BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MICHAEL L. APPLEBEE
and JENNIE M. APPLEBEE,
Petitioners,

vs.

WASHINGTON COUNTY,
Respondent,

and

NEIGHBORS AGAINST APPLE VALLEY
EXPANSION, ELLEN SAUNDERS,
DAVID BRATTON and RENEE MILLS,
Intervenors-Respondent.

LUBA No. 2007-001

FINAL OPINION
AND ORDER

Appeal from Washington County.

Wendie L. Kellington, Lake Oswego, filed the petition for review and argued on behalf of petitioners.

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

Edward J. Sullivan, Portland, filed a response brief and argued on behalf of intervenors-respondent. With him on the brief were William K. Kabeiseman, Carrie A. Richter and Garvey Schubert Barer, PC.

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

REMANDED 06/08/2007

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a hearings officer's decision that determines the uses and operations that existed in 1996 at a private use airport.

MOTION TO INTERVENE

Neighbors against Apple Valley Expansion, Ellen Saunders, David Bratton and Renee Mills (intervenors) move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is a rectangular-shaped parcel located between Highway 26 and the Southern Pacific Railroad tracks near Buxton. The property is zoned exclusive farm use (EFU) and exclusive forest conservation (EFC), and is subject to a Private Use Airport Overlay District. The parcel is entirely located within a 100-year floodplain, and is subject to winter floods.

In 1989, the county granted the previous owner, local television celebrity Ramblin' Rod Anderson, special use approval for a personal use airport, subject to conditions that limited its use to the owner and, on an infrequent and occasional basis, to the owner's invited guests. Commercial aviation activities were restricted to agricultural operations. Another condition of the 1989 approval required review after five years to determine whether additional conditions were necessary to reduce impacts on surrounding properties.

In a separate application filed in 1989, the county also granted Anderson approval for a dwelling and a three-sided agricultural outbuilding. Due to the property's location in the floodplain, the permit required that the area beneath the dwelling be unobstructed and that the agricultural building not be enclosed, to allow flood waters to pass through. Further, the permit required Anderson to record a deed prohibiting the storage of hazardous chemicals, including petroleum, herbicides and pesticides.

In 1994, Anderson applied for a review of conditions as required by the 1989 personal use airport permit, as part of a property line adjustment application. At that time Anderson had six aircraft based at the airport, which was known as Apple Valley Airport. The county found the conditions of the personal use airport approval satisfied, and modified the review of conditions requirement to 10 years. All other conditions of the 1989 personal use airport approval remained unchanged.

In 1995, the state adopted the Airport Protection Act (SB 1113), codified at ORS 836.600 *et seq.* As explained below, the statute requires counties to protect continued operation of listed uses that existed "at any time during 1996" at listed "private use" airports, and further provides for the future growth of such existing uses. The statute also allows counties to approve new uses at listed airports, subject to standards. The Act listed Apple Valley Airport as one of the airports that qualified for protection as a private use airport. In 2003, the county adopted local regulations to conform to the Act, under Washington County Community Development Code (CDC) 385, and added Apple Valley Airport to its list of protected airports.

Petitioners acquired Apple Valley Airport from Anderson's estate in 2004, and began conducting various commercial aviation activities, including flight instruction, scenic tours, and forest fire patrols. After neighbors complained, the county initiated a series of enforcement actions that prompted petitioners to file the instant application. Petitioners' application requested a determination of the operational level of the airport as it existed in 1996, and a 10-year review of conditions pursuant to the 1989 permit and 1994 review. In addition, the application requested approval of a number of aviation or aviation-related uses. Specifically, petitioners sought approval to (1) base up to 10 aircraft on-site, (2) conduct a range of commercial aviation agricultural operations, (3) offer flight instruction and scenic tours, (4) conduct forest fire patrols, and (5) store aviation fuel on-site in a 2,000-gallon fuel truck.

The application was not entirely clear regarding whether the above five additional uses were "expansions" of uses that existed at the airport in 1996, which do not require special use approval under CDC 385, or whether those uses were "new uses" that did not exist in 1996 and therefore required special use approval under CDC 385. The planning staff report understood that at least the proposals for flight instruction, scenic tours and forest fire patrols were new uses, and recommended denial of those proposals. Shortly before the hearing, petitioners requested permission to "withdraw" from their application their request for special use approval for flight instruction, scenic tours and forest fire patrols, taking the position that those uses in fact existed in 1996, and did not require special use approval.

Staff conducted a site visit, and discovered that at some point prior to petitioners' ownership fill had been placed under the existing dwelling, contrary to the 1989 dwelling/agricultural building permit, and that a fourth wall had been added to the three-sided agricultural building, which was being used as an office as well as an aircraft hangar.

The hearings officer conducted a hearing on September 21, 2006, at which opponents and petitioners submitted testimony regarding the aviation operations that occurred in 1996. On November 3, 2006, staff changed its recommendation from denial to approval with respect to flight instruction, scenic tours and forest fire patrol. Petitioners subsequently rescinded their previous request to withdraw those uses from special use approval.

On December 20, 2006, the hearings officer issued a decision that (1) denied petitioners' request to withdraw part of the application, (2) determined that the airport's operational level in 1996 consisted only of fixed wing flights by the owner and occasional invited guests, and (3) determined that the 1996 airport did not include flight instruction, scenic tours or forest fire patrols. Accordingly, the hearings officer denied the proposed "expansion" or growth of those uses. In addition, the hearings officer concluded that the application did not request review for any "new uses," and therefore declined to consider the requested additional uses under the code criteria for new uses. Finally, in conducting the 10-

year review of conditions, the hearings officer required petitioners to remove the fill that had been placed under the existing dwelling, and to remove the fourth wall and office that had been added to the three-sided agricultural building.

This appeal followed.

INTRODUCTION

Some discussion of ORS 836.600 and the county regulations implementing the statute is necessary to understand the parties' contentions.

A. Continued Operation of Uses

ORS 836.608(3)(a) provides that "[a] local government shall not impose limitations on the continued operation of uses described in ORS 836.616(2) that existed at any time during 1996 at [a listed airport]."[1] A local government also may not impose additional limitations on uses approved prior to January 1, 1997, at listed airports. ORS 836.616(2) in turn requires local governments to authorize within an airport boundary a number of aviation and aviation-related uses.[2] Thus, if any uses or activities listed in ORS 836.616(2) existed at

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[1] ORS 836.608(3)(a) provides:

> "A local government shall not impose limitations on the continued operation of uses described in ORS 836.616 (2) that existed at any time during 1996 at an airport described in subsection (2) of this section. A local government shall allow for the growth of uses described in ORS 836.616(2) that existed at any time during 1996 at an airport described in subsection (2) of this section. A local government shall not impose additional limitations on a use approved by the local government prior to January 1, 1997, for an airport described in subsection (2) of this section. Notwithstanding subsection (4) of this section, the construction of additional hangars or tie-downs by the owner of an airport described in subsection (2) of this section, basing additional aircraft and increases in flight activity shall be permitted at an airport described in subsection (2) of this section."

[2] ORS 836.616(2) provides:

> "Within airport boundaries established pursuant to commission rules, local government land use regulations shall authorize the following uses and activities:
>
> "(a) Customary and usual aviation-related activities including but not limited to takeoffs, landings, aircraft hangars, tie-downs, construction and maintenance of airport facilities, fixed-base operator facilities and other activities incidental to the normal operation of an airport;

any time during 1996 at the Apple Valley Airport, or were previously approved, the county must allow such uses to continue.

The county implemented the above statutes by adopting CDC 385-3, which provides for the continued operation and a determination of existing use, with a list of authorized uses that elaborates on those listed in ORS 836.616(2) and its implementing regulation, OAR 660-013-0100. [3] CDC 385-3(A) specifies that "customary and usual aviation-related activities do not include residential, commercial, industrial, [or] manufacturing * * * uses."

"(b) Emergency medical flight services;

"(c) Law enforcement and firefighting activities;

"(d) Flight instruction;

"(e) Aircraft service, maintenance and training;

"(f) Crop dusting and other agricultural activities;

"(g) Air passenger and air freight services at levels consistent with the classification and needs identified in the State Aviation System Plan;

"(h) Aircraft rental;

"(i) Aircraft sales and sale of aviation equipment and supplies; and

"(j) Aviation recreational and sporting activities."

[3] CDC 385-3 provides, in relevant part:

"Operation of the following uses may be continued at their current levels as of the effective date of this ordinance (November 27, 2003) upon demonstration that the use existed at the airport at any time during 1996.

"In response to requests for building permits or other expansions pursuant to Section 385-4 which may or may not otherwise require a Type II or Type III procedure, or in response to citizen complaints, the Review Authority may require a determination regarding the existence and level of a particular listed use in 1996. This determination of an existing use shall be based upon a review of evidence provided by the airport sponsor, and shall be processed via a Type II Procedure. This determination may be processed independently or concurrently with another Type II or Type III procedure.

