BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARQUAM FARMS CORPORATION, Petitioner, vs. MULTNOMAH COUNTY, Respondent, and TIM SCHILLEREFF and ANGELA SCHILLEREFF, Intervenors-Respondent.	LUBA No. 95-254 FINAL OPINION AND ORDER

Appeal from Multnomah County.

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

Sandra N. Duffy, Chief Deputy County Counsel, and Edward J. Sullivan, Portland, filed the response brief on behalf of respondent and intervenors-respondent. With them on the brief were Daniel Kearns and Preston Gates & Ellis. Sandra N. Duffy argued on behalf of respondent. Edward J. Sullivan argued on behalf of intervenors-respondent.

GUSTAFSON, Referee; LIVINGSTON, Referee, participated in the decision.

REMANDED 12/05/96

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

Opinion by Gustafson.

NATURE OF THE DECISION

Petitioner appeals the county's approval of (1) a conditional use permit; (2) an expansion of an existing conditional use permit; and (3) an expansion of a non-conforming use.

MOTION TO INTERVENE

Tim and Angela Schillereff (intervenors), the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

Intervenors operate a commercial dog kennel on EFU zoned land on Sauvie Island. Petitioner is a hunt club located adjacent to the kennel, whose operations have been adversely affected by the kennel since the kennel began operating in 1989. This appeal challenges the legality of that kennel.

Intervenors' predecessors in interest began operating a dog kennel at the subject property in the 1950's. At some point during the 1950's, zoning was first applied to the property, and the kennel became a nonconforming use.[1] In

[1]Petitioner claims zoning that made kennel use nonconforming was first applied to the property in 1955. The 1994 hearings officer determined that zoning was first applied to the property in 1958. We are not directed to the record where the operative date is clearly established. However, the exact date during the 1950's when restrictive zoning was applied to the

1986, dog kennels became conditional uses.[2] In 1977, the county adopted Multnomah County Code (MCC) 11.15.2028(B) (.2028(B)), which, as amended in 1980, states:

> "Conditional uses listed in subpart MCC .2012 legally established prior to August 14, 1980, shall be deemed conforming and not subject to the provision of MCC [.8805], provided however, that any change of use shall be subject to approval pursuant to the provisions of MCC .2012."[3]

Since the 1950's, ownership of the property has transferred several times, and there is considerable dispute as to whether a dog kennel use has continued uninterrupted during the intervening years. The parties appear to agree that prior to 1989 there had not been a commercial kennel on the property for at least 15 to 20 years. In 1989, intervenors obtained an interest in the property and,

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property does not appear to be at issue. From the parties' arguments it appears that the use of the property for a kennel during the 1950's was fairly constant, although the county in this case has made no finding regarding the exact nature and scope of that constant use.

[2]The 1994 hearings officer's decision refers to kennels being allowed at some point as conditional uses in the agricultural zone, which was apparently applied to the property during the 1950's. There is no assertion, however, that intervenors' predecessors ever obtained a conditional use permit for the site.

[3]MCC 11.15.2012 lists uses that "may be permitted when approved by the Hearings Officer" pursuant to the county conditional use procedures. Dog kennels have been included on that list since 1986.

MCC 11.15.8805 states, in relevant part:

> "If a non-conforming structure or use is abandoned or discontinued for any reason for more than two years, it shall not be re-established unless the resumed use conforms with the requirements of this code at the time of the proposed resumption."

according to intervenors' application, "re-established" a commercial kennel on the property in 1990. Record 418.[4] The parties dispute whether there was continuous kennel activity of any sort between 1958 and 1989 when intervenors reopened a commercial kennel.[5]

In 1990, intervenors made two separate applications to the county, one for a design review for "remodeling a kennel for 50 dogs" (Record Appendix A, 1990 design review); and one for a conditional use permit to build a watchman's residence on the site. The record reflects that intervenors initially asked to apply for a conditional use permit for the kennel, but were advised by county staff that no conditional use permit was required. See Record 845-47. The planning commission approved both applications. Neither the 1990 design review approval nor the 1990 conditional use permit dwelling approval refer to .2028(B) or otherwise discuss the legality of the underlying kennel use. Neither 1990 decision was appealed.

In 1994, intervenors applied to the county for design review approval in order to increase the kennel's capacity from 50 to 75 dogs. The hearings officer, however, did not

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[4]Neither in the application, nor elsewhere in the record to which we have been cited, is there a clear indication when commercial kennel activities were previously discontinued.

