

1 Opinion by DuBay.

2 NATURE OF THE DECISION

3 This is an appeal from the county's approval of a
4 conditional use permit allowing improvements on a private
5 airstrip.

6 FACTS

7 The airstrip is on land zoned for exclusive agricultural
8 use and is surrounded by land in agricultural use. The
9 airstrip has been used over a 20 year period, beginning prior
10 to adoption of Exclusive Farm Use (EFU) zoning for the property
11 in 1969. Until 1975, ORS 215.213 did not allow airports in
12 exclusive farm use zones. In 1975, the statute was amended to
13 permit personal use airports in EFU zones subject to standards
14 adopted by the governing body. Or Laws 1975, ch 551, sec 1.
15 In 1975 the zoning ordinance was amended to permit personal use
16 airports as conditional uses in the EFU zones.¹ The
17 ordinance was amended in 1985 to add a definition of personal
18 use airports. The definition mirrors the definition of
19 personal use airports in ORS 215.213(2)(h) and
20 215.283(2)(g).²

21 In early 1985 the county approved an application to improve
22 the airstrip. The approval was appealed to LUBA but then
23 remanded by stipulation of the parties.³

24 In mid 1985, the owner requested a determination that the
25 airstrip could continue as a personal use airport under ORS
26 215.213(2)(h) and 215.283(2)(g). These statutes define

1 personal use airports allowed in EFU zones and each provides in
2 part:

3 "A personal use airport lawfully existing as of
4 September 13, 1975, shall continue to be permitted
5 subject to any applicable rules of the Aeronautics
6 Division."

7 The county court found the airstrip was pre-existing,
8 stating in its order:

9 "...Underhill Airport is declared to be a pre-existing
10 personal use airport, and as such, complies with
11 county land use requirements as a pre-existing
12 conditional use permitted in the exclusive farm use
13 zone; and that such use allows commercial-agricultural
14 spraying operations." Record at 50.⁴

15 After the above order, the airstrip owner applied for a
16 conditional use permit to make airstrip improvements including
17 a locked storage area, a concrete loading facility, fuel and
18 water storage tanks, a waterline and power extension. The
19 planning department and the planning commission approved the
20 permit. The opponents appealed the decision to the county
21 court. On June 4, 1986, the court upheld the planning
22 commission approval. Petitioner's appeal followed.

23 FIRST ASSIGNMENT OF ERROR

24 Petitioner claims the county erred by failing to consider
25 whether the improvements will allow the airstrip to be used for
26 spraying operations that are more intensive than allowable
under the pre-existing use standards. According to petitioner,
the county's order was made on the erroneous supposition that
commercial agricultural spray operations on the airstrip are
unrestricted. We understand petitioner to claim the county

1 misconstrued the applicable law by basing its decision on this
2 supposition.

3 The county's land use development ordinance (LUDO) allows
4 personal use airports in the EFU zones "when authorized by the
5 approving authority upon satisfactory demonstration of
6 compliance with standards of this ordinance." LUDO, Section
7 3.210C.9. The county never granted a special use permit to
8 authorize a personal use airport pursuant to this or any
9 similar provision.⁵

10 In the absence of a conditional use permit for airport
11 operation, aviation activities on the airstrip are lawful only
12 by application of the statutory provisions protecting the right
13 to continue lawful uses that pre-date restrictive regulations.
14 Both ORS 215.213(2)(h) and 215.283(2)(g) provide for
15 continuation of lawful personal use airports existing on
16 September 13, 1975. However, since a personal use airport was
17 not allowed in the EFU zone before that date, the airport was
18 lawful only if it qualified for protection under the
19 pre-existing use provisions in ORS 215.130(5).⁶ When read in
20 conjunction with ORS 215.130(5), the pre-existing use
21 provisions in ORS 215.213(2)(h) and 215.283(2)(g) allow
22 continuation of airstrips only if they were lawfully used as
23 personal use airports before adoption of EFU zoning.

