BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CITIZENS FOR RESPONSIBILITY,
PHILIP ZIEBERT, ADAM NOVICK
and MAUREEN HUDSON,
Petitioners,

vs.

LANE COUNTY,
Respondent.

LUBA No. 2005-082

FINAL OPINION
AND ORDER

Appeal from Lane County.

Daniel J. Stotter, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was Bromley Newton, LLP.

Stephen L. Vorhes, Assistant County Counsel, Eugene, filed the response brief and argued on behalf of respondent.

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

REMANDED 04/07/2006

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a county permit approving modifications to an existing shooting range.

FACTS

The subject property is a 17-acre parcel zoned F-2 (Impacted Forest Lands), bisected by Spencer Creek. The property is bordered on the north, east and south by a 258-acre F-2 zoned parcel used for forestry, wildlife management and habitat restoration.

The owner, the Eugene Chapter of the Izaak Walton League (IWL), has operated a gun club on the property since the mid-1950s. In 1966, the property was zoned AGT (Agriculture, Grazing, Timber Raising) zone. The AGT zone apparently did not expressly allow recreational shooting ranges, but it did allow unspecified uses not authorized in other zoning districts, if approved under the criteria for a conditional use permit (CUP). In 1975, IWL applied for a CUP to facilitate expansion of the existing rifle shooting range to include a skeet shooting range. The county approved the CUP, subject to conditions that (1) require review in three years to ensure compatibility of the facility with the neighborhood, (2) limit the facility's use to recreational shooting of rifles, shotguns, and handguns, and (3) limit development and improvements to those shown on a site plan attached to the CUP. The site plan shows a skeet range and a 200-yard rifle range oriented towards the northeast.

At some point the property was rezoned to F-2, which allows a "[f]irearms training facility that shall not significantly conflict with the existing uses on adjacent and nearby lands." Lane Code (LC) 16.211(3)(c-c).[1] In the years following the 1975 CUP approval,

[1] LC 16.211(3)(c-c) presumably implements OAR 660-006-0025(4), which since the early 1990s has allowed a "firearm training facility" in forest zones, subject to the standards in OAR 660-006-0025(5). The latter rule requires a finding that the proposed use "will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands," or "significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire

IWL made a number of modifications to the facility. Among other changes, the skeet range was discontinued, and a pistol range constructed north of Spencer Creek.

In 2001, in response to nuisance complaints from neighboring properties, IWL applied for a nonconforming use verification, but later withdrew that application. In 2003, IWL filed the subject application, which seeks *post hoc* approval for some of the modifications made after 1975, pursuant to LC 16.211(3)(c-c). IWL took the position that it did not need county approval for any modifications made prior to September 9, 1995, pursuant to ORS 197.770. That statute, adopted in 1995, provides that any "firearms training facility" in existence on September 9, 1995 "shall be allowed to continue operating until such time as the facility is no longer used as a firearms training facility."[2]

The county planning director conducted a hearing on April 29, 2004, and issued a decision October 15, 2004, approving the application. The planning director agreed with IWL that as of September 9, 1995, the facility qualified as a "firearms training facility" as that term is defined in ORS 197.770(2)(c), because prior to that date the facility provided training courses and issued certifications required by nationally recognized programs that promote shooting matches, target shooting and safety. Therefore, the planning director confined his analysis under LC 16.211(3) to modifications made after September 9, 1995,

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suppression personnel[.]" LC 16.211(3) includes identical standards for a firearms training facility allowed under that code section.

[2] ORS 197.770 provides:

> "(1) Any firearms training facility in existence on September 9, 1995, shall be allowed to continue operating until such time as the facility is no longer used as a firearms training facility.
>
> "(2) For purposes of this section, a 'firearms training facility' is an indoor or outdoor facility that provides training courses and issues certifications required:
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> "(a) For law enforcement personnel;
>
> "(b) By the State Department of Fish and Wildlife; or
>
> "(c) By nationally recognized programs that promote shooting matches, target shooting and safety."

and concluded that those modifications in themselves did not significantly conflict with the existing uses on adjacent and nearby lands.

