

BEFORE THE LAND USE BOARD OF APPEALS JUL 29 3 51 PM '82
OF THE STATE OF OREGON

ROBERT BOEH and NORMA BOEH,)
and ELMER SCANLAN and)
ESTHER SCANLAN,)
Petitioners,)
vs.)
BENTON COUNTY and,)
BUD SLOCUM and RAMONA SLOCUM,)
Respondents.)

LUBA No. 82-026

FINAL OPINION
AND ORDER

Appeal from Benton County.

Scott A. Fewel, Corvallis, filed the Petition for Review and argued the cause on behalf of Petitioners.

Richard T. Ligon, Corvallis, filed the brief and argued the cause on behalf of Respondent Benton County.

Jack L. Joyce, Corvallis, filed the brief and argued the cause on behalf of Respondents Bud and Ramona Slocum.

REYNOLDS, Chief Referee; COX, Referee; BAGG, Referee; participated in this decision.

AFFIRMED in part 7/29/82
REVERSED in part

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

1 REYNOLDS, Chief Referee.

2 INTRODUCTION

3 Petitioners appeal Benton County's approval of a
4 conditional use permit which allows: 1) the replacement of an
5 existing mobile home with a larger one, and 2) a
6 non-conforming, pre-existing business use (inside storage) to
7 be expanded to include outside storage and automobile repair as
8 non-conforming uses. Petitioners contend the decision should
9 be reversed on the following grounds: first, the decision to
10 allow replacement of the mobile home with a larger one is
11 contrary to findings of fact previously adopted by the county
12 in denying a similar request by the same applicants; second,
13 the decision to allow replacement of the mobile home is not
14 supported by substantial evidence; and third, the county erred
15 in allowing as non-conforming uses outside storage and
16 automobile repair because these uses were not pre-existing,
17 non-conforming uses and petitioners received no notice that
18 such uses might be allowed as an expansion of the inside
19 storage use.¹

20 FACTS

21 On September 8, 1981, the applicants (Slocums) applied to
22 Benton County for a conditional use to allow them to place a
23 mobile home on property which they owned within the flood plain
24 agriculture (FPA) zone in Benton County. A mobile home in the
25 FPA zone in Benton County requires a conditional use permit.
26 At the time the applicants filed their request, their property

1 was divided into two zones, the FPA zone and a rural
2 residential, 5 acre minimum (UR-5) zone. Two storage buildings
3 and a mobile home were located on that portion of the property
4 zoned UR-5. The storage buildings were a non-conforming use
5 under the UR-5 zone, having been placed on the property prior
6 to the May 1977 adoption of the UR-5 zone. The applicants
7 sought to replace the existing mobile home in the UR-5 zone
8 with a larger mobile home in the FPA zone.²

9 The public notice of the planning commission hearing
10 contained the following summary of the action being considered:

11 "To modify an existing non-conforming use by replacing
12 an existing mobile home caretaker residence with a
13 larger one, and to allow its placement in the flood
plain agricultural (FPA) zoned portion of the
property."

14 In filing their application, the Slocums explained how the
15 mobile home would comply with the conditional use requirements
16 of the FPA zone. The stated reason for placement of the new
17 mobile home in the FPA zone was to provide a residence on the
18 property for the son of the owners.

19 A staff report was submitted to the planning commission.
20 This report stated that the non-conforming use (which the
21 applicants were seeking to expand or modify) consisted of
22 inside storage, outside storage and an auto repair business.
23 The staff report noted that these uses were "legal,
24 non-conforming uses that preexisted the current zoning." This
25 determination was, apparently, preliminary to a decision of
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1 whether the applicants could be allowed to expand or modify
2 their non-conforming use by replacing the existing mobile home
3 with a larger one. The staff report stated:

4 "The status of the automotive repair business should
5 be determined prior to action on the request to modify
the non-conforming use."

