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

DARRELL SPURGIN,)
)
Petitioner,)
)
vs.)
)
JOSEPHINE COUNTY,)
)
Respondent,)
)
and)
)
ROBERT BLEADON and BILLIEBOB, INC.,)
)
Intervenors-Respondent.)

LUBA No. 94-087
FINAL OPINION
AND ORDER

Appeal from Josephine County.

Daniel F. Hughes, Grants Pass, filed the petition for review and argued on behalf of petitioner. With him on the brief was Brown, Hughes, Bird, Lane & Rote.

No appearance by respondent.

Duane Wm. Schultz, Grants Pass, filed the response brief and argued on behalf of intervenors-respondent.

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

REMANDED 12/08/94

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county determination that a
4 personal use airstrip may continue as a nonconforming use.

5 **MOTION TO INTERVENE**

6 Robert Bleadon, the applicant below, and Billiebob,
7 Inc., the property owner, move to intervene on the side of
8 respondent. There is no opposition to the motion, and it is
9 allowed.

10 **FACTS**

11 A personal use airstrip has been operated on a portion
12 of the subject Forest Commercial-zoned 154 acres since 1967.
13 On May 13, 1985, the Forest Commercial zone was amended such
14 that only resource-related personal use airstrips are
15 allowed. The subject airstrip is not a resource-related
16 personal use airstrip. Under current zoning, the subject
17 personal use airstrip may only operate on the subject Forest
18 Commercial zoned property as a nonconforming use.

19 The applicant sought a "determination that the landing
20 strip and existing hanger buildings are valid non-conforming
21 structures," and a "determination of the nature and extent
22 of use to which the structures may be put * * *." Record
23 13.

24 The planning director referred the matter to three
25 special fact-finders to investigate the matter and make a
26 recommendation to him. The fact-finders provided notice to

1 property owners within a two-mile radius of the airstrip and
2 held a hearing concerning the request. The fact-finders
3 forwarded a written recommendation to the planning director
4 on January 5, 1993.

5 The planning director adopted a written decision on
6 January 6, 1993:

7 "The Planning Director concluded a personal use
8 airstrip and 1 hanger building (1971 structure)
9 lawfully existed on the property as of the date
10 the use became non-conforming (May 13, 1985). In
11 addition, the nature and extent of the use was by
12 light general aviation aircraft only, and
13 consisted of no more than 300 annual flights (of
14 which no more than 75 flights occurred in any
15 month, or 20 flights in any week), and there were
16 no more than 3 airplanes based at the airport.
17 The Planning Director also concluded no commercial
18 or group use of the airport is permitted." Record
19 14.

20 The planning director's decision was appealed by both
21 the applicant and opponents. The planning commission
22 considered the appeal on the record and, thereafter, issued
23 a decision modifying the planning director's decision as
24 follows:

25 "[1] Clarified reference to OAR [Chapter 738,
26 Division 20] by making specific citation to
27 OAR 738-20-015(1)(c) and (2)(a), and other
28 applicable provisions of [OAR] Chapter 738,
29 Division 20;

30 "[2] Deleted the term 'light general aviation
31 aircraft';

32 "[3] Changed the number of aircraft that may be
33 based at the airstrip from 3 to 2[;]

1 "[4] Modified the frequency of use by deleting any
2 reference to a specific number of flights; *
3 * *

4 "[5] Determined there was insufficient evidence in
5 the record to substantiate 300 flights per
6 year[; and]

7 "[6] Determined the frequency of use shall be in
8 conformance with the definitions and
9 provisions of OAR 738-20-015(2)(a) and other
10 relevant provisions in the same Chapter and
11 Division." Record 14-15.

12 Both petitioner and the applicant appealed the planning
13 commission decision to the Josephine County Board of County
14 Commissioners. The appeals were consolidated and the board
15 of commissioners conducted a hearing on February 2, 1994.
16 On February 23, 1994, the board of commissioners determined
17 the planning director and planning commission erred by not
18 considering evidence that the nonconforming use was
19 discontinued. Following notice, the board of commissioners
20 conducted an evidentiary hearing on March 30, 1994, at which
21 it accepted evidence concerning discontinuance of the
22 disputed airstrip. The board of commissioners' written
23 decision was signed May 4, 1994, and states:

24 "1. A lawful non-conforming personal use airstrip
25 exists * * *.

26 "2. The airstrip shall be limited in use
27 according to the definitions and other
28 provisions of Oregon Administrative Rules
29 [Chapter 738, Division 20].

