

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

3
4 TRENOR SCOTT and HELEN SCOTT,)
5)
6 Petitioners,)
7)
8 vs.)
9)
10 JOSEPHINE COUNTY,)
11)
12 Respondent,)
13)
14 and)
15)
16 ROBERT HAMLYN,)
17)
18 Intervenor-Respondent.)

LUBA No. 91-069

FINAL OPINION
AND ORDER

19
20
21 Appeal from Josephine County.

22
23 Patrick J. Kelly, Grants Pass, filed the petition for
24 review and argued on behalf of petitioners.

25
26 No appearance by respondent.

27
28 Duane Wm. Schultz, Grants Pass, filed a response brief
29 and argued on behalf of intervenor-respondent.

30
31 SHERTON, Referee; KELLINGTON, Chief Referee; HOLSTUN,
32 Referee, participated in the decision.

33
34 REVERSED 09/20/91

35
36 You are entitled to judicial review of this Order.
37 Judicial review is governed by the provisions of ORS
38 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision of the Josephine County
4 Board of Commissioners modifying a previous decision to
5 approve an alteration of a nonconforming use.

6 **MOTION TO INTERVENE**

7 Robert Hamlyn, the applicant below, moves to intervene
8 in this proceeding on the side of respondent. There are no
9 objections to the motion, and it is allowed.

10 **FACTS**

11 Intervenor owns and operates a restaurant on a 13 acre
12 parcel adjoining the Rogue River. The restaurant serves
13 patrons of jet boat excursions along the river. The
14 restaurant began operation in 1978 as a permitted use in the
15 Wild Rivers zone. Record 90. At that time, the restaurant
16 was 1100 sq. ft. in size, and served 40 persons per day.
17 Record 92-93.

18 The restaurant became a nonconforming use in 1981, when
19 the subject property was designated Residential on the
20 Josephine County Comprehensive Plan (plan) map and rezoned
21 Rural Residential, five acre minimum (RR-5). As far as we
22 can tell, neither the prior county decision approving an
23 alteration to this nonconforming use, the county decision
24 challenged in this appeal, nor any other county decision,
25 has established the size and intensity of the restaurant
26 operation in 1981, when it became nonconforming.

1 In April 1989, intervenor applied to the county for
2 approval of an alteration to the nonconforming use to add
3 1400 sq. ft. of decking.¹ On May 31, 1989, the county
4 hearings officer issued a decision denying intervenor's
5 application. Intervenor appealed this decision to the board
6 of commissioners. On July 3, 1989, after a public hearing,
7 the board of commissioners issued a decision approving the
8 application (1989 decision).² The decision imposed
9 conditions on the approval, including the following
10 ("condition 8"):

11 "This approval is valid for Two Years from the
12 date of approval. During such time [intervenor]
13 shall cooperate with the County in adopting
14 alternatives to the establishment of commercial
15 uses in conjunction with the use of the Rogue
16 River." Record 44.

17 In February 1991, intervenor filed an application with
18 the county requesting that the 1989 decision be modified to
19 delete condition 8. On April 10, 1991, the board of
20 commissioners held a public hearing on the application. On

¹The county staff report indicates that based on the restaurant's current seating pattern on the existing decks, this additional deck space will accommodate approximately 125 additional seats. Record 76.

²The board of commissioners decision refers only to "additional decking." The extent of the existing use to which the new decking will be added cannot be determined from the decision. We note intervenor's application states the existing restaurant structure is 1590 sq. ft. On the other hand, the 1989 staff report states assessor's records indicate the kitchen facilities area is 800 sq. ft. and a recent onsite visit showed the deck area to be 1900 sq. ft., with seating for 240. The staff report also states the only permit for the restaurant issued by the county since the original 1978 approval was an April 1989 building permit for a storage addition to the kitchen facilities.

1 May 8, 1991, the board of commissioners issued a decision
2 modifying the 1989 decision by changing condition 8 to read
3 as follows:

4 "This approval is valid until such time as the
5 study is completed by BLM [U.S. Bureau of Land
6 Management.] During such time, [intervenor] must
7 cooperate with the BLM and other appropriate
8 agencies in adopting alternatives to the
9 establishment of commercial uses in conjunction
10 with the use of the Rogue River." Record 16.

11 This appeal followed.

12 **FIRST ASSIGNMENT OF ERROR**

13 "The Josephine County land use hearing rules and
14 zoning ordinances do not provide for a procedure
15 to re-open previously made decisions concerning
16 the alteration of a non-conforming use. * * *
17 The [Board of] Commissioners lacked subject matter
18 jurisdiction for [its] decision to re-open and
19 modify [its] previous decision."

