BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARQUAM FARMS CORPORATION, Petitioner, vs. MULTNOMAH COUNTY, Respondent, and TIM SCHILLEREFF and ANGELA SCHILLEREFF Intervenors-Respondent.	)	LUBA No. 98-044 FINAL OPINION AND ORDER

Appeal from Multnomah County.

Lawrence R. Derr, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Josselson, Potter & Roberts.

Sandra Duffy, Chief Deputy County Counsel, Portland, and Daniel Kearns, Portland, filed the response brief and argued on behalf of the respondent and intervenors-respondent. With them on the brief was Preston, Gates & Ellis.

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

REMANDED 01/11/99

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

Opinion by Gustafson.

NATURE OF THE DECISION

Petitioner appeals the county's approval of an expansion of a dog kennel.

MOTION TO INTERVENE

Tim and Angela Schillereff (intervenors), the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

Intervenors operate a dog kennel on Sauvie Island. Petitioner is a hunt club adjacent to intervenors' kennel. This is the second time that the county's approval of intervenors' application to enlarge their kennel operation has been before this Board. The facts are fully set forth in Marquam Farms Corp. v. Multnomah County, 32 Or LUBA 240 (1996) aff'd 147 Or App 368, 936 P2d 990 (1997) (Marquam Farms I), and we do not repeat them here.

Before us in Marquam Farms I was the county's approval of three alternative applications, each of which had the effect of allowing intervenors to enlarge their kennel from its ostensible existing level of 50 dogs to 75 dogs. The county approved, alternatively, an "initial" (i.e., new) conditional use permit, an expansion of an existing conditional use, and an expansion of a nonconforming use. This Board disagreed with each of the county's bases of approval, and remanded the case to the county.

In remanding the county's approval of an expansion of a nonconforming use, we agreed with petitioner that before the county could approve such an expansion, it must first establish the extent of the existing nonconforming use.[1] Quoting from Tylka v. Clackamas

[1]ORS 215.130 (1995), which governs county decisions on nonconforming uses, provides, 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. 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.

County, 28 Or LUBA 417, 429 (1994), we explained the process the county must follow before it can evaluate an expansion of the existing use:

> "'In determining whether to approve a proposed use of property as an alteration of a nonconforming use, where the local government has not previously determined that a nonconforming use exists, there are generally four inquiries that the local government must make. Cf. Spurgin v. Josephine County, 28 Or LUBA 383, 390 (1994) (determining whether an existing use of property may continue as a nonconforming use). First, did the use lawfully exist at the time the zoning which first made the use unlawful 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 been discontinued or abandoned such that the right to continue the use or that part of the use as a nonconforming use was lost? Fourth, to the extent the proposed use constitutes an alteration of the lawfully established nonconforming use, structure or physical improvements, does that alteration comply with the standards governing alteration of nonconforming uses?'" Marquam Farms I, 32 Or LUBA at 258-59.

We determined that while the county had satisfied the first step, by establishing that the kennel use lawfully existed when the zoning that prohibited kennels was first applied, it had not satisfied the second or third steps. Thus, the county could not reach the question of the alteration of the use under the fourth step. Specifically, with regard to the establishment of the nonconforming use required by the second step, we determined that

---

"* * * * *

"(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.

"(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 impact to the neighborhood; and

"(b) A change in the structure or physical improvements of no greater adverse impact to the neighborhood."

> "the county made no findings regarding the nature and extent of the use at the time it became nonconforming. Thus, while the county has established the initial existence of a nonconforming use, the county has not established the scope of the original use." Id. at 259.

With regard to the third step, we found that there was substantial evidence in the record to support the county's conclusion that some level of kennel activity had continued, uninterrupted, since the kennel use became nonconforming. We concluded, however, that:

> "the hearings officer made no attempt to define the scope of the continued use. Rather, he apparently concluded, without analysis, that since intervenors established the continued existence of a kennel, i.e. at least 4 adult dogs on the property since the 1950s, they had somehow established a conforming use to operate and expand a 50-dog kennel. Such a conclusion is not legally justified.
>
> "The fact that the use has continued does not determine the scope of the continuing use. The county must still evaluate and determine the scope of the use as it has continued over the years in order to determine the intensity of the remaining nonconforming use. As the Court of Appeals explained in Hendgen v. Clackamas County, 115 Or App 117, 120[, 836 P2d 1369] (1992):
>
> > "'Short of the point that it is abandoned or discontinued, the intensity of a nonconforming use may be reduced without its being lost, Polk County v. Martin, 292 Or 69, 636 P2d 952 (1981); Bither v. Baker Rock Crushing, 249 Or 640, 438 P2d 988, 440 P2d 368 (1968); see also Warner v. Clackamas County, 111 Or App 11, 824 P2d 423 (1992), although the use may not be enlarged except through the alteration process under ORS 215.130 and complying with local law. * * *'
>
> "The county must determine the level of intensity of the use that has continued uninterrupted since the use became nonconforming. This requires an evaluation both of the threshold question of the level of intensity existing when the use became nonconforming, and the level of intensity that has continued, uninterrupted, since that time. The county has done neither of these required evaluations." Marquam Farms I, 32 Or LUBA at 261-62 (footnotes omitted).

