BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAMES CROOK and WILLIAM V. CROOK,
Petitioners,

vs.

CURRY COUNTY,
Respondent,

and

STEPHEN C. DONNELLY,
Intervenor-Respondent.

LUBA No. 2000-077

FINAL OPINION
AND ORDER

Appeal from Curry County.

John W. Shonkwiler, Tigard, filed the petition for review and argued on behalf of petitioners.

Jeffrey H. Boiler, Special County Counsel, Eugene, filed a response brief and argued on behalf of respondent. With him on the brief was Boiler & Kelly.

Gregory S. Hathaway and Christopher P. Koback, Portland, filed a response brief and argued on behalf of intervenor-respondent. With them on the brief was Davis, Wright, Tremaine, LLP.

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

AFFIRMED 09/15/2000

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal the county's decision that their beach house is not a legally pre-existing nonconforming use.

MOTION TO INTERVENE

Stephen C. Donnelly (intervenor) moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

Petitioners, along with other family members, own a 185-acre farm in the Pistol River area of central Curry County. The property includes three residential dwellings, one of which, a beach house, is the subject of this controversy. According to petitioners, the beach house was built in 1961, before the county first adopted a zoning ordinance, and has been used as a rental recreational dwelling since 1971. The county and intervenor assert, to the contrary, that the building was constructed after 1992, and that it is not entitled to recognition as a legally established nonconforming use.

The property was zoned Forest-Grazing (FG) with a Natural Hazard (NH) Overlay in 1972. The zoning designation does not permit construction of new vacation dwellings, but does permit alteration, restoration or replacement of a lawfully established dwelling, under certain conditions. Because the subject dwelling is within a geologic hazard area having potential for headland and sea cliff erosion, it is subject to the Natural Hazard Overlay zone, which imposes additional restrictions. The applicable zoning would not permit a new or replacement structure, devoted to its present use, at this particular site.

Sometime prior to June 1999, the county received a complaint from intervenor about use of the structure. On June 16, 1999, the county board of commissioners adopted a resolution authorizing the planning commission to initiate a land use action to determine whether the structure is a valid nonconforming use. The planning commission held hearings,

took evidence and concluded that the property "includes structures which constitute a valid nonconforming use in 1972, and that valid nonconforming use as a dwelling has been essentially continuous to the present."[1] Record 47-48.

Intervenor filed an appeal of the planning commission's decision with the board of commissioners. The board of commissioners conducted a *de novo* hearing on February 22, 2000, and continued the hearing to April 11, 2000. The board of commissioners voted to overturn the planning commission's decision, concluding that the structure was "not in existence until after 1972, and that the structure and use are not [a] legally existing, valid nonconforming structure or use under applicable law." Record 4. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the county exceeded its jurisdiction, committed procedural error, and improperly construed the applicable law by (1) initiating a proceeding to inquire into the validity of the alleged nonconforming use that is not authorized by the county's code; (2) failing to follow the appropriate process for enforcement provided for in the county's code; and (3) failing to provide a hearings officer's review, as required by ORS 215.130(8) and 215.416.

A. Authority to Initiate Enforcement Proceedings

The county board of commissioners instructed the planning commission to initiate a review proceeding, pursuant to Curry County Zoning Ordinance (CCZO) 2.040(d).[2]

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[1]Intervenor is a member of the county planning commission, but recused himself and did not participate in the proceedings before the planning commission as a commissioner.

[2]CCZO 2.040(d) provides in relevant part:

> "Applications for development approval may be initiated by one or more of the following:
>
> "* * * * *
>
> "d) A person or entity authorized by resolution of the Board [of commissioners] or [the Planning] Commission."

According to petitioners, CCZO 2.040(d) only allows the county to initiate a land use proceeding when the county seeks to make application for a land use decision, such as a zone change or development permit. Petitioners contend that the county's authority to take enforcement actions is set forth in CCZO 10.050(2), and those enforcement actions, petitioners argue, are limited to asking the circuit court to enforce the zoning code provisions.

CCZO 10.050 addresses enforcement of the zoning code provisions. It sets out a procedure for determining whether a violation exists and provides that the planning director may seek a remedy "under the applicable law." CCZO 10.050(1). CCZO 10.050(2) gives the board of commissioners explicit authority to enforce through the ordinance itself or through traditional judicial remedies. In relevant part, CCZO 10.050(2) provides:

> "In case a building or other structure is located or is proposed to be located, constructed, maintained, repaired, altered or used, or any land is or is proposed to be used in violation of any of the parts of this ordinance the county shall, *the Board of Commissioners may*, in addition to other remedies provided by law *institute injunction, mandamus, abatement or other appropriate proceedings to prevent, temporarily or permanently enjoin, abate or remove the unlawful location, construction, maintenance, repair, alteration or use*." * * * (Emphasis added.)

