BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

AQUILEO AGUILAR
and MARIA AGUILAR,
Petitioners,

vs.

WASHINGTON COUNTY,
Respondent.

LUBA No. 2004-193

FINAL OPINION
AND ORDER

Appeal from Washington County.

Lawrence R. Derr, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Josselson, Potter and Roberts.

Christopher A. Gilmore, Assistant County Counsel, Hillsboro, filed the response brief and argued on behalf of respondent.

HOLSTUN, Board Chair; BASSHAM, Board Member; DAVIES, Board Member, participated in the decision.

AFFIRMED 04/27/2005

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a county decision denying their request that the county verify the current use of their property qualifies as a nonconforming use and for that reason may continue notwithstanding county zoning laws that would otherwise prohibit the use.

FACTS

The relevant facts do not appear to be in dispute. The county first applied zoning to the property in 1974. The Agriculture-Forestry zoning that is applied to the property does not allow grocery storage use. A three-part structure on petitioners' property is currently being used for grocery storage. That three-part structure began as a single building, which was built sometime between 1974 and 1980.[1] A second building was built near the first building sometime between 1980 and 1984. Later, a roof was constructed over the open area between the two buildings sometime during the 1990s. That roof resulted in a covered area that was open on two sides and bounded by the buildings on two sides. Sometime after 2000, the open sides were enclosed with walls and the disputed three-part structure resulted.

It is not disputed that from 1984 until petitioners purchased the property in 2000, the property was used for storage in conjunction with an excavating business, "O.K. Tobey Excavating." Record 255. Sometime after petitioners occupied the property in 2001, the storage use on the property was changed to grocery storage.

The hearings officer's decision describes the county's enforcement action against petitioners' grocery storage use of the property:

> "After 2000 the County cited the applicant for the physical alteration of the two buildings without building permits and for use of the two buildings for storage of food and vending supplies. Approval of the application would remedy the alleged

[1] There is no evidence in the record that the first building was constructed and put to storage use before zoning was first applied to the property in 1974.

use violations, after which the applicant could apply for and receive approval of building permits to remedy the code violations." Record 6.

The hearings officer also describes the only legal issue that must be decided to resolve this matter as follows:

> "* * * Whether the applicant must show that the [nonconforming use] was legally established prior to the effective date of zoning in 1974, or whether ORS 215.130 prohibits the County from requiring the applicants to show the use existed prior to June 10, 1984 (i.e., 20 years prior to the date of the application). If the applicant is required to show that the use was legally established prior to 1974, the application should be denied, because the applicants did not meet that burden of proof. * * *" Record 7.

The hearings officer found that petitioners are required to provide evidence to establish that the first two structures were legally established and that ORS 215.130(11) does not prohibit the county from requiring proof that a use that first came into existence more than 20 years ago was legally established at the time the use first came into existence.

FIRST ASSIGNMENT OF ERROR

Our resolution of this matter requires us to determine whether the hearings officer's or petitioners' interpretation of ORS 215.130 is correct. We turn directly to that question after setting out relevant sections of that statute below.

The first four sections of ORS 215.130 have nothing to do with nonconforming uses. The sections of that statute that grant property owners certain rights to continue existing lawful uses of land nothwithstanding the enactment or change of county land use laws that would otherwise limit or prohibit lawful uses of land that already exist when the land use laws are enacted or amended appear at ORS 215.130(5) through (11). Relevant sections of the statute are set out below:

> "(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. * * *"
>
> "* * * * *
>
> "(7)(a) Any use described in subsection (5) of this section may not be resumed after a period of *interruption or abandonment* unless the resumed use

conforms with the requirements of zoning ordinances or regulations applicable at the time of the proposed resumption.

"* * * * *

"(10) A local government may adopt standards and procedures to implement the provisions of this section. The standards and procedures may include but are not limited to the following:

"(a) For purposes of verifying a use under subsection (5) of this section, a county may adopt procedures that allow an applicant for verification to prove the existence, continuity, nature and extent of the use only for the 10-year period immediately preceding the date of application. Evidence proving the existence, continuity, nature and extent of the use for the 10-year period preceding application creates a rebuttable presumption that the use, as proven, *lawfully* existed at the time the applicable zoning ordinance or regulation was adopted and has continued uninterrupted until the date of application[.]"

"* * * * *

"(11) For purposes of verifying a use under subsection (5) of this section, a county may not require an applicant for verification to prove the existence, continuity, nature and extent of the use for a period exceeding 20 years immediately preceding the date of application." (Emphases added.)

