BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAMES FRALEY, Petitioner, vs. DESCHUTES COUNTY, Respondent, and LLOYD SUYDAM, Intervenor-Respondent.	LUBA No. 96-092 FINAL OPINION AND ORDER

Appeal from Deschutes County.

Lawrence W. Erwin, Bend, filed the petition for review and argued on behalf of petitioner.

No appearance by respondent.

Peggy Hennessy, Portland, filed the response brief and argued on behalf of intervenor-respondent.

LIVINGSTON, Referee; HANNA, Chief Referee, participated in the decision.

AFFIRMED 09/20/96

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

Opinion by Livingston.

NATURE OF THE DECISION

Petitioner appeals a decision of the board of county commissioners denying his application for verification of a nonconforming use in the county's Multiple Use Agricultural and Landscape Management Combining Zone.

MOTION TO INTERVENE

Lloyd Suydam (intervenor) moves to intervene on the side of the respondent. There is no opposition to the motion, and it is allowed.

FACTS

The primary focus of petitioner's business is the repair of diesel engines and tractor trailer trucks. Five to six trucks are serviced each day, at least six days a week. Four full-time and two part-time employees work on diesel engines, and one employee works on cars and small vehicles. Secondary aspects of the business include a rock mill, wood chip trucking, and the repair and rehabilitation of boats and motor homes.

The history of this case is set forth in Suydam v. Deschutes County, 29 Or LUBA 273, 274-75, aff'd 136 Or App 548, rev den 322 Or 361 (1995):

> "In 1969, Bill Lee, [petitioner's] predecessor in interest, purchased an approximately six-acre parcel, which was then unzoned and which included the subject property. There is no dispute that sometime between 1969 and 1972, an approximately 4,800 square foot metal building with large doors for vehicle access was erected on the subject

property. Effective February 13, 1973, Deschutes County Ordinance PL-5 zoned the property A-1, an exclusive farm use zone that did not allow a vehicle repair business. Whether a vehicle repair business existed on the subject property on February 13, 1973 is a central issue in this appeal.

"On March 4, 1977, the county approved a variance to allow Lee to partition the six-acre parcel into a five-acre residential parcel and the subject one-acre parcel containing the shop building and Lee's vehicle repair business. Record 365-67. The minor partition was approved on July 24, 1979. On November 1, 1979, Deschutes County Ordinance PL-15 changed the zoning of the subject property to its Multiple Use Agricultural and Landscape Management Combining Zone (MUA10-LM) zoning, which does not permit a vehicle repair business.

"In June 1987, the subject property was purchased by Raymond Sophy. In June 1990, [petitioner] purchased the subject property and began to operate a diesel truck repair and welding business. [Petitioner's] operation involves seven employees and contract workers. Record 141-42. Whether any nonconforming use of the subject property for a vehicle repair business was abandoned or discontinued prior to June 1990 is an issue in this appeal.

"After the county initiated a code enforcement proceeding against [petitioner], [petitioner] applied for verification of a nonconforming use, and the enforcement proceeding was suspended. After a public hearing, the county hearings officer denied [petitioner's] application. Record 203. [Petitioner] appealed the hearings officer's decision to the board of commissioners. After an additional hearing, the board of commissioners issued the challenged decision determining that [petitioner's] truck repair and welding business is a valid nonconforming use and imposing certain limitations on its operation."

In Suydam we remanded the county's decision to permit

the county to make the four inquiries described in Spurgin v. Josephine County, 28 Or LUBA 383, 386-87 (1994):

> 1. Was the use lawfully established at the time the zoning that first prohibited the use was applied?
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> 2. What was the nature and extent of the use at the time it became nonconforming?
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> 3. If the use lawfully existed at the time restrictive zoning was applied, has the use since been discontinued or abandoned such that the right to continue as a nonconforming use was lost?
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> 4. If the nature and extent of the present use represents an alteration of the use in existence at the time the use became nonconforming, do those alterations comply with the standards governing alteration of nonconforming uses?

The county held a public hearing on remand on February 21, 1996, and accepted oral and written argument based on the existing record. On May 1, 1996, the county denied the application.