Petitioners believe the above-emphasized language in CCZO 10.050(2) means the county may not institute its own enforcement process. Petitioners are mistaken. In the first instance, the county must decide whether it believes its land use regulations have been violated. Without some determination by the county that code violation may have been committed, the county would have little reason to seek assistance in circuit court. CCZO 10.050(2) clearly vests the county board of commissioners with responsibility for choosing the appropriate course of action should a violation exist, but the board of commissioners cannot know if a violation exists without pursuing some process to so determine. In the instant case, the county chose to use a contested case process pursuant to CCZO 2.040(d), initially before the planning commission, to resolve whether the use was, in

fact, a valid nonconforming use. This process afforded petitioners a hearing, a right to present and rebut evidence and a written decision. The fact that petitioners do not approve of the county's process does not mean the process violated the law or deprived petitioners of a substantial right. We find no error in the county's choice to adjudicate this matter.[3]

Petitioners also object to the county's invocation of CCZO 2.040(d). That provision allows applications for development approval to be initiated by a "person or entity authorized by resolution" of the board of commissioners or planning commission. The provision is part of "Article II" of the county's ordinance which controls the procedures for making land use decisions. CCZO 2.010. The stated purpose of Article II is "to establish the procedures for applications provided for by this ordinance, appeals from aggrieved persons and parties, and review of any decision by a higher authority." *Id*. CCZO 2.040(d) governs who may apply for a development approval and specifically authorizes application by the board of commissioners or the planning commission.

In this case, counsel for the county advised that the county itself would be the "applicant" for the determination of validity of the alleged nonconforming use. Record 375. Petitioners' principal objection to this use of the county as "applicant" in order to initiate a contested case proceeding is that the county then becomes not only the applicant for a question but also its deciding body. Petitioners argue that, unlike review involving an independent hearings officer or a circuit court judge, the procedure the county adopted allows the decision maker to control the proceedings in a manner that allows the trier of fact to hide *ex parte* contacts and bias, and to exclude evidence and prevent adequate cross-

[3]*See ODOT v. City of Mosier*, 161 Or App 252, 256, 984 P2d 351 (1999), for a discussion of a similar city ordinance provision and the city's authority to conduct a quasi-judicial proceeding to determine the status of an alleged nonconforming use. The court found the city did have authority to initiate the proceeding notwithstanding a claim that the city's ordinance enforcement authority under an ordinance provision similar to that at issue here was limited to seeking enforcement through circuit court. As a legislative body with authority to enact ordinances, a county commission enjoys authority to provide for enforcement of its enactments. ORS 203.010, 203.035, 203.065; *Watson v. Clackamas County*, 129 Or App 428, 879 P2d 1309 (1994). Of course, traditional judicial remedies are left to the courts. *See* ORS 215.185.

examination of witnesses, to the prejudice of petitioners' substantial rights.

Petitioners have not demonstrated that the county's process or its dual role as applicant and decision maker violates any provision of ORS chapter 215 or creates any prejudice to petitioners' rights. Again, petitioners were afforded a hearing before the planning commission, an opportunity to present and rebut evidence and a written order. They had a second forum within which to assert their views in the appeal proceeding before the county board of commissioners. The act of making a referral to the planning commission to answer whether a use is validly established does not suggest the county commissioners had any particular outcome in mind for the proceeding. In other words, there is nothing in the county's chosen process that denies petitioners a fair hearing and decision. Were we to hold otherwise, we would place in question any county or city-initiated land use proceeding where the county or city had an interest in the outcome. We are aware of no authority suggesting that a county governing body, as the entity responsible for making land use decisions, is prohibited from deciding a matter simply because the county itself has some interest in the proceeding.[4]

We should note that the parties do not discuss what appears in the county zoning ordinance to be the required procedure when confronted with questions about the validity of an alleged nonconforming use. CCZO 2.060(1) provides that the planning director has authority to review, approve or deny certain "applications" as part of an administrative action, apparently without a hearing. CCZO 2.060(1)(c) lists the "determination of the existence and/or alteration of a nonconforming use (Section 5.060-5.062)" as one such matter for planning director action. Because the county treated this matter as an application and sent it to the planning commission for hearing and initial determination, one could conclude the county bypassed the applicable ordinance provision. That is, the matter arguably should

[4]Due process of law does not require a formal separation of the investigative and adjudicative functions of an administrative agency. *Withrow v. Larkin*, 421 US 35, 95 S Ct 1456, 43 L Ed 2d 712 (1975); *Fritz v. OSP*, 30 Or App 1117, 569 P2d 654 (1977). There is no reason to find otherwise with respect to local governments.

have gone to the planning director for an initial determination.