6 Thus, the applicants' request to allow replacement of the
7 existing mobile home with a newer, larger mobile home was
8 viewed as an expansion of a pre-existing, non-conforming use.
9 To allow expansion of the non-conforming use, the county had to
10 first decide whether the existing use, that of inside and
11 outside storage as well as automobile repair, was a
12 pre-existing, non-conforming use. The planning commission
13 voted to deny the request to expand the non-conforming use.
14 The applicants appealed this decision to the board of
15 commissioners.

16 The board of commissioners conducted two hearings on the
17 request. The notice of hearing before the board of
18 commissioners stated, as did the notice before the planning
19 commission, that the request was for the "modification of an
20 existing non-conforming use by replacing an existing mobile
21 home caretaker residence with a larger one, and to allow its
22 placement on the flood plain agriculture zoned portion of the
23 property." Testimony before the board of commissioners was
24 focused on the question of whether the automobile repair and
25 outside storage were pre-existing, non-conforming uses in May
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1 of 1977, the date the zoning on the property was changed to
2 UR-5. The evidence appeared to indicate that some outside
3 storage and automobile repair business may have been occurring
4 as early as March of 1977.

5 Following the board of commissioners' second hearing, the
6 matter was continued until the commissioners' meeting of
7 January 27, 1982. At the January 27, 1982 meeting, the board
8 approved the request by a vote of two to one. Commissioner
9 Karr moved to direct the applicants to "draft detailed legal
10 findings of fact on the previous motion and provide them to the
11 Board of Commissioners' office by February 10, 1982 for final
12 approval of the Board of Commissioners by February 24, 1982."³

13 The findings of fact and order of the board in support of
14 its decision were adopted on February 24, 1982.⁴ The caption
15 in the board's order reads as follows:

16 "In the Matter of the Appeal of Bud and Ramona Slocum
17 from the Planning Commissioner's decision denying
18 their request to modify and expand an existing
19 non-conforming use by operating an automobile repair
20 and outside storage business and caretaker residence
21 with a larger one and to allow its placement in the
22 flood plane agricultural (fpa) zone portion of the
23 property located at 1750 S.W. Allen Lane, south of
24 Avery Park;...in Benton County." (Emphasis added).

21 The order recites under "Nature of Proceedings" that "this is
22 an appeal from the decision of the Benton County Planning
23 Commission denying a request as set forth in the heading."

24 Under "Findings of Fact" the board made the following finding:
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26 "Mr. and Mrs. Slocum operate a commercial storage
business consisting of two metal buildings on the UR-5

1 portion of the property. The buildings were
2 constructed for inside storage pursuant to permits
3 issued in 1976 as a permitted use, and the area was
4 zoned industrial. Subsequently, in May of 1977, the
5 industrial zone was changed to UR-5, which zone (UR-5)
6 did not permit commercial storage facilities (nor
7 automobile repair shop). The commercial operations,
8 therefore, became non-conforming."

9 The board of commissioners also made findings of fact
10 concerning the placement of the mobile home in the FPA zone as
11 required by the conditional use ordinance. The board of
12 commissioners found that:

13 "The health, safety, and welfare of the occupants of
14 the mobile home would not be threatened by reoccurring
15 floods. The elevation of the proposed site is at
16 least equal to that of the existing site. Testimony
17 in the record from the Benton County Public Works
18 Department indicates that placement of the mobile home
19 in the flood plain, as proposed, will not affect
20 natural flooding in a manner that will pose an
21 additional hazard to adjoining properties."

22 Under the heading "Conclusions of Law," the board of
23 commissioners made the following statements:

24 "The application together with the conditions imposed
25 by this Board meets all applicable criteria. Article
26 XIX.01 of the zoning ordinance states that a
non-conforming use may be:

27 "'a. Increased in size or expanded within a building
28 or upon the same lot.

29 "'b. Changed to another non-conforming use.'"

