

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38

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

WALTER AMAN,)
)
 Petitioner,)
)
 vs.)
)
 CITY OF TIGARD,)
)
 Respondent,)
)
 and)
)
 SF PROPERTY INVESTMENT, LLC,)
)
 Intervenor-Respondent.)

LUBA No. 98-091
FINAL OPINION
AND ORDER

Appeal from City of Tigard.

Steven A. Moskowitz, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Moskowitz and Thomas.

James M. Coleman, Portland, filed a response brief on behalf of respondent. With him on the brief was O'Donnell Ramis Crew Corrigan and Bachrach.

Jack L. Orchard, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Ball Janik.

HANNA, Board Member; GUSTAFSON, Board Chair; participated in the decision.

AFFIRMED 12/14/98

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

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision by the city council to modify a planning director's
4 interpretation regarding a nonconforming use.

5 **MOTION TO INTERVENE**

6 SF Property Investment, LLC, (intervenor) moves to intervene on the side of
7 respondent. There is no opposition to the motion, and it is allowed.

8 **FACTS**

9 The subject property, owned by petitioner, is a 5.81-acre parcel that has a split
10 zoning. The front half of the property is zoned General Commercial (CG). The back half is
11 zoned Medium Density Residential (R-12). Intervenor owns an apartment complex abutting
12 the subject property.

13 Petitioner currently leases the subject property to Raz Transportation (Raz), a
14 commercial bus service. Since 1944, the property has generally been used for staging of
15 heavy construction equipment and tour and charter buses. Although the heavy equipment
16 and bus uses are allowed in the commercial portion of the property, these uses became
17 nonconforming on the residentially-zoned portion of the property in 1987 when the property
18 was annexed to the city.

19 Raz, proposing to move its entire bus service operation to the site, requested a
20 planning director's interpretation under Tigard Municipal Code (TMC) 18.12.010(A) to
21 confirm both the nonconforming use status of the property, and that the proposed bus
22 operation would continue to be in compliance with the nonconforming use provisions of the

1 TMC¹. TMC 18.12.010(A) provides that "the director shall have the initial authority to
2 interpret all terms, provisions, and requirements of [Title 18, Zoning]."

3 TMC 18.132.040(B)(1) sets forth the following limitations on nonconforming uses of
4 land:

5 "Where at the time of adoption of this title a lawful use of land exists which
6 would not be permitted by the regulations imposed by this title, and where
7 such use involves no structure or building other than a single sign or
8 accessory structure, the use may be continued as long as it remains otherwise
9 lawful, provided:

10 "a. No such nonconforming use is enlarged, increased or extended to
11 occupy a greater area of land or space than was occupied at the
12 effective date of adoption or amendment to this title;

13 "b. No such nonconforming use shall be moved in whole or in part to any
14 portion of the lot other than that occupied by such use at the effective
15 date of adoption or amendment of this title;

16 "c. The nonconforming use of land is not discontinued for any reason for
17 a period of more than six months;

18 "d. If the use is discontinued or abandoned for any reason for a period of
19 six months any subsequent use of land shall conform to the regulations
20 specified by this title for the zone in which such land is located."
21 (Emphases added.)

22 The director found, based on an historic use outline provided by Raz, that "the
23 proposed nonconforming use [of exclusive bus service] of the commercial and residential
24 portions of the property are in compliance with the nonconforming provisions of the
25 Community Development Code."² Record 19. This decision was not appealed.

¹The record suggests that various bus companies have staged buses on the property since 1979 and that RAZ began staging, repairing, servicing, and dispatching buses from this site in 1994. Raz now proposes to be the sole tenant on the property.

²This decision was based on findings that included:

"The proposed bus service did not appear to increase the intensity of the heavy equipment type uses that have taken place on the property since 1944; the entire site has been utilized for this purpose or other heavy equipment since 1944; and the proposed bus service did not involve the use of a non-conforming structure." Record 19-20.

1 However, intervenor subsequently made its own request for a re-interpretation of the
2 planning director's interpretation to further address historic use of the back portion of the
3 residentially-zoned half of the subject property. Intervenor's request was accompanied by
4 new evidence including a series of historic aerial photographs. The director found that

5 "the director's interpretation issued on April 28, 1997 was based on
6 information provided by RAZ in their request. * * * The director's
7 interpretation only included findings that relate to RAZ being a valid
8 continuing nonconforming use of the property in question. That decision was
9 silent on and did not approve an expansion of a nonconforming use. At issue
10 is whether RAZ has expanded the nonconforming use to areas not previously
11 used consistently over the years. Expansion of a nonconforming use is not
12 permitted by the community development code." Record 208.