On respondent and intervenors' appeal, the Court of Appeals affirmed each of LUBA's bases for remand. Marquam Farms Corp., 147 Or App 368. With regard to the nonconforming use question, the Court of Appeals found:

> "For largely the reasons expressed by LUBA, we conclude that the county's present decision on the nonconforming use issue does not satisfy ORS 215.130. Without further findings by the county to particularize the nature and extent of the original and continuing nonconforming use, in the face of evidence that the use has historically receded from commercial to fairly minimal levels, the requested expansion cannot be justified under ORS 215.130(5) and (9). * * * Whether the requested expansion meets that statutory standard cannot be ascertained unless the actual past and present scope of the use is identified and can be compared with the extent and effects of the proposed enlarged future use. Moreover, it cannot be known what is necessary and, therefore, permissible to 'continue the use' in the absence of a prior determination regarding the nature and scope of the original and present use that have acquired and retain nonconforming use status. The statutory test cannot be applied or passed on the basis of the county's present unquantified finding that some kennel use has endured throughout the 40-year period. Id. at 381. (Emphasis added in part, original emphasis retained, footnote omitted.)[2]

The Court of Appeals did not necessarily agree, however, that the county had established that some level of kennel activity had continued uninterrupted since it became nonconforming. The court noted:

> "The additional facts that the county must find may also affect the sufficiency of the applicants' showing under ORS 215.130(7), as well as subsections (5) and (9). That question, too, is before the county on remand.
>
> "In the present posture of the case, we cannot now decide whether the findings the county has made, if supplemented by the required additional ones, could suffice to establish compliance with the statute. However, if we correctly understand [respondent and intervenors] to argue that the existing findings are sufficient to demonstrate compliance in themselves, we disagree with them." Id. at 381, n 6. (Emphasis in original.)

---

[2]The Court of Appeals described the evidence regarding the nature and extent of the use as follows:

> "The evidence here was in conflict as to how many dogs occupied the property at various times between the enactment of restrictive zoning and the present. There was some evidence that only the owner's own dog or dogs inhabited the facility at some times, and there was even evidence that periods elapsed when no kennel activity was occurring on the property. However, the applicants presented evidence to the effect that there was a minimum of a least four dogs on the property at all relevant times. The county found that 'some degree of kennel operations has persisted unabated from 1952 forward.' However, it made no findings concerning the level of kennel activity at the time that the restrictive legislation became effective or at any subsequent time." Marquam Farms Corp., 147 Or App at 371.

On remand, the county board of commissioners (commissioners) considered only the nonconforming use issue. Without reopening the record, the commissioners again approved an expansion of a nonconforming use. In addressing the existence of the nonconforming use, the county specifically adopted the 1995 hearings officer's previous conclusions regarding the evidence, which acknowledged "some level of activity" in each of the years since the use became nonconforming. Intervenors acknowledged below and during Marquam Farms I that from approximately 1962 through 1989, the kennel was not operated commercially, but that in any given year, at times there were at least four dogs kenneled there. On remand, the county found:

> "We find that this kennel, and all kennel businesses have a periodic nature that results in a variation in the number of dogs boarded over the course of seasons and years. * * * This is similar to nonconforming schools, hotels, churches, campgrounds and similar facilities which have a basic set of facilities with a particular capacity, but the actual number of occupants varies over time.
>
> "* * * As set out above, we have found that the applicants have established that the subject property was used to kennel 50-60 dogs for several years prior to the zone change which made this kennel a nonconforming use. We also find that all of the basic facilities for boarding 50 dogs have been in place on the applicants' property since the early 50s, and have been actively maintained and used to the present. * * *
>
> "* * * * *
>
> "Marquam Farms has asserted that the nonconforming use has diminished over the intervening years and must be established for purposes of MCC 11.15.8810 at its lowest historical use. We do not find that there is any controlling legal authority which requires us to find the lowest historical use and establish that as the nonconforming use baseline for purposes of measuring impacts of proposed alterations.
>
> "The fact that there were less than 50 dogs at various times over the last 40 years (and the applicants do not dispute that), only relates to whether or not the established lawful nonconforming use was ever abandoned. We find that in the kennel business, like a quarry business, a church, a campground, a school, a hotel or other similar uses which generally have a basic set of facilities with a particular capacity, the actual number of occupants varies over time. The facility has always kenneled dogs, there was no demolition or conversion of the facility to another use; and, there is no evidence of an

> intention to abandon that use. When the basic facility and capacity have been actively maintained continuously over time and occasionally filled to that capacity, we will conclude the 'use' has persisted throughout and that the nonconforming use right has been maintained. Just because the number of dogs, students, hotel guests, parishioners, campers, etc. fluctuates over time, we do not measure or limit the extent of the nonconforming use right by the number of occupants, which in virtually all cases would be zero at some point during every year. This interpretation of MCC 11.15.8810 and state law is modeled on the Oregon Supreme Court's decision in Polk County v. Martin, 292 Or 69, 636 P2d 952 (19[81])." Record 9-11.

As an alternative basis for approval, the county also determined that intervenors' nonconforming right was established in 1989, when the county first approved intervenors' building permit to remodel the original kennel. The county's findings state:

> "In addition to the evidence in this record to support the applicants' claim that their kennel has maintained a capacity for 50 dogs since before 1958, we are persuaded by previous County land use decisions that are premised upon, and therefore confirm, the fact that the applicants have a right to a nonconforming dog kennel with capacity for 50 dogs. In particular, each of the following unappealed land use approvals by Multnomah County is legally premised upon the fact of this nonconforming use[.]" Record 11.

