08/01/19 AM11:23 LUBA

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

KAREN MORGAN,
Petitioner,

vs.

JACKSON COUNTY,
Respondent,

and

LARRY PERKETT and SUSAN PERKETT,
Intervenors-Respondents.

LUBA No. 2019-023

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Wendie L. Kellington, Lake Oswego, filed the petition for review. With her on the brief was Kellington Law Group PC. Sarah Mitchell argued on behalf of petitioner.

No appearance by Jackson County.

Garrett K. West, Medford, filed the response brief and argued on behalf of intervenors-respondents. With him on the brief was Huycke O'Connor Jarvis, LLP.

RYAN, Board Chair; RUDD, Board Member, participated in the decision.

ZAMUDIO, Board Member, did not participate in the decision.

REMANDED 08/01/2019

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a hearings officer's decision on remand verifying an "auto yard" as a lawful nonconforming use.

REPLY BRIEF

Petitioner filed a motion to file a reply brief and a reply brief. LUBA's procedural rules were amended as of January 1, 2019, and for appeals filed after January 1, 2019, parties are no longer required to request permission to file a reply brief. OAR 661-010-0039.

FACTS

The subject property is a 10-acre parcel zoned for exclusive farm use. Approximately 1.6 acres of the property is occupied by an "auto yard," consisting of two shop buildings, a storage building, and outdoor storage and parking of a number of automobiles within a fenced enclosure. The auto yard use includes two primary components: (1) the purchase, repair and retail sale of used automobiles, and (2) storage of impounded or abandoned vehicles.

In 2016, intervenors-respondents Larry and Susan Perkett (intervenors) applied to the county to verify their auto yard use as a lawful nonconforming use. Intervenors submitted evidence intended to demonstrate that the auto yard use was lawfully established prior to September 1, 1973, the date zoning was first applied that would prohibit the use, and that the auto yard use continuously

operated in its current nature and extent for a 10-year period preceding the application.[1]

Petitioner, an adjoining property owner whose property provides access to the subject parcel, opposed intervenors' application. In 2017, a county hearings officer issued a decision verifying the auto yard use as a lawful nonconforming use, with the exception of the two shop buildings and the storage building.

Petitioner appealed the 2017 hearings officer's decision to LUBA, challenging the nonconforming use verification on a number of grounds. LUBA addressed only one of petitioner's challenges, agreeing with petitioner that because it was undisputed that intervenors failed to obtain a required state permit for the auto yard use, and the statutes at the time treated such failure as a crime, the auto yard use established on the property prior to September 1, 1973, was unlawful. LUBA concluded that the hearings officer erred in finding that the use had been lawfully established, one of the necessary elements to a lawful

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[1] As explained further below, ORS 215.130 and the county's implementing ordinances allow an applicant for a nonconforming use verification to initially demonstrate that the use has continuously existed in its current nature and extent from the date it became nonconforming, based on evidence extending back only 10 years from the date of application. Such evidence creates a rebuttable presumption that the use lawfully existed at the time contrary zoning was first applied and has continued uninterrupted since. ORS 215.130(10)(a). Even if that presumption is rebutted, the county may not require the applicant to "prove the existence, continuity, nature and extent of the use for a period exceeding 20 years immediately preceding the date of application." ORS 215.130(11). In this opinion, we sometimes refer to these 10- and 20-year time periods as the 10-year and 20-year "lookback periods," respectively.

nonconforming use, and reversed the decision. *Morgan v. Jackson County*, 76 Or LUBA 170 (2017) (*Morgan I*). On appeal, the Court of Appeals reversed LUBA's decision, concluding that intervenors' failure to obtain the required state permit was not the kind of illegality that renders the nonconforming use unlawful, for purposes of ORS 215.130. *Morgan v. Jackson County*, 290 Or App 111, 414 P3d 917, *rev den,* 362 Or 860 (2018).

On remand from the Court of Appeals, LUBA addressed the remaining assignments of error, denying some and sustaining others, remanding the decision for the hearings officer to correct several errors. Specifically, LUBA directed the county to (1) re-evaluate the evidence in the record under a non-deferential standard of evidentiary review; (2) make new determinations regarding the existence, continuity, and nature and extent of the auto yard that are based on evidence submitted regarding the 20-year lookback period, with focus on the key date, 1996 (*i.e.*, 20 years prior to the 2016 application); and (3) evaluate aerial photographs and other evidence regarding whether the use existed at all on the subject property prior to September 1, 1973, including a 1973 land use inventory map cited by petitioner. *Morgan v. Jackson County*, __ Or LUBA __ (LUBA No 2017-053, Sept 13, 2018) (*Morgan II*).

