BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DORIS NEHODA, GEORGE NEHODA, JIMMIE RUTH DIXSON, CARROLL DIXSON, and ELENA FLAHERTY, Petitioners, and EDWARD H. HARTER, VI FIETZ, and DOROTHY HOOTMAN, Intervenors-Petitioner, vs. COOS COUNTY, Respondent, and DUANE HAUGHT, Intervenor-Respondent.	)	LUBA No. 94-246 FINAL OPINION AND ORDER

Appeal from Coos County.

Doris Nehoda, George Nehoda, Carroll Dixson, Jimmie Dixson, and Elena Flaherty, Coos Bay, filed a petition for review. Doris Nehoda and George Nehoda argued on their own behalf.

Edward H. Harter, Coquille, filed a petition for review and argued on his own behalf.

Vi Fietz and Dorothy Hootman, Coos Bay, represented themselves.

No appearance by respondent.

Michael H. Fairchild, Portland, filed the response

brief and argued on behalf of intervenor-respondent.

SHERTON, Chief Referee, participated in the decision.

REMANDED 05/18/95

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

Petitioners appeal an order of the board of county commissioners determining that a salvaged automobile parts business and automobile wrecking facility is a valid nonconforming use and imposing certain limitations on the operation of that use.

MOTIONS TO INTERVENE

Edward H. Harter, Vi Fietz and Dorothy Hootman move to intervene in this proceeding on the side of petitioners. There is no opposition to the motions, and they are allowed.

Duane Haught, the operator of the salvaged automobile parts business and wrecking facility and owner of the subject property, moves to intervene in this proceeding on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is approximately 10 acres in size and was purchased by Jack Woodworth, intervenor-respondent's (respondent's) predecessor in interest, in August, 1974. At the present time, respondent operates a salvaged automobile parts business and automobile wrecking facility on the subject property, including an automobile shop building, an automobile crushing machine, several hundred wrecked cars

and several employees.[1] Access to the subject property is from U.S. Highway 101, via a private road.

The subject property was unzoned until July 1, 1975, when it was zoned Interim Rural Residential, 5 acre minimum (IRR-5). Neither the IRR-5 zone, nor the property's current Rural Residential, 5 acre minimum (RR-5) zone allows a salvaged automobile parts business or automobile wrecking facility.[2] What use existed on the subject property as of July 1, 1975, the date restrictive zoning was first applied, is a central dispute in this appeal.

In January, 1994, petitioners filed complaints with the county that respondent's salvaged automobile parts business and automobile wrecking facility is in violation of the Coos County Zoning and Land Development Ordinance (ZLDO). Supp. Record 92-94. On January 21, 1994, intervenor-petitioner Harter (intervenor), who was then a county code compliance officer, sent a letter to respondent stating his opinion that respondent's current operation is more intensive than the nonconforming use of the property to which respondent is entitled. Intervenor's letter directed respondent to submit, by February 11, 1994, an application for alteration of a nonconforming use or a plan for bringing the use of the

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[1]There is also a dwelling on the subject property. However, the dwelling is not at issue in this appeal.

[2]Property to the south and east of the subject property is also zoned RR-5. Property to the north and west is zoned Forest (F).

subject property into compliance with the ZLDO. Record 159-60.

On March 21, 1994, respondent submitted an application for county approval of renewal of his Division of Motor Vehicles (DMV) wrecking certificate.[3] Apparently, the county used its proceedings on this application as a forum for determining whether respondent's existing use of the property is a valid nonconforming use. After a public hearing, the planning commission issued a decision that the existing use of the property "was grandfathered at approximately 200 cars since 1975." Record 81. The planning commission also determined that in 1975, "the intensity of the business [was] generally as it exists today (including operation of a vehicle 'crusher' at the site)," so that approval for an alteration of a nonconforming use is not required. Id.

Both petitioners and respondent appealed the planning commission's decision to the board of commissioners.[4] After an evidentiary hearing on both appeals, the board of commissioners adopted the challenged decision affirming the

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[3]To lawfully operate a motor vehicle wrecking business, one must possess a wrecking certificate issued by the DMV pursuant to ORS 822.100 to 822.150. Before the DMV will issue a wrecking certificate, the applicant must obtain, and submit to the DMV, local government approval of the certificate. ORS 822.110(4) and 822.140; Bradbury v. City of Independence, 22 Or 398, 399 (1991).