Petitioners appealed the planning director's decision to the county hearings officer, arguing in relevant part that there was no evidence that the facility provided training courses and certifications after 1995. Because the facility was "no longer used as a firearms training facility" after 1995, as that term is defined by ORS 197.770, petitioners contended that the facility lost the protection afforded by the statute. Therefore, petitioners argued, all of the post-1975 modifications must be evaluated under LC 16.211(3), not just those that post-date 1995. According to petitioners, some of the principal modifications cannot be approved under LC 16.211(3), because the expanded facility as a whole significantly conflicts with forestry and other uses on adjacent lands.

The hearings officer found that the record included no evidence that the IWL facility had provided training courses or certifications for several years preceding the application, but ultimately concluded that its use as a "firearms training facility" had not been discontinued for purposes of ORS 197.770. The hearings officer found that at all relevant times IWL intended to use the facility to provide training and certifications required by nationally recognized programs, and the facility had the capacity to do so. According to the hearings officer, that the record does not include evidence that IWL in fact provided training and certifications for several years preceding the application does not indicate that the facility's use as a "firearms training facility" was discontinued. With respect to LC 16.211(3)(c-c), the hearings officer agreed with the planning director that only improvements or modifications made after September 9, 1995 were subject to review under the "significantly conflict" standard. The hearings officer opined that if the facility as a whole were subject to LC 16.211(3), then it would not comply with the code, given evidence of significant impacts on neighboring forestry operations and other uses. The hearings officer ultimately affirmed the planning director's decision.

The county board of commissioners declined to hear an appeal of the hearings officer's decision, but adopted the hearings officer's interpretation of the statute as its own. This appeal followed.

FIRST ASSIGNMENT OF ERROR

A. "No Longer Used as a Firearms Training Facility"

Petitioners contend that the hearings officer misconstrued ORS 197.770 by relying solely on evidence of IWL's intent to provide training and issue certifications and the facility's continued capability to do so after 1995.[3] According to petitioners, whether a

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[3] The hearings officer's decision states, in relevant part:

> "While the Planning Director concluded that the applicant's facility qualified as a 'firearms training facility' under ORS 197.770, he did not address the issue of whether the facility lost that status thereafter through disuse but rather analyzed whether the uses added subsequent to September 1995 were consistent with [LC] 16.211(3). The statute does not provide a time duration beyond which a firearms training facility can be considered 'discontinued' and absent such a guideline, I believe that a 'reasonable person' standard should be applied.
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> "I believe that several factors are paramount in a determination of whether a facility is no longer used as a firearms training facility. Primary among these factors are intent to utilize a facility for firearms training, whether the facility has retained the ability to serve in that capacity and, of course, whether the facility has actually served in that capacity. Regarding the first factor, it is clear that the applicant has retained the intent to provide training and certifications to interested organizations. * * *
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> "Second, the applicant has maintained and enhanced its shooting ranges since 1995 and these facilities can be and are used for training and shooter education to this day. Also, the IWL members who have training experience are available and willing to utilize the applicant's facility for that purpose. It is obvious that the applicant's facility retains the capacity to operate as a firearms training facility as defined by ORS 197.770.
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> "In regard to the third factor, while there is ample evidence that the facility has been used for firearms training in the last eight years, there is no evidence in the record to support a finding that the applicant has issued training certifications in the last several years. [Petitioners] argue that this failure requires the applicant to lose its statutory protection.
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> "I believe that [petitioners'] conclusion represents too restrictive a reading of ORS 197.770(1) and, in this regard, is contrary to the intent implicit in that legislation. I believe that the purpose of the legislation was to ensure the survival of firearms training facilities so that there would remain a reasonable number of choices for the public and agencies that need the services offered by such facilities. I do not believe that a reasonable person would conclude that the applicant's facility no longer qualified as a firearms training facility merely because training certifications have not been issued for a couple of years." Record 74-75.

firearms training facility is discontinued under ORS 197.770 must be based on the actual use of the facility during the relevant period. Nothing in the statute, petitioners argue, suggests that mere intent or capability is sufficient to avoid discontinuance.

The county responds that ORS 197.770 does not require evidence in the form of actual certifications issued after 1995, in order to demonstrate that the facility has continued to be "used as a firearms training facility." Notwithstanding the absence of any recent certifications in the record, the county argues that testimony and affidavits in the record suffice to demonstrate that the facility provided training programs and certifications required by nationally-recognized programs following 1995 and to the present date.

