BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROY R. MICHAEL, Petitioner, v. CLACKAMAS COUNTY, a political subdivision of the State of Oregon, Respondent, and THEODORE R. ARMSTRONG, LEW LANGLOIS, JOHN ERICKSON and DUNCAN BRINKLEY, Participants.	LUBA No. 83-046 FINAL OPINION AND ORDER

Appeal from Clackamas County.

Gary M. Bullock, Portland, filed a petition for review and argued the cause for petitioners.

Respondent County did not appear.

Edward J. Sullivan, Portland, filed a brief and argued the cause for Participants.

Bagg, Board Member.

Affirmed 9/19/83

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a), as amended by Oregon Laws 1981, ch 748.

Bagg, Board Member.

NATURE OF THE DECISION

Petitioner appeals

> "that land use decision of respondent entitled Order No. 83-628, which became final on April 11, 1983, and which involves the denial by the Board of Commissioners of Clackamas County of petitioner's request to continue the use of three buildings constructed on the property without building and zoning permits and for a variance to reduce the sideyard setback for one of the buildings."1

Petitioner asks the Board to reverse the decision.

FACTS

Petitioner, Roy Michael, has operated a cedar shake mill and precast concrete business on property owned by him in Clackamas County since 1962. The land was unzoned when the business started. The county later applied agriculture zoning, and the facility now constitutes a nonconforming use.

The petitioner's business consists of a main manufacturing plant completed in 1973; a pole building used for storage (Building 1); a lunchroom/washroom and office building (Building 2); and a building covering a hearth grinder (Building 3), which also serves to protect sand and cement used in grinding. These structures were built without permits between 1975 and 1979. There is also a chip bin (Building 4), installed in 1975 to replace a smaller bin.

No building permits were required when petitioner built his residence and the main manufacturing plant. Petitioner claims to have been assured the county did not require building

permits before beginning construction on the lunchroom/washroom and office facility, the pole building and the building to cover the hearth grinder.

In 1978, the Worker's Compensation Accident Prevention Division cited petitioner for not having hot and cold running water near the restroom. Petitioner also claims he was warned that if adequate corrective measures were not taken, he would also be cited for not providing lunchroom facilities. According to petitioner, this warning prompted petitioner to construct the lunchroom/washroom and office building. Petitioner claims to have attempted to locate the washroom and lunchroom in the existing main plant, but because of a steel reinforced eight inch thick concrete floor and an overhead bridge crane running the length of the building, this attempt proved not to be practical.

Petitioner constructed a building for additional storage in 1975. At this point, the county informed him he needed to acquire a permit for the storage building, the hearth grinding building and the lunchroom/washroom and office facility. He stopped construction and applied for the permits.

The County Board of Commissioners denied permit requests on September 3, 1980, and LUBA affirmed the denial in Michael v. Clackamas County, 2 Or LUBA 285 (1981). Petitioner then reapplied for permission to continue the use of the buildings and the storage area. On April 11, 1983, the county commissioners again denied the request. This appeal followed.

ASSIGNMENT OF ERROR NO. 1

"ORDER NO. 83-628 VIOLATES PETITIONER'S RIGHT, GUARANTEED BY THE UNITED STATES CONSTITUTION, TO THE NATURAL GROWTH OF HIS BUSINESS."

Under this assignment of error, petitioner acknowledges zoning regulations constitute a legitimate exercise of the state's police power; however, he alleges that the Fourteenth Amendment to the United States Constitution prevents the county from prohibiting the "natural growth" of petitioner's business. Petitioner cites cases from the Supreme Court of Pennsylvania recognizing a constitutional right to the natural growth of one's business. Petitioner quotes the following explanation of this theory:

> "Once it is determined, as it has been determined, that a nonconforming use existed, natural development and growth cannot be paralyzed by an overly technical appraisement for the existing use. An ordinance which would allow the housing of a baby elephant cannot evict the animal when it is grown up, since it is generally known that a baby elephant becomes a big elephant. The growth of the business here is not an elephantine growth, but it is one that can be expected in any community and is usually looked upon with approval, admiration, and even encouragement. If we were to prevent the natural growth and expansion of the protected non-conforming use, we would invade the constitutional guarantees of due process which indeed brought the nonconforming principle into being." In Re Associated Contractors, 391 Pa 347, 138 A 2d 99 (1958).

