

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 CITIZENS FOR RESPONSIBILITY,  
5 PHILIP ZIEBERT, ADAM NOVICK  
6 and MAUREEN HUDSON,  
7 *Petitioners,*

8  
9 vs.

10  
11 LANE COUNTY,  
12 *Respondent.*

13  
14 LUBA No. 2005-082

15  
16 FINAL OPINION  
17 AND ORDER

18  
19 Appeal on remand from the Court of Appeals.

20  
21 Daniel J. Stotter, Eugene, represented petitioners.

22  
23 Stephen L. Vorhes, Assistant County Counsel, Eugene, represented respondent.

24  
25 BASSHAM, Board Chair; HOLSTUN, Board Member; RYAN, Board Member,  
26 participated in the decision.

27  
28 AFFIRMED

04/04/2007

29  
30 You are entitled to judicial review of this Order. Judicial review is governed by the  
31 provisions of ORS 197.850.

1

2 **NATURE OF THE DECISION**

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

5 **INTRODUCTION**

6 LUBA remanded the county’s approval under petitioners’ first assignment of error,  
7 which alleged that the county misconstrued ORS 197.770, which provides that any “firearms  
8 training facility” in existence on September 9, 1995 “shall be allowed to continue operating  
9 until such time as the facility is no longer used as a firearms training facility.”<sup>1</sup> In relevant  
10 part, LUBA concluded that the county erred in interpreting ORS 197.770 to protect (1)  
11 facilities or improvements that were unlawful or constructed without authorization prior to  
12 1995, and (2) facilities that have ceased activities that qualify it as a “firearms training  
13 facility” for indefinite periods of time, as long as the operator retained the intent and  
14 capability of providing firearms training. *Citizens for Responsibility v. Lane County*, 51 Or  
15 LUBA 588 (2006). LUBA remanded the decision to the county to apply the statute, as  
16 interpreted by LUBA, to the evidence. In light of that disposition, LUBA did not reach

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<sup>1</sup> 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:
  - “(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.”

1 petitioners’ second through fourth assignments of error, which involved county code  
2 provisions.

3 On appeal, the Court of Appeals disagreed with LUBA’s view of the statute, agreeing  
4 with the county that the statute delegates broad authority to local governments to interpret  
5 and apply ORS 197.770, and that the county’s interpretations were consistent with the  
6 statute. *Citizens for Responsibility v. Lane County*, 207 Or App 500, 142 P3d 486 (2006).

7 The Court’s disposition requires us to deny the first assignment of error, and to  
8 address the second through fourth assignments of error.

9 **FACTS**

10 We repeat the relevant facts from our initial opinion:

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

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

29 “At some point the property was rezoned to F-2, which allows a ‘[f]irearms  
30 training facility that shall not significantly conflict with the existing uses on  
31 adjacent and nearby lands.’ Lane Code (LC) 16.211(3)(c-c). In the years  
32 following the 1975 CUP approval, IWL made a number of modifications to  
33 the facility. Among other changes, the skeet range was discontinued, and a  
34 pistol range constructed north of Spencer Creek.

1 “In 2001, in response to nuisance complaints from neighboring properties,  
2 IWL applied for a nonconforming use verification, but later withdrew that  
3 application. In 2003, IWL filed the subject application, which seeks *post hoc*  
4 approval for some of the modifications made after 1975, pursuant to  
5 LC 16.211(3)(c-c). IWL took the position that it did not need county approval  
6 for any modifications made prior to September 9, 1995, pursuant to  
7 ORS 197.770. \* \* \*

8 “The county planning director \* \* \* agreed with IWL that as of September 9,  
9 1995, the facility qualified as a ‘firearms training facility’ as that term is  
10 defined in ORS 197.770(2)(c), because prior to that date the facility provided  
11 training courses and issued certifications required by nationally recognized  
12 programs that promote shooting matches, target shooting and safety.  
13 Therefore, the planning director confined his analysis under LC 16.211(3) to  
14 modifications made after September 9, 1995, and concluded that those  
15 modifications in themselves did not significantly conflict with the existing  
16 uses on adjacent and nearby lands.

17 “\* \* \* \* \*

18 “[On appeal to the hearings officer, t]he hearings officer found that the record  
19 included no evidence that the IWL facility had provided training courses or  
20 certifications for several years preceding the application, but ultimately  
21 concluded that its use as a ‘firearms training facility’ had not been  
22 discontinued for purposes of ORS 197.770. \* \* \* With respect to  
23 LC 16.211(3)(c-c), the hearings officer agreed with the planning director that  
24 only improvements or modifications made after September 9, 1995 were  
25 subject to review under the ‘significantly conflict’ standard. The hearings  
26 officer opined that if the facility as a whole were subject to LC 16.211(3),  
27 then it would not comply with the code, given evidence of significant impacts  
28 on neighboring forestry operations and other uses. The hearings officer  
29 ultimately affirmed the planning director’s decision.” 51 Or LUBA at 589-92  
30 (footnotes omitted).

