BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DORAN COONSE and KRISTINE COONSE,	)	
	)	
Petitioners,	)	LUBA No. 91-073
	)	
vs.	)	FINAL OPINION
	)	AND ORDER
CROOK COUNTY,	)	
	)	
Respondent.	)	

Appeal from Crook County.

Dennis C. Karnopp, Bend, filed the petition for review and argued on behalf of petitioners. With him on the brief was Marceau, Karnopp, Petersen, Noteboom & Hubel.

Thomas N. Corr, Prineville, filed the response brief and argued on behalf of respondent.

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

REMANDED 10/09/91

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a county decision concerning a nonconforming use.

FACTS

In 1978, the subject 2.32 acre property was designated Suburban Residential Mobile Zone SR(M)-1.[1] Beginning in the mid 1960's, the Woodward family began using the subject property for repair, storage and parking purposes in conjunction with several family enterprises which include logging, road building, erosion control businesses. Such uses of the subject property are not permitted in the SR(M)-1 zone. The county planning commission determined that the applicant, Brick Woodward, has a valid nonconforming use and may use the subject property in the manner in which it was used in 1978. The planning commission's decision was appealed to the Crook County Court, which affirmed the planning commission's decision.[2]

Although there is some dispute between the parties concerning the nature and extent of the use of the subject property in 1978 when the SR(M)-1 zone was applied, the

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[1]The subject property is also referred to as the Lincoln Drive property.

[2]The planning commission also granted the applicant's request to expand the nonconforming use beyond the level of use existing in 1978. The county court reversed this portion of the planning commission's decision. The county court's decision to deny an expansion of the nonconforming use is not challenged in this appeal.

central disagreement between the parties is whether the nonconforming use of the property was discontinued between 1985 and 1990.[3]

The evidence in the record regarding use of the subject property between the 1960's and the present time is conflicting. However, our review of the record shows the following findings of fact adopted by the county are generally supported by substantial evidence.

> "* * * Since [the late 1960's] the property has been used continuously each year, although at varying levels, for the parking, storage, repair, service, and maintenance, of various vehicles and items of equipment utilized by applicant, and his family, in the logging and road building business, as well as for log storage and storage of parts and support equipment. From 1970 until present, the property has also been utilized each year for storage of seed, fertilizer, mulch, and storage and repair of equipment utilized in an erosion control, i.e. contract seeding and mulching, business. The erosion control business was started in 1970 by applicant's brother, Craig Woodward. Since 1977, the erosion control business has been operated by applicant and, beginning in 1984, by his wife, Gail Woodward. Seeding and mulching is an integral part of current logging and road building businesses.
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> "* * * * *
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> "In May of 1985, applicant Brick Woodward was granted a conditional use permit to operate a truck and heavy equipment repair shop at the Prineville Machine Shop building located * * * in [the City of] Prineville. From May of 1985 until

[3]Under the Crook County Zoning Ordinance (CCZO), if a nonconforming use is interrupted for a period of more than one year, the nonconforming use may not be resumed.

January of 1990, applicant operated a commercial hydraulic business at the Prineville Machine Shop building. Applicant also worked on his own trucks and logging equipment at the Prineville Machine Shop building. Applicant continued in each year from 1985 to 1990, to utilize the Lincoln Drive property for the repair of equipment, particularly those items of equipment that were too large or awkward to move to the Prineville Machine Shop property. The Lincoln Drive property also continued in each year from 1985 to the present to be used each year for parking and storage of equipment and materials utilized in the logging, road building, and erosion control businesses, both by applicant and other members of the Woodward family. This equipment included such items as mulchers, cats, cattle trailers, belly dump trailers, flatbed trailers, log loaders, a lift truck, log trucks, low boy trucks, and a 5th wheel truck. The property was also used each year from 1985 to the present for the storage of logs, seed, fertilizer, mulch and other supplies and materials. The Lincoln Drive property was also used between 1985 and 1990 by others, with the permission of applicant, to repair equipment, to do welding, and to conduct other mechanic work. * * * Although use of the Lincoln Drive property from 1985 to 1990 was at a low level and on an intermittent basis, it was consistently used each year for the purposes set forth hereinabove in this paragraph and use of the property for these purposes was never discontinued for a period of one year." Record 10-11.