On remand from LUBA, a different county hearings officer conducted new evidentiary proceedings, limited to the remand issues set out in *Morgan II*. Both petitioner and intervenors submitted new evidence. On February 4, 2019, the hearings officer issued a decision verifying the auto yard use as a lawful

nonconforming use. The hearings officer described the auto yard use as "a retail motor vehicle sales operation that purchases used vehicles for resale, repairs and/or renovates those vehicles prior to resale, and sells the vehicles to customers coming to the subject property, subject to the limitations in this Order." Record 45. The hearings officer limited the physical extent of the auto yard to the area occupied in 1996, based on aerial photographs, and verified use of the two shop buildings that were in existence at that time, but denied verification for the storage building, which was not constructed until after 1996. The hearings officer limited retail sales of automobiles to 64 vehicles per calendar year, but unlike the previous hearings officer, declined to impose any limit on the number of vehicles that could be stored on the site. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner challenges the hearings officer's finding that an auto yard use existed on the subject property prior to September 1, 1973. According to petitioner, the only objective pieces of evidence in the record on this point are aerial photographs, which show that prior to 1975 there were no physical indications of an auto yard use on the property, such as the presence of multiple automobiles parked on site or areas disturbed by repeated vehicle movement. Petitioner contends that any automobile repair and associated activities that may have occurred on the property prior to 1975 were so minimal that such activities were insufficient to establish the existence of a nonconforming auto yard use prior to September 1, 1973.

Intervenors respond, initially, that LUBA rejected a similar argument in *Morgan II*, and that petitioner's failure to appeal that contrary ruling means that the issue is resolved and can no longer form the basis for any further challenges to the decision on remand, under the "law of the case" doctrine articulated in *Beck v. City of Tillamook*, 313 Or 148, 153-54, 831 P2d 678, *aff'd*, 113 Or App 660, 833 P2d 1327 (1992). We refer to that doctrine in this opinion as the *Beck* law of the case doctrine. In *Morgan II*, we rejected as inconsistent with ORS 215.130(11) petitioner's argument that the hearings officer erred in failing to adopt findings regarding the nature and extent of the auto yard use before September 1, 1973, an argument premised on petitioner's theory that any auto yard use prior to that date was so minimal in size or extent that at best constituted a hobby or home occupation, which in petitioner's view would be insufficient as a matter of law to constitute an existing nonconforming use.[2] *Id.*, __ Or LUBA __ (LUBA No 2017-053, Sept 13, 2018) (slip op at 31).

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[2] We stated in *Morgan II*:

> "Petitioner's theory rests on an alleged expansion of the 'nature and extent' of an existing use in 1975, which petitioner argues had the effect of transmuting the use from a conforming land use category to a different, unlawful or nonconforming land use category. Even if that theory is intended to challenge only the lawful establishment element of a nonconforming use, there is no way to give effect to it without compelling the applicant to submit evidence regarding the nature and extent of the use during periods that are more than 20 years prior to the date of application, which ORS 215.130(11) expressly prohibits. * * * [I]n the present circumstances, the

We disagree with intervenors that petitioner's first assignment of error in the present appeal is barred by the *Beck* law of the case doctrine. In *Morgan II* we remanded the decision to the hearings officer for a plenary evidentiary re-evaluation of the elements of a nonconforming use verification, including whether the auto yard use had been established prior to September 1, 1973, a task that the hearings officer on remand performed based in part on new evidence submitted on remand. That open-ended disposition did not preclude consideration of very many issues, especially of an evidentiary nature. On appeal, petitioner challenges the hearings officer's finding on remand that the auto yard use had been established prior to September 1, 1973. Petitioner's legal argument in support of that challenge—that to be recognized as an "existing" nonconforming use there must, at a minimum, be objective or visible physical evidence of the use—is somewhat similar to the one we rejected in *Morgan II*, and may suffer from the same flaws, but it is not the same argument. Further, much of petitioner's argument under the first assignment of error challenges evidence, or is evidentiary in nature. Petitioner argues that the affidavits, personal testimony and other evidence that the hearings officer chose to rely upon to

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hearings officer cannot consider petitioner's theory without impermissibly requiring intervenors to submit evidence to establish the nature and extent of the use more than 20 years prior to the date of application. The hearings officer's failure to adopt findings addressing that theory therefore does not provide a basis for reversal or remand." *Id.*, __ Or LUBA __ (LUBA No 2017-053, Sept 13, 2018) (slip op at 31).

conclude that the auto yard use existed on the property prior to September 1, 1973, are not substantial evidence, and that the hearings officer should have relied on the aerial photographs and land use inventory map to conclude that no auto yard use existed on the property prior to 1975.

On the merits, we agree with intervenors that neither petitioner's legal nor evidentiary arguments provides a basis for reversal or remand. No case cited to us suggests that in order to demonstrate the existence or establishment of a nonconforming use before the relevant date, the applicant must submit evidence of physical or visible changes to the land. Based on intervenors' testimony, which the hearings officer expressly found to be credible, the hearings officer noted that automobile repair and storage activities on the property prior to 1973 occurred primarily within a large garage (which was later destroyed in a fire). Record 26-27. Thus, even if the aerial photographs at the time were detailed enough to show visible evidence of automobiles parked on-site, which the hearings officer found to the contrary, the absence of visible evidence of automobile storage or other outdoor signs of the auto yard use does not compel the conclusion that no auto yard use existed on the property prior to September 1, 1973.

