BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOHANNES BESSELING, CATHARINA BESSELING
and NICK LAURANCE,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent,

and

GUY KENNERLY,
Intervenor-Respondent.

LUBA No. 2000-155

FINAL OPINION
AND ORDER

Appeal from Douglas County.

Nick Laurance, Winston, filed a petition for review and argued on his own behalf.

No appearance by Douglas County.

James R. Dole, Grants Pass, filed a response brief and argued on behalf of intervenor-respondent.

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

AFFIRMED 02/05/2001

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 nonconforming use determination.

MOTION TO INTERVENE

Guy Kennerly (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

FACTS

Intervenor owns a 10.3-acre parcel fronting the Umpqua River, near Dillard, Oregon. The property is designated farm in the county comprehensive plan and is zoned Farm Grazing (FG). The plan designation and zoning were imposed on the property in 1981.

The subject property has been subject to several industrial uses, including aggregate mining, large vehicle/equipment storage and repair, a welding/machine shop, and a wood fiber milling operation.[1] On April 17, 1998, the county planning department sent a letter to intervenor's predecessor in interest, setting out a process to rectify identified land use violations on the property. At the time, the property was used for wood fiber processing. In that letter, the county indicated that the last known use of the property was a nonconforming welding and machine shop with associated parking. The letter also stated the planning director's understanding that only two acres of the subject property were devoted to that nonconforming use. Record 258.

In 1999, intervenor purchased the subject property and commenced a large vehicle/equipment storage and repair business on it.

In response to complaints from the neighbors regarding the new business, the planning director issued a nonconforming use determination on December 14, 1999. In the nonconforming use determination, the planning director concluded that the southern three

[1]The record also establishes that there is a nonconforming mobile home sited on the subject property. That use is not disputed.

acres of the subject property were subject to the preexisting welding/machine shop and large vehicle/equipment storage uses and that, as a result, intervenor could use the shop for equipment repair, and could use the remainder of the three acres for large vehicle/equipment storage. Record 244-45.

Petitioners appealed the planning director's decision to the county planning commission. At the planning commission appeal hearings, petitioners presented evidence and testified as to the nature and extent of the nonconforming uses located on the property from 1981 until the present. According to petitioners, at two different points during the intervening years, the large vehicle/equipment storage and repair use was either interrupted or abandoned. Petitioners also argued that all of the nonconforming uses had been abandoned in whole or in part because the property was put to other uses in its past. Despite petitioners' testimony, the planning commission affirmed the planning director's decision on June 15, 2000.

Petitioners then appealed to the county board of commissioners (commissioners). In their decision, the commissioners affirmed the existence and nature of the nonconforming uses as described in the planning director's and planning commission's decisions, but concluded that the area subject to the large vehicle/equipment storage and repair nonconforming use covers only the southern two and one-half acres of the subject property and is limited to 20 vehicles.[2]

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners contend that the county violated ORS 215.130(10) and (11) in that the

[2]The commissioners adopted a specific definition of "vehicle" in their decision, differentiating between large trucks and mobile construction equipment, which were included in the 20-vehicle limit, and passenger vehicles and trucks, which were not.

planning director, *sua sponte*, made the initial nonconforming use determination.[3] According to petitioners, ORS 215.130(10) requires that the *applicant* provide evidence to prove the existence, continuity, nature and extent of the use, and does not allow the planning director to investigate and make a determination on evidence at his own instigation. Petitioners also assert that the county improperly shifted the burden of proof to petitioners to demonstrate that the nonconforming use either did not exist or was abandoned.