SECOND ASSIGNMENT OF ERROR

Petitioner contends the county imposed an impossible burden on him "to prove the precise number of vehicles and equipment on site on February 13, 1973[,] the date of the restrictive zoning, denying fundamental due process." Petition for Review 14. The county did not, in fact, require proof of a precise number of vehicles and equipment. However, we understand petitioner to contend more generally that because no one could provide the detail demanded by the

county about a business in existence more than 23 years ago, the county was too demanding in its application of Deschutes County Code (DCC) 18.120.010.A. (Verification of Nonconforming Use), which contains the relevant code provisions.[1]

Nonconforming uses are not favored because, by definition, they detract from the effectiveness of comprehensive land use regulation. Clackamas Co. v. Port. City Temple, 13 Or App 459, 462, 511 P2d 412, rev den (1973). One who claims a nonconforming use bears the burden of proving the facts upon which the right to such a use is based. Webber v. Clackamas County, 42 Or App 151, 154, 600 P2d 448, rev den 288 Or 81 (1979). Although it may be more

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[1]DCC 18.120.010.A. provides:

> "* * * Verification of the existence of a nonconforming use * * * is 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.A implements certain provisions of ORS 215.130(5) and (7) with regard to determinations concerning the existence of a nonconforming use.

difficult in most cases to establish the nature and extent of a use that existed years ago, the requirement is not reduced in proportion to the difficulty one has in satisfying it. We do not minimize the difficulty petitioner faces in establishing the nature and extent of a use that existed on the subject property on February 13, 1973, and in the years thereafter, particularly when many different businesses have occupied the property since 1973. Nevertheless, that is what ORS 215.130 and DCC 18.120.010.A require petitioner to do.

Petitioner also contends that charging him $1,000 to verify a nonconforming use in Deschutes County violates his rights under Article 1, section 18 of the Oregon Constitution and the Fourteenth Amendment to the United States Constitution. This argument is not developed, and we do not consider it further. Joyce v. Multnomah County, 23 Or LUBA 116, 118 (1992).

The second assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

Petitioner contends he satisfied all four of the Spurgin criteria, and maintains the county's conclusion to the contrary is not supported by substantial evidence in the record. Petitioner also contends the county did not address the fourth Spurgin criterion pertaining to alteration of a nonconforming use, as required by our remand order in Suydam.

A. Substantial Evidence

Substantial evidence is evidence upon which a reasonable person would rely in reaching a decision. City of Portland v. Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984); Carsey v. Deschutes County, 21 Or LUBA 118, aff'd 108 Or App 339 (1991). If there is substantial evidence in the whole record to support the county's decision, we must defer to it, notwithstanding that reasonable people could draw different conclusions from the evidence. Adler v. City of Portland, 25 Or LUBA 546, 554 (1993). Where the evidence is conflicting, if a reasonable person could reach the decision the county made, in view of all the evidence in the record, we will defer to the county's choice between conflicting evidence. Mazeski v. Wasco County, 28 Or LUBA 178, 184 (1994), aff'd 133 Or App 258, 890 P2d 455 (1995).

In order to overturn a local denial of an application on evidentiary grounds, it is not sufficient for petitioner to show there is substantial evidence in the record to support his position. Rather, the "evidence must be such that a reasonable trier of fact could only say petitioner's evidence should be believed." Thomas v. City of Rockaway Beach, 24 Or LUBA 532, 534 (1993); Schmaltz v. City of Hood River, 22 Or LUBA 115, 119 (1991); McCoy v. Marion County, 16 Or LUBA 284, 286 (1987). Petitioner must demonstrate he sustained his burden of proof as a matter of law. Jurgenson

v. Union County Court, 42 Or App 505, 600 P2d 1241 (1979); Consolidated Rock Products v. Clackamas County, 17 Or LUBA 609, 619 (1989).

The first three criteria stated in Spurgin are also stated in DCC 18.120.010.A.a.-c. We refer to the DCC in the following discussion.

1. DCC 18.120.010.A.a

The county's findings do not address the standard set forth in DCC 18.120.010.A.a, which requires only that a nonconforming use be lawful when established. However, it is undisputed that had a truck repair and welding business been established prior to February 13, 1973, the date the use was first prohibited by the DCC, it would have been lawfully established. DCC 18.120.010.A.a is satisfied.

