BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HAL'S CONSTRUCTION, INC.,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent,

and

RUTH BARBER and GARY RHEINSBURG,
Intervenors-Respondent.

LUBA No. 2000-174

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

A. Richard Vial and Robert Spajic, Portland, filed the petition for review. With them on the brief was Vial Fotheringham LLP. Robert Spajic argued on behalf of petitioner.

Michael E. Judd, Assistant County Counsel, Oregon City, filed a response brief and argued on behalf of respondent.

Jeffrey L. Kleinman, Portland, filed a response brief and argued on behalf of intervenors-respondent.

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

AFFIRMED 04/05/2001

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

Petitioner appeals a county's decision denying an application to alter a nonconforming use.

MOTION TO INTERVENE

Ruth Barber and Gary Rheinsburg move to intervene on the side of respondent.[1] There is no opposition to the motion, and it is allowed.

FACTS

The subject 4.17-acre parcel is identified as tax lot 1100 on the county assessor's map and is zoned Rural Residential Farm Forest-5 (RRFF-5). The property was first zoned Low Density Residential (R-20) on December 14, 1967. In December 1979, the property was rezoned to its present designation. Neither the RRFF-5 nor the R-20 zoning designation authorizes a vehicle repair business.

Petitioner's predecessor in interest operated Miller's Specialties, a vehicle and equipment repair business, on the property for many years. At the time the property was zoned R-20, the property contained a single-family dwelling and a small garage. In approximately 1979, petitioner's predecessor in interest built a large shop building to house a portion of the business. Since the early 1990s, Miller's Specialties' business included repair of petitioner's large construction equipment. Petitioner purchased the subject property and the business in 1996.

Petitioner operates a paving construction business, a trailer construction business, and an RV, truck and trailer hitch installation business on tax lot 1000, adjacent to the subject property. The businesses on tax lot 1000 are nonconforming uses. Petitioner purchased

[1]The county and intervenors-respondent filed separate briefs, but joined in each other's responses to the assignments of error. Therefore, we refer to the parties together as "respondents."

Miller's Specialties in order to have a large equipment repair facility to repair its own equipment.

Tax lot 1000 and the subject property use a common driveway to access Molalla Avenue, a collector street. From 900 to 1,650 vehicles per hour pass the subject property, including 80-105 trucks. To the south of the property, Molalla Avenue climbs relatively steeply, resulting in noise and additional exhaust from vehicles shifting gears as they move up or downhill. Tax lots 1000 and 1100 are bordered by several rural residential properties containing dwellings, including the properties owned by intervenors. Other commercial and industrial uses are located within one-quarter mile of the subject property.

In 1996, the county informed petitioner that the large shop building did not comply with county building code requirements. Petitioner expended approximately $20,000 in order to bring the building up to building code requirements. In 1997, petitioner applied for a verification of its nonconforming use rights on the subject property. In January 1998, after reviewing the application, the hearings officer determined that:

> "* * * As of the date of restrictive zoning, December 14, 1967, a nonconforming use was established on the subject property for the repair of automobiles and the installation of trailer hitches[.] [T]he established use was conducted solely in the small shop/garage on the subject property, and was operated as a part-time business by Kenneth Miller, without other employees[.] [T]he established nonconforming use has continued without abandonment or discontinuance of more than 12 consecutive months to the date of this application[.] [T]he second, larger shop building was constructed after 1979, and is not protected as a nonconforming use or structure[.] [T]here is no nonconforming use established for the sale of vehicles from the subject property[.] * * * [T]he current use of the subject property for the repair and maintenance of heavy construction vehicles and equipment represents an alteration or expansion of the protected nonconforming use, and is not protected." *Hal's Construction, Inc. v. Clackamas County*, ___ Or LUBA ___ (LUBA No. 98-209, May 8, 2000), Record 211-12.[2]

[2]The first hearings officer's decision was appealed to LUBA. The record of that proceeding was incorporated into the record of the proceedings leading to this appeal. Unless otherwise indicated, citations to "Record" refer to the record of the proceedings leading to this appeal.

In April 1998, after the hearings officer's decision became final, petitioner filed an application for alteration of the nonconforming use to allow storage of large construction equipment on tax lot 1100 and continued use of the larger shop building to repair petitioner's own equipment. In the application, petitioner contended that the alteration in use would be less intensive than uses of the property that occurred during the 1990s because, rather than having clients drop off and pick up their vehicles, use of the shop building and property would be limited to petitioner's own equipment. In addition, petitioner presented evidence to show that the use of the property for the nonconforming uses would be limited to regular business hours.

