

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

DONALD WARNER and SHIRLEY WARNER,

)

Petitioners,

vs.

LUBA No. 92-141

CLACKAMAS COUNTY,

Respondent,

FINAL OPINION
AND ORDER

and

VIOLA-FISCHER'S MILL CPO,

Intervenor-Respondent.

)

Appeal from Clackamas County.

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

Michael E. Judd, Chief Assistant County Counsel, Oregon City, filed a response brief and argued on behalf of respondent.

Jacqueline Tommas, Estacada, filed a response brief and argued on behalf of intervenor-respondent.

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

AFFIRMED

03/17/93

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

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county order determining the
4 existence of a nonconforming personal use airport and
5 limiting the scope of that nonconforming use.

6 **MOTION TO INTERVENE**

7 Viola-Fischer's Mill CPO moves to intervene on the side
8 of respondent in this appeal proceeding. There is no
9 objection to the motion, and it is allowed.

10 **FACTS**

11 The subject property is 37.98 acres in size and is
12 zoned General Timber District (GTD). Restrictive zoning was
13 first applied to the subject property in 1973. Prior to
14 1973, petitioners kept a Cessna aircraft in a barn, and
15 maintained a grass landing strip, on the subject property.
16 Prior to 1973, petitioners used this grass airstrip, in
17 conjunction with the Cessna aircraft, for recreational
18 purposes. Petitioners sold the Cessna aircraft in August,
19 1989.

20 In November, 1990, petitioners' son began using the
21 airstrip in conjunction with his "ultra light" aircraft.
22 Friends of petitioners' son also used the airstrip for other
23 ultra light aircraft flights, at least once, in December,
24 1990. Soon thereafter, petitioners' son began construction
25 of a hangar to accommodate three ultra light aircraft, on
26 the subject property. During construction of the hangar,

1 the county advised petitioners that local approval was
2 required to build the hangar. Consequently, in January,
3 1991, petitioners filed an application for expansion of a
4 nonconforming personal use airport, including permission to
5 build the hangar for the ultra light aircraft. The county
6 hearings officer denied petitioners' application and
7 determined that no nonconforming use had been established on
8 the subject property, or if a nonconforming airport use had
9 been established, it had been discontinued for a period in
10 excess of 12 months and was, therefore, lost.

11 In Warner v. Clackamas County, 22 Or LUBA 220 (1991)
12 (Warner I), this Board remanded the hearings officer's
13 decision on the basis that the county misconstrued the law
14 relating to the existence of nonconforming uses.¹ The
15 county appealed to the Court of Appeals, and the Court of
16 Appeals affirmed our decision. Warner v. Clackamas County,
17 111 Or App 11, 824 P2d 423 (1992).

18 On remand, the county hearings officer conducted public
19 hearings. The hearings officer determined that petitioners
20 established the existence of a nonconforming personal use
21 airport on the subject property, but that the scope of that
22 nonconforming use is quite limited. Petitioners filed this
23 appeal challenging the hearings officer's decision with

¹The county had erroneously determined that a nonconforming use could not exist where the nature of the alleged nonconforming use was intermittent, recreational and did not involve a substantial investment of money.

1 regard to the limited scope of the nonconforming personal
2 use airport.

3 **ASSIGNMENT OF ERROR**

4 "The respondent's conclusion, that the scope of
5 petitioners' personal use airport was limited to
6 infrequent landings by guests, not to exceed [one]
7 per year, was not based on substantial evidence in
8 the record as a whole."

9 The challenged decision determines a nonconforming
10 personal airport use exists on the subject property.
11 However, it also determines the scope of that nonconforming
12 use is limited to an average of one, four-hour flight per
13 year by petitioner Don Warner, and one landing by
14 petitioners' guests per year.²

15 Specifically the challenged decision determines the
16 following:

17 "* * * The frequency of flights was intermittent,
18 but averaged one, approximately 4-hour flight per
19 year by Don Warner, and infrequent (not more than
20 once per year) landings by guests.

21 "The frequency of flights was determined through
22 review of Don Warner's flight logs and,
23 especially, the engine log * * * which show that
24 Mr. Warner's aircraft was flown approximately 12
25 hours between September 1, 1971 to October 11,
26 1974, and approximately 15 hours between October
27 11, 1974 through May 3, 1978. That information
28 together with the testimony of [petitioners'
29 attorney] that the typical flight averaged
30 approximately 4 hours duration, limits the use

²The challenged decision also denies petitioners' request for an expansion of the nonconforming personal use airport, and this aspect of the decision is not challenged in this appeal.

1 established by the applicants to one,
2 approximately 4-hour flight per year. That
3 determination is consistent with the testimony of
4 surrounding residents, as to the very limited
5 nature of the flight activity from the subject
6 property." Record 3.

7 "[T]here is a protected nonconforming use as a
8 personal use airport * * *. The nature and scope
9 of that protected nonconforming use is determined
10 to be a personal use airport for * * * use by Don
11 Warner for infrequent and intermittent flights of
12 his fixed winged aircraft, averaging one 4-hour
13 flight per year, from a grass strip on the subject
14 property, utilizing a barn for aircraft storage,
15 with infrequent (not more than one per year)
16 landings by guests * * *." Record 5.

