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. 2003-089

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 Stewart Sokol and Gray LLC.

No appearance by Wasco County.

Rolf L. Anderson, Portland, filed the response brief and argued on behalf of intervenor-respondent.

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

AFFIRMED 11/10/2003

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 court decision that approves a conditional use permit for a hunting preserve on property that is zoned for exclusive farm use (EFU)

FACTS

The challenged decision is the county's decision following our remand in *Underhill v. Wasco County*, 43 Or App 277 (2002)(*Underhill I*). Intervenor-respondent (intervenor), the applicant below, owns a commercial agricultural operation that occupies approximately 3,443 acres and includes cattle grazing and wheat farming. Portions of the 3,443 acres are enrolled in a conservation reserve program. Intervenor sought and received county approval for a hunting preserve on approximately 1,280 acres located in the southeastern part of the larger commercial agricultural operation. Petitioner's property is bordered on three sides by the approved hunting preserve

The core issues in *Underhill I* were whether the county erred by (1) failing to find that the proposed hunting preserve will produce *less* income than the existing commercial farm operation and (2) not requiring that the applicant provide a safety buffer between the hunting preserve and petitioner's adjoining property. With regard to both of those issues, we agreed with petitioner in that the county's findings (1) inadequately explained why the county believed the local standards that make those issues relevant are satisfied by the proposal and (2) failed to respond to related interpretive questions that petitioner raised below. In this appeal, petitioner contends that the county has inadequately responded to our remand in *Underhill I*.

FIRST ASSIGNMENT OF ERROR

"Farm ranch recreation" is an allowed as a conditional use in the county's EFU zone. Wasco County Land Use and Development Ordinance (WCLUDO) 3.210(C)(24). Farm ranch recreation uses must comply with a number of approval standards, including those set

out at WCLUDO 3.210(L). The first three of the WCLUDO 3.210(L) standards are as follows:

> "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.
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> "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." (Emphasis added).

Petitioner does not argue that the county failed to establish that the applicant's 3,443 acres are "currently employed in a commercial agricultural operation as defined by ORS 215.203 and WCLUDO 3.210(E)," as required by WCLUDO 3.210(L)(1). Petitioner's arguments under the first assignment of error are limited to WCLUDO 3.210(L)(2) and (3). We turn first to WCLUDO 3.210(L)(2).

A. WCLUDO 3.210(L)(2)

1. The County's Findings

The one-sentence finding concerning WCLUDO 3.210(L)(2) that we found was conclusory and inadequate in *Underhill I* is set out below:

> "The [hunting preserve] proposed is not the primary enterprise of the tract, agriculture is the primary use." 43 Or LUBA 282.

On remand the county adopted much more elaborate findings to explain its position that the hunting preserve complies with WCLUDO 3.210(L)(2). In those findings the county court concludes that the terms "scope, scale and impact" refer to the physical characteristics of the proposed hunting preserve and existing farming operation and require that the scope, scale and impact of the hunting preserve must be subordinate to the scope, scale and impact of the commercial farming operation. The county's findings go on to recite a number of physical

characteristics of the hunting preserve and the existing commercial farming operation that led it to conclude that, rather than being the "primary enterprise," the hunting preserve will be "subordinate to the commercial agricultural operation in scope, scale and impact, and * * * contribute 'added value' to the commercial agricultural operation," as required by WCLUDO 3.210(L)(2). Record 18.[1]

> "The fee hunting area will include one graveled parking area for the personal vehicles to park of less than ¼ acre in size. The remainder of this operation involves fee hunters walking through the agricultural land. This is done primarily in draws and uneven terrain as testified to by the applicant. There are no structures that will be established removing active farmland from crop production or processing. Once the hunting is completed on a session by session basis, the land remains unchanged. The scope of this operation involves approximately ¼ acre changed from farm use to fee hunting demonstrating a use that is smaller in **scope and scale**.
>
> "This proposal is for 1,280 acres of fee hunting. This * * * limited * * * total acreage [is required] by State Statute. The tract under consideration is approximately 3,443 acres in size. The Limmeroth Farm consists of numerous acres that have been in agriculture use dating to the pioneer days. Official Wasco County geographic information system records demonstrate this entire tract [is] in agricultural use. A site visit conducted by staff demonstrated current agriculture crop production. The applicant supported this information by indicating current farm and enrollment in the conservation reserve program. The size of the proposal is less than half the size of the current agricultural crop use. This complies with WCLUDO [3.210(L)], and therefore, the use complies with that ordinance in that * * * scale of the proposed hunting preserve will be subordinate to the agricultural use.
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> "* * *The only improvement to be made is the parking area itself, which demonstrates little land lost to farming. The fee hunters will walk the farm in areas that are primarily of poor agricultural use * * *. Additionally, the hunting season is from the end of summer through spring. This is the time for the least impact to crop production as crops generally grow from spring through summer. This proposed use is subordinate to agriculture production and use in **impact**.
>
> "This proposal allows for concurrent annual operations of agriculture and fee hunting. As the impacts from fee hunting are subordinate to the primary

[1] The record in this appeal includes the original record in *Underhill I*. We refer to the incorporated record in *Underhill I* as "Original Record."

