BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DON WARNER and SHIRLEY WARNER, Petitioners, vs. CLACKAMAS COUNTY, Respondent, and VIOLA-FISCHER'S MILL COMMUNITY PLANNING ORGANIZATION, Intervenor-Respondent.	LUBA No. 91-094 FINAL OPINION AND ORDER

Appeal from Clackamas County.

David B. Smith, Tigard, filed the petition for review and argued on behalf of petitioners.

Michael E. Judd, Oregon City, filed the response brief and argued on behalf of respondent.

Jacqueline Tommas, Estacada, represented intervenor-respondent.

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

REMANDED 10/22/91

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioners appeal an order of the county hearings officer denying their request for a determination that a personal use airstrip on their property is a nonconforming use.

MOTION TO INTERVENE

Viola-Fischer's Mill Community Planning Organization moves to intervene on the side of respondent. Petitioners do not object to the motion, and it is allowed.

FACTS

The subject property is 37.98 acres in size and is zoned General Timber District (GTD). Restrictive zoning was first applied to the subject property in 1973. Prior to 1973, petitioner Don Warner hangared his Cessna aircraft in a barn on the subject property and maintained a grass landing strip to accommodate flights to and from the subject property. Since 1973, petitioners have used the airstrip in conjunction with the Cessna aircraft, on an infrequent basis, for recreational purposes. The record contains copies of petitioners' aircraft log for the Cessna. The copies of the aircraft log in the record appear to begin recording flights in 1977.[1] The log indicates there were

[1]Record 266 is a copy of a page of the log book indicating five flights, but is such a poor copy that it impossible to ascertain on what dates those flights occurred. The county indicates that its original copy, from which the record copies were made, is also illegible.

three flights between 1977 and 1979; one flight in 1980; two flights in 1985; one flight in 1986; one flight in 1987; one flight in 1988 and two flights in 1989. Record 264-271.[2] Petitioners sold the Cessna aircraft in August, 1989. In addition, the airstrip was licensed by the Aeronautics Division of the Oregon Department of Transportation (Aeronautics division) in 1973 when the restrictive zoning was imposed, and continues to be so licensed.

In November, 1990, petitioners' son began using the airstrip for an "ultralight" aircraft he had purchased. Some friends of petitioners' son, at least once in December, 1990, also used the airstrip for other ultralight aircraft. Petitioners' son began building a hangar to accommodate three ultralight aircraft on the subject property. At some point, petitioners were advised by the county that they needed county approval to build the hangar. Consequently, in January, 1991, petitioners filed an application for expansion of a nonconforming personal use airport, including permission to build the hangar for the ultralight aircraft. The planning department approved petitioners' application.

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[2]All of these log entries are for periods of time after the restrictive zoning was imposed. However, activities occurring on property after the imposition of restrictive zoning can be considered by the local government to the extent that those activities are representative of the nature of the activities occurring on the property prior to the imposition of the restrictive zoning. Smith v. Lane County, ___ Or LUBA ___ (LUBA No. 91-014, May 31, 1991), slip op 13-14. There is no dispute that the flights recorded in the log book after 1977 are representative of the flight activity on the property prior to 1973.

Intervenor-respondent (intervenor) appealed the planning department's decision to the hearings officer. The hearings officer determined (1) no nonconforming use had been established on the subject property, and (2) even if a nonconforming airport use had been established, it had been discontinued for a period in excess of 12 months and was, therefore, lost. Petitioners requested that the hearings officer reconsider this decision. The hearings officer reaffirmed his initial decision and refused to conduct a rehearing. This appeal followed.

OBJECTION TO DAVIDSON LETTER

The record contains a letter signed by David D. Davidson stating that he landed on petitioners' airstrip in May of 1990, utilizing the Cessna aircraft formerly owned by petitioner Don Warner. This letter also indicates Mr. Davidson has operated aircraft since the "mid-70's" and has "dropped into [petitioners'] field once or twice a year during most of the intervening years." Record 3.

The county objects to references in the petition for review to this letter. The county contends this letter, while submitted to this Board as part of the local record, was not before the hearings officer when he made his initial decision concerning the nonconforming use, and consequently should not be considered by this Board in reviewing the merits of this appeal.

