

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

LAND USE  
BOARD OF APPEALS  
JAN 16 5 03 PM '86

3 DAVID B. BENNETT, )  
4 Petitioner, ) LUBA No. 85-073  
5 vs. ) FINAL OPINION  
6 LINN COUNTY BOARD OF ) AND ORDER  
7 COMMISSIONERS, )  
8 Respondent. )

9 Appeal from Linn County.

10 David B. Bennett, Sweet Home, filed the petition for review  
and argued the cause on his own behalf.

11 Robert G. Danielson, Sweet Home, filed a response brief,  
12 but made no appearance before the board.

13 No appearance by Linn County.

14 KRESSEL, Chief Referee; BAGG, Referee, DUBAY, Referee;  
participated in the decision.

15 REVERSED IN PART, REMANDED IN PART 01/16/86

16 You are entitled to judicial review of this Order.  
17 Judicial review is governed by the provisions of ORS 197.850.  
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1 Opinion by Kressel.

2 NATURE OF THE DECISION

3 Petitioner appeals County Order 85-468. The order declares  
4 that a slaughterhouse known as Santiam Meat Packers is a lawful  
5 nonconforming use and approves certain alterations to the use.

6 FACTS

7 Two contiguous tax lots are involved in this appeal. Both  
8 are under the ownership of Respondent Smith. Smith operates  
9 Santiam Meat Packers and is the applicant for the permits in  
10 question.

11 Tax lot 1100 is approximately two and one-half acres. The  
12 slaughterhouse and a residence are located on this tax lot.  
13 Wastewater from the slaughterhouse is discharged into a  
14 ten-foot deep earthen pit on the lot. The slaughterhouse  
15 predates the zoning of this property and is considered a  
16 nonconforming use by the county.<sup>1</sup>

17 Tax lot 1301 is immediately east of tax lot 1100. It is  
18 approximately 14 acres and is in farm use. Wastewater from the  
19 disposal pit on the adjacent tax lot is periodically discharged  
20 onto tax lot 1301 through an irrigation pipe. The county  
21 considers this practice a nonconforming use of tax lot 1301,  
22 which is zoned Farm-Forest (FF).

23 In June, 1984, the State Department of Environmental  
24 Quality (DEQ) notified Smith that a Water Pollution Control  
25 Facilities Permit was required. The notification followed a  
26 site inspection and included a preliminary determination that

1 the current system for wastewater disposal was substandard.

2 In connection with applying for the DEQ permit, Smith  
3 requested county certification that the facility complied with  
4 applicable land use requirements. The request did not describe  
5 any proposed changes in the wastewater disposal system, but  
6 indicated that a pond might be added after DEQ review.

7 The county planning department granted the requested  
8 certification in November, 1984. The planning director's  
9 written decision includes the following findings:

10 "1. Santiam Meat Packers is a slaughterhouse  
11 operation that has existed since at least 1969  
12 when the Department of Environmental Quality  
13 certified the animal waste treatment and disposal  
14 system as being adequate. As such, the use  
15 predated the adoption of any Linn County Zoning  
16 Ordinances. The use became nonconforming when  
17 the 1971 zoning designation did not permit  
18 slaughterhouses. Subsequent zoning amendments  
19 allow slaughterhouses conditionally, yet, Santiam  
20 Meat Packers remains a nonconforming use.

21 "2 Santiam Meat Packers is required to obtain a  
22 Water Pollution Control Facility Permit (WPCF)  
23 from the Department of Environmental Quality  
24 (DEQ). Based upon DEQ and county site visits, it  
25 appears that alteration or expansion of the  
26 wastewater collection, treatment and disposal  
27 facilities will be required. Alteration or  
28 expansion will likely include a larger pond to  
29 provide sufficient treatment for existing waste  
30 flows as well as an improved method of dispersing  
31 waste water onto the adjacent 13 acre field. The  
32 alteration or expansion will be the minimum  
33 necessary to comply with the legal requirements  
34 as specified by the Department of Environmental  
35 Quality.

36 "3. An improved wastewater collection, treatment, and  
37 disposal facility at Santiam Meat Packers will  
38 provide greater protection of ground water,  
39 surface water, and odor control. These

1 improvements will ensure that no greater adverse  
2 impact upon the area will result and will result  
3 in a use that more closely conforms to the  
standards required of such a use." Record at 248.