[5]MCC 11.15.0010 defines a kennel as "[a]ny lot or premises on which four or more dogs, more than six months of age, are kept." Thus, a kennel need not be a commercial kennel in order to meet the county's definition.

reach the merits of the design review request. Rather, as a threshold matter, the hearings officer determined that intervenors had not established the hearings officer's authority to approve that request because intervenors could not establish either that they were operating under a valid conditional use permit, or that they had a valid, nonconforming use in 1980, which could have become a "conforming conditional use" under .2028. The 1994 hearings officer explained the underlying factual situation as follows:

> "On or about January 10, 1994, [intervenors] submitted a letter to the county planning department requesting a conditional use permit to expand and remodel the existing kennel. This request was consistent with a previous request made by [intervenor] Tim Schillereff in his February 24, 1989 letter to the county where he requested a conditional use permit for the kennel. It is of some note that Mr. Schillereff in his February 24, 1989 letter stated that:
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> > 'Please note that this request is pertaining to an existing kennel site, in other words, the buildings and structures are intact. However, the permits have lapsed for over 15 years, therefore a new request is now being sent.'
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> "In both 1989, and in 1994, the county advised [intervenors] that it would not be necessary, and that the respective expansions could be accomplished through design review. In the file pertaining to DR 90-07-02 (the initial remodel for 50 dogs), a notation appears beside a copy of code section 11.15.2028, indicating that pursuant to this section 'The Persinger Kennel is therefore a conforming CU [conditional use] therefore (sic) does not expire per October 8, 1990 opinion from [county counsel].' Also, in the file pertaining

> to this case (DR-4-94), it is apparent that the county based its administrative decision to approve the kennel expansion through Design Review (as opposed to through a conditional use process as originally requested by the applicant) on staff's legal interpretation that MCC 11.15.2028(B) results in the kennel being a 'pre-existing *conforming conditional use*, permitted to continue in the EFU District, and which may expand on its original lot without a CU hearing.' (See staff report and notice of public hearing for DR 4-94).
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> "The outcome of this case turns on whether or not staff's interpretation of MCC 11.15.2028(B), is correct. If staff's interpretation of MCC 11.15.2028(B) is wrong, and if the use is not otherwise a lawful use in the EFU zone, then the Hearings Officer lacks authority to approve this Design Review request, unless or until the underlying kennel use receives appropriate land use approval to make it a lawful use in the zone. See MCC 11.15.2006." Record 722-23. (Emphasis in original.)

The 1994 hearings officer then made the following findings interpreting .2028 as it applies to intervenors' application:

> "As noted above, the staff and the applicant have argued that MCC 11.15.2028(B) should be interpreted to mean that so long as the dog kennel was <u>listed</u> as conditional use in subpart .2012 prior to August 14, 1980, and since the kennel was lawfully established by any means, prior to the enactment of zoning in the county, then, under .2028(B), the kennel becomes a lawful permitted use in the EFU zone. The appellant disagrees with the applicant's and staff's interpretations. * * *
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> "The Hearings Officer finds that .2028(B) cannot be interpreted in the manner suggested by the applicant and the staff, without directly conflicting with ORS 215.283. Under the statutory scheme, permitted uses and conditional uses are a

static list. After 1958, when zoning was first applied in this area of the county, kennels were never allowed as outright permitted uses. Kennels were listed as conditional uses in the agricultural zone, but this particular kennel never received a conditional use permit. Therefore, the only way in which this particular kennel could have been lawful in 1958, when the zoning came into effect, was if the use was a lawfully established non-conforming use.

"The state statute that governs non-conforming uses does not permit a use that may have been a lawful non-conforming use to become an outright permitted use, simply because it was listed by the county as a conditional use prior to some arbitrary date. Under the statutory scheme, the only way a non-conforming use can expand is to satisfy the provisions of ORS 215.130, and any other relevant county ordinances not in conflict with the statutory scheme. Under the statutory scheme, in the EFU zones, non-conforming uses never become conforming uses, unless the local ordinances and the state statutes governing exclusive farm uses are both amended to allow such uses outright, or unless both the local ordinance and the statute eventually list such uses as conditional uses, and if the governing body of the county, or its designate, actually issues an approval for such a use. Therefore, the only way that .2028(B) can be construed in such a way so as not to be in conflict with the statutory scheme, is to interpret the ordinance to mean that the kennel use must not only have been listed as a conditional use, but it must have been legally established as such, prior to August 14, 1980 (i.e. it must have actually obtained a conditional use permit.)

"In this case, the county issued Design Review approval for the kennel in 1990. However, the county did not issue a conditional use permit for the kennel operation itself. Since the county did not issue a conditional use permit for the kennel prior to August 14, 1980, the applicant cannot take advantage of whatever benefit MCC

> 11.15.2028(B) might confer. Therefore, the kennel did not become a lawful use pursuant to .2028(B), because it never received a conditional use permit. Under the statutory scheme, MCC .2028(B) cannot be read in such a way so as to elevate a non-conforming use to a permitted use in the EFU zone. The fact that the use was listed as a conditional use prior to August 14, 19[80] is irrelevant under the statutory scheme, because the use did not actually obtain a conditional use permit. Therefore, since the kennel has never passed muster under the statutory scheme, which ultimately governs all uses permitted in exclusive farm use zones, it cannot be considered to have been a lawful use in the EFU zone, unless it was lawfully established as a nonconforming use, and if its status as such was maintained over time." Record 723-24.

