BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARLA GIBSON, MIKE VOLK, PEGGY KETTEMAN, JANET REX, JIM REX, TED KRAMER, CLIF BREWER, and JEAN BREWER, Petitioners, vs. DESCHUTES COUNTY, Respondent.	LUBA No. 89-002 FINAL OPINION AND ORDER

Appeal from Deschutes County.

Jeffrey L. Kleinman, Portland, filed the petition for review and argued on behalf of petitioners.

No appearance by respondent Deschutes County.

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

REMANDED 05/08/89

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

Petitioners appeal Deschutes County's approval of a conditional use permit allowing the addition of two mobile home spaces to a 28-unit mobile home park as an expansion of a nonconforming use.

FACTS

The subject parcel is 6.24 acres in size. It is designated Rural Residential and Landscape Management by the Deschutes County Comprehensive Plan. It is zoned Multiple Use Agricultural (MUA-10), with a Landscape Management (LM) overlay zone. A 28-unit mobile home park is presently located on the property, and the property has been used as a mobile home park since 1968. The county's order includes a determination that the existing mobile home park is a legal nonconforming use. That determination is not challenged in this appeal.

To the north and south of the subject parcel are parcels similar in size. Some of these parcels are vacant, and some contain single family dwellings in conjunction with some livestock and other farm uses. To the east and west of the subject parcel is Smith Rocks State Park. The Crooked River Gorge (gorge) is adjacent to the parcel to the east. The proposed additional two mobile home spaces would be located to the east of the existing mobile home park, near the property line along the gorge. The approximate location of the proposed structures will be 35 to 50 feet from the edge of the gorge.

The owners of the mobile home park applied for a conditional use permit for alteration of a nonconforming use on February 28, 1988. On May 17, 1988, the county hearings officer denied the application. The applicants appealed the denial to the county board of commissioners. On July 20, 1988, the board of commissioners issued a decision upholding the denial.

The applicants asked the board of commissioners to reconsider its decision and also appealed the board of commissioners' decision to this Board in Phelps v. Deschutes County, LUBA No. 88-062. Two petitioners in this case, Marla Gibson and Mike Volk, moved to intervene on the side of respondent county in that appeal. On September 16, 1988, in response to a stipulated order of remand from the petitioners and the county, we remanded the decision to the county.

On October 12, 1988, the board of commissioners held a de novo hearing, incorporating the record of the previous proceedings. On December 14, 1988, the board of commissioners issued its decision approving the conditional use permit. This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "Respondent Erred in Applying ORS 215.130 instead of Deschutes County Zoning Ordinance Section 6.010."

SECOND ASSIGNMENT OF ERROR

> "If Respondent was Correct in Choosing to Apply ORS 215.130(5), Respondent Erred in Finding that ORS 215.130(5) Contains No Requirement of Necessity with Respect to the 'Reasonably Continue' Standard."

In the first assignment of error, petitioners argue that the proposed expansion of a nonconforming use is governed by Deschutes County Zoning Ordinance (DCZO) 6.010(1), which provides as follows with regard to extensions or alterations of nonconforming uses:

> "Subject to the provisions of this section, a non-conforming use or structure may be continued but may not be extended or altered, unless necessary to comply with lawful requirement. The extension of a nonconforming use to a portion of a structure for which a building permit or zoning permit has been granted at the time of passage of this ordinance shall not be deemed an enlargement or expansion of a non-conforming use. A non-conforming structure which conforms with respect to use may be altered or expanded if the alteration or expansion does not cause the structure to deviate further from the standards of this ordinance." (Emphasis added.)

Petitioners contend DCZO 6.010(1) allows expansion of a nonconforming use only where "necessary to comply with [a] lawful requirement" for alteration in the use. Petitioners claim the county did not find that the proposed expansion of a nonconforming use was "necessary to comply with [a] lawful requirement," as required by DCZO 6.010(1). Rather, petitioners contend the county approved the proposed expansion of a nonconforming use based on a determination that the expansion "will reasonably continue the use." Record 12. According to petitioners, in approving the proposed expansion on this basis, the county erred by applying, in lieu of DCZO 6.010(1), the less restrictive standard of ORS 215.130(5) that "[a]lteration of any such [nonconforming] use may be permitted to reasonably continue the use."

