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

McKAY CREEK VALLEY ASSOCIATION,)
)
Petitioner,)
)
vs.)
)
WASHINGTON COUNTY,)
)
Respondent.)

LUBA No. 92-216

FINAL OPINION
AND ORDER

Appeal from Washington County.

Michael A. Lewis, Eugene, filed the petition for review and argued on behalf of petitioner.

David C. Noren, Assistant County Counsel, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 05/05/93

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

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals an ordinance amending the Washington
4 County Community Development Code (CDC) by replacing the
5 text of CDC Section 440 (Nonconforming Uses).

6 **FIRST ASSIGNMENT OF ERROR**

7 "A county zoning ordinance may not allow
8 replacement of nonconforming single dwellings when
9 not made necessary by fire, other casualty or
10 natural disaster."

11 In this assignment of error, petitioner relies on the
12 following provisions of ORS 215.130 concerning nonconforming
13 uses:¹

14 * * * * *

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

25 "(6) Restoration or replacement of any use
26 described in subsection (5) of this section
27 may be permitted when the restoration is made
28 necessary by fire, other casualty or natural
29 disaster. Restoration or replacement shall

¹A "nonconforming use" is one which existed lawfully prior to the enactment of restrictive regulations and which may be continued after the effective date of such regulations, although it does not comply with the applicable restrictions. Holmes v. Clackamas County, 265 Or 193, 196-197, 508 P2d 190 (1973); Hanley v. City of Salem, 14 Or LUBA 204, 208 (1986).

1 be commenced within one year from the
2 occurrence of the fire, casualty or natural
3 disaster.

4 * * * * *

5 "(9) As used in this section, 'alteration' of a
6 nonconforming use includes:

7 "(a) A change in the use of no greater
8 adverse impact to the neighborhood; and

9 "(b) A change in the structure or physical
10 improvements of no greater adverse
11 impact to the neighborhood."

12 Petitioner challenges the portion of CDC 440-6
13 emphasized below:

14 "Alterations to a Nonconforming Use or Structure

15 "Alterations to a nonconforming use or structure
16 to reasonably continue the nonconforming use or
17 structure are permitted through a Type I, II or
18 III procedure. Alteration includes a change in
19 [the] nonconforming use of a structure or a parcel
20 of land; or replacement, addition or modification
21 in construction to a [nonconforming] structure.

22 * * * * *² (Emphasis added.)

23 Petitioner argues the county's authority to allow
24 alterations to nonconforming uses is limited by ORS 215.130.
25 Petitioner further argues that the above quoted portions of
26 ORS 215.130 recognize a distinction between the replacement
27 and the alteration of nonconforming uses, allowing

²In addition, standards included in CDC 440-6.2 and 440-6.3 governing approval of alterations to nonconforming uses implement the requirement of ORS 215.130(9)(a) and (b) that a change in a nonconforming use or structure have "no greater adverse impact to the neighborhood."

1 replacement only where replacement is made necessary by
2 fire, other casualty or natural disaster. According to
3 petitioner, the county cannot override this statutory
4 distinction by defining "alteration" to include
5 "replacement."³ Petitioner maintains that interpreting
6 ORS 215.130 as allowing the county to treat "replacement" of
7 a nonconforming structure as a type of alteration would make
8 ORS 215.130(6) meaningless.

9 The county argues that ORS 215.130(6) does not state
10 that a nonconforming use may be replaced only because of
11 fire or other casualty, nor does ORS 215.130(9) limit
12 "change in use" or "change in structure" to exclude
13 "replacement." According to the county, "replacement" of a
14 nonconforming structure is a "change" in that structure,
15 which can be allowed under ORS 215.130(5) and (9) as an
16 alteration to a nonconforming use, if it (1) reasonably
17 continues the nonconforming use, and (2) has no greater
18 adverse impact on the neighborhood. The county further
19 argues that this interpretation does not render
20 ORS 215.130(6) without effect. Under ORS 215.130(6), a
21 county may approve "replacement" of a nonconforming use
22 because of fire or other casualty, regardless of whether the
23 replacement reasonably continues the use or has a greater

³Petitioner also contrasts the definitions in Black's Law Dictionary for the terms replace ("to gain again, to restore to a former condition") and alteration ("variation; changing; making different").

