

1 COX, Referee.

2 NATURE OF PROCEEDING

3 Petitioners requested from Clackamas County a permit to
4 allow expansion and alteration of a non-conforming use.
5 Petitioners contend respondent's order improperly limits the
6 existing non-conforming use and unreasonably places conditions
7 on the alterations that were allowed.

8 ALLEGATIONS OF ERROR

9 Petitioners assign as error the following:

10 (1) "The Hearings Officer's finding of fact, adopted
11 by the Board of Commissioners, regarding the level of
12 rezoning existing use on Tax Lot 2400 for vehicle
storage is not supported by substantial evidence and
resulted from a misunderstanding of the testimony."

13 (2) "Respondent improperly required that the existing
14 development on Tax Lots 2400 and 700 be subject to
15 design review with specific attention directed towards
16 buffering of the visual impact by appropriate
screening as a condition for allowance of structural
improvements and alterations on the property."

17 FACTS

18 Petitioners are owners of Tax Lots 2400 and 700, Sec 30C,
19 Township 1 South, Range 3 East, Willamette Meridian, Clackamas
20 County, Oregon, on which they have conducted a construction and
21 excavation business since 1961. Petitioners' business is a
22 non-conforming use under the zoning ordinance adopted by
23 Respondent Clackamas County on September 8, 1964, and amended
24 in December, 1979. Petitioners applied for a permit allowing
25 expansion or alteration of their use of the subject property in
26 the following particulars:

1 (1) To increase the number of commercial vehicles stored
2 on the property;

3 (2) To allow relocation of sand and gravel stockpiles
4 presently on the east side of 172nd Street to pasture area on
5 Tax Lot 2400; and

6 (3) To allow minor structural changes installed without
7 permit since 1964; and

8 (4) To allow permanent placement of a security personnel
9 trailer on Tax Lot 2400; and

10 (5) As an alternative to allowing placement of stockpile
11 materials on east side of 172nd Street on Tax Lot 700, if the
12 request for storage of such materials on Tax Lot 2400 was
13 denied.

14 Public hearings on petitioners' applications were held on
15 December 5, 1980, January 22, 1981 and March 2, 1981. The
16 decision of the hearings officer was announced on March 9,
17 1981. On July 20, 1981, respondent adopted the decision and
18 findings of the hearings officer and denied petitioners'
19 request concerning items 1, 2, 4 and 5 above. Clackamas County
20 approved petitioners' request for item no. 3 by approving the
21 then existing structural changes which included graveling a
22 truck parking area, paving a portion of the parking area and
23 enclosing a motor room and shop area. The county made such
24 approval, however, subject to the condition that "the existing
25 development shall be subject to design review with specific
26 attention directed toward buffering of the visual impact by

1 appropriate screening."

2 Petitioners conduct maintenance and repair work in their
3 shop, store fuel and stockpile gravel and building materials on
4 Tax Lot 2400. Building materials and gravel are also
5 stockpiled on Tax Lot 700. Petitioners own and use several
6 vehicles in their business. The maximum number of vehicles
7 actually stored on Tax Lot 2400 prior to September, 1964, is in
8 contest. Petitioners say that the number is more than the 12
9 vehicles which the hearings officer found to have been stored
10 on the date Clackamas County implemented its zoning ordinance.
11 Petitioners claim a minimum of 15 vehicles were stored on the
12 property as of September 8, 1964.

13 DECISION

14 First Assignment of Error

15 Petitioners assert that the county erred when it adopted
16 the hearings officer's finding of fact regarding the level of
17 rezoning existing use of Tax Lot 2400 for vehicle storage.
18 The thrust of petitioners' argument is that the hearings
19 officer's finding is incorrect when it refers to a requested
20 increase in commercial vehicles from 12 to 25. Petitioners
21 assert that the number 12 is inaccurate and that the number 15
22 is the correct number of vehicles that were stored on Lot 2400
23 prior to September 8, 1964. Petitioners claim that an increase
24 from 15 to 25 is what they applied for and the number 15 is
25 supported by the record. Petitioners, therefore, request that
26 the findings and conclusions be corrected to reflect a

1 pre-zoning level of vehicle storage of 15 vehicles rather than
2 the 12 referred to by the hearings officer.