In early 1990, the repair and maintenance activities, as well as the logging trucks and equipment which had been moved to the Prineville shop between 1985 and 1990, were relocated to the subject property.[4] It was the resumption

[4]The applicant conceded that the equipment moved from the Lincoln Drive property to the Prineville shop included six log trucks and two log loaders and tractors. In addition, sometime after 1985, the applicant ceased fueling vehicles at the subject property but continued to receive and store

of the pre 1985 level of use and activity on the subject property that led to the county's adoption of the decision challenged in this proceeding.

FIRST ASSIGNMENT OF ERROR

> "Respondent erred when it improperly shifted the burden of proof from the applicant to the petitioner[s]."

Petitioners contend the county court improperly shifted the burden of proof from the applicant to petitioners following their appeal of the planning commission's decision in this matter.

The burden of proof, i.e. the burden of producing sufficient evidence to demonstrate compliance with applicable approval standards, rests with the applicant throughout local land use proceedings. Sunnyside Neighborhood v. Clackamas County, 280 Or 3, 11, 571 P2d 141 (1977); Petersen v. City of Klamath Falls, 279 Or 249, 256, 566 P2d 1193 (1977); Fasano v. Washington County Comm., 264 Or 574, 586, 507 P2d 23 (1973). Where the applicant carries that burden to the satisfaction of the initial local

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grease and hydraulic fluid at the subject property. Although we are unable to determine from the conflicting statements in the record precisely how much equipment and how much of the maintenance and repair activity was moved to the Prineville Shop between 1985 and 1990, it was substantial and included most or all of the log trucks as well as other vehicles and equipment utilized in conjunction with the applicant's logging business. There is testimony that individual pieces of this equipment may have occasionally have been stored or repaired at the subject property. However, the record shows that while prior to 1985 the subject property was the primary locus of the logging vehicles and equipment and for maintenance and repair activities as well as a gathering place for employees, between 1985 and 1990 the subject property was not the primary locus for such activities.

decision maker, the initial decision maker may adopt a decision granting the requested approval and adopt findings in support of that decision, as the planning commission did in this case.

In a local appeal of the initial decision maker's decision, the applicant retains the burden of proof. Although local government procedural rules may impose certain obligations on appellants opposing an initial decision granting land use approval, the burden of proof imposed on the applicant under the above cited decisions remains with the applicant throughout the local proceedings. The opponents of the initial decision maker's decision also have a burden before the local appellate decision maker in the sense that the appellate decision maker may find the initial decision maker's decision to be well reasoned and supported by the evidentiary record. Unless the opponents of the initial decision are able to convince the appellate decision maker that the decision is erroneous in some way, the appellate decision maker may adopt that initial decision as its own.[5] The processing of local appeals in this manner does not impermissibly shift the burden of proof assigned to applicants in land use proceedings in this state.

Although some statements by members of the county court

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[5]Of course, the local appellate decision maker's decision to do so is appealable to this Board and subject to reversal or remand under ORS 197.835.

cited by petitioners suggest there may have been some confusion about the nature of petitioners' burden in the appeal of the planning commission's decision to the county court, there is nothing in the written decision challenged in this appeal to suggest that the burden of proof was shifted to the petitioners. We review the local government's final written decision, not statements that may have been made during the local proceedings. Gruber v. Lincoln County, 16 Or LUBA 456, 460 (1988); Cook v. City of Eugene, 15 Or LUBA 344, 355 (1987); Oatfield Ridge Residents Rights v. Clackamas Co., 14 Or LUBA 766, 768-69 (1986). We are satisfied that there was no impermissible shift of the burden of proof to the petitioners and that the county court understood the burden of demonstrating compliance with applicable approval standards remained with the applicant.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "Respondent erred when it found that the nonconforming use of the property at the time of the adoption of the zoning ordinance was a lawful use."