The Board understands petitioner to argue that he falls under this "natural growth" protection because he is merely modernizing and improving the business. Petitioner insists he is not engaging in prohibited expansion of the business. Petitioner says that the inclusion of ready-mix trucks and

modern equipment in exchange for dump trucks and handloading equipment is not an impermissible alteration of the business. Petitioner argues he has expanded his business by only about one-third, and such modest growth is protected by the Fourteenth Amendment.

In support of this argument, petitioner cites 1 R. Anderson, American Law of Zoning, sec 6.35 (2d ed 1976) as follows:

> "Ordinances which restrict change of use have occasionally been applied to situations which involve an increase in the volume or intensity of use. Exact cases are few, but it appears that an increase in volume of use, although it renders the use more obnoxious to its neighbors, is not a change of use. Thus, where a nonconforming user increased his wholesale fish business, the increase yielded stronger smells and additional traffic, the court held that an ordinance which prohibited change of use was not offended. Even an increase in volume accompanied by some change in the nature of the use may not be regarded as a change in use."

Petitioner also quotes the following:

> "It is the general rule that the employment of moderate and more effective instrumentalities not previously used in a nonconforming business or use or in connection with a nonconforming building does not constitute a prohibitive expansion or enlargement of the business, use or building. In short, an owner can modernize facilities and employ improved instrumentalities in connection with a nonconforming building or use. However, the instrumentalities must be ordinarily and reasonably adapted to make the use in question available to the owner, and, moreover, the original nature and purpose of the undertaking must remain unchanged. Thus, for example, in mining, quarrying and similar types of uses, the introduction of new, mechanized devices and equipment is not an enlargement or extension of the use, but merely a more effective method of carrying it on." 8 A E. McQuillin, Municipal Corporations, §25.1210 (3d ed

1976). Footnotes omitted.

Participants argue the right to continue a nonconforming use does not, in Oregon, include a right to expand the use, and expansion of nonconforming uses offends the spirit of zoning regulations. 1 Anderson, sec 6.43. According to participants, the addition of new equipment or facilities constitutes an unlawful expansion of a nonconforming use. According to participants, the new facilities, and the enlargement of existing ones, are illegal expansions of nonconforming uses because the volume or intensity of the use is increased, and the nature of the use is changed. See 8 A.E. McQuillin, Municipal Corporation, sec 25.202 (3d ed 1976).

Participants contrast expansion with "intensification" of a nonconforming use. Intensification is permissible as long as the character of the use is unchanged and substantially the same facilities are used. See Bither v. Baker Rock Crushing Co., 249 Or 640, 438 P2d 988, 440 P2d 368 (1968). Participants argue the record is clear that petitioner has expanded and not simply intensified his nonconforming use because petitioner has built three new buildings and expanded the storage area into formerly unoccupied land. This expansion is not protected by the United States Constitution, according to participants.

The Board recognizes nonconforming uses are not favored in Oregon. Oregon law does recognize, however, the existence of nonconforming uses and allows them to continue. ORS

215.130(5). Alterations of nonconforming uses are also permissible under a limited circumstance.

> "Alteration of such use shall be permitted when necessary to comply with any lawful requirement for alteration in the use. A change of ownership or occupancy shall be permitted." ORS 215.130(5).

Also, restoration or replacement of a nonconforming use is allowed when the use is destroyed by a "fire, other casualty or natural disaster." ORS 215.130(6).

Alteration of a nonconforming use is to be considered closely, however, when the alteration is not out of some legal necessity or casualty.

"ORS 215.130(8) states:

> "(8) Any proposal for the alteration of a use under subsection (5) of this section, except an alteration necessary to comply with a lawful requirement, for the restoration or replacement of a use under subsection (6) of this section or for the resumption of a use under subsection (7) of this section shall be considered a contested case under ORS 215.402(1) subject to such procedures as the governing body may prescribe under ORS 215.412."