A. ORS 215.130(5) (Lawful Existence)

1. The Statute

As relevant in this appeal, ORS 215.130(5) is not ambiguous. ORS 215.130(5) preserves a right to continue a "lawful use of any building, structure or land," notwithstanding the "enactment or amendment of any zoning ordinance or regulation," that might otherwise prohibit such continuation. While ORS 215.130(5) does not emphasize the two-part nature of the inquiry that is required by the subsection, the inquiry is nevertheless a two-part inquiry. It is not enough that a "use of any building, structure or land" *existed* when the zoning or other regulation was first enacted or later amended; it must have existed as a "lawful" use at the time the law changed. A use that was established in contravention of any existing land use laws and therefore did not exist "lawfully" at the

time the law changed is not saved by ORS 215.130(5), simply because it *existed* when the zoning or other regulation was first enacted or later amended.

2. The Washington County Community Development Code (CDC)

CDC 440-1 reflects ORS 215.130(5) and also allows lawful existing uses to continue notwithstanding changes in land use laws.[2] However, the wording of ORS 215.130(5) and one of the county's other parallel local code provisions at CDC 440-3.1 is different in a way that probably explains the different approaches that petitioners and the county take in this matter. We therefore take a moment here to discuss that difference.

As relevant, CDC 440-3.1 requires proof that "[t]he nonconforming use was lawfully *established* in accordance with applicable land use standards." The express focus in CDC 440-3.1 is on the date a use was *established*. ORS 215.130(5) requires that the use must have been lawful, on the date land use laws were first enacted or changed. The express focus in ORS 215.130(5) is on the date the law was first applied or amended rather than on the date the use was established. Despite this temporal difference in express focus, the substance of the CDC and ORS 215.130(5) appears to be the same. The right to continue a use as a nonconforming use extends only to *lawful* uses.

Under CDC 440-3.1, an applicant would *directly* prove that their use was "lawfully established" by proving: (1) the date the use was established, and (2) that no land use laws existed at that time, or that the use conformed with any land use laws that applied at that time. CDC 440 would then provide conditional protection from any subsequent changes in the land use laws.

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[2] As relevant, CDC 440-1 provides:

> "A nonconforming use is a structure or use of land which does not conform to the provisions of this Code or Comprehensive Plan lawfully in existence on the effective date of enactment or amendment of this Code or Comprehensive Plan. It is the intent of this Section to allow and regulate existing uses and structures that were lawfully established and are not now in conformance with the applicable regulations of this Code."

Under ORS 215.130(5), an applicant would *directly* prove that a use was lawful at the time the land use law was enacted or amended to prohibit or limit the use by proving when those laws were enacted or amended and (2) that the use predated those laws. ORS 215.130(5) would then provide conditional protection from any subsequent change in the land use laws.

However, the *direct* proof of a nonconforming use under CDC 440-3.1 described above (lawfulness on the date of creation) is also *indirect* proof of a nonconforming use under ORS 215.130(5) described above (that the use existed at the time the prohibiting land use laws first applied) and vice versa.[3] While proof of *existence* is an element of both proofs, it is only an element.

B. ORS 215.130(7)(a) (Interruption or Abandonment)

ORS 215.130(7)(a) is not directly relevant in this case. However, ORS 215.130(7)(a) was largely responsible for the adoption of the two provisions that do bear more directly on the question presented in this appeal. Under ORS 215.130(7)(a), the right to continue a legal use that is extended by ORS 215.130(5) is lost if the use is "interrupted or abandoned." Because proof that a use was not interrupted or abandoned necessitates proof that a use continued to exist, "existence" is an element in establishing that a use was not interrupted or abandoned just as it is an element in the required proof under ORS 215.130(5) that the use was lawful at the time the land use laws first applied or were amended.

C. ORS 215.130(10)(a) (Rebuttable Presumption)

As more time passes after the date zoning and other land use regulations were first applied to property, uses that depend on their status as existing legal uses on the date zoning and other land

[3] There is one circumstance that we can think of where a use would qualify as a nonconforming use under the statute but might not qualify as a nonconforming use under CDC 440. Where a use is established at a time when land use laws prohibit the use but those laws are later amended to allow the use and then subsequently amended a second time to again prohibit the use, the use would arguably qualify as a nonconforming use under ORS 215.130(5) but would not qualify under CDC 440-3.1. Because that circumstance is not presented in this appeal we do not consider it further except to note that the statute would likely control. *Wuester v. Clackamas County*, 25 Or LUBA 425, 431 (1993).

use regulations first applied face increasingly more difficult problems of proof. In 1997 the legislature adopted what is now codified at ORS 215.130(10)(a) to ease that burden of proof. ORS 215.130(10)(a) authorizes counties to adopt a procedure whereby an applicant may limit its proof to the 10 years that precede the application. Under the first sentence of ORS 215.130(10)(a), if the applicant can "prove the existence, continuity, nature and extent of the use * * * for the 10-year period immediately preceding the date of application," the applicant establishes the rebuttable presumption that is stated in the second sentence of ORS 215.130(10)(a).

