BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CITY OF CORVALLIS, an Oregon municipal corporation, Petitioner, vs. BENTON COUNTY, Respondent.	LUBA No. 87-115 FINAL OPINION AND ORDER

Appeal from Benton County.

Michael Newman, Corvallis, filed the petition for review and argued on behalf of petitioner.

Jeffrey G. Condit, Corvallis, filed a response brief and argued on behalf of Respondent County.

SHERTON, Referee; BAGG, Chief Referee; HOLSTUN, Referee; participated in the decision.

REVERSED 03/21/88

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioner City of Corvallis appeals a November 24, 1987 order of the Benton County Board of Commissioners. The decision affirms the Benton County Planning Commission's approval of a conditional use permit to alter a nonconforming use from a restaurant and tavern to a hardware and appliance store with a lunch counter.

FACTS

The subject property is located within the Corvallis Urban Growth Boundary (UGB) but outside Corvallis city limits. It is designated Low Density Residential in the Corvallis Comprehensive Plan (plan), which Benton County (county) has adopted as the comprehensive plan for the area outside Corvallis city limits but within the UGB (the urban fringe). The property is zoned Urban Residential, five-acre minimum lot size (UR-5) by the Benton County Zoning Ordinance (BCZO). The property was first zoned in 1968. Except for 1974-1979, when the property was zoned for commercial use, it has been zoned for residential use.

The property contains a building constructed in 1949. The property and building were used for a restaurant/bar from 1951 to 1967, a tavern from 1972 to 1985 and a club for teenagers in 1985. The property has been vacant and unused since September 12, 1985. The property is adjoined to the north and east by other nonconforming commercial uses inside the UGB, and to the

west and south by farmland outside the UGB.

After a sanitary survey conducted in 1986-1987, the subject property and adjacent area were declared a health hazard area by the County Board of Health and State Health Division. The State Health Division is expected to order annexation of the area to the City of Corvallis in early 1988.

On July 30, 1987, the applicant below entered into an agreement to purchase the property contingent upon obtaining a conditional use permit. On August 7, 1987, the applicant applied to Benton County for a conditional use permit to use the property for retail sales of hardware and appliances, and for a lunch counter "when septic system problems are resolved." Record 87. The planning commission approved the permit and the city appealed to the board of commissioners. On November 24, 1987, the board of commissioners issued its order affirming the planning commission decision.

FIRST ASSIGNMENT OF ERROR

> "The County's ordinance concerning alteration of nonconforming uses exceeds the authority granted by state law."

Petitioner argues that BCZO Article XIX (Nonconforming Use) fails to meet the requirements of ORS 215.130 and exceeds the authority granted to the county by that statute. Petitioner argues that the ordinance does not provide for review of a proposed alteration of a nonconforming use to ensure that it is necessary "to reasonably continue the use," as required by ORS 215.130(5). Petitioner also argues that the ordinance does

not comply with ORS 215.130 because it does not specify that incompatibility or adverse effects are to be measured against the use as it existed at the time it became nonconforming.

First, the county argues that ORS 197.762[1] precludes petitioner from appealing to us based on the issue raised in this assignment of error. The county claims that petitioner did not raise the issue of compliance of the BCZO with ORS 215.130 before either the planning commission or board of commissioners. The county concedes that it has not yet adopted appeal procedures to implement the provisions of ORS 197.762, and did not give petitioner the specific notices required by ORS 197.762(1)(b) and (2). However, the county argues that petitioner in fact had at least the information required by ORS 197.762(1)(c)(A, B, C and E) and (2)(a and b) well in advance of the board of commissioners' hearing on petitioner's appeal below.

Petitioner concedes that it did not specifically raise the issue of compliance with ORS 215.130 in the proceedings before the county. Petitioner argues, however, that in this case the county should not be allowed to rely on ORS 197.762 because it did not adopt or follow the appeal procedures required by that statute. Petitioner also points out that neither ORS 197.762 nor the law enacting it amended the statutory provisions setting out LUBA's scope of review.