To the extent petitioner contends that the auto yard use must exceed some undefined minimum size or scope in order to constitute an existing nonconforming use, that argument suffers from the same flaw we identified in *Morgan II*: ORS 215.130(11) prohibits the county from requiring the applicant

to prove the nature and extent of the nonconforming use beyond the 20-year lookback period.[3] While the applicant must demonstrate that the use lawfully existed or was established prior to the adoption of contrary zoning, nothing in

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[3] ORS 215.130 provides in relevant part:

> "(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:
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> > "(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;
> >
> > "(b) Establishing criteria to determine when a use has been interrupted or abandoned under subsection (7) of this section; or
> >
> > "(c) Conditioning approval of the alteration of a use in a manner calculated to ensure mitigation of adverse impacts as described in subsection (9) of this section.
>
> "(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."

ORS 215.130 authorizes a county to reject verification of a nonconforming use that was established prior to adoption of contrary zoning because the county deems the size or scope of the use to be too small. Petitioner cites two cases, *Washington County v. Stark*, 10 Or App 384, 499 P2d 1337 (1972), and *Clackamas County v. Portland City Temple*, 13 Or App 459, 511 P2d 412 (1973), to support that proposition. But both cases predate the enactment of ORS 215.130(11), and in any case do not support the proposition that the relatively small size or scope of a nonconforming use is a basis to conclude that the use did not "exist" prior to the date contrary zoning was applied.

As to petitioner's evidentiary challenge, the hearings officer examined the aerial photographs and other evidence cited by petitioner, including the 1973 county land use inventory map, and adopted extensive findings explaining why he instead chose to rely on the affidavits and other evidence submitted by intervenors to conclude that an auto yard use was established on the property prior to September 1, 1973. A reasonable person could rely on the evidence intervenors submitted to support that conclusion, viewed in the context of the evidence in the whole record. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988). Accordingly, petitioner's evidentiary arguments do not provide a basis for reversal or remand.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

A. Categorization of the Auto Yard Use and Discontinuance

In the first and second sub-assignments of error, petitioner first argues that the hearings officer erred in collapsing the four distinct activities that constitute the auto yard use into two current county land use categories: "motor vehicle sales" and "motor vehicle impound."[4] According to petitioner, the hearings

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[4] Section III(C) of the hearings officer's decision is labeled "Proper Characterization of the 'Auto Yard' Use," and states as relevant:

> "[Intervenors] and others refer to the nonconforming use of the Property as an 'auto yard' use. [Intervenors] describe the auto yard use as an 'automobile storage, repair and sales business.' [Intervenors] describe the auto yard activities as '(a) the storage of impounded or abandoned vehicles; (b) the purchase of used vehicles; (c) the repair of used vehicles purchased for purposes of resale; and (d) the retail sale of used vehicles.'
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> "Calling [Intervenors'] use an 'auto yard' is a convenient, shorthand way to refer to the nonconforming activities, but there is no 'auto yard' use listed in the [Jackson County Land Development Ordinance (LDO)]—either as a permitted use or a prohibited use. The Hearings Officer finds that the use needs to be described with reference to the uses that are actually regulated by the LDO.
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> "[Petitioner] argues that [intervenors] are actually conducting four separate nonconforming uses: (a) the storage of impounded or abandoned vehicles; (b) the purchase of used vehicles; (c) the repair of used vehicles purchased for purposes of resale; and (d) the retail sale of used vehicles. [Petitioner's] characterization of the 'auto yard' activities is similarly unhelpful and divorced from how the LDO organizes and regulates uses. (For example, there is no such use as 'purchase of used vehicles' in the LDO.) Again, the Hearings

officer must evaluate the actual nonconforming use itself to determine whether that use and all its components and activities can be verified, regardless of how the current county land use code categorizes various uses, and whether or not the actual use and all its various components fit within current land use categories. Further, petitioner argues that as a consequence of the hearings officer's reliance on current land use categories, the hearings officer incorrectly rejected petitioner's arguments that one of the essential components of the auto yard use, the purchase of used automobiles at off-site auctions, had been lost or discontinued during the period 2008-2011, based on undisputed evidence that intervenors made no trips to auctions to purchase used automobiles for more than two years during that period. *See* LDO 11.2.2(A) (providing that if a nonconforming use is discontinued for more than two years the subsequent use of the property will conform to applicable land use regulations).

> Officer finds that the nonconforming use needs to be described with reference to the regulated uses in the LDO." Record 16 (footnotes omitted).
>
> "In sum, motor vehicles sales (as described above and described in more detail in [intervenors'] affidavits and testimony) best describes the auto yard use–a retail motor vehicle sales operation that purchases used vehicles for resale, repairs or renovates those vehicles for retail sale (although the repairs required may be more significant than you would see in most motor vehicle sales uses), and sells retail to customers. There is also a minor motor vehicle impound use of 1 to 2 vehicles annually. * * *" Record 18 (footnotes omitted).

