BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAN JOHNSON and JOANNA JOHNSON,	)	
	)	
Petitioners,	)	LUBA No. 98-216
	)	
vs.	)	FINAL OPINION
	)	AND ORDER
CLACKAMAS COUNTY,	)	
	)	
Respondent.	)	

Appeal from Clackamas County.

Paul D. Schultz, Oregon City, filed the petition for review and argued on behalf of petitioners. With him on the brief was Hibbard, Caldwell & Schultz.

H. Andrew Clark, Assistant County Counsel, Oregon City, filed the response brief. Michael Judd, County Counsel, argued on behalf of respondent.

BRIGGS, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member, participated in the decision.

REMANDED 10/20/99

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioners appeal a county decision denying an appeal arising from the verification of petitioners' used-metal sales yard as a nonconforming use.

FACTS

Petitioners own and operate a used-metal sales yard on eight adjacent tax lots.[1] The business includes the collection, storage, and resale of scrap/used steel and other metals. The subject property is zoned Light Industrial, and all parties agree that the use of the property became nonconforming when the Light Industrial zoning designation was first applied on February 21, 1967. In 1998, petitioners applied for a verification of a nonconforming use on those lots or, in the alternative, the verification of nonconforming use and a permit to expand the nonconforming use so as to incorporate all of the properties' uses as they existed at the time of the 1998 application.

The planning director reviewed the history of the property to determine the nature and extent of activities at the time the use became nonconforming. The director determined that the used-metal sales activities existed on only two of the eight tax lots (tax lots 2700 and 3000) prior to 1967. The director approved limited expansion of the nonconforming use to five of the remaining six tax lots, but not on tax lot 4203.

Petitioners requested a hearing before the county hearings officer pursuant to Clackamas County Zoning and Development Ordinance (ZDO) 1305.02(D)(2). The reason for the hearing was to appeal that part of the planning director's decision that no nonconforming use existed on tax lot 2500 prior to February 21, 1967. The hearings officer allowed petitioners an opportunity to provide evidence to show that petitioners' predecessor in interest had operated a used-metal sales business on tax lot 2500 prior to 1967. After the

[1]Tax lots 2300, 2400, 2500, 2600, 2700, 3000, 3100, and 4203. Record 241-42.

hearing, the hearings officer denied petitioners' appeal, and affirmed the planning director's decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Verifications of nonconforming use pursuant to ZDO 1206 are administrative decisions made by the planning director. ZDO 1305.02(E)(2) provides that an appeal of an administrative decision of the planning director shall be reviewed by the hearings officer pursuant to procedures adopted to implement ORS 215.416(11)(a) and ORS 197.763.

In his decision, the hearings officer determined that ZDO 1305.02(E)(2) hearings procedures implement ORS 215.416(11)(a), and thus hearings upon appeal of the planning director's administrative decision must be *de novo*. However, he compared the hearings officer's role in this type of *de novo* review to *de novo* review by an appellate court and found the roles to be substantially similar. Based on that analogy, the hearings officer found that he could, but was not required to, accept new evidence that was not presented to the planning director. The hearings officer then distinguished between "supplemental evidence" (evidence that the applicant could have, but did not produce for the planning director) and "new evidence" (evidence that could not have been presented to the planning director, either because it was discovered immediately after the planning director's decision or otherwise was not accessible). The hearings officer opined that supplemental evidence should be accorded less credibility simply because it was not first offered to the planning director. In addition, the hearings officer stated that while he was not obligated to affirm the planning director's decision, he would "accord considerable deference to (or be guided by) the findings, conclusions, and reasoning in the Planning Director's decision – at least in the absence of some compelling reason to disagree with the Planning Director’s analysis or otherwise alter the result of the decision." Record 21.

Petitioners assert that the hearings officer's analysis of his role in *de novo* hearings

pursuant to ZDO 1305.02(E)(2) is incorrect.[2] Petitioners argue that ZDO 1305.02(E)(2) implements ORS 215.416(11)(a) and that under the statute the hearing must be *"de novo,"* which means a review of the evidence on an equal basis, notwithstanding the fact that some of the evidence could have been, but was not, presented to the planning director.[3]

Respondent argues that the hearings officer's stated analysis is essentially *dicta*, because he made his decision on his assessment of the credibility of the evidence presented to him, and did not summarily reject the evidence petitioners introduced during the appeal hearing.

The Court of Appeals has interpreted the county's responsibility under ORS 215.416(11)(a) to permit the county to make a decision without a hearing only if an opportunity for a *de novo* hearing is granted, and that *de novo* hearing follows the format described in ORS 197.763. *Wilbur Residents v. Douglas County*, 151 Or App 523, 528, 950 P2d 368 (1997), *rev den* 327 Or 83 (1998) ("The statute essentially gives counties the option not to conduct a hearing 'in the first instance if a *de novo* hearing and a meaningful ability to pursue it are provided for at a later stage of the county process.'")

We view the Court of Appeals' interpretation as not only authorizing, but *obligating* the hearings officer to consider all relevant evidence that is accepted at the *de novo* hearing

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[2]Black's Law Dictionary defines *de novo* as "[a]new; afresh; a second time." A *de novo* trial is defined as "[t]rying a matter anew; the same as if it had not been heard before and as if no decision had been previously rendered." *Black's Law Dictionary*, 435 (6th ed 1990).