ORS 197.762 was enacted by Oregon Laws 1987, chapter 729, section 15 and went into effect on September 27, 1987, prior to

the board of commissioner's November 4, 1987 hearing on petitioner's appeal below. ORS 197.762 requires, with regard to proposed developments entirely within UGBs, that applicants and appellants raise issues of compliance with relevant criteria before the local governing body. The purpose of this requirement is to insure that the governing body will have the opportunity to respond to and resolve such issues.

ORS 197.762 accomplishes this by directing local governing bodies to (1) adopt a requirement that such issues be raised in their local appeal procedures; (2) give written notice of this requirement and of the applicable criteria to applicants, appellants and others as required by law; and (3) make a statement explaining this requirement to raise issues and describing the applicable criteria at the commencement of hearings on proposed developments within UGBs. The written and oral notices are required to include statements that failure to raise an issue or address a criterion precludes appeal based on that issue or criterion. ORS 197.762(1)(c)(D) and (2)(c). Oregon Laws 1987, chapter 729 did not, however, amend the statutory provisions governing LUBA's jurisdiction and scope of review, except to provide that failure of a local governing body to describe an applicable criterion as required by ORS 197.762(2)(a) is not a basis for reversal of the governing body's decision by LUBA. ORS 197.830(11)(b).

In this case, we need not determine the effect of ORS 197.762 on our jurisdiction or scope of review. Petitioner

did not fail to raise an issue in a local governing body proceeding which complied with that statute's procedural requirements. We agree with petitioner that ORS 197.762 does not apply where the local governing body did not give petitioner the notice required by ORS 197.762(1)(c)(D) and (2)(c) that failure to raise an issue or address a criterion precludes appeal on that issue or criterion. See Cusma v. City of Oregon City, ___ Or LUBA ___ (LUBA No. 87-093; March 16, 1988, p. 19). Therefore, petitioner is not precluded by ORS 197.762 from raising in this appeal the issue of compliance of the BCZO with ORS 215.130.[2]

The county's alternative response to this assignment of error is that BCZO Article XIX, while having language slightly different from that of the statute, does not conflict with ORS 215.130.

We need not consider further the county's arguments regarding compliance of BCZO Article XIX with ORS 215.130, because we conclude that petitioner may not challenge the BCZO in this appeal.[3] The subject of this appeal is the county's November 24, 1987 decision applying BCZO Article XIX, not the BCZO itself. The notice of intent to appeal in this case did not identify the BCZO as the subject of the appeal and was not filed within 21 days of the adoption of the BCZO. See Owens v. City of Dundee, ___ Or LUBA ___ (LUBA No. 87-036; August 26, 1987).

The first assignment of error is denied.

SECOND THROUGH FOURTH ASSIGNMENTS OF ERROR

"The County failed to make findings of fact concerning whether the alteration is necessary to reasonably continue the nonconforming use."

"The County failed to make findings of fact concerning the intensity of the restaurant or tavern use existing at the time the use became nonconforming."

"The County's decision was based upon proceedings which failed to satisfy the requirements of state law."

A. Authority to Approve Alterations of Nonconforming Uses

Under its fourth assignment of error, petitioner claims the county's decision was based upon a proceeding which did not satisfy the requirements of ORS 215.130.[4] Petitioner argues the decision exceeds the authority granted to the county by that statute and is not based on the factual determinations required by that statute. According to petitioner, this error requires that the county's decision be reversed under OAR 661-10-070(1)(b)(A)(iii).[5]

The county replies that the provisions of ORS 215.130 concerning alteration of nonconforming uses are not state mandated criteria which the county must apply on a case-by-case basis. The county argues that the criteria applicable to its decision to approve the alteration of a nonconforming use are found in BCZO Article XIX and XX. According to the county, the criteria in the BCZO implement, and do not conflict with, the state statute.

