

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

3
4 LLOYD SUYDAM,)
5)
6 Petitioner,)
7)
8 vs.)
9) LUBA No. 94-249
10 DESCHUTES COUNTY,)
11) FINAL OPINION
12 Respondent,)
13) AND ORDER
14 and)
15)
16 JIM FRALEY,)
17)
18 Intervenor-Respondent.)

19
20
21 Appeal from Deschutes County.

22
23 Peggy Hennessy, Portland, filed the petition for review
24 and argued on behalf of petitioner.

25
26 No appearance by respondent.

27
28 Lawrence W. Erwin, Bend, and Charles C. Erwin,
29 Portland, filed the response brief and argued on behalf of
30 intervenor-respondent.

31
32 SHERTON, Chief Referee, participated in the decision.

33
34 REMANDED 05/30/95

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 Petitioner appeals an order of the board of county
4 commissioners determining that a truck repair and welding
5 business is a valid nonconforming use.

6 **MOTION TO INTERVENE**

7 Jim Fraley, the applicant below, moves to intervene in
8 this proceeding on the side of respondent. There is no
9 opposition to the motion, and it is allowed.

10 **FACTS**

11 In 1969, Bill Lee, intervenor's predecessor in
12 interest, purchased an approximately six-acre parcel, which
13 was then unzoned and which included the subject property.
14 There is no dispute that sometime between 1969 and 1972, an
15 approximately 4,800 square foot metal building with large
16 doors for vehicle access was erected on the subject
17 property. Effective February 13, 1973, Deschutes County
18 Ordinance PL-5 zoned the property A-1, an exclusive farm use
19 zone that did not allow a vehicle repair business. Whether
20 a vehicle repair business existed on the subject property on
21 February 13, 1973 is a central issue in this appeal.

22 On March 4, 1977, the county approved a variance to
23 allow Lee to partition the six-acre parcel into a five-acre
24 residential parcel and the subject one-acre parcel
25 containing the shop building and Lee's vehicle repair
26 business. Record 365-67. The minor partition was approved

1 on July 24, 1979. On November 1, 1979, Deschutes County
2 Ordinance PL-15 changed the zoning of the subject property
3 to its Multiple Use Agricultural and Landscape Management
4 Combining Zone (MUA10-LM) zoning, which does not permit a
5 vehicle repair business.

6 In June 1987, the subject property was purchased by
7 Raymond Sophy. In June 1990, intervenor purchased the
8 subject property and began to operate a diesel truck repair
9 and welding business. Intervenor's operation involves seven
10 employees and contract workers. Record 141-42. Whether any
11 nonconforming use of the subject property for a vehicle
12 repair business was abandoned or discontinued prior to
13 June 1990 is an issue in this appeal.

14 After the county initiated a code enforcement
15 proceeding against intervenor, intervenor applied for
16 verification of a nonconforming use, and the enforcement
17 proceeding was suspended. After a public hearing, the
18 county hearings officer denied intervenor's application.
19 Record 203. Intervenor appealed the hearings officer's
20 decision to the board of commissioners. After an additional
21 hearing, the board of commissioners issued the challenged
22 decision determining that intervenor's truck repair and
23 welding business is a valid nonconforming use and imposing
24 certain limitations on its operation.

25 **ASSIGNMENTS OF ERROR**

26 Petitioner contends the challenged decision fails to

1 determine that a vehicle repair business existed on the
2 subject property on February 13, 1973, the date restrictive
3 zoning was applied, or the nature and extent and of any such
4 use.¹ Petitioner next contends the challenged decision
5 fails to determine whether any such nonconforming use was
6 abandoned or interrupted prior to June 1990. Finally,
7 petitioner contends the scope and intensity of intervenor's
8 existing business exceeds anything allowable as a
9 nonconforming use. Petitioner argues the county's findings
10 are inadequate to demonstrate compliance with the relevant
11 portions of ORS 215.130.²

¹Petitioner also argues that under Webber v. Clackamas County, 42 Or App 151, 600 P2d 448, rev den 288 Or 81 (1979), the proponent of a nonconforming use bears the burden of proving whether a nonconforming use was established, and contends there is no evidence in the record to establish that a vehicle repair business existed on February 13, 1973 or the nature and scope of such business.

²ORS 215.130(5) through (9) provide as follows:

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

"(6) Restoration or replacement of any use described in subsection (5) of this section may be permitted when restoration is made necessary by fire, or other casualty or natural disaster. Restoration or replacement shall be commenced within one year from the occurrence of the fire, casualty or natural disaster.