There is no dispute that the Davidson letter was first

submitted to the hearings officer pursuant to petitioners' request for reconsideration of the hearings officer's initial decision on the merits. In the hearings officer's Order Denying Rehearing Request (order denying rehearing), he stated the following concerning the Davidson letter:

> "The Hearings Officer notes that the applicants have attached to the Request for Rehearing a statement from David D. Davidson, to the effect that he flew onto the subject property during May, 1990. This statement is presented to show that additional evidence exists which, if believed, would result in a determination that there has been no discontinuance of any protected nonconforming use for a period of 12 months. There is substantial evidence in the record of this proceeding contrary to Mr. Davidson's statement. Moreover, even if there were no discontinuance of the flying activity for a period of at least 12 months, the applicants' request could not be approved for the reasons discussed in the Findings and Decision herein.
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> "* * * * *" Petition For Review App 7.[3]

The Davidson letter is properly included as a part of the local record. Consolidated Rock Products v. Clackamas County, 17 Or LUBA 1047 (1989). What is uncertain is the scope of our review concerning the Davidson letter.

The hearings officer, in his order denying rehearing, explicitly analyzed and commented on the weight of the evidence supporting his decision in light of the Davidson

[3]The parties agree that the the hearings officer's decision denying reconsideration was inadvertently omitted from the local record submitted for this appeal. Accordingly, the parties do not object to our consideration of it.

letter. Essentially, the hearings officer reconsidered his decision in light of the Davidson letter. What the hearings officer refused to do in his order is conduct a rehearing of the matter. The Davidson letter was placed before the decision maker, and there is nothing to suggest that the decision maker rejected it.[4] Rather, the hearings officer determined the Davidson letter did not establish that petitioners have a nonconforming airport use on their property, and concluded his initial decision was correct. Under these circumstances, where the hearings officer specifically considered evidence submitted with a request for reconsideration, and the local government submits such evidence as a part of the local record, there is no basis for us to refuse to consider such evidence. Consequently, the references in the petition for review to the Davidson letter are proper, and we may consider that letter in our review of the hearings officer's decision.

FIRST ASSIGNMENT OF ERROR

> "The respondent's conclusion, that petitioners' personal use airport was not a protected

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[4]Even if we were to conclude that the letter was specifically rejected by the hearings officer, there is evidence that Davidson:

> "* * * flew in sometime in June/July '90 after haying when Cessna was all fixed up. * * * Davidson also flew the Cessna from the strip between Aug. & Dec. '89 when it was finally moved to new base by Davidson." Record 187.

Consequently, the letter does not really contain any new information not already in the record.

nonconforming use in the General Timber District zone, misconstrues the applicable law."

ORS 215.130(5) provides:

"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."

Clackamas County Zoning and Development Ordinance (ZDO) 1206.01 provides:

"A nonconforming use may be continued although it is not in conformity with the regulations in the zone in which the use is located."

The hearing officer determined as follows:

"The hearings officer concludes there is no protected nonconforming use for the personal use airstrip. The relevant facts in this case are not distinguishable from Clackamas County v. Portland City Temple, 13 Or App 459, [511 P2d 412] (1973). This record shows that the date of the restrictive zoning is November 21, 1973. Prior to that date, the applicants had purchased the property, constructed their home, hangared Mr. Warner's personal aircraft in an existing barn and used the property for aircraft flights on an infrequent basis for recreational purposes. No improvements were constructed by November 21, 1973 to accommodate the personal use airstrip. The landing strip is a grassy field. The record establishes that this field has also been used for hay production. The use was clearly incidental to the primary farm and forest use of the property, including raising cattle, hay and Christmas trees, and reforestation of the property. This record does not permit the Hearings Officer to determine the number of flights from this property occurring at the time of the restrictive zoning, but based on * * * Mr. Warner's log book and testimony from neighbors, there could not have been more than a few flights per year.

"Such a use is not sufficient to constitute an 'existing use' protected by ORS Chapter 215 and

> Section 1206 of the ZDO. There is no substantial evidence in this record that enforcement of the ZDO, prohibiting the personal use airport, would result in serious financial harm to the applicant." Record 6.

Petitioners argue it is erroneous for the hearings officer to apply the legal analysis of the Court of Appeals' Portland City Temple decision to determine no nonconforming airport use was established on the subject property.[5] Petitioners argue that subsequent to the Court of Appeals' Portland City Temple decision, the Supreme Court determined the only inquiry relevant to whether a nonconforming use has been established is whether the use is lawful.