The 1994 hearings officer then evaluated what he termed as "a considerable amount of evidence" concerning the non-conforming use status of the property. Based upon the county's records and evidence presented by intervenors, the 1994 hearings officer found that on the date restrictive zoning was first applied to the subject property, July 10, 1958, intervenors' predecessors in interest had a legal nonconforming use, which consisted of a "'commercial kennel [of] up to 50 dogs - boarding, breeding and training.'" Record 725. Intervenors, however, could provide no evidence of any kennel operation between December, 1962 and January 1964.[6] The 1994 hearings officer, therefore concluded that

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[6]The hearings officer's findings regarding this time period state:

> "Between December, 1962, when Blitz operated the kennel, and February 1964, when Courtway operated the kennel, there is no information in the record concerning the existence and scope of

kennel operations had been discontinued under the applicable county ordinance, and that no nonconforming use existed. The 1994 hearings officer's decision concludes:

> "Because the Hearings Officer finds that the kennel use is currently not a lawful use in the zone, the appeal of Marquam Farms Inc. is granted, and the Administrative Decision granting Final Design Review in DR 4-94, is reversed. Because the use has been found to be unlawful at the present time, a request for Design Review for such a use cannot be granted. However, if the applicant is able to obtain a conditional use permit or otherwise establish the use as a lawful use, this denial of Design Review should not prejudice such later action, if any. Therefore, the applicant's request for Design Review is denied, without prejudice." Record 727.

The 1994 decision was not appealed.[7]

In 1995, intervenors submitted another application to the county. The face of the application states that intervenors requested "conditional use approval, or,

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> the use. The county record is silent during this period. The applicant in their 'history' does not mention the Courtway operation, and their discussion of Blitz's use of the property during this time period in the early 1960's is of little value, and conclusory at best. During this period of time, the applicant's 'history' is not based on any direct knowledge. The Persinger affidavit does not include this time period and is therefore of no help either. This lack of evidence does not meet the legal standard for 'substantial evidence'. Therefore, the Hearings Officer concludes that between December 1962 and February 1964, the applicant has not carried its burden of proof regarding the continued operation of the kennel." Record 726.

[7]Respondents place considerable significance on the fact that the 1994 decision was not appealed only because intervenor's attorney missed a filing deadline. We do not see how a missed deadline has any bearing on that decision, other than perhaps to stress that intervenors were dissatisfied with the outcome.

alternatively, an alteration of a non-conforming use, for a 75-dog kennel." Record 391. After hearings, the 1995 hearings officer issued a lengthy decision in which it appears that he, either alternatively or cumulatively, approved (1) an initial conditional use permit application; (2) an alteration of a conditional use permit; (3) approval of a non-conforming use; (4) approval of an alteration of a non-conforming use; (5) and continuation of a conforming conditional use for which no approval for expansion is necessary.

Petitioner appealed the 1995 hearings officer's decision to the board of county commissioners (board) which, after deleting one section of the decision which discussed the legality of OAR 660-33-120, adopted the 1995 hearings officer's decision verbatim.

Petitioner appeals the county's decision.

FIRST ASSIGNMENT OF ERROR

Petitioner challenges the county's approval of an initial conditional use permit on the bases that (1) it was not requested by intervenors; (2) it is expressly prohibited by OAR 660-33-120; and (3) the findings misconstrue the criteria, do not adequately address the relevant criteria, and are not based upon substantial evidence in the record.

The county and intervenor (jointly, respondents) argue "petitioner's first assignment of error should be denied

because it mischaracterizes the county's decision."[8] Presumably, respondents' argument is that petitioner's assignment has no merit because either intervenors did request an initial conditional use permit, or the hearings officer did not approve an initial conditional use permit.

At various places in their response brief, respondents appear to argue both that no initial conditional use application was requested and that the 1995 hearings officer did not in fact approve an initial conditional use application; and that intervenors did request approval of a conditional use application and that the 1995 hearings officer did approve it.[9]

Underlying the parties' arguments, the issue appears to be whether intervenors requested an initial conditional use, or whether in applying for a "conditional use permit" they were actually applying to ratify and expand their existing

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[8]Respondents also argue this assignment is nothing more than a procedural issue for which petitioners have not established prejudice. We disagree. The issue of what the hearings officer approved in response to intervenors' numerous, alternative and generalized requests is more than a procedural issue.

[9]Intervenors' application states:

> Applicants seek conditional use approval, or, alternatively, an alteration of a non-conforming use, for a 75-dog kennel. A 50-dog kennel operated on the property with county approval for over 5 years (see DR 90-07-02) [1990 design review approval]. A request to expand the kennel was filed last year and processed through design review (DR 4-94) [the 1994 design review denial for lack of jurisdiction]." Record 391.

conditional use.[10]

Intervenors' generalized application for "conditional use" approval could be reasonably characterized by the 1995 hearings officer as a request for initial approval of a conditional use permit, and apparently he understood it as such in making the following findings:

> "Because of the peculiar -- if not unique -- circumstances of this approval request, I have considered the conditional use criteria for two purposes. First, I have considered and resolved the question whether Applicant fulfills the conditional use criteria with respect to the existing kennel facilities as if those facilities did not yet exist. Second, I have considered and resolved the question whether Application fulfills the conditional use criteria with respect to an expansion of kennel capacity." Record 141.

and

> "Alternatively, Applicant has fulfilled all of the applicable conditional use criteria in MCC 11.15.7105, et seq., MCC 11.15.7122, MCC 11.15.7205, et seq., and the pertinent Comprehensive Plan policies with respect to both of the following: (1) the initial establishment of a conditional use approval for a dog kennel, and (2) the expansion of an existing conditional use -- whether arising from .2028(B) or from the previous clause -- to allow an increase from a 50-dog kennel facility to a 75-dog kennel facility." Record 162.[11] (Emphasis added.)