[4]Respondent sought to challenge the planning commission's determination that his nonconforming use right is limited to an inventory of 200 wrecked automobiles.

planning commission's determination that respondent's existing operation is a nonconforming use, but reversed the planning commission's determination that the nonconforming use is limited to 200 wrecked cars. Rather, the board of commissioners concluded the nonconforming use is limited to an area of nine acres; limited operation of the automobile crusher on the subject property to 8:00 a.m. to 5:00 p.m. Monday through Friday; and ordered respondent to "promote the safe transportation of crushed vehicles on [the private road by either] widening the road to two lanes or providing a flagger when a load is moved to the highway." Record 56.

MOTION TO DISMISS

Respondent contends there are three reasons why petitioners' appeal is untimely and should be dismissed.

A. ORS 197.830(5)(a)

Respondent argues that in 1983, petitioners Dixson filed complaints with the county, contending that Woodworth's operation of a wrecking yard on the subject property violated the ZLDO.[5] Respondent further argues that on May 24 and June 15, 1983, the county planning department sent letters to petitioners Dixon stating that the county would not proceed with any enforcement action, because Woodworth has "established 'grandfather' rights * * *." 2d

[5]Respondent argues the complaints were made on behalf of petitioners Nehoda as well, but we note respondent does not contend petitioner Flaherty had any involvement in these 1983 events.

Supp. Record 1, 4. Therefore, according to respondent, the county decided in 1983 that the wrecking yard on the subject property is a nonconforming use and under ORS 197.830(5)(a) petitioners had to appeal that decision within three years.[6]

Petitioners do not seek to appeal a decision allegedly made by the county in 1983, they appeal an order adopted by the board of county commissioners on November 23, 1994. Petitioners' notice of intent to appeal was timely filed to challenge the county's November 23, 1994 decision.[7]

B. ORS 12.140

Respondent argues, in the alternative, that petitioners' appeal is untimely under ORS 12.140, which provides:

> "An action for any cause not otherwise provided for shall be commenced within 10 years."

ORS 12.140 applies to initiating civil proceedings in Oregon courts. It does not apply to this Board's proceedings.

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[6]ORS 197.830(3) provides that if a local government makes a land use decision without providing a hearing, a person adversely affected by that decision may appeal it to LUBA, generally within 21 days of when that person gains knowledge of the decision. ORS 197.830(5)(a) provides that, with certain exceptions, the appeal period established under ORS 197.830(3) shall not extend more than three years after the date of the decision.

[7]If respondent wishes to argue the county lacked jurisdiction to make a determination on the existence of a nonconforming use of the subject property in 1994, because it previously made a determination on the same matter in 1983, respondent should have appealed the county's decision or filed a cross petition for review. See Brentmar v. Jackson County, 27 Or LUBA 453, 456, aff'd 130 Or App 438, rev allowed 320 Or 453 (1994).

C. Laches

Respondent contends petitioners' appeal should be barred by the equitable doctrine of laches, because petitioners failed to pursue their claim diligently and in good faith since 1983. According to respondent, this cases satisfies all the elements of laches, as set out in Dillingham Corp. v. Employers Mut. Liab. Ins. Co., 503 F2d 1181, 1185 (9th Cir 1974).

This Board lacks the general equitable powers of a court. This Board's jurisdiction and scope of review are established by statute. We do not have the authority to reject an otherwise properly filed appeal on the basis of an equitable defense of laches. See Dack v. City of Canby, 17 Or LUBA 265, 275 n10 (1988).

Respondent's motion to dismiss is denied.

PETITIONERS' THIRD ASSIGNMENT OF ERROR

INTERVENOR'S FIRST AND THIRD ASSIGNMENTS OF ERROR

Petitioners and intervenor (hereafter petitioners) make several interrelated allegations of bias and procedural error.

A. Bias by Decision Makers

1. Planning Commission

Petitioners contend certain planning commission members were biased and should have recused themselves. Petitioners complain this bias was reflected in errors in the procedures followed at the planning commission hearing. Petitioners

contend the bias and errors make the planning commission's decision a nullity and, therefore, argue there was nothing for the board of commissioners to review on appeal.

