

**BEFORE THE LAND USE HEARINGS OFFICER
OF CLACKAMAS COUNTY, OREGON**

Regarding an Appeal of a Planning Director)	Case File No.
Decision Approving Alteration of a)	Z0472-19-E
Nonconforming Use.)	(Douglas Ridge Rifle Club)

A. SUMMARY

1. The owner and applicant is the Douglas Ridge Rifle Club.
2. The appellant is Tom New.
3. The subject property is located at 27787 Southeast Highway 224, Eagle Creek, Oregon 97022. The legal description is T2S, R4E, Section 19, Tax Lots 501, 1300, 1500, and 1600, and T2S, R3E, Section 24, Tax Lot 4100, W.M. The subject property is approximately 34.45 acres and is zoned RRFF-5 – Rural Residential Farm Forest – 5 Acres and TBR - Timber.
4. On February 27, 2020, the Hearings Officer conducted a public hearing to receive testimony and evidence about the application. At the conclusion of the public hearing, the record was left open one week for the submission of new evidence, testimony, and argument; one additional week for responses to the new evidence, testimony, and argument; and one additional week for the applicant’s final legal argument.

B. HEARING AND RECORD HIGHLIGHTS

1. The Hearings Officer received testimony at the public hearing on this application on February 27, 2020. All exhibits and records of testimony are filed with the Planning Division, Clackamas County Department of Transportation and Development. At the beginning of the hearings, the Hearings Officer made the declaration required by ORS 197.763. The Hearings Officer disclaimed any *ex parte* contacts, bias, or conflicts of interest. The Hearings Officer stated that the only relevant criteria were those identified in the Planning Director’s decision, that participants should direct their comments to those criteria, and failure to raise all arguments may result in waiver of arguments at subsequent appeal forums.

2. At the hearing, county planner Glen Hamburg discussed the Planning Director's decision and recommended that the Planning Director's decision be upheld.
3. The applicant argued that the alteration of the nonconforming use should be approved.
4. The appellant, appellant's attorney, and other neighbors testified in opposition to the application.
5. At the conclusion of the public hearing, the Hearings Officer left the record open one week for the submission of new evidence, testimony, and argument; one additional week for responses to the new evidence, testimony, and argument; and one additional week for the applicant's final legal argument.

C. FACTS

This case involves the appeal of a Planning Director decision approving an alteration of a nonconforming use to construct a concrete slab and roof for a shooting berm at the Douglas Ridge Rifle Club (DRRC). An alteration to a nonconforming use is subject to a type II procedure, whereby the decision is made by the Planning Director. The Planning Director approved the alteration to the nonconforming use with conditions of approval.¹ This appeal followed.

The Planning Director's decision gives an excellent review of the proposed alteration and property:

“The applicant proposes to construct a concrete slab, with a steel-post-supported truss roof above it, on an existing raised dirt shooting berm at the far west of Tax Lot 1600 (27787 SE Hwy 224). The slab would measure 4 inches tall, 10 feet wide, and 164 feet long; the roof would extend three feet beyond both long sides of the slab. The structure will not be enclosed on any side or include lights. The applicant explains that the structure is needed to provide long-range rifle shooters, who already use the subject area to shoot at fixed targets 1,000 yards to the west, a solid non-dirt surface to lay on and to shield the shooters from weather.

“Douglas Ridge Rifle Club (the Club) operates the property for firearms recreation and training. The applicant states that their proposal does not

¹ Under ZDO 1307.03(B), the Planning Director includes “any County staff member authorized by the Planning Director to fulfill the responsibilities assigned to the Planning Director by the [ZDO].”

include the structure's location being used any more frequently or by any more people than it currently is, and that the proposal will not include any new activities.

"The structure will be built only at the western end of Tax Lot 24E19-01600 (27787 SE Hwy 224), 170 feet from the northeast property line of Tax Lot 23E25-00200 (27727 SE Hwy 224), 31 feet from the southeast property line of Tax Lot 23E25-00100 (27625 SE Hwy 224), and 285 feet from the northwest property line of Tax Lot 24E30-00404 (27969 SE Hwy 224).

"The subject tax lot, Tax Lot 1600, is one of five adjacent lots of record that together form a roughly 124.44-acre tract owned by the Douglas Ridge Rifle Club (the Rifle Club). Three of the tract's component lots of record are zoned RRF-5: the subject tax lot, 24E19-01500, and 23E24-04100. The tract's other two lots of record, 24E29-00401 and 24E29-01300, are both zoned TBR.