"(7) Any use described in subsection (5) of this section may not be resumed after a period of interruption or

1 The challenged decision identifies the applicable
2 standards as ORS 215.130, DCC 18.120.010 and the definition
3 of "use" in PL-5. The county's findings of fact, in their

abandonment unless the resumed use conforms with the requirements of zoning ordinances or regulations applicable at the time of the proposed resumption.

"(8) Any proposal for the alteration of a use under subsection (5) of this section, except an alteration necessary to comply with a lawful requirement, for the restoration or replacement of a use under subsection (6) of this section or for the resumption of a use under subsection (7) of this section shall be subject to the provisions of ORS 215.416.

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

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

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

Deschutes County Code (DCC) 18.120.010.A (Verification of Nonconforming Use) implements the provisions of ORS 215.130(5) and (7) with regard to determinations concerning the existence of a nonconforming use:

"Verification of the existence of a nonconforming use * * * shall be required prior to or concurrent with any application to alter or restore the use. The burden of proof shall be on the applicant to demonstrate its lawful existence. The applicant shall demonstrate all the following:

"a. The nonconforming use * * * was lawful on the effective date of the provisions of this title prohibiting the use.

"b. The nonconforming use * * * was actually in existence on the effective date of the provisions of this title prohibiting the use, or had proceeded so far toward completion that a right to complete and maintain the use would be vested.

"c. The nonconforming use * * * has not been interrupted for a period in excess of one year or was never abandoned."

DCC 18.120.010.D implements ORS 215.130(8) and (9) regarding alterations of nonconforming uses.

1 entirety, state:

2 "1. The County's records and evidence disclose
3 the site was developed and the [shop]
4 structure existed in 1969. The structure has
5 always had contained in it a hydraulic hoist,
6 has always had large doors to facilitate
7 access for large equipment and vehicles. The
8 site has been used for a variety of
9 commercial enterprises, the principal type
10 uses being the repair and maintenance of
11 trucks, motor homes, mobile homes, and
12 vehicles, including construction companies
13 and their equipment.

14 "2. Deschutes County granted a variance to a
15 former owner, Bill Lee, to split off the
16 subject parcel from the residential portion
17 of the site in 1977 at which time it was
18 found to contain a 'nonconforming truck
19 repair and contracting business on the
20 [subject] one acre' and a minor partition was
21 approved in MP-78-42, on July 24, 1979.^[3]

22 "3. Use of the site and building has not been
23 abandoned or interrupted for over one year
24 and there have been no alterations in the
25 nature of and physical structures employed by
26 the nonconforming use.

27 "4. [Intervenor] has occupied and used the site
28 and structure since May of 1990 as a truck
29 repair [sic] and for related activities."
30 (Emphasis added.) Record 18.

31 In Spurgin v. Josephine County, ___ Or LUBA ___ (LUBA

³Intervenor does not contend this finding means the county previously made a determination verifying the existence of a nonconforming use on the subject property, and we agree. Based on the record, it appears the 1977 proceeding was not conducted for the purpose of determining the existence of a nonconforming use on the subject property. Record 365-67. We agree with intervenor that, at most, this finding is a statement that the 1977 variance decision constitutes evidence that there was a truck repair and contracting business on the subject property in 1977.

1 No. 94-087, December 8, 1994), slip op 4-5, we explained
2 that in determining whether an existing use of property has
3 a right to continue as a nonconforming use, which is what
4 the county purported to do in this case, there generally are
5 four inquiries a local government must make. First, was the
6 use lawfully established at the time the zoning that first
7 prohibited the use was applied? Second, what was the nature
8 and extent of the use at the time it became nonconforming?
9 Third, if the use lawfully existed at the time restrictive
10 zoning was applied, has the use since been discontinued or
11 abandoned such that the right to continue as a nonconforming
12 use was lost? Finally, if the nature and extent of the
13 present use represents an alteration of the use in existence
14 at the time the use became nonconforming, do those
15 alterations comply with the standards governing alteration
16 of nonconforming uses?

17 The first and second questions identified in Spurgin
18 are whether a use was lawfully established on the date
19 restrictive zoning was first applied and, if so, what was
20 the nature and extent of that use. The challenged decision
21 simply states the shop building has existed on the subject
22 property since 1969. The decision does not state that any
23 particular use of the property existed as of February 13,
24 1973, the date the A-1 zone was first applied, or what the

1 nature and extent of any such use was.⁴ The decision merely
2 states the property "has been used for a variety of
3 commercial enterprises." Record 18.