> enterprise of this tract, and farming will continue unimpeded, the fee hunting will provide **added value** to the tract by allowing an additional income source. * * *" Record 23 (bold type in original).[2]

2. Failure to Respond to Petitioner's Interpretive Issue

Petitioner first complains that although he has consistently taken the position that WCLUDO 3.210(L)(2) requires that the county must find that the income that the hunting preserve will generate will not exceed the income that the commercial farm generates, the county failed to address that interpretive issue in its decision on remand.

While it might be debatable whether the county expressly rejected petitioner's interpretation of WCLUDO 3.210(L)(2), it is beyond any reasonable question that the county at least implicitly rejected petitioner's view of WCLUDO 3.210(L)(2). *See* n 2. The county found that the hunting preserve would generate "added value" for the existing commercial farming operation. Petitioner not only does not dispute that finding, he contends that the income generated by the hunting preserve will exceed the income of the existing commercial farming operation. It is this potentially larger income from the hunting preserve that petitioner argues violates WCLUDO 3.210(L)(2) because, in petitioner's view, this larger income necessarily means the hunting preserve is the "primary enterprise," rather than the "subordinate" use. The county clearly rejected petitioner's interpretation.

3. Petitioner's Remaining Arguments

Petitioner offers a number of arguments in support of his position that the county erred by failing to interpret WCLUDO 3.210(L)(2) to require (1) that anticipated hunting and farming income be estimated and compared and (2) that the anticipated hunting income must be the smaller of the two.

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[2] In an earlier finding, the county court clarified its understanding of the "added value" criterion:

> "The term 'added value' means helping to contribute to the commercial agricultural operation, and there is no limit to the value the recreational use may add to the commercial agricultural use." Record 22.

We turn first to ORS 197.829(1), which sets out our standard of review when considering the county court's interpretation of its own land use legislation.[3] It may be that petitioner's interpretation of WCLUDO 3.210(L)(2) would not conflict with the express language of WCLUDO 3.210(L)(2) and would be a sustainable interpretation. However, as we pointed out in *Underhill I*, "[w]e do not believe petitioner's understanding of WCLUDO 3.210(L)(2) is the only way it can be interpreted." 43 Or LUBA at 281. The county rejected petitioner's income determinative interpretation in favor of a comparative physical characteristics interpretation. There is nothing that we can see in the county court's interpretation that is inconsistent with the "express language" of WCLUDO 3.210(L)(2), its "purpose," its "underlying policy," or the "state statutes, goals, or [administrative] rules" that apply to agricultural land. It may be that it would also be consistent with WCLUDO 3.210(L)(2), its purpose, its underlying policy and the state statutes, goals, or administrative rules that apply to agricultural land to include a consideration of comparative income, but petitioner identifies nothing in those laws that either requires such an income comparison or mandates that comparative income be given the determinative weight that petitioner argues it should be given. To the contrary, we conclude that the county's approach, which focuses on comparative physical characteristics and requires that the hunting preserve use not

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[3] 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;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

unreasonably interfere with or physically dominate the existing commercial farm use, is consistent with the text of WCLUDO 3.210(L)(2), and the regulatory context in which it appears.

Petitioner cites to numerous references to the word "commercial" in the WCLUDO and related statutes. We fail to see how that assists his argument that the use that generates the most income is necessarily the dominant use and the "primary enterprise" under WCLUDO 3.210(L)(2). Petitioner also suggests the word "added" in the phrase "contribute 'added value' to the commercial agricultural operation" in WCLUDO 3.210(L)(2) is superfluous, if "added value" can exceed the value of the commercial agricultural operation. Petition for Review 17.[4] We fail to see the particular significance in the county's phrasing that petitioner sees. If the county had intended that the *income* of the farm ranch recreation use be estimated and that the farm recreation use only be approved if its anticipated income would not exceed the income of the existing commercial farm operation, it would have been easy enough to write WCLUDO 3.210(L)(2) to say so. That the county's phrasing in WCLUDO 3.210(L)(2) could have been more succinct does not mean the phrasing the county chose must be interpreted in the manner petitioner argues.

B. WCLUDO 3.210(L)(3)

Petitioner also argues that the record does not include the "farm management plan" that is required by WCLUDO 3.210(L)(3). Intervenor responds to that argument by citing a county court *finding* that the applicant submitted a farm management plan, but intervenor does not identify where that farm management plan is located in the record. Intervenor-Respondent's Brief 11. In different circumstances, that failure to respond to petitioner's

[4] We understand petitioner's point to be that the county could have written the code more simply to say the farm ranch recreation use shall "contribute value to commercial agricultural operation" if it intended to impose no limit to the amount of value that a farm ranch use could add.

argument might be sufficient to warrant remand. However, for the reasons explained below, we do not believe that failure warrants remand here.