3 Respondent Clackamas County takes the position in its brief
4 that there is adequate evidence in the record as a whole to
5 support a finding of the Board of County Commissioners that the
6 pre-zoning existing use of the property was limited to 12
7 vehicles.

8 We have difficulty understanding the position taken by
9 either party. The Clackamas County Board of Commissioners
10 Order No. 81-1508 does not state that the petitioners shall
11 only be able to place 12 vehicles on their property. The order
12 states, in pertinent part, as follows:

13 "NOW, THEREFORE, IT IS HEREBY ORDERED that the
14 decision of the Hearings Officer is affirmed and that
15 the request to expand the construction and excavation
16 business by:

- 17 "1. Increasing the commercial vehicle storage
18 from 15 to 25 vehicles;
19 "2. Stockpiling sand and gravel of Tax Lot 2400;
20 "3. Permanently establishing a trailer house for
21 a watchman; and
22 "4. Allowing sand and gravel stockpiles on Tax
23 Lot 700;

24 "is denied; but,

25 "The request to expand the construction and
26 excavation business by permitting the existing
27 structural changes including graveling a truck parking
28 area, paving a portion of the parking area, and
29 enclosing a motor room and shop area are hereby
30 allowed subject to the following conditions:

31 "* * *

1 "2. "The existing development shall be subject to
2 design review with specific attention directed
3 toward buffering of the visual impact by
4 appropriate screening.

5 "* * *

6 "5. Approval is subject to the above stated
7 conditions. Failure to comply with these
8 conditions shall be cause for revocation of this
9 permit." (Emphasis added)

10 In addition, the order of Clackamas County adopts by reference
11 the decision of the hearings officer which, in pertinent part,
12 states under Decision:

13 "Denial of the request to expand the construction and
14 excavation business by

15 "(1) increasing the commercial vehicle storage from 15
16 to 25 vehicles; * * *"

17 The only place in the county's findings and order that
18 indicates the county may have believed only twelve vehicles
19 existed on the lot prior to 1964 is found in the hearings
20 officer's opinion. On page 5 of that opinion, the hearings
21 officer states:

22 "To this extent, the applicant is proposing to
23 increase the storage of commercial vehicles from
24 approximately 12 to 25 and the location of additional
25 materials on the property."

26 We do not interpret the county's order to be requiring
petitioner to store a maximum of 12 vehicles on the property.
A review of the record indicates that the petitioners applied
for an increase from 15 to 25 the number of commercial vehicles
that could be stored on the subject property. The reference to
12 as above quoted from the hearings officer's decision appears

1 to be merely a typographical error. The decisions of both the
2 county and the hearings officer deny petitioners' request to
3 increase commercial vehicle storage beyond 15 vehicles. There
4 is no finding stating as a fact the number of vehicles the
5 county believed were stored on the property prior to September,
6 1964. The order merely denies petitioners' request to expand
7 storage beyond 15 vehicles. Without more, we can only assume
8 that up to 15 vehicles are still allowed to be stored on the
9 property. Therefore, for the foregoing reasons, we deny
10 petitioners' first allegation of error.

11 Second Assignment of Error

12 Petitioners claim that the respondent improperly required
13 that the existing development on Tax Lots 2400 and 700 be
14 subjected to design review. The thrust of petitioners'
15 argument is that they are entitled to continue their use of the
16 subject property as that use existed prior to the enactment of
17 zoning regulations on September 8, 1964 (citing OPS 215.130(5)
18 and Clackamas County Zoning and Development Ordinance Section
19 1201.01). Petitioners state that the only structural
20 alterations to the subject property that have taken place since
21 September 8, 1964 are the enclosure of a motor room and tire
22 shed on the south side of the existing shop, insulation and
23 sound proofing of the shop, graveling the truck parking area
24 and installation of a concrete slab with waste water and oil
25 catch basins. Petitioners argue that the enclosure of the
26 motor room and insulation of the shop have substantially