We cannot agree with the county's argument. There are numerous provisions in the statutes which require counties to

make land use decisions in compliance with their comprehensive plans and land use regulations. See, e.g., ORS 197.175(2)(d), 197.835(3) and 215.416(4) and (8). The provisions of ORS 215.130 which authorize county approval of alterations to nonconforming uses represent a very limited grant of authority to counties to approve uses which, by definition, are not consistent with their adopted comprehensive plans or land use regulations.[6]

County approval of an alteration of a nonconforming use which does not comply with the relevant provisions of ORS 215.130 exceeds the authority granted to the county by the statute, and is subject to reversal or remand under ORS 197.835(8)(a)(A) or (D). Thus, we must uphold this assignment of error if we conclude that the county's decision in this case did not comply with ORS 215.130. Petitioner's specific allegations regarding lack of compliance with ORS 215.130 are found in its second and third assignments of error, which are discussed below.[7]

B. Reasonable Continuation of the Use

Under its second assignment of error, petitioner argues that the county's decision violates ORS 215.130(5) because the county did not find that the proposed alteration is necessary "to reasonably continue the use." Petitioner asserts that this case is indistinguishable from Jessel v. Lincoln County, 14 Or LUBA 376, 379 (1986), in which we stated that under both the county ordinance and ORS 215.130(5), only alterations

"reasonably necessary to continue the nonconforming use" may be approved by local governments.

The county makes three alternative arguments in response. First, the county argues that the provision of ORS 215.130(5) that alteration of a nonconforming use "may be permitted to reasonably continue the use" expresses a state policy that a local government must prevent unreasonable expansion of a nonconforming use, through compliance with the "no greater adverse impact" criterion of ORS 215.130(9). The county concedes that BCZO Article XIX does not specifically require that an alteration to a nonconforming use "reasonably continue the use," but contends that application of the "no greater adverse impact" test, incorporated into BCZO XIX.04, and of the conditional use criteria of BCZO Article XX, ensure that only alterations which "reasonably continue" a nonconforming use will be allowed.

The county's second response is that the "to reasonably continue the use" provision of ORS 215.130(5) imposes no "need" or "necessity" test for approval of an alteration of a nonconforming use. It simply requires that such an alteration be reasonable, and the county believes its decision meets that standard. The county distinguishes this case from Jessel v. Lincoln County, supra, in that the Lincoln County ordinance provisions governing alteration of nonconforming uses specifically limited alteration of nonconforming uses "to the extent necessary in order to continue the use" (emphasis

added). Id. at 379.

The county's third response is that even under petitioner's interpretation of ORS 215.130(5), there is evidence in the record which clearly supports the county's decision. The county concedes that it did not adopt findings addressing this criterion, but contends that under ORS 197.835(10)(b) we must affirm the county's decision if the county identifies evidence in the record which clearly supports its decision.[8]

The county contends that evidence in the record clearly demonstrates that alteration of the nonconforming use is "'necessary to continue' the nonconforming commercial use of the property." Respondent's Brief at 11. According to the county, the record shows that on-site sewage treatment problems (failure of the existing sand filter septic system), which cannot be remedied without prohibitive expense, "effectively prevent the continuation of a restaurant-type commercial use on the site, rendering alteration of the use to a hardware store/lunch counter 'necessary to continue' the nonconforming commercial use of the site." Id. at 12. The county's argument assumes that the "to reasonably continue the use" requirement of ORS 215.130(5) can be interpreted as to reasonably continue the nonconforming commercial use of the property in general, not the specific commercial use of the property which existed in 1979 and became nonconforming when restrictive zoning was applied.

It is apparent from a comparison of paragraphs (a) and (b)

of ORS 215.130(9) (see footnote 4) that the "alteration" of a nonconforming use allowed under the statute includes changes in the nature of the use as well as changes in structures and improvements. An alteration of a nonconforming use which is a change in the nature of the use is limited by two requirements. It must have "no greater adverse impact to the neighborhood" (ORS 215.130(9)(a) - see section C. below) and it must "reasonably continue the use" (ORS 215.130(5)). The requirement that an alteration "reasonably continue the [nonconforming] use" is not found in the applicable provisions of the BCZO.