The hearings officer rejected petitioner's argument below that the purchase of used automobiles at off-site auctions represents a separate and distinct nonconforming use, that must be analyzed separately from other components of the auto yard use and that can be lost or discontinued even if other components continue during all relevant time periods. Accordingly, the hearings officer rejected petitioner's argument that the two-plus year gap in purchasing used automobiles at off-site auctions means that intervenors have lost the right to continue to purchase used automobiles at auction and bring them onto the subject property for repair and retail sales.[5]

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[5] The hearings officer's findings state:

> "[Intervenors] also documented at least a portion of their inventory purchase activities by providing a list of auctions to which they traveled in order to purchase vehicles for the auto yard. The list shows no trips during 2009 or 2010, during the height of the recession. [Petitioner] argues that this break in auction attendance constitutes an abandonment of the nonconforming use (reasoning the purchasing cars at auctions is a separate use). [Petitioner] is incorrect. As discussed in Section III.C above, the purchasing of autos for resale is not a separate nonconforming use. The auto yard has two uses as regulated by the LDO - retail sales of motor vehicles (including acquisition of inventory, acquisition of parts & some parts cars, and repairing the cars for resale) and a modest sideline of storage of impound vehicles. [Intervenor Larry Perkett] also testified that he 'primarily' buys from auctions, and he did not say exclusively. The lack of auction attendance is not evidence of an abandonment of the auto yard use." Record 43 (footnotes omitted).

We generally agree with petitioner that the focus of verifying a nonconforming use is on the *actual use* of the subject property on the date it became nonconforming or other relevant time periods. In most circumstances, there seems little to gain, and possible risk of error, by trying to label the nonconforming use in terms of one or more land use categories set out in the currently applicable land use ordinance.[6] As an example of potential error, a hearings officer would err if he verified as part of the lawful nonconforming use activities that fall within a particular land use category that is the closest approximation to the nonconforming use in the current land use code, even though those activities were in fact not present on the subject property on the relevant dates. *See Spurgin v. Josephine County*, 28 Or LUBA 383, 392 (1994) (a county errs in verifying the nature and extent of a nonconforming private airport use based not on the nature and extent of the airport use on the date it became nonconforming, but on a state administrative rule definition of private airports).

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[6] It is sometimes necessary to describe the nonconforming use in terms of the land use categories that applied at the time the use became nonconforming, to clarify the nonconforming nature of the use. But there seems little relevance in describing the nonconforming use in terms of the currently applicable land use categories, which may be quite different from those that applied at the time the use became nonconforming. One circumstance where that approach might be useful is if some element of the nonconforming use is now a permitted use in the applicable zone, and does not require nonconforming use verification.

However, petitioner has not demonstrated that the way the hearings officer described or characterized the nonconforming auto yard use in terms of the two current land use categories resulted in any reversible error. Initially, we observe that the activity of purchasing used automobiles at off-site auctions is not, in itself, an activity that can be evaluated as part of a nonconforming use of the subject property. That is because the scope of a nonconforming use is confined to uses that occur on the subject property; off-site activities on other properties play no role in verifying the existence, nature, etc., of the nonconforming use on the subject property. The fact that the operator of the nonconforming use sometimes leaves the property to purchase supplies or inputs for the nonconforming use is not subject to analysis or regulation as part of the nonconforming use. Such offsite activities may be part of the *business* of the nonconforming commercial use, but are irrelevant for purposes of verifying nonconforming *use* of the property.

What *is* relevant is that the scope of the nonconforming auto yard use includes the activities of bringing automobiles purchased off-site onto the subject property, and storing them on-site until such time as they are repaired and then sold. The hearings officer treated these on-site activities not as a separate and distinct land use, but instead the stockpiling and storage of raw inputs that are the first step in the larger auto yard nonconforming use operation. That is an accurate characterization: intervenors must bring used automobiles onto the property and store them there, before intervenors can repair and sell them. The question for

the hearings officer and on appeal is whether a two-year hiatus in bringing used automobiles purchased at auction onto the property, while continuing to repair and sell automobiles presumably from the existing stockpile, means that that first step or element of the nonconforming use has been discontinued.

Petitioner is correct that, in some circumstances, a discrete element or portion of a nonconforming use can be discontinued or abandoned, while leaving other stand-alone elements or reduced portions in place. *See Hendgen v. Clackamas County*, 115 Or App 117, 119-20, 836 P2d 1396, *rem'd on other grounds*, 24 Or LUBA 355 (1992), *aff'd*, 119 Or App 55, 849 P2d 1135 (1993) (uninterrupted use of two buildings for storage could continue, even though related nonconforming commercial uses on site had been abandoned). However, petitioner has not established that the present case is one of those circumstances. Bringing used automobiles onto the property and storing them until they are repaired and sold is not a discrete or stand-alone element of the nonconforming use, but the first step in a three-step operation. Without that first step, the entire nonconforming use operation must eventually cease, once existing stockpiles of automobiles are exhausted. The hearings officer did not err in concluding that a temporary hiatus in that first step, while relying on existing stockpiles of

automobiles to continue the nonconforming use, does not mean that the first step or any part of the nonconforming use has been discontinued.[7]

In any case, as the hearings officer noted, intervenors testified that they "primarily" obtain used automobiles from auctions, not that they exclusively obtain automobiles from auctions. Record 43; *see* n 5. Petitioner does not challenge that finding, or argue or cite to any evidence that intervenors ceased entirely to bring automobiles onto the site for repair and sale during any two-year period. Petitioner argues only that intervenors temporarily ceased to obtain automobiles *at auction* during the 2008 recession. Petitioner has not demonstrated that the hearings officer erred in concluding that a hiatus in using one source of supply input for the auto yard use means that any part of the auto yard use has been discontinued.