ORS 197.770 clearly contemplates that a qualifying "firearms training facility" may lose the statute's protection when it "is no longer used as a firearms training facility." As the hearings officer observed, the statute is silent as to how to determine when a facility is "no longer used as a firearms training facility," or how long that use may be discontinued before the facility is disqualified. The hearings officer adopted a "reasonable person" approach, under which evidence of continued actual use as a firearms training facility is irrelevant, as long as the owner of the facility retains the intent and capability of providing training programs and required certifications for an indefinite period. We reject that approach for the following reasons.

First, we recognize that any approach to construing ORS 197.770 will require a significant degree of interpretation and reasoning by analogy, given that the text and context of the statute say nothing about how to determine when a qualifying facility is "no longer used as a firearms training facility." In our view, the closest and most appropriate analogy is to nonconforming uses allowed in areas of county jurisdiction under ORS 215.130(5) through ORS 215.130(11). While the analogy is not exact, it seems reasonably clear that ORS 197.770 treats firearms training facilities as something like nonconforming uses. Qualifying firearms training facilities that exist on a certain date may continue to operate,

notwithstanding any subsequent zone changes or regulations adopted by counties or cities, until the facility is "no longer used as a firearms training facility." In other words, like nonconforming uses, a "firearms training facility" may lose its qualifying status through disuse or discontinuation of qualifying activities. *See* ORS 215.130(7)(a). Significantly, the statutory language focuses on how the facility is "used," not on the intent of the property owner or whether the facility continues to be capable of qualifying uses. We agree with petitioners, therefore, that a determination whether a qualifying firearms training facility has lost the protection of ORS 197.770 requires evaluation of the actual use of the facility following September 9, 1995, and whether it continues to qualify as a firearms training facility. If the facility is "no longer used as a firearms training facility," the mere intent and capability to use it as a qualifying facility are insufficient to prevent loss of the statute's protection.

As the hearings officer noted, ORS 197.770 does not specify how long qualifying uses at a facility may be discontinued before losing the protection of the statute. The hearings officer apparently viewed the statute as allowing *indefinite* discontinuation of actual use as a firearms training facility, as long as there remains an intent and capacity to use it as a training facility. We reject that view. As explained, the statute clearly contemplates that a qualifying facility will be disqualified when it is "no longer *used* as a firearms training facility." While the statute does not specify what period of disuse disqualifies a facility, in this respect the statute is again similar to the statutes governing non-conforming uses at ORS 215.130, which do not specify the length of the period of interruption that will terminate the right to continue a non-conforming use. Instead, ORS 215.130(10)(b) leaves it up to individual counties to establish criteria to determine when a use has been interrupted or abandoned. We note that the county has adopted regulations providing that nonconforming uses are deemed interrupted or abandoned if discontinued for more than one year. LC 16.251(1)(c). Absent some other basis to apply a different period of time, we conclude

that whether a qualifying facility in the county is "no longer used as a firearms training facility" for purposes of ORS 197.770 depends on whether qualifying use of the facility has continued since 1995 with no interruption longer than one year.

Finally, we note that a qualifying use under ORS 197.770 consists of providing training courses and issuing certificates that are required by one of three types of organizations. Training and certificates required by other types of organizations do not qualify. As petitioners point out, the county relied in part on evidence that the facility has been used for training by several different organizations not among the three types of organizations listed in ORS 197.770(2), for example, use in 2000 by the military. We agree with petitioners that evidence of such use during the relevant period does not support a finding that the facility continues to be used as a "firearms training facility" as the statute defines that term.

We turn now to the parties' differing views of the evidence in the record regarding post-1995 use. As noted, the hearings officer found that there is "no evidence in the record to support a finding that the applicant has issued training certifications in the last several years." Record 75 (quoted at n 3). The county disputes the significance of that finding, arguing that the hearings officer improperly focused on whether copies of actual certificates were placed in the record, and gave less weight to affidavits from trainers clearly indicating that in fact certificates have been issued in recent years based on training conducted at the IWL facility.

