

LAND USE
BOARD OF APPEALS
APR 15 4 48 PM '86

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

3	THEODORE S. HOLDER,)	
4	Petitioner,)	LUBA No. 85-074
5	vs.)	FINAL OPINION
6	JOSEPHINE COUNTY and EDWIN)	AND ORDER
7	and NANCY CLAIBOURN,)	
8	Respondents.)	

9 Appeal from Josephine County.

10 Theodore S. Holder, Grants Pass, filed the petition for
11 review and argued on his own behalf.

12 Benjamin E. Freudenberg, Grants Pass, filed a response
13 brief and argued on behalf of Respondent Claibourns.

14 No appearance by Josephine County.

15 BAGG, Referee; KRESSEL, Chief Referee; DuBAY, Referee;
16 participated in the decision.

17 REMANDED 04/15/86

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

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioner appeals county approval for the alteration of a
4 nonconforming use. Petitioner asserts the approval violates
5 portions of the Josephine County Zoning Ordinance controlling
6 alteration and reconstruction of nonconforming uses.

7 FACTS

8 The applicant, Edwin Claibourn, operates a truck repair
9 shop and storage facility. The existing and planned activities
10 are not permitted under the applicable residential zoning.
11 However, the property was used at various times for the
12 applicant's business before the introduction of restrictive
13 zoning. It is therefore considered a nonconforming use under
14 the county ordinance.

15 The applicant proposes to remove the existing 36 x 112 foot
16 structure and replace it with a new two-story building
17 measuring 66 x 108 feet. The uses would remain the same.

18 The Josephine County Hearings Officer considered the
19 request in May, 1985, and found the applicant did not meet the
20 criteria for alteration of a nonconforming use. The applicant
21 appealed this decision to the county board of commissioners.
22 The county board granted the applicant's request after a new
23 hearing.

24 FIRST ASSIGNMENT OF ERROR

- 25 "1. Respondent violated Josephine County Zoning
26 Ordinance No. 81-13, amended by ORD. 82-5, Sec.
50.010, Criteria at 1, 2, 3, and 5."

1 The Josephine County Zoning Ordinance provides that a
2 nonconforming use may be altered or reconstructed subject to
3 the following conditions:

- 4 "1. There is no other suitably zoned land available
5 in the vicinity that would accommodate the use.
- 6 "2. The alteration or reconstruction of the non-
7 conforming use shall not constitute an excessive
8 nuisance condition to the public or to the use of
9 adjoining properties.
- 10 "3. The alteration or reconstruction is limited to
11 the same type and intensity of use or to a use
12 more conforming to the provisions of this
13 Ordinance.
- 14 "4. The non-conforming use is located on a tract of
15 land isolated from other similar uses, and it
16 would be contrary to the Comprehensive Plan to
17 permit the introduction of similar uses by
18 rezoning of the tract.
- 19 "5. The use can be maintained in compliance with any
20 conditions the Commission finds necessary to
21 ensure the continued compatibility of the use
22 with adjoining land uses."

23 The county found the applicant's proposal met all five of
24 these criteria, but petitioner complains that the findings
25 showing conformity with criteria 1, 2, 3, and 5 are not
26 supported by the record.¹

- "1. "There is no other suitably zoned land available
 in the vicinity that would accommodate the use."

 The county's finding that there is no other suitably zoned
property available in the vicinity rests upon its view that the
"vicinity" of study is a small area approximately four-tenths
by five-tenths of a mile.² There is no dispute that this
small area includes no property suitable for the kind of heavy

1 equipment operation contemplated.³

2 Petitioner's view is that this area is too small.
3 Petitioner believes the term "vicinity" was properly
4 interpreted by the Josephine County Hearings Officer to be an
5 area of several square miles. We agree that the county's
6 interpretation is unduly narrow.

7 The ordinance prohibits alteration of a nonconforming use
8 if there is other suitably zoned land (i.e., land where the
9 alteration is permitted outright) in the vicinity. The
10 apparent purpose of this provision is to encourage
11 nonconforming uses to relocate to sites in conformity with
12 county zoning regulations.⁴

13 This standard is modified, however, by the term
14 "vicinity." Regrettably, neither the ordinance nor the county
15 board's order provides much guidance on the proper
16 interpretation of "vicinity."⁵ We assume that the county
17 treats the term as a hardship factor. That is, the county
18 ordinance encourages the relocation of a nonconforming use to a
19 conforming site, but the requirement will not be imposed if it
20 forces the owner to abandon a site or area that is critical to
21 continuation of the uses. Thus, if a particular nonconforming
22 use is dependent on a particular neighborhood or area, the term
23 "vicinity" will be interpreted accordingly.

24 Assuming the foregoing reflects the intent of Section
25 50.010(1), we note this nonconforming use serves a broad
26 geographical area. There is nothing in the record to suggest

1 that the use is somehow dependent upon a particular
2 geographical location to function. There is no suggestion that
3 moving to appropriately zoned land would present any hardship
4 to the applicant or otherwise interfere with his business
5 enterprise. Indeed, there is no reason in the record why this
6 use could not be moved to any site zoned M-Z.

