BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GARY FEMLING and TERRY FEMLING, Petitioners, vs. COOS COUNTY, Respondent, and MARK MCPEEK, Intervenor-Respondent.	LUBA No. 97-176 FINAL OPINION AND ORDER

Appeal from Coos County.

C. Randall Tosh filed the petition for review and argued on behalf of petitioner. With him on the brief were Ormsbee, Corrigall, McClintock & Tosh.

David A. Cameron filed a brief on behalf of Coos County.

Martin E. Stone filed a response brief and argued on behalf of intervenor-respondent. With him on the brief were Stone, Trew & Cyphers.

HANNA, Board Member; GUSTAFSON, Board Chair, participated in the decision.

AFFIRMED 04/09/98

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

Opinion by Hanna.

NATURE OF THE DECISION

Petitioners appeal the county's issuance of a zoning compliance letter for an accessory building.

FACTS

The subject property is a 1.12-acre parcel zoned rural residential 2 (RR-2). The property is one of twelve that surround a private airport landing strip. Most of the surrounding parcels contain a dwelling and large garages or hangars used in part to store private aircraft.

Intervenor McPeek (intervenor)[1] purchased the vacant subject property in 1992, placed a mobile trailer on the property and built a 60 by 80 foot, 4800 square feet pole barn (the structure), which intervenor began using for storage of aircraft and antique automobiles. After petitioners filed complaints with the county, intervenor requested a zoning compliance letter from the county. The county determined that the structure is not an "accessory" structure within the meaning of ZLDO 3.1.300 because no dwelling existed for the structure to be accessory to.[2] Intervenor appealed that decision, and we affirmed. McPeek v. Coos County, 26 Or LUBA 165 (1993).

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[1] We previously allowed intervenor's motion to intervene. McPeek v. Coos County, ___ Or LUBA ___ (LUBA No. 97-176, Order on Motion to Intervene, December 4, 1997).

[2] ZLDO 3.1.300 (1992 Ordinance) stated that "structures customarily accessory to the lawfully established principal use shall be allowed in all cases."

In 1994 the county amended ZLDO 3.1.300 to require a conditional use permit to build an accessory structure more than 1200 square feet in size.[3] During 1994-1995, intervenor built a 744-square foot A-frame dwelling on the subject property. In 1995, the county brought an enforcement action against intervenor in circuit court. The court issued a letter opinion in October 1995 allowing intervenor 45 days to seek a conditional use permit for the accessory structure under the current provisions of the ZLDO, and issuing an injunction requiring intervenor to reduce the size of the structure to 1200 square feet. In July 1996, the Court of Appeals affirmed the circuit court decision.

On September 4, 1996, the county adopted Ordinance 96-06-007PL (1996 ordinance), which among other things amended ZLDO 3.1.300(D) to remove the 1200 square footage limitation on accessory buildings in rural residential zones.[4] None of the hearing notices published by the county described the

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[3]ZLDO 3.1.300(D)(1) (1994 Ordinance) stated:

> "Garages and other accessory structures, the principle use of which is not for agricultural or forestry purposes, shall be allowed outright within rural-residential zoning districts when the proposed accessory structure is less than or equal to 1,200 square feet in base floor area." (Emphasis added.)

[4]After the 1996 amendment, ZLDO 3.1.300(D)(1) states:

> "Garages and other accessory structures, the principle use of which is not for agricultural or forestry purposes, shall be allowed outright within rural-residential zoning districts when a lawfully established dwelling exists, or is being established on the subject property[.] (Emphasis added.)

amendment to ZLDO 3.1.300(D). The 1996 ordinance became effective on September 4, 1996.

On September 5, 1996, intervenor sought and obtained from the county a zoning compliance letter stating that the structure complied with the 1996 ordinance. The zoning compliance letter also approved a second 20' by 20' accessory structure for horses. Petitioners filed an appeal with the county, seeking revocation of the zoning compliance letter.[5] A county hearings officer denied the appeal, affirming the compliance letter. The county board of commissioners (commissioners) adopted the findings and conclusions of the hearings officer as its own.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the county erred in applying the 1996 ordinance "retroactively" to legalize a structure previously determined to be illegally constructed. Petitioners argue that ORS 215.110(6) prohibits such "retroactive" application of the 1996 ordinance.[6] Petitioners contend that whether the structure complied with the ZLDO on

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[5]In December 1996, petitioner also filed a petition for writ of mandamus in circuit court asking the court to cancel the September 5, 1996 zoning compliance letter. The court dismissed the writ, finding that intervenor had complied with the terms of the court's 1995 injunction. Petitioner appealed that decision, and it is currently before the Court of Appeals.