After citing to the 1989 building permit to remodel the original kennel, a 1990 design review approval of the existing kennel, a 1990 conditional use permit approval for a night watchman's residence for the existing kennel, and a 1996 design review approval of the existing kennel and the 25 unit expansion, the findings continue:

> "Each of the design review approvals specifically stated that the capacity of [intervenors'] kennel was 50 dogs. Marquam Farms received notice of each of these applications, and in each had the opportunity to refute the stated kennel capacity of 50 dogs. Yet Marquam Farms failed to appeal any of these design review decisions, including the underlying kennel use with a 50-dog capacity. Moreover, in each of these applications, County Counsel and planning staff advised the applicants they did not need to make a separate application to establish the underlying kennel use. The applicants justifiably relied upon that specific direction from County staff and upon the County's approval and continued to invest in and maintain their kennel facilities." Record 12 (footnotes omitted).

The quoted finding ends with a footnote that states:

> "Under our interpretation of MCC 11.15.8810, we find that, not only do the applicants have a right to continue the nonconforming use they claim based on prior County approvals and advice of staff, but that we are estopped from concluding at this late date that the right does not in fact exist." Record 12 n 4.

Petitioner appeals the county's approval.

FIRST ASSIGNMENT OF ERROR

Petitioner contends that the county did not adequately comply with this Board's remand order in Marquam Farms I. Specifically, petitioner argues that the county's determination that the use of intervenors' property was and is that of a dog kennel with a capacity of 50 dogs does not determine the intensity and scope of the use since 1958, as required by our decision. Petitioner claims that the county necessarily had to determine the actual number of dogs regularly utilizing the kennel facility at the time that the zoning was applied, as well as through the years since the use became nonconforming, in order to determine the nature and extent of the use. According to petitioner, such a determination is essential to establish a baseline for applying the alteration criteria of MCC 11.15.8810 (MCC .8810).[3]

In a joint response brief, the county and intervenors (together, respondents) respond:

> "Throughout the local process, Marquam Farms sought to re-cast the nonconforming use issue as simply a dog counting exercise and, in so doing it ignored the fact that the kennel has always had capacity for 50 dogs. Because the record showed that actual dog count at the kennel varied from zero to 60 many times over the years from 1954 to the present, Marquam argued that zero, or no more than 4 dogs, was the maximum measure of [intervenors'] nonconforming use. The County emphatically disagreed with Marquam about the correct legal interpretation of MCC .8810. Thus, Marquam's First

[3]MCC .8810 is titled "Alteration of a Non-Conforming Use." MCC.8810(A) defines such an alteration:

> "Alteration of a non-conforming use includes:
>
> "(1) A change in the use of no greater adverse impact to the neighborhood.
>
> "(2) A change in the structure or physical improvements of no greater impact to the neighborhood."

> Assignment of Error is simply a dispute over the County's interpretation of MCC [.8810]. In this regard, Marquam has a substantial burden of proving that the County's interpretation of its own code provision is not sustainable under ORS 197.829." Response Brief 12 (emphasis in the original).

We disagree that the first assignment of error is no more than a dispute over the county's interpretation of MCC .8810. MCC .8810 addresses only the alteration of non-conforming uses. As we discussed in Marquam Farms I, before the proposed alteration can be evaluated, the county must first determine (1) "the nature and extent of the use at the time it became nonconforming" and (2) whether the use has "been discontinued or abandoned such that the right to continue the use or that part of the use as a nonconforming use was lost." Tylka, 28 Or LUBA at 429. We determined in Marquam Farms I that the county had not conducted that necessary evaluation before it evaluated the proposed alteration. Petitioner's first assignment of error here is that the county has still not conducted that necessary evaluation.

We also disagree with respondents' characterization of this determination as one of local interpretation. Respondents argue:

> "[Petitioner] disputes the Board of Commissioners' interpretation of MCC 8810 [in] which it characterizes the nature of [intervenors'] nonconforming use as a kennel facility with a particular maximum capacity instead of a kennel with a particular attendance or fixed number of dogs. Although MCC 8810 is based on state law, i.e., ORS 215.130, it is the County who must interpret its own ordinance in determining how to characterize the nature of the alleged nonconforming use. This is purely a matter of local code interpretation and an evaluation of the facts presented by the applicant about the use at issue. Once the nature of the use is characterized, the substantive code provisions controlling the applicant's rights must be interpreted in a manner consistent with ORS [215].130." Response Brief 11 (emphasis in original.)

As discussed above, the issue before us is not one of interpreting MCC .8810. The question of the alteration under MCC .8810 does not arise until after the county has established the nature and extent of the nonconforming use. The issue before us is strictly a question of the county's compliance with ORS 215.130 (1995). To the extent the county has

attempted to interpret that statute, we owe that interpretation no deference under ORS 197.829.[4]

The question before us is whether the county has sufficiently established the nature and extent of the nonconforming use to be able to justify an expansion under ORS 215.130(5) and (9) (1995). As the Court of Appeals directed the county,

> "Whether the requested expansion meets that statutory standard cannot be ascertained unless the actual past and present scope of the use is identified and can be compared with the extent and effects of the proposed enlarged future use. Moreover, it cannot be known what is necessary and, therefore, permissible to 'continue the use' in the absence of a prior determination regarding the nature and scope of the original and present use that have acquired and retain nonconforming status." Marquam Farms Corp., 147 Or App at 381 (emphasis added, original emphasis omitted).