30 "3. The 1971 hanger is the only building
31 authorized as a lawful non-conforming use
32 structure." Record 28.

1 **INTRODUCTION**

2 In determining whether an existing use of property has
3 a right to continue as a nonconforming use, there generally
4 are four inquiries a local government must make. First, did
5 the use lawfully exist at the time the zoning which first
6 prohibited the use was applied? Second, what was the nature
7 and extent of the use at the time it became nonconforming?
8 Third, if the use lawfully existed at the time restrictive
9 zoning was applied, has the use since been discontinued or
10 abandoned such that the right to continue as a nonconforming
11 use was lost? Finally, if the nature and extent of the
12 present use represents an alteration of the use in existence
13 at the time the use became nonconforming, do those
14 alterations comply with the standards governing alteration
15 of nonconforming uses?¹

¹ORS 215.130(5) through (9) provide as follows:

"(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. 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.

"(6) Restoration or replacement of any use described in subsection (5) of this section may be permitted when restoration is made necessary by fire, or other casualty or natural disaster. Restoration or replacement shall be commenced within one year from the occurrence of the fire, casualty or natural disaster.

"(7) Any use described in subsection (5) of this section may not be resumed after a period of interruption or

1 As explained below, we agree with petitioner that the
2 county erred in answering the second of the above inquires.
3 Because the county failed to adequately establish the nature
4 and extent of the nonconforming use, we do not address a
5 number of arguments advanced by petitioner concerning the
6 third and fourth inquiries.²

7 **FIRST ASSIGNMENT OF ERROR**

8 Petitioner first contends the county erred by failing
9 to appoint a hearings officer to make the determination
10 concerning the challenged nonconforming use.

abandonment unless the resumed use conforms with the requirements of zoning ordinances or regulations applicable at the time of the proposed resumption.

"(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, for the restoration or replacement of a use under subsection (6) of this section or for the resumption of a use under subsection (7) of this section shall be subject to the provisions of ORS 215.416.

"(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."

²Throughout the petition for review, petitioner alleges the county erred in considering, or not considering, their contentions that any nonconforming use rights were abandoned after May 13, 1985 when nonresource-related personal use airports were first prohibited in the Forest Conservation zone. Petitioner also argues the present airstrip use represents an alteration of whatever nonconforming use may have existed on May 13, 1985, and statutory requirements for such alterations have not been shown to be satisfied.

1 Josephine County Zoning Ordinance (JCZO) 15.204
2 explicitly provides that the "County Hearings Officer" must
3 approve "alteration or reconstruction" of a nonconforming
4 use. In approving alterations or reconstruction of a
5 nonconforming use, the hearings officer is required to apply
6 certain standards included in that section. However, as the
7 board of commissioners explains in its decision, JCZO 15.204
8 and the other JCZO sections specifically addressing
9 nonconforming uses do not specifically require that the
10 County Hearings Officer make the initial determination
11 concerning whether a nonconforming use exists and the nature
12 and extent of that nonconforming use at the time the use
13 became nonconforming. The challenged decision interprets
14 JCZO 15.201 as sufficient to grant the planning director
15 authority to make this initial determination.³

16 We cannot say the board of commissioners was clearly
17 wrong in interpreting the JCZO to grant the planning
18 director authority to make the initial determinations
19 concerning whether a nonconforming use existed on the date
20 the restrictive zoning was first applied and nature and
21 extent of any such nonconforming use. See ORS 197.829;

³JCZO 15.201 provides:

"The County Planning Director shall have the authority and duty to administer and interpret the provisions of this Ordinance. An appeal from a ruling of the County Planning Director shall be to the Planning Commission or Hearings Officer, as appropriate."

1 Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992);
2 Goose Hollow Foothills League v. City of Portland, 117 Or
3 App 211, 843 P2d 992 (1992); West v. Clackamas County, 116
4 Or App 89, 840 P2d 1354 (1992); Cope v. City of Cannon
5 Beach, 115 Or App 11, 836 P2d 775 (1992), aff'd 317 Or 339
6 (1993).