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[10]The hearing notice characterized the request as one for "Conditional Use approval, or approval to alter a Non-Conforming use, to expand the capacity of the existing dog kennel facility on this property from a maximum of 50 dogs to 75 dogs." Record 350.

[11]The reference to "from the previous clause" is not clear to this Board. If it is a reference to the previous paragraph in the findings, that paragraph states:

Thus, notwithstanding what either party may now argue, it appears from the 1995 hearings officer's findings that the county understood intervenors to request and the county did approve an initial conditional use permit.

Petitioner argues next that the approval of an initial conditional use permit violates OAR 660-33-120. Respondents argue both that OAR 660-33-120 is invalid under Lane County v. LCDC, 138 Or App 635, ___ P2d ___, modified on reconsideration, 140 Or App 368, ___ P2d ___ (1996), and that OAR 660-33-120 does not apply to intervenors' application because intervenors' kennel is already in existence.

OAR 660-33-120 prohibits establishment of dog kennels on high value farm land.[12] Neither Lane County v. LCDC nor any other authority invalidates that rule as it applies here. See, DLCD v. Polk County __ Or LUBA __ (LUBA No. 96-

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> "Unless otherwise the subject of 'limitations or conditions' imposed by a prior conditional use approval, nothing in the conditional use provisions of MCC 11.15.7105, et seq., plainly requires that an applicant must seek additional conditional use approval in order to modify or alter components of an existing conditional use that do not otherwise comprise any change in the 'use' itself."

As we interpret this paragraph in the context of intervenors' application, the hearings officer determined that since intervenors never obtained a conditional use permit, under .2028 there are no "limitations or conditions" that would restrict intervenors' ability to expand the conditional use, and that no local approvals are necessary to effect that expansion. We discuss the hearings officer's interpretation of .2028 under the fifth assignment of error.

[12]There appears to be no dispute that intervenors' property constitutes high value farm land for purposes of OAR 660-33-120.

036/042, September 10, 1996).

Respondents' alternative argument, that OAR 660-33-120 does not apply to this existing kennel, presumes no application for conditional use approval of an initial kennel. If the county's decision involved only an expansion of an existing kennel, whether as a conditional use or nonconforming use, respondents would be correct that OAR 660-33-120 does not prohibit their request, since that rule specifically allows expansion of "existing facilities." However, the county's decision is not so limited. Intervenors requested, and the county adopted findings of approval for an initial conditional use. Regardless of what may exist on the property without benefit of approval, in order to legalize the use through a conditional use review, the proposed use must be evaluated as new.[13] As a new use, intervenors' proposed kennel is prohibited under OAR 660-33-

[13]DLCD appealed the hearings officer's decision to the board. In its appeal, DLCD correctly explained:

> "[T]he hearings officer correctly stated that LCDC's administrative rules prohibit the establishment of *new* dog kennels (and other uses) on high value farmland, but that existing kennels 'may be maintained, enhanced or expanded, *subject to the requirements of law*.' OAR 660-33-130(18). * * * The hearings officer's first mistake is his assumption that the term 'existing' as used in OAR 660-33-130(18) has no special meaning. According to the hearings officer, if the use at issue is 'on the ground' it is 'existing' for purposes of the OAR's and it does not matter whether the use is a conditional use, a non-conforming use or something else. DLCD submits that as used in the OAR's, the term 'existing' necessarily means 'lawfully existing.'" Record 34. (Emphasis in original.)

120.[14]

The first assignment of error is sustained, in part.[15]

SECOND ASSIGNMENT OF ERROR

Petitioner contends the county exceeded its jurisdiction and improperly construed the applicable law when it approved both an expansion of a conditional use and an expansion and alteration of a nonconforming use. Petitioner argues that the county may not have had authority to entertain inconsistent, alternative permit applications, and that even if it could consider alternative applications, it could not grant them all since they depend upon mutually exclusive factual and legal bases for approval.

Respondents argue, and we agree, that there is no authority to prohibit alternative applications. Moreover, of itself, the county's approval of inconsistent permits does not in this case provide an independent basis for remand or reversal.

The second assignment of error is denied.

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[14]That an initial conditional use is legally prohibited on the subject property is grounds for reversal of the decision on that basis. However, because of the numerous approvals granted by the county in this single decision, the fact that the use is prohibited as a new conditional use is not dispositive if the use is approvable under one of the other legal bases upon which the decision appears to rest.

[15]Because we find that approval of an initial conditional use for a dog kennel on high value farm land in the EFU zone is prohibited under OAR 660-33-120, we do not reach petitioner's additional arguments that the county's findings approving the initial conditional use misconstrue the criteria, are inadequate, and are not based on substantial evidence in the record.