With regard to the merits of this assignment of error, respondents argue that the county has sufficiently "interpreted" the "nature and extent" of the nonconforming use as a "kennel facility with a capacity for 50 dogs." Response Brief 14. Respondents explain,

> "All of this evidence [upon which the county relied] supports the fact that [intervenors'] kennel was constructed prior to 1958 with a capacity for 50 dogs and those original buildings and other facilities have remained intact from that time until the present.
>
> "The Board of Commissioners found this testimony to be credible and compelling evidence that the nature and extent of [intervenors'] nonconforming use is a kennel facility with the capacity for 50 dogs." Response Brief 15.

In other words, the county defines the "use" at issue as a physical structure, which was built prior to the restrictive zoning with a capacity for 50 dogs, and continues today as a structure with a capacity for 50 dogs. Under respondents' rationale, the actual operation within the structure, i.e., the kenneling of dogs, is not determinative of the use. As respondents explain, "the measure of the nonconforming kennel use is its capacity for 50

[4]Even if the county's interpretation of MCC .8810 were at issue in this assignment of error, to the extent that ordinance provision implements ORS 215.130(9) (1995), we also disagree with respondents that the county's interpretation of that provision is owed deference.

dogs and not its actual accommodation of 50 dogs." Response Brief 10 (emphasis in original).

The county's interpretation of the nature of the use is inconsistent with ORS 215.130(5) (1995), which explicitly provides, "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." (Emphasis added.) It is how the structure is used, and not the structure itself, that defines the nature of the nonconforming use under ORS 215.130(5)(1995).

The county's characterization of the use as merely a structure that has the capacity to kennel 50 dogs is also inconsistent with the "use" that intervenors want to alter now. As we understand intervenors' intent, they want not only a structure with the "capacity" to kennel 75 dogs, but they actually desire to use that structure for the purpose of kenneling dogs. To the extent they wish to kennel dogs now, the use that must be evaluated from the time of the restrictive zoning necessarily must be the kenneling of dogs and not the existence of a structure.

In Marquam Farms I, we determined that the county had established intervenors' use of the kennel structure as a dog kennel when the restrictive zoning was first applied. We also determined, however, that the county had not established the nature of that kennel operation as of the date of the restrictive zoning. While it may be that the kennel structure itself did in 1958, and does today, have the capacity to kennel 50 dogs, the county has yet to make a determination of how that kennel was being operated when the restrictive zoning was first applied.

We also reject respondents' determination of the extent of the nonconforming use. Relying on Martin, respondents urge that this use is properly evaluated as would be a quarry, church, school, campground or hotel, where there are necessarily "fluctuations" in the operation of the business. As respondents now attempt to characterize the operation of the challenged kennel, the decreased use of the kennel over a nearly 30-year period was merely

the result of natural "fluctuations" in the kennel business. Respondents argue that "all fluctuations in the number of dogs shown in the record are a consequence of the seasonality and sporadic nature of the commercial dog kennel business." Response Brief 21.[5]

Factually, this argument is inconsistent with and not supported by the record or the county's decision. During Marquam Farms I, respondents acknowledged that no later than approximately 1970 the commercial operation of the kennel ceased, and that the kennel was used by the owners for periodic kenneling of their dogs and occasionally a few others. Intervenors argued, and the hearings officer determined, that while there was no commercial operation during those years, there was evidence that at all times during the period between 1970 and 1989, when intervenors applied to the county to "re-establish" a commercial kennel, there were in any given year, at least 4 dogs kenneled.[6] Marquam Farms I, 32 Or LUBA at 243. This evidence, which the commissioners adopted in this appeal, does not in any way support respondents' argument on appeal that the dramatic decrease in the level of intensity of the kennel operation was somehow due to fluctuations of an ongoing commercial business.

In addition, the county's reliance on Martin is legally misplaced. First, nowhere in the Martin case does the Supreme Court analogize the quarry operation there to a church, school, campground, hotel, or other business for which use fluctuates for seasonal or other business reasons. We reject respondents' assumption that the court's rationale in Martin extends to those types of "fluctuating" uses. With regard to the quarry operation at issue in

---

[5]Even if the evidence in the record could be read to support respondents' new argument that the kennel had operated commercially between 1970 and 1989, there is no evidence in the record discussing or documenting the "seasonality or sporadic nature" of operations within the commercial kennel industry.

[6]The individual who owned the kennel property from 1973 until 1989 stated in his 1994 affidavit:

> "[A]lthough we never operated the kennel commercially, we did operate the kennel continuously for our own dogs and as a courtesy to friends and relatives from 1973 until [intervenors] took over operation of the kennel [in 1989]. We regularly cared for 4-5 dogs at the kennel." Record 133.

Martin, respondents urge that the kennel use is similar to the quarry operation there because that operation was also "a use, which, by nature, is sporadic and intermittent." Response Brief 17. We fail to see the similarity. As the court found in Martin, the quarry operation there had consistently been operated in the same sporadic and intermittent fashion since the time restrictive zoning was applied. The operator had not altered his operation from its inception. In contrast, the facts determined by the county in this case establish that the kennel's commercial operation at an as yet to be determined level, ceased in approximately 1970. No effort was made to operate a commercial kennel over the next nearly 20 years. In 1989, the new owners sought to "re-establish" a commercial operation. These facts do not in any way reflect a "sporadic and intermittent" operation as occurred in Martin. They reflect instead a significant change in how and the extent to which the kennel was used. Respondents' attempt to analogize the kennel operation at issue to that of the quarry challenged in Martin fails.

