BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

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| BERTEA/AVIATION, INC., Petitioner, vs. BENTON COUNTY, Respondent, and CITY OF CORVALLIS, Intervenor-Respondent. | LUBA No. 91-130 FINAL OPINION AND ORDER |

Appeal from Benton County.

Edward F. Schultz, Albany, filed the petition for review and argued on behalf of petitioner. With him on the brief was Weatherford, Thompson, Quick & Ashenfelter.

Candace Haines, Corvallis, and Janet S. McCoy, Salem, filed a response brief on behalf of respondent. Janet S. McCoy argued on behalf of respondent.

Richard D. Rodeman, Corvallis, filed a response brief and argued on behalf of intervenor-respondent.

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

REVERSED 12/09/91

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 appeals a county board of commissioners order approving the expansion of a nonconforming use.

**MOTION TO INTERVENE**

The City of Corvallis moves to intervene in this proceeding on the side of respondent. There is no opposition to the motion, and it is allowed.

**FACTS**

Intervenor-respondent City of Corvallis (intervenor) owns the Corvallis Airport and an adjoining rye grass field. These properties are, however, outside city limits and under the jurisdiction of respondent Benton County (county). The airport property is designated Public-Institutional and is zoned Public and Airport Overlay (P/A). Intervenor leases certain land and facilities on the airport property to two fixed-based operators, petitioner Bertea/Aviation, Inc. (petitioner) and Avia Flight Services, Inc. (Avia).

The airport includes an above ground fuel storage area, generally referred to as a "fuel farm." Intervenor leases areas within the fuel farm to operators who desire to have fuel storage capacity. A fuel storage facility within such a fuel farm is generally comprised of a concrete pad, containment structure and fuel tank(s). While the fuel tanks may belong to the tenant, the concrete pads and containment structures belong to intervenor. The fuel farm

is located within the Approach Safety Zone for at least one runway.[1]

In March 1990, the county granted petitioner permission to place two 12,000 gallon above ground fuel tanks in the fuel farm. In April 1990, the Benton County Development Code (BCDC) was amended to make "[a]bove ground storage of flammable materials" a prohibited use in the Approach Safety Zone. BCDC 86.115(2). This made the fuel farm, including petitioner's fuel tanks, a nonconforming use.

On May 1, 1991, Avia applied for approval to expand the existing nonconforming use by adding two 12,000 gallon above ground fuel tanks and a containment structure to the existing fuel farm. Avia's new fuel storage facility is proposed to be located adjacent to petitioner's existing facility and approximately 50 feet closer to the adjoining rye grass field. The Avia facility would be located approximately 20 feet from a plowed burn strip at the edge of the rye grass field.

The county planning commission approved Avia's application. Petitioner appealed that decision to the board of commissioners. On August 7, 1991, after a de novo public hearing, the board of commissioners issued an order denying the appeal and approving the expansion of the nonconforming use. This appeal followed.

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[1]The Approach Safety Zone is a subarea within the Airport Overlay Zone.

**FIRST ASSIGNMENT OF ERROR**

> "Benton County erred in allowing Avia to locate and construct two new above-ground fuel tanks as an expansion of a nonconforming use when Avia had no prior nonconforming use."

Petitioner contends the county cannot grant Avia's application to expand a nonconforming use unless Avia already has a nonconforming use to be expanded. According to petitioner, the existing nonconforming use belongs only to petitioner, because the existing above ground fuel storage tanks were constructed pursuant to a county permit issued to petitioner.

The county and intervenor (respondents) argue that BCDC 53.305 allows a nonconforming use to continue regardless of changes in ownership or occupancy. Respondents contend this means a nonconforming use runs with the land. According to respondents, it is intervenor, as the property owner, which "owns" the existing nonconforming fuel farm use. Respondents observe that petitioner does not dispute that the existing fuel farm use was lawfully established and, therefore, contend the county has authority to approve an expansion of the fuel farm use.

We agree with respondents that a nonconforming use is tied to the land on which it was lawfully established. Portland City Temple v. Clackamas County, 11 Or LUBA 70, 75 (1984). Under BCDC 53.305 and ORS 215.130(5), from which the county's authority to regulate nonconforming uses is

derived, changes in the ownership or occupancy of a nonconforming use must be allowed. For example, should petitioner's lease of the existing fuel storage facility expire, another tenant could continue that nonconforming use. Thus, we view the existing nonconforming fuel farm use at issue in this case to belong to intervenor, the property owner. We see no reason why a second tenant, with the permission of the property owner, cannot apply to the county for permission to expand that nonconforming use.[2]

The first assignment of error is denied.

**SECOND ASSIGNMENT OF ERROR**

> "Benton County violated the terms of its own ordinance and state statute in concluding that Avia was reasonably continuing the use when Avia had no prior lawful existing use and the permit doubled the existing size of the prior nonconforming use owned by Bertea."