The application was denied, based on the planning director's determination that the visual impacts from the alteration would be substantially different from the allowed nonconforming use. Specifically, the planning director determined that the large shop building, the removal of trees for the building and associated parking and the parking of large vehicles and equipment would have a greater impact than the nonconforming use for small vehicle and light truck repair and sales.

Petitioner appealed the planning director's decision. Two hearings officers reviewed the planning director's decision, and affirmed it. This appeal followed.[3]

FIRST ASSIGNMENT OF ERROR

ORS 215.130(10)(a) provides, in relevant part:

> "For purposes of verifying a use under [ORS 215.130(5)], a county may adopt procedures that allow an applicant for verification [of a nonconforming use] to prove the existence, continuity, nature and extent of the use only for the 10-year period immediately preceding the date of application. Evidence proving the existence, continuity, nature and extent of the use for the 10-year period preceding application creates a rebuttable presumption that the use, as proven,

[3]The decision by the first hearings officer was appealed to LUBA and was voluntarily remanded to the county for further proceedings. This appeal is an appeal of the hearings officer's decision on the application after LUBA's remand.

lawfully existed at the time the applicable zoning ordinance or regulation was adopted and has continued uninterrupted until the date of application."

Clackamas County has established a nonconforming use alteration permitting process, which is codified at Clackamas County Zoning and Development Ordinance (ZDO) 1206.05(B).[4] ZDO 1206.06 sets out the process for verifying a nonconforming use, pursuant to ORS 215.130(5). ZDO 1206.06(C) essentially duplicates the 10-year evidentiary presumption of ORS 215.130(10)(a).[5]

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[4]ZDO 1206.05(B) sets out criteria for approving an alteration of a nonconforming use. ZDO 1206.05(B) provides, in relevant part:

> "1. The alteration in the structure and/or other physical improvements, or change in the use, will, after the imposition of conditions as authorized [by ZDO 1206.05(B)(3)] have no greater adverse impact on the neighborhood than the existing use, structure(s) and/or physical improvements; and
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> "2. The nonconforming use status of the existing use, structure(s) and/or physical improvements is verified pursuant to [ZDO] 1206.06. The verification and alteration/change requests may be combined as a single application * * *.
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> "3. The Planning Director, or designate, may impose conditions of approval on any alteration of a nonconforming use, structure(s) or other physical improvements permitted under this section when deemed necessary to ensure the mitigation of any adverse impacts."

[5]ZDO 1206.06 provides, in relevant part:

> "A. The Planning Director * * * shall review all requests for verification of nonconforming use status * * *.
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> "B. The Planning Director * * * may approve a request for nonconforming use status if: the applicant proves that the nonconforming use lawfully existed at the time of the adoption of zoning regulations, or a change in zoning regulations, which prohibited or restricted the use; and, the nonconforming use has not been subsequently abandoned or discontinued.
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> "C. In the alternative, the applicant may submit evidence proving the existence, continuity, nature and extent of the nonconforming use for the ten (10) year period immediately preceding the date of the application. Such evidence shall create a rebuttable presumption that the nonconforming use, as proven, lawfully existed at the time of, and has continued uninterrupted since, the adoption of restrictive zoning regulations, or a change in the zoning or zoning regulations, that have the effect of prohibiting the nonconforming use under the current Ordinance provisions."

ZDO 1206.06 was adopted on February 26, 1998, after the verification of nonconforming use decision was made, but before the alteration of nonconforming use application was submitted.

Petitioner argues that the challenged decision erroneously relies on the findings of fact made in the January 1998 nonconforming use verification decision, without considering the new legal standard set out in ZDO 1206.06(C). According to petitioner, the alteration criteria of ZDO 1206.05(B) require the hearings officer to consider evidence presented regarding the nature and scope of the nonconforming use prior to determining whether the alteration of the use will have a greater impact than the permitted nonconforming use. Petitioner argues that the hearings officer improperly relied on the January 1998 decision to conclusively establish the nature and scope of the nonconforming use in 1967.[6]