We tend to agree with the county that it is not necessary to include copies of actual certificates in the record, in order to demonstrate that the IWL facility continues as a firearms training facility.[4] Other probative evidence, such as testimony from a trainer at the facility

[4] That said, copies of certificates issued or records of the training that led to issuance of certificates would obviously be the most direct and compelling evidence of qualifying use during the relevant period. It seems highly likely that the organizations that require certificates also require that a record be kept of the training that led to issuance of the certificates, in which case those records should be readily available, if in fact certificates

describing training courses or certificates issued during the relevant period, may be sufficient. However, it is not clear to us that the hearings officer relied exclusively on the absence of certificates in the record. As far as we can tell, the hearings officer reviewed the same testimony and affidavits the county cites to us.

In general, the testimony and affidavits cited to us do not specifically describe particular training courses and/or certificates, and often do not refer to specific dates or periods of time. The most focused testimony is provided by the affidavit of Monty Millican, one of the directors of the Eugene Chapter of the IWL and a trainer licensed by various organizations, who describes his participation in various courses at the facility. For example, Mr. Millican states that two national organizations sponsor monthly on-going Basic Practical Pistol Courses at the facility that result in certificates of completion. Record 887. Mr. Millican also states that he has observed and assisted with Hunter Safety classes held at the facility, sponsored by the Oregon Department of Fish and Wildlife, that result in a Hunter Safety card, and that he participated in two such classes in 2004. Record 888.

In our view, testimony of that kind may well be substantial evidence sufficient to support a finding that the IWL facility has continued to be used as a "firearms training facility" during at least part of the relevant period following 1995, assuming there is no other conflicting evidence in the record. However, the hearings officer did not make such a finding or explicitly evaluate evidence of actual use since 1995, but instead proceeded to resolve the issue of discontinuance under the view that evidence of actual use is unnecessary where there is evidence of intent and capability. For the reasons explained above, we have rejected that interpretation of the statute. Remand is therefore necessary for the hearings officer to evaluate the evidence regarding actual use of the facility since 1995, consistent with the interpretation of ORS 197.770 set forth in this opinion.

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were issued during the relevant period. Viewed in this light, the fact that IWL and its supporters submitted no records of certificates issued after about 1996 carries the suggestion, at least, that the facility issued no certificates in recent years.

B. Unauthorized Pre-1995 Uses

Petitioners also dispute the county's apparent view that ORS 197.770 operates to grandfather all uses and improvements that existed on September 9, 1995, regardless of whether those uses or improvements were authorized or lawful under whatever county land use regulations may have existed when the improvements were first constructed. Petitioners contend that the improvements and modifications made between the 1975 CUP and 1995 were unauthorized and unlawful expansions of the facility approved in 1975, which was limited to recreational shooting and to the improvements depicted on the 1975 site plan.

The county responds that the statute provides absolute protection for all uses and structures associated with a firearms training facility that were in existence on September 9, 1995, regardless of whether those existing uses were in fact authorized or lawful. In any case, the county argues, the general areas of the property used in 1995 are the same areas approved for use by the 1975 CUP, even if some uses and facilities have been modified or added in those areas. Therefore, we understand the county to argue, all uses and facilities in existence on September 9, 1995, were authorized by the 1975 CUP and thus lawful.

ORS 197.770 does not specify whether the statute's protection extends only to authorized and lawful "firearms training facilities" that exist on September 9, 1995, or whether it also has the effect of legalizing facilities or portions of facilities that are unauthorized and unlawful. However, it seems unlikely that the legislature intended to protect unauthorized or unlawful facilities, or the entirety of facilities with unauthorized and unlawful expansions.[5] Absent a clear expression of such intent, we are reluctant to infer on the legislature's part an intent to retroactively legalize uses or structures that were unlawful when first commenced or constructed. Consequently, we reject the county's argument that

[5] The county has supplied us with portions of the legislative history leading to adoption of ORS 197.770. We discern nothing in that legislative history suggesting that the legislature intended to legalize uses or facilities that were not authorized or lawful under the regulations applicable at the time those uses were commenced or facilities were constructed.

ORS 197.770 extends absolute protection to any qualifying facility that existed on September 9, 1995, regardless of whether that facility is unauthorized or includes unauthorized expansions or modifications.