4 Petitioner, who has resided near the slaughterhouse since  
5 1973, appealed the planning director's determination to the  
6 Linn County Planning Commission. While the appeal was pending,  
7 Smith amended his request, asking the planning commission to  
8 also grant approval of two structural alterations to the  
9 facility: (1) replacement of a free-standing animal  
10 disemboweling room ("gutting room") by construction of a 320  
11 square foot addition to the slaughterhouse and (2) construction  
12 of a roof and wall extension over certain freezer  
13 compartments. The application indicated the alterations were  
14 already in place.

15 The planning commission took up petitioner's appeal and the  
16 additional requests by Smith at a hearing in March, 1985. At  
17 the conclusion of the hearing, the commission denied  
18 petitioner's appeal and approved the alterations.

19 Petitioner appealed both decisions to the Linn County Board  
20 of County Commissioners. After a de novo hearing, the board  
21 rejected the appeals and entered Order 85-468, the order at  
22 issue here.

23 Order 85-468 describes the matters before the governing  
24 body as follows:

- 25 "1. This action involves two case files, NC-1-84/85  
26 and NC-3-84/85, and three issues. NC-1-84/85

1 involves issuance of a Water Pollution Control  
2 Facilities (WPCF) Permit by the Oregon Department  
of Environmental Quality (ODEQ) to the  
3 applicant. A WPCF permit, as stated in a  
September 1984 letter from DEQ, may either  
4 involve approval of the existing wastewater  
treatment system or improvements to that system.  
5 NC-1-84/85 is being reviewed as an alteration or  
change in a nonconforming use required by law  
(Section 30.360, Linn County Zoning Ordinance).

6 "NC-3-84/85 involves two additions to the  
7 slaughterhouse that occurred before this review.  
The additions are an animal disemboweling room  
8 (gutting room) and a roof and wall extension over  
freezer compartments. The gutting room issue is  
9 reviewed as an alteration or change in a  
nonconforming use required by law (Section  
10 30.360, Linn County Zoning Ordinance). The  
freezer area construction is reviewed as an  
11 alteration or change in a nonconforming use not  
required by law (Section 30.340)." Record at 4.

12 In certifying that Santiam Meat Packers is a nonconforming  
13 use, the final order concludes, in part:

14  
15 "5. The slaughterhouse has actually used the parcel  
16 for definable purposes since before ordinance  
provisions were adopted, making the use  
17 nonconforming. Its use has been continual since  
that time, involving slaughtering animals,  
18 cutting, wrapping and storing meat products,  
associated vehicle use of the site, and disposing  
19 of wastewater onto the 13 acre field. Usage of  
the field for wastewater disposal has been  
20 continual to this day, but on an intermittent,  
as-needed basis. The county finds that the  
21 continual operation of the slaughterhouse, the  
lack of an approved alternative wastewater  
22 disposal system on the property, and the  
testimony of a neighboring property owner are  
23 sufficient evidence to show that the wastewater  
disposal usage has never been abandoned.

24 "6. Linn County concludes that the slaughterhouse's  
25 use of a wastewater system has always been  
lawful. No evidence has been submitted showing  
26 any determination by ODEQ that the existing  
system was unlawful, or that system alterations

1 were needed until 1984. It must be considered  
2 agency error to not have required a WPCF permit  
3 prior to 1984--not the error of the various  
4 operators for having failed to obtain one. The  
Oregon Sanitary Authority's 1969 letter and  
ODEQ's 1983 letter both stated that the system  
met all requirements.

5 "ODEQ's 1984 requirement for a WPCF permit  
6 precipitated the NC-1-84/85 application.  
7 Proposed modifications to the wastewater system  
8 are requirements of law necessary to obtain a  
WPCF permit. The alterations would not be  
applied for if the slaughterhouse's current  
system was sufficient.

9 "Santiam Meat Packers is a lawful nonconforming  
10 use. It predates all zoning ordinances not  
11 allowing slaughterhouses outright. The use was  
12 established lawfully according to county  
13 ordinances because no zoning regulated the use at  
the time of its establishment, and as evidenced  
by the 1969 Oregon Sanitary Authority and the  
1983 ODEQ letters, complied with state  
regulations...." Record at 8.