[6]ORS 215.110(6) states:

> "No retroactive ordinance shall be enacted under the provisions of this section."

September 5, 1996, when the county issued the zoning compliance letter, must be determined by that version of the ZLDO in effect on the date the structure was constructed, i.e. the 1992 ordinance.

The county and intervenor respond that the county's application of the 1996 ordinance to intervenor's request for a zoning compliance letter does not violate ORS 215.110(6) or constitute "retroactive" application of the 1996 ordinance.

We agree. We recognized in Schoonover v. Klamath County, 16 Or LUBA 846 (1988), that ORS 215.110(6) does not act to vest potential uses in property and thus prohibit a local government from amending its land use ordinance adverse to such uses. In Schoonover, the petitioner had previously and lawfully subdivided his land, but had not yet applied for any permits for dwellings. The county changed its plan and zoning designations so that dwellings were no longer an outright permitted use on the petitioner's land. The petitioner argued that ORS 215.110(6) prohibited "retroactive" application of the new plan to the petitioner's property to divest him of the right to build dwellings thereon. We disagreed, stating:

> "[S]tatutory prohibitions against retroactive land use regulations protect uses that exist on the date the regulations are adopted, not uses that could have been, but were not, initiated. " 16 Or LUBA at 849.

The corollary here is that ORS 215.110(6) does not act to make permanent an illegal or nonconforming use status and thus prohibit the local government from applying amendments to its

land use ordinance, the effect of which is to legalize such uses. ORS 215.110(6) does not prohibit legalizing a use that was unlawfully established under prior land use regulations, when the use is allowed under current regulations.[7]

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the county erred in finding that the 1996 ordinance was properly adopted pursuant to the notice requirements of ORS 215.233, and thus could be applied to intervenor's September 5, 1996 request for a zoning compliance letter.[8]

We do not have jurisdiction to decide the question petitioners present: whether the 1996 ordinance has "legal effect." Petitioners did not appeal the 1996 ordinance, and the time to appeal it is long past. We have no authority to review the validity of an ordinance, adopted in a separate proceeding, in the course of reviewing a decision that applies the ordinance. Our jurisdiction and scope of review are limited to the decision appealed. See Cummings v. Tillamook

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[7]In any case, we do not understand how petitioner is assisted by his argument that the construction date of the structure governs what version of ZLDO 3.1.300(D) applies. The structure was built in 1992, and the 1992 ordinance did not restrict accessory structure size to 1200 square feet.

[8]ORS 215.223(1) states:

> "No zoning ordinance enacted by the county governing body may have legal effect unless prior to its enactment the governing body or the planning commission conducts one or more public hearings on the ordinance and unless 10 days advance public notice of each hearing is published in a newspaper of general circulation in the county * * *." (Emphasis added).

County, 30 Or LUBA 17, 21 (1995)(an appeal challenging a local appeal fee established by ordinance amounts to an impermissible collateral attack on the fee ordinance).

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners argue that the county erred in failing to apply a "gross disproportionality standard" from an earlier county decision in determining that the structure is "subordinate in area, extent, or purpose to the principal structure" within the meaning of ZLDO 2.1.200.[9]

According to petitioners, the county found in its 1993 decision that we reviewed in McPeek v. Coos County, that the structure was "grossly out of proportion to other structures in the area and the mobile home that has been sited on the property." Record Vol. II 10. Intervenor challenged that finding on appeal, but our opinion did not reach that assignment of error. 26 Or LUBA at 168, n3. However, the circuit court relied on that finding in issuing its injunction in 1995. We understand petitioners to contend that (1) the county is bound by the "gross disproportionality standard" it

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[9]ZLDO 2.1.200 defines "accessory structure":

> "[A] structure or use which: (1) is subordinate to and serves a principal structure or principal use; (2) is subordinate in area, extent, or purpose to the principal structure or principal use served; (3) contributes to the comfort, convenience or the necessity of occupants of the principal structure or principal use; and (4) is located on the same lot, parcel or tract as the principal structure or principal use * * *."

articulated in the 1993 decision; (2) the principle of issue preclusion prevents the county from revisiting its 1993 finding of gross disproportionality; and (3) the principle of claim preclusion prevents the county from revisiting its 1993 determination that the structure does not comply with ZLDO 2.1.200, as affirmed by the 1995 circuit court judgment.