"A. Customary and usual aviation-related activities, including but not limited to takeoffs and landings; aircraft hangars and tie-downs; construction and maintenance of airport facilities; fixed based operator facilities; a residence for an airport caretaker or security officer; and other activities incidental to the normal operation of an

B. Growth of Existing Uses

ORS 836.608(3)(a) also requires that "[a] local government shall allow for the growth of uses described in ORS 836.616(2) that existed at any time during 1996 at [a listed airport]." *See* n 1. ORS 836.608(4) provides that growth of existing uses that require a building permit shall be allowed as an administrative decision without public hearing, unless the growth cannot be supported by existing public facilities, the growth would force a significant change or significantly increases the costs of conducting existing uses on surrounding lands, or the growth would exceed the standards of ORS 215.296(1) if the airport is adjacent to land zoned for exclusive farm use.[4] However, ORS 836.608(3)(a)

> airport. Except as provided in this ordinance, 'customary and usual aviation-related activities' do not include residential, commercial, industrial, manufacturing and other uses.
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> "* * * * *
>
> "D. Law enforcement and firefighting activities, including aircraft and ground-based activities, facilities and accessory structures necessary to support federal, state or local law enforcement or land management agencies engaged in law enforcement or firefighting activities. Law enforcement and firefighting activities include transport of personnel, aerial observation, and transport of equipment, water, fire retardant and supplies.
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> '* * * * *
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> "F. Flight instruction, including activities, facilities, and accessory structures located at airport sites that provide education and training directly related to aeronautical activities. Flight instruction includes ground training and aeronautic skills training, but does not include schools for flight attendants, ticket agents or similar personnel.
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> "* * * * *
>
> "L. Aeronautic recreational and sporting activities, including activities, facilities and accessory structures at airports that support recreational usage of aircraft and sporting activities that require the use of aircraft or other devices used and intended for use in flight, are permitted subject to the acceptance of the airport sponsor. Aeronautic recreation and sporting activities include, but are not limited to, fly-ins; glider flights; hot air ballooning; ultralight aircraft flights; displays of aircraft; aeronautic flight skills contests; gyrocopter flights; flights carrying parachutists; and parachute drops onto an airport. As used herein, parachuting and parachute drops include all forms of skydiving."

[4] ORS 836.608(4) provides:

provides that, notwithstanding any limitations on growth set out in ORS 836.608(4), "construction of additional hangars or tie-downs[,] * * * basing additional aircraft[,] and increases in flight activity" shall be permitted at a listed airport. *See* n 1.

The county implemented the statutory requirement to allow for "growth" of existing uses by adopting CDC 385-4, which provide standards for approving the "expansion of existing uses."[5] It is important to note that CDC uses the term "expansion of existing uses"

"Growth of an existing use on an airport as described in subsection (3)(a) of this section that requires a building permit shall be allowed as an administrative decision without public hearing unless the growth:

"(a) Cannot be supported by existing public facilities and services and transportation systems authorized by applicable statewide land use planning goals;

"(b) Forces a significant change or significantly increases the costs of conducting existing uses on surrounding lands; or

"(c) Exceeds the standards of ORS 215.296 (1) if the airport is adjacent to land zoned for exclusive farm use."

[5] CDC 385-4 provides:

"The expansion of uses identified in Section 385-3 of this Overlay District that existed at any time during 1996 is permitted as provided in this section.

"A. Expansions Permitted Through a Type I Procedure

"The following expansions of existing uses are permitted subject to the general standards of this Overlay District, the Development Standards of Article IV and all other applicable standards of the Code.

"(1) Construction of additional hangars and tie-downs.

"(2) Basing additional aircraft at the airport.

"(3) Increases in flight activity.

"B. Expansions Permitted Through a Type II Procedure

"The expansions of existing uses listed in Section 385-3 are permitted subject to the specific standards for the use set forth below as well as the general standards of this Overlay District, the Development Standards of Article IV and all other applicable standards of the Code. Approval may be further conditioned by the Review Authority pursuant to Section 207-5 and as described in Section 385-8.

to describe what the statute refers to as "growth of existing uses." CDC 385-4(A) allows the county to approve through a "Type I" administrative procedure the expansion of three types of existing uses. CDC 385-4(B) allows growth of all other existing uses that require a building permit, subject to a Type II procedure, under criteria that directly implement those at ORS 836.608(4).

C. New Uses Listed at ORS 836.616(2)

ORS 836.608(3)(b) provides that "[a] local government may authorize the establishment of a new use described in ORS 836.616(2) at [a listed airport] following a public hearing on the use."[6] ORS 836.608(5) sets out the standards that apply to new uses, which generally require consideration of impacts on public facilities and surrounding uses.[7]

> "(1) Growth of existing uses that require building permits, other than those existing uses identified in subsection A. of this Section, shall be permitted through a Type II procedure, provided the growth:
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> "(a) Can be supported by existing public facilities and services and transportation systems authorized by applicable statewide land use planning goals;
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> "(b) Does not force a significant change or significantly increases the costs of conducting existing uses on surrounding lands; and
>
> "(c) Does not exceeds the standards of ORS 215.296(1) if the airport is adjacent to land zoned for exclusive farm use."

[6] ORS 836.608(3)(b) provides:

> "A local government may authorize the establishment of a new use described in ORS 836.616(2) at an airport described in subsection (2) of this section following a public hearing on the use. The hearing shall be for the purpose of establishing compliance with adopted clear and objective standards relating to the compatibility and adequacy of public facilities and services as provided under subsection (5) of this section. Standards and requirements as adopted by the local government shall further the policy of ORS 836.600 to the maximum extent practicable."

[7] ORS 836.608(5) provides:

> "A local government shall authorize a new use described in subsection (3)(b) of this section provided the use:

The county implemented ORS 836.608(3)(b) and (5) by adopting CDC 385-5, which is entitled "Uses Which May be Permitted Through a Type III Procedure," and which directly implements the statute.[8]

D. Uses Not Listed in ORS 836.616(2)

ORS 836.616(3) provides that all land uses and activities, other than those established under ORS 836.616(2), shall comply with applicable land use regulations.[9]

"(a) Is or will be supported by adequate types and levels of public facilities and services and transportation systems authorized by applicable statewide land use planning goals;

"(b) Does not seriously interfere with existing land uses in areas surrounding the airport; and

"(c) The local government reviews the use under the standards described in ORS 215.296 if the airport is adjacent to land zoned for exclusive farm use."

[8] CDC 385-5 provides:

"Airport related uses identified in Section 385-3 of this Overlay District shall be permitted via a Type III public hearing process upon demonstration of compliance with the following standards. An applicant may demonstrate that these standards will be satisfied through the imposition of clear and objective conditions, and/or additional requirements may be conditioned pursuant to Section 385-8.

"A. The use is or will be supported by adequate types and levels of facilities and services and transportation systems consistent with the County's adopted and acknowledged 2020 Transportation Plan;

"B. The use does not seriously interfere with existing land uses in areas surrounding the airport; and

"C. For airports adjacent to land zoned for exclusive farm use, the use complies with the requirements in ORS 215.296."

[9] ORS 836.616(3) provides:

"All land uses and activities permitted within airport boundaries, other than the uses and activities established under subsection (2) of this section, shall comply with applicable land use laws and regulations. A local government may authorize commercial, industrial and other uses in addition to those listed in subsection (2) of this section within an airport boundary where such uses are consistent with applicable provisions of the acknowledged comprehensive plan, statewide land use planning goals and commission rules and where the uses do not create a safety hazard or limit approved airport uses."

With that overview of the relevant statute and code provisions, we turn to petitioners' assignments of error.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that flight instruction, scenic tours, and forest fire patrols, as well as other requested uses, are not "new uses" that require special use approval, and that under ORS 836.608(3)(a) such uses are permitted without any county approval at all, either because such uses were previously approved under the 1989 permit, or because such uses are simply "increases in flight activity" that are permitted outright under the statute.

A. Uses Approved by the County Prior to January 1, 1997

As noted, in relevant part the 1989 personal use airport permit allowed the airport to be used for (1) personal use by the owner, (2) the owner's invited guests "on an infrequent and occasional basis," and (3) commercial aviation activities connected to agricultural operations outside of the urban growth boundary. Petitioners contend that the 1989 permit implicitly authorized flight instruction, scenic tours and forest fire patrols.

According to petitioners, the owner's personal use of the airport under the 1989 permit necessarily included "scenic tours," citing evidence that Anderson sometimes gave neighbors or friends rides on his airplanes. Petitioners argue that it is immaterial that such flights were not commercial activities or paid for as "scenic tours." Similarly, petitioners argue that inherent in "commercial aviation activities in connection with agricultural operations" is flight instruction for such activities, as well as forest fire patrols. In addition, petitioners argue that forest fire patrols are "forest uses" that are permitted outright on the property, because two acres of the property are zoned EFC, which is a forest conservation zone. Finally, petitioners argue that the airport is a "fire service facility providing rural fire protection service" that is permitted under ORS 215.213(1).

Intervenors respond that the hearings officer made no determinations regarding whether scenic tours, flight instruction, or forest fire patrols were approved as part of the

1989 permit, because petitioners did not request such a determination. Intervenors appear to be correct. As far as petitioners have established, no request was made to approve scenic tours, flight instruction or forest fire patrols based on the activities authorized by the 1989 permit, the EFC zoning, or ORS 215.213(1). Even if such a request were made, petitioners have not assigned error to the hearings officer's failure to address those issues. Petitioners simply posit as a matter of law that the county had implicitly approved the requested uses under the 1989 permit, or is required to approve them under the EFC zone or the EFU statute. Because those theories were not presented below, petitioners' arguments under this sub-assignment of error do not provide a basis for reversal or remand.[10]

B. Increases in Flight Activity

As noted, ORS 836.608(3)(a) provides that, notwithstanding any limitations on growth set out in ORS 836.608(4), "increases in flight activity" shall be permitted at a listed airport. *See* n 1. Petitioners argue that, as a matter of law, ORS 836.608(3)(a) allows as a permitted use not only increases in existing flight activity (*e.g.* increases in the number of personal use take-offs and landings), but also changes in the *type* of flight activity (e.g., from personal use to flight instruction and scenic tours, or from agricultural flights to forest fire patrols). According to petitioners, ORS 836.608(3)(a) permits "increases in flight activity" for any reason, without regard for the purpose or nature of the flight activity.