30 "The new caretaker's residence will replace an
31 existing mobile home located nearer to the storage
32 buildings. That mobile home will be removed from the
33 premises. The result will be no increase in the
34 number of structures currently on the premises.
35 Applicant desires to perform limited auto repair and
36 outside storage activities at the location, in
addition to indoor storage which is a non-conforming

1 use as noted above. Article XIX.012(2) permits the
2 expansion of a non-conforming use (the indoor storage)
3 to include these proposed uses 'pursuant to the
4 provisions of Section .04 of this Article and
5 conditional use procedures...'" (Emphasis added).

6 The board proceeded to analyze Section .04 of Article of
7 XIX.⁵ The board concluded that Subsection B of Section .04

8 "Is satisfied in that applicant is required to modify
9 the existing buildings to comply with all applicable
10 standards in the building code relative to the uses of
11 auto repair and outside storage. Applicant has
12 demonstrated that such modifications will occur.
13 Coordination with the Fire Department has occurred
14 regarding such modifications."

15 The remainder of the board of commissioners' conclusions
16 address compliance with the conditional use factors for
17 placement of the mobile home in the FPA zone.

18 The "Order" section of the board of commissioners' findings
19 states:

20 "Based upon the foregoing, the decision of the
21 planning commission is reversed and the application of
22 Bud and Ramona Slocum is approved subject to the
23 following conditions:...."

24 The conditions included, in part, a requirement that "all
25 outdoor repair of motor vehicles must be ceased except and
26 between the hours of 7:00 a.m. and 8:00 p.m., Monday through
27 Saturday."

28 OPINION

29 First Assignment of Error.

30 Petitioners' first assignment of error is in two parts, and
31 is about that portion of the county's decision which allows the

1 mobile home to be placed in the FPA zone. The first part is
2 that the county erred in adopting findings of fact which are
3 contrary to findings of fact made in a prior application to
4 locate a second mobile home in the FPA zone.⁶ In its
5 decision denying the prior application for a second mobile
6 home, the county commissioners found:

7 "Additional landfill in this area could have an
8 additional adverse effect on existing residences in
9 the area which experience flooding problems during
heavy rains and high water."

10 A finding identical to the above finding was made by the Benton
11 County planning commissioners in the Slocums' application which
12 is involved in this appeal. Petitioners argue the Board of
13 Commissioners reversed its position and overturned the decision
14 of the planning commission "with no additional testimony"
15 having been offered. Petitioners then state:

16 "If, in fact, findings of fact are to have any
17 meaning, they cannot be arbitrarily reversed after
18 two and three different bodies review them simply
19 because of the policital makeup of the deciding body.
20 To put integrity into our land use decision making
practices, the findings of fact have to have some
reliablility and must be reversed only upon a showing
of substantial and different evidence..." Petition
for Review at 6-7.

21 Petitioners are apparently mistaken that no additional
22 evidence was presented in the decision presently on appeal. In
23 the instant case, expert testimony was presented by a county
24 engineer and CH₂M Hill to the effect that placement of the
25 mobile home in the flood plain will not materially increase the
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1 hazard of flooding. Respondent Benton County states in its
2 brief that such testimony was not presented during the Slocums'
3 prior request. This statement by the county is not denied by
4 the petitioners. We conclude, therefore, the testimony of the
5 county engineer and the CH₂M Hill expert was present in this
6 case and absent from the prior case. We can find no error as
7 claimed by petitioners in this part of their first assignment
8 of error.⁷

9 The second part of petitioners' first assignment of error
10 is that there was no substantial evidence in the record to
11 'support the county's decision that the conditional use criteria
12 for placement of a mobile home in the FPA zone have been
13 met.⁸ Petitioners, however, have only pointed in their brief
14 to evidence and written testimony in the record which they
15 believe "substantiates certainly a reasonable fear if not a
16 valid point that the addition of any more landfill will create
17 a hazard." We conclude, however, that the expert testimony
18 submitted by the county engineer and the expert testimony from
19 a CH₂M Hill engineer supply evidence which a reasonable mind
20 would accept as adequate to concluding that placement of the
21 mobile home would not create a hazard. See Christian Retreat
22 Center v Commissioners for Washington County, 28 Or App 673,
23 560 P2d 1100, rev den (1977). Such testimony is sufficient, in
24 our view, to entitle the county to find that placement of the
25 mobile home in the FPA zone would not pose an additional hazard
26 to adjoining properties.