ORS 215.130(5) provides in pertinent part as follows:

> "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. * * *"

Petitioners cite testimony in the record that the structure on the subject property used for storage and truck repair failed to meet fire code and Uniform Building Code (UBC)

requirements in 1978. There is also testimony in the record that the structure is presently in a dangerous condition and at least some of the structural defects existed in 1978. According to testimony by the county building inspector, the wiring does not comply with UBC requirements and likely did not comply those requirements in 1978. Further, the county building inspector testified that the existing wooden structure is too close to the property line to comply with UBC and fire code requirements.

As respondent correctly notes, the above arguments are directed solely at the existing structure and have nothing to do with the disputed nonconforming use of the subject property. Even with regard to the structure, we do not agree with petitioners' apparent assumption that any violation of any regulation affecting the structure on the subject property is sufficient to render the protection afforded by ORS 215.130(5) inapplicable.

ORS 215.130(5) authorizes the continuation of "lawful" uses, notwithstanding the enactment or amendment of zoning or other land use regulations with which the use does not comply. Thus, uses are "lawful" in the sense that term is used by ORS 215.130(5) only if they comply with applicable zoning and other land use regulations on the date they are changed. It may be that compliance with other federal, state or local regulations or licensing requirements that apply to some aspect of the use or structure are integrally

related to the zoning or land use regulation requirements or for some other reason must be satisfied for a structure or use to be "lawful" as that term is used in ORS 215.130(5). However, we do not believe the building and fire code violations alleged by petitioners, if true, would constitute failure to comply with such requirements.[6]

Of course, previously applicable zoning ordinance or land use regulations may themselves require compliance with such other regulations and laws. Where that is the case, such laws and regulations are effectively made zoning and land use regulation requirements, and an existing structure would have to comply with such requirements on the date a new or amended zoning or land use regulation is adopted in order to be protected by ORS 215.130(5). However in this case, as far as we can tell, petitioners do not allege the structure on the subject property violated any zoning or other land use regulation in 1978 when the property was zoned SR(M)-1. Nor do petitioners contend compliance with the cited UBC and fire code requirements was a requirement imposed by the prior zoning or land use regulations.

The second assignment of error is denied.

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[6]We are aware of nothing in ORS 215.130(5) which prevents the county from requiring that the structure be brought into compliance with applicable fire and UBC requirements. However, we note that Section 104C of the UBC apparently allows use or occupancy of buildings which is legal when the UBC was adopted to continue "provided such continued use is not dangerous to life." According to testimony in the record, the UBC first became effective in Crook County in 1974. We cannot tell whether the defects petitioners complain of existed when the UBC was first adopted.

FIFTH ASSIGNMENT OF ERROR

> "Respondent erred when it failed to apply Crook County's Comprehensive Plan and ignored the interests of the community."

Petitioners contend the disputed nonconforming use fails to comply with several comprehensive plan goals and standards.

As we explained in City of Corvallis v. Benton County, 16 Or LUBA 488, 498 (1988), a nonconforming use is one that by definition fails to comply with applicable zoning and planning requirements. Assuming the challenged use is a nonconforming use, the alleged inconsistencies with plan goals and standards provide no basis for reversal or remand, because ORS 215.130(5) provides the use may continue notwithstanding such inconsistencies.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

> "Respondent erred when it failed to base its Decision on substantial evidence in the whole record and it failed to adequately weigh the evidence."

SEVENTH ASSIGNMENT OF ERROR

> "Respondent erred when it incorrectly applied the law concerning the determination of the continuity of use."

County regulation of nonconforming uses is governed by ORS 215.130, which provides in pertinent part:

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

In determining whether the disputed use had been interrupted or discontinued for more than one year following 1978, the county relied heavily on the Oregon Supreme Court's decision in Polk County v. Martin, 292 Or 69, 636 P2d 952 (1981).[8] In Polk County v. Martin the Oregon Supreme Court explained that a lawful use may be one that is continuous and relatively constant in nature or it may be

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[7]CCZO § 5.010(2) provides as follows:

> "If a nonconforming use is discontinued for a period of one year, further use of the property shall conform to this ordinance."