We disagree. ORS 836.608(3) clearly distinguishes between existing uses, growth in existing uses, and new uses at existing airports, all of which use as their reference point the aviation uses and activities described in ORS 836.616(2). There would be no purpose in

[10] Although we need not decide the issue, we seriously question petitioners' claims that the 1989 permit implicitly authorized the requested flight instruction, scenic tours or forest fire patrols, or that such uses are inherent in the authorized uses. The 1989 permit does not require Anderson to fly solo, or prohibit him from offering occasional rides to friends or neighbors as part of his personal use. However, the permit restricts "commercial aviation activities" at the airport to those connected to agricultural operations. The requested uses, flight instruction, scenic tours, and forest fire patrols, appear to be "commercial aviation activities" that have no nexus to agricultural operations. Rather than implicitly authorize such uses, the 1989 permit appears to explicitly prohibit them.

providing standards for new uses if an existing use described in ORS 836.616(2) could be metamorphosed into a different use described in ORS 836.616(2), simply by treating such metamorphosis as an "increase in flight activity" under ORS 836.608(3)(a). For example, ORS 836.616(2) distinguishes between "flight instruction" and "[a]ir passenger and air freight services." If flight instruction existed in 1996 at the airport, increases in such instruction (*e.g.*., the number of take-offs and landings associated with flight instruction) is permitted under ORS 836.608(3)(a) without regard for any limitations on growth that might otherwise apply. However, that existing flight instruction use could not be "increased" to include air passenger or air freight services, if those services did not exist in 1996. Such services must be approved as new uses. Consequently, we disagree with petitioners that the existing personal use or commercial agricultural use of the airport can be "increased" under ORS 836.608(3)(a) to include flight instruction, scenic tours and forest fire patrols.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners contend that the hearings officer misconstrued the applicable law in determining that only uses deemed to be "lawful" in 1996 could be considered "uses * * * that existed at any time in 1996" under ORS 836.608(3)(a).

In a general discussion of ORS 836.608(3)(a) and the CDC provisions that implement the statute, the hearings officer stated:

> "* * * The term 'use[s]' is not defined in the legislation. In the Hearings Officer's judgment current land use law, County, and State policies require that *the use must have been a legal permitted use on the site in 1996 or a legally non-conforming use, to qualify as a use*." Record 17-18 (emphasis in original).

According to petitioners, the text and legislative history of ORS 836.608(3)(a) make it clear that the legislature did not intend the scope of "uses * * * that existed at any time in 1996" to be limited to approved or "lawful" uses. Petitioners argue that the hearings officer

applied this misinterpretation of the statute in evaluating the evidence presented on what uses existed at the airport in 1996.

The county and intervenor do not dispute petitioners' view of the statute, and the legislative history petitioners cite makes it abundantly clear that the legislature did not intend existing uses to be limited to "lawful" or approved uses. The Court of Appeals interpreted a similarly-worded statute to make the lawfulness of existing facilities irrelevant. *Citizens for Responsibility v. Lane County*, 207 Or App 500, 506-08, 142 P3d 486 (2006) (a statute providing that "any firearms training facility in existence on September 9, 1995, shall be allowed to continue operating" is not limited to lawful or approved facilities). However, intervenors argue that the hearings officer's erroneous interpretation of the statute is harmless, because the hearings officer did not apply that interpretation in evaluating the evidence regarding what uses existed in 1996.

We discuss under the fifth assignment of error petitioners' substantial evidence challenge to the hearings officer's findings regarding the uses that existed in 1996, and quote the relevant findings at length. For present purposes, we agree with intervenors that nowhere in the hearings officer's findings cited to us is there any indication that the hearings officer applied the above construction of ORS 836.608(3)(a) in evaluating the evidence. The hearings officer considered all evidence submitted regarding uses that allegedly occurred at the airport in 1996, and did not appear to discount any evidence on the grounds that it pertained to unlawful or unauthorized uses. The above-quoted sentence interpreting ORS 836.608(3)(a) appears in a prefatory section where the hearings officer sets out the applicable law at length. That prefatory section is separate from the later section where the hearings officer discusses the evidence, and is still further removed from the section of the decision where the hearings officer draws conclusions based on that evidence. Nothing cited to us in those later sections mentions lawful uses or draws any distinctions based on lawfulness of existing uses. Without some indication that the hearings officer actually

applied the above misinterpretation of ORS 836.608(3)(a) or that it made any difference in his evaluation of the evidence, we cannot say that the hearings officer's misinterpretation is more than harmless error.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners argue that the hearings officer misconstrued ORS 868.608(3)(a) in applying a "vested rights" analysis to determine what uses existed in 1996 on the airport.

In discussing and evaluating which uses existed in 1996, the hearings officer quoted and discussed *Washington County v. Stark*, 10 Or App 384, 499 P2d 1337 (1972), a case involving whether an applicant had established that a private use airport was an "existing non-conforming use" as of the date contrary zoning was applied, and if not whether the applicant had established a "vested right" to complete the airport. In *Stark*, the Court concluded that any takeoffs and landings that occurred prior to the relevant date were similar in nature to planes landing in a hayfield or cow pasture, of such "minimal character" that they cannot be said to evidence an "existing non-conforming use." *Id.* at 388. With respect to vested rights, the Court noted that whatever plans the owners had in mind, they had failed to "substantially commit" the land to the proposed use prior to the relevant date, and thus had not "vested" the right to develop the property as an airport. *Id.* at 389.

The hearings officer found *Stark* "helpful" and "instructive" in determining what an "existing use" is for purposes of ORS 836.608(3)(a):

> "The parties disagree as to what uses existed in 1996 or the definition of 'uses that existed.' The statutes do not provide any guidance. There is case law guidance, in *Washington County v. Stark*, 10 Or App 384, 499 P2d 1337 (1972), a case also involving an airport. In *Stark*, the Court was presented with the question of what constituted an existing use under state land use laws. In the Hearings Officer's judgment, the Court of Appeals' opinion in that case is helpful in deciding what an 'existing use' is. The Court of Appeals' opinion is instructive. The Court found that occasional landing in a field did not rise to a vested right constituting an existing land use. The Court stated: [quoting five paragraphs of *Stark*]." Record 23-24.

After discussing the evidence in the present case, the hearings officer concluded that:

> "[T]he Applicants have failed to produce substantial evidence that in 1996 any pilot training, aircraft sales, commercial scenic tours, or maintenance, took place on the Site. If these activities took place at all it is clear from the evidence noted above that they were occasional and infrequent uses. There is insufficient evidence in the record to establish that these uses did occur. There is insufficient evidence in the record to establish that the land was committed to those uses. In *Stark*, as in the present case, the infrequency of the use is underscored by the testimony of the neighbors who observed the Site on a daily basis.
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> "The Hearings Officer finds that the Opponents have produced substantial evidence that in 1996 the Site was used by the owner for flying his own fixed wing aircraft, and on an occasional basis, invited guests, maintenance of the owners' aircraft, and the storage of a neighbor's fixed wing aircraft and that these were the only uses on the Site in 1996." Record 33-34.

Petitioners appear to be correct that the hearings officer applied, at least in the alternative, a "vested rights" analysis based on *Stark*, in determining what uses existed at the airport in 1996. The hearings officer's primary conclusion is that petitioners failed to produce substantial evidence that in 1996 any flight instruction or commercial scenic tours took place at all on the property. Apparently in the alternative, the hearings officer concluded that "[i]f these activities took place at all it is clear from the evidence noted above that they were occasional and infrequent uses." The hearings officer's ultimate conclusion, based on the evidence produced by the opponents, is that the only uses of the airport in 1996 were personal flights by the owner, occasional use by invited guests, maintenance of the owner's planes, and storage of a neighbor's plane.

Petitioners argue that the hearings officer misinterpreted the statute such that "uses * * * that existed at any time" does not include occasional or infrequent uses, or uses that did not "commit" the land to those uses. According to petitioners, properly interpreted ORS 836.608(3)(a) the phrase "uses * * * that existed at any time" in 1996 includes uses that had only one occurrence, and there is nothing in the statute that suggests that a use must physically "commit" the land in order to "exist." Petitioners note in this respect that

ORS 836.630(3) provides that the Aviation Protection Act shall be construed liberally to further the policy established in ORS 836.600, which to encourage and support the continued operation and vitality of Oregon's airports.[11]

We agree with petitioners that the hearings officer misinterpreted ORS 836.608(3)(a) to the extent he required that any airport uses in 1996 be frequent or regular occurrences or result in physical commitment of the land, in order to qualify as "uses * * * that existed at any time" in 1996. Nothing in the text of ORS 836.608(3)(a) supports that view of the language. Many of the uses and activities listed in ORS 836.616(2) do not result in physical commitment of the land, and the phrase "uses * * * that existed at any time" in 1996 does not suggest that there must be frequent or regular occurrences of a listed use or activity in order for that use or activity to "exist." *Stark* involved a very different legal context, and in our view it is not particularly helpful or instructive as to the meaning of ORS 836.608(3)(a).