Petitioners contend DCZO 6.010(1) was not amended or repealed by the county after the enactment of the above-quoted portion of ORS 215.130(5), and therefore continues to govern proposed alterations of nonconforming uses. Petitioners point out that with regard to interpretation of the relationship between local ordinances and state statutes concerning the same subject

> " * * * the first inquiry must be whether the local rule in truth is incompatible with the [state] legislative policy, either because both cannot operate concurrently or because the legislature meant its law to be exclusive. It is reasonable to interpret local enactments, if possible, to be intended to function consistently with state laws, and equally reasonable to assume that the legislature does not mean to displace local civil or administrative regulation of local conditions by a statewide law unless that intention is apparent." LaGrande/Astoria v. PERB, 281 Or 137, 148-149, 576 P2d 1204, aff'd on rehearing, 284 Or 173, 586 P2d 765 (1978).[1]

Petitioners argue that in this case DCZO 6.010(1) is consistent with the state policy set out in ORS 215.130(5). Petitioners contend that although ORS 215.130(5) requires counties to allow an alteration to a nonconforming use "when necessary to comply with any lawful requirement for alteration in the use," it merely grants counties the authority to allow an alteration of a nonconforming use "to reasonably continue the use." Petitioners contend this distinction is clearly expressed by the contrasting use of the words "may" and "shall" in the relevant portions of ORS 215.130(5):

> " * * * Alteration of any such [nonconforming] use may be permitted to reasonably continue the use. Alteration of any such [nonconforming] use shall be

> permitted when necessary to comply with any lawful requirement for alteration in the use. * * * " (Emphasis added.)

Petitioners argue that because there is no indication in ORS 215.130(5) that the state intends to displace local regulation with regard to alteration of nonconforming uses, there is no state requirement that a county adopt or apply the statutory "to reasonably continue the use" approval criterion. According to petitioners, where there is no such requirement, a county is required to apply the standards in its ordinance. Petitioners note that in prior cases we approved application of county standards for alteration of nonconforming uses which are more restrictive than the standards of ORS 215.130(5), citing Holder v. Josephine County, 14 Or LUBA 454, 461 (1986) and Jessel v. Lincoln County, 14 Or LUBA 376 (1986).

In summary, we understand petitioners to contend in the first assignment of error that the county approved the subject alteration of a nonconforming use in violation of DCZO 6.010(1), based on an erroneous belief that DCZO 6.010(1) is preempted by the provisions of ORS 215.130(5).

In the second assignment of error, petitioners argue, in the alternative, that if the approval standard applicable to the county's decision is the "may be permitted to reasonably continue the use" provision of ORS 215.130(5),[2] the county misinterpreted and misapplied that provision. Petitioners argue that under this provision of ORS 215.130(5) only alterations reasonably necessary to continue a nonconforming

use may be approved by the county. According to petitioners, the county erred by interpreting this provision of ORS 215.130(5) not to require that a proposed alteration be "necessary" to continue the nonconforming use.

We agree with petitioners that, under DCZO 6.010(1), the only potential basis for county approval of the addition of two mobile home spaces to a nonconforming mobile home park is necessity to comply with a legal requirement for alteration in the use. The county's decision does not determine that such a necessity exists. Thus, this assignment of error must be sustained unless we agree with the county that ORS 215.130(5) preempts DCZO 6.010(1) and consequently provides the only standards applicable to the county's decision.

The portions of ORS 215.130 which are relevant to alteration of a nonconforming use[3] provide:

> "(5) The lawful use of any building, structure or land at the time of 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, * * * 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."

In a case concerning county approval of an alteration of a nonconforming use, pursuant to county ordinance provisions less restrictive than ORS 215.130, we stated:

> " * * * 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 ORS 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) or (D). * * * " (Footnote omitted.) City of Corvallis v. Benton County, ___ Or LUBA ___ (LUBA No. 87-115, March 21, 1988), slip op 7-8.

Thus, we have interpreted the above-quoted provisions of ORS 215.130 as setting limits on counties' authority to approve alteration of nonconforming uses, and have held that counties err when they adopt ordinances or approvals which exceed that authority. City of Corvallis v. Benton County, supra; Apalategui v. Washington County, 14 Or LUBA 261, 280, rev'd in part on other grounds, 80 Or App 508 (1986).