To demonstrate a local government decision maker was biased, petitioners must establish the decision maker exhibited personal bias or was incapable of making a decision by applying relevant standards to the facts and argument presented. Stern v. City of Portland, 26 Or LUBA 544, 546 (1994); Schneider v. Umatilla County, 13 Or LUBA 281, 283-84 (1985). Petitioners' arguments do not meet this standard. Additionally, petitioners do not explain, and we fail to see, why any error alleged in the procedures used by the planning commission is not cured by the board of commissioners' de novo review. See Wilson Park Neigh. Assoc. v. City of Portland, 23 Or LUBA 708, 713-14 (1992); Murphey v. City of Ashland, 19 Or LUBA 182, 189-90, aff'd 103 Or App 238 (1990); Slatter v. Wallowa County, 16 Or LUBA 611, 617 (1988). Finally, petitioners offer no legal argument in support of their contention that the alleged errors make the planning commission's decision void and deprive the board of commissioners of jurisdiction to consider the local appeals.

This subassignment of error is denied.

2. Board of Commissioners

Petitioners contend the chairman of the board of commissioners was biased and should have recused himself.

Petitioners contend the chairman's bias was demonstrated during an ex parte contact he had with intervenor, then the county code compliance officer. Petitioners also contend the chairman did not base his decision on the evidence in the record, but rather on his own personal knowledge.

Under ORS 215.422(4), a communication between a member of the board of commissioners and county staff is not an ex parte contact that is required to be disclosed pursuant to ORS 215.422(3). Therefore, the fact that the chairman did not disclose the contents of his conversation with intervenor, in the local record, is not error. Intervenor described the contents of his conversation with the chairman in his brief and at oral argument. However, neither intervenor nor petitioners moved for an evidentiary hearing. Unless an evidentiary hearing is granted, this Board's review is limited to the local record. ORS 197.830(13). Nothing in the record cited by petitioners is sufficient to establish the chairman exhibited personal bias or was incapable of making a decision by applying relevant standards to the facts and argument presented. Stern v. City of Portland, supra; Schneider v. Umatilla County, supra.

This subassignment of error is denied.

B. Failure to Give Equal Consideration to Evidence

Petitioners contend the county decision makers failed to give equal consideration to certain evidence submitted by

petitioners, including aerial and other photographs, testimony by intervenor, testimony by the planning director, and certain county records.

This argument is simply a complaint that the county decision makers failed to give enough weight to certain evidence. It provides no basis for reversal or remand separate from petitioners' challenges to the evidentiary support for the county's decision, found in petitioners' second and fourth assignments of error, and intervenor's second assignment of error, addressed infra.

This subassignment of error is denied.

Petitioners' third assignment of error and intervenor's first and third assignments of error are denied.

PETITIONERS' FIRST ASSIGNMENT OF ERROR

In this assignment of error and elsewhere in their brief, petitioners contend the existing use of the subject property does not comply with a variety of comprehensive plan provisions and ZLDO provisions, other than those which specifically govern nonconforming uses. This appears to reflect a misunderstanding on petitioners' part concerning the nature of a nonconforming use. The purpose of a local government proceeding to determine the existence of a nonconforming use is to determine what use existed on the date restrictive regulations were applied. So long as that use has not been abandoned or discontinued, as provided by local ordinance, that use has a right to continue,

regardless of whether it complies with local regulations that would govern a new, conforming use.

Petitioners' first assignment of error is denied.

PETITIONERS' SECOND AND FOURTH ASSIGNMENTS OF ERROR

INTERVENOR'S SECOND ASSIGNMENT OF ERROR

Petitioners and intervenor (petitioners) challenge the county's determination that respondent's existing salvaged automobile parts business and automobile wrecking facility is a valid nonconforming use. Petitioners specifically challenge the county's determinations that (1) an automobile wrecking use existed on the subject property on July 1, 1975, (2) the use was lawfully established, (3) the use is entitled to occupy nine acres of the subject property, and (4) the use has not been altered or expanded since 1975 without required county approvals. Petitioners argue the county's findings are inadequate and are not supported by substantial evidence in the whole record.

In Spurgin v. Josephine County, ___ Or LUBA ___ (LUBA No. 94-087, December 8, 1994), slip op 4-5, we explained that in determining whether an existing use of property has a right to continue as a nonconforming use, which is what the county purported to do in this case, there generally are four inquiries a local government must make. First, was the use lawfully established at the time the zoning which first prohibited the use was applied? Second, what was the nature and extent of the use at the time it became nonconforming?