That said, it is not clear that the hearings officer's misconstruction of law is reversible error. As noted, the hearings officer's primary conclusion is that petitioners failed to carry their burden of proof that any flight instruction or commercial scenic tours took place at all on the property in 1996. As discussed below, the hearings officer expressly chose to believe and rely upon the opponents' evidence that no such uses occurred at all in 1996, over petitioners' contrary evidence. Apparently as an alternative, the hearings officer concluded that "[i]f these activities took place at all it is clear from the evidence noted above that they

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[11] ORS 836.600 states:

> "In recognition of the importance of the network of airports to the economy of the state and the safety and recreation of its citizens, the policy of the State of Oregon is to encourage and support the continued operation and vitality of Oregon's airports. Such encouragement and support extends to all commercial and recreational uses and activities described in ORS 836.616 (2).

ORS 836.630(3) provides:

> "The provisions of ORS 836.600 to 836.630 and any rules established hereunder shall be liberally construed to further the policy established in ORS 836.600."

were occasional and infrequent uses." Record 33-34. In our view, any error the hearings officer made as part of that alternative conclusion is reversible error only if the primary conclusion is erroneous or not supported by substantial evidence. *See Leupold & Stevens, Inc. v. City of Beaverton*, 51 Or LUBA 65, 81, *aff'd* 206 Or App 368, 138 P3d 23 (2006) (a decision based in part on an erroneous interpretation of applicable law provides no basis for remand where the decision is separately based on findings that correctly interpret and apply the applicable law); *Carrigg v. City of Enterprise*, 48 Or LUBA 328 (2004) (potential flaws in two of the three alternative reasons supporting the city's decision are not a basis for reversal or remand, where the third reason is an independent and sufficient basis to sustain the decision); *McFall v. City of Sherwood*, 46 Or LUBA 735, 743 (2004) (same). We address petitioners' evidentiary challenges to the hearings officer's primary conclusion under the fifth assignment of error, and reject those challenges. Because we affirm the hearings officer's primary conclusion regarding existing uses, the error in the hearings officer's alternative conclusion does not provide a basis for reversal or remand.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners contend that the hearings officer erred in shifting the burden of proof under ORS 836.608(4), to demonstrate whether the growth of existing uses should be permitted under the standards set forth in that statute, from the opponents to the applicant. According to petitioners, the opponents to such growth have the burden of proof and persuasion under ORS 836.608(4) to demonstrate that growth of existing uses should not be allowed.

We need not resolve this assignment of error, because as far as we can tell or petitioners have established the hearings officer did not apply the standards at ORS 836.608(4) at all. Those standards apply only when growth or expansion of an existing use requires a building permit. *See* n 4. None of the requested uses in the present case

require a building permit. Petitioners do not argue that those standards apply, and they apparently do not. The hearings officer properly did not apply them. Any conclusion we might reach in the present case regarding who has the burden of proof to demonstrate compliance or lack of compliance with the standards in ORS 836.608(4) would be hypothetical and advisory.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioners contend that the hearings officer's determination that flight instruction, scenic tours, and forest fire patrols uses did not "exist" at the subject airport at any time during 1996 is not supported by substantial evidence. According to petitioners, no reasonable decision maker could reach any conclusion based on the record in this case other than the conclusion that the requested uses existed at the airport during some point in 1996.

In challenging a denial of a land use application on evidentiary grounds, it is not sufficient for the applicant to demonstrate that the evidence would also support approval of the application. Rather, the applicant must demonstrate that the evidence is such that he "sustained his burden of proof as a matter of law." *Jurgenson v. Union County Court*, 42 Or App 505, 510, 600 P2d 1241 (1979); *Horizon Construction, Inc. v. City of Newberg*, 28 Or LUBA 632, *aff'd* 134 Or App 414, 894 P2d 1267 (1995); *Consolidated Rock Products v. Clackamas County*, 17 Or LUBA 609, 619 (1989). That is, the applicant must demonstrate that the evidence is such that a reasonable trier of fact could conclude only that the applicant's evidence should be believed. *Dhillon v. Clackamas County*, 40 Or LUBA 397, 400 (2001), *aff'd*, 179 Or App 742, 42 P3d 950 (2002), citing *Thomas v. City of Rockaway Beach*, 24 Or LUBA 532, 534 (1993), and *Schmaltz v. City of Hood River*, 22 Or LUBA 115, 119 (1991). With that understanding of our scope of review and petitioners' burden, we turn to petitioners' evidentiary challenges.

A. Flight Instruction

"Flight instruction" is among the uses listed in ORS 836.616(2). *See* n 2. The initial application did not claim that any flight instruction occurred at the airport in 1996. However, petitioners obtained statements, and later affidavits, from four persons that claimed that they either received or gave "flight instruction" at the airport sometime in 1996. Petitioners argue that these affidavits conclusively establish that flight instruction occurred at the airport in 1996, and that the hearings officer erred in declining to rely on that testimony, in favor of contrary testimony.

The first affidavit cited to us is signed by Michael Seager, an area pilot who states he landed and took off from Apple Valley Airport in 1996. Seager further states that:

> "I have known of and seen the following activities that have gone on at the Apple Valley Airport during the year 1996:
>
> "* * * * *
>
> "d. Aircraft flight instruction occurred there." Record 190.

The second affidavit is signed by Daniel Arensen, who states in relevant part:

> "On September 8, 1996 I flew a helicopter from Twin Oaks (7S3) to Apple Valley (OR61) with a student as part of a cross county flight instruction lesson. I attached a copy of my log book as verification. At (OR61) I demonstrated some approaches and hovering work for the student. * * *" Record 192.

Third, petitioners cite to the affidavit of Steve Jackson, a neighbor and the general contractor for the dwelling and agricultural building, who states in relevant part:

> "It is my personal belief and knowledge that the following activities I either witnessed or participated in at Apple Valley Airport were being conducted prior to 1996, during 1996 and after 1996 at Apple Valley Airport:
>
> "* * * * *
>
> "b. I personally received flight instruction at Apple Valley Airport." Record 195.

Finally, petitioners cite to the affidavit of Del Heikkla, an area pilot, who states in relevant part:

> "I have been using the Apple Valley Airport from 1990 including in 1996 and beyond and my uses of Apple Valley I made in 1996 included:
>
> "* * * * *
>
> "3. Airplane and Helicopter landings and takeoffs for: skydiving, commuting to and from work, training and staying current, which includes flight instruction; and giving rides." Record 197.

After reciting the above testimony, the hearings officer critiqued it as follows:

> "As noted above much of the testimony in support of Applicants' position as to the use of the Site was originally not sworn. The Applicants produced subsequent sworn affidavits repeating the testimony. Some of the affidavits were qualified with the phrase '. . .to the best of my knowledge.' It is not clear to the Hearings Officer the intent of such language. It is not clear to the Hearings Officer as to what parts of the testimony are based on *personal* knowledge as opposed to knowledge gained from others. Applicants' witnesses provided very little detail or corroborating evidence to support their testimony. For instances, Mr. Heikkla states that he has been using Apple Valley Airport, but does not offer specifics. His communications do not provide information as to the extent or frequency of his use of the airport, or the other uses he described. Mr. Seager states he has known of and seen aircraft maintenance and flight instruction activities at the airport during 1996, but details supporting his observations are lacking. Mr. Jackson does not detail the activities he claimed to have witnessed, and provides no corroborating evidence or documentation to support any of his statements. It is not clear to the Hearings Officer which of those activities listed by Mr. Jackson were conducted 'prior to 1996,' 'during 1996' and 'after 1996.' * * * Mr. Arenson states that he flew from 'Twin Oaks to Apple Valley with a student,' once, on September 8, 1996. The fact that there was a flight to Apple Valley airport is supported by a page from his flight log, which shows that a touch-down occurred on that date. However, the log provides no evidence that the flight from Twin Oaks to Apple Valley was actually for instructional purposes. Mr. Arenson does not identify himself as someone who is qualified to give flight lessons or his alleged student. * * * The Applicants did not offer any of this testimony at the public Hearing. Neither the Hearings Officer nor the parties were able to ask questions in aid of clarification." Record 27-28 (emphasis in original).

The hearings officer then recited the opposing testimony from several neighbors who both testified under oath at the hearing and submitted affidavits. In particular, the hearings officer

quoted at length and expressly found to be "credible and reliable" the testimony of Doug Stenger, a neighbor, area pilot and friend of Anderson's who first met Anderson in 1998. Stenger stated that Anderson "was very protective of his provisional-use airstrip, to the point of paranoia. For that reason I find the idea that he allowed any commercial or private operation to fly in or out of his airstrip ridiculous." Record 30. With respect to flight instruction, Stenger stated that "[t]he first training flights originated out of Apple Valley in late 2000 and early 2001 during which the actual instruction took place at Scappoose Airport. I can confirm this information because my father's airplane was used for this instruction." Record 31. The hearings officer cited other testimony to the effect that use of the airport in 1996 was consistent with the scope of uses approved in 1989 and confirmed in the 1994 review of conditions, which did not include flight instruction.