THIRD ASSIGNMENT OF ERROR

Petitioner contends that res judicata binds the county to the findings of the 1994 hearings officer decision regarding the interpretation of .2028 and the status of the nonconforming use. Petitioner argues the county exceeded its jurisdiction and improperly construed the applicable law when it failed to follow that decision.

Respondents argue that the 1994 hearings officer had no authority to consider the legality of intervenors' use because the issue before him was limited to design review. Therefore, respondents argue, since the 1994 hearings officer exceeded his authority, his determination that he lacked authority to consider the design review was purely dicta, by which the 1995 hearings officer was not bound.

Whether the applicant has established the county's authority to review an application is a threshold determination, relevant to all land use applications. Necessarily, before a hearings body can determine the merits of a design review application, that body must first determine whether the applicant has established the legal use upon which the design review is based. Such threshold determinations are not dicta.[16]

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[16]Although not directly relevant to this appeal, because of the emphasis respondents place on their argument that the 1994 hearings officer lacked authority to determine whether he could review the 1994 design review application, we find it appropriate to point out that since a hearings officer always has authority to determine whether an applicant has

However, this is not a case where the rules of res judicata apply, either as to the factual determination of whether a nonconforming use has been established, or as to the legal interpretation of .2028.

Claim preclusion (res judicata) and issue preclusion (collateral estoppel) preclude relitigation of factual issues and claims that have been conclusively determined between the parties involved. See North Clackamas School District v. White, 305 Or 48, 750 P2d 485, modified 305 Or 468 (1988); Nelson v, Clackamas County, 19 Or LUBA 131 (1990). In 1994, the hearings officer did make a factual determination that intervenors had not legally established the existence of a nonconforming use. However, in the 1994 design review proceeding the hearings officer specifically left the door open for intervenors to establish such a legal use. The application subject to this appeal attempts to establish that legal use. No determination of factual issues was determined in the 1994 case that bars their evaluation now.[17] Thus, while the 1994 decision is

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established the elements necessary for review of an application, the 1994 hearings officer did not exceed his authority in making that determination.

[17]As we recognized in Nelson,

> "[W]e note that Oregon counties and cities generally permit an unsuccessful land use applicant to reapply for the denied development, albeit some require that a specified period of time have elapsed before such reapplication can be made. If a local government denial of land use approval had a preclusive effect, the applied for use could never be approved by the local government, unless applicable approval criteria providing

certainly not dicta, in evaluating the 1995 application the hearings officer was not bound by the 1994 determination regarding the establishment of a nonconforming use.

The rules of res judicata are also inapplicable to the county's legal interpretation of .2028. Although the legal issues presented in both the 1994 and 1995 cases regarding the interpretation of .2028 were identical, the county is not bound by its earlier interpretation. As we recognized in Reeder v. Clackamas County, 20 Or LUBA 238, 244 (1990),

> "We have explained on several occasions that when this Board reviews land use decisions for compliance with relevant approval standards, it does not matter whether the challenged decision is consistent with prior decisions, if those prior decisions applied incorrect interpretations of the applicable approval standards. As we explained in Okeson v. Union County, 10 Or LUBA 1, 5 (1983) in rejecting petitioner's arguments that the county's decision in that case should be remanded for failure to follow prior decisions:
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> > 'The issue here is whether [the challenged decision] meets all the applicable criteria based upon the facts in the record. There is no requirement local government actions must be consistent with past decisions, but only that a decision must be correct when made. Indeed, to require consistency for that sake alone would run the risk of perpetuating error. * * *.'
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> See also BenjFran Development v. Metro Service Dist., 17 Or LUBA 30, 46-47; S & J Builders v. City of Tigard, 14 Or LUBA 708, 711-712 (1986)."

Therefore, in the present proceedings the county was

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the original basis for denial were amended." Nelson, 19 Or LUBA at 140.

not bound by the 1994 hearings officer's interpretation of .2028, to the extent the board determined that interpretation to be incorrect.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners contend, essentially, that the county misconstrued .2028(B) when it determined that under that ordinance, intervenors have a "conforming conditional use".[18]

Respondents appear to make two responses. First they urge a binding interpretation of .2028 was made in one or both of the 1990 decisions, and cannot be revisited now because those decisions vested certain rights in the intervenor. Second, they argue that the county made exhaustive findings interpreting .2028(B), to which we must defer.

We are directed to no conclusive interpretation of .2028 in the county's decision. The 1995 hearings officer appears to have made two conflicting conclusions. First, he concludes that the interpretation of .2028 was conclusively determined in one or both of the 1990 proceedings. On that basis, he concludes both that the 1994 hearings officer had

[18]The hearings officer's determination that .2028(B) grants intervenors a "conforming conditional use" is a necessary prerequisite to his determination that intervenors have an existing valid conditional use, which is subject to expansion either without further review or, alternatively, through this proceeding.

no authority to interpret .2028, and that the interpretation of .2028 was not subject to further review during the 1995 proceeding.