1 Second Assignment of Error.

2 The focus of petitioners' attack in the second assignment
3 of error is the county's legalization of outside storage and
4 automobile repair. The parties have addressed in supplemental
5 memoranda whether the county followed proper procedures in
6 deciding to allow expansion of the pre-existing, non-conforming
7 use (inside storage) to allow outside storage and automobile
8 repair. Petitioners argue there is a separate procedure for
9 reviewing requests concerning non-conforming uses in Article
10 XIX of the Benton County Zoning Ordinance. This process
11 requires application of all applicable provisions of the
12 conditional use procedure contained in Article XX of the Benton
13 County Zoning Ordinance as well as certain additional
14 criteria.⁹ Petitioners also assert any request for expansion
15 or modification of a pre-existing use is a quasi-judicial
16 proceeding in which persons are entitled to notice and an
17 opportunity to be heard. Petitioners argue "the notice must
18 state the nature of this proceeding, describe the property and
19 state the date, time and place of the public hearing."
20 Petitioners argue no notice was ever given to them that the
21 proceedings involved a request to expand or modify a
22 pre-existing, non-conforming use to allow automobile repair and
23 outside storage. Petitioners argue the only matter under
24 consideration in this proceeding, according to the notices
25 published thereof, was that the county was considering whether
26 to allow a conditional use permit for a mobile home in the FPA

1 zone "and nothing more." Finally, petitioners argue, citing
2 Oregon State Bar CLE Land Use, Section 11.30, "failure to
3 comply with applicable notice requirements renders
4 quasi-judicial decisions void."

5 Respondents Slocums argue that, in fact, Article XIX of the
6 Benton County Zoning Ordinance was followed and applied by
7 Benton County throughout these proceedings. They argue the
8 status of the outside storage and repair was at issue and was
9 the issue involved in the county's proceedings. Petitioners
10 were aware, say respondents, that auto repair and outside
11 storage were at issue as is indicated by petitioners' proposed
12 findings submitted to the planning commission. Respondent
13 Benton County adds that petitioners, through their attorney,
14 stated that they felt "the legitimacy of the auto repair is an
15 issue." Respondent county argues, in essence, that petitioners
16 had actual knowledge of what was involved in the proceedings
17 before the county and that they cannot complain because of what
18 the county describes as "technical wording of the publicized
19 advertisement." The county further argues that petitioners
20 have waived any irregularity in the notice provided at the
21 county level because petitioners appeared and did not object to
22 improper notice.

23 We conclude petitioners did not have actual or constructive
24 notice that the proceedings before the county concerned a
25 request to expand or modify an existing non-conforming use to
26 allow automobile repair and outside storage. It was not until

1 after the county issued its order in this case that petitioners
2 knew the county was treating the proceedings as a request by
3 the Slocums for an expansion or modification of inside storage
4 use to allow outside storage and automobile repair. We can
5 find no reference in the record of these proceedings until the
6 "Notice of Board of Commissioners' Decision" dated January 29,
7 1982, was issued, that the Slocums' "request" involved
8 permitting automobile repair and outside storage on the
9 Slocums' property. The issue that was addressed previously in
10 all the hearings was whether automobile repair and outside
11 storage were "pre-existing, non-conforming uses" such that they
12 could be modified or expanded by allowing a larger caretaker
13 residence. It was this issue which petitioners addressed.
14 None of the parties below addressed the question of whether the
15 existing non-conforming use (inside storage) should be expanded
16 or modified pursuant to Article XIX of the county's ordinance.
17 Accordingly, we do not believe petitioners waived any
18 irregularity in the notice as they had no actual or
19 constructive knowledge during the pendency of the proceedings
20 that the Slocums' request involved or the county was
21 considering allowing an expansion of the inside storage use to
22 allow outside storage and automobile repair.