Petitioners misunderstand ORS 215.130(10) and (11). The statute authorizes a county to adopt a local process to document preexisting nonconforming uses, within certain parameters. It does not prohibit persons other than the applicant from providing evidence regarding the existence of a nonconforming use. As for the argument that the county

---

[3]ORS 215.130 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 subject to [ORS 215.130(9)]. * * * A change in ownership or occupancy shall be permitted.
>
> "* * * * *
>
> "(9) As used in [ORS 215.130], 'alteration' of a nonconforming use includes:
>
> > "(a) A change in the use of no greater adverse impact to the neighborhood; and
> >
> > "(b) A change in the structure or physical improvements of no greater adverse impact to the neighborhood.
>
> "(10) A local government may adopt standards and procedures to implement the provisions of [ORS 215.130]. The standards and procedures may include but are not limited to the following:
>
> > "(a) For purposes of verifying a use under [ORS 215.130(5)], a county may adopt procedures that allow an applicant for verification to prove the existence, continuity, nature and extent of the use only for the 10-year period immediately preceding the date of application. * * *
> >
> > "* * * * *
>
> "(11) For purposes of verifying a use under [ORS 215.130(5)], a county may not require an applicant for verification to prove the existence, continuity, nature and extent of the use for a period exceeding 20 years immediately preceding the date of application."

improperly shifted the burden of proof, we believe that it is relatively clear that the county understood that the proponent of the nonconforming use had the burden of showing that the nonconforming uses of the property had been retained.

> "* * * We are mindful that it is the applicant who is obligated to carry the burden of proof on a non-conforming use determination. We have reviewed the [planning commission's] record *de novo* and find that the applicant has carried his burden of proof * * *." Record 5.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the county's decision determining that the property is subject to a legal nonconforming use for a welding/repair shop and large vehicle/equipment storage is not supported by substantial evidence. According to petitioners, they provided evidence and testimony to demonstrate that the two nonconforming uses were not as intense as the planning director's decision had concluded. Petitioners also presented evidence to show that the use had been interrupted or abandoned.

As a review body, we are authorized to reverse or remand the challenged decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984); *Bay v. State Board of Education*, 233 Or 601, 605, 378 P2d 558 (1963); *Carsey v. Deschutes County*, 21 Or LUBA 118, 123, *aff'd* 108 Or App 339, 815 P2d 233 (1991). In reviewing the evidence, however, we may not substitute our judgment for that of the local decision maker. Rather, we must consider and weigh all the evidence in the record to which we are directed, and determine whether, based on that evidence, the local decision maker's conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

The evidence upon which the commissioners relied includes a 1981 aerial photo, which shows the northern portion of the property being mined. The photo also shows the shop building, the mobile home and approximately 20 large vehicles. The commissioners' decision determines that this photo is the best evidence of the activities that existed on the property at the time the property was zoned FG.

The decision also relies on evidence contained within the staff report and testimony and evidence from the applicant's representative to conclude that the use of the property for large vehicle/equipment maintenance, repair and storage has been continuous since 1981. We describe that evidence as follows.

Testimony of Intervenor's Representative

Intervenor's representative provided evidence regarding the ownership and use of the subject property over a 25-year period. According to the representative's testimony, the property was owned and used by a construction company from 1975 until 1985. The construction company mined and crushed rock, used the building for concrete pipe manufacturing, and used a portion of the property to store vehicles and equipment associated with the business. In 1985, the property was purchased by Rice Creek Rock Company, which mined and crushed rock on the property. The company also operated Doug's Diesel on the property. The business of Doug's Diesel was to store, maintain and repair heavy equipment. From 1985 through 1988, Terrain Tamers Trucking leased a portion of the site for the storage, maintenance and repair of its large chip trucks and other heavy equipment used in its business. During this time, another portion of the site, including the building, was leased to Quality Machinery. In 1988, the property was sold to Bracelin and Yeager, which operated a sand and gravel business on the north half of the property. Much of the remainder of the property continued to be leased to Doug's Diesel until 1994. From 1994 to 1996 the portion of the site formerly leased to Doug's Diesel was leased to Stalcup Trucking for storage, maintenance and repair of chip trucks and other heavy equipment. In 1996, the property was

sold to Oregon Fiber. Oregon Fiber used the property and the building to process wood products. A portion of the wood products business included the storage of large vehicles/equipment, and repair and maintenance of machinery within the building. Record 114-115.