B. Limits on the Number of Automobiles On-Site

In the third sub-assignment of error, petitioner argues that the hearings officer erred in failing to impose a limit on the total number of vehicles that can

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[7] We note that the present circumstances have some parallel in a line of cases involving aggregate mining. Oregon courts have held that temporary interruptions in excavating new aggregate, while aggregate processing and sales continue based on existing stockpiles, does not result in discontinuing the nonconforming quarry use or any part of it, in part due to the fluctuating nature of aggregate mining. *Polk County v. Martin*, 292 Or 69, 636 P2d 952 (1981); *see also* ORS 215.130(7)(b) (legislative codification of *Polk County* and its progeny). Intervenors' auto yard use, like that of an aggregate mining operation, is a sequential three-step operation of generating and storing input, processing that input, and sales of the final product.

be stored on-site. Petitioner argued below that failing to limit the total number of vehicles stored on site, consistent with the number of vehicles stored on site on the key date in 1996, would potentially allow intervenors to substantially increase the number of vehicles stockpiled on the site over historic levels, which would represent a significant and unapproved expansion of the nonconforming auto yard use. Petitioner argues that in determining the nature and extent of the nonconforming use of the relevant date, 1996, the hearings officer must be careful to describe the nature and extent in a manner that does not inadvertently allow unauthorized expansion or alteration of the nonconforming use, citing *Spurgin*, 28 Or LUBA at 390-91.[8]

The hearings officer rejected that argument, concluding that limitations on the physical extent of the auto yard use, combined with imposed limitations on the number of vehicles that could be sold each year, would together function to

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[8] In *Spurgin*, we held:

> "The county has some flexibility in the manner and precision with which it describes the scope and nature of a nonconforming use. However, the county may not, by means of an imprecise description of the scope and nature of the nonconforming use, authorize *de facto* alteration or expansion of the nonconforming use. At a minimum, the description of the scope and nature of the nonconforming use must be sufficient to avoid improperly limiting the right to continue that use or improperly allowing an alteration or expansion of the nonconforming use without subjecting the alteration or expansion to any standards which restrict alterations or expansions." 28 Or LUBA at 390-91 (footnote omitted).

prevent the hypothetical expansion cited by petitioner.[9] The hearings officer also commented that limiting the total number of vehicles stockpiled on site to the levels present in 1996 could "improperly limit the right to continue the auto sales use because inventory needs fluctuate," and provided a slip opinion citation to page 11 of *Spurgin,* which we understand to be a citation to 28 Or LUBA at 390-91.

We agree with petitioner that the hearings officer erred in failing to describe the nature and extent of the auto yard use in a way that imposes an upper limit on the number of vehicles stored on site, consistent with the upper number present at or approximate to the key date under the 20-year lookback period, 1996. While the hearings officer limited the physical extent of the auto yard use to one that is visible in aerial photographs in 1996, and limited annual sales of vehicles sold to the approximate number sold in 1996, neither limitation alone or

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[9] The hearings officer's decision states, in relevant part:

> "[Petitioner] argues that the Hearings Officer must place a limit of the total number of cars that may be stored on the Property. The Hearings Officer concludes that limits on the geographic scope of the auto yard use and limits on the number of retail sales per year are all that is required. Moreover, storage of cars, by itself, is not one of the auto yard uses. The only storage allowed is in conjunction with the repair and retail sales use, and while inventory numbers will inevitably fluctuate, limiting the geographic scope of the use and capping the retail sales sufficiently limits the nonconforming use. Limiting the total number of cars brought to the property could also improperly limit the right to continue the auto sales use because inventory needs fluctuate. *See Spurgin* at 11." Record 42.

together would necessarily prevent intervenors from stockpiling increased numbers of vehicles on site, for example by parking them at tighter intervals or stacking them, than was present in 1996. A significant increase in the number of vehicles stored on site over 1996 would represent an expansion or alteration of the nonconforming use. And the outdoor parking of vehicles is the most visible and tangible land use impact of the nonconforming auto yard use.

It is also unclear why the hearings officer believes that limiting the total number of vehicles stored on site to that present in 1996 could improperly limit the right to continue the auto yard use. As *Spurgin* suggests, the hearings officer has the flexibility to determine a total number of stored vehicles that is consistent with continued auto yard use. As noted below, the hearings officer relied heavily upon a 1996 aerial photograph that shows over 100 cars parked on the subject property on that particular date. *See* n 10, below. If for some reason that level of inventory is deemed insufficient to allow the continuation of the auto yard use, the hearings officer has the ability, as he did in setting an upper limit on automobile sales, to examine evidence from surrounding dates, to determine an average or adequate inventory level. But we agree with petitioner that what the hearings officer cannot do is decline to impose any upper limit on vehicle storage numbers at all, as that would determine the nature and extent of the nonconforming use in a manner that would potentially allow for significant and unlimited expansion of the auto yard use without review or approval for expansion or alteration of the nonconforming use.