2. DCC 18.120.010.A.b

The county's findings purportedly addressing DCC 18.120.010.A.a, actually address the standard set forth in DCC 18.120.010.A.b. The challenged decision states:

> "The Board finds that the applicant has not met its burden of proving that the nonconforming use was lawfully established prior to February 13, 1973. The record before the Board does not contain sufficiently specific information regarding the date that the nonconforming use commenced, nor the nature and extent of the alleged use at the time restrictive zoning became effective. Evidence cited by the applicant in its Suggested Findings and Argument, such as County

tax records (Rec. [Vol. 2] 350-364)[2] and testimonial evidence in the form of affidavits and interviews of previous site occupants (Rec. [Vol. 2] 374-378) tends to show that the shop building existed on the subject property prior to 1973, but does not give a clear picture of how the building was used on the effective date of restrictive zoning. Such evidence also indicates that some form of commercial business existed on the subject property in 1973, but it does not indicate the specific date in 1973 that such business commenced, nor the specific nature of any such business at that time.

"Photographic evidence (Rec. [Vol. 2] 357, 364, 388) cited by the applicant gives some idea of the types of uses that may have occurred on the subject property at different times, but does not confirm that any such uses existed prior to February 13, 1973. The photograph of the shop building with signs stating "Bill Lee Welding/Repair" (Rec. [Vol. 2] 357, 364) is dated 12-76 and gives no indication of whether these activities were occurring on the effective date of restrictive zoning. Similarly, the thermometer photograph (Rec. [Vol. 2] 388) may indicate that Mr. Lee maintained a 24 hour towing and truck repair business with a 5000 sq. foot shop, but provides no information regarding the actual dates of such use, nor the date on which the thermometer came into existence to advertise this use.

"Other evidence cited by the applicant is equally non-specific regarding the dates on which an identifiable use commenced on the subject property. The Statement of Pastor Dunaway (Rec. [Vol. 2] 380) describes uses that occurred 'years ago' or 'ever since Dunaway can remember' but does not identify actual dates. Portions of this statement indicating that the Dunaway/Lee

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[2]The record consists of three, separately numbered volumes: Volume 1 and the Supplemental Record (SR) include materials generated during the remand proceedings; Volume 2 includes materials generated prior to the appeal in Suydam.

> friendship began in 1974 or 1975 suggest that Dunaway's recollection back to this time, not to the period preceding the effective date of restrictive zoning. Similarly, the Statement of Fisher (Rec. [Vol. 2] 381) indicates that a mobile home was installed on the subject property in the 1970's, and a shop building constructed sometime later, but fails to identify actual dates in the 1970's when construction occurred. Moreover, the Statement gives no indication of the time period during which the described truck repair use occurred on the property. Finally, the Testimony of Chastain (Rec. [Vol. 2] 119, 121, 122) merely reflects Lee's affidavit statements which support the existence of the shop building prior to 1973.
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> "Due to the lack of date-specific and use-specific evidence in the record, the Board cannot find that the nonconforming use was lawfully established on February 13, 1973." Record Vol. 1, 17-18.

In additional findings that expressly address DCC 18.120.010.A.b, the challenged decision states:

> "[T]he applicant must provide evidence that clearly defines the nature and extent of any nonconforming use. The testimonial evidence submitted by the applicant in the form of affidavits and interviews of former site occupants suggests that a variety of commercial uses have historically occurred on the subject property. However, such evidence merely describes an inclusive list of uses that allegedly took place on the subject property over a range of time, but does not identify the specific mix and intensity of uses that were occurring on the effective date of restrictive zoning." Record Vol. 1, 19.

In connection with this and the other assignments of error, we have reviewed the portions of the record cited in the challenged decision and by petitioner and intervenor (Record Vol. 1, 64-65; Vol. 2, 221, 26, 47-48, 119-24, 131-36, 138-43, 151, 155, 157, 193, 197-203, 211-12, 245-46, 293-94,

346, 357, 364-67, 374-88, 416-18, 449, 457, 463, 512, 517, 519-21, 527, and 538-39). We cannot say a reasonable trier of fact could only find that the evidence establishes the existence of a truck repair or welding business as of February 13, 1973. See J and D Fertilizers v. Clackamas County, 20 Or LUBA 44, 53 (1990).