As pointed out by petitioners, in other cases we approved

the application of county alteration of nonconforming use ordinance provisions which were more restrictive than ORS 215.130. See Holder v. Josephine County, supra; Jessel v. Lincoln County, supra. However, the issue of whether more restrictive county ordinance standards for approval of alterations to nonconforming uses are preempted by ORS 215.130 was not raised in those cases. In order to resolve petitioners' first assignment of error, we must address this issue.

ORS 215.130(5) provides that alteration of a nonconforming use "may be permitted to reasonably continue the use." (Emphasis added.) On the other hand, that same subsection provides that alteration of a nonconforming use "shall be permitted when necessary to comply with any lawful requirement for alteration in the use." (Emphasis added.) We believe the distinction between the statute's use of the words "may" and "shall" in these two provisions is significant.[4] That this distinction was intended is supported by the legislative history of ORS 215.130(5).

Prior to 1977, ORS 215.130(5) (then codified as ORS 215.130(4)) did not allow any alteration of a nonconforming use without bringing the use into conformity with applicable zoning regulations.[5] In 1977, the legislature amended ORS 215.130(5) as follows, for the first time allowing county approval of certain alterations to nonconforming uses without requiring that those uses be made conforming:

> "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 and alteration of any such use shall be permitted when necessary to comply with any lawful requirement for alteration in the use." (Emphasis added.) Or Laws 1977, ch 766, sec 5.

Thus, from the first enactment of statutory authority for counties to approve alterations of nonconforming uses, there has been a continuing distinction made by the legislature between two types of alterations, ones necessary to comply with a lawful requirement, which "shall be permitted" by counties, and ones to reasonably continue the use, which "may be permitted" by counties.[6]

Furthermore, during the 1979 legislative session, specific consideration was given to changing the "may be permitted" in ORS 215.130(5) to "shall be permitted." Testimony before the House Committee on Intergovernmental Affairs indicated that the use of "may be permitted" was intended to leave it to the counties to decide whether that type of nonconforming use alteration should be allowed, whereas the use of "shall be permitted" was intended to require counties to allow that type of alteration. See House Committee on Intergovernmental Affairs, Minutes of April 18, 1979, pages 2-5, May 9, 1979, pages 6-7. At one point, the committee amended HB 2301 to include changes of "may be permitted" to "shall be permitted" in ORS 215.130(5) and (6). However, the committee later deleted those amendments, and the finally adopted bill did not

alter the use of "may be permitted" in those subsections.[7] There have been no subsequent amendments to ORS 215.130(5).

Thus, the legislative history of ORS 215.130(5) does not demonstrate an intent to require county approval of alterations of nonconforming uses "to reasonably continue the use," but rather an intent to give counties discretion to decide whether such alterations should be allowed. ORS 215.130(5) grants counties the authority to adopt ordinance provisions allowing approval of an alteration of a nonconforming use if the alteration reasonably continues the use, but does not require counties to do so. In this case, the county has not adopted ordinance provisions allowing it to approve an alteration to a nonconforming use on the basis that the alteration reasonably continues the use. Therefore, the county erred by approving the subject permit on that basis, rather than applying the provisions of DCZO 6.010(1).

The first assignment of error is sustained.

Because we do not find that the "may be permitted to reasonably continue the use" provision of ORS 215.130(5) is an approval standard for the appealed county decision, we need not decide the alternative second assignment of error.

THIRD ASSIGNMENT OF ERROR

> "Respondent Erred in Treating the Application in Question as One for Mere Alteration of an Existing Use Under ORS 215.130(5)."

Petitioners contend that in Polk County v. Martin, 292 Or 69, 76, 636 P2d 952 (1981), the Oregon Supreme Court limited

the scope of permissible alterations to a nonconforming use. Petitioners argue that allowing additional mobile home sites at the subject nonconforming mobile home park impermissibly exceeds the extent of the prior lawful use. According to petitioners, such "geographic expansion" of a mobile home park cannot constitute an "alteration" of a nonconforming use potentially allowable under ORS 215.130(5). To interpret "alteration" of a nonconforming use to include such "expansion," petitioners argue, would allow nonconforming facilities "to sprout like mushrooms over any acreage held by owners of such nonconforming uses, so long as the general character of the additional facilities was the same as that of the original one." Petition for Review 10.