Even if the county were understood to have failed to follow the procedure set out in CCZO 2.060, there would be no basis upon which we could reverse or remand the decision. A failure to follow the proscribed procedure is a procedural error. Petitioners do not articulate a reason why their access to and participation in a full contested case proceeding caused prejudice to their substantial rights. Without such a showing, we have no basis upon which to overturn the county's decision.[5] ORS 197.835(9)(a)(B).

B. Hearings Officer

Petitioners also assert that applicable statutory provisions require that the county's nonconforming use verification be conducted by a hearings officer. Under ORS 215.130(8), any proposal for verification of an alleged nonconforming use is subject to the provisions of ORS 215.416(11).[6] This latter statute calls for land use decisions by a hearings officer. Petitioners argue that, pursuant to ORS 215.402(3), a "hearings officer" is defined in a manner that does not include the county planning commission or board of commissioners.[7] Petitioners believe, therefore, that a hearings officer must decide matters such as the resolution of whether or not an alleged nonconforming use is valid. We do not agree.

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[5]We add that even if the county's ordinance were silent on the appropriate means and person or body to hear the issue, the board of commissioners' resolution sending the matter to the planning commission would be within the county's authority under ORS 215.406 and 215.416. We find no error in the county's use of the planning commission to address this issue or in its taking review of the planning commission's decision.

[6]ORS 215.130(8) provides:

> "Any proposal for the verification or 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. An initial decision by the county or its designate on a proposal for the alteration of a use described in subsection (5) of this section shall be made as an administrative decision without public hearing in the manner provided in ORS 215.416 (11)."

[7]ORS 215.402(3) provides:

> "'Hearings officer' means a planning and zoning hearings officer appointed or designated by the governing body of a county under ORS 215.406."

ORS 215.406 authorizes a county governing body to appoint hearings officers and also provides that the county planning commission or the governing body itself may serve as the hearings officer.[8] In other words, a county board of commissioners may use the planning commission or itself as the hearings officer responsible for carrying out whatever adjudication may be called for in statute or under county ordinances or regulations.

In sum, there is no requirement that a county governing body appoint a hearings officer to hear contested cases such as a determination of the legitimacy of a nonconforming use. It may hear such cases itself, or it may choose to designate some one or some body, such as a planning commission, to hear such cases. Nothing in ORS chapter 215 forces Curry County to use the procedure petitioners assert as the exclusive means to address a nonconforming use.

Two procedural matters remain. First, petitioners complain of a county staff refusal to furnish public documents. Petitioners offer a citation to an affidavit in the record making this assertion. Record 649-50. The affidavit, however, does not show petitioners were denied access to documents, only that the affiant, James Crook, was told that any request for documents must be taken to the county counsel. In other words, it appears petitioners did not pursue their rights. Further, they fail to explain fully the significance of the documents and how any inability to obtain them injured their cause. Petitioners have not demonstrated that any denial of access to documents occurred or, if it did, that it injured their substantial rights.

Similarly, petitioners argue that they did not have the opportunity to cross-examine

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[8]ORS 215.406 provides:

> "(1) A county governing body may authorize appointment of one or more planning and zoning hearings officers, to serve at the pleasure of the appointing authority. The hearings officer shall conduct hearings on applications for such classes of permits and contested cases as the county governing body designates.
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> "(2) *In the absence of a hearings officer a planning commission or the governing body may serve as hearings officer with all the powers and duties of a hearings officer*." (Emphasis added.)

witnesses during the proceedings below. However, petitioners point to no law or authority requiring cross-examination as part of any land use proceeding.[9] The record does contain a document entitled "Land Use Appeal Hearing Introduction" which provides that the presiding officer at the hearing will allow "the Board and attorneys for the Board and any parties a brief opportunity for cross-examination of any persons giving testimony at the hearing. Cross-examination shall be reasonable in scope and duration and shall only be allowed at the presiding officer's sole and absolute discretion." Record 28. Thus, petitioners may have had some right to cross-examine witnesses under the county's procedures. However, we are cited to nothing in the record that shows petitioners attempted to exercise that right, or requested cross-examination of any witness or decision maker. Indeed, we are cited to no portion in the record wherein petitioners objected to the county's instruction regarding the hearing or the process actually used at the hearing. *See* ORS 197.835(3) (limiting matters on review to those raised before the local hearings body). We find no error as alleged.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In this assignment of error, petitioners assert the board of commissioners violated state law by failing to properly and completely disclose *ex parte* contacts and failing to provide a right to rebut the substance of *ex parte* communications, in violation of ORS 215.422(3).[10] Petitioners also argue that the commissioners were biased against them.