"The Club was incorporated in 1956, as stated by the applicant and found in previous land use decisions. In 1968, the Board of County Commissioners approved the Club's request for a conditional use permit (File No. CU-45-68) to construct a clubhouse and indoor rifle range on Tax Lot 1600. The Club's application, dated July 26, 1968, indicated that the membership roll included approximately 250 people at that time.

"In 1973, the Club applied for an Open Space Assessment (File No. OS-3-73) for the Club property. The application was approved and the staff report indicates that the Club membership at the time was approximately 350 to 400 members.

"In 1981, the Club applied for a conditional use permit for a clubhouse and indoor range (File No. 726-81-C,D), which was approved in 1982. In the application, it was indicated that the clubhouse and range would be used five hours per day, five days per week and that monthly club meetings would be attended by approximately 45 people.

"In 1999, an application for an alteration of a nonconforming use (File No. Z0404-99-E) requested approval of a new additional firing range on Tax Lot 4100, but was denied.

"The most recent prior land use decision for the Club was in 2007 (File No. Z0350-07-E), which approved an archery range at the north of Tax Lot 4100. Z0350-07-E did not approve the Club property to be used by any more people or at any greater frequency than was considered in the 1981 conditional use permit application or any previous application." Planning Director Decision 9.

D. DISCUSSION

Clackamas County Zoning and Development Ordinance (ZDO) 1206.06(B) provides the approval criteria for an alteration to a nonconforming use:

“Alterations Not Required by Law: An alteration of a nonconforming structure or other physical improvements, or a change in the use, requires review as a Type II application pursuant to Section 1307, Procedures, and shall be subject to the following standards and criteria:

“1. The alteration or change will, after the imposition of conditions pursuant to Subsection 1206.06(B)(4), have no greater adverse impact on the neighborhood than the existing structure, other physical improvements, or use; and

“2. The nonconforming use status of the existing use, structure(s), and/or physical improvements is verified pursuant to Subsection 1206.07.

“3. The alteration or change will not expand the nonconforming use from one lot of record to another unless:

“a. The lot of record on which expansion is proposed and the lot of record on which the nonconforming use currently is established have been part of the same tract continuously since the date the nonconforming use became nonconforming; or

“b. The expansion would allow only for facilities necessary to support the nonconforming use, such as driveways, storm water management facilities, and on-site wastewater treatment systems.

“4. Conditions of approval may be imposed on any alteration of a nonconforming structure or other physical improvements, or a change in the use, permitted under Subsection 1206.06(B), when deemed necessary to ensure the mitigation of any adverse impacts.”

1. Whether the Nonconforming Uses Are Verified

In order to determine whether a proposed alteration of a nonconforming use will have no greater impact on the neighborhood than the existing structure under ZDO 1206(B)(1), the existing nonconforming use must be verified under ZDO 1206.06(B)(2). The Planning Director’s findings state:

“Evidence in the record, including prior land use approvals, satellite images, and newsletters, reasonably demonstrate that the subject property has had a 1,000-yard-long outdoor range used for firearms

recreation and training, without being discontinued for more than 12 consecutive, since before restrictive zoning.” Planning Director Decision 13.

The Planning Director’s findings were based on the prior land use approvals described earlier, satellite images showing a large rectangular open area on the property, and DRRC newsletters from the years 2007-2020. The DRRC newsletters establish that the area proposed for the concrete slab and roof for the 1000 yard range was in use during those times. The satellite images show that there was a shooting range on the property before restrictive zoning was applied to the property. The prior land use decisions establish that DRRC has a nonconforming use to operate a shooting range on the property. Based on this evidence and the lack of any argument that there was not an existing nonconforming use for a 1000 yard range, it was reasonable for the Planning Director to conclude that the existing nonconforming use was verified.²

During the open record period, the appellant’s attorney argued that the 1000 yard range was not established until the 1990s and was never approved as part of any County land use decision. The appellant’s attorney provided a copy of the DRRC June 2015 Newsletter, which contains an article by a past DRRC president entitled “Some Club History.” The article explains: “In the mid-1990s, the upper pits were built and the long distance range was extended to 1,000 yards.” The appellant argues that the 1000 yard range was not established until the mid-1990s and was therefore an improper alteration of the original nonconforming use. According to the appellant, even if the proposed alteration of the 1000 yard range would have no greater adverse impact on the neighborhood (although the appellant argues that it would), DRRC may not alter a use that is not verified as a lawful nonconforming use.