Intervenors respond that LUBA rejected petitioner's similar argument in *Morgan II* that the hearings officer erred in failing to limit the number of vehicles stored on site to those present in 1996, and therefore this issue is barred by doctrine of law of the case. However, intervenors do not cite to any language in *Morgan II* that resolved this issue against petitioner, and in fact as we read the relevant portions of *Morgan II* it is clear that we remanded the 2017 decision for the hearings officer to determine the nature and extent of the auto yard use as of the key date, 1996, including the number of vehicles stored on site. *Morgan II*, __ Or LUBA __ (Or LUBA No 2017-053, Sept 13, 2018) (slip op at 34) (the hearings officer erred in determining nature and extent based on the auto yard use in 2006 rather than 1996, and remanded in relevant part so that the hearings officer can determine "how many vehicles can be stored, repaired and sold on the property[]").

Intervenors next argue, based on the language both parties cite in *Spurgin*, that the county has some flexibility in the manner and precision with which it describes the scope and nature of the auto yard use, and that greater precision regarding the total number of vehicles stored on site is not necessary to ensure against unauthorized expansions in the intensity of the auto yard use. However, the problem is not an imprecise limit on vehicle storage, but a lack of any limits at all. We conclude that if the evidence in the record allows the hearings officer to determine the approximate number of vehicles stored on-site on the relevant

date in 1996, and it appears it does, the hearings officer should impose a corresponding limit on the number of vehicles that can be stored on-site.

This subassignment of error is sustained.

The second assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

As noted, the 2017 hearings officer declined to verify two shop buildings and a storage building, concluding that the buildings were constructed sometime after the auto yard use became nonconforming on September 1, 1973, and thus the buildings were not lawfully established. No party challenged or cross-appealed that conclusion in the proceedings leading to *Morgan II*. Our opinion in *Morgan II* discussed that conclusion as part of our analysis of the ORS 215.130(10) rebuttable presumption, and the operation of the 10- and 20-year lookback periods, but our opinion did not expressly require that the hearings officer on remand reconsider verification of the three buildings. We did, however, require the hearings officer to re-evaluate the evidence under the correct evidentiary standard, with focus on the nature and extent of the auto yard use on the key date in 1996.

On remand, the 2018 hearings officer re-opened the record at petitioner's request to include new evidence, including a 1996 aerial photograph that the hearings officer primarily relied upon to determine the nature and extent of the

nonconforming auto yard use in 1996.[10] That 1996 aerial photograph shows that the two shop buildings, but not the storage building, existed in 1996. Without much discussion, the hearings officer verified as part of the nonconforming use the two shop buildings that he found were present on the subject property on the relevant date in 1996. The 2018 hearings officer declined to verify the storage building that he found was constructed after that time.[11] In four alternate sub-

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[10] The 2018 hearings officer examined aerial photographs from 1994 and 1996, and found, in relevant part:

> "The 1996 aerial was taken within two weeks of the terminus of the 20-year lookback period. The Hearings Officer concludes that the 1996 aerial photograph is the best evidence in the record showing the geographic scope of the auto yard use at the beginning of the 20-year lookback period. There appear to be over 100 cars outside the Shops in that photograph. The two Shop buildings are plainly visible. The auto yard area extends well to the east of the house and the Shops. There are three or four rows of cars parked to the south of the Shop that is immediately south of the residence, and a road/driving area surrounds the auto yard area to the south of that. The Storage Building is not present." Record 39 (footnote omitted).

[11] At the end of the decision, the hearings officer describes the verified elements of the auto yard use:

> "In characterizing the scope of the nonconforming use, the Hearings Officer concludes that the geographic scope of the auto yard is that area shown on the June 29, 1996, aerial photograph. The two Shop buildings are shown in the photograph (and in the 1994 photograph), but the Storage Building was not present in 1996 and cannot be verified. * * *" Record 44.

assignments of error, petitioner challenges the verification of the two shop buildings.

A. Scope of Remand; Law of the Case

Petitioner first argues that no party in the appeal of the 2017 decision to LUBA challenged the finding in the 2017 decision that all three structures could not verified as part of the nonconforming use, and that intervenors filed no cross-appeal or cross-assignment of error on that point. Petitioner contends that no part of LUBA's remand required the hearings officer to revisit that finding or redetermine the status of the two shop buildings. Petitioner notes that the 2018 hearings officer expressly limited the scope of remand to the remand issues identified in *Morgan II*. Petitioner argues that the hearings officer erred in expanding the scope of remand to revisit an unappealed issue that was not within the scope of remand. For the same reason, petitioner argues that when the hearings officer revisited this unappealed issue he violated the *Beck* law of the case doctrine.

Intervenors respond that LUBA remanded the 2017 decision to the hearings officer to re-evaluate the evidence in the record under the correct evidentiary standard, with focus on the nature and extent of the nonconforming auto yard use as of the key date 1996, and that at petitioner's request (and over intervenors' objection) the hearings officer re-opened the record for new evidence on that point. Intervenors argue that consistent with LUBA's remand instructions the 2018 hearings officer applied the correct evidentiary standard to

the evidence in the record, including the 1996 aerial photograph, to determine the nature and extent of the auto yard use in 1996, and concluded, as the photograph clearly shows, that the two shop buildings existed in 1996. According to intervenors, the hearings officer's verification of the two shop buildings on remand was consistent with LUBA's remand and not barred by *Beck* law of the case doctrine.