Respondents concede that the hearings officer concluded that the January 1998 decision was binding on petitioner. However, they argue any error in doing so does not provide a basis for reversal or remand because the hearings officer adopted an alternative finding where he considered the evidence and testimony presented by petitioner and other proponents of the application regarding the nature and use of the property during the late 1980s and throughout the 1990s. After considering all of the evidence, the hearings officer determined that the evidence contained within the record was sufficient to rebut the presumption by a preponderance of the evidence. *See Lawrence v. Clackamas County*, 164 Or App 462, 992 P2d 933 (1999) (legal presumption established by ORS 215.130(10)(a) may be rebutted by a preponderance of the evidence).[7] Accordingly, the hearings officer found

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[6]We understand petitioner to argue that, if the evidence of activities on the property since the late 1980s and early 1990s is considered, the evidence relied upon in the 1998 decision regarding the nature and scope of the nonconforming use in 1967 would not be sufficient to overcome the presumption that the evidence of activity on the subject property during the 1980s and early 1990s establishes by virtue of ZDO 1206.06(C).

[7]The hearings officer found:

> "ZDO 1206.06(C) provides that, where an applicant presents '[e]vidence proving the existence, continuity, nature and extent of the nonconforming use for the ten (10) year period immediately preceding the date of the application,' a rebuttable presumption is created that the use was lawfully established as proven. However, that presumption can be rebutted by a preponderance of the evidence. * * * The hearings officer finds that the presumption has been rebutted in this case. The aerial photographs and testimony in the record demonstrate that Mr. Miller did not construct the larger shop building on the site until after the use became nonconforming in 1967. Mr. Miller testified in his affidavit that he significantly expanded the

that the scope of the nonconforming use was the same as that found in the January 1998 decision: part-time, small vehicle repair.

We agree with the hearings officer's alternative finding that petitioner's evidence concerning the scope and nature of the nonconforming use was rebutted by a preponderance of the evidence. The evidence shows that the large shop building was constructed approximately 12 years after the use became nonconforming, and that Mr. Miller significantly increased his vehicle repair business after 1974, seven years after the use became nonconforming.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the hearings officer's finding that the proposed alteration will have more impacts on the surrounding neighborhood than the permitted nonconforming use is not supported by substantial evidence. According to petitioner, the hearings officer summarily determined that "the shop building on the property quadruples the vehicle repair capacity of the subject property" and that such an increase in capacity "is likely to have additional adverse impacts on the neighborhood." Record 12. Petitioner contends that there is nothing in the record to support a conclusion that an increase in capacity will result in an increase in impacts. Petitioner argues that the hearings officer "simply concludes that there will be an adverse effect without specifying what these adverse [e]ffects might be." Petition for Review 10.

The hearings officer adopted the following findings:

> "The hearings officer finds that the impacts generated by vehicle repair will be largely the same, regardless of the type of vehicle being repaired. * * *

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scope of the use after he retired from his position with the U-Haul Company in 1974, seven years after the use became nonconforming. Therefore, the hearings officer finds that there is a preponderance of evidence that Mr. Miller significantly expanded the scope of the use after it initially became nonconforming in 1967. Therefore, the presumption has been rebutted, and [petitioner] must prove the scope of the use at the time it initially became nonconforming [in] 1967." Record 11 (citation omitted).

> However, [petitioner's] use significantly increases the scope of vehicle repair occurring on the subject property in comparison to the use in existence in 1967. The shop building on the subject property quadruples the vehicle repair capacity of the subject property. In 1967, vehicle repairs were limited to the small garage building on the subject property. Therefore Mr. Miller could work on a maximum of one vehicle at a time. However, the three-bay shop on the subject property allows [petitioner] to repair up to four vehicles at a time, significantly increasing the potential adverse impacts generated by vehicle repair on the subject property. * * *
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> "In addition, the majority of [petitioner's] vehicles and equipment are powered by diesel engines, which are louder and generate more exhaust fumes than the passenger vehicles Mr. Miller worked on, especially when the engines are initially started. * * * [Petitioner's] vehicles generate additional noise from the use of back-up beepers and the movement of tracked equipment on pavement or other hard surfaces. Therefore, the hearings officer finds that [petitioner's] use will generate greater adverse noise and odor impacts than were generated by the passenger vehicle repair use in existence [in 1967.]" Record 12-13 (footnote omitted).