Moreover, it is not a "sporadic and intermittent" use that intervenors propose to "continue" now. In Martin, the operator desired to continue the same type of operation that he had maintained since the restrictive zoning was established. In explaining the permitted nature and extent of the permissible operation, the Supreme Court stated:

> "The determinative factor under ORS 215.130(5) is lawful use. Matters concerning frequency of use or intensity of use bear more on the nature and extent of use rather than upon the lawfulness of the use. A sporadic and intermittent use is sporadic and intermittent, but it may nonetheless be a 'lawful use' under ORS 215.130(5). The nature and extent of the prior lawful use determines the boundaries of the permissible continued use after the passage of the zoning ordinance. The significant thing is that a sporadic and intermittent use may give rise to a permitted nonconforming use, with the extent of the permitted nonconforming use limited to the sporadic and intermittent use that existed prior to the enactment of the zoning ordinance." 292 Or at 76 (emphasis added).

In contrast to Martin, respondents here have not attempted to establish the "sporadic and intermittent" nature of the kennel operation at the time of the restrictive zoning. Rather, while the county has not established the actual use of the kennel at the time of the zoning,

they argued during Marquam Farms I, and appear to argue now, that the kennel operation was an ongoing commercial operation from the early 1950s until approximately 1970. While there may have been some "sporadic and intermittent" use of the ongoing kennel operation at that time "due to seasonal fluctuations" no issue of the extent of that use has been raised.[7]

Unlike the quarry operation in Martin, what intervenors here propose is to re-establish the operation that may have existed when the restrictive zoning was applied, after a nearly 20 year decrease in the operation. That is not the type of "sporadic and intermittent" that the Supreme Court approved in Martin. It is also not analogous to an ongoing but seasonally fluctuating business such as a church, school, campground or hotel.

As petitioner points out, this case is more analogous to the situation this Board addressed in Coonse v. Crook County, 22 Or LUBA 138 (1991). In that case, the applicants maintained a nonconforming business on their property. Some time after the business became nonconforming, the applicants relocated a significant portion of their business to another location for a period of five years. As this Board explained, in the record, the county stated,

> "'although use of the [nonconforming] property from 1985 to 1990 was at a low level and on an intermittent basis, it was consistently used each year for the purposes [for which it was used when it became nonconforming] and the use of the property for those purposes was never discontinued for a period of one year.'" Id. at 141.

After approximately five years, the applicant attempted to move those business activities that had been relocated back to the nonconforming property. This Board determined that, while the sporadic and intermittent use of the property continued to enjoy nonconforming use status to that extent, as to that portion of the business that had been relocated, the applicant had lost their nonconforming use status. This Board concluded:

---

[7]Because the county has yet to determine the extent of the use when the restrictive zoning was applied, any issue regarding whether that use fluctuated seasonally, or was otherwise intermittent, would be premature, at best.

"We reject petitioners' suggestions that the applicant entirely discontinued the prior nonconforming use of the subject property. Although it is clear that the bulk of the applicant's maintenance and repair activities and most of the logging equipment was removed from the property, there is substantial evidence that some logging equipment continued to be stored on the property and some maintenance and repair continued to be carried out on the property, albeit at a greatly reduced level and frequency. Furthermore, it appears from the record that equipment and supplies associated with the seeding and mulching business continued to be stored at the subject property.

"However, we also reject the county's conclusion that because the subject property continued to be put to some use between 1985 and 1990, the applicant may close the Prineville shop and again put the subject property to the much more intensive level and type of use that existed in 1978 prior to the relocation of significant aspects of the nonconforming use to the Prineville shop.

"Changes in the volume or intensity of a use generally do not constitute an impermissible change in a nonconforming use provided such changes are attributable to growth or fluctuations in business conditions and are not accompanied by alterations in the nature of, or physical structures employed by the nonconforming use. However, the change in the nonconforming use on the subject property that occurred between 1985 and 1990 is not of this variety. The applicant in this case significantly reduced the scope of the nonconforming use which existed in 1978 by relocating * * * activities elsewhere. This is not a change in volume or intensity of a nonconforming use that can be attributable to changes in the volume or intensity of the family businesses served by the subject property. These relocated activities represent a partial interruption or discontinuance of the nonconforming use which existed in 1978. This partial relocation of the nonconforming use in 1985 is different in kind and degree from the fluctuations in the intensity of the use of the property which occurred prior to that date and which were attributable to the sporadic and intermittent nature of the family business enterprises.

"The Oregon Supreme Court's decision in Polk County v. Martin lends indirect support to our decision that where a nonconforming use is substantially discontinued or interrupted, there is no absolute right to thereafter restore the property to its prior type and intensity of nonconforming use. * * *[W]e do not believe a property owner may significantly reduce the scope and intensity of a nonconforming use by relocating significant aspects of that nonconforming use to a different location and then, five years later, unilaterally resume the nonconforming use at its former scope and intensity." Coonse, 22 Or LUBA at 148-49 (citation omitted, footnote omitted).

Likewise here, we find that a property owner may not significantly reduce the scope and intensity of a nonconforming use by decreasing use of the facilities to minimal levels for

nearly 20 years, then unilaterally resume the nonconforming use at the scope and intensity that existed at the time it became nonconforming. As in Coonse, this is not a situation where the nonconforming use "fluctuated" due to seasonal or other business changes. Rather, the facts determined by the county establish that the scope and intensity of the kennel operation decreased substantially, and that the decrease remained relatively constant, over a long period of time.