Under this assignment of error, petitioner argues that even if there were a lawful nonconforming use which could be expanded pursuant to Avia's application, Avia's proposal would not "reasonably continue" the nonconforming use, as required by ORS 215.130(5) and BCDC 53.315. Petitioner argues that Avia cannot "reasonably continue" Bertea's above ground fuel storage use. Petitioner also argues that Avia's proposed doubling of above ground fuel storage does not

[2]There is no dispute that in this case the property owner, intervenor, endorsed the subject application. There is also no argument made that under the BCDC, Avia lacked authority to apply for the expansion of the nonconforming use.

"reasonably continue" the existing use.

ORS 215.130(5) and (9) provide, in relevant 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. * * *"
>
> "(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."

BCDC 53.315(1) provides, in relevant part:

> "Alteration or change of a nonconforming use may be permitted if the alteration or change reasonably continues the use and if the alteration or change of the use has no greater adverse impact on the neighborhood than did the existing use at the time it became nonconforming. * * * The [county] may impose conditions of approval pursuant to [BCDC] 53.220 in order to reduce the impact of the alteration on the neighborhood."

As explained supra, the existing nonconforming use at issue in this case is the fuel farm owned by intervenor and presently occupied by one fuel storage facility operated by petitioner. Avia proposes to alter that existing use by adding a second fuel storage facility to the fuel farm. Adding an additional fuel storage facility to a fuel farm is a type of alteration which reasonably continues the existing nonconforming fuel farm use. Compare City of Corvallis v.

Benton County, 16 Or LUBA 488, 496 (1988) (a hardware/appliance store with lunch counter does not reasonably continue a nonconforming tavern use).

The next question is whether the magnitude of the proposed alteration, i.e. doubling the existing fuel storage capacity of the fuel farm, means that the proposed alteration does not reasonably continue the use. Prior to a 1979 amendment, ORS 215.130(4) (now (5)) provided that alteration of a nonconforming use "may be permitted when necessary to reasonably continue the use without increase * * *." In Gibson v. Deschutes County, 17 Or LUBA 692, 702 (1989), we explained that the 1979 amendments to ORS 215.130 replaced the previous general prohibition against "increase" in nonconforming uses with the present requirement that any change in a nonconforming use result in no greater adverse impacts on the neighborhood. We concluded that a proposed expansion of a nonconforming use could be considered a permissible alteration, so long as it did not violate the "no greater adverse impacts" standard.

BCDC 53.315(1), quoted above, reflects the current language of ORS 215.130(5) and (9) regarding alteration of nonconforming uses. Under that language, if a proposed alteration is of a type that "reasonably continues" the existing use, it may be allowed so long as it will have no greater adverse impact on the surrounding neighborhood than the existing nonconforming use.

The second assignment of error is denied.

**THIRD ASSIGNMENT OF ERROR**

> "[Benton County] violated a state statute and its own ordinance in concluding that Avia's proposal would have no greater adverse impact on the neighborhood."

Under this assignment of error, petitioner challenges (1) the adequacy of the findings to demonstrate compliance with the "no greater adverse impact on the neighborhood" requirement of ORS 215.130(9) and BCDC 53.315(1), quoted supra, and (2) the evidentiary support for those findings. Petitioner argues the findings inadequately address two issues which it raised below, danger of fire and explosion and impact of fuel spills.

Respondents rely in part on arguments that above ground fuel storage has fewer adverse impacts than below ground fuel storage, which would be allowed in the Approach Safety Zone under the BCDC.[3] However, even if respondents are right in this regard,[4] it is irrelevant to the issue before the county in approving the subject application for expansion of a nonconforming use. In order to comply with ORS 215.130(9) and BCDC 53.315(1), what the county must determine is that the addition of another fuel storage

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[3]Respondents also point out that intervenor has amended its Airport Master Plan to allow above ground fuel storage.

[4]We note that if the county believes above ground fuel storage to be preferable to below ground storage, it may amend the BCDC to delete the prohibition against above ground storage in the Approach Safety Zone.

facility with two 12,000 above ground tanks, at the proposed location, will have no greater adverse impact than the existing fuel storage facility which became nonconforming when the BCDC was amended. City of Corvallis v. Benton County, 16 Or LUBA at 497.

**A. Danger of Fire and Explosion**

Petitioner argues that it raised the issue of fire and explosion danger below. According to petitioner, what ORS 215.130(9) and BCDC 53.315(1) require is that the county determine the danger of fire and explosion posed by the existing nonconforming use, and the danger posed with the addition of the proposed Avia facility, and compare the two to see if the altered nonconforming use would have a greater adverse impact. Petitioner contends that although the county's findings recognize the potential for fire and explosion as the major impact of the proposed use, they improperly attempt to avoid this issue by stating that such events will never occur.

