discontinuance.

As we earlier noted, there is no dispute that nearly all of RRGC's prior use of the subject property prior to the fire on December 31, 1990 has continued. Social events sponsored by persons other than RRGC appear to be the only activity that ended when the clubhouse burned in 1990. No question is presented in this appeal whether RRGC retains a nonconforming use right to continue those uses of the subject property that have continued since 1990. However, as we explained in *Coonse v. Crook County*, 22 Or LUBA 138. 148-49 (1991), a nonconforming use may be partially interrupted or partially discontinued. Where a nonconforming use is partially interrupted or partially discontinued, the part of the nonconforming use that has been interrupted or discontinued may not be resumed. *Id*. at 149. The ultimate question presented in this appeal is whether reconstruction of the clubhouse that burned in 1990, which began in 1991, was thereafter interrupted or discontinued for more than one year. If so, reconstruction of that clubhouse may not now be completed without violating ORS 215.130(7)(a) and CCZO 1504.4.

Although RRGC commenced replacement of the clubhouse that burned in 1990 by replacing the septic system in 1991, as far as we can tell all construction activity to replace the clubhouse ended in 1991 with the completion of the septic system. Since that time the only activity directed toward replacement of the clubhouse has been RRGC's fund raising activity over the past 10 years to raise the funds needed to complete construction of the clubhouse. That fundraising activity does not amount to uninterrupted or continued

construction activity to replace the clubhouse. While efforts to secure construction funds or financing may be necessary to allow construction activity to begin or continue, such efforts do not themselves constitute construction activity. Because RRGC interrupted construction of the replacement clubhouse for more than one year after it commenced that construction in 1991, it lost its nonconforming use right to replace the clubhouse that burned in 1990.

The third assignment of error is sustained.

The county's decision is reversed.