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[9]ORS 197.763 sets out standards for local quasi-judicial land use hearings. While permitting presentation of evidence is required, cross-examination is not.

[10]ORS 215.422(3) provides:

> "No decision or action of a planning commission or county governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:

A. *Ex Parte* Communications

Support for the existence of the alleged *ex parte* contacts is found in an affidavit of petitioner William Crook stating, in sum, that he was advised of the existence of *ex parte* contacts by the planning director. On May 14, 1999, the planning director is reported to have said to petitioner that intervenor "has had contact with the County Commissioners; that's not right; they will serve like a court hearing any appeal." Record 651.

Petitioners also argue that county staff sent copies of various county correspondence to the complaining party, intervenor, and to the board of commissioners. Record 655. Petitioners characterize these transmittals as *ex parte* communications.

Petitioners have failed to establish that any undisclosed *ex parte* communications with the board of commissioners occurred. An *ex parte* communication must be disclosed only if it concerns the decision or action at issue in a land use proceeding. The complaint about contact between intervenor and the county board of commissioners includes no assertion that the contacts were indeed about material issues relevant to the alleged nonconforming use, or otherwise constituted an *ex parte* communication within the meaning of ORS 215.422(3). Absent such a showing, there is no basis to invalidate the decision.[11] *Lane County School Dist. 71 v. Lane County*, 15 Or LUBA 608, 610-12 (1986). Similarly, petitioners' allegations that county staff sent copies of correspondence to intervenor and the

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> "(a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and
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> "(b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related."

[11]We note also that the alleged contact between intervenor and the board of commissioners occurred sometime before May 14, 1999, *i.e.*, at a time when no proceedings before the county planning commission or board of commissioners had been initiated or authorized. Although we need not and do not reach the issue, it is arguable under such circumstances that because no "decision or action" was pending before the county, any such communication with the board of commissioners does not constitute an *ex parte* communication that must be disclosed under ORS 215.422(3).

board of commissioners are insufficient to allege the existence of undisclosed *ex parte* communications. Such communications must be with a member of the decision making body. ORS 215.422(3). Communications between county staff and the decision making body are not considered *ex parte* contacts. ORS 215.422(4); *Dickas v. City of Beaverton*, 16 Or LUBA 574, 581, *aff'd* 92 Or App 168, 757 P2d 451 (1988).

To the extent petitioners have shown evidence of an *ex parte* communication, we conclude that, having had opportunity to do so, they failed to object below to the lack or inadequacy of disclosure. *Wicks v. City of Reedsport*, 29 Or LUBA 8, 13 (1995) (where a party has the opportunity to object to the inadequacy of disclosure regarding a site visit by the decision makers, but fails to do so, that error cannot be assigned as grounds for reversal or remand).[12] As noted above, petitioners apparently learned of the possibility of the alleged *ex parte* contact between intervenor and the board of commissioners on May 14, 1999. The county submits partial transcripts of the February 22, 2000, and April 11, 2000 hearings, which show the commissioners were questioned by county counsel about *ex parte* contacts, conflicts of interest and bias.[13] At the first hearing, one commissioner mentioned that intervenor was a campaign contributor.[14] Respondent's Brief App 3. One commissioner disclosed a contact with the planning director on an issue involving other property where intervenor and his wife testified. *Id.* at 6. There were no other declarations of *ex parte* contact or bias. On April 11, 2000, the county counsel asked the chair to call for objections

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[12]*But see Horizon Construction, Inc. v. City of Newberg*, 114 Or App 249, 834 P2d 523 (1992) (the petitioner's failure to object to the timing and lack of opportunity to rebut late disclosure made after the close of the evidentiary hearing is not a basis to reject petitioner's claim under ORS 227.180(3), the analogue to ORS 215.422(3) applicable to cities).

[13]The partial transcripts appear as attachments to the county's brief.