23 It is true, as both respondents argue, that Article XIX of
24 the Benton County ordinance was followed in the proceedings
25 below. However, Article XIX pertaining to expansion or
26 modification of non-conforming uses was only applied with

1 respect to the question of whether the pre-existing,
2 non-conforming use should be expanded to allow placement of a
3 larger mobile home on the property. This application of
4 Article XIX hardly satisfies petitioners' concerns that Article
5 XIX was not applied at any stage in the proceedings below for
6 purposes of deciding whether the pre-existing, non-conforming
7 use should be expanded or modified to allow outside storage and
8 automobile repair.

9 We conclude petitioners were prejudiced in that the county
10 failed to give any notice that the request under consideration
11 involved expansion of a pre-existing, non-conforming use to
12 allow automobile repair and outside storage. Such notice is at
13 the very heart of the quasi-judicial decision-making process.
14 See Fasano v Board of Commissioners of Washington County, 264
15 Or 574, 507 P2d 23 (1973). Petitioners were deprived of an
16 opportunity to address the criteria under Article XIX of the
17 county's ordinance because they did not know that such a
18 request was even being considered.¹⁰

19 Accordingly, we conclude that Benton County's decision to
20 grant the Slocums a conditional use request allowing expansion
21 of their inside storage business to include outside storage and
22 automobile repair was not in accordance with proper procedures
23 and was prejudicial to petitioners. We further conclude,
24 however, that Benton County's decision to grant the Slocums a
25 conditional use to allow placement of a mobile home in the
26 flood plain agricultural zone was not in error for any of the

1 reasons cited by petitioners. Benton County's decision is,
2 accordingly, affirmed in part and reversed in part.

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FOOTNOTES

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4 This third basis for reversal requires some explanation.
5 In their petition for review, petitioners argued:

6 "The automobile repair business and outside storage
7 were not legally pre-existing, non-conforming uses and
8 as such, should not be allowed to continue. The only
9 legally established pre-existing, non-conforming use
10 is the inside storage."

11 At oral argument, we asked whether the county's order
12 recognized the auto repair and outside storage uses as
13 pre-existing, non-conforming uses. Pertinent portions of the
14 order are set forth, infra, at pages 5-7. Petitioners argued
15 that even if the county did not decide that outside storage and
16 auto repair were pre-existing, non-conforming uses, the county
17 erred in granting a conditional use to the Slocums allowing
18 outside storage and auto repair as an expansion or modification
19 of a pre-existing use. Petitioners argued they received no
20 notice at any time that the Slocums were requesting a
21 conditional use to allow expansion of their pre-existing use to
22 include outside storage and automobile repair.

23 Respondent Benton County asserts in its brief that it did
24 not find the auto repair and outside storage uses were
25 pre-existing uses, only that inside storage was found to be a
26 pre-existing, non-conforming use. The county argues the
27 decision was to permit expansion or modification of this
28 pre-existing use to include outside storage and automobile
29 repair, and that this expansion or modification is allowed
30 pursuant to Article XIX.01 of the Benton County Zoning
31 Ordinance. At oral argument, Benton County argued the petition
32 for review did not raise an issue as to whether the county
33 correctly followed its ordinance in approving outside storage
34 and auto repair.

35 We agree with respondent Benton County that the only use
36 recognized by the county's order as a pre-existing,
37 non-conforming use is inside storage. The county "legalized"
38 the auto repair and outside storage uses by finding that the
39 county's ordinance permitting expansion or modification of the
40 inside storage use to allow the auto repair and outside storage
41 uses had been met. Even though petitioners did not properly
42 characterize the nature of the county's decision in the
43 petition for review petitioners did challenge the effect of the
44 decision which was to legalize the applicants' auto repair and
45 outside storage business. This challenge is sufficient, we
46 believe, to enable us to review the validity of the county's
47 decision allowing these uses to occur.