In remanding this case, the Court of Appeals directed the county to determine that level of intensity. In other words, it was incumbent upon the county on remand to determine the extent to which the kennel operation continued uninterrupted (i.e., how many dogs were kenneled there) between the time of the restrictive zoning and 1989. Because the "use" of the property is necessarily for the kenneling of dogs, that determination necessarily involves counting the number of dogs kenneled there.[8] The county's explanation that the capacity of the structure has remained unchanged, and that the use has become "intermittent and sporadic" does not answer that inquiry. The county has not yet addressed the question of the extent of the nonconforming use that has continued uninterrupted so as to establish a baseline for the alteration inquiry under MCC .8810.[9]

---

[8]As respondents correctly point out, this number will necessarily fluctuate, and that on any given day there could be no dog. However, for purposes of determining the extent of the continuing nonconforming use, the county must determine at what level the nonconforming use has continued uninterrupted. Under MCC 11.15.8805, a use is considered discontinued or abandoned if it has not continued for two years. Thus, to determine the level of intensity that has continued uninterrupted, the county must consider the number of dogs kenneled at the site over any given two-year period.

[9]At oral argument intervenors added that because the 50-dog capacity of the kennel had remained unchanged since the use became nonconforming, the baseline for evaluating the impacts to the neighborhood from the proposed alteration under MCC .8810 was that of the kennel at full capacity. In other words, in determining whether increasing the capacity by 25 dogs, intervenors could artificially assume that the there had been 50 dogs boarded there since the restrictive zoning was imposed. The "impact" to the neighborhood would then be only the effect of an increase from 50 to 75 dogs, rather than from the actual extent of the use to the impact with 75 dogs. At best, this argument defeats the purpose of evaluating the impacts of proposed alterations, and underscores the fallacy in respondents' attempt to characterize the "use" as that of a structure, without regard to the actual "use" to which that structure to proposed to be put.

The first assignment of error is sustained.[10]

SECOND ASSIGNMENT OF ERROR

Petitioner challenges the county's alternative finding that the nonconforming use status of intervenors' kennel was established through four other decisions, and that the county is "estopped" from concluding otherwise.

As explained above, the county's findings state that in four previous decisions the county has already determined that intervenors' kennel was a legal nonconforming use. Those decisions included a 1989 building permit to remodel the kennel building; a 1990 planning director design review decision approving the remodeling of the existing kennel; a 1990 planning commission conditional use permit approval for a night watchman's residence; and a 1996 planning director design review approval of the applicants' remodel of the existing kennel and an additional 25 kennel units. The county determined that petitioner could have, but did not, challenge any of those determinations and is precluded from challenging those decisions now. Specifically, the county found:

> "We find that Marquam Farms' failure to appeal the county's [1989, 1990 and 1996] decisions and the applicants' reliance on those same decisions have resulted in the applicants' right to a nonconforming kennel use with a capacity for 50 dogs. We are estopped from concluding otherwise in this application even if we were inclined to do so." Record 12.

---

[10]Intervenors make an additional argument that under ORS 215.130(10)(A) (1997), intervenors were required only to prove the nature and extent of the nonconforming use for only the ten years preceding the application, and on that basis, were required to evaluate the use only back to 1989. Intervenors do not establish how this 1997 amendment applies to this 1995 application. Even if intervenors established that it did, we do not understand why a ten-year evaluation would require them to consider only back to 1989. However, in any event, we do not see that that statutory provision is relevant here. Respondents quote and rely on only a portion of that statute. ORS 215.130(10) (1997) begins:

> "A local government may adopt standards and procedures to implement the provisions of this section."

One of those provisions allows local governments to adopt standards providing the continuity or extent of a nonconforming over a 10-year period preceding the application creates a rebuttable presumption that the use enjoys nonconforming use rights. Respondents do not show that the county has adopted such a standard.

Petitioner argues first that the preclusive effect of the earlier decisions was decided adverse to the county in Marquam Farms I, and cannot be reasserted now; and second, that even if the issue could be revived, the rules of estoppel do not apply in this situation.[11]

We note at the outset that respondents have not in any way established how two of the four "previous" decisions upon which the county relies could, in any event, preclude petitioner from challenging the nonconforming use status of the subject property. First, petitioner argues the 1989 building permit was not a decision for which petitioner received notice. On appeal, the county does not contend otherwise and does not discuss the effect of that building permit. The 1989 building permit does not appear in the record of this case, and respondents have not established how petitioner could in any way be precluded from raising issues in this appeal because of the issuance of that permit. Second, the 1996 design review approval for the additional 25 units, which is apparently dependent upon the challenged decision, post-dated the application for nonconforming use status at issue in this appeal. While it is possible that the res judicata rules could impact the ability of one of the parties here from raising issues in that subsequent case that are definitely determined in this case, petitioner here cannot be precluded from raising an issue here based on that application.

With respect to the 1990 design review and conditional use decisions, in Marquam Farms I, it appeared that one of the alternative bases for approval of the application was that one or both of those decisions "vested" nonconforming use status in the property. We held:

---

[11]Respondents take issue with petitioner's characterization of the county's alternate decision as one of "estoppel" rather than "res judicata." Respondents argue that in this case it is res judicata, rather than estoppel, that bars petitioner from challenging the nonconforming use status of intervenors' kennel use. As the Supreme Court explained in North Clackamas School District v. White, 305 Or 48, 50, 750 P2d 483, modified 305 Or 468, 752 P2d 1210 (1988), both claim preclusion (res judicata) and issue preclusion (collateral estoppel) are included within the law of res judicata. While the county's findings and respondents' analysis of those findings could be interpreted in different ways, given the county's own statement that it considers itself "estopped" from concluding that intervenors' kennel is a legal nonconforming use, we can understand how petitioner would conclude that the county's argument was one of estoppel. As we read the county's decision, it claims both that the nonconforming use status was conclusively established in 1989 or 1990 by petitioner's failure to appeal those decisions and, therefore the claim cannot be revisited now (i.e. claim preclusion;) and that, even if the nonconforming use status was not conclusively established then, the county is legally estopped because it has allowed intervenors to proceed.