Other Testimony and Evidence

Other testimony and evidence supports the testimony of intervenor's representative. The staff report sets out the chain of ownership, and generally describes the uses on the property as being gravel mining, rock crushing, truck storage, maintenance of large vehicles and equipment and a welding shop. Record 230, 232. Testimony from neighbors of the property, including petitioners, describes the same uses on the property, although petitioners contend those uses diminished considerably in 1996. Record 139, 151, 161-63, 197, 215, 240.

We conclude that there is substantial evidence in the record to demonstrate that the relevant portion of the property has been used for large vehicle/equipment maintenance, repair and storage from 1981 to the present. Petitioners' evidence establishes that the intensity of the nonconforming uses may have fluctuated during the relevant time period, but does not establish that the nonconforming uses have been *abandoned or interrupted* for more than one year.[4] While the evidence is conflicting, a reasonable person could choose to believe intervenor's evidence over the contrary evidence presented by petitioners. *Tigard Sand and Gravel, Inc. v. Clackamas County*, 149 Or App 417, 943 P2d 1106 (1997).

The second assignment of error is denied.

---

[4]ORS 215.130 does not establish a length of time a use must be interrupted or abandoned in order for it to be lost. However, Douglas County Land Use and Development Ordinance 3.37.250 provides:

> "When a nonconforming use of a structure or property is discontinued for a period in excess of one (1) year, the structure or property shall not thereafter be used except in conformance with the zone in which it is located."

THIRD AND FOURTH ASSIGNMENTS OF ERROR

Petitioners argue that, by determining the subject property is subject to a nonconforming use for truck repair and storage of up to 20 large vehicles on a portion of the subject property, the county impermissibly permitted an expansion of the nonconforming use. According to petitioners, by 1996 the scope of the nonconforming uses had diminished to only the welding operation in the shop building and some accessory parking. Petitioners contend that the county could not permit a return to the 1981 level of activity without approving an expansion or alteration of the nonconforming uses. Petitioners argue further that if the county's decision does permit an expansion or alteration of the nonconforming uses, the decision fails to comply with ORS 215.130(9) and county regulations that govern alterations of nonconforming uses. *See* n 3.

Intervenor responds that the county properly determined that the nature and extent of the nonconforming use was established at the time the FG zoning was imposed on the property in 1981 and that, contrary to petitioners' arguments, all of the nonconforming uses continued on the property. According to intervenor, the evidence in the record shows a variety of owners using the property for generally the same purposes: large vehicle/equipment storage and repair and gravel mining. While the intensity of the use may have varied over time, intervenor argues that the continuation of the nonconforming uses is sufficient to retain the nonconforming use rights established in 1981.

A nonconforming use may continue at the same level of intensity that existed when the use first became nonconforming, provided the use is not abandoned or interrupted. *Spurgin v. Josephine County*, 28 Or LUBA 383, 390 (1994) ("the protected right to continue a nonconforming use is a right to continue the nature and scope of use that existed at the time the use became nonconforming"). Cyclical businesses may retain nonconforming use rights to that cyclical level of activity, provided an intervening use is not established on the property that would extinguish the nonconforming use. *Tigard Sand and Gravel, Inc.*, 149 Or

App at 424. A nonconforming use may continue, even though a related nonconforming use may be lost. *Hendgen v. Clackamas County*, 115 Or App 117, 836 P2d 1369 (1992).

In this case, the county determined that there were two nonconforming uses established on the property in 1981: large vehicle/equipment storage and a machine shop. According to the county's decision, those uses continued, with some fluctuation, until the present. These conclusions are conclusions of fact—that two nonconforming uses were established in 1981 and continued, with fluctuations, until the present time. They also result in a conclusion of law—that intervenor is entitled to operate a business that is of the same level and intensity that was established in 1981.

Petitioners do not argue that the current uses and intensity of those uses are different from the uses and intensity that existed in 1981. Rather, their argument is that the *intensity* of the large vehicle storage and repair uses is different from that intensity existing in *1996*. It may be that there were fewer trucks stored on the property at some point in 1996, but petitioners have not established that the reduction in intensity was of a degree or duration sufficient to result in the permanent loss of some discrete part of the nonconforming use for large vehicle/equipment storage and repair.

The third and fourth assignments of error are denied.

The county's decision is affirmed.