24 The statutes allowing pre-existing uses to "continue" after
25 restrictive regulations are adopted do not expressly limit the
26 intensity of such uses. However, court decisions interpreting

1 ORS 215.130(5) have addressed the extent to which such uses are
2 protected from subsequent restrictive zoning regulations. The
3 courts have consistently held that a pre-existing use may
4 continue only at the intensity existing prior to enactment of
5 regulations prohibiting or restricting the use. Polk County v.
6 Martin, 292 Or 68, 636 P2d 952 (1981); Lane County v. Bessett,
7 46 Or App 319, 612 P2d 297 (1980); Bither v. Baker, 244 Or 640,
8 438 P2d 988, 440 P2d 368 (1968). In Polk County v. Martin,
9 supra, the court said:

10 "The nature and extent of the prior lawful use
11 determines the boundaries of permissible continued use
12 after the passage of the zoning ordinance." 292 Or at
13 76.

14 Given this limitation, and without approval of a conditional
15 use permit for a personal use airport, the county could not
16 approve airport uses any more extensive than existed when EFU
17 zoning was adopted.

18 Petitioner claims the county's decision authorizes
19 commercial spraying activities at the airstrip that exceed
20 these limits. According to petitioner, the following finding
21 shows the county based its decision on the erroneous assumption
22 that no restrictions limited the intensity of agricultural
23 spraying activities on the airstrip.

24 "On July 3, 1985 the Wasco County Court affirmed a
25 decision on appeal that the Underhill Airport was a
26 pre-existing personal use airport;...and as such
27 complied with the county land use requirement as a
28 pre-existing use, permitted conditionally in the
29 exclusive farm use zone. This use allows commercial
30 agricultural spraying operations which were found, in
31 the above order, not to be limited in any way by

1 definition in state aeronautics rules, Oregon Revised
2 Statutes or Wasco County Zoning Ordinance."

3 While this finding may be interpreted to support
4 petitioner's claim, the county also found the proposed
5 improvements would not increase the agricultural spraying
6 activities at the airstrip. These additional findings suggest
7 the county recognized some level of aviation use as a benchmark
8 for measuring allowable uses of the airstrip. As we noted
9 above, the appropriate benchmark is the level of lawful
10 airstrip use when EFU zoning was adopted. However, the extent
11 of personal airport use on that date, or on any other, is not
12 specified in the county's order. Neither is the intensity of
13 lawful airport use predating EFU zoning spelled out in the
14 county's July 3, 1985 order, declaring the airstrip to be a
15 pre-existing conditional use.

16 If the county's findings can be read to fix any level of
17 use as a measure to assess the effects of the proposed
18 improvements, it is the level of use at the time of the
19 decision. The county concluded

20 "[t]he proposed improvements would not change the
21 existing use of the airport as a personal use
22 airport." (Emphasis added) Record at 14.

23 As explained above, the correct standard for assessing the
24 proposal is the nature and extent of lawful use when EFU zoning
25 was adopted and not at the time of the decision.

26 These circumstances convince us that the county
misunderstood the extent of personal use airport activities

1 legally allowed on the airstrip without a conditional use
2 permit. The error is grounds for sustaining this assignment of
3 error.

4 We recognize Respondent Ocel's contention that the county
5 evaluated whether the proposed improvements will intensify
6 airstrip uses over the level of use prior to EFU zoning.
7 Respondent Ocel also points out that the sod airstrip has not
8 been improved in 20 years, and that the condition of the sod
9 runway prevents any increase in use.

10 We reject this argument for two reasons. First, as noted
11 in the foregoing discussion, the county's order does not
12 express an analysis based on the level of airport use before
13 restrictive zoning was enacted.⁷ Instead, the findings only
14 discuss intensification over the level of use existing when the
15 challenged decision was made.

16 Second, the findings about the condition of the sod runway
17 do not define the extent of airstrip use before EFU zoning was
18 adopted. The character and condition of the runway may
19 demonstrate suitability of the airstrip for personal airport
20 purposes but does not establish the intensity of use. This
21 assignment of error is sustained.

22 SECOND ASSIGNMENT OF ERROR

23 Petitioner charges that the court misconstrued the law by
24 making the following finding:

25 "This (personal use airport) use allows
26 commercial-agricultural spraying operations which were
 found, in the above order, not to be limited in any

1 way by definition in state aeronautics rules, Oregon
2 Revised Statutes or Wasco County Zoning Ordinance."
Record at 13.