1 reduced the impact of noise produced by the use on the
2 surrounding neighborhood. In addition, petitioners claim that
3 the graveling and paving of the truck storage area reduces any
4 adverse effects caused by mud and dust created when the
5 property is used. Those alterations, according to the
6 petitioners, were found by the hearings officer to be necessary
7 to, reasonably continue the use as it existed on September 8,
8 1964 and, in essence, to be an improvement in the overall
9 appearance of the petitioners' business operation. Petitioners
10 further argue had the improvements not been undertaken,
11 petitioners would have still been allowed to continue their use
12 of the subject property. The petitioners conclude, therefore,
13 that it was improper and beyond the authority of the respondent
14 to attempt now to subject the entire existing development to
15 design review merely because alterations beneficial to the
16 surrounding neighborhood were previously undertaken by the
17 petitioners. In a sense petitioners' argument is that they are
18 being punished for requesting acknowledgment of past
19 improvements which significantly reduce the impact of their
20 business on the surrounding neighborhood.

21 Respondent takes the position that conditioning the
22 approval of petitioners' request to legitimize the improvements
23 made since 1964 is within the authority of the Board of County
24 Commissioners. Citing Section 13.0305 of the Clackamas County
25 Zoning and Development Ordinance, the county argues that any
26 administrative action request may be granted subject to

1 conditions. Respondent recognizes it does not have absolute
2 discretion in imposing conditions upon which an administrative
3 action may be granted, citing Section 13.0305(B)(1). Section
4 1303.05 entitled "Conditions of Approval" states:

5 "Approval of any administrative action request may be
6 granted subject to conditions. The following
7 limitations shall be applicable to conditional
8 approvals:

9 "* * *

10 "B. Such conditions shall be reasonably calculated to
11 fulfill public need; emanating from the proposed
12 land uses as set forth in the application in the
13 following respects:

14 "1. Protection of the public from the
15 potentially deleterious effects of the
16 proposed use; * * * *"

17 Respondent argues the record is replete with evidence of the
18 deleterious effects on the neighborhood of petitioners' use of
19 their property.

20 Respondent's argument, however, does not address
21 petitioners' concerns that alterations allowed by the county
22 already have the effect of reducing deleterious effects on the
23 neighbors. This fact was recognized by the hearings officer
24 when he stated:

25 "Regarding the enclosure of the shop area and the
26 graveling and paving of the parking area, the hearings
27 officer finds that these improvements do not result in
28 any greater adverse impact on the neighborhood for the
29 reasons set forth above."

30 The "reasons set forth above" referred to state:

31 "The Hearings Officer finds that the proposed
32 graveling and paving of portion of the parking area
33 and enclosure of a motor room and shop area are

1 necessary to reasonably continue the use as it existed
2 on September 8, 1964. These modifications are
3 designed to mitigate the impact of this industrial use
4 on surrounding rural residential uses. Those
5 modifications tend to improve [sic] the overall
6 appearance of the operation and lessen the impacts on
7 the area by enclosing certain work areas and by
8 keeping the mud and dust down on the property."

9 We do not, however, find the requirement that petitioners'
10 "existing development" be subjected to design review as
11 unreasonable, or as petitioners assert, beyond respondent's
12 authority. Implicit in petitioners' argument is an assumption
13 that Clackamas County will impose screening provisions as a
14 result of design review. This Board is not in a position to
15 predict what, if anything, design review will require of
16 petitioners. Even if some screening were to be required of
17 petitioners, the question of the county exceeding its authority
18 can only be reviewed by analyzing the relationship of the
19 required screening to the alterations which were granted to
20 petitioners. Since no screening has yet been required, such an
21 analysis can not be made.

22 For the above stated reasons, we affirm the decision of
23 Clackamas County.
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