Petitioner appears to be correct that there is no document in the record that is entitled or labeled "farm management plan."[5] However, we do not understand petitioner's first assignment of error in *Underhill I* or petitioner's first assignment of error in this appeal to assert that this failure, in and of itself, is sufficient to warrant remand. Rather, petitioner's argument is based on his view that WCLUDO 3.210(L)(2) requires that the county establish that the proposed hunting preserve will generate *less income* than the commercial farm operation. Petitioner argues that without the farm management plan required by WCLUDO 3.210(L)(3)

> "the County cannot discern whether the criteria of WCLUDO 3.210(L)(2) are satisfied – it cannot make a determination as to whether or not the primary economic engine of the parcel will remain a permitted agricultural use, as opposed to a conditional use and that its scale, scope and operation will remain secondary." Petition for Review 19.[6]

Petitioner's argument under WCLUDO 3.210(L)(3) is simply an extension of his argument that the county is obligated under WCLUDO 3.210(L)(2) to establish that the income that will be produced by the hunting preserve will be less than the income that is generated by intervenor's commercial farming operation. Petitioner's WCLUDO 3.210(L)(3) argument is that the farm plan referenced in WCLUDO 3.210(L)(3) is needed to make that comparative income determination. We have already rejected petitioner's comparative income argument above. Petitioner does not argue that the evidentiary record is insufficient to support the county conclusion the proposed hunting preserve is consistent with WCLUDO 3.210(L)(2), if the county correctly interprets WCLUDO 3.210(L)(2) not to require a comparison of

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[5] There is, however, evidence in the record regarding the characteristics of the existing commercial farming operation on the 3,443 acres and the characteristics of the proposed hunting preserve on 1,280 of those acres.

[6] Petitioner made the same argument under his first assignment of error in *Underhill I* at pages 7-8 of his petition for review.

hunting and farming income. We affirm the county's interpretation to that effect, and therefore petitioner's argument concerning the farm management plan provides no basis for reversal or remand.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Before the county may approve a conditional use, 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.[7] WCLUDO 5.030 authorizes the county to impose conditions to ensure that a conditional use will be compatible with surrounding permitted uses and to ensure that the purposes of the WCLUDO are fulfilled.[8]

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[7] The WCLUDO 5.020 criteria include the following:

> "B. 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.
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> "* * * * *
>
> "D. The proposed use will not unduly impair traffic flow or safety in the area.
>
> "E. The effects of noise, dust and odor will be minimized during all phases of development and operation for the protection of adjoining properties.
>
> "* * * * *
>
> "G. The proposed use will not adversely affect the air, water, or land resource quality of the area.
>
> "* * * * *
>
> "J. The proposed use will not significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to or available for farm and forest use.
>
> "K. The proposed use will not force a significant change in accepted farm or forest practices on surrounding lands devoted to or available for farm or forest use."

[8] WCLUDO 5.030 provides the following nonexclusive list of the types of conditions that the county may impose:

A. Failure to Find Compliance with WCLUDO 5.020 Criteria

Petitioner argues that the county failed to adopt any findings concerning impacts on accepted farm practices, as required by WCLUDO 5.020(J) and (K). Petitioner also argues that the county's finding regarding traffic safety under WCLUDO 5.020(D) is inadequate and that the county did not adequately address WCLUDO 5.020(G), because it did not specifically address concerns he raised below that there is a "risk of water quality reduction due to the leeching into the soil of heavy metals used in pellets and bullets." Original Record 98.

Contrary to petitioner's argument, the county did adopt findings concerning WCLUDO 5.020(J) and (K), and petitioner makes no attempt to explain why those findings are inadequate. Original Record 138-40, 143. Petitioner does not explain why he believes the county's finding concerning traffic safety under WCLUDO 5.020(D) is inadequate.[9] Petitioner made no attempt below and makes no attempt in the petition for review in this appeal to explain why he believes birdshot poses a realistic threat to water quality. More

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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.
>
> "B. Establishing a special yard or other open space or lot area or dimension.
>
> "* * * * *
>
> "H. Requiring diking, screening, landscaping, or another facility to protect adjacent or nearby property and designating standards for its installation and maintenance.
>
> "I. Designating the size, height, location and materials for a fence.
>
> "* * * * *
>
> "K. Other conditions to permit the development of the County in conformity with the intent and purpose of the conditional classification of uses."