Second, the hearings officer engages in a convoluted discussion about the possible meanings of .2028, concluding with the following:

> "None of the above outcome-based interpretations explain the meaning of .2028(B) with certainty. Unfortunately, the only alternatives comprise declarations that .2028(B): (1) has no discernible purpose, (2) runs afoul of ORS 215.130 in some unspecified fashion, or (3) remains hopelessly ambiguous. Because I conclude that none of the alternatives comprises the *only* reasonable alternative, I cannot in this case accept an alternative that would effectively obliterate a local enactment.
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> "I therefore conclude that the most probable and reasonable meaning to be accorded .2028(B) is this: It purports to apply to a use that, but for the absence of a conditional use permit, *would be* a true conditional use. The resulting use comprises a 'conforming' conditional use or what might be described as a ".2028(B)" use. Such a 'conforming' conditional use may be curtailed or discontinued and resumed in the same manner as a true conditional use, unburdened by notions of 'abandonment' or 'discontinuance' normally associated with *non*-conforming uses.
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> "That interpretation also resolves a profound dilemma for a use that had, for example, been a non-conforming use and later became a 'listed' conditional use. A pre-existing use that suddenly becomes a 'listed' conditional use can scarcely be described as a 'nonconforming use.' * * * MCC 11.15.2028(B) renders that species of use a 'conforming' conditional use without the need to apply for a conditional use permit in order to maintain a use that, but for the absence of a

> permit, is *already* a conditional use." Record 138. (Emphasis in original.)

A footnote to this conclusion adds:

> "MCC 11.15.0010's definition of 'non-conforming use,' for instance, describes a use 'which does *not* conform with the use regulations of the district in which it is located.' Obviously, a 'non-conforming use' that suddenly attains a new status as a 'listed' conditional use falls outside that definition. Even if the definition of 'non-conforming use' said '*did* not conform' instead of '*does* not conform,' it would defy logic or reason to describe a 'listed'-but-never-formally-approved conditional use as a 'nonconforming' use." Id.

The board summarily adopted the 1995 hearings officer's order. Respondents now argue that LUBA must defer to the board's "interpretation" of .2028. We disagree.

The initial problem with respondents' argument is that it is unclear which alternative conclusion the county intended to adopt, and to which "interpretation" it now argues we must defer.

First, the hearings officer concluded that in 1990 the county implicitly made a binding interpretation which is not now subject to review. Although neither of the 1990 decisions mentions .2028, the hearings officer concludes that the planning commission made a binding interpretation regarding the meaning of .2028 in 1990 when it approved a conditional use for a dwelling, stating:

> "Thus, the pivotal question appears to have percolated to the surface during the November 6, 1990, hearing in such an indelible manner that I must conclude that the Planning Commission (1) became fully cognizant of the issue and (2)

> necessarily -- albeit impliedly -- rendered an appealable interpretation of .2028(B) in the manner now advocated by Applicant." Record 121.

The hearings officer then concludes that the time for challenging the county's interpretation of .2028 was in 1990 when the "implicit" planning commission finding was made; and that challenging the interpretation of .2028 today, when the issue has been squarely raised, would be an impermissible collateral attack on the 1990 "implicit" binding determination.

The hearings officer's conclusion regarding the 1990 proceedings is not an interpretation of .2028. Rather, it is a refusal to make an interpretation. Moreover, we disagree with the hearings officer's conclusion that .2028 is not now subject to interpretation. Petitioner is not bound by an earlier, alleged implicit decision for which it received no notice. See Higgins v. Marion County, 30 Or LUBA 426, aff'd 141 Or App 598, adhered to 142 Or App 418 (1996).

To the extent respondents argue we must now defer to an earlier implicit interpretation because the board in this case adopted a finding that it was made, we also disagree. We do not defer to the board's adoption of the hearings officer's deferral to an "implicit" interpretation made by the planning commission in another proceeding five years earlier, where the interpretive issue was not raised. To the extent the board's adoption of the hearings officer's

conclusion concerning the 1990 decision constitutes an interpretation of .2028 at all, we cannot discern what that interpretation is, and therefore do not defer to it. See Thomas v. Wasco County, 30 Or LUBA 302, 313 (1996).

With regard to the county's explicit interpretation in its 1995 decision, as we read the hearings officer's analysis, he concludes that a nonconforming use can become permitted outright as a 'conforming conditional use' if the use is listed in the county's code as being a conditional use. It is unclear to us whether the county's explicit interpretation of .2028 allows abandoned nonconforming uses to "spring" back into existence as permitted uses when those uses are listed as conditional uses, or whether it interprets .2028 to permit only valid existing nonconforming uses to become "conforming conditional uses."

We must defer to the county's interpretations of its own ordinances, unless those interpretations are clearly wrong or they violate a state statute. ORS 197.829; Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992); Zippel v. Josephine County, 128 Or App 458, 461, 876 P2d 854, rev den 320 Or 272 (1994). In this case, the county's interpretation violates ORS 215.283, and possibly OAR 660-33-120.

As we understand the narrowest interpretation of .2028(B) that the county could have made in this decision, kennels in existence in 1986 are legislatively established

as permitted uses (conforming conditional uses) without a showing of compliance with the ORS 215.296 farm impact standards. Such a showing is required for dog kennels to be established as permitted uses under ORS 215.283(2).[19] To the extent the interpretation also allows abandoned nonconforming uses to "spring" back, the interpretation also violates OAR 660-33-120, which prohibits new kennels on high-value farm land.