The county responds, and we agree, that the "grossly out of proportion" language from the county's 1993 order does not constitute a "standard" by which accessory structures are judged.[10]

We also reject petitioners' argument that either claim or issue preclusion binds the county to its 1993 finding or 1993 determination of noncompliance. We held in Nelson v. Clackamas County, 19 Or LUBA 131, 140 (1990) that our system of land use adjudication "is incompatible with giving preclusive effect to issues previously determined by a local government tribunal in another proceeding." Similarly, the county is not bound to resolve "claims" made in one application consistently with "claims" in earlier applications. Nelson, 19 Or LUBA at 136. In short, nothing the county decided in the 1993 proceeding precludes or binds its decision in this proceeding.

[10]Considered in context, the language appears to be a statement of fact supporting the county's finding that at that point in time the structure was not accessory to a residence but was the parcel's primary structure and primary use. Record Vol. II, 76.

The same is not necessarily true of claims or issues decided in the circuit court proceeding. We held in Joines v. Linn County, 24 Or LUBA 456, 461-63 (1993), that where a party's claim of a vested right was determined by a circuit court judgment to which the local government was a party, the local government is precluded from making a new determination on that vested right claim. However, the circuit court letter opinion in the present case did not independently resolve the issue of whether the structure was subordinate to the primary residential use. The letter opinion merely applied the county's 1993 finding of disproportion, as a basis for finding that the structure was still not in compliance with ZLDO 3.1.300(D), which in 1995 limited accessory structures to 1200 square feet in size. Record Vol. I, 52. The circuit court made no independent determination that the structure is disproportionate to other structures or that it was not subordinate to the primary use. We see nothing in the circuit court's opinion or judgment that precludes the county from determining that in September 1996 intervenor's structure complied with ZLDO 2.1.200.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners argue that, even if the county's prior decision has no preclusive effect, the county "erred in failing to find the facts still establish [intervenor's] structure is 'grossly disproportionate' to other structures in

the area." Petition for Review 21.

In the third assignment of error we determined that disproportionality in size between the structure and the residence or other structures is not part of any applicable standard. It follows that the county was not required to make any findings of proportionality, and the county committed no error in failing to do so. To the extent petitioners' argument is intended as an evidentiary challenge, that challenge is directed at the proportionality of the structure to intervenor's dwelling and other structures in the area, rather than at any findings the county made with respect to applicable approval standards. That the record lacks substantial evidence to support findings that the county was not required to make and did not make provides no basis for reversal or remand.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioners argue that intervenor uses the structure for commercial purposes and thus the county erred in finding that the structure is "customarily accessory" to the principal use within the meaning of ZLDO 3.1.300 and "subordinate" to the principal use as required by 2.1.200.

Petitioners contend that the hangar and by extension the property as a whole is used for a commercial business, the sale of ultralight aircraft and instruction in such aircraft, and thus the county's finding that the hangar is "accessory"

and "subordinate" to the residential use is not supported by substantial evidence.

Intervenor refers us to evidence in the record that he uses the hangar to store nine antique cars, a personal ultralight, tools and a catamaran. Record Vol. II 19-20. Petitioners do not cite to the record to demonstrate that any of these uses are commercial or otherwise support their assertion that intervenor uses the hangar for commercial, rather than personal, use, and thus that the hangar is not accessory or subordinate to the residence. We will not search the record to locate evidence controverting the county's finding. Helvetia Community Assoc. v. Washington County, 31 Or LUBA 446, 452 (1996).

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Petitioners argue that the county erred in finding that the structure's use to store cars and a plane for recreational use is consistent with the requirement, at ZLDO 2.1.200, that the structure be used for a use permitted under ZLDO 4.2.400.

ZLDO 4.2.400 is a matrix that sets out the uses permitted, regulated or prohibited in rural residential zones. Under ZLDO 4.2.400, "storage" is a prohibited use and "high-intensity recreation" is a conditional use in the RR-2 zone. We understand petitioners to contend that the county essentially found that the structure is used for "storage" and "high-intensity recreation" within the meaning of ZLDO

4.2.400, and thus the county's own findings demonstrate that the structure cannot be approved consistent with ZLDO 4.2.400 and 2.1.200.