3 According to petitioner, this finding illustrates the county's
4 view that its authority to regulate the airstrip is limited.
5 Petitioner argues that agricultural spraying operations at
6 personal use airports may be restricted by whatever ordinance
7 or plan provisions the county chooses to impose in its
8 conditional use regulations.

9 If petitioner is alleging the county acted under a
10 misconception that it had no authority to restrict personal use
11 airport activities at the airstrip, this challenge must fail.
12 The county approved the permit subject to three conditions.⁸
13 See Record at 31-32. Imposing these conditions is inconsistent
14 with petitioner's allegations about the county's interpretation
15 of its authority. This assignment of error would be denied
16 under this interpretation of petitioner's challenge.

17 If, however, petitioner is alleging the county found the
18 commercial-agricultural spraying activities on the airstrip are
19 subject to no restrictions, our decision in the first
20 assignment of error is applicable here. ORS 215.130(5) only
21 gives the airstrip owner the right to continue aviation use at
22 the intensity existing before EFU zoning was adopted. Any
23 intensification of the use must be granted according to LUDO
24 Section 3.210C.9.

25 THIRD ASSIGNMENT OF ERROR

26 Petitioner's last assignment of error follows allegations

1 in the first assignment of error that the county misconstrued
2 the law by interpreting county ordinance and state law to allow
3 the existing level of airport use. Petitioner alleges in this
4 assignment of error that because of the wrong interpretation,
5 the county failed to make findings addressing what effect the
6 improvements would have on the extent of allowable use of the
7 airstrip. Petitioner says that at the hearing on the current
8 proposal, the county refused to accept evidence of recent
9 intensification of airstrip use and also refused to consider
10 similar evidence in the record of a previous application to
11 improve the airstrip. Consequently, the findings fail to
12 address the question of intensified use, according to
13 petitioner's argument.

14 The county answers this challenge by asserting the offered
15 evidence is relevant only to the question whether the airstrip
16 has acquired a right to continue as a pre-existing use. The
17 county contends this issue was decided in the county's July 3,
18 1985 order, and petitioner may not reopen that proceeding.

19 As we noted above, the county's position is in error. The
20 application for improvements required consideration of the
21 extent of the lawful use of the airstrip to determine if they
22 constitute an expansion of a pre-existing use. Without a
23 conditional use permit for a personal use airport, the
24 lawfulness of airport use is measurable only by the
25 pre-existing use standards discussed in the first assignment of
26 error. The county's findings address only whether the

1 improvements will expand the existing use without showing the
2 link between existing use and the level of use pre-dating EFU
3 zoning of the property. The findings, therefore, fail to
4 explain how the proposal meets an applicable legal standard.
5 Green v. Hayward, 275 Or 693, 552 P2d 815 (1976). This
6 assignment of error is sustained.

7 Remanded.
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1 FOOTNOTES

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5 By order dated December 31, 1975, conditional uses allowed
6 in the EFU zone included:

7 "Personal use airports for airplanes and helicopter
8 pads, including associated hangar, maintenance and
9 service facilities."

10 2
11 Oregon Laws 1975, chapter 551, section 1, amended ORS
12 215.213(2) by adding personal use airports to the list of
13 nonfarm uses allowed on land zoned EFU subject to standards of
14 the county. In 1983, ORS 215.213 was renumbered as ORS
15 215.283, and a new ORS 215.213 was adopted. Personal use
16 airports are defined in identical terms in both ORS
17 215.213(2)(h) and 215.283(2)(g) as follows:

18 "Personal-use airports for airplanes and helicopter
19 pads, including associated hangar, maintenance and
20 service facilities. A personal-use airport as used in
21 this section means an airstrip restricted, except for
22 aircraft emergencies, to use by the owner, and, on an
23 infrequent and occasional basis, by invited guests,
24 and by commercial aviation activities in connection
25 with agricultural operations. No aircraft may be
26 based on a personal-use airport other than those owned
or controlled by the owner of the airstrip.
Exceptions to the activities permitted under this
definition may be granted through waiver action by the
Aeronautics Division in specific instances. A
personal-use airport lawfully existing as of September
13, 1975, shall continue to be permitted subject to
any applicable rules of the Aeronautics Division."