It is also clear that Oregon law disfavors any change in a nonconforming use that would have a greater impact on the neighborhood than existed before the use was altered.

> "(9) As used in this section, 'alteration' of a nonconforming use includes:
>
> > "(a) A change in the use of no greater adverse impact to the neighborhood; and
> >
> > "(b) A change in the structure or physical improvements of no greater adverse impact to the neighborhood."

Indeed, in Bergford v. Clackamas County Transportation Service, 15 Or App 362, 367, 515 P2d 1345 (1973), the court stated:

> "...a zoning plan, by its very existence, forbids the expansion of nonconforming use -- absent a finding by the appropriate authority that given the choice of continuing an existing use 'as is' or allowing a proposed expansion with attendant changes in the nature of the structure, the changes will result in a situation in which the nonconforming use will be more compatible with the goals of the zoning plan than the existing nonconforming use."

In this case, the county found more than simple intensification of a nonconforming use, that is, more than increased volume to petitioner's business, an increased number of employees or simply greater activity on the site. The county found alteration of the use by the construction of new buildings. Record 12-13.

Nothing has been cited to the Board to suggest that state and county limitations on this kind of alteration are prohibited by the United States Constitution. No citation suggests the Oregon courts follow (or would follow) the Pennsylvania courts in finding a constitutional right to the kind of growth in structures and uses requested here. Indeed, the provisions of Oregon law cited above and the Bergford and Bither cases suggest any growth that is offensive to the prevalent use in the neighborhood will be held invalid. See Bither, supra, 249 Or at 651.

Further, the Board does not find any unconstitutional taking of petitioner's property as alleged. Petitioner has a nonconforming use which he may continue to operate. Petitioner

is not precluded from economically feasible uses of his property, and the county has done nothing in designating this property for agricultural use that prevents the petitioner from obtaining an economic benefit from it. Fifth Avenue Corporation v. Washington County, 282 Or 591, 581 P2d 50 (1978); Joyce v. City of Portland, 24 Or App 689, 546 P2d 1100 (1976). In short, the Board does not see how petitioner's property has lost its value by the imposition of county zoning regulations that limit expansion of nonconforming uses. See Multnomah County v. Howell, 9 Or App 374, 496 P2d 235 (1972), and Penn Central Transportation Company v. New York City, 438 US 104, 98 S Ct 2646, 57 L ed 2d 631 (1978).

Petitioner's first assignment of error is denied.

ASSIGNMENT OF ERROR NO. 2

> "THE BOARD ERRED IN DENYING APPROVAL OF THE CHIP BIN, THE HEARTH GRINDER BUILDING, THE POLE BUILDING USED FOR STORAGE, AND THE STORAGE AREA BECAUSE IT APPLIED THE WRONG STANDARD."

Petitioner argues the county was mistaken in not approving the continued use of petitioner's new buildings because the county applied the wrong statutory standard. Petitioner says the county board's findings reveal it concluded the structures were "not necessary" to reasonably continue the nonconforming use. Petitioner argues there is no need for a finding of necessity under Clackamas County Zoning Ordinance sec 1206.06 which states that alterations or change in the use of a structure "may be permitted to reasonably continue the use * *

* *" Petitioner argues the county zoning code simply parrots ORS 215.130(5) which states that alterations of any nonconforming use "may be permitted to reasonably continue the use."

In support of this argument, petitioner recites 1977 Or Laws, ch 766, sec 5 which then provided

> "The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. Alteration of any such use may be permitted when necessary to reasonably continue the use without increase."

The 1979 legislature amended the statute to read

> "The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. Alteration of any such may be permitted to reasonably continue the use." 1979 Or Laws, ch 610, sec 1.

By deletion of the words "when necessary" and "without increase," petitioner argues the legislative intent is clear that there be no requirement of necessity when a county is considering the alteration of a nonconforming use.