The hearings officer summed up his evaluation of the competing testimony as follows:

> "In the Hearings Officer's judgment there is a vast difference in the quality of evidence offered by the Applicants and that offered by the Opponents. The Opponents' testimony was sworn and much of it offered at the Hearing, providing the Hearings Officer and the parties an opportunity to ask questions and seek clarification. Opponents' testimony came from people who lived near the Site, knew the owner and over a period of time had an opportunity to view the activities on the Site. Opponents' testimony, while it varied as to the number of actual flights was consistent as to the uses that existed in 1996. Opponents' testimony as to the use of the Site was also consistent with the approved use of the Site, which was for a personal use airport restricted, except for airport emergencies, to the owner, and on an infrequent and occasional basis, to invited guests. Opponents' testimony that the previous owner Mr. Anderson was well liked by his neighbors and did not want to risk losing his right for a personal use airport, by violating conditions of approval, is consistent with the undisputed facts. The undisputed facts are that when Mr. Anderson in 1994 applied for Review of Conditions and the Property Line Adjustment via Washington County Land Development Casefile 94-302-PLA/RC, there were no letters of comment from the neighbors. Opponents' testimony is consistent with the Staffs' finding in approving the request in Casefile 94-302-PLA/RC, that the Applicant complied with all applicable conditions of approval established by Casefile 88-574-SU. The Hearings Officer finds the Opponents' testimony to be very credible. Opponents' testimony is also consistent with the Applicants' initial position stated in its

> Application that the use of the airport in 1996 was consistent with the level set forth in the Casefile 94-302-PLA/RC." Record 33.

The hearings officer then reached his ultimate conclusion, quoted above, which we repeat here:

> "The Hearings Officer finds the Applicants have failed to produce substantial evidence that in 1996 any pilot training, aircraft sales, commercial scenic tours, or maintenance, took place on the Site. If these activities took place at all it is clear from the evidence noted above that they were occasional and infrequent uses. There is insufficient evidence in the record to establish that these uses did occur. There is insufficient evidence in the record to establish that the land was committed to those uses. In *Stark*, as in the present case, the infrequency of the use is underscored by the testimony of the neighbors who observed the Site on a daily basis.
>
> "The Hearings Officer finds that the Opponents have produced substantial evidence that in 1996 the Site was used by the owner for flying his own fixed wing aircraft, and on an occasional basis, invited guests, maintenance of the owners' aircraft, and the storage of a neighbor's fixed wing aircraft and that these were the only uses on the Site in 1996." Record 33-34.

Petitioners critique the evidence relied upon by the hearings officer, noting for example that Stenger did not meet Anderson until 1998, and had no personal knowledge of whether the flights he may have witnessed at the airport in 1996 as a neighbor involved flight instruction or not. According to the petitioners, none of the opposing evidence cited by the hearings officer specifically contradicts the four affidavits cited above, which claim that the affiants witnessed, received or gave "flight instruction" at the airport during 1996. Petitioners also dispute the hearings officer's negative assessment of the credibility and reliability of the four affidavits, arguing that the affidavits are personal, sworn, corroborated and adequately detailed and sufficient to prove as a matter of law to a reasonable decision maker that there was "flight instruction" taking place at Anderson's airport during 1996, notwithstanding any contrary testimony.

Intervenors respond that hearings officer correctly viewed the petitioners' four affidavits to be insufficient and conclusory with respect to flight instruction. None of those affidavits, intervenors argue, describe what is meant by the "flight instruction" that was

allegedly witnessed or participated in, and the failure of those affiants to testify at the hearing prevented the hearings officer and other parties from asking clarifying questions. Intervenors argue, for example, that merely touching down at the airport as part of a flight lesson that originates from and returns to a different airport is not "flight instruction" within the meaning of ORS 836.616(2)(d). Intervenors contend that, for the reasons set out in the hearings officer's critique of those affidavits, and because the opposing testimony undermined the conclusory statements in those affidavits, petitioners have fallen short of establishing that a reasonable trier of fact could conclude *only* that petitioners' evidence should be believed.

Although it is an exceedingly close question, we agree with intervenors that petitioners have not established that petitioners "sustained [their] burden of proof as a matter of law" with respect to flight instruction in 1996. *Jurgenson*, 42 Or App at 510. As noted above, in challenging a denial on evidentiary grounds, it is not sufficient for applicants to demonstrate to LUBA that the evidence they submitted is substantial evidence on which a reasonable decision maker could rely. The applicants must demonstrate, essentially, that no reasonable decision maker could reach any conclusion based on the whole record other than that the applicants had met their burden of establishing compliance with applicable approval criteria. That demonstration, while not insuperable, is an extraordinarily difficult one to make in a contested development application where, as here, there is evidence on both sides of the issue.

Further, the hearings officer has some discretion to weigh the credibility and reliability of witness testimony on a disputed factual issue. If, as here, the hearings officer's evaluation of the evidence is based in part on a considered assessment that one set of witnesses is more credible or reliable than others, it will be a rare circumstance where LUBA has a basis to overturn that credibility judgment or an ultimate evidentiary call based on that judgment. *See Sanders v. Clackamas County*, 10 Or LUBA 231, 237 (1984) (LUBA is not authorized to second guess the judgments made by local decision-makers with respect to the

credibility of evidence presented at land use hearings). Although petitioners disparage the credibility of the witnesses the hearings officer chose to rely upon, and argue that their witnesses are more credible and reliable, we cannot say that we have a basis in the present case to overturn the hearings officer's credibility judgments or the ultimate evidentiary determination that petitioners had failed to bear their burden of proof to demonstrate that "flight instruction" existed at any time during 1996 at the airport. Accordingly, we affirm that conclusion.

B. Scenic Tours

Petitioners argue that one pilot, Del Heikkla, testified that he used the airport to give "rides" during 1996. Record 197 (quoted above). The hearings officer criticized Heikkla's affidavit for lack of specific information, and ultimately concluded that petitioners have failed to satisfy their burden of proof to demonstrate that "commercial scenic tours" existed at any time at the airport in 1996. Record 33.

Petitioners argue that it is immaterial that there is no evidence of "commercial" scenic trips in 1996, in the sense that a commercial operator charged money to tourists for scenic flights. According to petitioners, Heikkla's testimony that he gave "rides" in 1996 is sufficient to establish as a matter of law that "scenic flights" of some kind were offered at the airport in 1996. Once the existence of that use is established, petitioners argue, as a matter of law that existing use can be "expanded" to include the proposed commercial scenic tour operation under ORS 836.608(3)(a).

Intervenor responds that the act of "giving rides" to friends or neighbors is not the same use or activity as commercial scenic tours, for purposes of ORS 836.608(3)(a). We agree with intervenor. ORS 836.616(2) does not include "scenic tours" or a similar-worded use in its list of authorized uses and activities. *See* n 2. We understand petitioners to contend that the proposed commercial scenic tour operation falls within the ambit of "[a]viation recreational and sporting activities" authorized by ORS 836.616(2)(j), and we assume, for

purposes of this opinion, that that view is correct. Even under that view, however, we do not believe that the hearings officer erred in concluding that Heikkla's reference to "giving rides" is sufficient to establish as a matter of law the existence of the same type of use or activity as the proposed commercial scenic tour operation.

Heikkla's affidavit does not describe what he meant by "giving rides," but petitioners do not contend that that phrase connotes more than taking a friend along on a flight to or from Apple Valley Airport. The act of taking a friend along on a flight that is permitted to invited guests under Anderson's personal use airport permit would be incidental to such a flight. Such a personal use flight is presumably a "[c]ustomary and usual aviation-related" activity as described in ORS 836.616(2)(a). CDC 385-3(A), which implements the statute, specifies that "customary and usual aviation-related activities" do not include commercial uses. In our view, the incidental act of taking a friend along on a personal recreational flight is different in kind, not just degree, from the proposed commercial scenic tour operation. "Giving rides" to a friend as an incidental part of a "personal use" flight is not the same use or activity as a commercial operation that attracts tourists to the airport and generates new, non-personal use flights contracted for by those tourists.

We are mindful that ORS 836.630(3) states that the Aviation Protection Act shall be construed "liberally" to further the policy established in ORS 836.600. However, petitioners' elastic understanding of the statute simply reads too much into it. In order to grow or expand a use under ORS 836.608(3)(a), the use must be listed in ORS 836.616(2), and have "existed" at the airport during 1996. To "grow" suggests an increase in size, frequency or scope, not a metamorphosis from one type of use to another. No evidence cited to us suggests that anything resembling the proposed commercial scenic tour operation "existed" at the airport at any time during 1996. The hearings officer did not err in so concluding.

C. Forest Fire Patrols

Petitioners make no argument under this assignment of error that "forest fire patrols" existed in any form in 1996 at the airport.

D. Storage of Airplanes Belonging to Others

The hearings officer found that Anderson allowed a neighbor to store a fixed wing aircraft at the airport in 1996. Petitioners argue that, accordingly, such storage use is allowed to grow as a matter of law. Intervenors respond that no party disputes the hearings officer's finding, but petitioners' application did not propose storage of planes owned by others, and petitioners do not allege any cognizable claim of error under this assignment of error, with respect to storage of planes. We agree with intervenor that petitioners' arguments under this assignment of error do not state a basis for reversal or remand.[12]

E. Aircraft Maintenance

The hearings officer found that "maintenance of the owners' aircraft" existed in 1996. Record 34. Petitioners argue, therefore, that such use must be allowed to grow as a matter of law. Intervenors respond that petitioners did not request any expansion of the airport with respect to maintenance, and the hearings officer did not approve or deny any such expansion.