The 1994 hearings officer made an interpretation of .2028 that appears to give meaning to the ordinance, and which allows it to be applied consistently with ORS 215.283. However, given that the county did not adopt that interpretation, we find it appropriate to remand the decision for the county to interpret .2028 in a manner consistent with ORS 215.283 and OAR 660-33-120.

The fourth assignment of error is sustained.

FIFTH ASSIGNMENT OF ERROR

Petitioner challenges the county's approval of an expansion of a nonconforming use, on the basis that the county has not established that intervenors have a valid nonconforming use for a 50-dog kennel. Petitioner challenges both the county's determination that a dog kennel has existed on the subject property uninterrupted since the

[19]Permitted use status, as opposed to nonconforming use status, is not without legal affect. As a permitted use, the operation of a kennel could be altered or abandoned and resumed without addressing the nonconforming use limitations of ORS 215.130.

use became nonconforming in 1955; and its conclusion that intervenors now have a nonconforming right to a 50-dog kennel.[20] As such, petitioner challenges both the existence and the scope of the nonconforming kennel use.

Respondents appear to have two alternative responses. First, they seem to argue that intervenors' nonconforming use rights were somehow "vested" through one or both of the 1990 decisions. They also argue that, as a factual matter, they have established continuous, uninterrupted use of the property as a dog kennel since prior to the time the restrictive zoning was applied to the property.

To the extent respondents argue that one or both of the 1990 decisions somehow "vested" certain nonconforming use rights in intervenors, we reject that argument.[21] Neither

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[20]Intervenors argue petitioner waived its right to raise any issue regarding the scope of the nonconforming use by failing to raise the issue below. Intervenors applied for "expansion" of a nonconforming use. Before the hearings officer, petitioner raised the issue that intervenors did not have a valid nonconforming use. In finding a valid nonconforming use that is subject to expansion, the county was obligated to establish the existence of the nonconforming use. See Tylka v. Clackamas County, 28 Or LUBA 417 (1994). Petitioner's purported failure to expressly raise the scope of the nonconforming use, as an alternative to its argument that no nonconforming use existed, would not excuse the county from complying with the statutory and ordinance requirements. Nonetheless, we find that petitioner did adequately raise the issue of the scope of the nonconforming use in its notice of appeal to the board of commissioners, when it challenged the hearings officer's finding that the kennel "does have that status [as a nonconforming use] as a 50 dog kennel." Record 73.

[21]Although the 1995 hearings officer summarily concludes that through one or both of the 1990 proceedings, certain rights were vested in intervenors, which now authorizes the kennel operation, he also concludes intervenors do not have a legal vested right to continue the kennel. Record 185. We do not understand the legal significance of the rights the county determined were "vested" through the earlier proceedings. To the

of the 1990 decisions addressed intervenors' nonconforming use rights directly, or through an application of .2028. Rather, in 1990 the county merely approved a design review for a 50-dog kennel and a conditional use for a watchman's residence.

While that 1990 decision cannot now be revisited, neither can the county rely on that decision to demonstrate the existence of nonconforming use rights to intervenors' current kennel operations. The continuance or alteration of nonconforming uses authorized by ORS 215.130 applies to lawful uses "at the time of the enactment or amendment of any zoning ordinance or regulation." If either of the 1990 decisions established any lawful use, it established that use after, not before the time of, the enactment of the restrictive zoning. Thus, in this case, before the county may grant intervenors an alteration to a nonconforming use, intervenors must satisfy their burden of establishing the existence of that nonconforming use. As we explained in Tylka v. Clackamas County, 28 Or LUBA at 429 (1994):

> "In determining whether to approve a proposed use of property as an alteration of a nonconforming use, where the local government has not previously determined that a nonconforming use exists, there are generally four inquiries that the local government must make. Cf. Spurgin v. Josephine County, 28 Or LUBA 383, 390 (1994) (determining

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extent this finding indicates intervenors established a vested right to the kennel operation, this finding is in direct conflict with the county's additional finding in this case that intervenors do not have a vested right to the operation.

whether an existing use of property may continue as a nonconforming use). First, did the use lawfully exist at the time the zoning which first made the use unlawful was applied? Second, what was the nature and extent of the use at the time it became nonconforming? Third, if the use lawfully existed at the time restrictive zoning was applied, has the use been discontinued or abandoned such that the right to continue the use or that part of the use as a nonconforming use was lost? Fourth, to the extent the proposed use constitutes an alteration of the lawfully established nonconforming use, structure or physical improvements, does that alteration comply with the standards governing alteration of nonconforming uses?"[22]

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[22]ORS 215.130 governs county decisions on nonconforming uses, in relevant part, 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.
>
> "* * * * *
>
> "(7) 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 fo 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.
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> "(9) As used in this section, 'alteration' of a nonconforming use includes:

A. Establishment of Nonconforming Use

In this case, there is no dispute that a kennel operated on the subject property at the time restrictive zoning was applied to the property. Thus, there is no issue here that the use lawfully existed at the time the zoning which first made the use unlawful was applied. However, the county made no findings regarding the nature and extent of the use at the time it became nonconforming. Thus, while the county has established the initial existence of a nonconforming use, the county has not established the scope of the original use.