Petitioner adds the county never gave Mr. Michael notice that he would have to comply with any standard other than that included in ORS 215.130(5). Petitioner says the county owed Mr. Michael an explanation of what would be required in order obtain the required permits.

Participants state the county board properly interpreted its own ordinance to require a showing of necessity before a nonconforming use may be altered. Respondent quotes the following portions of the Clackamas County Zoning Ordinance.

"ALTERATIONS REQUIRED BY LAW: The Planning Director shall permit the alteration of any nonconforming use when necessary to comply with any lawful requirement for alteration of the use or structure, subject to all other laws, ordinance and regulations.

* * * *

"ALTERATIONS AND CHANGES: Alterations or a change of the use or structure may be permitted to reasonably continue the use subject to Hearings Officer review and approval under provisions of Section 1300, and the following conditions:

"A. The change in the structure or physical improvements will have no greater adverse impact on the neighborhood than the existing structure and improvements; and

"B. The change in use, if applicable, will have no greater adverse impact on the neighborhood than the existing use."

Participants remind the Board that it previously reviewed the county board's interpretation of this section and found it proper. According to participants, neither the wording of the statute nor the wording of the county ordinance has changed since LUBA reviewed the matter in Michael v. Clackamas County, 2 Or LUBA 285 (1981). The Board understands participants to say the petitioner was on notice of the standard the county believed applicable.

Participants add the 1979 amendment to ORS 215.130(5) gives counties more discretion than they had previously in that the counties may now permit any alteration of a nonconforming use if it reasonably continues that use. They need not do so, however. Participants argue the only duty placed on counties to approve changes in nonconforming uses is when the change is

shown to be "necessary to comply with any lawful requirement." ORS 215.130(5). Participants conclude the county board's interpretation of Section 1206.06 to require a showing of necessity is well within its power and is reasonable.

Further, participants go on to explain the county also found the proposed alterations would have an adverse affect on the neighborhood. Record at 10-12, 17, 20-21. Participants say the adequacy of these findings was not assigned as error by petitioner; therefore, the county's determination that buildings 1, 3 and 4 and the outdoor storage shed fail to meet the "no greater adverse impact" standard provides "an independent and unchallenged basis for denial" of this application.

It is not precisely clear to the Board that the county indeed found Section 1206.06 of its zoning ordinance to require a showing of necessity. The Board understands the county to adopt the "opponents'" arguments regarding the appropriate test for alteration of a nonconforming use.[2] The county findings show the following to be its apparent understanding of how it should apply to Sections 1206.04 and 1206.06.

> "The subject use expands an indoor area, lends more permanency to the use, and becomes a better competitor to lawful uses. There must be, therefore, a distinction between facilities reasonably necessary to continue the use and those merely convenient. If this building was not allowed, the use would not die; it would be more inconvenient to maintain, but that is the purpose of nonconforming use regulations." Record at 122.
>
> "The Hearings Officer does not interpret 'to

reasonably to continue the use' to mean that the use may continue in a reasonable manner. To do so would change the uniform hostility towards such nonconforming uses envisioned by the Clackamas County Comprehensive Plan and the Statewide Planning Goals, as well as nonconforming use case law. * * * Rather, the Hearings Officer concludes that the Legislature, in passing Ch. 190 and 610, Oregon Laws 1979, intended to give local governments some measure of flexibility in dealing with nonconforming uses." Record 164.

"Also of interest is the 'to reasonably to continue the use' language. There has been testimony that the changes proposed here are more convenient to the uses involved (Michael testimony of April 19, 1982). For example, the change in the office from the applicant's house to the plant allows for more convenience in responding to orders, * * * but there is no evidence that any of the facilities are necessary to continue the use. Rather they change the use so as to both expand its area and extend its permancy [sic]." Record 165-166.

The county goes on to say that the changes requested by the applicant will have an adverse impact on the neighborhood.