[14]The fact that a party to a land use proceeding before the board of commissioners was an election contributor does not show the recipient of the contribution to be unable to perform the quasi-judicial function required. County commissioners are elected officers. We are aware of no authority suggesting that elected officers may not sit in judgment over a contested case in which a campaign contributor is a party. Indeed, there is authority standing for just the opposite proposition, as respondent points out with its citation to *In re Fadeley*, 310 Or 548, 565, 802 P2d 31 (1990).

on the basis of conflict of interest or personal bias. There were no responses. *Id.* at 8. Petitioners and their counsel attended the hearings below. However, there is no indication that petitioners challenged or objected to the lack of disclosure of these alleged *ex parte* contacts at any time.[15] Thus, even assuming the alleged contact should have been disclosed, petitioners failed to exercise several opportunities to raise that issue below, and cannot raise it now before LUBA.[16] *Wicks*, 29 Or LUBA at 13; ORS 197.835(3).

B. Bias

Finally, petitioners allege the decision makers were biased against them. In order to make out a successful claim of bias, petitioners must show not only that the board of commissioners was predisposed to interpret the law in a particular manner against them, but also that the commissioners prejudged the facts. *Davidson v. Oregon Government Ethics Comm.*, 300 Or 415, 429, 712 P2d 87 (1985); *ODOT v. City of Mosier*, 36 Or LUBA 666, 681-82 (1999). In other words, petitioners must show the decision maker was not able to perform the statutorily mandated function to adjudicate the issue before it.

As discussed, there is nothing to show the decision was influenced by any *ex parte* contact. *Turnquist v. Employment Division*, 72 Or App 101, 104, 694 P2d 1021 (1985). Further, petitioners have not shown any prejudgment of fact or law against them. *Davidson*, 300 Or at 429; *Teledyne Wah Chang v. Energy Fac. Siting Council*, 298 Or 240, 692 P2d 86

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[15]Petitioners cite to several places in the record where, they argue, they raised objections to *ex parte* contacts. The only citation that bears on the alleged contact between intervenor and the board of commissioners is the affidavit of petitioner William Crook, dated March 14, 2000, and marked as received by the county on that date. Record 651. As far as we can tell, the affidavit is not accompanied by any request or motion that the board of commissioners consider and disclose the substance of the *ex parte* communications alleged in the affidavit. As noted in the text, the transcript of the proceedings before the board of commissioners reveals no objection or oral request or motion for disclosure.

[16]In addition, we note that, as intervenor points out, the planning director was present at the planning commission hearing of September 2, 1999, and at the board of commissioners' hearings of February 22, 2000, and April 11, 2000. Record 17, 22, 82. As discussed earlier, Mr. Crook's affidavit cited the planning director as the source who disclosed that that intervenor had *ex parte* communication with the county commissioners. Record 651. Petitioners do not assert they attempted to call the planning director to obtain testimony about the alleged contacts.

(1984); *Boughan v. Board of Engineering Examiners*, 46 Or App 287, 611 P2d 670 (1980). In this case, petitioners do not identify any evidence that the board of commissioners or any of its members were incapable of performing the required review function.[17] *Eckis v. Linn County*, 19 Or LUBA 15, 48-49 (1990).

Further, as discussed earlier, the fact the board of commissioners and staff serve several functions does not provide a legitimate basis for a claim of bias. *1000 Friends of Oregon v. Wasco Co. Court*, 304 Or 76, 82-83, 742 P2d 39 (1987). A county board of commissioners is the governing body of the county. ORS 203.010. As such, it must either perform several functions itself or delegate such functions to others within county government. That a board of commissioners both institute a proceeding and serve as the final arbiter of that proceeding does not mean the proceeding will be unfair. The process does not somehow render the individual commissioners unable to perform their jobs.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In the final assignment of error, petitioners argue the evidence in the record does not support the county's determination that the alleged nonconforming use was not validly established. Petitioners believe evidence supporting their position so undermines the evidence the county relied upon as to require us to remand the county's decision as not supported by substantial evidence. ORS 197.835(9)(a)(C).[18]

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[17]Petitioners argue that the board of commissioners rejected their request to disclose any political campaign contributions received from intervenor. Petitioners argue that the commissioners had a duty to disclose such contributions under ORS 215.422(3), but petitioners do not explain why such contributions would constitute *ex parte* communications under that statute. In any case, the transcript of the proceedings before the board of commissioners indicates that at least one commissioner disclosed the fact that intervenor was a campaign contributor. Petitioners do not explain why that disclosure was inadequate, or what bearing that fact has on the board of commissioners' ability to render an unbiased decision.