We also reject the county's alternative argument that all current uses and structures are authorized by the 1975 CUP, because the current facility occupies approximately the same footprint as the one approved in 1975. Among other things, the current facility includes a five-pit pistol range located north of Spencer Creek adjacent to the forestry parcel to the north. The 1975 CUP did not approve a pistol range at all, and did not approve any kind of facility at that location. The 1975 CUP limits development and improvements to those shown on the site plan. The CUP site plan shows only a clearing and some trees at the present location of the pistol range. Record 149.[6]

The hearings officer opined, apparently in *dicta*, that the entire current facility would be denied if evaluated under LC 16.211(3), given the evidence of damage to adjoining forestry operations and other uses. As far as we can tell, that opinion did not distinguish impacts from uses authorized in the 1975 CUP from impacts related to modifications or expansions that post-date 1975. However, it possible that at least some impacts relate to apparently unauthorized post-1975 modifications or expansions, such as the pistol range. Certainly, we are cited to no basis in the decision or record to conclude that all significant impacts to adjoining properties relate solely to uses and improvements authorized by the 1975 CUP.

In sum, we agree with petitioners that the county erred in assuming that ORS 197.770 absolutely protects all uses and structures associated with the firearms training facility that existed on the subject property on September 9, 1995. As explained, the statute protects only

[6] The planning director deduced from the site plan and a 1975 aerial photo that the area now occupied by the pistol range was being used as part of the skeet range south of Spencer Creek. Record 141. That may be correct, but the fact remains that the 1975 CUP did not authorize the pistol pits that now exist north of the creek.

lawful uses (including lawful nonconforming uses), and does not protect unauthorized uses that required the county's discretionary approval but did not receive such approval. Remand is therefore necessary to address petitioners' arguments regarding unauthorized post-1975 modifications and to determine the extent to which such modifications require evaluation under LC 16.211(3) and (3)(c-c).

To be clear on this point, on remand the county should determine what authorized or lawful uses existed on September 9, 1995. As far as ORS 197.770 is concerned, such uses may continue unless discontinued for more than a one year period. All uses not authorized by the 1975 CUP and not otherwise lawful are not protected by the statute, and are therefore subject to evaluation under LC 16.211(3) and (3)(c-c).

The first assignment of error is sustained.

SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR

As noted, LC 16.211(3) provides that certain uses allowed in the F-2 zone, including firearms training facilities, may be allowed subject to a finding that the use will not "force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands" and will not "significantly increase fire hazards or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel." In addition, LC 16.211(3)(c-c) allows a firearms training facility in the F-2 zone only if the facility does not "significantly conflict with the existing uses on adjacent and nearby lands."

Under the second assignment of error, petitioners challenge the county's findings with respect to fire hazards as conclusory and inadequate, and for failing to address issues raised by opponents, including two fire safety experts. Under the third assignment of error, petitioners argue that those findings are not supported by substantial evidence. Finally, petitioners contend under the fourth assignment of error that the county misconstrued LC 16.211(3) and (3)(c-c) as being effectively mooted by ORS 197.770.

As explained above, the county's findings under LC 16.211(3) and 3(c-c) focus only on improvements or modifications made after 1995, and did not consider improvements or modifications from 1975 to 1995. For the reasons discussed above, remand is necessary for the county to consider any uses or modifications not authorized by the 1975 CUP and to determine the extent to which such modifications require evaluation under LC 16.211(3) and (3)(c-c). Because remand on those terms will require adoption of amended or additional findings, no purpose would be served by addressing the adequacy of the present findings or their evidentiary support.

Our resolution of the first assignment of error also makes it unnecessary to resolve the fourth assignment of error, alleging misinterpretation of LC 16.211(3) and (3)(c-c). The critical issue, it seems to us, is the correct interpretation and application of ORS 197.770. The parties agree that where that statute operates, it precludes any contrary local regulation. We explained under the first assignment of error our view of where the statute operates. On remand, the county must apply ORS 197.770 consistent with our interpretation, and apply LC 16.211(3) and (3)(c-c) where the statute does not operate. Remand on those terms essentially moots the arguments under the fourth assignment of error.

We do not reach the second, third or fourth assignments of error.

The county's decision is remanded.