> "To the extent respondents argue that one or both of the 1990 decisions somehow 'vested' certain nonconforming use rights in intervenors, we reject that argument. Neither of the 1990 decisions addressed intervenors' nonconforming use rights directly, or through an application of [MCC] .2028. Rather, in 1990 the county merely approved a design review for a 50-dog kennel and a conditional use for a watchman's residence."[12] 32 Or LUBA at 258 (footnote omitted).

On appeal, the Court of Appeals concluded:

> "We do not understand [respondents] to argue that the 1990 decisions, or either of them, are preclusive or dispositive in any other way or for any other reason. Before LUBA, [respondents] advanced an argument to the effect that the applicants had acquired a vested right to the 50-dog use through the 1990 decisions. [Respondents] have chosen not to repeat that argument to us." Marquam Farms Corp., 147 Or App at 384.

Early in its opinion, the Court of Appeals also notes that in 1990

> "[t]he applicants attempted to apply for a conditional use permit in conjunction with the kennel remodeling but were advised by county personnel, apparently on the basis of section 2028(B), that a conditional use permit was unnecessary. No argument based on estoppel, vested rights or related principles is made to us.
>
> "It is important to emphasize that the design review approval is not the equivalent of a conditional use permit, either in terms of the procedures or the substantive criteria that must be satisfied in order to obtain it. We also emphasize that the 1990 design review concerned the augmentation of the kennel's capacity to 50 dogs, conversely, in the main, the present decisions involve applications to increase a use from 50 dogs to 75." Id. at 371-72 n 2 (emphasis in original).[13]

Petitioner argues that under Beck v. City of Tillamook, 313 Or 148, 831 P2d 678 (1992) the county cannot reassert the alleged preclusive effect of the 1990 decisions in this appeal, since that issue was conclusively decided against the county in Marquam Farms I. In Beck, the Supreme Court determined that an appellate court cannot review legal issues that

---

[12]MCC 11.15.2028, titled "exemptions from non-conforming use provisions" was the basis for the county's earlier decision that intervenors' kennel was a "conforming conditional use," which we rejected in Marquam Farms I. That provision is not at issue in this appeal.

[13]If, as respondents assert, the kennel has always had the capacity to board 50 dogs, it is unclear what "augmentation" was necessary through the 1990 design review to allow the boarding of 50 dogs.

LUBA decided in an order in the same case, for which judicial review was not sought. In reaching that conclusion, the court explained that

> "[w]hen the record is reopened at LUBA's direction on remand, the 'new issues' by definition include the remanded issues, but not the issues that LUBA affirmed or reversed on their merits, which are old, resolved issues." Beck, 313 Or at 153.

Based on the court's rationale, petitioner here argues, that "[i]t necessarily follows that a decision maker cannot rely for approval upon a resolved issue that both it and the appellate bodies have previously decided against the applicant." Petition for Review 10.

This case is factually distinct from Beck in that the Beck petitioners were seeking judicial review of issues that were conclusively decided adverse to them during the initial review. In contrast, here it is the county, which on remand following Marquam Farms I, decided an issue in a manner that is adverse to this Board's conclusion in Marquam Farms I, and which the county did not raise before the Court of Appeals. However, while factually dissimilar, a similar rationale applies. Whether it is construed as an extension of the principle enunciated in Beck, or the application of rules of res judicata, the county cannot in this proceeding, reach a conclusion that is adverse to our conclusive determination in the first case.[14] As we stated in Marquam Farms I,

> "Claim preclusion (res judicata) and issue preclusion (collateral estoppel) preclude relitigation of factual issues and claims that have been conclusively determined between the parties involved. See North Clackamas School District v. White, 305 Or 48, 750 P2d 483, modified 305 Or 468 (1988); Nelson v. Clackamas County, 19 Or LUBA 131 (1990)." 32 Or LUBA at 252.

The alleged preclusive effect of the 1990 decisions was fully litigated and resolved adverse to the county in Marquam Farms I. Thus, to the extent the county's decision determines that the county established the existence of a nonconforming use during an earlier

[14]We do not imply that that, had the county on remand reopened the record and considered additional facts that could have altered the analysis upon which the first decision was based, it would be precluded from reaching a result contrary to our decision based upon the analysis of those new facts.

proceeding, that decision has already been decided in Marquam Farms I, and will not be revisited again. However, to the extent the county's decision can be read to state that petitioner here cannot raise the issue of the existence of the nonconforming use because they had the opportunity to and failed to raise the issue below, that issue was not resolved during Marquam Farms I. On its merits, however, the county's conclusion is legally incorrect.

Respondents urge that this is an issue of res judicata, and that petitioner is precluded from challenging the existence of the nonconforming use because it failed to take advantage of the opportunity to address and/or appeal that issue during the earlier proceedings when, according to petitioners, "the nonconforming use issue was clearly raised in, and made a part of, these prior decisions." Response Brief 29. However, the record citations to which respondents refer as support for that statement, do not in any way establish that either the nonconforming issue was "clearly raised in" or "a part of" those decisions.

