BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PATRICIA LAWRENCE,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent,

and

DAN CLANCY and DAMASCUS NEIGHBORS,
Intervenors-Respondent.

LUBA No. 2001-097

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Mary W. Johnson, Oregon City, filed the petition for review and argued on behalf of petitioner. With her on the brief was Mary Ebel Johnson, P.C.

No appearance by Clackamas County.

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

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

REMANDED 10/24/2001

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a decision by the county hearings officer denying petitioner's application for verification of a nonconforming use to operate a go-kart track.

MOTION TO INTERVENE

Dan Clancy and Damascus Neighbors (intervenors), opponents below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

INTRODUCTION

Outside incorporated cities, the right to continue a land use after new or amended county land use laws prohibit or limit the use is governed by statute and county land use legislation. This appeal concerns whether the county correctly interpreted and applied those statutes. We discuss those statutes briefly before setting out the relevant facts and addressing petitioner's assignments of error.

A. Legal Nonconforming Uses May Continue and May be Altered

If new or amended land use laws prohibit or limit a use, such a use may nevertheless be continued if the use was legally in existence on the date the prohibiting or limiting land use legislation takes effect. Such uses are commonly referred to as "legal nonconforming uses" or simply "nonconforming uses."[1]

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[1] The relevant statutes are ORS 215.130(5) and (9), which provide as follows:

> "(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 subsection (9) of this section.
>
> "* * * * *
>
> "(9) As used in this section, '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."

To establish the existence of a nonconforming use under ORS 215.130(5), there must be sufficient evidence to demonstrate the existence, scope and nature of the alleged nonconforming use on the date it became nonconforming. *Spurgin v. Josephine County*, 28 Or LUBA 383, 390 (1994). Once the existence, scope and nature of a nonconforming use are established, a nonconforming use may continue at the level of use that legally existed on the date it became nonconforming and that nonconforming use may be altered. However, the statutory definition of "alteration" makes it clear that any alteration may not have "greater adverse impact to the neighborhood." ORS 215.130(9).

B. Loss of a Nonconforming Use Right Through Interruption or Abandonment

Although a right to continue and alter a legal nonconforming use may exist on the date new or amended land use regulations take effect, that right may be lost through interruption or abandonment. Once a nonconforming use is interrupted or abandoned, the right under ORS 215.130(5) to continue the nonconforming use is lost, and the use may not be resumed unless it complies with the land use regulations that are in effect on the date the use resumes. Although counties are authorized to adopt their own criteria governing interruption and abandonment, ORS 215.130(7)(b) and (c) set forth special rules that govern interruption or abandonment of surface mining uses.[2]

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[2] ORS 215.130(7) provides as follows:

> "(7)(a) Any use described in subsection (5) of this section may not be resumed after a period of interruption or abandonment unless the resumed use conforms with the requirements of zoning ordinances or regulations applicable at the time of the proposed resumption.
>
> "(b) Notwithstanding any local ordinance, a surface mining use continued under subsection (5) of this section shall not be deemed to be interrupted or abandoned for any period after July 1, 1972, provided:
>
> "(A) The owner or operator was issued and continuously renewed a state or local surface mining permit, or received and maintained a state or local exemption from surface mining regulation; and

C. County Procedures and Standards for Verifying Nonconforming Uses

ORS 215.130 both requires and authorizes certain procedures and standards when counties consider applications to verify nonconforming uses. ORS 215.130(8) *requires* that counties employ the permit procedure set out at ORS 215.416(11) when reviewing applications for verification or alteration of nonconforming uses. That procedure requires an administrative decision, followed by notice of that decision and an opportunity for a *de novo* local appeal of the administrative decision. ORS 215.130(10) *authorizes* counties to adopt other standards and procedures to implement ORS 215.130. As noted earlier, ORS 215.130(10) specifically authorizes counties to adopt criteria to govern whether a use has been interrupted or abandoned and it also authorizes imposition of conditions of approval to limit adverse impacts in accordance with ORS 215.130(9).[3]

> "(B) The surface mining use was not inactive for a period of 12 consecutive years or more.
>
> "(c) For purposes of this subsection, 'inactive' means no aggregate materials were excavated, crushed, removed, stockpiled or sold by the owner or operator of the surface mine."