We understand petitioners to argue that the proposed change, which adds additional facilities/structures to a nonconforming use, covering a greater geographic area, cannot as a matter of law constitute an "alteration" of a nonconforming use, but rather constitutes an "expansion" of a nonconforming use. We further understand petitioners to argue that county approval of "expansion" of a nonconforming use is not authorized by ORS 215.130.

The only source of a prohibition against geographic expansion of a nonconforming use being considered a type of alteration of a nonconforming use identified by petitioners is Polk County v. Martin, supra. However, we do not agree with petitioners that the Oregon Supreme Court established limits on

alterations to nonconforming uses potentially allowable under ORS 215.130 in that decision. In Polk County v. Martin, the court addressed only the issue of how to define the "lawful use" which may be continued as a nonconforming use after enactment of a restrictive ordinance provision. The issue of limits on permissible alterations to nonconforming uses was not before the court in Polk County v. Martin.

ORS 215.130(9), quoted supra, defines "alteration" of a nonconforming use to include changes to the use, structure or physical improvements "of no greater adverse impact to the neighborhood." This definition specifically includes additions to the physical improvements of a nonconforming use, such as proposed in this case, so long as the change would not have greater adverse impacts on the neighborhood. The statute imposes no other limitation on the changes which may be defined as potentially permissible alterations to nonconforming uses.[8]

We, therefore, conclude there is no reason why the proposed addition of two mobile home sites to the existing mobile home park cannot be considered an alteration to a nonconforming use, so long as the change satisfies the "no greater adverse impact to the neighborhood" standard of ORS 215.130(9).

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

> Respondent Erred in Disregarding a Provision of Its Ordinance Which Respondent Did Not Find to Be Preempted by State Law and Which Is not So Preeempted."

DCZO 6.010(6) provides:

> "Non-conforming uses created by this ordinance shall register their status with the Planning Department within two years of the adoption of this ordinance."

Petitioners specifically state they do not contend that all nonconforming uses not registered with the county planning department within two years of the adoption of DCZO 6.010(6) in 1979 have lost their legal status as nonconforming uses. However, petitioners do argue that DCZO 6.010(6) requires that the applicant's nonconforming mobile home park be registered with the county planning department before an application for extension or alteration of the mobile home park under DCZO 6.010(1) is filed. Petitioners assert there is no evidence in the record of this case that the applicants' mobile home park was registered as required by DCZO 6.010(6).

Petitioners do not claim that the existing mobile home park lost its status as a valid nonconforming use because it was not registered with the planning department as such within two years after the adoption of DCZO 6.010(6). Indeed, petitioners do not challenge the determination made by the county, as part of the appealed decision, that the existing mobile home park is a valid nonconforming use. Petitioners do not explain why violation of the registration requirement of DCZO 6.010(6), if such violation does not preclude the existence of a nonconforming use, precludes the approval of an alteration of a nonconforming use.[9] It is petitioners' responsibility to make their case and state a basis upon which we might grant

relief. Deschutes Development v. Deschutes County, 5 Or LUBA 218, 220 (1982).

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

> "Respondent Erred in Voluntarily Remanding the Application after First Denying It, in Order to Accept Testimony on the Requirement on 'Necessity' under Applicable Law."

Petitioners argue there was no legal basis for the county governing body to seek remand by LUBA of its prior land use decision in this matter, appealed in Phelps v. Deschutes County, supra, merely because "a party or the party's attorney is surprised by a legal issue which has arisen." Petition for Review 12. Petitioners contend the county erred by obtaining a voluntary remand of, and reconsidering, the decision on appeal in Phelps v. Deschutes County on the basis of such "surprise."

In this assignment of error, petitioners actually seek to challenge either (1) the county's decision to seek remand of its decision in Phelps v. Deschutes County from LUBA, or (2) our order of remand in Phelps v. Deschutes County. Neither of those decisions is the subject of this appeal. The county's decision in Phelps v. Deschutes County was remanded to the county, and that order of remand was not appealed. Petitioners do not argue that the county lacked authority to take further action on the decision after the remand occurred.

The fifth assignment of error is denied.

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SIXTH ASSIGNMENT OF ERROR

"Respondent's Decision Is not Supported by Substantial Evidence in the Whole Record as to Respondent's Findings Concerning Adverse Impact and Necessity."