In Polk County v. Martin, 50 Or App 361, 367, 622 P2d 1152, rev'd 292 Or 69 (1981), focusing on "financial and economic commitment," the Court of Appeals concluded that an intermittent and financially insubstantial aggregate mining operation did not qualify as a nonconforming use.

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[5]The issue in Portland City Temple, supra, was whether a nonconforming recreational airport use had been established on a parcel prior to the time restrictive zoning was imposed. In rejecting arguments that the recreational airport was entitled to continue as a nonconforming use, the Court of Appeals explained as follows:

> ""* * * [Nonconforming uses] are permitted to continue only when enforcement of the ordinance would cause serious financial harm to the property owners. * * *
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> "The use involved herein, in addition to being minimal in terms of frequency, was recreational and incidental to the primary use of the property. It was not a substantial use, the loss of which would cause serious financial harm to defendants, and hence the destruction of the use is justified by the advantage to the public in being able to carry out an effective zoning plan." Id. at 462-63.

Petitioners contend the Oregon Supreme Court squarely rejected the Court of Appeals' reasoning in that case and held that even an intermittent and financially insubstantial use may qualify as a nonconforming use. Polk County v. Martin, 292 Or 69, 79, 636 P2d 952 (1981). Petitioners argue the Court of Appeals' reasoning in Portland City Temple, and the hearings officer's decision in this case, are similarly inconsistent with the Supreme Court's decision in Polk County v. Martin, because they determine petitioner cannot have a right to continue his recreational airport use solely because that use is intermittent and economically insubstantial.

The challenged decision relies upon the legal analysis applied by the Court of Appeals in Portland City Temple, supra. Accordingly, we must determine whether Portland City Temple continues to express a valid legal analysis concerning the establishment of nonconforming uses under ORS 215.130(5).

Respondent is correct that in Polk County v. Martin, supra, it was only necessary for the Supreme Court to review the Court of Appeals' decision in that case. However, the Supreme Court quoted a portion of the Court of Appeals' decision which cites and relies on Portland City Temple, supra, and stated:

> "Although the defendant's financial commitment was virtually nil in the sense that there was little or no capital improvement or investment by the

defendant beyond the cost of the land, a lawful use of property can exist without substantial additional capital investment. Although the development of property often involves capital improvement or investment, the sole criterion in the statute is 'lawful use.' There is no claim that the defendant's prior use was not lawful. Nor is there any dispute that the use was achieved without the commitment of substantial expenditures. Nor is there any dispute that the property was committed to this use and was so used, albeit on a sporadic and intermittent basis, under circumstances where the intensity of use would fluctuate. (Emphasis supplied.) Polk County v. Martin, 292 Or at 79.

The Supreme Court further stated:

"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 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. * * *" (Emphasis supplied.) Id. at 76.

"The defendant's failure to personally commit substantial sums toward the development of the land in no way detracts from the use to which the land was committed. Once a nonconforming lawful use is shown to exist, there is no requirement of 'financial and economic commitment to a particular use' beyond that necessary to create the initial nonconforming use.

"* * * * *

> "Unlike Clackamas Co. v. Holmes, [265 Or 193, 508 P2d 190 (1973)], which turned on the degree of development, the resolution of this case turns on the extent of use prior to the passage of the zoning law. Neither ORS 215.130 nor Clackamas Co. v. Holmes, supra, require that anything beyond the requirements of present ORS 215.130(5) be shown in order for a landowner to have the right to continue use of property in the same condition and at the same level as was the case at the time of the enactment of the zoning legislation. * * *" (Emphasis in original.) Id. at 79-82.

We agree with petitioners that the legal analysis applied by the Court of Appeals in Portland City Temple is inconsistent with the holding of the Supreme Court in Polk County v. Martin. In determining whether a nonconforming use has been established, the decision of the Supreme Court in Polk County v. Martin requires a local government to (1) ascertain the scope and nature of the uses occurring on the property at the time restrictive zoning was applied, and (2) determine whether those uses were lawful at the time the restrictive zoning was imposed. Thereafter, those uses may be continued at the level established, unless interrupted or abandoned. ORS 215.130(7).