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Apparently, the request to replace the existing mobile home with a larger one was treated as an expansion of a non-conforming use because the mobile home was viewed as an integral part of the storage business. A mobile home in the FPA zone, if by itself and not part of a business, is allowed conditionally.

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The Notice of Board of Commissioners' decision, dated January 29, 1982, states that the applicants' request identified as a "conditional use" was "approved with modification." This "Notice" also contains the following summary of the Board of Commissioners' decision:

"Based on the findings in favor numbers 2 through 10 in the staff report, the applicants' proposed modifications to the existing legally non-conforming indoor storage use of the property is approved to permit the location of a larger mobile home caretaker residence on the site, automobile repairs, and outside storage; and that a conditional use permit is approved allowing the placement of the mobile home in an area zoned for flood plain agriculture (FPA) uses..." (Emphasis added).

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No issue has been raised as to whether the Board of Commissioners actually made their decision to approve the conditional use on January 27, 1982, prior to the adoption of findings of fact. See Heilman v City of Roseburg, 39 Or App 71, 591 P2d 390 (1979). We therefore do not address this issue.

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Section .04 of Article XIX, as stated in the board's order, requires that:

"All applicable provisions of the conditional use procedure (see Article XX) shall apply in addition to the following criteria for any request considered under Sections .01, .02, and .03 of this Article:

"a. All reasonable measures will be undertaken to alleviate or reduce the incompatibility or adverse effects of the non-conforming use or building upon abutting properties or a general vicinity, e.g., objectionable conditions, visual

1 or noise pollution, vehicular traffic or
2 on-street parking.

3 "b. All changes, additions or expansions shall comply
4 with all current development requirements and
5 conditions of this ordinance.

6 "c. Additions to buildings will provide for storage
7 or necessary equipment, materials and refuse
8 rather than create a need for additional outside
9 storage..."

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13 In December of 1980, the Slocums applied for a second
14 (additional) mobile home "as an expansion of a
15 non-conforming use for a caretaker residence to be located
16 at the west end of the parcel." The permit for a
17 conditional use was denied by the staff. The Slocums
18 appealed this decision to both the planning commission and
19 the board of commissioners, both of which upheld the
20 denial of the permit for a second mobile home.

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24 Petitioners have not offered any authority to support
25 their theory that the Board of Commissioners in a
26 separate, subsequent hearing cannot adopt findings of fact
different from those adopted in a prior proceeding even
where the evidence is substantially similar.

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30 We are giving petitioners the benefit of the doubt in
31 stating their argument is that substantial evidence does
32 not exist to support a finding the conditional use
33 criteria have been met. Petitioners' "Summary of
34 Arguments" section of their brief summarizes their
35 position as follows:

36 "Furthermore to allow the expansion of the
non-conforming use and the placement of the mobile
home in the Flood Plane [sic] Agricultural Zone is not
supported by the evidence..."

37 Petitioners' discussion of this issue in their brief relates to
38 the evidence about whether placement of the mobile home in the
39 FPA zone will create a hazard. Petitioners do not, however,
40 cite the specific findings of fact or the legal criteria for
41 which they claim substantial evidence does not exist. We must
42 presume, therefore, the legal criteria are those contained in

1 Article XX of the county's ordinance pertaining to conditional
2 uses. The only part of Article XX contained in the record is
3 that part (Article XX.05(2)) quoted in the county's order.
4 Article XX.05(2), in essence, requires that the county find the
5 proposed use "is designed to be compatible with surrounding
6 land uses."

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See Footnote 5.

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11 In fact, no application was made by the Slocums for an
12 expansion of a non-conforming use to allow automobile repair
13 and outside storage. Absent such an application, we question
14 whether the county had authority under its ordinance, even if
15 proper notice had been given, to grant the Slocums a
16 conditional use to allow expansion of their inside storage
17 business to allow outside storage and automobile repair. In
18 view of the county's failure to provide adequate notice,
19 however, and the prejudice which resulted to petitioners, we
20 need not address this issue.
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