Petitioners are probably correct in asserting, based on the hearings officer's finding that maintenance of the owners' aircraft existed in 1996, that such use can be expanded. However, intervenors appear to be correct that petitioners did not request any such expansion as part of their application, and the hearings officer neither approved nor denied such expansion. Accordingly, petitioners' arguments under this sub-assignment of error do not provide a basis for reversal or remand.

The fifth assignment of error is denied.

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[12] However, we note that petitioners argue under the ninth assignment of error that one of the miscellaneous conditions the hearings officer imposed limiting ownership of aircraft stored at the site to petitioners is inconsistent with ORS chapter 836. We address that argument below.

SIXTH ASSIGNMENT OF ERROR

After concluding that petitioners failed to demonstrate that flight instruction, scenic tours and forest fire patrols "existed at any time" during 1996 at the airport, the hearings officer declined to consider whether those uses could be approved as "new uses" under CDC 385-5 and ORS 836.608(5). According to the hearings officer, petitioners' application as well as their expressed position throughout the proceedings below indicated that petitioners viewed flight instruction, scenic tours, and forest fire patrols to be an "expansion" of existing uses, and petitioners did not request review of those uses as "new uses."[13]

As an alternative to the first five assignments of error, petitioners challenge that conclusion, arguing that, as staff recognized, the initial application generally took the position that the baseline for existing uses included those uses present during the last review of conditions in 1994, and those uses did not include flight instruction, scenic tours and forest fire patrols. Staff understood the application to request approval of those uses as "new uses." Petitioners argue that their planning consultant applied for those uses as "expansions" because that is the term he understood CDC 385 to use. According to petitioners, CDC 385 does not expressly distinguish between approval of "expansions" and "new uses," or even use the term "new uses." It is true, petitioners admit, that they later changed the theory under

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[13] After reviewing language from the application and statements by petitioners' attorney, the hearings officer concluded:

> "Applicants have consistently contended throughout these proceedings that they are seeking to grow existing uses.
>
> "As discussed above ORS 836.608(4) lays out specific standards for the approval of the *growth of existing uses* when that activity requires a building permit. ORS 836.608(3)(a), (5) and (6) authorize and adopt standards for 'new uses.' The statutory frame work for the expansion or growth of an existing use is separate and distinct than that for a 'new use.' The Staff in the initial Staff Report and subsequent memoranda has considered the Application as including request for 'new uses.' The Hearings Officer would like to decide the issues raised regarding any 'new uses.' However, the Hearings Officer reluctantly agrees with the Opponents that an application for 'new uses' pursuant to ORS 836.608(3)(a), (5) and (6), was not in fact made and is not before the Hearings Officer." Record 36 (footnote omitted, emphasis original).

which the application had been filed, and attempted to "withdraw" their request for approval of those three uses as "expansions," because they believed, based on new evidence, that those uses existed in 1996 and did not require approval as "expansions." However, petitioners later rescinded that attempted withdrawal request and, in any case, the hearings officer denied their attempt to withdraw the request for approval as "expansions." Petitioners note that staff sent out a notice of that withdrawal request that described the proposed action as requesting withdrawal of that portion of the application that seeks "approval to add three new uses to the airport: flight training, scenic tours, and forest fire patrol." Record 2648. Petitioners contend that it was reasonably clear to all parties below that the application sought approval of flight instruction, scenic tours and forest fire patrols, and that at least staff believed that the application requested approval for those "new uses."

Intervenors respond that the application clearly seeks "expansion" of *existing* uses under CDC 385-4 and does not seek approval of any "new uses" under CDC 385-5.

As intervenors note, CDC 385-5 appears to implement the statutory requirements for "new uses," although CDC 385-5 does not use that term. *See* ns 7 and 8. Petitioners' application did not clearly distinguish between "expansions" of existing uses (or "growth" as the statutes term it) and "new uses." However, the initial application did not claim that flight instruction, scenic tours and forest fire patrols were authorized by any county permit, or existed during any time in 1996. Further, the initial application addressed at length the requirements of CDC 385-5, although the analysis of that code section does not clearly set out what specific uses are being evaluated. Record 3932-40. Planning staff understood the initial application to request approval of flight instruction, scenic tours and forest fire patrols as "new uses" to be evaluated under CDC 385-5, and provided notice and staff reports consistent with that understanding. Had the hearings officer issued a decision on the application at that point, it seems reasonably likely that the hearings officer would have followed staff in evaluating the requested uses as "new uses" under CDC 385-5, not as

"expansions" of existing uses. It was not until quite late in the proceedings that intervenors argued to the hearings officer, and the hearings officer agreed, that the application did not in fact explicitly request approval for any "new uses."

Petitioners' attempt to "withdraw" those requested uses from consideration as "expansions" and their subsequent rescission of that "withdrawal" muddied further the less than limpid waters. For whatever reason, petitioners did not clarify whether they agreed with staff that the proposed uses can be analyzed and approved as "new uses," but instead petitioners appeared to take the contrary position that those uses are "existing uses" that can be expanded without any further county review or approval. If the hearings officer erred in declining to review the proposed three uses as "new uses," petitioners bear a great deal of the responsibility, both for the lack of clarity in the initial application and in the manner petitioners later framed the requested uses to the hearings officer.

Nonetheless, we agree with petitioners that the hearings officer erred in declining to review the proposed three uses as "new uses." While the initial application was less than clear on this point, it addressed at length why the airport if used as proposed would comply with the standards at CDC 385-5. Those standards apply only to "new uses" as the statute uses that term, and do not govern the "expansion" of "existing uses." Further, in rescinding the request to withdraw part of the application, petitioners' counsel appears to request that the hearings officer evaluate the proposed uses as "new uses" under the CDC 385-5 standards, if the hearings officer disagrees that those uses did not exist on the site during 1996.[14] We are not aware of any prohibition on requesting contingent, alternative reviews

[14] Petitioners' attorney wrote:

> "The applicant no longer seeks withdrawal of the 'expansion' portion of the application. That motion is hereby withdrawn. The staff report recommends approval of the application. Therefore, whether cast as simply continuation of aviation uses that existed at any time in 1996, or as some new use(s), an approval recommendation is a long way from where the applicant was a few days before the hearing. * * *

under different approval criteria, if the hearings officer disagrees with the applicant's primary theory for why the application should be approved. Remand is necessary for the hearings officer to evaluate the proposed flight instruction, scenic tours, and forest fire patrols as "new uses" under the standards at CDC 385-5 and ORS 836.608(3)(a), (5) and (6).

The sixth assignment of error is sustained.

SEVENTH ASSIGNMENT OF ERROR

Petitioners' application requested a review of conditions, pursuant to the 1994 permit review which required the next review in 10 years. Based on the staff site visit, the hearings officer found several alleged violations on the property, involving fill placed under the dwelling, and enclosure of the three-sided agricultural building and its partial conversion to office space.[15] The hearings officer's decision imposes two conditions requiring correction of those violations, as discussed under the eighth assignment of error. Further, the hearings officer required petitioners to "apply for a review of conditions within 2 years of the date of this Order[.]" Record 40.

Petitioners argue that the hearings officer had no authority to conduct a 10-year review of conditions or to require that petitioners apply for another review of conditions within two years of the present decision. According to petitioners, because the airport is protected under ORS Chapter 836 as a private use airport, none of the conditions imposed in the 1989 airport approval continue to apply to restrict the airport. The only lawful role for a

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> "There is plenty of evidence that all the uses that the applicants want to make of the property were being made 'at any time' in 1996. ORS 836.608(3)(a). *Even if the hearings officer were to find that some uses were not being made at Apple Valley 'at any time' in 1996, there is a great deal of evidence from the applicant, staff and the opponents to enable the hearings officer to find any 'new' uses meet relevant standards.* Therefore, if the hearings officer finds that there are any 'new' uses, then the hearings officer is free to work through the multi-layered 'expansion' analysis without wading through the withdrawal issue." Record 42 (emphasis added).

[15], Petitioners assert that any placement of fill under the dwelling or enclosure of the agricultural building pre-dated their ownership, and further assert that the fill and enclosure occurred prior to 1992, when the county issued final approvals of the dwelling and building permits. The county disputes the legal significance of those assertions. We need not resolve those contentions.

"review of conditions," petitioners argue, is to recognize the change in the airport's legal status and to remove all of the previous conditions. Under this assignment of error, petitioners particularly object to imposition of the new requirement for a review of conditions within two years.

ORS 836.608(3)(a) provides that "[a] local government shall not impose additional limitations on a use approved by the local government prior to January 1, 1997, for [a listed airport]." The apparent corollary is that any *existing* limitations or conditions imposed by a decision prior to January 1, 1997, can continue, as long as such limitations or conditions are consistent with other requirements of the statute. For example, a condition of approval that limited the number of tie-downs that an owner could construct would obviously conflict with ORS 836.608(3)(a), which expressly permits increases in the number of tie-downs. However, we see no basis in the statute for the broad proposition petitioners espouse, that following passage of the Airport Planning Act all conditions or limitations imposed in development approvals prior to January 1, 1997, were automatically nullified.