17 Petitioners contend the county's determinations that
18 the nonconforming use is limited to one four hour flight per
19 year by petitioners and one guest landing per year, are not
20 supported by substantial evidence in the whole record.
21 Petitioners state there is no evidence in the record
22 concerning the precise number of flights associated with the
23 nonconforming personal use airport. To support their
24 position that the evidence does not support the county's
25 specific limitations on the flights to and from the
26 property, petitioners cite the statement of their legal
27 counsel that:

28 "It is impossible to establish, I believe, with
29 any degree of evidentiary certainty the exact
30 number of other flights besides those of the
31 Warners in and out of the airfield." Remand

1 Record 38.³

2 Further, petitioners cite a portion of a letter from Ms.
3 Satre stating:

4 "* * * there were many planes visiting the
5 airfield on many occasions." Remand Record 113.

6 Finally, petitioners cite a cryptic handwritten note by a
7 member of the county planning staff stating that:

8 "Period of 9 months w/o based aircraft prior to
9 Dec. 3'90 - Has had guests in also during that
10 time period." Original Record 201.

11 In this case, the hearings officer had little evidence
12 from which to make a decision concerning the scope of the
13 nonconforming use. Petitioners, the local applicants,
14 presented vague evidence below concerning the scope of the
15 nonconforming use. However, even where evidence is
16 imprecise, a reasonable person may be able to draw an
17 inference concerning what that evidence means. As the
18 applicants below, petitioners had the burden to produce
19 evidence from which the county could determine the scope of
20 the nonconforming use. They presented extremely nonspecific
21 information about the number of flights from the subject
22 property. In so doing, petitioners ran the risk that
23 reasonable people, including the local decision maker, would
24 differ about what their evidence established.

³We refer to the record of the proceedings leading to the challenged decision as Remand Record. We refer to the record of proceedings of the local proceedings culminating in Warner I, as Original Record.

1 From the above quoted evidence, and other evidence in
2 the record, a reasonable decision maker could infer that the
3 scope of the nonconforming use is limited in the way
4 described by the hearings officer. From the limited
5 evidence in the record, the hearings officer made a
6 determination about the number of flights from the subject
7 property that petitioners now contend they disagree with.
8 However, during the final hearing below, the hearings
9 officer engaged in a dialogue with one of the petitioners,
10 who confirmed that the hearings officer had arrived at a
11 fairly accurate assessment of the scope of the nonconforming
12 personal use airport. A portion of this dialogue follows:

13 "Warner [T]he question that I have primarily is
14 * * * I think you said * * * that I have
15 one hour. * * * How did you interpret
16 that from my records is my question?

17 "[County] I was required, as a result of the LUBA
18 remand in this matter, to determine the
19 nature and scope of a pre-existing
20 nonconforming use * * * and as I
21 indicated [at the last public hearing]
22 my review of the record indicated that
23 you had established a personal use
24 airport. Of frequency of flights, I
25 determined to be one four-hour flight
26 per year by you, and infrequent landings
27 by guests, and the basis for that was
28 the compilation of * * * your personal
29 engine logs that were included within
30 the record which showed the number of
31 hours that both you had flown and the
32 number of hours that were logged on the
33 engine since the date of restrictive
34 zoning, and they also included testimony
35 that a typical flight was roughly four
36 hours. * * *

1 "Warner Well, that's pretty accurate.

2 "[County] The total number of hours on your flight
3 log and the total number of hours on
4 that engine that period of time from the
5 date of zoning until * * * roughly the
6 time those records were no longer
7 available averaged out to be one
8 four-hour flight per year approximately.

9 "Warner Well, that's okay. * * *

10 "[County] * * * What I have determined and what
11 the written decision will reflect is
12 that you have an established and legally
13 protected nonconforming use to operate a
14 private strip from your property, and
15 that the use or scope or nature of that
16 use includes an average of one four-hour
17 flight per year together with
18 occasional, which the record would
19 reflect not more than one or so per
20 year, landings by guests, and as far as
21 I can determine that is the extent of
22 the use that was established at the date
23 of restrictive zoning.

24 "Warner Okay.

25 "* * * * *" Record 10-11.

26 Petitioners had the burden of providing an evidentiary
27 basis to enable the county to determine the scope of their
28 nonconforming personal use airport. See Adams v. Jackson
29 County, 20 Or LUBA 398, 401 (1991); Forest Park Estate v.
30 Multnomah County, 20 Or LUBA 319, 341 (1990). While the
31 evidence petitioners presented below does not specifically
32 identify the scope of the nonconforming personal airport
33 use, it establishes an evidentiary basis from which a
34 reasonable decisionmaker could conclude that the use is

1 limited as the hearings officer determined it was. We
2 conclude the hearings officer's decision concerning the
3 scope of the nonconforming personal airport use is supported
4 by substantial evidence in the whole record.⁴

5 Petitioners' assignment of error is denied.

6 The county's decision is affirmed.

⁴We do not mean to suggest that the level of precision in the hearings officer's decision is required generally in determining the scope of nonconforming uses or was required by the evidence in this case.