One of the citations is to an excerpt of the county's code, with a notation that the county counsel considers the kennel to be a "conforming conditional use." Even if it were relevant to the issue before us, there is no indication that petitioner would have had any reason to know during the 1990 proceedings about either the county counsel's opinion or the excerpted page upon which the notation is added. The other citations are to a "notice of planning director decision" which refers to "remodeling plans for an existing 50-dog kennel; no additional dogs are authorized by this permit," and to a "final design review" notice, which refers to "remodeling a Kennel for 50 Dogs." Record 173-74.

None of these citations supports respondents' conclusion that the nonconforming use issue was either "clearly raised in" or "made a part of" those decisions. To the contrary, nothing to which we have been cited would give petitioner any reason to believe that a nonconforming use was, or could potentially be made to be, at issue in those cases.

At oral argument, respondents acknowledged that there was no discussion of any nonconforming use issue in those proceedings, but nonetheless argue it "could" have been

litigated during one or both of those cases. Whether or not it theoretically "could" have been raised during either of those proceedings, the issue of whether intervenors had an existing use was not at issue in either the 1989 and 1990 design review or conditional use proceedings. Rather, the evidence establishes that the issue of whether intervenor had a legal nonconforming use did not arise until the 1994 hearings officer decision, when he concluded that that determination had not yet been made. The earlier decisions may have assumed the existence of a nonconforming use, but the existence was not at issue, and was not decided in those cases.

Respondents argue nonetheless that the nonconforming use issue constitutes an "other matter which might have been litigated and decided as incident to or essentially connected therewith either as a claim or a defense." Response Brief 28, citing Joines v. Linn County, 24 Or LUBA 456, 462 (1993). We disagree. In Joines, this Board applied the res judicata principle of claim preclusion to an issue that had been resolved between the same parties in an earlier civil court proceeding. This Board quoted the Oregon Supreme Court to explain that:

> "'The doctrine of claim preclusion applies when a subsequent action is brought by one party against another party to a prior suit. If the two cases involve the same "claim, demand, or cause of action," then the judgment in the first suit not only bars all matters actually determined, but also every other matter which might have been litigated and decided as incident to or essentially connected therewith either as a claim or a defense. * * *' Waxwing Cedar Products v. Koennecke, 278 Or 603, 610, 564 P2d 1061 (1977), quoting Western Baptist Mission v. Griggs, 248 Or 204, 209, 433 P2d 252 (1967)." Joines, 24 Or LUBA at 462.

That quote, upon which respondents rely, quoted from several civil court cases, in which the courts applied and relied on civil court pleading procedures that all "claims" and "demands" stemming from the same "causes of action" must be plead together. Respondents appear to erroneously presume that civil court pleading requirements are analogous to local land use proceeding requirements, and that matters "essentially connected" to claims or defenses in a civil court proceeding have the same meaning when applied in the context of a

local land use proceeding. However, whatever analogies could potentially be made between "claims" in civil court proceedings and "issues" in local land use proceedings in other contexts, respondents here have not established that the nonconforming use issue here stems from the same "cause of action" or was "incident to or essentially connected" with a "claim" at issue during either the 1990 conditional use application or design review application. Neither of those earlier applications considered, or even alluded to, the existence of a nonconforming use. While the county may have been in error for failing to require intervenors to establish the legality and extent of its nonconforming use prior to initiating other applications, it was not incumbent upon petitioner to identify that error and raise the issue to avoid a claim of res judicata. Petitioner is not barred from challenging the nonconforming use status of intervenors' kennel by failing to identify and raise the issue during earlier proceedings during which the nonconforming use status was not at issue.

Finally, we understand the county's decision to assert that it is equitably estopped from denying the nonconforming use status of intervenors' kennel because of intervenors' reliance on the earlier decisions. Again, we disagree. As we have stated on numerous occasions, it is doubtful that equitable estopped could ever apply to preclude a local government from following the law. Even if it could be applied to some situations, it does not here. The county does not establish how it satisfies the five elements necessary for equitable estoppel, and we do not see that it has.[15] The county is not estopped from applying ORS 215.130 (1995), simply because it erroneously failed to do so earlier.

---

[15]As we quoted in DLCD v. Benton County, 27 Or LUBA 49, 61-62 (1994), the Supreme Court explained the five elements necessary to establish equitable estoppel in Coos County v. State of Oregon, 303 Or 173, 180-81, 734 P2d 1348 (1987), as follows:

> "The elements of equitable estoppel in Oregon were set out by this court in Oregon v. Portland Gen. Elec. Co., 52 Or 502, 528, 95 P 722 (1908):
>
> > "'To constitute estoppel by conduct there must (1) be a false representation; (2) it must be made with knowledge of the facts; (3) the other party must have been ignorant of the truth; (4) it must have been made with the intention that it should be

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

Petitioner challenges the county's approval of the expansion of intervenors' kennel from 50 to 75 dogs. Petitioner asserts, and we agree, that because the county has not established the nature and extent of the legal nonconforming use, if any, it cannot evaluate an expansion of that use.

The third assignment of error is sustained.

The county's decision is remanded.

---

acted upon by the other party; (5) the other party must have been induced to act upon it: Bigelow, Estoppel (5 ed.), 569, 570.'

"Courts generally have held that the misrepresentation must be one of existing material fact, and not of intention, nor may it be a conclusion from facts or a conclusion of law. Everest and Strode, The Law of Estoppel 251 (3d ed 1923). The party seeking estoppel must demonstrate not only reliance, but a right to rely upon the representation of the estopped party."