13 At the director's request, the planning commission took the matter under
14 consideration and conducted a public hearing.³ The planning commission reviewed the
15 aerial photographs, considered testimony from neighbors, and considered affidavits of prior
16 owners and users of the subject property. The planning commission found that: (1) the
17 proposed increased bus use would increase the intensity of the heavy equipment type use
18 over that which had taken place on the back 200 feet of the residentially zoned portion of the
19 property in recent years (TMC 18.132.040(B)(1)(a); (2) except for the back 200 feet,
20 nonconforming uses had continued on the property since 1987; and (3) commercial use on
21 the back 200 feet of the property was discontinued for a period of over six months (TMC

³TMC 18.32.390 "Revocation of Approvals" provides:

"A. The hearings authority may, after a hearing conducted pursuant to this chapter, modify or revoke any approval granted pursuant to this chapter for any of the following reasons:

"* * * * *

"4. A material misrepresentation of mistake of fact or policy by the City in the written or oral report regarding the matter whether such misrepresentation be intentional or unintentional.

"B. In the case of a decision made by the Director, the hearing on whether to modify or revoke an approval shall be held by the Commission."

1 18.132.040(B)(1)(c) and (d).⁴ Raz appealed the planning commission's decision to the city
2 council.

3 The city council conducted a de novo review and affirmed the planning commission's
4 decision. The city council adopted the findings made by the planning commission and made
5 additional findings of its own. The city council's additional findings provide an alternate
6 basis for its decision and include an interpretation of its code. The city council found the
7 portion of TMC 18.132.040(B)(1)(a) that prohibits enlargement, increase or extension of
8 nonconforming uses to be ambiguous. The council interpreted enlargement, increase and
9 extension to include such off-site impacts as noise, odors, visual impact and hours of
10 operation. In affirming the planning commission's decision, the council concluded that there
11 had not been an adequate demonstration that a lawful nonconforming use had existed on the
12 rear 200 feet of the property without discontinuance for a period of six months since 1987.⁵

13 This appeal followed.

14 **FIRST ASSIGNMENT OF ERROR**

15 Petitioner argues that the city's decision that the nonconforming use does not include
16 the back 200 feet of the residentially-zoned portion of the subject property is not supported
17 by substantial evidence in the whole record. Petitioner relies on evidence introduced at the
18 planning commission hearing that primarily consisted of affidavits from previous owners of
19 the property and former employees who had worked at the location. These affidavits state
20 that the entire property has been continually used for commercial purposes since the use
21 became nonconforming.

⁴The planning commission ordered petitioner to restore the back 200 feet of the property to its previous unused state and prohibited any future commercial use on that portion of the property.

⁵In the alternate basis for its decision, the council found that petitioner had increased the intensity of use on the back 200 feet of the property in terms of off-site impacts, in violation of TMC 18.132.040(B)(1)(a).

1 In response, intervenor relies on evidence it introduced at the planning commission
2 hearing that consisted of live testimony given by neighbors and a series of historical aerial
3 photographs taken in 1984, 1986, 1990, and 1992. This evidence indicates that at least the
4 back 200 feet of the property has not been in commercial use without discontinuance for a
5 period of six months since the use became nonconforming in 1987.

6 In deciding whether a challenged decision is supported by substantial evidence in the
7 whole record, we are required to consider whether evidence supporting the decision is
8 refuted or undermined by other evidence in the record, but we cannot reweigh the evidence.
9 Younger v. City of Portland, 305 Or 346, 358-60, 752 P2d 262 (1988). Where evidence is
10 conflicting and the contrary evidence does not so undermine the evidence relied upon by the
11 local decision maker that it is unreasonable for the decision maker to rely upon it, the choice
12 between such conflicting believable evidence belongs to the local government decision
13 maker, and LUBA will not disturb that choice. Harwood v. Lane County, 23 Or LUBA 191,
14 198 (1992).

15 The decision states that while both petitioner and intervenor presented evidence in
16 support of their positions, the city council found the intervenor's live testimony and aerial
17 photographs to be more credible. In particular, the city council found that intervenor's
18 photographs did not show tire tracks, vehicle surfacing, or lighting within the back 200 foot
19 area that would be indicative of bus or heavy vehicle usage. Petitioner responded by arguing
20 that the 1990 and 1992 photographs were taken in the summer months when heavy
21 equipment and buses are most likely to be off-site. However, the city council did not find
22 petitioner's explanation for the apparent lack of activity on the back 200 feet of the property
23 to be persuasive. We conclude that petitioner's evidence does not so undermine intervenor's
24 evidence as to make the city council's decision to rely on intervenor's evidence unreasonable.
25 The city's decision that the nonconforming use does not include the back 200 feet of the
26 residentially zoned portion of the subject property is supported by substantial evidence.

1 The first assignment of error is denied.

2 **SECOND ASSIGNMENT OF ERROR**

3 Petitioner argues that the city improperly construed the standard of TMC
4 18.132.040(B)(1)(a), which prohibits enlargement, increase or extension of a nonconforming
5 use. Because we affirm the city's determination under TMC 18.132.040(B)(1)(c) and (d) that
6 a lawful nonconforming use had not existed without discontinuance for a period of six
7 months on the back 200 feet of the residential portion of the property, we need not reach the
8 city's alternate basis for its decision.

9 The city's decision is affirmed.