The hearings officer went on to examine whether the additional impacts would be detectable off-site, given the existing ambient conditions. He considered the noise and fumes generated by the activities on tax lot 1000 and from the traffic on Molalla Avenue. He also considered the mitigating effects of distance and vegetative screening. The hearings officer concluded that, even with ambient noise levels, the additional impacts would be detectable. Based on all of these factors, the hearings officer adopted his ultimate conclusion that the proposed alteration would have more impacts than the valid nonconforming use.

Much of petitioner's argument under this assignment of error is based on petitioner's view that the proposed alteration would have fewer impacts than the uses on the property in the 1980s and early 1990s. The hearings officer correctly focused on the comparison of the uses existing in 1967, when the repair facility became nonconforming. Substantial evidence supports the hearings officer's conclusion that the proposed alteration will have more adverse impacts than the protected nonconforming use as it existed in 1967.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the hearings officer improperly construed ZDO 1206.05(B)(1) by relying only on the testimony of adjacent neighbors to determine the impacts of the proposed alteration on the entire neighborhood. *See* n 4. According to petitioner, the reliance on the testimony and evidence presented by two neighbors who are opposed to the alteration effectively confers veto authority over the application to those opponents. Petitioner contends that the testimony from other neighbors who support the application must be balanced against the testimony of the opponents to determine whether, as a whole, the alteration will result in additional impacts to the neighborhood.

Respondents argue that the hearings officer properly considered all of the evidence presented to show that the proposed alteration would have an impact on the neighborhood. The hearings officer's decision summarizes the testimony given by the parties regarding ZDO 1206.05, accepting certain testimony and discounting other testimony. Respondents note that the hearings officer discounted testimony by persons employed by petitioner because, under the circumstances, he considered it unlikely that an employee would testify against his or her employer. Respondents contend that this was a credibility assessment that the hearings officer may properly make. Respondents contend that the evidence petitioner cites to is not so overwhelming as to refute the evidence relied upon by the hearings officer and, therefore, the hearings officer's conclusion should not be overturned.

The hearings officer considered the testimony of the parties, and determined that some of the persons who testified were unlikely to be affected by the adverse impacts because they live too far away from the subject property. In other circumstances, the hearings officer questioned the credibility of testimony from persons located closer to or on the subject property, but who are employed by petitioner. Other testimony was discounted because it merely professed general support for the business or, at least, no objection to its existence. The hearings officer also considered the testimony of two neighbors describing

adverse impacts from the proposed alteration. The hearings officer concluded that there was evidence that adverse impacts from the alteration would be detectable off-site, and denied the application accordingly.

Petitioner argues that the hearings officer misconstrued ZDO 1206.05(B)(1) by limiting the scope of the "neighborhood" to the two opposing neighbors. However, nothing in the hearings officer's decision indicates that the hearings officer construed ZDO 1206.05(B)(1) in that manner, or that the hearings officer did more than weigh the evidence before him. We believe the hearings officer correctly construed and applied the applicable standard, and that the conclusion that the alteration would result in adverse impacts on the neighborhood is supported by substantial evidence.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner argues that, with respect to the larger shop building, the county is estopped from denying its application for an alteration of a nonconforming use because the county required approximately $20,000 in improvements to bring the building up to building code requirements. Petitioner contends that employees within the Clackamas County Planning Division, the county assessor's office, and other employees of the county were aware of the building and the activities that occurred therein for many years. According to petitioner, the county is estopped from denying the proposed use of the shop building because it required petitioner to bring the building up to code, knowing that the building was being used for, and was intended for use for, large-vehicle repair.

The elements of estoppel are set out in *Coos County v. State of Oregon*, 303 Or 173, 734 P2d 1348 (1987):

> "'[T]here 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 acted upon by the other party; [and] (5) the other party must have been induced to

act upon it. * * *'" *Id.* at 180-81 (*quoting Oregon v. Portland Gen. Elec. Co.*, 52 Or 502, 528, 95 P 722 (1908)).

We assume, without deciding, that LUBA can review petitioner's estoppel claim and reverse or remand the county's decision if petitioner establishes the elements of estoppel are met in this case. However, petitioner makes no attempt to establish those elements. Respondents argue, and we agree, that the building permit approval permitted the structure to remain on the property to be used by petitioner in compliance with the RRFF-5 zoning designation. Petitioner has not shown how the improvements that were required to comply with the building code translated into approval of or a representation of approval of the activities that were occurring within or planned for the structure.

The fourth assignment of error is denied.

The county's decision is affirmed.