As discussed earlier, the applicant and the Planning Director relied upon DRRC newsletters from 2007-2020, satellite images, and the prior land use decisions involving the property to establish the nonconforming use. As the DRRC newsletters are from 2007-

² The parties agree that the existing nonconforming use that must be established is the use of the 1000 yard range rather than a more general shooting range use. DRRC presumably wishes to focus on the 1000 yard range rather than the general shooting range use because opponents have submitted considerable evidence and testimony that DRRC has significantly expanded the use of the shooting range that was initially approved as a conditional use. This decision only addresses the 1000 yard range – not any alleged expansion of DRRC’s general shooting range use.

2020 they are obviously of no assistance in determining whether the 1000 yard range was established prior to restrictive zoning being applied to the property. The satellite photos do show that there was a shooting range in the general vicinity of the current use. Those photos, however, are at a very large scale. While they show a shooting range, they do not demonstrate that there was a 1000 yard range as opposed to a shorter long distance range. Neither the DRRC newsletters nor the satellite photos establish that the 1000 yard range was established prior to restrictive zoning of the property.³

The prior land use decision involving the property discuss the use of the property as a shooting range. There does not seem to be any dispute that DRCC began operating as a shooting range in the late 1950s. In 1968, DRRC applied for a conditional use to construct a clubhouse and an indoor range. The Board of County Commissioners (Board) approved the conditional application and recognized the existing shooting range as an existing use. As far as I can tell, the only description of the outdoor shooting range was as an “existing non-conforming use.” While the Board’s 1968 decision certainly established the shooting range as a nonconforming use, it sheds no light on when the 1000 yard range was established. In 1973, the Board approved a DRRC application for an Open Space Assessment. The staff comments provide the following description of the property:

“The site is comprised of some three distinct features. (1) Wooded, flat, wet with springs along the N.W. portion of the site several hundred feet in width and some 600 to 800 yards in length. (2) Cleared, flat, wet, and planted in grass along the southeast portion of the site. *This area is used as the range itself and has an 800 yard range.* (3) The arrowhead portion of the site which is principally wooded and steeply sloped. A portion of this area nearer Judd Road upon the bluff is of a rolling character and is planted in peach trees. All of this area is utilized as a back drop for the target area.”

As the emphasized language illustrates, it does not appear that a 1000 yard range existed in 1973.

In 1981, DRRC again applied for a conditional use permit to construct the clubhouse and indoor range.⁴ The Board approved the conditional use application in 1982,

³ Restrictive zoning was applied to the northwest and southwest portions of the property in 1967. Restrictive zoning was applied to the remainder of the property in 1976.

⁴ Apparently the clubhouse and indoor range approved in the 1968 conditional use decision had not been fully completed. Therefore, another conditional use permit was necessary to complete the buildings.

but the only mention of the outdoor shooting range was that “the north part is used as a rifle range and is more open and clear.” The 1982 conditional use approval does not shed any light on when the 1000 yard range was established.

In 1999, DRRC applied for an alteration of the existing nonconforming use to approve an additional firing range on a different portion of the property. Renowned County planner Rick McIntire (McIntire) denied the application because, among other things, DRRC did not demonstrate that noise, safety, and traffic impacts would have no greater adverse impact on the neighborhood. In the 1999 case, DRRC also had to establish that the existing use was a valid nonconforming use. McIntire described the nature of the nonconforming use as follows:

“Based on information submitted by the applicant and the land use permit records pertaining to the subject properties, the staff finds that the applicant has established a nonconforming use * * * for a firearms recreational facility including the use of these parcels for target/shooting ranges and a clubhouse/indoor range. The applicant has not provided details concerning the operational characteristics of the Club, e.g. days and hours of operations, number of users, etc.; therefore, the Planning Staff cannot determine the complete nature and scope of the nonconforming use with any degree of specificity. * * *.” 1999 Decision 3-4.