We need not decide in this case whether the statutory requirement that a change in the nonconforming use "reasonably continue the use" requires that any necessity for the change in order to continue the use be shown. We conclude that the change in use approved by the county in this case does not continue the nonconforming use of the property.

The subject property and building were being used as a tavern when restrictive zoning was applied in 1979. Record 6. It is the nature and extent of this prior lawful use which determines the boundaries of permissible continued nonconforming use after the application of the restrictive zoning ordinance. Polk County v. Martin, 292 Or 69, 76, 636 P2d 952 (1981). Replacing tavern use with a hardware/appliance store and lunch counter is not, as a matter of law, a continuation of the nonconforming tavern use.[9]

Thus, replacement of a nonconforming tavern by a hardware/appliance store and lunch counter is not allowed under ORS 215.130(5). No purpose would be served by reviewing the evidence cited by the county to determine whether the record clearly supports a decision that conversion to a hardware/appliance store and lunch counter is reasonably necessary to continue some form of commercial use of the property.

The second assignment of error is upheld. Because the alteration of the nonconforming tavern use to hardware/appliance store and lunch counter use is prohibited as a matter of law, the county's decision must be reversed. OAR 661-10-070(1)(b)(A)(iii).

C. Change in the Use of No Greater Adverse Impact

Under the third assignment of error, petitioner argues that the county's finding that the proposed use would have less impact on the neighborhood than the "preexisting restaurant and bar" (Record 14) does not satisfy ORS 215.130(9)(a) because the statute requires the county to compare the impacts of the proposed use to those of the tavern use existing in 1979 when the use became nonconforming. According to petitioner, the county's findings are deficient because they do not establish the level of use which existed on the site at that time.

The county argues in the alternative (1) its findings do demonstrate compliance with ORS 215.130(9)(a); and (2) under ORS 197.835(10)(b), even if the findings do not satisfy ORS

215.130(9)(a), we should affirm the decision because there is evidence in the record which clearly supports it.

We agree with petitioner that ORS 215.130(9)(a) requires a county decision approving a change in a nonconforming use to be based on findings comparing the impacts of the altered use with the impacts of the use which existed on the site when restrictive zoning was applied. As we previously stated, it is the nature and extent of the lawful use which existed when the use became nonconforming which is the reference point for determining the boundaries of permissible continued use. Polk County v. Martin, supra.

In this case, the statute requires a comparison of the impacts of the proposed hardware/appliance store and lunch counter (assuming such a change in use were permissible) with the impacts of the tavern existing on the site in 1979. The county's findings are deficient because they compare the impacts of the proposed use to those of the "preexisting restaurant and bar."[10] Record 14. Elsewhere the findings state that the property was used as a "restaurant and bar" from 1951 to 1967 and a "tavern" from 1972 to 1985. Record 6. We can only conclude that the county's findings refer to the original use of the property as a restaurant and bar rather than the 1979 use of the property as a tavern.

Furthermore, the evidence in the record to which we are directed by the county does not clearly support a decision that the proposed use will have "no greater adverse impact on the

neighborhood" than the tavern existing in 1979. The only evidence cited by the county is the county Development Department staff report at Record 44-52. The report states the proposed change of use "will have limited impacts upon abutting properties." Record 47. The report also states "the general vicinity may be somewhat adversely affected by the proposal in relation to the imminent annexation by the City of Corvallis." Id. The report states that a trip generation study estimates that the traffic generated by the proposed use will be 48% less than that generated by a typical tavern/restaurant. Record 48. The study did not compare traffic generated by the proposed use to that generated by the tavern which existed on the property in 1979. This evidence does not clearly support a decision that the proposed change in use will have no greater adverse impact on the neighborhood.

The third assignment of error is sustained.

Because we sustain the second and third assignments of error, the fourth assignment is sustained as well (see section A. above).