That said, we feel differently about the requirement to apply for the next review of conditions within two years. The 1989 special use approval and the 1994 review of conditions imposed a continued review of conditions requirement, for five years and ten years, respectively. While it seems consistent with ORS 836.608(3)(a) to require continued reviews of conditions imposed by those previous decisions, we agree with petitioners that increasing the frequency of the requirement of review of conditions from a period of five or ten years to a period of two years constitutes an "additional limitation[] on a use approved by the local government prior to January 1, 1997[.]"

The seventh assignment of error is sustained, in part.

EIGHTH ASSIGNMENT OF ERROR

As noted, the airport and the dwelling/agricultural building were approved pursuant to separate applications and separate decisions, both issued in 1989, and each with separate

conditions of approval. The airport special use approval is known as casefile No. 88-574-SU, and the dwelling/agricultural building decision is known as casefile No. 89-204-FP. The latter, casefile No. 89-204-FP, has no condition requiring future reviews. The county issued the dwelling's certificate of occupancy in 1992. When conducting a site visit for the present application, planning staff noted that fill and/or walls had been placed under the dwelling, and that the three-sided agricultural building had been enclosed and partially converted to an office. Staff believed that the fill, enclosure and conversion to habitable space were inconsistent with the dwelling/agricultural building approval in casefile No. 89-204-FP.

During the proceedings below, petitioners requested "withdrawal" of certain requests made in the application, although that requested withdrawal was later rescinded. Notwithstanding that the withdrawal request was no longer active, the hearings officer's decision addresses and denies that request, citing CDC 203-1.2, which in relevant part permits withdrawal of an application where the county determines that "[n]o existing violation" of the county's code or comprehensive plan has been identified on the subject property that "might best be cured by further processing the application." The hearings officer found based on the staff allegations regarding fill and enclosure that there were "existing violations" on the property, and thus the county could not allow the requested withdrawal. Record 15-16.[16] As explained, the hearings officer went on to impose two

[16] The hearings officer apparently relied upon an October 20, 2006 staff report, which states in relevant part:

> "* * * FEMA [the Federal Emergency Management Administration] requires all structures located within a 100-year floodplain to be flood proofed and that all habitable space within a structure must be located one-foot above the elevation of the 100-year flood plain. It is because of these regulations that the existing accessory building on the site was permitted as an agricultural building only with no habitable space and was required to be three-sided to meet the flood-proofing requirements. * * *
>
> "* * * In addition, as discussed at the Hearing the ground floor of the existing dwelling on the site has also been filled in (walls erected), which is also a violation of the conditions of approval of Casefile 89-204-FP. The approved design called for the ground floor to be open

conditions requiring correction of the alleged fill and enclosure violations, to enforce the condition of approval originally imposed in casefile No. 89-204-FP .[17]

Under this assignment of error, petitioners challenge imposition of those two conditions, arguing that (1) the conditions are a collateral attack on the 1989 permit approval, (2) the county has no authority to conduct proceedings to enforce the conditions of approval imposed in casefile No. 89-204-FP as part of an unrelated land use application, and (3) the conditions imposed are in violation of the Takings Clause to the 14th Amendment of United States Constitution. Because we agree with petitioners that the county exceeded its code authority to impose the disputed conditions as part of the present application, we do not address petitioners' other arguments.

Petitioners' application sought (1) a determination of "existing uses" relating to the airport in 1996, (2) a review of conditions pursuant to the 1989 airport permit in casefile No. No. 88-574-SU, as modified by the 1994 review, and (3) approval to "expand" certain uses related to the airport. No request was made to review the conditions imposed in the dwelling/agricultural building permit, in casefile No. 89-204-FP, and as far as we are informed petitioners' application does not propose any structural or use changes to the dwelling or agricultural building.

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on two sides so that water could flow through the building, which * * * cannot occur at this time [because] of the additional walls. * * *. Record 2558-59.

[17] The two conditions challenged under this assignment of error state, in relevant part:

"II. Within Ninety (90) days of the Date of this Decision the Applicants/Property Owner must remove one wall from the approved Agriculture Building on the Site and submit a request for an inspection by the Code Enforcement Staff. * * *

"III. Within Ninety (90) days of the Date of this Decision the Applicants/Property Owners must remove the unauthorized fill (walls) from beneath the Dwelling on the Site and submit a request for an inspection by the Code Enforcement Staff. * * * Alternatively, the Applicants may submit an application for a Flood Plain Alteration within Ninety (90) days of the Date of this Decision to obtain approval for the illegal fill (walls). * * *"

The hearings officer cited CDC 207-5 as authority for the conditions requiring removal of the fill under the dwelling and the fourth wall from the agricultural building.[18] In relevant part, CDC 207-5.1 authorizes conditions that are "designed to protect the public from potential adverse impacts of the proposed use or development[.]"[19] Nothing cited to us in CDC 207-5 provides authority to impose conditions to ameliorate code violations unrelated to the "proposed use or development[.]"

The county's response brief cites two code provisions that, in the county's view, authorize the county to enforce code violations unrelated to the application pending before the county, by approving that application with conditions of approval requiring remediation of the alleged violations. The first code provision is CDC 203-1.2, which, as noted above, allows the planning director to permit withdrawal of an application if "no existing violation of this Code or the Comprehensive Plan, which might best be cured by further processing the application, have been identified on the subject property."[20] The second code provision is

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[18] The hearings officer's decision also cited CDC "421," which is the code chapter that requires a permit for development within the 100-year floodplain. However, neither the decision nor the county's response brief cites to a specific provision of CDC 421 that authorizes imposition of conditions to remediate code violations unrelated to the application before the county.

[19] CDC 207-5.1 provides:

> "The Review Authority may impose conditions on any Type II or III development approval. Such conditions shall be designed to protect the public from potential adverse impacts of the proposed use or development or to fulfill an identified need for public services within the impact area of the proposed development. Conditions shall not restrict densities to less than that authorized by the development standards of this Code."

[20] CDC 203-1.2 provides, in full:

> "The Director may withdraw any application, petition for review or motion for reconsideration at the request of the applicant or petitioner except when an application is deemed complete. Once accepted as complete, the application may be withdrawn only if the Director determines that:
>
> "A. Written consent to withdraw an application has been obtained from a majority of the owners or contract purchasers or the majority interest holders in the property, or all signers of the petition for review; and

CDC 215-5, which prohibits the county from issuing a building or development permit unless the county first determines "that such building or structure, as proposed, and the land upon which it is proposed to be located, complies with" applicable code provisions, approved site plans, and conditions of approval.[21]

CDC 203-1.2 is concerned with withdrawal of applications, and does not expressly authorize imposition of conditions of approval at all. CDC 203-1.2 authorizes the planning director to reject a request to withdraw an application where, by continuing to process the "application," identified code violations "might best be cured." That language suggests that there is some nexus between the proposed use and the identified code violations, such that approving or denying the application is likely to cure the violations. Nothing in CDC 203-1.2 purports to authorize the planning director to reject a request to withdraw an application based on identified code violations that are unrelated to the proposed development; still less does CDC 203-1.2 purport to authorize the hearings officer to impose conditions of approval requiring correction of such unrelated code violations.

CDC 215-5 comes closer to the mark, but also falls short. CDC 215-5 prohibits issuance of a development permit unless the county determines that the "building or structure, as proposed, and the land upon which it is proposed to be located, complies with all applicable" code provisions and conditions of approval. Petitioners' application proposed no "building or structure," and proposed no use at all with respect to the existing dwelling

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> "B. No existing violation of this Code or the Comprehensive Plan, which might best be cured by further processing the application, have been identified on the subject property."

[21] CDC 215-5 provides, in full:

> "No building or development permit shall be issued unless it has first been determined that such building or structure, as proposed, and the land upon which it is proposed to be located, complies with all applicable provisions of this Code, with approved site plans, and with conditions of approval, or is exempt therefrom. In addition to any other materials required by law, applications for building permits shall be accompanied by a valid Development Permit or statement specifying the applicable exemption."

and agricultural building. Without a proposed "building or structure" that is "proposed to be located," CDC 215-5 has no apparent applicability. Even if CDC 215-5 applied in circumstances where no "building or structure" is proposed, it prohibits issuance of a development permit, not the imposition of conditions. Read together with CDC 207-5.1, it seems likely that the county could condition "proposed development" to remedy existing violations related to that development. However, neither CDC 207-5.1 nor CDC 215-5 appears to authorize imposition of conditions to remedy code violations involving existing buildings or structures or existing land conditions that are not related to the proposed development.

That is not to say that the county cannot enforce its code and cannot require petitioners to remedy any identified code violations. CDC 215 prohibits any use of land or development in violation of the code, and authorizes the county to issue citations and to prosecute code violations in court. However, nothing cited to us in CDC 215 or elsewhere purports to authorize the county to do as the hearings officer did here: impose conditions to remedy code violations that apparently have nothing to do with the application pending before the county.

The eighth assignment of error is sustained.

NINTH ASSIGNMENT OF ERROR

In addition to the two conditions challenged in the eighth assignment of error, the hearings officer imposed (1) a set of three "miscellaneous conditions," (2) a condition requiring that the applicants obtain a flood plain alteration permit prior to any ground disturbing activity, and (3) a condition requiring petitioners to remove chemicals needed for crop-dusting activities off-site and to record a deed prohibiting storage of such chemicals. Petitioners challenge these additional conditions.