31 **FIRST ASSIGNMENT OF ERROR**

32 For the reasons stated in the Court of Appeals’ opinion, petitioners’ first assignment  
33 of error is denied.

34 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

35 LC 16.211(3)(c-c) allows in the F-2 zone a “[f]irearms training facility that shall not  
36 significantly conflict with the existing uses on adjacent and nearby lands.” LC 16.211(3)  
37 provides that a number of uses, including firearms training facilities allowed under

1 LC 16.211(3)(c-c) may be allowed if they “will not significantly increase fire hazard or  
2 significantly increase fire suppression costs or significantly increase risks to fire suppression  
3 personnel.” As we noted in our initial opinion, LC 16.211(3) implements OAR 660-006-  
4 0025(4), which allows a “firearms training facility” in forest zones subject to the same  
5 standards set out in LC 16.211(3).

6 As explained, the county applied the standards in LC 16.211(3) only with respect to  
7 those modifications or improvements to the facility that post-dated September 9, 1995.  
8 However, the planning director and hearings officer concluded that post-1995 improvements  
9 to the proposed facility operation are subject to the standards in LC 16.211(3), and that such  
10 improvements comply with those standards. Specifically, with respect to the increased fire  
11 hazards/cost/risk standard, the hearings officer found:

12 “The appellants have pointed to the isolated nature of the applicant’s firearms  
13 training facility, the limited access to fire vehicles and the concern over near-  
14 drought conditions experienced generally in the area. However, there has not  
15 been a documented fire caused by or emanating from the facility, and I do not  
16 believe that a significant increase in fire hazards, fire suppression costs, or  
17 significant increased risks to fire suppression personnel has been found.”  
18 Record 18.

19 Petitioners challenge that finding, arguing that it is inadequate and is not supported  
20 by substantial evidence. Petitioners cite to testimony from two fire suppression experts that  
21 expanded operation of the facility will significantly increase fire hazards, fire suppression  
22 costs, and risks to fire suppression personnel, and argue that the applicants failed to present  
23 substantial evidence to the contrary.

24 The county responds that petitioners fail to appreciate that the hearings officer  
25 affirmed the planning director’s decision, which includes a number of findings addressing  
26 whether any post-1995 improvements increase fire hazards, fire suppression costs or risks to  
27 fire suppression personnel. The county also argues that petitioners’ argument and the  
28 evidence they cite to does not distinguish between fire hazards created by the facility as a  
29 whole and any fire hazards attributable to post-1995 improvements.

1 If the above-quoted single-paragraph finding were the extent of the county’s findings  
2 on the increased fire hazard/cost/risk criterion, we might agree with petitioners that the  
3 county’s findings are inadequate. That finding does not identify any evidence that supports a  
4 finding of compliance with that criterion, other than the fact that there has been no  
5 documented fire caused by the facility. That the facility has not yet caused a fire is not  
6 particularly compelling evidence of compliance with the criterion, in light of the expert  
7 testimony to the contrary that petitioners cite. However, as the county points out, the  
8 hearings officer affirmed the planning director’s decision, which includes findings regarding  
9 the increased fire hazard/cost/risk standard that petitioners do not challenge.

10 The hearings officer and planning director identified the uses or improvements that  
11 were added to the facility after September 1995, the most relevant of which are listed below:

- 12
- 13 • Enclosing the former shotgun shelter and adding a woodstove, electrical outlets and  
14 workspace.
- 15 • Converting a temporary shed next to the shotgun shelter into an office.
- 16 • Constructing a storage shed on the west end of the shotgun shelter.
- 17 • Constructing a secure storage sheds at the pistol pits.
- 18 • Adding two tarp-covered shelters in the pistol pit area.
- 19 • Adding freestanding walls at the pistol pits.
- 20 • Constructing an all-weather parking area.
- 21 • Constructing a secure storage room attached to west end of the upper rifle shelter.
- 22 • Adding baffles to rifle range shelters.