There is no dispute that at the time restrictive zoning was applied to the subject property in 1973, there was an intermittent personal and recreational airport use of the subject property by petitioner Don Warner. Further, there is no dispute that such use was lawful at the time of the imposition of restrictive zoning. Specifically, prior to 1973, we are aware of no zoning regulations prohibiting

airport use of the property and petitioners had a license to operate an airport on the property at the time of the imposition of restrictive zoning.[6] Accordingly, there is nothing to suggest that petitioners did not have a lawful, albeit intermittent, personal and recreational airport use of their property in 1973.

The hearings officer erred in determining petitioner did not possess a nonconforming airport use of the subject property simply because use prior to the imposition of restrictive zoning was recreational, sporadic, and did not involve the investment of substantial sums of money.

The first assignment of error is sustained.

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[6]Petitioners also contend the hearings officer erroneously concluded that Portland City Temple was factually nearly identical to the instant appeal. Petitioners argue that in Portland City Temple, the Court of Appeals expressly left open the possibility that where an airport use possessed requisite licenses from state and federal government agencies, such facts might be relevant in determining whether a nonconforming airport use had been established. Petitioners' cite the following portion of the Portland City Temple decision:

> "The trial judge granted the injunction on the grounds that the prior [airport] use had been unlawful because neither defendants nor their predecessors had obtained the required state and federal airport licenses; hence a nonconforming use was never established. We do not reach the question whether failure to obtain the airport licence rendered defendants' use unlawful within the meaning of ORS 215.130(5) * * *." (Footnote omitted.) Portland City Temple, 13 Or App at 461.

Petitioners reason that because at all times relevant they did possess the requisite licenses, their airport use is lawful. We are not sure how the Court of Appeals would have treated the existence of an airport license in the Portland City Temple case. However, we do agree with petitioners that whether they possessed requisite airport licenses at the time of the imposition of restrictive zoning is relevant to determining whether their airport use of the subject property was lawful under ORS 215.130(5).

SECOND ASSIGNMENT OF ERROR

"The respondent's conclusion, that petitioners' personal use airport, even if it had been established as a protected nonconforming use, had been discontinued by being abandoned for over 12 months, was not based on substantial evidence in the record as a whole."

The hearings officer determined:

"Even if a protected nonconforming use existed, the Hearings Officer finds that such use would have been lost due to discontinuance for in excess of 12 months. Subsection 1206.02 of the ZDO provides that if a nonconforming use is discontinued for a period in excess of 12 consecutive months, the use shall not be resumed unless in conformance with the ZDO.

"This record establishes that the applicant sold his aircraft not later than August 1989, and that the aircraft was dismantled and removed from the property. The evidence is that no aircraft use occurred on the property from at least August 1989 until November 1990, when the applicants' son based his ultralight aircraft on the property. Pursuant to [ZDO] Subsection 1206.02, any nonconforming use would have been lost because of the discontinuance during this period of time." Record 6-7.

ORS 215.130(7) provides:

"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."

ZDO 1206.02 provides:

"If a nonconforming use is discontinued for a period of more than twelve (12) consecutive months, the use shall not be resumed unless the resumed use conforms with the requirements of the

> Ordinance and other regulations at the time of the proposed resumption."[7]

The issue under this assignment of error is whether the county correctly determined the nonconforming airport use of the subject property was interrupted.[8] However, in order to determine whether the nonconforming airport use was interrupted for more than twelve months, it is necessary for the county to first establish the nature of the nonconforming use, based on the evidence submitted to it. As we explain under the first assignment of error, the county erroneously interpreted and applied the law relating to the establishment of a nonconforming use. Accordingly, the county did not determine with any specificity the frequency of flights from the airport on the subject property and the scope of the nonconforming airport use of

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[7]In Sabin v. Clackamas County, __ Or LUBA ___ (LUBA No. 90-077, September 19, 1990), slip op 10 n 6, we stated:

> "* * * We interpret the provision of ZDO 1206.02 regarding loss of a nonconforming use after such use has been 'discontinued' for more than twelve months, to be the period of interruption of a nonconforming use after which such use may not be resumed, referred to in ORS 215.130(7). * * *"

Accordingly, we interpret the term "discontinue" used in ZDO 1206.02, to have the same meaning as "interruption" used in ORS 197.130(5). For simplicity, in analyzing this assignment of error, we use the term "interruption."