7 Petitioner also argues the county's failure to utilize
8 a county hearings officer in this matter violates ORS
9 215.416.⁴ However, we determine above that the county
10 properly interpreted its code to allow the planning director
11 to make the initial determinations concerning the existence
12 and nature and scope of the nonconforming use. The fact-
13 finders appointed by the planning director conducted
14 evidentiary hearings. The fact-finders' recommendation led
15 to a decision by the planning director, which was appealed
16 to the planning commission and the board of county
17 commissioners. Petitioner participated throughout this
18 process. The board of commissioners allowed a limited
19 opportunity for an additional evidentiary hearing.
20 Petitioner does not explain how he believes this process
21 violated ORS 215.416, and we do not see that it does. In
22 addition, to the extent petitioner alleges procedural error,

⁴ORS 215.416 has thirteen subsections and establishes a number of requirements concerning applications for permits. The only subsection specifically cited by petitioner is subsection 3 which, with one exception inapplicable here, requires "the hearings officer shall hold at least one public hearing on the application."

1 petitioner does not show his substantial rights were
2 prejudiced by the county's failure to follow one or more of
3 the procedural requirements of ORS 215.416.⁵ ORS
4 197.835(7)(a)(B).

5 The first assignment of error is denied.

6 **THIRD ASSIGNMENT OF ERROR**

7 The burden of showing an alleged nonconforming use was
8 lawfully established at the time it became nonconforming
9 rests with the proponent. Lane County v. Besset, 46 Or App
10 319, 323, 612 P2d 297 (1980); Sabin v. Clackamas County, 20
11 Or LUBA 23, 30 (1990). Petitioner suggests there is
12 evidence the disputed airstrip was not used for two years
13 prior to the date the zoning was changed to preclude
14 nonresource-related airports in the Forest Commercial zone.
15 For that reason, petitioner contends there was no personal
16 use airstrip in existence on the date the zoning was changed
17 and there can be no nonconforming use right to operate a
18 personal use airstrip on the subject property.

19 As we explain in our discussion of the fourth
20 assignment of error, infra, even sporadic and intermittent
21 uses may qualify as a nonconforming use. Therefore, even if
22 the disputed airstrip was not used for two years prior to
23 the relevant 1985 change in the JCZO, that would not

⁵Petitioner claims the three fact-finders were partial to aviation, but does not establish that such was the case or explain how that may have prejudiced his substantial rights.

1 necessarily establish that the airstrip use did not exist on
2 that date. In any event, intervenor cites evidence in the
3 record that the airstrip was used between 1983 and 1985, and
4 it is evidence a reasonable person could believe.

5 We conclude the county's determination that there is a
6 nonconforming personal use airstrip on the subject property
7 is supported by substantial evidence. The nature and scope
8 of that nonconforming use is a separate question.

9 The third assignment of error is denied.

10 **FOURTH ASSIGNMENT OF ERROR**

11 After it is determined that a nonconforming use exists,
12 the nature and extent of the nonconforming use must be
13 identified. See Hendgen v. Clackamas County, 23 Or LUBA
14 285, 287 rev'd on other grounds 115 Or App 117 (1992);
15 Warner v. Clackamas County, 22 Or LUBA 220, 227 (1991),
16 aff'd 111 Or App 11 (1992); Smith v. Lane County, 21 Or LUBA
17 228, 237 (1991); City of Corvallis v. Benton County, 16 Or
18 LUBA 488, 497 (1988). This requirement is important because
19 the protected right to continue a nonconforming use is a
20 right to continue the nature and scope of use that existed
21 at the time the use became nonconforming.

22 As is explained in some detail in Polk County v.
23 Martin, 292 Or 69, 636 P2d 952 (1981), a sporadic and
24 intermittent use may qualify as a nonconforming use. See
25 Coonse v. Crook County, 22 Or LUBA 138, 147 (1991). As the
26 airstrips at issue in this case and in Warner v. Clackamas

1 County, supra, demonstrate, it may be difficult to describe
2 a sporadic and intermittent nonconforming use in a way that
3 is supported by the evidence in the record. However, while
4 the task of describing the scope and nature of a sporadic
5 and intermittent nonconforming use may be difficult, it may
6 not be avoided.

7 The county has some flexibility in the manner and
8 precision with which it describes the scope and nature of a
9 nonconforming use. However, the county may not, by means of
10 an imprecise description of the scope and nature of the
11 nonconforming use, authorize de facto alteration or
12 expansion of the nonconforming use.⁶ At a minimum, the
13 description of the scope and nature of the nonconforming use
14 must be sufficient to avoid improperly limiting the right to
15 continue that use or improperly allowing an alteration or
16 expansion of the nonconforming use without subjecting the
17 alteration or expansion to any standards which restrict
18 alterations or expansions.