3. DCC 18.120.010.A.c

In findings addressing DCC 18.120.010.A.c, the challenged decision states:

> "The Board finds substantial evidence in the record that between February, 1985 and May, 1987 the sole occupant of the subject property, Ralph Grogan, maintained a use significantly different in nature from the commercial vehicle repair business which the applicant seeks to verify. The interview of Ralph Grogan (Rec [Vol. 2] 384) describes the use during this period as consisting primarily of structural repair of motorhomes, campers, RVs and camp trailers. Mr. Grogan does not mention vehicular engine repair, diesel or otherwise, as a use during this period. This description is confirmed by Grogan's letter of April 5, 1994 (Rec. [Vol. 2] 457). Suggestions in Mr. Lee's affidavit (Rec [Vol. 2] 375) that his truck repair business, as described at various points in the record, continued through 1987 are not credible in light of uncontroverted evidence that * * * A-1 Mobile Home Specialties was the sole occupant of the site during this period and evidence in [Mr. Lee's] letter (Rec. [Vol. 2] 211) that commercial vehicle repair was not occurring as a use on the subject property from 1979 to 1984. * * *
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> "Other evidence referred to by the applicant * * * is not sufficient to controvert the evidence cited above which indicates that any nonconforming use on the subject property was interrupted for a period in excess of two years from February, 1985

to May, 1987." Record Vol. 1, 21-22.

On the basis of the evidence in the record, we cannot say a reasonable trier of fact could only find that the nonconforming use was not interrupted for a period in excess of one year or was never abandoned. We do not agree with petitioner that the use was not interrupted because all of the commercial operations on the subject property since February 13, 1973, share the same essential nature or common nucleus. Cf. Hendgen v. Clackamas County, 115 Or App 117, 836 P2d 1369 (1992) (storage use of property is common nucleus that prevents loss of nonconforming use status, notwithstanding use by different types of businesses). For example, A-1 Mobile Home Specialties, whose primary activity was the structural repair of mobile homes and which was the sole occupant of the subject property for over two years, from February 1985 to May 1987, had little in common with the present primary use, the repair of diesel engines and tractor trailer trucks. Furthermore, during the period A-1 Mobile Home Specialties was the sole occupant, the whole yard was used for the storage of lumber. The yard is now occupied, at least in part, by large trucks in various stages of repair.

B. Alteration of Use

Petitioner contends the county erred in failing to consider the fourth Spurgin criterion, which pertains to the

alteration of a nonconforming use.[3] We do not find the county erred, because petitioner did not carry his burden of establishing the nature and scope of the nonconforming use. See Spurgin, supra, 28 Or LUBA at 394 (until scope and nature of nonconforming use is established, it is impossible to determine whether current use is consistent with or represents an alteration of that nonconforming use).

The first assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner contends the county erred in refusing to permit Bill Lee, who was a witness in the initial proceedings, prior to our decision in Suydam, to participate

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[3]DCC 18.120.010.D states the standards for alteration of a nonconforming use:

> "Any alteration to a nonconforming use * * * permitted under this section shall also be subject to all applicable provisions of this title, including site plan review. Alteration does not include expansion of a use * * * or a change in use.
>
> "a. The alteration of a nonconforming use * * * shall be permitted when necessary to comply with any lawful requirement.
>
> "b. In all cases other than that described in (a) above, alteration of a nonconforming use * * * or any physical improvements may be permitted by the Hearings Officer when both of the following criteria are met:
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> "1. The alteration is necessary to reasonably continue the nonconforming use.
>
> "2. The alteration will have no greater adverse impact on the neighborhood."

DCC 18.120.010.D implements certain provisions of ORS 215.130(5) and (9) with regard to determinations concerning the alteration of a nonconforming use.

during the remand proceedings. Petitioner maintains that Mr. Lee's appearance "to explain any supposed discrepancies in the record would have been helpful." Petition for Review 24.

In the absence of instructions from LUBA or code provisions to the contrary, when a local government decision is remanded by LUBA, the local government need not repeat the procedures applicable to the initial proceedings. Sanchez v. Clatsop County, 29 Or LUBA 26, 30 (1995); Wentland v. City of Portland, 23 Or LUBA 321 (1992). In Suydam we remanded for additional findings only, and gave no special instructions concerning proceedings on remand.

DCC Chapter 22.34 contains the code provisions that govern proceedings on remand. We look there to see if the DCC requires the county to permit a witness, such as Mr. Lee, to participate in remand proceedings, as petitioner contends.