14 The order adds the condition that "no structure associated  
15 with the slaughterhouse shall be located on tax lot 1301 or  
16 east of the existing site access road." Record at 2.

17 With respect to the disemboweling room previously added to  
18 the facility, the county's order concludes:

19 "9. The county concludes that the 1976 addition to  
20 the slaughterhouse complied with the 1976 county  
21 zoning provision. Section 24.020(1) of the 1972  
22 zoning ordinance provided for additions required  
23 by law. The county finds convincing evidence in  
24 the 1979 Smith-Hickey transcript showing that the  
25 gutting room addition was required by federal  
26 inspectors. No explicit evidence showing a  
requirement from an agency was necessary, and no  
planning review responsibility existed.  
Inclusion of the gutting room addition in  
NC-3-84/85 is a remedial action to allow for  
building permits and inspections for construction  
allowed by zoning provisions effective at the

1 time; no agency statement need be submitted at  
2 this time.

3 "Alternatively, the gutting room addition  
4 replaced a free standing gutting room. The  
5 alteration did not alter the use of the parcel as  
6 a slaughterhouse since a gutting room existed on  
7 the parcel at the time Santiam Meat Packers  
8 became nonconforming. The alterations did not  
9 make the use unlawful since no new use was  
10 added." Record at 9.

11 Finally, with respect to the freezer alterations previously  
12 installed by the operator, the order concludes:

13 "12. The freezer area alterations reviewed as  
14 NC-3-84/85 involve extension of a roof structure  
15 and wall to provide protection of prefabricated  
16 meat freezer units. The appellant alleges that  
17 other alterations were made but has provided no  
18 evidence of what alterations occurred. The board  
19 concludes that only the freezer roofing occurred  
20 as outlined in NC-3-84/85. The alterations are  
21 inconsequential changes built to protect existing  
22 slaughterhouse components. The alterations did  
23 not functionally expand or alter the use. These  
24 actions did not make the use--a slaughterhouse  
25 --unlawful since no new use was added." Record  
26 at 10.

#### 17 FIRST ASSIGNMENT OF ERROR

18 The county's order concludes that the intermittent use of  
19 tax lot 1301 for disposal of wastewater was a lawful component  
20 of the slaughterhouse when it became nonconforming under the  
21 zoning ordinance. This determination is evidently intended to  
22 certify that an upgrading of the disposal system (as may be  
23 required by DEQ) will not contravene the zoning restrictions  
24 applicable to the lot. In this assignment of error, petitioner  
25 mounts three challenges to the county's determinations. First,  
26 he contends the nonconforming use determination is not

1 supported by substantial evidence in the record. Second,  
2 petitioner argues that the intermittent irrigation of tax lot  
3 1301 is ancillary to farm use--a conforming use under the  
4 zoning ordinance--and thus could not be a nonconforming use.  
5 Finally, petitioner argues that the sporadic nature of  
6 wastewater disposal on tax lot 1301 prevents the county from  
7 classifying the use as nonconforming.

8 At the outset, we find merit in petitioner's contention  
9 that the intermittent irrigation of tax lot 1301 with  
10 wastewater from the slaughterhouse (assuming that is an  
11 accurate characterization of the use) cannot be considered a  
12 nonconforming use of the lot. It is undisputed that since the  
13 imposition of zoning, the property has been zoned and used for  
14 farm use. Irrigation of farm land is a farm use. The fact  
15 that irrigation is beneficial to an adjacent nonconforming use  
16 does not make the irrigation itself nonconforming. Spencer  
17 Creek Pollution Control Association v. Oregon Fertilizer  
18 Company, 264 Or 557, 564, 505 P2d 919 (1973), rehearing denied  
19 (1973).

20 The county's order asserts that wastewater disposed on tax  
21 lot 1301 is not a conforming farm use because "[I]t is not  
22 being accomplished to increase agricultural productivity and is  
23 not intended as farmland irrigation." Record at 9. However,  
24 no evidence to support the assertion has been brought to our  
25 attention. Moreover, we do not believe an intent test should  
26 control the zoning classification of this land use.