"The criteria for such a determination include the inherent land use conflicts between agricultural and heavy industrial uses being exacerbated by the greater permanency linked to this use if the application were granted, especially in view of the conclusion that the additions were not necessary. A second point is that this change would allow the use to expand its area for offices, worker facilities, storage and for the replaced hearth grinder machine. Finally, the Hearings Officer believes the testimony of the opponents as to noise, traffic, dust, smell and aesthetic injuries they would suffer with the operations now, as compared to the use in 1974 and 1975, when production was far below the present level. This test is confirmed by the aerial photos in the record. Also, the testimony as to the loss of value by the presence of the use and its expansion by the applicants' own expert witness regarding appraisal further leads the Hearings Officer to the conclusion that this criteria is not met." Record 168.

Whether the county believes Section 1206.06 requires a

showing of necessity before a use may be altered or whether the county believes it may allow alteration of a nonconforming use upon a showing of "no greater or adverse impact" is not determinative of the outcome of this case. The county found no "necessity" to alter the use to meet lawful regulations except for a washroom. See discussion under assignment of error number 3, infra. Also, the county found the change in the physical plant would have an adverse impact on the neighborhood and that the changes in the use, to the extent that they allow the use to become more permanent and more firmly established as an industrial use in the middle of an agricultural area, are contrary to the purpose of nonconforming use regulations and have an adverse impact on the permitted agricultural use in the neighborhood. In sum, the petitioner is unable to show compliance with the county regulations; and without a showing of compliance, the county is under no obligation to grant the request.

The second assignment of error is denied.

ASSIGNMENT OF ERROR NO. 3

> "THE BOARD ERRED IN DENYING APPROVAL OF THE LUNCHROOM/WASHROOM/OFFICE BUILDING BECAUSE CONSTRUCTION OF THE BUILDING, DUE TO LACK OF REASONABLE ALTERNATIVES, WAS NECESSARY TO COMPLY WITH STATE HEALTH REGULATIONS."

Under this assignment of error, petitioner notes Clackamas County Zoning Ordinance Section 1206.04 gives the planning director permission to alter a nonconforming use

> "when necessary to comply with any lawful requirement for alteration of the use or structure, subject to all

other laws, ordinance [sic] and regulations."[3] Petitioner says again the Worker's Compensation Accident Prevention Division cited petitioner for failure to provide hot and cold running water next to his restroom, and the field representative also indicated he would cite the petitioner for failure to provide adequate lunchroom facilities. No such citation was issued in the lunchroom matter, however.

In order to comply with the order, petitioner advises he attempted to locate washing facilities and the lunchroom inside the existing main plant. However, because the main plant was designed from the beginning to accommodate a bridge crane, a safety hazard would result from installing the lunchroom and washroom inside the plant. Should a load carried by the bridge crane come loose, it could cause injury. Further, the main plant has a reinforced thick concrete floor through which it would have been difficult to extend plumbing. Petitioner complains the county's conclusion that building no. 2 is not necessary to comply with state regulations is not supported by substantial evidence and ignores the practical realities of the situation.

Participants argue LUBA has previously held that Section 1206.04 (then Section 9.144) of the county's ordinance may be correctly interpreted to require a finding of necessity in order to comply with state regulations before a change may be made. Michael, 2 Or LUBA at 290. Secondly, the county's findings state that neither the Worker's Compensation

Department citation, the regulations nor testimony in the record support a conclusion that state regulations require construction of a separate lunchroom, washroom or office. Participants point to evidence in the record from a masonry contractor and engineer stating it would be possible to put handwashing facilities with hot and cold running water inside the main plant building or outside the building without constructing a new building. See Record 288-290, 728-732. Participants add that an oral threat to issue a citation in the future does not constitute issuance of the citation and give rise to a legal necessity. Also, there is no requirement in the citation for new offices.

Participants conclude the county decision on the lunchroom/washroom and office facility was supported by substantial evidence. This Board believes participants are correct. The county ordinance at Section 1206.04 requires a finding of necessity before alteration of a nonconforming use may be made. In this case, the county did not make a finding of necessity, and the Board believes there is substantial evidence in the record to support the county's decision. Specifically, the evidence cited above from a masonry contractor and an engineer stating the required handwashing facilities did not require a new building is sufficient in itself to support the county's conclusion on this part of petitioner's request. Further, there is no citation or other document in the record which could be even remotely considered

legally enforceable to require the installation of a lunchroom and offices. Petitioner has simply failed to meet the required burden created by Section 1206.04 of the county ordinance.