The 1999 decision has the most detailed analysis of the nature, extent, and scope of the nonconforming use for the shooting range, and even the 1999 decision is unable to make any specific determinations. Even though the 1999 decision succeeds the apparent establishment of the 1000 yard range, the decision does not address whether the 1000 yard range was in use when restrictive zoning was applied.⁵

In 2007, DRRC applied for an alteration of a nonconforming use to establish an archery range on the same area that was denied an alteration of a nonconforming use for additional shooting ranges in 1999. McIntire again wrote the decision. McIntire recounted much of the same language from the 1999 decision stating that DRRC “has established a nonconforming use * * * for a firearms recreational facility including the use of those parcels for target/shooting ranges, and a clubhouse/indoor range.” 2007 Decision 4. As

⁵ There would have been no need for McIntire to determine when the 1000 yard range was established as the proposed expansion was proposed for a different portion of the property. As discussed in the decision, the main issues were noise, safety, and traffic.

with the 1999 decision, the 2007 decision does not address whether the 1000 yard range was in use when restrictive zoning was applied.

While it was completely understandable for the Planning Director to assume that the 1000 yard range was part of the nonconforming use established by the 1968 decision given it was not in dispute at the time, the issue of when the 1000 yard range was established is now squarely at issue – and DRRC must verify that the 1000 yard range is an existing nonconforming use. Although the appellant’s attorney raised this issue during the initial open record period, DRRC neither responded to this issue during the second (responsive) open record period nor during their final legal argument. While perhaps there is more or better evidence regarding the establishment of the 1000 yard range, I must decide the issue based on the evidence in the record.

The only evidence in favor of the 1000 yard range being established before restrictive zoning was applied to the property is the vague assurances from DRRC and satellite photos showing shooting ranges in the general vicinity. On the other hand, there is the specific statement of a past club president in the official DRRC newsletter that the long distance range was extended to 1000 yards in the mid-1990s. There is also the description in the 1973 decision that describes the shooting range as being only 800 yards. The obvious conclusion from the available evidence is that the original long distance range was in the vicinity of 800 yards when it was first established and then was extended to 1000 yards in the mid-1990s. The evidence that the 1000 yard range was not established prior to restrictive zoning to the property is much more persuasive than the evidence that it was. I agree with the appellant that DRRC has not established that the 1000 yard range is part of the existing nonconforming use. Therefore, ZDO 1206.06(B)(2) is not satisfied.

2. Other Issues

One of the primary issues in the materials submitted by the parties and argued at oral argument is the question under ZDO 1206.06(B)(1) of whether the proposed alteration would “have no greater adverse impact on the neighborhood than the existing structure, other physical improvements, or use.” That question, however, only comes into play if an applicant has demonstrated that there is an existing nonconforming use that can be altered. As DRRC has not established that there is an existing nonconforming use for the 1000 yard range, there is no need to address ZDO 1206.06(B)(1).

The parties raised numerous other issues such as whether the scope of the use of the entire club has expanded in violation of the original nonconforming use, adverse impacts from the existing use of the club, and whether the local community planning organization was in favor of the application or not. While I can certainly understand the parties' positions and fervor regarding these issues, they are just not pertinent to the issues that must be decided in this decision. I therefore want to make clear that I am not deciding any of those issues.⁶

E. DECISION

Based on the findings, discussion and conclusions provided or incorporated herein and the public record in this case, the Hearings Officer hereby **DENIES** the proposed alteration of a nonconforming use.

DATED this 7th day of April, 2020.


Fred Wilson
Clackamas County Hearings Officer

APPEAL RIGHTS

ZDO 1307.10(F) provides that, with the exception of an application for an Interpretation, the Land Use Hearings Officer's decision constitutes the County's final decision for purposes of any appeal to the Land Use Board of Appeals (LUBA). State law and associated administrative rules promulgated by LUBA prescribe the period within which any appeal must be filed and the manner in which such an appeal must be commenced. Presently, ORS 197.830(9) requires that any appeal to LUBA "shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final." This decision will be "final" for purposes of a LUBA appeal as of the date of mailing (which date appears on the last page herein).

⁶ I also want to make clear that I am not making any decisions about the current use of the shooting range – including the 1000 yard range. This application only involves a request to alter a nonconforming use – it is not an application to verify an existing nonconforming use (even though that is one element of a proposed alteration of a nonconforming use). DRRC was not represented by counsel and did not even respond to the appellant's argument that the 1000 yard range was not a valid nonconforming use. There may well be evidence or arguments that could produce a different result – they were just not presented in this case.