1           Petitioner describes the use as "sporadic irrigation of  
2 crops." Parts of Order 85-468 echo this characterization (see  
3 finding of fact 10 and conclusion 8). Moreover, respondent  
4 Smith's brief insists "tax lot has never been used in  
5 slaughterhouse operations." Respondent Smith's brief at 2. If  
6 these are accurate characterizations of the use, the county's  
7 determination that it is nonconforming is erroneous. Spencer  
8 Creek Pollution Control Association v. Oregon Fertilizer  
9 Company, supra. However, other parts of the county's order  
10 describe the use of tax lot 1301 more generally as "the  
11 disposal of wastewater." That description may or may not  
12 justify classifying the use as nonconforming. As a result of  
13 this ambiguity, a remand is in order.

14           As previously noted, petitioner argues that even if the use  
15 of tax lot 1301 for wastewater disposal can be classified as  
16 nonconforming (i.e., not a farm use), the record does not  
17 support the county's determination that this use was lawfully  
18 in existence when the property was zoned. We must agree.

19           Neither respondent has directed us to evidence establishing  
20 that tax lot 1301 was actually used for wastewater disposal  
21 (the claimed nonconforming use) when zoning was applied to the  
22 property. One who claims a nonconforming use bears the burden  
23 of proving facts upon which the right to such a use is based.  
24 Webber v. Clackamas County, 42 Or App 151, 600 P2d 448 (1979);  
25 Lane County v. Bessett 46 Or App 319, 612 P2d 297 (1980). It  
26 is respondents' obligation, not this board's, to cite evidence

1 supporting the nonconforming use determination.<sup>2</sup>

2 The first assignment of error is sustained.<sup>3</sup>

3 SECOND ASSIGNMENT OF ERROR

4 ORS 215.130(7) provides:

5 "Any use described in subsection (5) of this section  
6 may not be resumed after a period of interruption or  
7 abandonment unless the resumed use conforms with the  
8 requirements of zoning ordinances or regulations  
9 applicable at the time of the proposed resumption."

10 The county has implemented this statute by adopting the  
11 following zoning provision:

12 "Any nonconforming use of land or use of a structure  
13 that is discontinued for a period exceeding 12 months  
14 shall, thereafter, only be used in ways that conform  
15 to the regulations of the applicable zoning district  
16 and other applicable ordinance provisions." Section  
17 30.315(1) Linn County Zoning Ordinance.

18 In this assignment of error, petitioner contends that, even  
19 if tax lot 1301 was used for wastewater disposal when the  
20 slaughterhouse became nonconforming, that component of the use  
21 was eliminated by discontinuance. In support of the claim,  
22 petitioner cites (1) the statement by a previous operator of  
23 the slaughterhouse that the lot was not used for wastewater  
24 disposal from December 1972 to February 1974 and (2)  
25 petitioner's testimony about use of the lot from the summer of  
26 1973 to the spring of 1975.

27 Petitioner raised the discontinuance issue during the  
28 county's hearings. In response, the governing body concluded:

29 "8. The county finds the appellant's argument that  
30 the use of tax lot 1301 for wastewater disposal

1 had been abandoned is not supported by the  
2 evidence. The fact that a use is occasional or  
3 intermittent does not mean that the use is  
4 abandoned. The board concludes that the weight  
5 of the evidence is that the irrigation practices  
6 involving tax lot 1301 were not abandoned. The  
7 persuasive evidence includes the constant  
8 operation of the slaughterhouse with no other  
9 means of disposal of slaughterhouse wastes and  
10 the testimony of a neighboring property owner.  
11 Contrary allegations by the appellant are  
12 discounted because of the appellant's relatively  
13 short residence (since 1973) in the area during  
14 the alleged period of abandonment, the low  
15 probability that the appellant was alertly  
16 watching for wastewater disposal before the  
17 present controversy arose, and the potential bias  
18 of the appellant due to a current lawsuit between  
19 the appellant and the applicant over the use of  
20 an access road. Therefore, the board concludes  
21 that the appellant's testimony does not  
22 substantiate abandonment of the nonconforming  
23 wastewater irrigation system." Record at 9  
24 (emphasis added).