We agree with intervenors. The 1996 aerial photograph was apparently not in the record before the 2017 hearings officer, and that hearings officer made no focused findings regarding the nature and extent of the auto yard use in 1996. Our remand in *Morgan II* required a broad evidentiary re-evaluation, with focus on the nature and extent of the auto yard use in 1996. The 2018 hearings officer, at petitioner's request, expanded the record to include new evidence regarding the nature and extent of the auto yard use in 1996, apparently including the 1996 aerial photograph. Petitioner does not dispute that the 1996 aerial photograph clearly shows the two shop buildings. Given the terms and plenary nature of our remand, we conclude that it fell within the scope of remand for the hearings officer to make a full determination regarding the nature and extent of the auto yard use in 1996, even if that determination is contrary to an unchallenged determination that was present in the 2017 hearings officer's decision, based on a different and arguably less comprehensive evidentiary record. For the same reason, we disagree with petitioner that the status of the two shop buildings was a resolved issue, precluded from review under the *Beck* law of the case doctrine.

The first and second subassignments of error are denied.

B. Misconstruction of Law: Nonconforming Structure

The LDO distinguishes between structures that are nonconforming by use or design, and structures whose use is otherwise lawful but which do not conform to currently applicable dimensional, locational or similar standards. LDO 11.1.2(A) and (B). The 2018 hearings officer noted the distinction, and correctly concluded that the issue on remand did not involve any issue regarding "nonconforming structures" in the sense of structures that do not conform to applicable dimensional or locational standards.[12] The hearings officer evaluated

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[12] The hearings officer's decision states, in relevant part:

> "This case is about the verification of a nonconforming use, not a nonconforming structure. Put another way, the use of the Property generally for the nonconforming use is not distinct from the use of any structures on the Property for the nonconforming use. The use of structures for the nonconforming use is, of course, an important consideration in the analysis. Physical enlargement of structures containing the nonconforming use, for example, would be an expansion of the property used by the nonconforming use under LDO 11.2.1(B)(l)(c). Replacement of a structure in which a nonconforming use is located with a larger structure is also an expansion of the nonconforming use. LDO 11.2.l(B)(l)(a). The regulation of nonconforming structures themselves, on the other hand, has to do with whether the structure meets 'dimensional or locational' standards. In this case, the Hearings Officer must focus on the nonconforming use, and the structures in which the use is taking place should not be analyzed separately from the remainder of the Property when considering whether the Appellant has rebutted the 10-year presumption regarding the existence,

the status of the three structures as part of determining the nature and extent of the auto yard use in 1996, and did not repeat the 2017 hearing officer's error in analyzing the structures separately from the rest of the auto yard use.

On appeal, petitioner argues that the 2018 hearings officer's findings regarding nonconforming structures misconstrues the applicable law.[13] However, we do not understand petitioner's argument. Petitioner argues that as defined at LDO 11.3 the category of "nonconforming structures" includes *both* structures that are nonconforming by use or design, *and* those that are nonconforming only with respect to dimensions or location standards.[14] That may be the case, but petitioner does not explain why that means the hearings

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> continuity, nature, and extent [of] the auto yard use. This decision will not analyze the use of the structures separately from the use of the other portions of the Property." Record 20 (emphases in original).

[13] Intervenors respond, initially, that the issue raised under the third subassignment of error was not raised below, and is waived under ORS 197.763(1). Petitioner replies that the alleged misconstruction of law arose for the first time in the findings adopted on remand and petitioner could not have anticipated the alleged error. We agree with petitioner.

[14] LDO 11.3 is part of a code section addressing "nonconforming structures," and states in relevant part:

> "Structures may be nonconforming because they do not comply with the locational or dimensional requirements of this Ordinance, or because their intended use and purpose is not consistent with the zoning district in which they are located. Such structures are considered to be nonconforming by design. Nonconforming structures are subject to the following standards[.]"

officer misconstrued the applicable law or how any misconstruction results in reversible error. Absent a more developed argument, the third subassignment of error does not provide a basis for reversal or remand.

The third subassignment of error is denied.

C. Inadequate Findings regarding LDO 11.3, 11.8.1(A) and 13.3(146)

The 2017 hearings officer cited LDO 11.3, 11.8.1(A) and 13.3(146), as support for his conclusion that the three structures can be analyzed separately from the rest of the auto yard use, for purposes of the rebuttable presumption and 10 and 20-year lookback periods.[15] In *Morgan II*, we rejected that conclusion, noting that LDO 11.3, 11.8.1(A) and 13.3(146) offer no support for that

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[15] LDO 11.3 is quoted in part above. *See* n 14. LDO 11.8.1(A) is part of a code section setting out the process to verify a nonconforming use, providing in relevant part:

> "The application must be accompanied by documentation that establishes the approximate date that the use, structure, or sign was established; proof that the use, structure, or sign was lawfully established at the time it became nonconforming; and proof that the use has not been discontinued or abandoned, except as provided in Section 11.8.2 below. The Director may require or provide additional information if deemed necessary to permit an accurate determination."