1 adverse impact on the neighborhood.⁴

2 The county's authority to adopt regulations allowing
3 alterations to nonconforming uses is limited by ORS 215.130.
4 Bertea/Aviation, Inc. v. Benton County, 22 Or LUBA 424, 432
5 (1991); Scott v. Josephine County, 22 Or LUBA 82, 88 (1991);
6 City of Corvallis v. Benton County, 16 Or LUBA 488, 498
7 (1988). Prior to its amendment in 1979, ORS 215.130(5)
8 (then ORS 215.130(4)) provided that alteration of a
9 nonconforming use "may be permitted when necessary to
10 reasonably continue the use without increase * * *."
11 (Emphasis added.) Oregon Laws 1979, chapter 610, section 1,
12 deleted "without increase" and added the current definition
13 in ORS 215.130(9) of alteration of a nonconforming use as a
14 change in the nature of the use, the structure or associated
15 physical improvements, having no greater adverse impacts on
16 the neighborhood. This change shows the legislature
17 intended to replace a general prohibition against "increase"
18 in nonconforming uses with a specific requirement that any
19 alteration in a nonconforming use result in no greater
20 adverse impacts on the neighborhood. The statute imposes no
21 other limitation on the "changes" which may be potentially
22 permissible alterations to nonconforming uses. Gibson v.
23 Deschutes County, 17 Or LUBA 692, 702 (1989).

⁴Under ORS 215.130(6), however, replacement must be commenced within one year after the occurrence of the fire or other casualty necessitating the replacement.

1 ORS 215.130(6) gives a county the authority to adopt
2 regulations allowing replacement of a nonconforming use,
3 where necessitated by fire or other casualty, without
4 requiring that the replacement reasonably continues the use
5 or that the replacement has no greater adverse impact on the
6 neighborhood. Id., at 700 n 7. We see no basis in the
7 statute for concluding that "replacement" of a nonconforming
8 use may only be permitted under ORS 215.130(6).
9 Accordingly, it is within the county's authority under
10 ORS 215.130(5), (6) and (9) to adopt CDC provisions treating
11 "replacement" of a nonconforming structure as a potentially
12 allowable alteration of a nonconforming use, so long as it
13 requires that the replacement reasonably continues the
14 nonconforming use and has no greater adverse impact on the
15 neighborhood.⁵

16 The first assignment of error is denied.

17 **SECOND ASSIGNMENT OF ERROR**

18 "The County wrongfully determined that Statewide
19 Planning Goals 3 and 4 should not be considered
20 [in the] regulation of lawful nonconforming
21 use[s]."

22 Petitioner contends the county erred by failing to
23 apply, and adopt findings demonstrating compliance with,
24 Statewide Planning Goals 3 (Agricultural Lands) and 4

⁵There is no dispute that the provisions of CDC 440-6 adopted by the challenged decision include the requirements that the replacement of a nonconforming structure reasonably continues the nonconforming use and has no greater adverse impact on the neighborhood.

1 (Forest Lands). Petitioner argues the county improperly
2 found:

3 "Because nonconforming uses are governed by
4 ORS 215.130, the statewide planning goals are not
5 applicable, with the exception of Goals 1 and 2;
6 nonconforming uses are allowed to continue or be
7 altered notwithstanding the goals * * *."
8 Record 32.

9 We agree with petitioner that the above quoted finding
10 takes the position that Goals 3 and 4 do not apply to the
11 challenged amendment to the acknowledged county land use
12 regulations governing nonconforming uses. However, the
13 challenged decision also reflects a recognition by the
14 county that there is uncertainty regarding this issue, and
15 includes additional findings addressing Statewide Planning
16 Goals 1-14. Record 33-41. Petitioner does not contend the
17 findings that specifically address Goals 3 and 4 are
18 inadequate, or explain why these findings are insufficient
19 to demonstrate compliance with Goals 3 and 4.⁶ Therefore,
20 even if we were to agree with petitioner that Goals 3 and 4
21 are applicable to the challenged decision, this assignment
22 of error would not provide a basis for reversal or remand.

23 The second assignment of error is denied.

24 The county's decision is affirmed.

⁶For the most part, these findings explain why the county believes that unamended comprehensive plan policies and CDC provisions, together with standards for nonconforming uses adopted by the challenged decision as part of CDC section 440, insure that replacement of nonconforming dwellings under CDC 440-6 will have no adverse impacts on farm or forest uses. Record 33, 36-37.