4 The requirement to identify the nature and extent of
5 the nonconforming use is critical because the protected
6 right to continue a nonconforming use is a right to continue
7 the nature and extent of use that existed at the time the
8 use became nonconforming.⁵ Polk County v. Martin, 292 Or
9 69, 366 P2d 952 (1981); Spurgin, supra, slip op at 9-10. As
10 we explained in Spurgin, supra, slip op at 10-11:

11 "[A] county has some flexibility in the manner and
12 precision with which it describes the scope and
13 nature of a nonconforming use. However, [a]
14 county may not, by means of an imprecise
15 description of the scope and nature of the

⁴As mentioned above, the decision identifies the following definition of
"use" from PL-5 as an applicable criterion:

"USE: The purpose for which land or a structure is designed,
arranged or intended, or for which it is occupied or
maintained."

The decision does not elsewhere interpret this provision or explain how the
county applied this provision in making the challenged decision. If the
county believes that under this definition of "use," it may conclude that a
nonconforming use existed simply because there was a structure on the
subject property, it must set out that interpretation in its decision and
explain how that interpretation is consistent with ORS 215.130(5) and the
requirement of DCC 18.120.010.A(b) that a nonconforming use be "actually in
existence" on the effective date of restrictive zoning or have a vested
right to exist.

⁵Additionally, we note it is the proponents of a nonconforming use that
have the burden of producing evidence from which a local government can
make an adequate determination of the nature and extent of the
nonconforming use. Tylka v. Clackamas County, ___ Or LUBA ___ (LUBA No.
94-017, December 19, 1994), slip op 23; Warner v. Clackamas County, 25
Or LUBA 82, 86 (1993).

1 nonconforming use, authorize de facto alteration
2 or expansion of the nonconforming use. At a
3 minimum, the description of the scope and nature
4 of the nonconforming use must be sufficient to
5 avoid improperly limiting the right to continue
6 that use or improperly allowing an alteration or
7 expansion of the nonconforming use without
8 subjecting the alteration or expansion to any
9 standards which restrict alterations or
10 expansions." (Footnote omitted.)

11 Intervenor argues we can infer what the county believed
12 the nature and extent of the nonconforming use to be from
13 the conditions imposed by the county on intervenor's current
14 operation. Such conditions include limitations on days and
15 hours of operation, a prohibition against performing vehicle
16 repair work outside the shop building, and a limitation on
17 the area devoted to outdoor storage of vehicles and
18 material. Intervenor also points out the section of the
19 decision limiting the intensity of his use includes the
20 following statement:

21 "This decision acknowledges and reflects the
22 historic use of the property as illustrated in the
23 record. Any increase in the size of the use,
24 expansion onto other areas of the property or
25 other properties, or significant change in the
26 nature of the use is prohibited." (Emphasis
27 added.) Record 19.

28 The above emphasized statement is not the equivalent of
29 a determination regarding the nature and extent of the use
30 of the subject property that existed on February 13, 1973.
31 We agree with petitioner that identifying a nonconforming
32 use as a "variety of commercial enterprises," without
33 identifying the nature and extent of the particular

1 commercial enterprise that existed on the subject property
2 at the time restrictive zoning was applied, is not
3 sufficient.

4 The third question identified in Spurgin requires a
5 county to determine whether a nonconforming use was
6 discontinued or abandoned after the date restrictive zoning
7 was applied, such that the right to continue the
8 nonconforming use was lost. Finding 3, quoted supra, is
9 simply a conclusory statement that the standard of
10 DCC 18.120.010.A(c) is satisfied. The finding fails to
11 address several issues raised below concerning the nature
12 and extent of various enterprises that occupied the subject
13 property between 1984 and 1990 and whether a complete or
14 partial interruption or abandonment of any nonconforming use
15 that existed on February 13, 1973 occurred during those
16 years.

17 In conclusion, we agree with petitioners that the
18 county's findings are inadequate because they do not
19 determine what use of the subject property existed on
20 February 13, 1973 or the nature and extent of such use. The
21 findings also fail to adequately address whether any
22 nonconforming use of the subject property, or aspect
23 thereof, was lost through interruption or abandonment prior
24 to intervenor's purchase and use of the property.⁶ Without

⁶Because the county's findings are inadequate, no purpose would be served in addressing petitioners' challenges to the evidentiary support for

1 adequate determinations on the nature and extent of any
2 nonconforming use, and whether the right to continue all or
3 any part of such use has been lost, the county cannot
4 determine whether intervenor's existing operation is
5 allowable as a continuation of the nonconforming use.

6 The assignments of error are sustained.

7 The county's decision is remanded.

those findings. Forster v. Polk County, 22 Or LUBA 380, 388 (1991); DLCD v. Columbia County, 16 Or LUBA 467 (1988).