LDO 13.3(146) is a definition of the term "Lawfully Created/Established," which means: "Any building, structure, use, lot or parcel that complied with land use laws and local standards, if any, in effect at the time of its creation or establishment, whether or not it could be created/established under this Ordinance."

conclusion. *Id.*, __ Or LUBA __ (LUBA No 2017-053, Sept 13, 2018) (slip at op at 22-23).

On appeal of the decision on remand, petitioner faults the hearings officer for failing to address LDO 11.3, 11.8.1(A) and 13.3(146) in determining whether the two shop buildings can be verified as part of the nonconforming auto yard use. According to petitioner, the 2018 hearings officer's findings are inadequate, for failing to address three LDO standards that the 2017 hearings officer found relevant to evaluating the nonconforming use status of the two shop buildings.

Intervenor responds that LUBA has already held that LDO 11.3, 11.8.1(A) and 13.3(146) are irrelevant to determination of the nonconforming use status of the two shop buildings, and that petitioner's contrary argument that the hearings officer on remand must adopt findings addressing those code provisions is therefore barred by the *Beck* law of the case doctrine.

We disagree with intervenors that *Beck* law of the case precludes petitioner from challenging the failure of the hearings officer's findings on remand to address LDO 11.3, 11.8.1(A) and 13.3(146). Our conclusion in *Morgan II* that those three code provisions do not support the 2017 hearings officer's conclusion that the three structures can be analyzed separately from the rest of the nonconforming use does not necessarily mean that those three code provisions may not be relevant to the issues on remand in other ways.

However, on appeal petitioner does not explain what relevance these three code provisions might have to any issue on remand. Petitioner does not argue

that LDO 11.3, 11.8.1(A) and 13.3(146) are approval standards or other applicable standards in any sense. None of the standards for "nonconforming structures" at LDO 11.3 appear to have any bearing on verification of the two shop buildings. LDO 11.8.1(A) describes the application process for verifying a nonconforming use, and potentially could have some procedural relevance to the proceedings on remand, but if so, petitioner does not explain what that relevance is. LDO 13.3(146) is simply a definition of the term "Lawfully Created/Established." Petitioner argues only that the 2018 hearings officer must address these three code provisions because the 2017 hearings officer addressed them. However, that is not necessarily the case.

It is possible that petitioner believes that if the 2018 hearings officer is allowed to revisit the issue of verifying the nonconforming use status of the two shop buildings, the 2018 hearings officer is obliged to address the basis for the 2017 hearings officer's conclusion that the two shop buildings cannot be verified. As we understand the 2017 hearings officer's decision, that basis was that the evidence in the record before him showed that the shop buildings did not exist on September 1, 1973, the date contrary zoning was first applied, and that the buildings were constructed sometime prior to 2000 without obtaining required county land use approvals as expansions of the nonconforming use. Based on this evidence, the 2017 hearings officer concluded that the two shop buildings (and the storage building) were not "lawfully established," a requirement that the

2017 hearings officer apparently extrapolated from LDO 11.3, 11.8.1(A) and 13.3(146). Response Brief Appendix 22.

As we explained in *Morgan II*, the 2017 hearings officer did not correctly apply the 20-year lookback period, and did not appreciate the significance of the key date, 1996. We remanded to correct those errors, and on remand the 2018 hearings officer complied, based on a different evidentiary record that included the 1996 aerial photograph. The 2018 hearings officer conducted that task with the apparent understanding that any structure associated with the auto yard use that existed on the property prior to the key date in 1996 may be verified, even if that structure represents an (unauthorized) expansion of the auto yard use since the use became nonconforming on September 1, 1973. That understanding is consistent with ORS 215.130(11). *Reeder v. Multnomah County*, 59 Or LUBA 240, 248-49 (2009) (ORS 215.130(11) effectively prohibits a county from refusing to verify unauthorized expansions or alterations that occur between the date the use became nonconforming and the 20-year lookback period). To the extent petitioner is contending on appeal that the hearings officer must apply LDO 11.3, 11.8.1(A) and 13.3(146) in a manner that would contravene ORS 215.130(11), we reject the argument. Similarly, to the extent the 2018 hearings officer's findings are inadequate for failure to address the applicability and requirements of LDO 11.3, 11.8.1(A) and 13.3(146), petitioner has not demonstrated that the failure to address LDO 11.3, 11.8.1(A) and 13.3(146) provides a basis for reversal or remand.

The fourth subassignment of error is denied.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Under the fourth assignment of error, petitioner argues that the hearings officer erred in failing to impose limits on the number of vehicles that can be purchased.

The 2017 hearings officer imposed a limit on how many vehicles intervenors could purchase and sell each year. The 2018 hearings officer also imposed a limit on the number of vehicles that can be sold on the property, but declined to impose any limit on the number of vehicles purchased at off-site locations.

Intervenors respond, and we agree, that the hearings officer has no authority to limit the number of vehicles that intervenors can purchase at off-site locations. As explained above, the scope of nonconforming use verification is limited to activities that occur on the subject property, including the storage of vehicles. However, petitioner cites no basis in the LDO or any other law for the hearings officer to impose limits on the number of off-site vehicle purchases.

The fourth assignment of error is denied.

The county's decision is remanded.