23 The planning director found, in relevant part:

24 “Since ORS 197.770 does not speak to the number of members/uses allowed,  
25 the construction of ‘creature comforts’ such as installation of woodstove(s),  
26 walling off open structures, creation of a small ‘office’ space, secured storage  
27 areas, tarp structures, gravel parking, and the addition of electrical outlets is  
28 not seen as significantly conflicting with adjacent and nearby uses[, or]  
29 forcing a significant change in or increase in the cost of forestry practices. It  
30 has been noted previously that attendance and membership has decreased in  
31 recent years. As a condition of this approval, [county] staff will conduct a  
32 field survey of the facility, and assess which improvements require building,  
33 electrical and woodstove permits. Since building codes are formulated to  
34 ensure the safety of improvements, including eliminating the risk of fire from  
35 woodstoves, no significant increase in the risk of fire or risk to fire  
36 suppression personnel is foreseen from the improvements made since 1995

1 (Note: although ORS 197.770 provides apparent amnesty for land uses, it does  
2 not do so for building code permits).

3 “\* \* \* \* \*

4 “The walls along the pistol pits will be examined for building code  
5 requirements. To the extent that they attempt to serve as physical buffers to  
6 the [adjacent] property, they do not represent a ‘significant change’ as per LC  
7 16.211(3). Likewise for the baffles installed in the rifle sheds, whose purpose  
8 is to improve safety by limiting the angle of trajectory.” Record 143-44.

9 Absent some challenge to the above findings, we cannot agree with petitioners that the  
10 county’s findings of compliance with the LC 16.211(3) fire hazard/costs/risk standard are  
11 inadequate. With respect to petitioners’ evidentiary challenge, the testimony we are cited to  
12 does not clearly distinguish between potential fire hazards/costs/risks associated with the pre-  
13 1995 facility and any hazards/costs/risks associated with the post-1995 improvements. As  
14 the planning director found, the post-1995 improvements identified above do not, in  
15 themselves, significantly increase fire hazards, significantly increase fire suppression costs or  
16 significantly increase risks to fire suppression personnel, with the possible exception of the  
17 woodstoves and unpermitted electrical work. However, the director conditioned approval  
18 based on bringing the stoves, electrical work and other improvements into compliance with  
19 applicable building code standards, which the director found would eliminate any fire risk.  
20 Petitioners do not explain why that conclusion is erroneous, or insufficient to ensure  
21 compliance with LC 16.211(3).

22 The second and third assignments of error are denied.

23 **FOURTH ASSIGNMENT OF ERROR**

24 As noted, LC 16.311(3)(c-c) allows in the F-2 zone firearms training facilities “that  
25 shall not significantly conflict with the existing uses on adjacent and nearby lands.” The  
26 hearings officer opined that, but for the protection afforded by ORS 197.770, the existing  
27 facility *as a whole* would not satisfy the standards in LC 16.211(3)(c-c), citing a number of  
28 conflicts operation of the existing facility has caused with adjacent forest uses. However, the

1 hearings officer concluded essentially that all such conflicts stem from activities that are  
2 protected by ORS 197.770.

3 Petitioners argue that the hearings officer erred by concluding that ORS 197.770  
4 “mooted” application of the “significantly conflicts” language in LC 16.211(3)(c-c), and that  
5 that provision therefore did not apply at all.<sup>2</sup>

6 While there is language in the hearings officer’s decision that appears to take the  
7 approach that petitioners suggest the hearings office took, read as a whole and particularly in  
8 conjunction with the planning director’s decision, it is reasonably clear that at least the  
9 planning director applied the “significantly conflicts” test in LC 16.211(3)(c-c) to the post-  
10 1995 improvements and determined that those improvements satisfy that test. In the findings  
11 quoted above in the text, the planning director concluded that several of those improvements,  
12 for example the new walls at the pistol pits and the baffles added to the rifle range, improve  
13 safety and had the effect of reducing impacts on adjacent lands, and that the other  
14 improvements had no significant impacts on adjacent lands. Petitioners do not challenge  
15 those findings. As with the second and third assignments of error, petitioners’ arguments  
16 under this assignment of error do not clearly distinguish between impacts of the facility  
17 protected by ORS 197.770 and any impacts created by the post-1995 improvements.  
18 Accordingly, petitioners’ arguments provide no basis for reversal or remand.

19 The fourth assignment of error is denied.

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<sup>2</sup> Petitioners cite to the following portion of the hearings officer’s decision:

“The Planning Director’s analysis, which is embraced by this decision, essentially makes moot the application of the Lane Code 16.211(3) to this request. The analysis is based upon a determination that the statutory protection of ORS 197.770 has continued and that the statutory protection is based upon the nature of the firearms training and not its intensity. These assumptions are fundamental to the affirmation of the Planning Director’s decision and, if incorrect, the resulting land use determination would be quite different.

“If the applicant’s firearm training facility had lost its statutory protection, then Lane Code 16.211(3)(c-c) would require an inquiry into whether the operation of any of the aspects of the facility significantly conflicted with existing uses on adjacent and nearby lands. This is a test that I believe the applicant’s proposal could not pass.” Record 76.



1           The county's decision is affirmed.