19 The record includes a chart prepared by the planning
20 staff summarizing evidence concerning the number of flights

⁶The right to alter a nonconforming use, to the extent allowed, is subject to statutory standards that limit alterations. See ORS 215.130(5), (8) and (9), quoted supra at n 1. An alteration of a nonconforming use may include expansion, provided the "no greater adverse impacts" standard of ORS 215.130(9) is satisfied. Gibson v. Deschutes County, 17 Or LUBA 692, 702 (1989). JCZO 15.204 and 15.206 restrict alteration and expansion of nonconforming uses.

1 at the disputed airstrip.⁷ The challenged decision explains
2 that this chart accurately summarizes the number of flights
3 to and from the airstrip "supported by specific numbers."
4 Record 20. The board of commissioners' decision goes on to
5 reject the planning commission's position that the number of
6 flights shown on the chart should be increased by 25%, based
7 on less specific evidence. However, the board of
8 commissioners acknowledges there is less specific evidence
9 in the record that indicates the disputed airstrip
10 accommodated additional flights during this period.

11 In concluding that the disputed personal use airstrip
12 qualifies as a nonconforming use and describing the scope
13 and nature of that nonconforming use, the county explains:

14 "We understand it is our responsibility to
15 determine the nature and extent airstrip uses and
16 structures are permitted to continue, and that the
17 non-conforming use rule limits such uses and

⁷That chart shows the following total number of flights for the years shown:

<u>Year</u>	<u>Number of flights</u>	<u>Year</u>	<u>Number of flights</u>
1968	38	1975	18
1969	98	1976	19
1970	52	1977	1
1971	81	1978	1
1972	84	1979	1
1973	84	1980	3
1974	60	1981-83	52/year

1 structures to those that existed at the time the
2 airstrip became unlawful. * * * Opponents say the
3 [county] must count the actual number of flights
4 to and from the airstrip during critical times.

5 "We conclude the frequency of lawful use is the
6 test, and frequency is measured by both actual and
7 authorized uses. In this case Oregon
8 Administrative Rule 738-20-015 provides two
9 definitions of Personal Use Airports that measure
10 the nature and extent of the use. The two
11 definitions are:

12 "Personal Use Airport': A designated
13 area where all aircraft must be owned or
14 controlled by the owner of the airport
15 and non-based aircraft must have the
16 permission of the airport owner to land.
17 [OAR 738-20-015(1)(c).]

18 "Personal Use Airport': As used in
19 this rule means an airstrip restricted,
20 except for aircraft emergencies, to use
21 by the owner and, on an infrequent and
22 occasional basis, by his invited guests,
23 and to commercial activities in
24 connection with agricultural operations
25 only. No aircraft may be based on a
26 personal-use airport other than those
27 owned or controlled by the owner of the
28 airport. Exceptions to the activities
29 permitted under this definition may be
30 granted through waiver action by the
31 Aeronautics Administrator in specific
32 instances. [OAR 738-20-015(2)(a).]

33 "We hereby adopt these definitions as the method
34 of measuring the scope of the use. The frequency
35 of use shall be unlimited by the owner. Invited
36 guests shall use the airport on an infrequent and
37 occasional basis only. All aircraft based at the
38 airport shall be owned or controlled by the owner.
39 There shall be no commercial use of the airstrip
40 other than those in conjunction with agricultural
41 activities.

1 "We make this finding in light of the need to
2 enforce this limitation against future use of the
3 airstrip. We find the monitoring of specific
4 numbers of flights to be an ineffective--if not
5 impossible--method of enforcing non-conforming use
6 limitations, and for this reason is inappropriate.
7 We believe the OAR definitions, in the historical
8 context of statewide administration, provide a
9 much better method of measuring the nature and
10 extent of use for enforcement purposes."
11 (Emphasis in original, double emphasis added.)
12 Record 25.