20 Petitioners contend the Josephine County Zoning
21 Ordinance (JCZO) and Land Use Hearing Rules (LUHR) do not
22 give the board of commissioners authority to reopen or
23 reconsider a previously made final decision concerning
24 alteration of a nonconforming use. Petitioners argue that
25 LUHR 20 ("Rehearing") establishes the board of commissioners
26 may only rehear a matter if the matter is remanded by a
27 higher tribunal.³ Petitioners further argue that under JCZO

³LUHR 20 provides:

"Once a matter has been heard by the Board [of Commissioners]
upon a Petition for Appeal as provided herein, the matter may
be heard before it again, in a rehearing, if an aggrieved party

1 15.204, any request for an alteration of a nonconforming use
2 must be initially considered and decided by the county
3 hearings officer. According to petitioners, only after a
4 decision on such a request is made by the hearings officer
5 can there be an appeal to the board of commissioners,
6 pursuant to JCZO 15.231.

7 Intervenor argues that pursuant to the original
8 language of condition 8 itself, the board of commissioners
9 retained jurisdiction over the matter of the alteration of
10 the subject nonconforming use, and had authority to reopen
11 its consideration of the matter when intervenor requested a
12 modification of the 1989 decision. Intervenor also argues
13 that LUHR 3 ("Requests for Hearing") authorizes the board of
14 commissioners to hold a hearing on any type of application.⁴

15 Contrary to intervenor's contention, we see nothing in
16 the language of the original condition 8 which would have
17 the effect of conferring continuing jurisdiction in the
18 matter on the board of commissioners. The first sentence of

so requests, only if the matter was remanded to the County from
a higher court or tribunal."

⁴Intervenor also contends we should not consider the issue of the board of commissioners' authority to consider intervenor's request, and certain other issues raised in the petition for review, because those issues were not raised in the local proceedings. ORS 197.763(1); 197.835(2). However, under ORS 197.825(2)(a), petitioners may raise new issues to this Board if the county failed to follow the requirements of ORS 197.763. Petitioners contend the county failed to give the notice of the "raise it or waive it" requirement required by ORS 197.763(3)(e) and (5)(c). We agree with petitioners that the record does not show the county complied with ORS 197.763 and, therefore, we may consider any issue raised in the petition for review.

1 condition 8 limits the 1989 decision to approving the
2 requested alteration of the nonconforming use for two years
3 only. The second sentence simply requires intervenor to
4 cooperate with the county in some sort of planning process.
5 The 1989 decision is a final land use decision which was not
6 appealed to this Board.

7 Furthermore, we see nothing in the JCZO or LUHR to give
8 the board of commissioners authority to reconsider a
9 previously made final land use decision. LUHR 20 provides
10 the board of commissioners may only rehear a matter if that
11 matter has been remanded to it by a higher authority.
12 LUHR 3 establishes who may initiate an application for a
13 land use hearing, and how such an application must be
14 initiated, but says nothing about which county body has
15 authority to conduct a hearing in response to a particular
16 type of application. On the other hand, JCZO 15.204 clearly
17 requires that applications for alteration of a nonconforming
18 use be considered and acted upon by the county hearings
19 officer.

20 The board of commissioners clearly has statutory
21 authority to delegate to an inferior body the authority to
22 make decisions on land use permit applications. ORS 215.402
23 to 215.428. The JCZO and LUHR delegate to the hearings
24 officer the authority to act initially on a request for
25 alteration of a nonconforming use. The board of
26 commissioners retains power to review the decisions of the

1 hearings officer. JCZO 15.231. However, nothing in the
2 JCZO or LUHR reserves to the board of commissioners the
3 power to act initially on requests for alteration of
4 nonconforming uses.

5 Under the 1989 decision, approval for an alteration of
6 the subject nonconforming use expired two years from the
7 date of that decision. Intervenor's request to modify that
8 decision by deleting condition 8 was in effect a new request
9 for permanent approval for the alteration of the
10 nonconforming use. We conclude the board of commissioners
11 exceeded its authority by approving that request without it
12 having first been acted upon by the hearings officer.
13 Downtown Community Ass'n v. Portland, 3 Or LUBA 244, 252-53
14 (1981). This requires that we reverse the board of
15 commissioners' decision. OAR 661-10-071(1)(a).