Petitioner argues the record shows that the proposed fuel tanks will be at least 50 feet closer to the adjacent rye grass field and within 20 feet of the plowed "no burn" strip surrounding that field. Supplemental Record 1. Petitioner also argues there is evidence in the record that the county has no idea of the amount of damage that would occur from a fire or explosion at the current or proposed facility. Record 28. Petitioner notes the county staff

report states that the proposed facility would add to the danger of fire and explosion. Record 45. With regard to approval of the proposal by the Federal Aviation Administration (FAA), petitioner contends the record does not show what the FAA approved or what the applicable standards were. Record 62. With regard to alleged approval by the City Fire Marshal, petitioner argues there is no written approval in the record, and that the City Fire Marshal's testimony at the hearing says nothing about the impacts of placing above ground fuel tanks closer to the location of field burning.

The relevant county findings provide:

> "* * * The proposed tanks will be some 50 feet closer to the [rye grass] field than the existing tanks. The record does not quantify the risk of field burning to the existing tanks, but we presume it is a safe arrangement as there are no reported incidents to review. Whatever risk that exists because of field burning for grass seed planting near the airport can be controlled by the City of Corvallis, which owns the nearest field. [The a]irport manager * * * told the Board [of Commissioners] that the City is doing less field burning because of visibility problems. In addition, there are simple ways to lengthen the distance between the tank farm and the field burning without significantly altering the current land use. We believe the City will not allow that field operation to increase whatever safety risk may now exist." Record 13-14.

> "The neighborhood includes the Corvallis Municipal Airport and adjacent fields. There has been virtually no adverse impact of the existing tanks on the neighborhood. The main impact of the tank farm, as it exists or after expansion, is the potential for fire or explosion. There may never

> be an adverse impact on the neighborhood. * * * The existing and proposed tanks are in plain view of airport personnel; leaks and spills may be spotted easily in the existing tanks and the proposed tanks. As long as proper safeguards are required to the satisfaction of federal, state and local airport and safety officials, the adverse impact can be expected to remain no greater than that which existed when the Bertea Aviation tanks became nonconforming. Given the City's experience with an underground toxic spill at the site, and its desire to change the [City] Master Plan to allow above ground tanks, the Board [of Commissioners] finds that the expansion of the nonconforming use has no greater adverse impact on the neighborhood." Record 16-17.

Nonconforming uses are not favored in Oregon law. Michael v. Clackamas County, 9 Or LUBA 70, 75 (1983). A nonconforming use is by definition contrary to provisions of a local government's comprehensive plan and land use regulations. ORS 215.130(5) and (9) and BCDC 53.315(1) provide a limited authorization for counties to approve the expansion of nonconforming uses which are contrary to provisions of their plans and land use regulations and, therefore, must be construed narrowly. Scott v. Josephine County, __ Or LUBA ___ (LUBA No. 91-069, September 20, 1991), slip op 8-9; City of Corvallis v. Benton County, 16 Or LUBA at 498. Also, the requirement that the alteration of the nonconforming use have "no greater adverse impact" on the surrounding neighborhood is an extremely strict standard in itself.

The county's findings recognize that the main impact of the proposed expansion of the fuel farm is "the potential

for fire or explosion." Record 17. The findings also recognize that the proposed expansion will double the amount of flammable fuel stored above ground in the Approach Safety Zone, adding two 12,000 gallon above ground tanks and a containment structure to the existing fuel farm. Under the approved expansion, the fuel storage facility will be significantly closer to a field which is periodically burned. Record 13. In such circumstances, the proposed expansion will increase the potential for fire and explosion as a matter of law. We believe this constitutes a "greater adverse impact on the neighborhood" within the meaning of ORS 215.130(9) and BCDC 53.315(1) and, therefore, we reverse the county's decision.

This subassignment of error is sustained.

**B. Fuel Spills**

Petitioner argues that the design of the proposed Avia fuel storage facility will result in a greater risk of spilled fuel creating environmental damage.

Because our determination under the previous subassignment of error requires that we reverse the county's decision, no purpose would be served by considering this subassignment further.

The third assignment of error is sustained, in part.

**FOURTH ASSIGNMENT OF ERROR**

> "Benton County violated the state law when it placed the appellant Bertea with the burden of going forward and failed to certify that Avia had

the burden of proof and going forward."

Petitioner contends that the county improperly shifted the burden of proof in the de novo proceeding before the board of county commissioners from the applicant (Avia) to the appellant (Bertea). Petitioner also argues the county improperly failed to address this issue in its findings after petitioner had raised it below.

We have previously reviewed a claim that the BCDC provisions governing procedures for de novo review of quasi-judicial land use decisions by the board of commissioners impermissibly shift the burden of proof from the applicant to an appellant, and found nothing wrong with the county's regulations. 1000 Friends v. Benton County, ___ Or LUBA ___ (LUBA No. 90-066, September 14, 1990), slip op 10-13. Petitioner does not contend the county failed to comply with applicable regulations. Further, petitioner cites nothing in the decision which indicates the county placed any improper burden on petitioner.

The fourth assignment of error is denied.

The county's decision is reversed.[5]

[5]The fifth and sixth assignments of error raise no issues in addition to those already dealt with under the first through third assignments of error.