7 We will uphold a reasonable interpretation of the ordinance
8 by the county. Alluis v. Marion Co., 64 Or App 478, 668 P2d
9 1242 (1983). However, the interpretation in this case runs
10 counter to the apparent purpose of the provision. This fact
11 requires a remand.

12 On remand, the county should make clear its interpretation
13 of this ordinance provision (if it differs from our own) and
14 apply it to the facts existing in this case.

15 "2. The alteration or reconstruction of the non-
16 conforming use shall not constitute an excessive
17 nuisance condition to the public or to the
18 adjoining properties."

19 The county found that alteration of the building would not
20 create any greater noise or nuisance. Indeed, in the county's
21 view, noise may be lessened by the proposal

22 "[A]s the trucks would be worked on inside the
23 building, and also the fact that the applicant would
24 not be increasing the level of their [sic] business."
25 Record 18.

26 Petitioner complains that the larger building, will
constitute a "nuisance condition to the public and to adjoining
properties." Petition for Review at 21. Petitioner seems to
read this criterion to require abatement of existing nuisance

1 conditions.

2 As we understand petitioner's view, the "nuisance" existing
3 now is truck traffic and noise. The criterion does not call
4 for an abatement of nuisance conditions, but only requires that
5 there not be "an excessive nuisance condition" created by the
6 alteration or reconstruction. There is nothing to contradict
7 the county's finding that alteration of the building will
8 lessen noise levels and create no "excessive\ nuisance
9 condition."

10 We therefore reject this challenge.

11 "4. The alteration or reconstruction is limited to
12 the same type and intensity of use or use more
conforming to the provisions of this ordinance."

13 Petitioner complains that the structure will be increased
14 in size by more than 75 percent. This increase furnishes
15 petitioner's "greatest concern." Petition for Review at 10.
16 Petitioner believes that the size of the structure indicates
17 that the intensity of use will increase.

18 As discussed above, the county found the level of the
19 applicant's business would not increase. The applicant
20 testified to this effect.

21 The use of this property is a truck repair and storage
22 facility. The building now existing, and the proposed building
23 constitute a "use" of the land. The fact the building itself
24 will increase in size by 75 percent means that the land is
25 being put to a more intensive nonconforming use. Therefore,
26 while we agree with the county that the type of use inside the

1 building will not change, we do not agree that the intensity of
2 the use of the property will not change. See the concurring
3 opinion of Justice Tanzer in Polk Co. v. Martin, 292 Or 69,
4 82-83, 636 P2d 952 (1981).

5 We therefore sustain this challenge.

6 "5. The use can be maintained in compliance with any
7 condition the commission finds necessary to
8 insure the continuing compatibility of the use
9 with adjoining land use."

10 Petitioner complains the proposed alteration will result in
11 a "policing problem."

12 We are uncertain as to the thrust of petitioner's
13 argument. Petitioner appears to argue that it is not possible
14 to attach conditions to the operation which would make it
15 compatible with adjacent land uses. This may be true. It is
16 probably safe to assume that this nonconforming use is not
17 compatible with neighboring land uses. However, the criterion
18 does not call for restricting the use as petitioner suggests.
19 Rather, the criterion appears to authorize conditions to insure
20 that an altered nonconforming use will be at least as
21 compatible with adjacent land uses as in the past.

22 The conditions which were attached by the site plan review
23 committee were found by the county to be sufficient to insure
24 continued compatibility, and petitioner does not attack the
25 adequacy of the findings under this criterion. We therefore do
26 not find error as petitioner has alleged.

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1 However, the fact that the intensity of use will increase
2 because of the new larger building suggests that the use will
3 no longer be as compatible with adjacent land uses as is the
4 present structure. Because this case is to be remanded on
5 other grounds, we believe it appropriate for the county to
6 consider what affect the size of the proposed building has on
7 this issue of compatibility.

8 The first assignment of error is sustained, in part.

9 SECOND ASSIGNMENT OF ERROR

10 "Respondent violated Josephine County Zoning Ordin-
11 ance 81-13 Amended by ORD. 82-5, Sec. 50.010 of the
 Josephine County Zoning Ordinance."

12 This assignment of error is a restatement of petitioner's
13 claim the county violated Section 50.010(1) by restricting the
14 "vicinity" of review for possible sites to a small area.

15 We sustain this assignment of error for the reason stated
16 under the first assignment of error, supra.

17 THIRD ASSIGNMENT OF ERROR

18 "Respondent violated Josephine County Land Use Hearing
19 Ordinance 85-3 Section 17."