FIFTH ASSIGNMENT OF ERROR

> "The County's decision permits commercial use in an area not designated for commercial use in either the Comprehensive Plan or the applicable zoning district."

Petitioner argues that the county's decision is inconsistent with plan policies and BCZO UR-5 zoning provisions which do not permit commercial uses on the subject property.

The county concedes that the plan and UR-5 provisions do

not allow commercial use of the site. However, the county points out that a nonconforming use is by definition contrary to applicable plan and zoning designations, and contends that the statutory authorization for local government approval of alterations to nonconforming uses provides a limited exception to the requirement that uses must comply with the plan and BCZO.

We agree with the county that a nonconforming use is by definition contrary to provisions of the applicable plan and land use regulations. We also agree that ORS 215.130 provides a limited authorization for counties to approve alterations to nonconforming uses which are contrary to provisions of the plan and land use regulations. Had the county validly approved an alteration to a nonconforming use, in compliance with ORS 215.130 and its own ordinance, we would deny this assignment of error. However, since the county erred in approving the proposed hardware/appliance store and lunch counter as an alteration of a nonconforming use, the net effect of its decision is to approve a conditional use permit for a commercial use which is prohibited by the plan and UR-5 zone.

The fifth assignment of error is sustained.

SIXTH ASSIGNMENT OF ERROR

> "The County's interpretation of the Corvallis Urban Fringe Management Agreement fails to recognize the City's legitimate planning interests in the subject parcel."

Petitioner argues its "legitimate planning interests" in the subject property are recognized by the Corvallis Urban

Fringe Management Agreement (CUFMA). According to petitioner, the CUFMA process for review and action on conditional use permits requires that the city's recommendations be given "great weight," which the county failed to do.

The county agrees that it should give weight to the city's recommendations concerning land use actions in the urban fringe. It contends that it did so, but argues that CUFMA does not obligate it to follow the city's recommendations or to interpret provisions of the BCZO to be identical to substantially different provisions in the city's code.

The CUFMA sets out a process for review and action on development proposals in the urban fringe. It provides that the city shall make recommendations on development proposals in the urban fringe for which the county has approval authority, including conditional use permits. CUFMA 6(a)(3). It provides that the county shall request the city to review such development proposals and recommend action. CUFMA 6(c). However, it also states that these provisions are not intended to "alter the legal decision-making authority of either the City or the County." CUFMA 6(d).

All that CUFMA required in this instance is that the county offer the city the opportunity to review and make recommendations on the application for a conditional use permit and that the county consider the city's recommendations. The city participated fully in the county's decisionmaking process, to the extent of appealing the planning commission approval to

the board of commissioners. The county's findings show that the county considered and responded to the issues raised by the city. Record 9-16. Nothing more was required by the CUFMA.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

> "The County's decision violates the Statewide Planning Goal 2 requirement of consistency between City and County comprehensive plan implementation measures."

Petitioner argues that a Statewide Planning Goal 2 (Land Use Planning) requirement for consistency between city and county plan implementation measures gives a city a veto power over county actions in the city's urban fringe, citing DLCD v. Clatsop County, 14 Or LUBA 358, 361 (1986). Petitioner also argues that this Goal 2 consistency requirement requires the county to interpret the term "discontinued" in its ordinance provisions relating to termination of nonconforming uses consistently with the way this term is used in the parallel provision of the city's code, when the county applies its ordinance provision to property in the city's urban fringe.[11]

The county argues that the Goals do not apply to this decision because both city and county plans and land use regulations have been acknowledged by LCDC. The county points out that DLCD v. Clatsop County is distinguishable because it concerned a plan amendment. Furthermore, the county argues that Goal 2 does not impose any requirement of consistency between the city and county codes.

