BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARTIN UNDERHILL,
Petitioner,

vs.

WASCO COUNTY,
Respondent,

and

JASEN ALEXANDER,
Intervenor-Respondent.

LUBA No. 2002-094

FINAL OPINION
AND ORDER

Appeal from Wasco County.

Jeffrey B. Wilkinson, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Steward, Sokol and Gray, LLC.

No appearance by Wasco County.

Rolf L. Anderson, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Anderson Law Offices.

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

REMANDED 11/07/2002

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

Petitioner appeals county approval of a conditional use permit that allows a hunting preserve on property that is zoned for exclusive farm use (EFU).

MOTION TO INTERVENE

Jasen Alexander (intervenor), the applicant below, moves to intervene on the side of respondent. There is no objection to the motion, and it is allowed.

FACTS

Intervenor's property is a commercial agricultural operation that includes cattle grazing and wheat farming, with portions of the subject property enrolled in a conservation reserve program. Intervenor's entire operation includes 3,500 acres. Intervenor's proposed hunting preserve would be located on 1,063 acres in the southeast portion of his property, which is located away from existing nearby dwellings.[1] A portion of the proposed hunting preserve forms an approximate inverted "U" shape, with petitioner's property located in the interior of the inverted "U" so that petitioner's property is bordered on three sides by the proposed hunting preserve. Record 84. Like intervenor's property, petitioner's property is zoned EFU and is currently used for growing wheat and grazing cattle.[2]

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[1] The Oregon Fish and Wildlife Commission issues licenses for private hunting preserves. ORS 497.248. East of the summit of the Cascade Mountains, private hunting preserves may not exceed 1,280 acres in size and must be "at least three miles from any other licensed private hunting preserve." ORS 497.248(2)(b). The boundaries of hunting preserves must be posted with signs "at intervals of 1,320 feet or less." ORS 497.248(2)(d). The applicant for a state license for a private hunting preserve may "not prevent or attempt to prevent public hunting on lands adjacent to the preserve." ORS 497.248(2)(f).

[2] The county's EFU zone apparently allows the private hunting preserves that can be licensed under ORS 497.248 by authorizing "Farm Ranch Recreation" as a conditional use in an EFU zone. The standards that govern approval of Farm Ranch Recreation uses are set out in our discussion of the first assignment of error. The parties refer to the activities that are proposed for the disputed farm ranch recreation by various names, including "recreational fee hunting enterprise," "game shooting enterprise," "for fee hunting preserve," or simply "hunting preserve." We use the term "hunting preserve" in this opinion. As relevant, the proposed activities include allowing others to come onto the designated part of intervenor's property to hunt upland game birds for a fee, between August 1 and March 31.

One of the issues below concerned the use of buffers along the property line separating the hunting preserve from petitioner's partially surrounded property. In his August 31, 2001 application for a conditional use permit, intervenor stated that "hunters will be at least 100 feet from fence lines of neighboring property at times of hunting." Record 166. This language apparently was included in intervenor's application at the suggestion of the county planning staff. Record 55. However, in the January 8, 2002 staff report, a county planner recommended that a 300-yard buffer be imposed along the adjacent neighboring property based on an assumption that shot travels "approximately 300 yards." Record 140. Planning staff anticipated that the buffer zone might later be reduced if "the actual harmful distance of shot" could be determined. Record 140. Although shot may travel 300 yards, the potential damage that shot has at 300 yards is "negligible." *Id.*[3] The planning commission's February 5, 2002 decision did not impose a condition requiring a buffer zone adjacent to petitioner's property.[4] Record 119. The planning commission's decision was appealed to the county court, and on June 26, 2002, the county court approved intervenor's conditional

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[3] The planning staff report acknowledged evidence from a number of sources that hunting preserves are not incompatible with adjoining livestock operations. Record 138-40. With regard to the danger that livestock may be injured by shotgun shot, the record includes testimony that describes an experiment that was conducted during the application process for another hunting preserve (unrelated to this current case) in Wasco County. A county planner made a site visit to investigate issues of noise and safety of shotgun use. During the planner's site visit, the applicant (not the applicant in this case) and a friend apparently decided that empirical evidence would be the most persuasive and decided to perform an experiment to demonstrate how little damage a shotgun loaded with birdshot does, provided the target is not too close. The record states that the applicant