[18]Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. When reviewing for substantial evidence, LUBA may not substitute its judgment for that of the decision maker. *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992). Where the evidence is conflicting, if a reasonable person could reach the same conclusion as the local government, LUBA will defer to the local government. *Gionet v. City of Tualatin*, 30 Or LUBA 96

A. Photogrammetric Evidence

The county's findings rely heavily on evidence given by a photogrammetrist and a report from county staff. The photogrammetrist examined a series of aerial photographs of the area taken in 1973, 1979, 1992 and 1997. Record 168.[19] Because the beach house did not appear in the photographs prior to 1997, he concluded the beach house was built after 1992. *Id*.

The county's findings also place reliance on a planning staff investigation concluding that there were no building, electrical, plumbing or septic permits for the beach house, either prior to or after 1992. Record 13, 58. In addition, the county relied upon a staff site visit to the beach house, which examined the foundation, exterior and interior of the house and concluded that it appeared to be of "all new construction." Record 152.

Petitioners begin their challenge by attacking the evidence furnished by the photogrammetrist. In part, petitioners' challenge consists of claims that the county's photogrammetrist is poorly qualified to offer an opinion about whether the vacation house was in place before 1992. They argue his qualifications do not prepare him to analyze aerial photographs to determine the nature of objects photographed.

The county relied on the photogrammetrist's evidence and was apparently satisfied with his qualifications. The record shows that the photogrammetrist has 21 years of experience in photogrammetry and has provided services for local governments in the past. Record 167. He provided the county with a detailed analysis of his findings in a written report and a more detailed 10-page affidavit. Record 168, 815-24. Given his stated

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(1995). Under a similar judicial review statute, ORS 183.482(8)(C), "[i]f an agency's finding is reasonable, keeping in mind the evidence against the finding as well as the evidence supporting it, there is substantial evidence." *Armstrong v. Asten-Hill Co*., 90 Or App 200, 206, 752 P2d 312 (1988). Importantly, a decision may be reasonable even if it is not the same decision a court (or LUBA) might make given the same evidence. *Younger v. City of Portland*, 305 Or 346, 359, 752 P2d 262 (1988); *1000 Friends v. Marion County*, 116 Or App at 587; *Adler v. City of Portland*, 25 Or LUBA 546 (1993).

[19]Copies of these aerial photographs may be found at Record 386-93. The original diapositives are at Record 395-98.

qualifications and the detailed nature of the evidence, a reasonable person could conclude the photogrammetrist was qualified to offer evidence about the structures on the ground shown in the photographs. The county did not err in accepting his evidence or in relying on it.[20]

The photogrammetrist's report states no structure was visible before the 1997 photograph. In his affidavit, he states that had the structure been in existence prior to that time, the structure would have been visible through the tree canopy. Record 819-20. He based that conclusion on the presumption that the trees making up the canopy grow and do not shrink. He states that the tree canopy "where the structure appears in 1997, would have necessarily been of much lower height in earlier aerial photographs, and an examination of aerial photographs up to 25 years prior to 1997, a growth period of 25 years, shows no indication of any structure under the tree canopy." Record 820.

Petitioners produced their own photogrammetrist. His affidavit stated he viewed four photographs, two from 1992 and two from 1997. The photographs appear to be the same as those discussed by the county's expert. Petitioners' photogrammetrist concludes:

> "While it is possible that a building or buildings may have existed at the time the photographs were exposed, I do not find conclusive evidence of a man-made structure, other than a road, in either set of photographs." Record 467.

While somewhat cryptic, petitioners' photogrammetrist appears to be saying that he does not see the beach house that the county's photogrammetrist discussed.

This evidence does not render the county photogrammetrist's testimony unreliable or otherwise compel a reasonable person to reject that evidence. Notwithstanding petitioners' disagreement with the county photogrammetrist's analysis, a reasonable person could rely on that evidence as supportive of the county's conclusion.

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[20]The photogrammetrist relied upon by the county supplied a resume setting out his qualifications. The resume lists his qualifications and experience in photogrammetry. Record 167. Petitioners do not cite us to a portion of the record in which they challenged the photogrammetrist's qualifications before the planning commission or county board of commissioners.

B. Site Users and Visitors

A member of the planning commission, Mr. Smith, testified that because of the tree canopy, an aerial photograph would not show whether a dwelling existed on the site or not. Record 810. Mr. Smith also testified he visited the site in 1967 and saw a dwelling. *Id*. He also filed an affidavit affirming that the house existed prior to July 7, 1992. Record 590. Other witnesses supported Mr. Smith's testimony about a beach house on the property in the 1960's or later, but before 1992. Record 75-80, 121, 124-33. Their submittals included statements by service providers and persons claiming to have stayed at the beach house.