Petitioner's third assignment of error is denied.

ASSIGNMENT OF ERROR NO. 4

> "THE BOARD'S CONCLUSION THAT THE VARIANCE WOULD PERMIT USES INCONSISTENT WITH AGRICULTURAL USES BECAUSE OF TRAFFIC IS NOT SUPPORTED BY ANY FINDINGS OF FACT, NOR IS IT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE WHOLE RECORD."

Under this assignment of error, petitioner takes issue with the county's denial of a variance requested to accommodate an extension to the equipment storage building. As the Board understands petitioner's argument, petitioner believes the county board denied the variance with the following conclusion:

> "The proposed variance would facilitate the furthest conceivable use classification from agricultural uses [sic] and the presence of such heavy industrial use as in conflict with agricultural use by virtue of the noise, dust, vibration, traffic and the like." Record 8.

Petitioner complains the county board made no findings of fact to support this conclusion, and petitioner goes on to point to evidence in the record supporting his contention that the proposed uses would actually reduce traffic. Petitioner says the county was obliged to explain the facts upon which it relied in denying the application, in part, because of traffic problems.

Participants note that even if petitioner's fourth assignment of error were sustained, there would still not be a

sufficient basis for reversing or remanding the county's denial of the variance. The petitioner failed, according to participants, to challenge any of the findings addressing the specific standards for granting a variance in the county's zoning code. Participants say a failure to meet any one of the provisions would be a sufficient basis to deny the variance.

Clackamas County Zoning Ordinance Section 1205.02 sets out the criteria for approval of variances. The section requires the applicant to make the following showing:

"A. Compliance with the applicable requirement or standard of the ordinance would create a hardship due to one or more of the following conditions:

"1. The physical characteristics of the land, improvements, or uses are not typical of the area. When the requested variance is needed to correct an existing violation, that violation shall not be considered as a condition 'not typical of the area'.

"2. The property cannot be developed to an extent comparable with other similar properties in the area if the requirement or standard is satisfied.

"3. Compliance with the requirement or standard would eliminate a significant natural feature of the property.

"4. Compliance with the requirement or standard would reduce or impair the use of solar potential on the subject property or adjacent properties.

"B. Strict adherence to the requirement or standard is unnecessary because the proposed modification or variance from the standard or requirement will reasonably satisfy all the following objectives:

"1. Will not adversely affect the function or appearance of the development and use on the subject property, and

"2. Will not impose limitations on other properties and uses in the area, including uses that would be allowed on vacant or underdeveloped properties, and

"3. Will accomplish the purpose(s) for the standard as set forth in this ordinance.

"C. Approval of the application will allow the property to be used only for purposes authorized by the Zoning and Development Ordinance; and

"D. Approval of the application complies with the Comprehensive Plan."

In order for this Board to find fault with the county's findings, the county would have to make an error in the application of its zoning code. Whether or not the county made an error in the discussion regarding traffic is not important by itself. Traffic patterns and facts about traffic will not answer all of the criteria set out in the county ordinance at Section 1205.02. The issue is how the county applied its variance code. Petitioner did not assign error to the county's application of its variance code, and petitioner has not complained about the other findings the county made addressing the code. Petitioner is not entitled to a reversal or remand of the county's decision where petitioner is unable to show the county erred in the application of its ordinance.

This assignment of error is denied.

The decision of Clackamas County is affirmed.

FOOTNOTES

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[1] This statement of the case is from petitioner's notice of intent to appeal.

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[2] The "opponents" below appear to be the participants in the instant case.

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[3] This provision is substantially similar to that in ORS 215.130(5), supra, allowing alteration of use "when necessary to comply with any lawful requirement for alteration in the use."