16 The first assignment of error is sustained.

17 **SECOND THROUGH THIRTEENTH ASSIGNMENTS OF ERROR**

18 JCZO 15.204 provides that an alteration of a
19 nonconforming use may be approved if the following standards
20 are met:

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

24 "2. The alteration * * * of the nonconforming use
25 shall not constitute an excessive nuisance
26 condition to the public or to the use of
27 adjoining properties.

28 "3. The alteration * * * is limited to the same
29 type and intensity of use or to a use more

1 conforming to the provisions of [the JCZO].

2 "4. The nonconforming use is located on a tract
3 of land isolated from other similar uses, and
4 it would be contrary to the Comprehensive
5 Plan to permit the introduction of similar
6 uses by rezoning of the tract.

7 "5. The use can be maintained in compliance with
8 any conditions the Hearings Officer finds
9 necessary to ensure the continued
10 compatibility of the use with adjoining land
11 uses."

12 In the second through thirteenth assignments of error,
13 petitioners contend the county failed to apply the criteria
14 of JCZO 15.204.1 through 15.205.5 to intervenor's
15 application, failed to adopt findings adequate to
16 demonstrate compliance with these criteria and made a
17 decision not supported by substantial evidence. Petitioners
18 also make similar arguments with regard to application of
19 and compliance with three comprehensive plan policies.

20 Intervenor concedes the county did not apply, or adopt
21 findings to demonstrate compliance with, JCZO 15.204.1
22 through 15.204.5 and the three plan policies cited by
23 petitioners. Intervenor argues, however, that these
24 criteria do not apply to the subject application, because
25 they were fully addressed and satisfied by the 1989
26 decision. Intervenor argues that modification of a
27 condition of the 1989 decision does not require that the
28 approval criteria for alteration of a nonconforming use be
29 addressed again.

30 As we explained above, we view the subject request to

1 be a request for a new approval for alteration of a
2 nonconforming use, necessitated because the 1989 decision
3 approved such alteration only for two years. In these
4 circumstances, the county is required to apply the approval
5 criteria of JCZO 15.204.1 through 15.204.5 in making its
6 decision, and to adopt findings supported by substantial
7 evidence demonstrating compliance with those criteria. The
8 county failed to do so.⁵

9 However, with regard to the plan policies cited by
10 petitioners, we point out that a nonconforming use is by
11 definition a use which is contrary to provisions of a local
12 government's comprehensive plan and land use regulations.
13 ORS 215.130 and county regulations adopted pursuant thereto,
14 provide a limited authorization for counties to approve
15 alterations to nonconforming uses which are contrary to
16 provisions of their plans and land use regulations. City of
17 Corvallis v. Benton County, 16 Or LUBA 488, 498 (1988). We
18 therefore disagree with petitioners' contention that these
19 plan policies are approval standards for alteration of a
20 nonconforming use.

21 The second through thirteenth assignments of error are
22 sustained in part.

⁵This failure would require that we remand the county's decision. However, under the first assignment of error, supra, we determine that the county's decision must be reversed for other reasons.

1 **FOURTEENTH ASSIGNMENT OF ERROR**

2 "Section 15.209 of the [JCZO] prohibits the
3 [county] from removing the two year time limit
4 provided in the 1989 decision."

5 JCZO 15.209 ("Change of a Non-Conforming Use")
6 provides:

7 "If a non-conforming use is changed, it shall be
8 changed to a use conforming to the regulations of
9 the district in which it is located, and after
10 change, it shall not be changed back again to any
11 non-conforming use."

12 Petitioners argue that the alteration approved by the
13 1989 decision constitutes an expansion making the restaurant
14 less conforming. According to petitioners, JCZO 15.209
15 therefore prevents the county from acting to extend the
16 temporary increase in nonconformity approved by the 1989
17 decision.

18 Intervenor contends JCZO 15.209 is not applicable to
19 the subject application. Intervenor argues that the
20 "change" of a nonconforming use referred to in JCZO 15.209
21 is a change in the fundamental nature of the use, and is
22 distinct from "alterations" of a nonconforming use allowed
23 pursuant to JCZO 15.204.

24 If petitioners' interpretation of JCZO 15.209 were
25 correct, no alterations to a nonconforming use of any kind
26 could be approved without bringing the use into conformity
27 with applicable regulations. This would clearly be
28 inconsistent with JCZO 15.204, which allows alterations to
29 nonconforming uses if certain standards are met.

1 Interpreting these provisions together, we agree with
2 intervenor that JCZO 15.209 refers only to changes in the
3 basic nature or type of a nonconforming use.

4 The fourteenth assignment of error is denied.

5 The county's decision is reversed.