The county found the testimony of persons claiming to have seen or used the house prior to 1992 unconvincing. The county findings point out that none of the persons claiming to have used the structure could provide a detailed description of it or produce pictures of it. The findings note the property owner offered no pictures of the house, even though it allegedly existed for more than 35 years prior to the hearing. Record 14. The county added that old newspaper advertisements referencing a beach house appeared to relate to a different structure because the ads referred to a house with a fireplace, and the subject beach house has no fireplace. *Id*.

The county's rebuttal of petitioners' evidence offers an explanation of why the county found the witnesses' claims of the existence and use of the house unconvincing. Given that the testimonials did not include specific information about the house and its exact location, the county's dismissal of this evidence is reasonable.

Petitioners counter, however, with citation to another set of affidavits and letters from several persons. These affidavits include a map showing the location of the structure and recent pictures of the subject vacation house. Record 418-465. Because the affidavits make use of a map and recent photographs of the beach house, they offer considerable support for petitioners' position. This evidence casts doubt on the adequacy of the factual base for the county's ultimate conclusion that the house was not in existence until recently.

The county declared it found "unconvincing" evidence of those who claimed the beach house was in continuous use. Record 14. As discussed, the record includes affidavits from persons claiming the house has been in continuous use for many years. These affidavits were accompanied by a map showing the dwelling's location and by photographs of the dwelling as it now exists. The affidavits lend considerable support to petitioners' assertion that the house predated the 1972 zoning restrictions. The county appears to have discounted the map and photographic support for the affidavits because neither petitioners nor petitioners' witnesses offered a photograph of the house prior to 1997. The county's conclusion is not unreasonable given petitioners' claim that the structure has been in continuous use for over 30 years. The county's skepticism is supported also by the fact that an old advertisement for the vacation structure stated it had a fireplace. The current structure has no fireplace. Record 14. This fact suggests that either the structure in the ad is not the same as the current structure, or it was extensively remodeled. In either case, a reasonable person could draw legitimate inferences from petitioners' failure to supply photographic evidence of the earlier structure or the alteration.

C. Building Materials

Petitioners also argue about the significance of the age of some of the building materials found in the house. *See* Record 221-25, 230, 468 (evidence dating certain building materials in the house to the 1970s and earlier). Intervenor responds by pointing out that there is no clear evidence about when the older fixtures and equipment were installed. Intervenor-Respondent's Brief 13-14, 20. The county found on this point:

> "The evidence offered to show that the Beach House had old fixtures and material integrated into its construction was also unpersuasive. There was no independent or substantial evidence in the record as to the date that the fixtures and equipment were installed. Additionally, some of the evidence was internally inconsistent. At one point, the Property Owner claimed that the electrical panel for the structure was purchased and installed in 1972-1973. However, other evidence Mr. Crook submitted tended to establish that the electrical system was installed *no earlier* than 1993." Record 14 (emphasis in original).

Both positions are reasonable, and the evidence is such that a reasonable person could conclude that the structure is over 30 years old and that, as petitioners argue, the new materials simply represent the product of recent improvements to the structure. It is also reasonable to conclude the structure is of recent construction and simply made use of older materials where possible.

The fact that reasonable people could conclude that the house did exist prior to the time the county's photogrammetrist testified the structure first appears in photographs does not mean that the evidence the county relied on is not substantial evidence. The evidence of use of new materials along with the photogrammetrist's analysis of the aerial photographs is sufficient to permit a reasonable person, after reviewing all the evidence, to conclude the structure was relatively new. Again, the fact that reasonable people might conclude differently given the same evidence does not mean the county's choice may be set aside. *Adler*, 25 Or LUBA at 554 (1993).

D. Official Records of the Dwelling

The county's decision is further supported by evidence that the assessor's office had no record of the dwelling until 1997, and that there is no record of building or subsurface sewage disposal permits. The county also found there was no record of any electrical inspections. Lack of official documentation of the structure placing its age prior to 1972 supports the county's position and tends to undermine petitioners' position.