13 The emphasized portion of the county's conclusion does not  
14 take into account Section 30.315(1) of the zoning ordinance.  
15 As noted, that provision extinguishes the nonconforming status  
16 of a land use if it is discontinued for more than a 12-month  
17 period. Thus, as we read the county's ordinance, if the  
18 disposal of wastewater onto tax lot 1301 was a nonconforming  
19 use, but that use was discontinued for more than 12 months  
20 after it became nonconforming, the land could then:

21  
22 "only be used in ways that conform to the regulations  
23 of the applicable zoning district and other applicable  
24 ordinance provisions." Section 30.315(1) Linn County  
25 Zoning Ordinances.

26  
27 Petitioner directs our attention to evidence indicating  
28 that the limitation of Section 30.315(1) applies to the use of

1 tax lot 1301. The county's order suggests that some of the  
2 evidence relied on by petitioner is not credible. However, the  
3 order is silent concerning other evidence on which petitioner  
4 relies. That evidence is the following statement by James W.  
5 Hickey, a previous owner of Santiam Meat Packers:

6  
7 "During the period that Ralph Moore operated this  
8 business as my tenant, from December, 1972 to February  
9 1974, the wastewater was disposed of through the  
10 drainfield as represented by the attached blueprint of  
11 Santiam Meat Packers dated March 28, 1974. The  
wastewater was never pumped or irrigated onto tax lot  
1301 (the adjoining 13.6 acres) which was never  
considered a part of Santiam Meat Packers." Record at  
206-207.

12 The failure of the county to address this evidence in order  
13 85-468, combined with the failure of either respondent to  
14 direct our attention to evidence contradicting the evidence of  
15 discontinuance, requires that we uphold this challenge.

16 The second assignment of error is sustained. We must  
17 reverse the county's determination that the use of tax lot 1301  
18 for wastewater disposal is a nonconforming use.

19 THIRD ASSIGNMENT OF ERROR

20 ORS 215.130(5), and a parallel county ordinance, grant  
21 lawful nonconforming uses the right to continue. As the  
22 Supreme Court noted in Polk County v. Martin, 292 Or 69, 76 636  
23 P2d 952 (1981), lawful use on the date of the imposition of  
24 zoning controls is essential to the claim of statutory  
25 protection. In this assignment of error, petitioner contends  
26 that the use of tax lot 1100 as a slaughterhouse was unlawful

1 when the county zoned it in November, 1971. The argument is  
2 that the practice of discharging wastewater onto tax lot 1301  
3 required approval of state sanitary authorities and that no  
4 such approval had been granted. Accordingly, petitioner urges  
5 us to hold that the county erred in characterizing the  
6 slaughterhouse as a lawful nonconforming use.

7 As a threshold matter, we note that this claim is  
8 predicated on a finding in the county's order which we have  
9 already concluded lacks evidentiary support in the record, i.e.,  
10 the finding that the slaughterhouse actually discharged  
11 wastewater onto tax lot 1301 when zoning was applied to the  
12 property. See first assignment of error, supra. Assuming for  
13 the sake of argument that our conclusion on that point is  
14 incorrect, we sustain petitioner's evidentiary challenge to the  
15 finding that Santiam Meat Packers was a lawful use when zoning  
16 was applied to the property.

17 The county's determination rests on the following points:  
18 (1) that state sanitary authorities approved the disposal  
19 system in 1969 and 1983 and (2) during the county's hearings,  
20 no evidence was submitted showing that state authorities  
21 considered the system unlawful. Record at 8. However, neither  
22 point is adequate to meet petitioner's evidentiary challenge.

23 As noted, Santiam Meat Packers became a nonconforming use  
24 in 1971, two years after the agency approval relied on by the  
25 county was issued. Petitioner alleges that the discharge of  
26 wastewater from the plant onto tax lot 1301 commenced after

1 1969 and that this practice never received the necessary state  
2 approval. We have already observed that the record does not  
3 disclose when this use of tax lot 1301 commenced. As a  
4 consequence, we cannot interpret the 1969 approval as proof  
5 that the disposal system was lawful when the facility became  
6 nonconforming.

7 The county's remaining arguments why the use must be  
8 considered lawful are not persuasive. The 1983 letter from DEQ  
9 is silent on the lawfulness of the wastewater disposal system  
10 employed when the property was first zoned in 1971. Finally,  
11 the county cannot shift the burden to opponents of this  
12 decision on the lawfulness question.