[9] The county found that the additional trips that the hunting preserve would generate on county roads "is insignificant." Original Record 142. To the extent petitioner believes WCLUDO 5.020(D) imposes a general safety criterion that goes beyond traffic safety, we do not agree. In any event, the county addressed petitioner's larger hunting-related safety concerns in its consideration of whether to require a buffer.

importantly, each of these three issues are issues that petitioner could have raised in his petition for review in *Underhill I*. He did not do so, and may not do so for the first time here in his appeal of the county's decision following our remand in *Underhill I*. *Beck v. City of Tillamook*, 313 Or 148, 153-54, 831 P2d 678 (1992).

These subassignments of error are denied.

B. Buffer

As we noted in *Underhill I*, the planning staff initially suggested a buffer and the applicant initially proposed a buffer. 43 Or LUBA at 284. The planning staff report that the county relied on in its decision in *Underhill I* recommended a 300-yard buffer, although that staff report suggested a small buffer might be sufficient. *Id*. The county's decision in *Underhill I* offered no explanation for why the county court ultimately decided to approve the application without requiring any buffer to separate hunting activities from adjoining properties. We remanded for the county to explain its decision not to impose a buffer. On remand the county adopted findings, which are set out in part below:

> "* * * The question of whether a buffer should be required along the outer edge of the hunting preserve was considered. After considering the testimony and evidence that was submitted, the determination was made that the imposition of a buffer was not necessary for this use. The [County] Court based its decision that no buffers were necessary and the hunting preserve complied with WCLUDO 5.030 without the imposition of buffers, after considering all of the evidence provided * * *.[10] Additional testimony and evidence submitted by the applicant demonstrated that a buffer was not necessary for this use. * * *
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> "* * * * *
>
> "[D]uring review of this application a similar proposal demonstrated the firing range using the type of shotgun to be used for fee hunting. [The] demonstration * * * showed that the shotgun must be discharged within a hundred feet or so to actually cause harm to a person, and by inference [to] an

[10] The challenged decision sets out testimony that was submitted below by a certified animal nutritionist, a wildlife biologist, owners of a livestock operation, a university extension beef specialist, a veterinarian, and a number of individuals, all of whom testified that bird hunters pose no danger to cattle on adjoining property.

> animal. This short distance was believed to remove any doubt of harm as a human or animal would be in clear view of the fee hunter.
>
> "Additionally, [the] County Court found that this area includes very little population density with very few people in the area. This factor contributes to the lack of necessity for a buffer." Record 21-22.

Petitioner first argues the county erroneously believed it was powerless to require a safety buffer, even if it felt such a buffer were warranted. We see nothing in the county's decision on remand that suggests it believed it lacked authority to require a safety buffer.

Petitioner also points out that planning staff initially recommended that a buffer be provided and the applicant initially proposed a buffer. Petitioner contends that "[c]ommon sense dictates that [a] reasonable safety zone" be required. Petition for Review 24. Petitioner also argues that the county has required that other applicants for hunting preserves provide buffers.[11] Petitioner contends that the county erred by failing to explain adequately, in its decision, when it believes buffers are needed and when they are not needed.

Petitioner and the county clearly disagree about the necessity for a buffer to ensure safety and to ensure that the hunting preserve will be compatible with his adjoining cattle ranch. However, that disagreement does not provide a basis for remand. The county adequately explained why it does not believe a buffer is needed to ensure safety and compatibility in this case. That the county may have reached a different conclusion in other cases, without more, does not provide a basis for remand. We do not know whether the properties in the other applications were similarly situated, and we do not know whether the county had the benefit in those other cases of the extensive testimony that was presented in this case regarding the likelihood that bird hunters on the subject property would not pose a significant safety or compatibility problem with petitioner's adjoining livestock operation.

[11] Petitioner did not submit evidence of these other decisions during the proceedings below. We denied petitioner's attempt to supplement the record in this appeal with evidence of those other decisions.

We also reject petitioner's suggestion that the county is required to articulate in its findings a precise template for how it will determine whether to require buffers and "avoid * * * inconsistent rulings in the future[.]" Petition for Review 27. The county's obligation is to adequately explain why it decided its decision on remand as it did. We do not mean to suggest the county is completely free to adopt inconsistent decisions. *See Friends of Bryant Woods Park v. City of Lake Oswego*, 126 Or App 205, 207, 868 P2d 24 (1994) (reserving judgment on whether an actual inconsistency in a local government's interpretations of the same legislation on different occasions might require remand). However, the fact that the county may have required hunting preserve buffers in some prior decisions does not necessarily mean the decision on review in this appeal is inconsistent with those decisions. As we have noted, there may well have been factual differences that explain the different results. Even if those properties were similarly situated, the evidence presented in this case might well have led to a different result in those cases had that evidence been available to the county when those cases were decided. Petitioner's arguments under this subassignment of error provide no basis for reversal or remand.

The second assignment of error is denied.

The county's decision is affirmed.