Petitioners counter with evidence of an electrical permit from the Department of Commerce from the early 1970s and a statement from a local electric service provider that in 1996, the provider replaced an old electrical service to petitioners' beach cabin. Record 119, 120. While this evidence suggests a structure was in place before 1996, it does not show that the structure is the subject beach house. It is evidence a reasonable person could find supportive of petitioners' position. Again, however, unless petitioners' evidence is such that

it is unreasonable to reach the conclusion the county did, the decision may not be overturned for lack of substantial evidence.

E. Alteration of the Dwelling

Perhaps because of the conflicting evidence produced as part of this controversy, the county made an alternative finding as follows:

> "Even if a structure of some kind existed on the property as of July 7, 1972, there is no substantial evidence in the record, which specifically identifies where the alleged structure was located or the nature and extent of the structure or its use. There is no photographic evidence in the record to define the size and scale or appearance of an alleged structure. The lack of evidence defining the nature and extent of the alleged structure or use as of July 7, 1972 will prevent the County from determining whether the extensive remodeling of the alleged structure is a *permissible alteration* under the County Code. The Code permits an alteration only if it can be demonstrated that the alteration is necessary to reasonably continue the use. There is no substantial evidence in the record which demonstrates that the County has approved the alteration of the subject dwelling *after* July 7, 1972. There is *no substantial evidence* in the record that any alteration to a 'beach cabin' referred to in letters produced by [petitioners], was necessary to reasonably continue the pre-existing use of any beach cabin on the subject property. * * *" Record 13 (emphases in original).

In other words, the county found that even if there were a cabin on the property before the county zoning ordinance prohibited such structures in that location, the result is the same. There is nothing to show the use was altered or remodeled in conformity to county regulations. CCZO 5.060(3) permits limited alteration of a nonconforming use only as is reasonably necessary to continue or maintain the use in accordance with the law. As the county's finding states, nothing in the record allows it to conclude that any alterations to the beach house were necessary to "reasonably continue the use."

Petitioners respond with evidence discussed earlier supporting their assertion that the house existed in 1972 and has been in continuous use since. Petitioners discount the lack of

alteration approvals, arguing any alterations did not expand or intensify the use.[21] They acknowledge, however, that some of the alterations may have required review for building permit approval.

CCZO 5.060(1) permits a nonconforming structure or use to be maintained in reasonable repair. Such maintenance does not require county planning department approval. However, the ordinance also provides that any alteration of a nonconforming use requires an administrative decision of the planning director. The director may impose conditions as needed to carry out the intent of the zone and the provisions of the ordinance. *Id*. We are not cited to any evidence of planning director approval for alterations. Petitioners' response, therefore, does not answer the county's finding that the code permits alteration of a nonconforming use only as necessary to reasonably continue the use and that there is "no substantial evidence in the record which demonstrates that the County has approved the alteration of the subject dwelling *after* July 7, 1972." Record 13 (emphasis in original). As the county concluded, the burden of proof to show the legitimacy of a nonconforming use rests with petitioners. *ODOT v. City of Mosier*, 36 Or LUBA at 671. Even assuming the structure existed prior to 1972, petitioners' failure to show approval for alterations to the structure or the absence of necessity for such approvals is sufficient to permit the county to conclude the use is not a valid nonconforming use.[22]

F. Conclusion

One could point out at length many similar bits of evidence in the record supporting one proposition or its opposite. Indeed, this record is replete with believable evidence that

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[21]*But see* ORS 215.130(9), which defines "alteration" of a nonconforming use to include "[a] change in the structure or physical improvements of no greater adverse impact to the neighborhood."

[22]The parties do not argue about the significance of this alternative finding. It provides another and separate means of concluding that the use fails to qualify as a legitimate nonconforming use. That is, it does not depend on the conclusion the beach house was built after 1992. The finding, standing alone, is sufficient to declare the subject use invalid under the zoning code.

supports and undermines the county's conclusion. However, our role is not to reweigh the evidence or substitute our judgment for the local decision maker. *1000 Friends of Oregon v. Marion County*, 116 Or App at 588; *Gionet*, 30 Or LUBA at 98-99. As stated earlier, a decision is supported by substantial evidence when reasonable persons, considering the whole record, could reach the same conclusion as the decision maker. We conclude that reasonable persons, after reviewing all the evidence, could agree with the county that petitioners failed to demonstrate that the disputed beach house existed prior to the relevant dates or, if it did, that petitioners failed to demonstrate that the admitted alterations conformed to county and statutory regulations governing permissible alterations of nonconforming uses. That a reasonable person, reviewing the whole record, might come to the opposite conclusion does not change the fact that the county's decision is supported by substantial evidence.

The third assignment of error is denied.

The county's decision is affirmed.