The challenged decision does not address this issue, or contain an interpretation of ZLDO 4.2.400. In this circumstance, we may make our own determination of whether the county's decision is correct. ORS 197.829(2). With respect to storage, ZLDO 4.2.400 does not prohibit personal storage associated with residential use of the property. With respect to recreation, ZLDO 4.2.400 distinguishes between "low-intensity recreation," which is a permitted use, and "high-intensity recreation," which is a conditional use. The definitions of both terms indicate an orientation toward public, rather than personal, recreational facilities.[11] We conclude that ZLDO 4.2.400 does not prohibit or regulate the type of personal storage and recreational uses conducted on the subject property.

The sixth assignment of error is denied.

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[11]ZLDO 4.2.400 provides the following definitions:

> "High intensity recreation facilities may include the same types of facilities as low intensity facilities, but are generally more intense in nature and may include large improved parking lots, highly developed picnic or camping areas, skeet ranges or trap ranges, commercial hunting or fishing preserves. High-intensity facilities can include small docks that provide temporary, day-use only, transient boat tie-ups when in conjunction with approved boat ramps."

> "Low intensity recreation facilities may include boat ramps, minimal toilet facilities, interpretative shelters and other non-structural improvements such as trails, paths and other activities not requiring permanent structural facilities."

SEVENTH ASSIGNMENT OF ERROR

Petitioners argue that the county erred in failing to limit intervenor to a single accessory structure, and thus erred in approving the second accessory structure for horses. Petitioners note that ZLDO 3.1.300(A) provides only for "[a]n accessory structure" on the property (emphasis added). Petitioners contend that the use of the indefinite article "an" necessarily denotes only a single accessory structure.

ZLDO 2.1.200 describes "accessory structures" as "garages, storage sheds, play houses, swimming pools, and parking for recreational vehicle, boat, log truck or other vehicle." The hearings officer rejected petitioners' interpretation of ZLDO 3.1.300(A) as unreasonable because it would limit the number of items listed at ZLDO 2.1.200 that could be placed on the property to one structure, i.e. if one has a garage then one cannot place a play house or storage shed or pool on the property. We affirm the hearings officer's interpretation as not inconsistent with the express language of ZLDO 3.1.300(A). ORS 197.829(1)(a).

The seventh assignment of error is denied.

EIGHTH ASSIGNMENT OF ERROR

Finally, petitioners contend that the county erred in failing to apply the circuit court's 1995 injunction by its terms to require intervenor to either reduce the structure to 1200 square feet or apply for a conditional use permit under the "current provisions" of the ZLDO.

The county and intervenor respond that in November 1996 petitioners filed for a writ of mandamus in circuit court based on the same argument. The circuit court rejected that argument and dismissed the writ, stating:

> "Upon consideration of the testimony and evidence, the court finds that [intervenor] filed his application for zoning clearance permit in a timely manner, that Coos County correctly applied the provisions of the [ZLDO] as it existed on the day of the application, and that [intervenor] and Coos County have complied with the terms and requirements of the injunction in [Case No.] 95CV0191." State ex rel Gary Femling, Relator v. Gordon Ross, Bev Owen and Jim Whitty, Defendants and Mark intervenor, intervenor, Coos County Circuit Court Case No. 96CV1153 (May 2, 1997), 2.

The county and intervenor argue that the circuit court is better placed than this Board to determine whether the county's actions on September 5, 1996, complied with the terms of the 1995 injunction. To the extent the county and intervenor argue that we lack jurisdiction to enforce the provisions of the circuit court's 1995 injunction, we agree. Pursuant to ORS 197.825(3)(a), the circuit court retains jurisdiction to enforce the provisions of the county's land use regulations.[12] It follows that the circuit court, not this

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[12]ORS 197.825(3) provides:

> "Notwithstanding subsection (1) of this section, the circuit courts of this state retain jurisdiction:
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> "(a) To grant declaratory, injunctive or mandatory relief in proceedings arising from decisions described in ORS 197.015 (10)(b) or proceedings brought to enforce the provisions of an adopted comprehensive plan or land use regulations; * * *."

Board, has jurisdiction to determine whether intervenor's actions are consistent with its 1995 injunction.

The eighth assignment of error is denied.

The County's decision is affirmed.