13 The third assignment of error is sustained.<sup>4</sup>

14 FOURTH ASSIGNMENT OF ERROR

15 Petitioner next directs our attention to the improvements  
16 authorized by order 85-468 (addition of a disemboweling room  
17 and a freezer enclosure). As noted, these alterations had  
18 already been made when the county's order was entered.<sup>5</sup> In  
19 this assignment of error, petitioner argues that the  
20 construction of these improvements without the required permits  
21 made the slaughterhouse unlawful and therefore extinguished its  
22 protection as a nonconforming use. The petition states:

23 "The applicant has been in noncompliance with the law  
24 since 1976, a period exceeding 12 months. This  
25 noncompliance has affected the legal status as a  
26 nonconforming use. Therefore, this operation cannot  
be considered a 'nonconforming use' but an unlawful  
use." Petition at 30.

1 We reject this argument. ORS 215.130(5) and the county  
2 zoning ordinance authorize the continuation of nonconforming  
3 uses. If additions or changes to such uses are made without  
4 the necessary approvals, those additions or changes may be  
5 unlawful and subject to abatement. However, the underlying use  
6 may nonetheless continue as a nonconforming use. Polk County  
7 v. Martin, supra.

8 FIFTH ASSIGNMENT OF ERROR

9 ORS 215.130(5) requires governmental approval of any  
10 alteration of a nonconforming use "when necessary to comply  
11 with any lawful requirement for alteration in the use." The  
12 county ordinance implements this provision by requiring a  
13 finding that:

14 "(1) The requested alteration or expansion is the  
15 minimum necessary to comply with the legal  
16 requirements as verified by the agency requiring the  
17 request." Section 30.360(1) Linn County Zoning  
18 Ordinance.

19 In this assignment of error, petitioner maintains that the  
20 county erred in approving the contemplated upgrading of the  
21 wastewater disposal system and the 1976 addition of the  
22 disemboweling room under this section. We agree.

23 The county's order concedes that Smith's application  
24 presented no concrete proposal for upgrading the wastewater  
25 disposal system to meet DEQ requirements. Indeed, the order  
26 indicates that the nature of those requirements has yet to be  
determined. We fail to see how an unformulated proposal to

1 alter a nonconforming use so as to comply with as yet  
2 unspecified state agency requirements can be deemed to be "the  
3 minimum necessary to comply with the legal requirements as  
4 verified by the agency requiring the request." Yet this is  
5 what the county's order concludes.<sup>6</sup> Under Section 30.360(1),  
6 the county must have state agency verification before approving  
7 an alteration in the wastewater disposal system.

8 Correspondingly, we uphold petitioner's challenge under  
9 Section 30.360(1) in connection with approval of the  
10 disemboweling room. On this issue, the county's order states:

11 "The county concludes that the 1976 addition to the  
12 slaughterhouse complied with 1976 county zoning  
13 provisions. Section 24.020(1) of the 1972 zoning  
14 ordinance provided for additions required by law. The  
15 county finds convincing evidence in the 1979  
16 Smith-Hickey transcript showing that the gutting room  
17 addition was required by federal inspectors. No  
18 explicit evidence showing a requirement from an agency  
19 was necessary, and no planning review responsibility  
20 existed. Inclusion of the gutting room addition in  
21 NC-3-84/85 is a remedial action to allow for building  
22 permits and inspections for construction allowed by  
23 zoning provisions effective at the time; no agency  
24 statement need be submitted at this time.

25 "Alternatively, the gutting room addition replaced a  
26 free-standing gutting room, the alteration did not  
alter the use of the parcel as a slaughterhouse, since  
a gutting room existed on the parcel at the time  
Santiam Meat Packers became nonconforming. The  
alterations did not make the use unlawful, since no  
new use was added." Record at 9.