13 The county's findings correctly recognize actual use of
14 the subject property at the time it became nonconforming is
15 important in establishing the scope and nature of the
16 nonconforming use. The findings, however, erroneously state
17 the nature and scope of the nonconforming use is also
18 governed by the use that would be authorized under the cited
19 administrative rules. Those rules permit unlimited use by
20 the owner and invited guests "on an infrequent and
21 occasional basis." Moreover, OAR 738-20-015(2)(a) provides
22 for exceptions that could allow additional flights. The
23 personal use airport described in the cited rules clearly
24 could accommodate far more flights than the evidentiary
25 record shows historically occurred at the disputed airstrip
26 before it became a nonconforming use.⁸ Therefore, the

⁸Neither do the administrative rules limit the type of aircraft that may use the subject airstrip to the same types of aircraft that were using the airstrip at the time it became nonconforming. Petitioner contends the present use of the airstrip by ultralight aircraft represents an alteration in the nonconforming use and constitutes an alteration in violation of the statutory requirement that alterations may not have "any greater adverse impact to the neighborhood." ORS 215.130(9)(a).

1 county may not use the administrative rule definitions as a
2 surrogate descriptor of the nature and scope of the
3 nonconforming use. It must develop its own description of
4 the nature and scope of the nonconforming use, based on the
5 evidence of the nature and scope of the use at the time it
6 became nonconforming.

7 In view of the historic sporadic and intermittent use
8 of the disputed airstrip, the county may not wish to
9 identify the scope and nature of the nonconforming use
10 solely in terms of a specific number of flights per year or
11 month.⁹ However, whatever means the county selects to
12 describe the scope and nature of the nonconforming airstrip,
13 it must reflect the use in existence at the time the use
14 became nonconforming. The description adopted in the
15 challenged decision clearly would allow a more intense use
16 of the airstrip than the record shows historically existed
17 on the subject property prior to the date the airstrip
18 became nonconforming.

19 The fourth assignment of error is sustained.

⁹The county states that limiting or describing the disputed airstrip in terms of specific numbers of flights is "ineffective" or "impossible." We fail to see how describing the airstrip in terms of annual number of flights or in terms of flights over a number of years with a limitation on the number of flights in a single year presents a monitoring or enforcement problem. A condition that intervenors record and report flights to the county on a monthly or annual basis does not seem impossible. Neither do we see why reviewing those reports for enforcement purposes would be impossible.

1 **SECOND ASSIGNMENT OF ERROR**

2 Petitioner contends the county erred by not considering
3 evidence that the disputed airstrip was altered after it
4 became a nonconforming use, without first demonstrating
5 compliance with statutory and JCZO standards governing such
6 alterations.

7 Until the county adequately describes the scope and
8 nature of the nonconforming use, it is impossible to
9 determine whether the current airstrip use is consistent
10 with the scope and nature of the nonconforming use or
11 represents an alteration of that nonconforming use.¹⁰

12 We do not consider the second assignment of error.

13 **FIFTH ASSIGNMENT OF ERROR**

14 Petitioner contends the county erred by concluding the
15 right to continue the subject airstrip as a nonconforming
16 use was not lost through discontinuance.¹¹

17 As all parties recognize, the historic use of the
18 subject personal use airstrip has been sporadic and
19 intermittent. The evidence in the record is conflicting on
20 the issue of discontinuance of the nonconforming use since
21 1985. However, until the county more adequately describes

¹⁰Petitioner contends that both the number of flights and the types of aircraft currently using the airstrip, particularly its use by ultralight aircraft, constitute an alteration of the nonconforming use.

¹¹JCZO 15.208 provides "[i]f a non-conforming use is discontinued from active use for a period of one year, further use of the property shall be for a conforming use."

1 the scope and nature of the sporadic and intermittent
2 nonconforming use, it is not possible to determine how to
3 apply a provision like JCZO 15.208 properly to determine
4 whether the right to continue the personal use airstrip as a
5 nonconforming use was lost, in whole or in part, through
6 discontinuation. We therefore do not consider this aspect
7 of petitioner's fifth assignment of error.

8 A final point raised by petitioner in support of this
9 assignment of error is the existence of an agreement entered
10 into between the property owner and the county, in which the
11 owner agreed not to allow flights to or from the airstrip
12 until this dispute is resolved. Petitioner contends the
13 nonconforming use right was lost because, pursuant to this
14 agreement, there were no flights for two years.

15 Intervenors cite evidence that there were flights
16 during this two year period, despite the agreement. More
17 importantly, they note the agreement specifically provided
18 that the owner's nonconforming use rights would not be lost
19 as a result of complying with the agreement while the issue
20 was resolved through appropriate county proceedings. We
21 reject petitioner's contention that nonuse of the airstrip
22 under the agreement could have the legal effect of
23 extinguishing the nonconforming use under JCZO 15.208.

24 The fifth assignment of error is denied, in part.

25 The county's decision is remanded.