> "grabbed a plastic bucket and walked * * * 200 feet and [the applicant's friend] shot him three times from a distance of 200 feet. He took the bucket so we could hear the ping ping as the shots hit. Upon inspection of [the applicant], he had a long sleeve shirt on; there were some small pits in the back of his shirt where you could see the shot actually hit him. It did not break the fabric; it did not break his skin. [T]he Planning Commission * * * drew a pretty good conclusion from that that safety was perhaps not as big an issue as some of the neighbors thought. [I]f a human being with a cotton shirt on could get hit within 200 feet the hide of a cow would probably not be greatly damaged if they did happen to get hit." Record 40.

[4] The planning commission did impose a condition of approval that intervenor establish a "150 yard no-shooting buffer from all residences and public roads * * *." Record 119. This condition was not carried forward by the county court in its final decision.

use permit with conditions. Like the planning commission, the county court did not impose a condition requiring a no-shooting buffer next to petitioner's property. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Wasco County Land Use and Development Ordinance (WCLUDO) 3.210(L) sets out the standards for conditional use approval of a "Farm Ranch Recreation" use in conjunction with a commercial agricultural operation. WCLUDO 3.210(L) requires in relevant part:

> "1. The tract or parcel is currently employed in a commercial agricultural operation as defined by ORS 215.203 and WCLUDO 3.210(E).
>
> "2. The 'recreation' in the Farm Ranch Recreation proposal shall not be the *primary enterprise* of the tract, but shall be *subordinate to the commercial agricultural operation in scope, scale and impact*, and shall contribute 'added value' to the commercial agricultural operation.
>
> "3. The farm management plan shall specifically quantify the size, scale, and operational characteristics of the commercial agricultural operation and the Farm Ranch Recreation proposal." Record 136 (emphasis added).

Petitioners argue that the Wasco County Court misapplied WCLUDO 3.210(L)(2). Petitioner argues that WCLUDO 3.210(L)(2) should be read to require the applicant to prove that the income derived from the proposed Farm Ranch Recreation enterprise will not exceed the income derived from the commercial agricultural operation. Petition for Review 7. According to petitioner, the term "primary enterprise" must mean the enterprise that generates the most income. According to petitioner, if the income from the hunting preserve will exceed the income from the commercial agricultural operation, the hunting preserve must be viewed as the "primary enterprise" on the property under WCLUDO 3.210(L)(2).

We do not believe petitioner's understanding of WCLUDO 3.210(L)(2) is the only way it can be interpreted. WCLUDO 3.210(L)(2) is expressed as both a prohibition and a requirement. WCLUDO 3.210(L)(2) *prohibits* the hunting preserve from being "the primary enterprise of the tract." WCLUDO 3.210(L)(2) requires that the hunting preserve must "be subordinate to the commercial agricultural operation in scope, scale and impact, and [that it

must] contribute 'added value' to the commercial agricultural operation." Petitioner focuses on the prohibition and specifically the word "enterprise." Petitioner argues "[i]f the choice of the word 'enterprise' does not mean source of income, then the entire section at issue is meaningless." Petition for Review 8. Intervenor, on the other hand, focuses on the requirement that the hunting preserve must be "subordinate to the commercial agricultural operation in scope, scale and impact" and that it add value to the farm operation. Intervenor contends it is undisputed that the hunting preserve will "add value" and that the requirement that the hunting preserve be subordinate "in scope, scale and impact" does not include any requirement that the county consider relative income of the farming operation and hunting preserve.

Although petitioner's arguments under the first assignment of error are almost entirely devoted to setting out and defending his interpretation of WCLUDO 3.210(L)(2), petitioner also argues that "both the Planning Commission and the County Court failed to make any factual findings supporting [their] conclusion that the proposed conditional use complied with WCLUDO §3.210(L)." Petition for Review 7. Petitioner is correct. Just as importantly, the challenged decision does not address the interpretive question raised under this assignment of error. The bodies of the planning commission and county court decisions do not address WCLUDO 3.210(L)(2) at all. Both decisions simply adopt the planning staff report's findings by reference. The planning staff report, after quoting WCLUDO 3.210(L)(2), states:

> "FINDING: The request complies with [WCLUDO 3.210(L)(2)]."
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> "● The [hunting preserve] proposed is not the primary enterprise of the tract, agriculture is the primary use." Record 136.