There is an ambiguity in the first sentence of ORS 215.130(10)(a) that is repeated in the first clause of the second sentence but is eliminated in the last clause of the second sentence. Proof that a use "existed" ten years ago certainly does not mean that the use existed when the zoning or other land use regulation was first applied more than 10 years ago or that it existed *legally* at that time. The last clause of the presumption makes it clear that proof that a use existed 10 years ago is sufficient to entitle the applicant to a rebuttable presumption that the use "lawfully existed" when the zoning or other land use regulation was first applied. In other words, the rebuttable presumption applies to both parts of the inquiry that is necessary under ORS 215.130(5), *i.e*. that the use existed on that date and that its existence was lawful.

D. ORS 215.130(11) (Twenty Year Limit on Proof)

ORS 215.130(11) is the focus of this appeal. Although we have already quoted it above, we set it out again here:

> "For purposes of verifying a use under subsection (5) of this section, a county may not require an applicant for verification to prove the existence, continuity, nature and extent of the use for a period exceeding 20 years immediately preceding the date of application."

We assume that the general purpose underlying ORS 215.130(11) is similar to the general purpose that underlies ORS 215.130(10)(a). Both sections of the statute appear to have been adopted to assist applicants who face difficult burdens of proof in establishing that they have a nonconforming use that is protected under ORS 215.130(5), where the relevant zoning or other

ordinance that prohibits the use was applied many years ago. However, ORS 215.130(11) operates somewhat differently from ORS 215.130(10)(a). ORS 215.130(10)(a) gives counties the *option* to allow a reduced burden of proof via a *rebuttable presumption*. ORS 215.130(11) *prohibits* a county from requiring any proof of four things: "existence, continuity, nature and extent." Whereas ORS 215.130(10)(a) is optional and only a rebuttable presumption, ORS 215.130(11) is a strict limitation that appears to allow an applicant to establish "existence, continuity, nature and extent," as a matter of law, by proving "existence, continuity, nature and extent" for the prior 20 years.

It may be, as petitioners contend, that the legislature intended the ORS 215.130(11) prohibition against requiring proof of a use's "existence" more than 20 years ago to include a prohibition against any requirement that the applicant prove the use was a *lawfully* existing use on the date the zoning or other land use regulation was first applied more than 20 years ago.[4] That interpretation is at least consistent with a literal reading of the language of ORS 215.130(11) because to prove that a use lawfully existed on the date it first came into existence more than 20 years ago, one must prove that it existed at that point in time 20 years ago. However, we do not agree that ORS 215.130(11) unambiguously imposes such a prohibition on proof of existence, when proof of existence is merely part or an element of the required proof that the use was lawful when the law changed to make it unlawful.

The legislature was careful to expressly provide that the rebuttable presumption in ORS 215.130(10)(a) extends to both existence *and* lawfulness. That is at least some indication that the legislature believes existence and lawfulness are different things. The legislature's failure to say anything about "lawfulness" in ORS 215.130(11) creates an ambiguity that cannot be adequately

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[4] Petitioners argue:

> "Lawful existence is a subset of the set, existence. If the statute prohibits requiring proof of existence beyond the cut-off date, it certainly prohibits requiring proof of lawful existence beyond the same date. The plain meaning of subsection (11) is that no proof of existence can be required earlier than the [20-year] cut-off date." Petition for Review 11.

resolved by analysis of the text and context of ORS 215.130(11). Although petitioners' interpretation is consistent with the literal words of ORS 215.130(11), we do not agree that ORS 215.130(11) unambiguously prohibits the county from requiring proof that a use was a lawful use when it came into existence more than 20 years ago or that it existed when the land use laws changed to prohibit the use. This is not a case where the "legislature's intent * * * is clear from the text and context of the relevant statutes." *Smith v. Salem-Keizer School District*, 188 Or App 237, 245, 71 P3d 139 (2003). It is therefore appropriate to view the legislative history that the county relied on.