20 Ordinance 85-3 adopts rules for the conduct of land use
21 hearings. Section 17 controls standing to appeal a decision,
22 whether from the planning director to the hearings officer or
23 from the hearings officer to the county commission.
24 Petitioner's complaint centers on subsection 10 which calls for
25 a hearing on the record, and subsection 12 which allows de novo
26 hearings if requested by the board. Petitioner argues that the

1 proceedings before the county amounted to a de novo hearing.
2 However, petitioner was not advised, as required by Section 12,
3 that a de novo hearing would be held. Petitioner also
4 complains that he was not given access to evidence to be
5 introduced before the county board before the hearing. The
6 result, according to the petitioner, is violation of county
7 procedural rules and damage to petitioner's position. We
8 understand petitioner to claim the procedure prejudiced his
9 substantial right to an impartial tribunal. See Fasano v.
10 Board of County Commissioners, 264 Or 574, 507 P2d 23 (1973).

11 Our authority to overturn a local government decision
12 because of procedural error is limited to those situations in
13 which petitioners can show prejudice to their substantial
14 rights. ORS 197.835(a)(B). In this case, petitioner was given
15 opportunity to comment on the evidence at the hearing before
16 the county board. Also, petitioner does not allege he was
17 unable to present his own evidence. Under such circumstances,
18 notwithstanding any failure of the county to provide notice or
19 materials in advance of the hearing, there has been no
20 prejudice to petitioner's substantial rights. We deny this
21 assignment of error. Turner v. Washington Co., 8 Or LUBA 234,
22 70 Or App 575, 689 P2d 1318 (1984).

23 FOURTH ASSIGNMENT OF ERROR

24 "Respondent violated Urban Growth Area Zoning
25 Ordinance 126.01 and 126.02 by not allowing a truck
and equipment service and repair in M-1 district."

26 Petitioner complains that the county should have considered

1 both the M-1 and M-2 zoning districts as possible zone to house
2 this proposed use when applying the "no other suitably zoned
3 land" criterion. The county concluded that the M-2 Zone was
4 appropriate for the use, not the M-1 Zone.

5 The applicant's testimony reveals, and the petitioner does
6 not challenge, that not only would truck and equipment service
7 and repair occur on the site, but also storage. Only the M-2
8 Zone permits storage. Therefore, we find the county committed
9 no error by limiting its review of possible sites to those
10 zoned M-2.

11 FIFTH ASSIGNMENT OF ERROR

12 "Respondent violated Josephine County Land Use
13 Ordinance 85-3 Section 9. Members of the hearings
14 body did not avoid significant ex parte contacts with
15 interested parties to the proposal. [sic] So that
16 their deliberation and recommendations would be based
17 on the evidence presented at the time of the public
18 hearing."

19 It is not clear what ex parte contacts petitioner believes
20 prejudiced the case. However, we note that each of the three
21 commissioners stated that each of them had contacts with
22 individuals interested in the case. Each board member
23 indicated that he had viewed the area. The board members
24 commented on the nature of the contacts and their respective
25 property views.

26 We find nothing in this record to suggest any impropriety.
27 The commissioners fulfilled their responsibility under the law
28 by revealing their contacts on the record of the proceedings.

29 See ORS 197.835(12) and ORS 215.422(3). Jessel, supra.

1 We deny this assignment of error.

2 This decision is remanded.

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FOOTNOTES

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Petitioner makes no claim that this approval, or the county nonconforming use ordinance, is in violation of ORS 215.130(5). ORS 215.130(5) authorizes alteration of a nonconforming use "to reasonably continue the use." Jessel v. Lincoln City, ___ Or LUBA ___ (LUBA No. 85-078, April 4, 1986).

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This criterion requires a finding that the proposed use can not be moved to an appropriately zoned site. This strict standard goes beyond that required in state law. ORS 215.130 does not require analysis of other sites when considering an application for alteration of a nonconforming use.

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See the discussion under the Fourth Assignment of Error, supra.

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In that regard, the ordinance is more strict than statutory nonconforming use regulations which allow alteration of nonconforming uses where necessary "to reasonably continue the use." See ORS 215.130(5) and Jessel, supra.

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The county board found the vicinity should be "city like" area because the use is near a populated place (the urban growth boundary). Record at 17. However, the geographical area chosen does not include a large area within the UGB. The county's finding is as follows:

"The Board found that the Hearings Officer erred in his application of the above section, particularly in his use of the term 'vicinity.' Based upon the Findings of the Hearings Officer, it is the impression of the Board that the Hearings Officer defined 'vicinity' as basically the Urban Growth Boundary, and the City. He then denied the application, stating that the applicant did not meet this criteria as he had failed to provide substantial evidence that there was no other suitably zoned land available in the vicinity that would accomodate (sic) the use.

1 "The Board finds that the property is located near a
2 populated area, near the Urban Growth Boundary, and
3 thus, would invoke construction of the term 'vicinity'
4 in the ordinance, in a city-like manner; as opposed to
5 a rural-like manner, which would be reserved for areas
6 which were less populated. Thus, the Board determines
7 that the 'vicinity' in this instance, would be the
8 area of Williams Highway, and the Redwood Avenue
9 Interchange, south of the river. The area suggested
10 by the opposition, the entire County, is could (sic)
11 not be considered 'vicinity' for purposes of
12 construing the ordinance. However, the definition
13 should be expanded to include more than just those
14 properties adjacent to the applicant's property."
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