[3]ORS 215.416(11)(a) provides:

> "The hearings officer, or such other person as the governing body designates, may approve or deny an application for a permit without a hearing if the hearings officer or other designated person gives notice of the decision and provides an opportunity for appeal of the decision to those persons who would have had a right to notice if a hearing had been scheduled or who are adversely affected or aggrieved by the decision. Notice of the decision shall be given in the same manner as required by ORS 197.763. An appeal from a hearings officer's decision shall be to the planning commission or governing body of the county. An appeal from such other person as the governing body designates shall be to a hearings officer, the planning commission to the governing body. *In either case, the appeal shall be a de novo hearing*." (Emphasis added.)

granted pursuant to ORS 215.416(11)(a). As the Court of Appeals' decision in *Wilbur Residents* makes clear, the county is authorized by ORS 215.416(11)(a) to render a permit decision *without* a hearing and *without* allowing adjoining property owners a chance to participate. But such decisions are only permissible if the county provides notice of the decision, an opportunity for appeal and an opportunity for a "*de novo* hearing" if an appeal is filed. We believe the *de novo* hearing under ORS 215.416(11)(a) requires that the applicant and other parties (who, unlike the applicant, likely were not involved in the decision at all) be given the same chance to present evidence as they would if the county had provided a hearing before the initial decision under ORS 215.416(3). We discern nothing in ORS 215.416(11)(a) that permits the hearings officer to view evidence "with some skepticism" simply because it could have been presented prior to the *de novo* hearing. Record 26. We therefore conclude that the hearings officer's jaundiced view of what he terms "supplemental evidence" is inconsistent with the statute.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the hearings officer failed to adopt findings adequate to explain why petitioners' nonconforming use verification for tax lot 2500 was denied.

The hearings officer's findings state:

> "* * * at the November 18 hearing Appellant offered additional testimony of Joanna Johnson and Norman Fandrei to establish that a prior owner had established a use on Tax Lot 2500 that would qualify as a nonconforming use. * * * Had that testimony been offered to the Planning Director – and the Hearings Officer concludes that there exists no compelling explanation from Appellant why it could not have been – the record would have supported a finding that a particular use had been established on Tax Lot 2500 prior to February 21, 1967 [the date the use became nonconforming]. However, the additional testimony does not necessarily result in a reversal of the Planning Director's decision, for a number of reasons.
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> "*First,* the additional testimony offered by Appellant during the appeal hearing contradicts not only the County's tax records but all of Appellant's *own* evidence as well; prior to the appeal Appellant's evidence pointed to no

> time earlier than 1971 that any particular use had been established on Tax Lot 2500. The oddity causes the Hearings Officer to view the additional evidence with some skepticism, particularly since it seeks to vary documentary evidence.
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> "*Second*, Appellant's supplemental testimony that belatedly introduces a distinctly different time element into the equation merely comprises 'substantial' evidence that *could* support a finding in Appellant's favor, but certainly does not *compel* the decision-maker to find that a prior owner established a particular use prior to 1967. * * *
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> "*Third*, and maybe most importantly, the appeal process does not exist as a device by which an applicant can belatedly augment the record with evidence that *could* have – and certainly should have – been offered to [the] Planning Director in the first place. Nor does the appeal process function to afford an applicant the equivalent of a second opportunity to make his or her case after conducting a post-mortem assessment of an adverse administrative decision. The additional testimony offered by Appellant at the November 18 hearing certainly does not constitute 'new' evidence in the sense that it had not been available to Appellant long prior to the land use application itself. * * * The record thus offers no compelling reason why Appellant's belated offering of supplemental evidence should be accorded any outcome-determinative significance on appeal." Record 25-27. (Emphasis in original).

Respondent argues that these findings show that petitioners failed to carry their burden to identify the nature and extent of the nonconforming use on tax lot 2500 by substantial evidence in the whole record, regardless of the analysis the hearings officer used to reach his conclusions.

If, as the county argues, the hearings officer fully considered and gave appropriate weight to the evidence that was submitted during the *de novo* review, without regard to whether the evidence could have been submitted earlier, then we would affirm the county's decision. *See Lawrence v. Clackamas County*, ___ Or LUBA ___ (LUBA No. 98-132, June 15, 1999) (Where the county could show that a decision encompassing a faulty analysis contains one basis for denial that does follow a correct analysis, and that basis for denial is supported by substantial evidence, LUBA will affirm the denial.) However, such a case is not before us.

The record before the planning director contained no evidence regarding whether tax lot 2500 was being used in any particular manner at the time the Light Industrial zoning designation was applied to the property in 1967. In fact, the reason why the planning director determined there was no nonconforming use on tax lot 2500 was because petitioners failed to show that the property was occupied by a used-metal sales yard. The evidence presented to the hearings officer at the hearing was offered to show what was occurring on the property before February 21, 1967. The evidence supported the appellants' contention that the used-metal sales business encompassed tax lot 2500 as well as tax lots 2700 and 3000. Until that testimony was presented, there was no evidence, one way or another, to show what activities were occurring on tax lot 2500.

The hearings officer's three alternative bases for rejecting the appeal arise from his assessment of the outlined testimony. However, each of these bases, in one way or another, are affected by his improper view of the evidence presented at the hearings – evidence he believed could have and should have been presented earlier. We conclude that respondent failed to adopt adequate findings to explain why petitioners' nonconforming use verification for tax lot 2500 was denied.

The second assignment of error is sustained.

The decision is remanded.