[8]Polk County v. Martin involved a quarry operation on a parcel of over 100 acres. The owner of the site did not conduct the quarry operation, but rather contracted with persons who had their own extraction and crushing equipment. The quarry operation began in 1939 and a large amount of rock was removed initially. More than 200,000 cubic yards of rock were removed between 1947 and 1948. After 1949 a total of 345,000 cubic yards of rock were extracted. Although stockpiles of rock were maintained continuously after 1949 there was no extraction during 14 years of the period after 1949. For the five years preceding the 1978 rezoning of the property which prohibited continued rock extraction, extraction had been meager or nonexistent.

sporadic and intermittent.

> "The determinative factor under ORS 215.130(5) is lawful use. Matters concerning frequency of use or intensity of use bear more on the nature and extent of use rather than upon the lawfulness of the use. A sporadic and intermittent use is sporadic and intermittent, but it may nonetheless be a 'lawful use' under ORS 215.130(5). The nature and extent of the prior lawful use determines the boundaries of permissible continued use after the passage of the zoning ordinance. The significant thing is that a sporadic and intermittent use may give rise to a permitted nonconforming use, with the extent of the permitted nonconforming use limited to the sporadic and intermittent use that existed prior to the enactment of the zoning ordinance. * * *" 292 Or at 76.

Polk County v. Martin clearly provides support for a conclusion that the applicant's sporadic and intermittent use of the property was entitled to nonconforming use status after 1978. The record contains substantial evidence that the use of subject property had been sporadic and intermittent prior to 1978.[9] The record also includes substantial evidence that the repair, maintenance, storage and parking and other needs associated with the Woodward family enterprises between the 1960's and 1985 were satisfied on the subject property. However, Polk County v. Martin does not address the issue of whether a sporadic and

[9]Much of the equipment used in the Woodward family businesses, particularly the logging trucks and equipment, is frequently stored at the work site where it is being used. Storage, repair and maintenance of equipment on the subject property fluctuates based on whether the equipment was being used and stored elsewhere.

intermittent use, after it becomes a nonconforming use, may later be discontinued or interrupted. We turn to that question.

The record shows that use of the subject property significantly changed, qualitatively and quantitatively, after 1985. Between 1985 and 1990, the subject property served a much more limited role by virtue of the applicant's operation of a truck and heavy equipment repair shop and commercial hydraulic business in Prineville. During this period of time much of the lighter equipment and the supplies associated with the seeding and mulching operations continued to be stored on the site. In addition, some logging equipment apparently continued to be stored occasionally on the subject property. Further, there is testimony in the record that the Woodwards' employees and friends continued to do some truck and equipment maintenance on the subject property. However, it is clear from the record that between 1985 and 1990 the truck and heavy equipment repair shop in Prineville was the primary location of the Woodward's maintenance and repair operations. Logging trucks, log loaders, and other logging equipment previously stored on the subject property were stored at the Prineville shop and a significant portion of the equipment repair and maintenance was performed at the Prineville shop rather than at the subject property.

Although it is difficult to tell from the record

precisely what activities previously carried out at the subject property were moved to the Prineville shop, the record is clear that the level and types of activities conducted on the subject property changed significantly between 1985 and 1990. The applicant's relocation of these nonconforming activities from the subject property to the Prineville shop resulted in a significant reduction in the intensity and nature of the use of the subject property.

We reject petitioners' suggestions that the applicant entirely discontinued the prior nonconforming use of the subject property. Although it is clear that the bulk of the applicant's maintenance and repair activities and most of the logging equipment was removed from the property, there is substantial evidence that some logging equipment continued to be stored on the property and some maintenance and repair continued to be carried out on the property, albeit at a greatly reduced level and frequency. Furthermore, it appears from the record that equipment and supplies associated with the seeding and mulching business continued to be stored at the subject property.