B. Continuity of use

The primary issue in this assignment of error is whether the use established when the restrictive zoning was applied has since been discontinued or abandoned such that the right to continue the use as a nonconforming use was lost.

In the 1994 decision, the hearings officer determined, based upon evidence submitted from intervenors, that intervenors could not satisfy their burden that the kennel was operational during a period from December, 1962 to January, 1964. The basis of this conclusion appears to have

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"(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."

been county inspection records which showed a gap in use between those two dates. Based on that evidence, the hearings officer concluded the kennel use had been abandoned as of December, 1962. He did not inquire further to determine whether any additional gaps in use were evident.

Subsequent to the 1994 determination, intervenors supplied additional evidence that there had been some kennel use during the periods where the county records reflect a gap in use. The evidence supplied by intervenors also showed some level of kennel use of the property in every year since 1952. There was also evidence from petitioner that there was no sign of any kennel activity, and only the property owners' dog was present on the property during all of the 1980's. Intervenors refuted this testimony with testimony of their own that the property owners commonly cared for other individuals' dogs, and that there were "always" at least four dogs on the property. The hearings officer chose to believe intervenors over petitioner, finding, in part:

> "Although less satisfactory than other means of demonstrating continuity of use, the unbroken succession of owners/operators from 1952 to date -- each of whom operated and maintained kennel facilities of some sort -- coupled with the absence of affirmative evidence that any of those same individuals subsequently discontinued or abandoned the very facilities that each was known for maintaining, comprises 'substantial evidence' that some degree of kennel operations has persisted unabated from 1952 forward.' Record 171.

The question here is one of substantial evidence. In reviewing the evidence, we may not substitute our judgment for that of the local decision maker. Rather, we must consider and weigh all the evidence in the record to which we are directed, and determine whether, based on that evidence, the local decision maker's conclusion is supported by substantial evidence. Younger v. City of Portland, 305 Or 346, 358-60, 752 P2d 262 (1988); 1000 Friends of Oregon v. Marion County, 116 Or App 584, 588, 842 P2d 441 (1992). If there is substantial evidence in the whole record to support the county's decision, LUBA will affirm 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, LUBA 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); Bottum v. Union County, 26 Or LUBA 407, 412 (1994); McInnis v. City of Portland, 25 Or LUBA 376, 385 (1993).

We note that in some of the county's findings regarding the evidence of nonconforming use, the hearings officer impermissibly reversed the burden of proof, finding that petitioner had not established the non-existence of continuity. Notwithstanding that error, however, the

hearings officer also affirmatively considered the testimony and determined, based upon the conflicting evidence before him, that some level of kennel activity has continued, uninterrupted since 1952. The choice between the conflicting testimony is the county's to make, and we defer to it.

However, the hearings officer made no attempt to define the scope of the continued use. Rather, he apparently concluded, without analysis, that since intervenors established the continued existence of a kennel, i.e. at least 4 adult dogs on the property since the 1950's, they had somehow established a nonconforming use to operate and expand a 50-dog kennel.[23] Such a conclusion is not legally justified.

The fact that the use has continued does not determine the scope of the continuing use. The county must still evaluate and determine the scope of the use as it has continued over the years in order to determine the intensity of the remaining nonconforming use. As the Court of Appeals explained in Hendgen v. Clackamas County, 115 Or App 117, 120 (1992),

"Short of the point that it is abandoned or

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[23]In none of the evidence to which we have been cited is there any indication that the "four or more" dogs kenneled at the site were adult dogs. However, petitioners assign no error or otherwise raise the issue of whether intervenors have established the requisite age of the dogs so as to satisfy the county's definition of kennel.

> discontinued, the intensity of a nonconforming use may be reduced without its being lost, Polk County v. Martin, 292 Or 69, 636 P2d 952 (1981); Bither v. Baker Rock Crushing, 249 Or 640, 438 P2d 988, 440 P2d 368 (1968); see also Warner v. Clackamas County, 111 Or App 11, 824 Pd 423 (1992), although the use may not be enlarged except through the alteration process under ORS 215.130 and complying local law. See Parks v. Tillamook Co. Comm./Spliid, 11 Or App 177, 501 P2d 85 1972), rev den (1973)."

The county must determine the level of intensity of the use that has continued uninterrupted since the use became nonconforming. This requires an evaluation both of the threshold question of the level of intensity existing when the use became nonconforming, and the level of intensity that has continued, uninterrupted, since that time. The county has done neither of these required evaluations.[24]

The fifth assignment of error is sustained, in part.

The county's decision is remanded.

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[24]We note that ORS 215.130(9)(a) and (b) distinguish between a change in use and a change in structure. While there may have been no change in the structure (i.e. the kennel buildings remained intact), the intensity of the use itself may nonetheless have diminished. We also note that it is only after the intensity of the existing nonconforming use has been established that an alteration of that use, under the standards of ORS 215.130(5) and (9), can be evaluated.