A. Adverse Impacts

Petitioners argue that ORS 215.130(9) requires an alteration to a nonconforming use to have "no greater adverse impact to the neighborhood." Petitioners claim there is not substantial evidence in the record to support the following county findings concerning the visual impacts of the proposed alteration:

> "The addition of two additional mobile home spaces along the Crooked River Gorge will not result in a change having a greater adverse impact to the neighborhood for the following reasons:
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> " * * * * *
>
> "C. The [additional] mobile homes will not be visible from the gorge.
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> "D. Rock climbers and hikers viewing down on the new mobile homes will not be adversely affected by the spaces since they will blend harmoniously with the existing park.
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> " * * * * *
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> "G. With proper screening, the new mobile home sites will not be visible from the opposite side of the gorge.
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> " * * * * * * " Record 11-12.

Petitioners support their contention with citation to testimony presented by petitioners Gibson and Volk concerning visual impacts of the proposed additional mobile home spaces. Petitioner Volk testified that rock climbers, riders and hikers

using the neighboring state park find the existing mobile home park visually objectionable. He also stated that the proposed additional mobile home spaces would be very visible and would compound this problem. Record 74, 82. Petitioner Gibson's testimony included the following:

> "These additional trailers * * * are basically going to be an eyesore because they are on the very edge of the rim on a flat piece of property that has no landscaping around it as far as trees. The trailers that are in there now are somewhat protected by tall trees * * * Many people do hike and ride in this area so it's not like these trailers are going to be sitting back there where no one ever sees them, just because they're at the back of the trailer park. They would be the only buildings on the edge [of the gorge]. * * *" Record 75-76.

Substantial evidence is evidence which a reasonable mind could accept as adequate to support a conclusion. Braidwood v. City of Portland, 24 Or App 477, 480, 546 P2d 777, rev den (1976). We must determine whether, in light of all the evidence to which we are cited in the record, the challenged county findings are reasonable. Younger v. City of Portland, 305 Or 346, 360, 752 P2d 262 (1988).

The only relevant evidence to which we are cited in the record is the above-described testimony of petitioners Gibson and Volk.[10] That evidence does not support, and in fact contradicts, the challenged findings. We must, therefore conclude that the challenged findings on visual impacts are not supported by substantial evidence. That conclusion, however, does not complete our consideration of this assignment of error.

We are authorized to reverse or remand the county's

approval of the subject alteration of a nonconforming use if the county made a decision not supported by substantial evidence in the whole record. ORS 197.835(8)(a)(C); Sellwood Harbor Condo Assoc. v. City of Portland, ___ Or LUBA ___ (LUBA Nos. 87-079 and 87-080; April 1, 1988). That a challenged finding is not supported by substantial evidence is basis for reversal or remand only if the finding is critical to the county's decision. See Territorial Neighbors v. Lane County, ___ Or LUBA ___ (LUBA No. 87-083, April 27, 1988), slip op 22-23; Bonner v. City of Portland, 11 Or LUBA 40, 52 (1984).

In this case, there is no requirement in DCZO 6.010 that an alteration of a nonconforming use not have greater adverse impacts on the neighborhood. However, as discussed under the third assignment of error, supra, the county's authority to approve alterations to nonconforming uses is limited by ORS 215.130(9)'s definition of such allowable alterations as changes having "no greater adverse impact to the neighborhood." A county decision approving a change to a nonconforming use having greater adverse impacts on the neighborhood would exceed the authority granted to the county by statute and would be subject to reversal or remand under ORS 197.835(8)(a)(A) or (D). City of Corvallis v. Benton County, supra. We therefore conclude that the unsupported findings on lack of adverse visual impacts are essential to the county's decision.

This subassignment of error is sustained.

B. Necessity

Petitioners argue:

> "* * * to the extent that respondent relied upon the testimony of applicants as to the economic hardship of operating their mobile home park without two additional sites, it must be noted that this sort of economic justification for a change in land use will not support a finding justifying the requested change." Petition for Review 14.

We understand petitioners to argue that evidence in the record concerning the applicant's economic need for two additional mobile home spaces does not provide sufficient basis for the county to find that the requested permit is justified.