Third, if the use lawfully existed at the time restrictive zoning was applied, has the use since been discontinued or abandoned such that the right to continue as a nonconforming use was lost? Finally, if the nature and extent of the present use represents an alteration of the use in existence at the time the use became nonconforming, do those alterations comply with the standards governing alteration of nonconforming uses?[8]

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[8]ORS 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.
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> "(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.
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> "(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.
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> "(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.

The challenged decision concludes that "a salvaged auto parts business [and automobile] wrecking yard, was present on the subject property prior to July 1, 1975." Record 54-55. However, the decision does not determine whether that use was lawfully established, as is required by ORS 215.130(5) and the ZLDO definition of a nonconforming use.[9]

The challenged decision also fails to determine the nature and extent of the use that existed on July 1, 1975. This requirement is critical because the protected right to continue a nonconforming use is a right to continue the nature and extent of use that existed at the time the use became nonconforming.[10] Polk County v. Martin, 292 Or 69,

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"(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."

[9]The county's decision quotes nonconforming use provisions from both the 1975 and 1983 versions of the ZLDO, but does not interpret either or explain which set of provisions it applied in making its decision. Petitioners and respondent attach two additional sets of ZLDO nonconforming use provisions to their briefs. These versions appear to be different from either the 1975 or 1983 versions and from each other. When making a decision on remand, the county should clarify which version or versions of the ZLDO it applies in making the necessary determinations regarding the existence of a nonconforming use on the subject property.

[10]Additionally, we note it is the proponents of a nonconforming use that have the burden of producing evidence from which a local government can make an adequate determination of the nature and extent of the nonconforming use. Tylka v. Clackamas County, ___ Or LUBA ___ (LUBA No.

366 P2d 952 (1981); Spurgin v. Josephine County, supra, slip op at 9-10. As we explained in Spurgin, supra, slip op at 10-11:

> "[A] county has some flexibility in the manner and precision with which it describes the scope and nature of a nonconforming use. However, [a] county may not, by means of an imprecise description of the scope and nature of the nonconforming use, authorize de facto alteration or expansion of the nonconforming use. At a minimum, the description of the scope and nature of the nonconforming use must be sufficient to avoid improperly limiting the right to continue that use or improperly allowing an alteration or expansion of the nonconforming use without subjecting the alteration or expansion to any standards which restrict alterations or expansions." (Footnote omitted.)

The county's decision purports to allow or approve "expansion of the Grandfathered Use to the nine acres originally purchased [by Woodworth] for said Use." Record 55. However, we agree with petitioners that it is the actual use of the subject property existing on July 1, 1975 that determines the extent of the protected nonconforming use right, not the owner's intent in purchasing the property. Any alteration in the nature and extent of the use that existed on July 1, 1975, must satisfy applicable statutory and ZLDO standards for the alteration of a nonconforming use.[11]

94-017, December 19, 1994), slip op 23; Warner v. Clackamas County, 25 Or LUBA 82, 86 (1993).

[11]As explained in n9, supra, we are unable to determine which ZLDO provisions would govern a county decision to approve aspects of the

In conclusion, we agree with petitioners that the county's findings are inadequate because they do not determine whether the use of the subject property that existed on July 1, 1975 was lawfully established or the nature and extent of such use. Without a determination on the nature and extent of the lawfully established nonconforming use, the county cannot determine whether the use that currently exists on the subject property requires approval for alteration of the nonconforming use. Because the county's findings are inadequate, no purpose would be served in addressing petitioners' challenges to the evidentiary support for those findings. Forster v. Polk County, 22 Or LUBA 380, 388 (1991); DLCD v. Columbia County, 16 Or LUBA 467 (1988).

Petitioners' second and fourth assignments of error are sustained. Intervenor's second assignment of error is sustained.

The county's decision is remanded.

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existing use of the subject property as alterations of the nonconforming use. However, alterations of a nonconforming use are also subject to the statutory standards that limit such alterations. See ORS 215.130(5), (8) and (9), quoted supra at n8. 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). * * *" Spurgin v. Josephine County, supra, slip op at 10 n6.