A. Commercial Food and Beverage Service

The first miscellaneous condition states that "[n]o commercial food and beverage service [is] permitted on the site." Petitioners did not propose any commercial food and beverage service, or argue that any existed in 1996, and it is not clear why the hearings officer felt compelled to impose this condition. Petitioners argue that ORS 836.608(3)(a), (4) and (5) allow petitioners to apply for "new uses," and argues that there is no basis to preclude petitioners from filing a future application for commercial food and beverage service at the airport.

The county responds that this condition is simply part of the hearings officer's determination of what uses existed in 1996 and what uses did not.

We agree with petitioners that it is inappropriate for the hearings officer to impose a condition that is apparently intended to foreclose future applications for commercial food and beverage service. ORS 836.616(3) authorizes the county to approve at listed airports "commercial, industrial and other uses" in addition to those listed in ORS 836.616(2), if found to be consistent with applicable comprehensive plan provisions and statewide land use planning goals and rules. It may be that the county would deny such an application because it is not consistent with applicable plan provisions or statewide planning goals and administrative rules; however, until such an application is made it seems premature to impose a condition of approval that precludes a particular commercial use, in the context of an application that does not propose such a use. This subassignment of error is sustained.

B. Ownership of Aircraft

The second miscellaneous condition states that "[a]ll aircraft based at the site must belong to the owner of Apple Valley Airport." The hearings officer found, however, that in 1996 Anderson allowed a neighbor to store his airplane at the airport. Because that use existed in 1996, petitioners argue, storage of aircraft owned by others not only can continue, but can be expanded in size to include more than one aircraft owned by others.

The county offers no response to this argument, and we agree with petitioners that remand is necessary to delete or modify this condition, to make it consistent with the hearings officer's finding that existing uses in 1996 included storage of at least one aircraft not owned by the airport owner.

C. Install Obstruction Markers

The third miscellaneous condition requires petitioners to "[i]nstall obstruction markers on the agricultural building or any structure located along or adjacent to the runway." This condition apparently arose out of an inspection by the state Department of Aviation, which identified structures within the runway zone to be marked or flagged. CDC 386-7 requires that the airport owner shall install obstruction markers as determined by the Department of Aviation.

Petitioners object to this condition because it is not "clear and objective," as required by ORS 836.608(6). That statute provides that an applicant for a "new use" may demonstrate that approval criteria will be satisfied through imposition of conditions, which shall be "clear and objective."

The county responds that ORS 836.608(6) requirement for clear and objective conditions applies only to "new uses," and that, in any case, the condition is clear and objective. We agree with both responses. This sub-assignment of error is denied.

D. Floodplain Alteration Permit

The hearings officer imposed a condition providing that "[p]rior to any ground disturbing activities (grading, building construction, etc.) other than agricultural cultivation activities associated with that portion of the site outside the Airport Overlay District, the Applicants shall obtain approval for a Flood Plain Alteration via a Type II Procedure." Record 40.

Petitioners contend that it is unclear what this condition is intended to do, but if the hearings officer is taking the position that airport uses listed at ORS 836.616(2) are subject to

the requirement to obtain a flood plain alteration permit, the hearings officer is mistaken. According to petitioners, application of CDC 421 flood plain regulations to airport uses listed at ORS 836.616(2) is prohibited by ORS 836.616(3), which states that "[a]ll land uses and activities permitted within airport boundaries, *other than the uses and activities established under subsection (2) of this section*, shall comply with applicable land use laws and regulations." (Emphasis added). The clear implication, petitioners argue, is that uses and activities established under ORS 836.616(2) need not comply with local land use regulations, including the county's floodplain regulations.

The county responds that this condition is not intended to and does not limit existing airport uses at the airport. According to the county, it simply advises petitioners that any future grading or construction activities at the airport will require a flood plain alteration permit. Given the undisputed history of illegal fill and construction in the flood plain on the property, the county argues, it is reasonable to advise the current owners that the CDC flood plain alteration provisions will apply to future new fill or development activities.

Petitioners do not dispute that the county may apply CDC 421 to any proposed non-aviation activities that involve ground-disturbance or development in the flood plain, such as construction of a dwelling or agricultural building. Petitioners argue, however, that this condition is overbroad in appearing to require a flood plain permit for *any* future ground-disturbing activity, potentially including the aviation-related uses protected under ORS 836.616(2).

Petitioners may be correct that ORS 836.616(3) implicitly prohibits application of local land use approval standards (other than those specified in the statute) to proposed new aviation uses and activities listed in ORS 836.616(2). Even if so, however, the county asserts and petitioners do not dispute that the CDC 421 flood plain regulations implement and are required by federal law. *See* n 16. It seems highly unlikely that the legislature intended ORS 836.616(3) to exempt new airport uses and activities from local health and safety

regulations that are required by federal law, and the Supremacy Clause of the United States Constitution would seem to preclude such a statute, even if the legislature so intended. Accordingly, we decline to agree with petitioners that this condition is inconsistent with ORS 836.616(3) or impermissibly broad. This sub-assignment of error is denied.

E. Petroleum Storage

The hearings officer's decision quotes the following staff finding:

> "Finding: Through Casefile 89-204-FP the applicant was required to record a deed prohibiting the storage of petroleum products, explosives, herbicides and other similar products on the project site. This deed restriction is required to comply with [CDC] 421-14.2.
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> "If, as defined by the American Heritage College Dictionary, storage means the act of storing goods or the state of being stored and to store means to reserve for future use, staff finds that the applicant shall not be permitted to maintain a store of fuel on the site that exceeds the amount of fuel needed for use during a typical day. A fuel truck may come on site to fuel planes, but the truck cannot be based at the site or parked at the site overnight.
>
> "The applicant shall provide a copy of the required deed restriction within thirty (30) days of the date of this decision." Record 37-38.

The hearings officer's decision then states:

> "The Hearings Officer concurs and adopts the Staff Finding. Based on the above findings Staff has recommended what is Condition IV below." Record 38.

Condition IV states:

> "Within thirty (30) days of the Date of this Decision the Applicants/Property Owner shall remove chemicals, (e.g. pesticides, herbicides, etc.) needed for crop-dusting activities to a legal off-site storage facility. [CDC] 421-14.2 prohibits storage of such chemicals within the flood plain and [the applicants shall] provide copies of the recorded deed restriction prohibiting the storage of the above-mentioned chemicals on the site." Record 40.

Petitioners argue, first, that it is unclear whether Condition IV as written governs the proposed use of petitioners' 2,000-gallon fuel truck, because the condition speaks only of "chemicals * * * needed for crop-dusting activities," not petroleum. To the extent the condition can be read to govern use of the truck, petitioners argue that the condition is

impermissibly vague and contrary to the requirement for clear and objective conditions under ORS 836.608(6). Further, petitioners contend that any regulation of the fuel truck is preempted by the Airport Protection Act as an unlawful restriction on airport services allowed under ORS 836.616(2). Finally, petitioners dispute the staff finding, adopted by the hearings officer, that use of a 2,000 gallon fuel truck constitutes "storage" of petroleum for purposes of CDC 421-14.2.[22] Because the truck is mobile and can be moved in the event of a flood, petitioners argue, its use does not involve "storage."

The county responds, and we agree, that Condition IV is reasonably read in conjunction with the accompanying findings to prohibit storage of petroleum as well as other chemicals at the airport. Condition IV is consistent with conditions of approval imposed in casefile 89-204-FP, approving the dwelling and agricultural building, and also consistent with CDC 421-14.2, which prohibits of storage of petroleum, herbicides, etc., within the flood plain. As explained above, pursuant to ORS 836.608(3)(a), the county may continue to impose limitations on uses approved prior to January 1, 1997. Petitioners' application proposed to store aviation fuel on-site in the fuel truck, apparently as a "new use" since no claim is made that such use existed in 1996 or was approved in any prior decision. While petitioners may be correct that storing aviation fuel is a "customary" aviation activity or service at private use airports and a use that potentially could be approved under ORS 836.616(2) and 836.608(5), as explained above we do not understand the statute to preempt application of the county's floodplain regulations required by federal law. Finally, we see no error in the staff finding that maintaining 2,000 gallons of fuel on-site in a fuel truck constitutes "storage" of petroleum for purposes of CDC 421-14.2. This subassignment of error is denied.

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[22] CDC 421-14.2 provides, in full:

> "Storage of petroleum products, explosives, herbicides, pesticides, insecticides, poisons, defoliants, fungicides, desiccants, nematocides and rodenticide is prohibited."

The ninth assignment of error is sustained, in part.

TENTH ASSIGNMENT OF ERROR

The tenth assignment of error summarizes and restates the challenges to the conditions imposed by the hearings officer that were discussed under the seventh, eighth and ninth assignments of error. For example, petitioners argue that the conditions requiring removal of fill beneath the dwelling and the fourth wall of the agricultural building are unconstitutional takings under *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 107 S.Ct 3141, 97 L.Ed.2d 677 (1987) and *Dolan v. City of Tigard*, 512 U.W. 374, 114 S.Ct. 2309, 129 L.Ed.2d. 304 (1994). Petitioners' arguments under the tenth assignment of error add nothing to those advanced in seventh, eighth and ninth assignments of error, and do not provide an independent basis for reversal or remand.

The tenth assignment of error is denied.

The county's decision is remanded.