As noted, the ordinance plainly authorizes approval only  
where the alteration is the minimum necessary to comply with  
legal requirements as verified by governmental authorities. We  
have been cited to no verification that the disemboweling room

1 was required by governmental authorities.<sup>7</sup>

2 Based on the foregoing, we sustain this assignment of error.

3 SIXTH ASSIGNMENT OF ERROR

4 Section 30.360(2) of the Linn County Zoning Ordinance  
5 provides that an alteration of a nonconforming use that is  
6 necessary to comply with legal requirements must "...be  
7 accomplished in a manner resulting in a site more closely  
8 conforming to the property development standards required for  
9 such a use." In connection with certifying the nonconforming  
10 status of the plant's wastewater disposal system, the county  
11 concluded:

12 "14. Proper treatment and disposal of wastewater  
13 constitutes a property development standard  
14 required of a slaughterhouse. Compliance with  
15 ODEQ's requirements will result in a site more  
16 closely conforming to the development standards  
17 required of such a use...." Record at 10.

18 Petitioner contends the finding does not demonstrate  
19 compliance with Section 30.360(2). The argument is that until  
20 the applicant submits a concrete proposal to alter the plant's  
21 wastewater disposal system, the county is not in a position to  
22 apply the zoning standard. We agree. The county may not  
23 delegate its zoning authority<sup>8</sup> over alterations of this  
24 nonconforming use to other agencies of government. When (and  
25 if) DEQ requires alteration of the wastewater disposal system,  
26 the county will be in a position to apply Section 30.360 and  
other relevant provisions of the zoning ordinance.

The Sixth assignment of error is sustained.

1 SEVENTH ASSIGNMENT OF ERROR

2 In this assignment of error, petitioner maintains that  
3 numerous findings of fact made by the county are unsupported by  
4 substantial evidence in the record. See ORS 197.835(8).  
5 However, many of the challenged findings do not appear to be  
6 relevant to any criteria the county was required to apply.  
7 Petitioner does not explain why the absence of evidentiary  
8 support for these findings warrants remand or reversal of the  
9 county's decision. Accordingly, we proceed no further as to  
10 these findings.<sup>9</sup> Bonner v. City of Portland, 11 Or LUBA 40  
11 (1984).

12 The evidentiary challenge focuses attention on a number of  
13 other findings which, either singly or in combination,  
14 constitute the legal foundation for the county's decision.<sup>10</sup>  
15 For the most part, these findings purport to describe the  
16 nature, history, and scope of the nonconforming  
17 slaughterhouse. Respondents have failed to answer the  
18 substantial evidence challenge. Under these circumstances, we  
19 uphold the challenge. We will not examine an extensive record  
20 for evidentiary support of a locality's findings.

21 The seventh assignment of error is sustained.

22 EIGHTH ASSIGNMENT OF ERROR

23 Petitioner assigns error to numerous procedures leading up  
24 to the final decision by the county. The alleged errors are  
25 said to warrant remand or reversal under ORS 197.835(8). The  
26 statute authorizes relief where the local government "failed to

1 follow the procedures applicable to the matter before it in a  
2 manner that prejudiced the substantial rights of the  
3 petitioner. ORS 197.835(8)(a)(B).

4 We reject this assignment of error. The alleged procedural  
5 errors are listed in a footnote to this opinion.<sup>11</sup> In some  
6 cases we conclude that the procedures have not been  
7 demonstrated to be unlawful. In others, we conclude the  
8 alleged errors have not been shown to be prejudicial to  
9 petitioner's substantial rights.

10 The county's decision that tax lot 1301 is a nonconforming  
11 use is reversed. The decision is remanded as to all other  
12 issues decided in petitioner's favor.

FOOTNOTES

1  
2  
3 1  
4 Zoning was first applied to the property in 1971. It is  
5 now zoned Agribusiness (AB). This designation allows a  
6 slaughterhouse as a conditional use.

7 2  
8 The petition directs us to evidence that tax lot 1301 was  
9 irrigated by wastewater from the slaughterhouse between 1956  
10 and 1969, but this evidence does not establish the scope of the  
11 use in 1971, when it became nonconforming.

12 3  
13 Petitioner also contends in the first assignment of error  
14 that the sporadic nature of the use of tax lot 1301 for  
15 wastewater disposal prevents the county from identifying that  
16 use as nonconforming. Petitioner is incorrect. Polk County v.  
17 Martin 292 Or 69, 76, 636 P2d 952 (1981).