DCC 22.34.030 describes notice and hearing requirements applicable to proceedings on remand. DCC 22.34.030.A states:

> "The County shall conduct a hearing on any remanded or withdrawn decision, the scope of which shall be determined in accordance with the applicable provisions of this Chapter and state law. Unless state law requires otherwise, only those persons who were parties to the proceedings before the County shall be entitled to notice and be entitled to participate in any hearing on remand."

There is no definition of "party" in the DCC. However,

DCC 22.24.080, which governs standing to appear and be heard in a land use action hearing, states who shall be a party during the initial proceedings. DCC 22.24.080.B provides:

> "Any person appearing on the record at a hearing (including appeals) or presenting written evidence in conjunction with an administrative action or hearing shall have standing and shall be a party."

See Schob v. Deschutes County, 24 Or LUBA 147 (1992) (petitioners who assert a position contrary to the county's decision during local proceedings are parties under DCC 22.24.080, and may appeal to LUBA).

During the proceedings on remand, the parties were permitted to submit additional written and oral argument limited to whether the findings required by this Board in Suydam could be made on the existing record. At one of the hearings on remand, Bill Lee indicated he wished to speak, then added, "I don't want to start entering new evidence or anything like that." SR 38. An assistant county counsel, assuming the role of gatekeeper with respect to who could participate, told Mr. Lee that notwithstanding his appearance by affidavit in the initial proceedings, he "wasn't a noticed party to this proceeding" and therefore could not speak. SR 38-39.

We conclude that under DCC 22.24.080.B, Mr. Lee was a party to the remand proceedings. Like any other party, he had a right under DCC 22.34.030.A to participate in the county's hearing on remand. By denying him the right to

participate, the county acted in a manner that prejudiced his substantial rights. However, we are authorized to reverse or remand a challenged decision on the basis that the decision maker failed to follow applicable procedural requirements only if that failure "prejudiced the substantial rights of the petitioner." ORS 197.835(9)(a)(B) (emphasis added.) Moore v. Clackamas County, 29 Or LUBA 372, 379 (1995). Mr. Lee is not now a petitioner before LUBA.

DCC 22.34.040 permits the county to limit the scope of the proceedings on remand, specifically stating the board has discretion whether to open the record to allow additional evidence. The board chose not to open the record. Mr. Lee could not have given evidence on petitioner's behalf even if he had been allowed to participate.

Petitioner's discussion of prejudice to him is limited to a statement that it would have been helpful to have Mr. Lee's participation. Since Mr. Lee's participation would have been limited to argument, and since petitioner himself had an opportunity to present argument, we find the refusal to allow Mr. Lee to participate did not prejudice petitioner's substantial rights.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

At the board of commissioners' February 28, 1996,

hearing on remand, one commissioner commented: "I think there was a non -- a break in the non-conforming use originally of a diesel shop and it went to upholstery. It was completely different." SR 60. Petitioner suggests the commissioner's comment is evidence of undisclosed ex parte contacts, and contends "it denies fundamental due process of law to ignore the Commissioners' oral findings which were totally unsupported by any evidence." Petition for Review 25.

The final written decision and findings make no reference to upholstery. As we explained in Fraley v. Deschutes County, ___ Or LUBA ___ (LUBA No. 96-092, Order on Motions and Record Objections, July 26, 1995), slip op 9, statements made by individual decision makers expressing erroneous interpretations of law or legally improper reasons for adopting a land use decision provide no basis for reversal or remand unless such statements are adopted in the final written decision or findings supporting the written decision.

We reject petitioner's contention that remand is appropriate to determine the reason for the commissioner's single, unexplained reference to upholstery. If a party at LUBA wishes to establish ex parte contacts, the party must request an evidentiary hearing. OAR 661-10-045. Yet even if petitioner had requested an evidentiary hearing, the request probably would not have been granted, since the

commissioner's reference to upholstery, standing alone, is simply not a reasonable basis for a belief that an undisclosed ex parte contact took place. See Pfahl v. City of Depoe Bay, 16 Or LUBA 1073 (1988).

Finally, petitioner's reference to "due process" suggests he bases his argument in part on constitutional grounds. Since there is no argument to support a constitutional claim, we do not consider the reference further. Joyce, supra.

The fourth assignment of error is denied.

The county's decision is affirmed.