However, we also reject the county's conclusion that because the subject property continued to be put to some use between 1985 and 1990, the applicant may close the Prineville shop and again put the subject property to the much more intensive level and type of use that existed in 1978 prior to relocation of significant aspects of the

nonconforming use to the Prineville shop.

Changes in the volume or intensity of a use generally do not constitute an impermissible change in a nonconforming use provided such changes are attributable to growth or fluctuations in business conditions and are not accompanied by alterations in the nature of, or physical structures employed by, the nonconforming use. 1 Anderson, American Law of Zoning § 6.38 (3d rev ed 1986). However, the change in the nonconforming use of the subject property that occurred between 1985 and 1990 is not of this variety. The applicant in this case significantly reduced the scope of the nonconforming use which existed in 1978 by relocating nonconforming maintenance, repair and storage activities elsewhere. This is not a change in volume or intensity of a nonconforming use that can be attributable to changes in the volume or intensity of the family businesses served by the subject property. These relocated activities represent a partial interruption or discontinuance of the nonconforming use which existed in 1978. This partial relocation of the nonconforming use in 1985 is different in kind and degree from the fluctuations in the intensity of use of the property which occurred prior to that date and which were attributable to the sporadic and intermittent nature of the family business enterprises.

The Oregon Supreme Court's decision in Polk County v. Martin, supra, lends indirect support to our decision that

where a nonconforming use is substantially discontinued or interrupted, there is no absolute right to thereafter restore the property to its prior type and intensity of nonconforming use.[10] The Supreme Court explained that while a land owner may have a right to continue a sporadic and intermittent nonconforming use, the land owner does not necessarily have a right to pursue that use at a level of intensity which occurred only infrequently in the past and was not occurring at the time the use became a nonconforming use. Polk County v. Martin, supra, 292 Or at 83 (Tanzer, J. concurring); see n 8, supra. Similarly, we do not believe a property owner may significantly reduce the scope and intensity of a nonconforming use by relocating significant aspects of that nonconforming use to a different location and then, five years later, unilaterally resume the nonconforming use at its former scope and intensity.

The applicant is entitled to continue his nonconforming use of the subject property in the manner and at the reduced level which prevailed between 1985 and 1990. The applicant is not entitled to reestablish the type and intensity of nonconforming use that existed in 1978. Remand is required so that the county may enter a determination consistent with the above and provide additional clarification concerning

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[10]ORS 215.130(5) does permit a nonconforming use to be altered in certain circumstances. Therefore, it might be possible to justify an "alteration" of a nonconforming use to restore it to a prior type or intensity of use.

the nature and extent of applicant's nonconforming use between 1985 and 1990.

The sixth and seventh assignments of error are sustained, in part.

REMAINING ASSIGNMENTS OF ERROR

Petitioners' remaining assignments of error are denied. Assignments of error three and four allege procedural errors. Procedural errors only provide a basis for reversal or remand if petitioners' substantial rights are thereby prejudiced. ORS 197.835(7)(B); Muller v. Polk County, 16 Or LUBA 771 (1988); Colwell v. Portland, 1 Or LUBA 74 (1988). Petitioners fail to demonstrate they suffered any prejudice to their substantial rights as a result of the alleged procedural errors.

Assignment of error eight alleges the county failed to adopt findings explaining how the conditions it imposed are adequate to mitigate impacts associated with the nonconforming use. We are aware of no legal requirement that the county impose such conditions, and neither of the authorities cited by petitioners imposes such a requirement.

Finally, assignment of error nine alleges the county should follow what petitioners allege is the modern trend toward more aggressively eliminating nonconforming uses. In this state, the authority of counties to eliminate nonconforming uses is limited by ORS 215.130(5) to (9). To the extent petitioners are arguing the county should go

beyond the authority granted it by statute to eliminate the nonconforming use, the county may not do so.

The county's decision is remanded.