[8]We note the county does not contend that any of the periods prior to August 1989 where there were apparently no flights, according to the log entries for the Cessna Aircraft, constituted an interruption of the airport use of the property. The county only argues that an interruption occurred between the time the Cessna aircraft was sold and the time petitioner's son began flights from the property using his ultralight aircraft.

the property. The county simply decided, as an alternative to its determination that no nonconforming use had been established, that the flights from the property were "intermittent."

Before we are in a position to determine whether there is substantial evidence to support a determination that the nonconforming airport use was interrupted, we must first know the scope of that nonconforming use. It may be that the nonconforming airport use involved flights from the property on an average of one flight every two to three years. If the county were to determine that such is the case, then the fact that there may have been no flights from the property between August 1989 and November 1990 would be consistent with the established nonconforming use and would not constitute an "interruption," within the meaning of ORS 215.130(7).[9] Consequently, remand is necessary for the county to determine the scope of the nonconforming airport use of the property consistent with our resolution of the first assignment of error. Additionally, we do not

[9]We note that petitioners cite a letter from the Oregon Aeronautics Division to the effect that so long as petitioners' airstrip is licensed, it constitutes an airport under regulations governing airports. Petitioners also contend the fact that they maintained their airport license establishes their intention not to interrupt the nonconforming airport use of the property. In Sabin v. Clackamas County, supra, slip op at 10-11, we determined that under ZDO 1206.02, if a nonconforming use is interrupted for more than twelve months it is lost regardless of any "subjective intent to continue the use at sometime in the future." Accordingly, whether petitioners intended not to interrupt the nonconforming airport use is irrelevant.

interpret Polk County v. Martin to extend the protection of ORS 215.130(5) and (7) to any related series of historical activities no matter how erratically or infrequently such activities occur. However, the Supreme Court's decision in Polk County v. Martin expressly determined that an intermittent use with an active/less active cycle which exceeded one year qualified as a nonconforming use under ORS 215.130(5), and that the nonconforming use was not lost during the less active period of the cycle under ORS 197.130(7). Specifically, in Polk County v. Martin, the Supreme Court made it clear that even though actual mining activities may have ceased for long periods of time, the fact that there was always some aspect of the mining business which continued to exist on the property over time, i.e. the stockpiling of aggregate available for sale, meant that there had been no interruption of the nonconforming use. Similarly, here, if it is the case that flights to and from the property may not have occurred every year, but the airstrip was continuously maintained for aircraft landings and takeoffs, then there would be no interruption of the nonconforming use, simply because there may have been no flights during a particular year. While we are uncertain how far the protection expressed by the legal principles articulated in Polk County v. Martin goes, we believe nonconforming use status must be extended to such cyclical uses, and that they are not "interrupted" during the less

active periods, under the interpretation of ORS 215.130(7) articulated in Polk County v. Martin. In other words, such cyclical nonconforming uses could not be deemed interrupted under ZDO 1206.02 solely because one aspect of the nonconforming activity did not occur for a period of one year.

One final point merits comment. As stated above, the county determined that any personal and recreational airport nonconforming use petitioners may have had was lost due to being interrupted between August 1989 and November 1990. Consequently, the county did not consider whether the use of the airport for the ultralight aircraft, which began in November 1990, is within the scope of the existing nonconforming use. On remand, the county should consider whether use of the airport by ultralight aircraft is within the scope of the nonconforming use, as a part of its determination of whether petitioners' nonconforming use was interrupted.[10]

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[10]We note that if airport use by ultralight aircraft is not within the scope of the existing nonconforming use, it can only be allowed as an "alteration" of the nonconforming use if (1) the nonconforming use was not lost prior to inception of the ultralight aircraft use, (2) the ultralight aircraft use "reasonably continues" the prior nonconforming use (ORS 215.130(5)), and (3) ORS 215.130(9) is satisfied. ORS 215.130(9) defines the circumstances constituting an "alteration" of a nonconforming use as follows:

> "(a) A change in the use of no greater adverse impact to the neighborhood; and
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> "(b) A change in the structure or physical improvements of no greater adverse impact to the neighborhood."

The second assignment of error is sustained.

The county's decision is remanded.