After acknowledgment by LCDC, the criteria applicable to a

land use decision, other than an amendment to the acknowledged plan or regulations, are found in the acknowledged plan and regulations themselves, not in the Goals. ORS 197.175(2)(c) and (d). Byrd v. Stringer, 295 Or 311, 313, 666 P2d 1332 (1983); Todd v. Jackson County, 14 Or LUBA 233, 237 (1986). After acknowledgment, we are not authorized to reverse or remand land use decisions, other than amendments to acknowledged plans or land use regulations, for failure to comply with the Goals. ORS 197.835(2)-(6). cf. Fujimoto v. LUBA, 52 Or App 875, 878, 630 P2d 364 (1981).

The county plan and land use regulations for the subject property have been acknowledged by LCDC as being in compliance with the Statewide Planning Goals. The appealed decision approves a conditional use permit for alteration of a nonconforming use. The Goals are not applicable to such a decision and, therefore, this assignment of error does not assert a basis upon which we can grant relief.

The seventh assignment of error is denied.

EIGHTH ASSIGNMENT OF ERROR

> "The County erred in approving a commercial use in violation of City standards where the property is subject to an imminent health hazard annexation to the City."

Petitioner asserts that health hazard annexation of the subject property to the city is imminent. Petitioner argues that the applicant below was seeking county approval before the city assumes jurisdiction because he knew he would be denied

approval under the city's code. Petitioner states that the county's approval is "flatly contrary to Oregon land use policy," and because of the imminent annexation the county's decision should be based on city, not county, standards.

The county replies that it has no authority to apply city code standards to the subject property prior to annexation.

It is petitioner's responsibility to identify a basis upon which we might grant relief. Deschutes Development v. Deschutes County, 5 Or LUBA 218, 220 (1982). Under this assignment of error, petitioner has not identified any applicable provision of a constitution, statute, plan, ordinance or regulation allegedly violated by the challenged decision.

The eighth assignment of error is denied.

The county's decision is reversed.

FOOTNOTES

[1] ORS 197.762 provides as follows:

"The following shall apply to land use hearings on applications for development of property entirely within an urban growth boundary to be conducted by a local governing body:

"(1) An appeal procedure shall:

"(a) Require an applicant or appellant to raise any issue before the local governing body with sufficient specificity so as to have afforded the governing body, and applicant, if appropriate, an adequate opportunity to respond to and resolve each issue.

"(b) Provide notice of the provisions of this section to:

"(A) The applicant; and

"(B) Other persons as otherwise provided by law.

"(c) The notice shall:

"(A) Describe in general terms the applicable criteria from the ordinance and the plan known to apply to the application at issue;

"(B) Set forth the street address or other easily understood geographical reference to the subject property;

"(C) State the date, time and location of the hearing;

"(D) State that failure to raise an issue in person or by letter precludes appeal and that failure to specify to which criterion the comment is directed precludes appeal based on that criterion; and

"(E) Be mailed at least 10 days before the hearing or administrative decision on the application.

"(2) At the commencement of a hearing, a statement shall be made to those in attendance that:

"(a) Describes the applicable substantive criteria;

"(b) Testimony and evidence must be directed toward the criteria described in paragraph (a) of this subsection; and

"(c) Failure to address a criterion precludes appeal based on that criterion."

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[2] The county has also argued that ORS 197.762 precludes petitioner from raising the issues asserted in petitioner's second through seventh assignments of error. The conclusion we have reached under the first assignment with regard to inapplicability of ORS 197.762 applies to these other assignments as well and will not be repeated below.

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[3] As we explain in the discussion of the second through fourth assignments of error, we agree with petitioner that we must determine in this appeal whether the county's decision applying the BCZO complies with ORS 215.130.

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[4] The provisions of ORS 215.130 applicable to alteration of a nonconforming use state as follows:

"(5) 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 to reasonably continue the use. Alteration of any 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.

* * * * *

"(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 uder 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.

"(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."

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[5] OAR 661-10-070(1)(b)(A)(iii) states that the Board will reverse a land use decision when it "violates a provision of applicable law and is prohibited as a matter of law."