Petitioners have not identified, and we do not find, any findings in the county's decision relying on economic hardship to the applicants as a justification for approval of the subject permit. Therefore, even if we agrees with petitioners that the applicants' economic hardships are not relevant to approval of an alteration of a nonconforming use under either state statute or county ordinance, such agreement would not provide a basis for reversing or remanding the county's decision, since the county did not rely on the applicants' economic hardship in its decision.

This subassignment of error is denied.

The sixth assignment of error is sustained, in part.

The county's decision is remanded.

FOOTNOTES

[1] Petitioners also point out that whereas LaGrande/Astoria v. PERB, supra, concerns city ordinances, the Supreme Court has applied its rationale in that case to county ordinances as well. See Multnomah Kennel Club v. Department of Revenue, 295 Or 279, 287, 666 P2d 1327 (1983).

[2] At oral argument, petitioners stated that if we agree with petitioners that the appealed decision is governed by DCZO 6.010(1), rather than ORS 215.130(5), and sustain the first assignment of error, we need not rule on petitioners' alternative second assignment of error.

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

[4] We note that further distinction between these two types of alterations of nonconforming uses is found elsewhere in ORS 215.130. Under ORS 215.130(8), a proposal for an alteration of a nonconforming use necessary to comply with a lawful requirement is not required to be considered as a contested case, whereas a proposal for an alteration of a nonconforming use to reasonably continue the use is required to be considered as a contested case.

[5] Prior to its amendment in 1977, ORS 215.130(4) provided:

> "The lawful use of any building, structure or land at the time of the enactment of any zoning regulation or amendment thereto, may be continued as such although not in conformity with the zoning regulation, but such nonconforming uses shall not be increased, changed or resumed after a period of interruption or abandonment except in conformity with such provisions as the zoning regulations may provide."

[6] However, the initial version of the amendment presented to the Senate Environment and Energy (E & E) Committee on June 23, 1977, which became Or Laws 1977, ch 776, sec 5, provided:

> " * * * Alteration of any such use shall be permitted when necessary to reasonably continue the use without increase and when necessary to comply with any lawful requirement for alteration in the use." 1977 Senate E & E Committee Exhibits, SB 846, Exhibit L.

Thus, as originally proposed, the amendment provided that both types of alterations of nonconforming uses shall be permitted by counties. However, the wording was changed prior to adoption by the Senate E & E Committee to state, as in the final adopted version, that alterations to reasonably continue the use may be permitted. Testimony before the Senate E & E Committee indicated that the primary motivation in amending ORS 215.130(4) was to prevent counties from being able to force abandonment of a nonconforming use by denying approval of a change when that change is required by another government agency. Senate E & E Committee, Minutes of June 23, 1977, page 6.

[7] ORS 215.130(6) provides as relevant:

> "Restoration or replacement of any use described in subsection (5) of this section may be permitted when the restoration is made necessary by fire, other casualty or natural disaster. * * * " (Emphasis added.)

Testimony before the House Committee on Intergovernmental Affairs indicated that the purpose of the proposed change in this provision from "may be permitted" to "shall be permitted" was to guarantee owners of nonconforming uses the right to rebuild if a nonconforming use is destroyed by fire, rather than leaving an owner's ability to rebuild to the discretion of the counties. House Committee on Intergovernmental Affairs, Minutes of April 18, 1979, page 3.

[8] As previously described, prior to its amendment in 1979, ORS 215.130(4) provided that alteration of a nonconforming use "may be permitted when necessary to reasonably continue the use without increase * * * ." (Emphasis added.) Oregon Laws 1979, chapter 610, section 1 deleted "without increase" and added the

present definition of alteration of a nonconforming use as having no greater adverse impacts on the neighborhood. This change shows the legislature intended to replace a general prohibition against "increase" in nonconforming uses with a specific requirement that any change in a nonconforming use result in no greater adverse impacts on the neighborhood.

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9 We note that even if DCZO 6.010(6) does require registration as a nonconforming use before an application for alteration of a nonconforming use can be accepted or processed by the county, as petitioners contend, petitioners do not explain why an application for alteration of a nonconforming use cannot itself constitute the registration required by DCZO 6.010(6). In this case, an application for alteration of a nonconforming use, which effectively identifies the existing nonconforming use, was filed by the applicants on February 22, 1988. Record 86-87.

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10 The county did not file a respondent's brief in this appeal, and thus did not cite us to any evidence in the record supporting the challenged findings.