18 4  
19 If the matter is again taken up by the county, the  
20 following inquiries should be made: As of the date the use  
21 became nonconforming (a) what were the methods of wastewater  
22 disposal used by the facility, and (b) were those methods  
23 approved as required by the applicable law.

24 5  
25 The disemboweling room was installed in 1976. The freezer  
26 was enclosed in 1981.

27 6  
28 We are aware that the order forbids construction of any  
29 structures associated with the slaughterhouse on tax lot 1301.  
30 We do not view this limitation as sufficient under Section  
31 30.360(1).

32 7  
33 The county's order refers vaguely to the "1979 Smith-Hickey  
34 transcript," showing that the addition was required by federal  
35 inspectors. However, neither respondent directs our attention  
36 to portions of that transcript demonstrating that Section  
30.380(1) of the ordinance is satisfied. By contrast,  
petitioner directs our attention to evidence in the record

1 which at least suggests that federal authorities have not  
2 required construction of the disemboweling room. The evidence  
3 consists of correspondence between petitioner and federal  
4 officials at the Department of Agriculture and indicates that  
5 the agency field inspection office has no record of requiring  
6 Santiam Meat Packers to construct a gut room or any other  
7 improvement to the facility. See Record at 16, 18.

8

9 We assume here that Section 30.360(2) is a lawful  
10 limitation on the rights bestowed by ORS 215.130(5) (alteration  
11 of nonconforming use "shall be permitted when necessary to  
12 comply with any lawful requirement for alteration in the  
13 use"). Whether the county can review governmentally required  
14 alterations of a nonconforming use for compliance with county  
15 zoning standards is not before us for adjudication.

16

17 The findings falling into this category are listed in the  
18 petition as 1, 3, 4, 5, 6, 18, 23, 24 and 25.

19 Other findings identified in this assignment of error are  
20 not actually challenged by petitioner, but instead are argued  
21 to support his version of the nature and scope of the  
22 nonconforming use. The findings in this category are listed in  
23 the petition as numbers 7, 15, and 22. We do not consider the  
24 evidentiary challenge to address these findings..

25

26 These findings are listed in the petition as 2, 8-17,  
19-21, 26.

27

28 The alleged procedural irregularities are listed below.  
29 Our response follows each allegation.

30 1. The application for nonconforming use certification was  
31 incomplete.

32 We have already held that the county could not approve an  
33 upgrading of the plant's wastewater disposal system without  
34 (1) a concrete proposal and (2) DEQ verification pursuant  
35 to Section 30.360 of the ordinance. However, to the extent  
36 the applicant was requesting certification that the present  
use of the property is a nonconforming use, such detail was  
not necessary.

1 2. Planning staff did not allow petitioner to comment on  
2 certain information provided by the applicant.

3 The record discloses that petitioner was given ample  
4 opportunity to introduce evidence during the county's  
5 hearing. We find no prejudice in this instance.

6 3. Planning staff presented a biased case to the planning  
7 commission.

8 Petitioner cites no authority for the proposition that  
9 planning staff may not express its views during the  
10 hearings process. Nor does petitioner demonstrate that he  
11 was prevented from introducing evidence during the hearing.

12 4. The planning commission postponed a hearing on the matter  
13 due to insufficient public notice, but heard other matters  
14 for which public notice was also insufficient.

15 Petitioner does not explain why it was unlawful for the  
16 commission to reschedule a hearing for which public notice  
17 was insufficient. The hearing of other matters has no  
18 bearing on the lawfulness of the procedure followed in this  
19 case.

20 5. Ex parte contact between a planning commissioner and the  
21 applicant.

22 Petitioner does not explain the nature of the ex parte  
23 contact. Further, there is no showing of bias as a result  
24 of the contact. No relief is warranted.

25 6. Allowance of only 15 minutes for petitioner's case at  
26 planning commission hearing.

No explanation of how the alleged limitations prejudiced  
petitioner has been presented.

7. Failure of county commissioner to disclose ex parte contact  
with applicant's witnesses.

Petitioner does not explain the nature of the alleged  
contact or why it should result in remand or reversal of  
the decision.

8. Order 85-468 does not accurately reflect the motion  
approved by the governing body.

The county's written order constitutes the final decision  
reviewable by LUBA. We will not look behind the order for  
proof of the challenged decision.