The above-quoted language from the planning staff report is an unexplained conclusion; it does not constitute findings. ORS 215.416(9) requires that the county's decision in this matter be

> "accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."

See also Le Roux v. Malheur County, 30 Or LUBA 268, 271 (1995) (setting out the requirements for adequate findings generally) (and cases cited therein). Because the meaning of WCLUDO 3.210(L)(2) is the critical first step in determining whether the disputed proposal complies with WCLUDO 3.210(L)(2), the county's findings must address that question as well.

Petitioner clearly raised the interpretational issue that is raised in the first assignment of error below and the county must address that issue in its written decision. The county court may well agree with intervenor's view that petitioner's suggested interpretation is simply wrong. If so, it must adopt findings that take that position and explain why the proposed hunting preserve satisfies WCLUDO 3.210(L)(2) as the county interprets that provision. If the county court does so, in any subsequent appeal we would be required to give that interpretation considerable deference under ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). *Huntzicker v. Washington County*, 141 Or App 257, 261, 917 P2d 1051 (1996); *Zippel v. Josephine County*, 128 Or App 458, 461, 876 P2d 854 (1994); *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 217, 843 P2d 992 (1992).

Because the challenged decision ignores petitioner's interpretational arguments, and simply concludes that WCLUDO 3.210(L)(2) is met without including any findings that explain why the county court believes that is the case, the first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

WCLUDO 5.020(B) requires that the county find that the proposed hunting preserve will be compatible with permitted uses.[5] WCLUDO 5.030 permits the county to impose conditions to ensure a conditional use is compatible with surrounding permitted uses. It provides in relevant part:

> "Such reasonable conditions as are necessary to insure the compatibility of a conditional use [with] surrounding permitted uses as are necessary to fulfill the general and specific purposes of this Ordinance may be imposed in approving an application, pursuant to [WCLUDO] 2.10(D). Such conditions may include, but are not limited to, the following:
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> "A. Limiting the manner in which the use is conducted including restricting the time an activity may take place and restraints to minimize such environmental effects as noise, vibration, air pollution, glare and odor.
>
> "* * * * *
>
> "K. Other conditions to permit the development of the county in conformity with the intent and purposes of the conditional classifications of uses."

Petitioner argues that the county court adopted no findings to explain why it believed no buffer or other limitations were necessary to ensure the hunting preserve will be compatible with permitted uses on adjoining properties. Petition for Review 10. As we have already noted, the applicant proposed such a buffer at the planning staff's suggestion. The planning staff report, which both the planning commission and the county court relied on, initially recommended a 300-yard buffer to ensure that hunting activity in the hunting preserve would be compatible with petitioner's surrounding property. The planning staff report did leave open the possibility that a smaller buffer might suffice, and the question of

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[5] WCLUDO 5.020 requires that the county find that certain criteria are (1) not applicable, (2) met or (3) can be met through imposition of conditions. WCLUDO 5.020(B) imposes the following criterion:

> "Taking into account location, size, design and operational characteristics of the proposed use, the proposal is compatible with the surrounding area and development of abutting properties by outright permitted uses."

whether a buffer is needed to ensure compatibility with adjoining livestock operations was debated at length below.

The challenged decision imposes no buffer. However, in declining to impose a buffer, the county court adopted no findings of its own explaining why the county court believes no buffer is required to ensure the hunting preserve will be compatible with permitted farm uses on adjoining property. If the county court ultimately concluded that the evidence in the record demonstrated that no buffer is required to ensure that the proposed hunting preserve will be compatible with permitted uses on petitioner's adjoining property, as it apparently did, it must adopt findings that explain that position in its decision. As it stands, the only findings the county court adopted addressing the compatibility requirement of WCLUDO 5.020(B) are those in the planning staff report, which recommend a 300-yard buffer. The county court's decision is therefore inconsistent with the findings it adopted in support of the decision.

The second assignment of error is sustained.

The county's decision is remanded.