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[6] A nonconforming use is one which lawfully existed prior to enactment of restrictive regulations and which may be maintained after the effective date of such regulations, although it does not comply with the use restrictions applicable to the area. Hanley v. City of Salem, 14 Or LUBA 204, 208 (1986); Holmes v. Clackamas County, 265 Or 193, 196-197, 508 P2d 190 (1973).

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[7] A demonstration of compliance with county ordinance provisions regulating alteration of nonconforming uses would suffice to demonstrate compliance with relevant provisions of ORS 215.130, if the ordinance provisions were consistent with the authority granted by the statute. Petitioner has not assigned as error failure to comply with the BCZO provisions governing alteration of nonconforming uses. Therefore, in evaluating petitioner's specific allegations of lack of compliance with ORS 215.130 in the sections below, we will consider, where raised as a defense by the county, whether BCZO provisions are adequate to ensure compliance with the statute.

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[8] ORS 197.835(10)(b) provides:

"Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board

shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

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9 The county's decision does not find that the hardware/appliance store and lunch counter would "reasonably continue" the nonconforming tavern use. The decision does not provide any facts as to the nature and extent of the preexisting tavern use or proposed hardware/appliance store and lunch counter, save to state that the lunch counter would be "small scale." Record 7. We note that the record indicates that the tavern included a licensed restaurant. Record 47. The record also indicates that 25% of the existing building is proposed to be used for the primarily take-out lunch counter. Record 39, 48. Furthermore, the record shows that whereas the hardware/appliance store could go into operation immediately, using the existing septic tank as a holding tank, opening of the lunch counter will require extensive and expensive repairs to the sand filter septic system. Record 56, 58-59. The conditional use permit proposes use for a lunch counter "when septic system problems are resolved." Record 87. In these circumstances, it is clear that the county's decision approved use of the subject property predominantly as a hardware/appliance store, with only incidental use as a lunch counter. Such use cannot constitute continuation of a nonconforming tavern use.

We also note that in Jessel v. Lincoln County, supra, whether the existing nonconforming use would be continued was not an issue. The applicant in that case proposed to add an automobile wrecking yard to existing construction, excavation and metal scrapping businesses.

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10 The relevant county findings state:

> " * * * The Planning Commission made findings that the proposed hardware and lunch counter would have less impact on the surrounding neighborhood and would be more compatible than the preexisting restaurant and bar because considerably less traffic is generated by such a use, and because of conditions of approval imposed by the Planning Commission requiring the new use to meet current development criteria and improving access onto Philomath Boulevard. * * * " Record 14.

We note that the above quote is not a statement of what the

board of commissioners believed to be true, but rather is a description of findings made by the planning commission, and therefore not a finding of fact at all (the board of commissioners' order does not adopt the planning commission's findings as findings of the board). See Hill v. Union County Court, 42 Or App 883, 886-887, 601 P2d 905 (1979).

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The subject property was vacant and unused from at least September 12, 1985 until the conditional use permit application was filed on August 7, 1987. BCZO XIX.01.1 provides that a nonconforming use may continue only if it has not been "discontinued" for a period of one year. In its decision, the county interpreted BCZO XIX.01.1 to require objective evidence of intent to abandon in order to terminate a nonconforming use. In other words, the county interpreted "discontinued" as not being equivalent to mere "nonuse." Record 13.

In its decision, the county also conceded that city code 111.03.04 provides that "discontinued," as used in the parallel provision of the city code, means "nonuse" and shall not require a determination regarding the voluntary nature of the discontinuance or the intent to abandon the use. Record 12. However, the county concluded that the city code does not apply in the urban fringe.

We note that petitioner does not argue the county's interpretation of its ordinance provision is unreasonable because it is inconsistent with, e.g., applicable plan policies for the urban fringe or the provision of ORS 215.130(7) that a nonconforming use may not be resumed after "a period of interruption or abandonment." Petitioner only argues that the interpretation is unreasonable because it violates a Goal 2 requirement for consistency between city and county implementation measures.