The statutory language that is now codified at ORS 215.130(11) was first adopted in 1999 as Senate Bill 470 (SB 470). The county provides the following explanation of the history of the adoption of SB 470:

> "The legislature adopted [SB] 470 including the text that is now codified at ORS 215.130(11). Senators Beyer and George, at the request of Oregonians in Action, first introduced this bill on February 8, 1999. Two public hearings followed by work sessions were conducted on March 9 and 10, 1999. Two people testified at the first hearing before the Senate Water and Land Use Committee: Ed Shattuck, a property owner, and Larry George, Executive Director of Oregonians in Action ('OIA'). The only written material included in the record was a letter from Mr. George to Senator Veral Tarno, Chair of the Committee * * *." Respondent's Brief 10.

Because the letter describes the purpose and intent of SB 470 in some detail, we set out most of that letter below:

"**BACKGROUND**

"State and local land use laws have changed dramatically over the past thirty years. Many times a landowner establishes a legal use on his or her property, only to have the land use laws change, making such use illegal. Although the use was legal at its inception, changes in land use laws make the original use on the property a 'nonconforming' use.

"Prior to 1997 Oregon landowners had to prove continual use of a property from the time the use became nonconforming through the present day. In some cases this can be thirty-five years or more. The 1997 legislature made amendments to ORS 215.130 by allowing county governments the option to require a landowner to only prove 10 years of continual use on the property.

"The problem is that not all county governments have taken advantage of the new statutes, and in some cases have required that land owners prove several decades of continual use. Simply because of the length of time or incomplete records, landowners may know that the use has been continual, but cannot document it.

"**SB 470**

"[SB] 470 leaves in place the ability of a local government to verify nonconforming use by using the 10-year test allowed [by ORS 215.130(10)(a)]. What SB 470 adds is a 20-year limitation. Under SB 470 a landowner must prove two things:

"1) That the use, when initiated, was a legal use allowed in the zone and that the landowner complied with the permit requirements to establish the use, ***and***

"2) That the use has existed continuously for at least the past 10 years, ***but the landowner cannot be required to prove more than 20 years of continual existence***." Record 98-99 (emphases in original).

The only legislative history that has been provided to us clearly supports the county's view of ORS 215.130(11) and just as clearly contradicts petitioners' interpretation. The letter was offered by the sponsor of the legislation and shows that the problem that was to be addressed by SB 470 was the difficulty of proving continuity of use, not the difficulty in proving that the use was lawfully established or that the use was lawful on the date the law changed. The sponsor specifically represented to the committee that under the bill the landowner must continue to prove that the use, when initiated, was a legal use.

ORS 215.130(11) bars the county from requiring proof of the continuous "existence" at discrete points in time after it became a nonconforming use if proof is provided to establish continuous existence for the past 20 years. ORS 215.130(11) does not bar the county from requiring that the applicant prove (1) the date the use was established or (2) that the use existed on the date the relevant land use laws changed to prohibit the use. The legislative history makes clear what is not clear under the statute; ORS 215.130(11) operates to apply the 20-year cut-off to any requirement of proof of existence as an element of continuity but it does not apply the 20-year cut-off to any requirement of proof of existence as an element of lawfulness at the time the use became nonconforming. We agree with petitioners that legislative history cannot provide a basis for disregarding unambiguous statutory language. However, we have already concluded that the statute, when viewed in context, is ambiguous. We find that the legislative history is persuasive. Although we do not agree with all of the county's reasoning or analysis in the challenged decision, we agree with the county that ORS 215.130(11) does not bar it from requiring that petitioners present evidence to establish that their use was lawful at the time it was initiated more than 20 years ago. Because petitioners failed to carry their burden of proof on that question, the county properly denied petitioners' request.

Finally, we emphasize that there may also be persuasive public policy reasons why counties should be barred from requiring that an applicant for a nonconforming use determination prove that a use was lawful when initiated more than 20 years ago, in cases where the applicant can prove that the use has existed continuously for the past 20 years. As more time passes problems of proof are likely to increase and assuming lawfulness at the beginning likely becomes more warranted. However, the legislature did not unambiguously state that intent in ORS 215.130(11), and the legislative history belies any such intent.

The county's decision is affirmed.[5]

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[5] Given our disposition of the first assignment of error, the county's decision must be affirmed, and it is not necessary to consider petitioners' second and third assignments of error.