27 Wasco County has not adopted a "marginal lands"
28 classification permitted by ORS 197.247. Therefore, the county
29 may apply either ORS 215.213(2) or 215.283(2) to land zoned for
30 exclusive farm use. ORS 215.288(1).

31 3
32 The improvements sought in the 1985 application included
33 paving the landing strip and other improvements not requested
34 in the application leading to the decision here reviewed.

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2 The record submitted by the county was not numbered as
3 required by OAR 661-10-025(2)(b)(D). References in this
4 opinion to page numbers in the record refer to numbers placed
5 in the record by the Board.

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7 Between 1981 and 1985, the county ordinance allowed
8 "personal use airports as defined in ORS 215.213(2)(g)" as
9 conditional uses in EFU zones. LUDO does not list personal use
10 airports as "conditional uses" but lists them as uses permitted
11 in EFU zones when authorized by the approving authority. LUDO,
12 Section 3.210C.9. We attach no significance to the changed
13 terminology in this case. Under LUDO, personal use airports
14 are allowed only after review of a proposed airstrip shows
15 compliance with standards in the ordinance chapter on
16 conditional uses.

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12 ORS 215.130(5) states:

13 "(5) The lawful use of any building, structure or land
14 at the time of the enactment or amendment of any
15 zoning ordinance or regulation may be continued.
16 Alteration of any such use may be permitted to
17 reasonably continue the use. Alteration of any such
18 use shall be permitted when necessary to comply with
19 any lawful requirement for alteration in the use. A
20 change of ownership or occupancy shall be permitted."

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20 The county's argument in this appeal buttresses our view of
21 the county's order. The county argues that no level of use
22 restrictions applied to the airstrip because personal use
23 airports are allowed conditionally in the EFU zone. The county
24 distinguishes conditionally-allowed uses from prohibited uses.
25 We reject this distinction for the purpose asserted by the
26 county. Until a conditional use for a personal use airport is
authorized by the county according to LUDO, Section 3.210C.9,
the only authority for continuing airport uses is the
pre-existing use provisions of ORS 215.213(2)(b), 215.283(2)(g)
and 215.130(5).

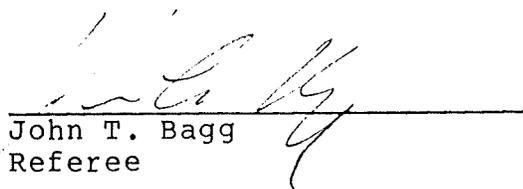
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26 The three conditions relate to the physical attributes of
the proposed improvements and not to flight operations at the
airstrip.

1 DR 17-85-405, it was made on October 21, 1986, and a Notice of
2 Intent to Appeal DR 17-85-405 filed on November 7, 1986 is
3 therefore timely.

4 The motion to dismiss is denied.

5 Dated this 18th day of December, 1986.

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9 John T. Bagg
Referee

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CERTIFICATE OF MAILING

I hereby certify that I served the foregoing Order on Motion to Dismiss for LUBA No. 86-086, on December 18, 1986, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

Barbara Gay Canady
Legal Counsel
4040 Douglas Way
PO Box 1708
Lake Oswego, OR 97034

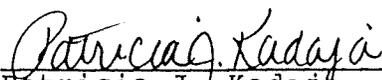
Barry Adamson
Williamama, Fredrickson, et al
775 Boise Cascade Bldg.
1600 SW Fourth Avenue
Portland, OR 97201

James Coleman
City Attorney
PO Box 369
Lake Oswego, OR 97034

James H. Bean
Lindsay, Hart et al
Suite 1800
222 SW Columbia
Portland, OR 97201

Frank Josselson
Josselson, Potter & Roberts
53 SW Yamhill
Portland, OR 97204

Dated this 18th day of December, 1986.



Patricia J. Kadaja
Administrative Assistant