ORS 215.130(7)(a) does not specify the length of time that a legal nonconforming use must be abandoned or interrupted before the right to continue or resume that use is lost. Clackamas County Zoning and Development Ordinance (ZDO) 1206.02 provides that:

> "If a nonconforming use is discontinued for a period of time of more than twelve (12) consecutive months, the use shall not be resumed unless the resumed use conforms with the requirements of the Ordinance and other regulations applicable at the time of the proposed resumption."

Although ZDO 1206.02 uses the term "discontinued" rather than the statutory term "interrupted," no party argues that the different terminology is legally significant.

[3] ORS 215.130(10) provides in part:

> "A local government may adopt standards and procedures to implement the provisions of this section. The standards and procedures may include but are not limited to the following:
>
> "* * * * *
>
> "(b) Establishing criteria to determine when a use has been interrupted or abandoned under subsection (7) of this section; or

Beyond the procedure required by ORS 215.130(8) and the standards and procedures authorized by ORS 215.130(10)(b) and (c), the legislature has adopted two additional provisions that presumably were adopted in recognition of the difficulties of proof that applicants face in establishing the existence of a nonconforming use and the continued existence of that use without interruption or abandonment, where such uses have been nonconforming for many years. The first is the 10-year rebuttable presumption that is provided by ORS 215.130(10)(a).[4] The second is the 20-year limitation on proof that is provided by ORS 215.130(11).[5]

FACTS

Petitioner's property is an 8.27-acre parcel in the Damascus area of Clackamas County that is developed with a single-family residence and a quarter-mile closed-loop go-kart track. The operation of the go-kart track has generated substantial opposition in recent years from area residents and has been the subject of numerous county enforcement actions. These problems led petitioner to file an application in 1998 for verification of the go-kart track as a nonconforming use. The county denied the 1998 application because the hearings officer found the use had been discontinued for at least 12 months between 1969 and 1971.

> "(c) Conditioning approval of the alteration of a use in a manner calculated to ensure mitigation of adverse impacts as described in subsection (9) of this section."

[4] ORS 215.130(10)(a) provides:

> "For purposes of verifying a use under subsection (5) of this section, 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. 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, lawfully existed at the time the applicable zoning ordinance or regulation was adopted and has continued uninterrupted until the date of application[.]"

[5] ORS 215.130(11) provides:

> "For purposes of verifying a use under subsection (5) of this section, 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."

Petitioner appealed to LUBA, and we affirmed the county's decision. *Lawrence v. Clackamas County*, 36 Or LUBA 273 (1999). Petitioner appealed to the Court of Appeals, which reversed and remanded our decision. *Lawrence v. Clackamas County*, 164 Or App 462, 992 P2d 933 (1999).[6]

As a result of the Court of Appeals' decision, we remanded the county's first decision. During the course of the county's proceedings on remand, the legislature adopted the 20-year limitation on an applicant's burden of proof that is now codified at ORS 215.130(11). *See* n 5. The county concluded during its remand proceedings that the new 20-year limitation on an applicant's burden of proof did not apply to the 1998 application, because it was not one of the standards and criteria applicable at the time the application was first submitted. ORS 215.427(3).[7] The county ultimately concluded in its August 7, 2000 decision following our remand (hereafter remand decision) that any nonconforming use petitioner may have had was lost under ZDO 1206.02, because the use was discontinued for more than 12 consecutive months between 1969 and 1971. *See* n 2. Petitioner appealed the county's remand decision to LUBA. However, petitioner did not file a petition for review, and for that reason we dismissed petitioner's appeal of the county's remand decision. *Lawrence v. Clackamas County*, ___ Or LUBA ___ (LUBA No. 2000-139, January 31, 2001).

While petitioner's second appeal was pending before LUBA, but before we issued our January 31, 2001 opinion dismissing that appeal, petitioner filed a new application on December 28, 2000 (hereafter 2000 application) requesting that the county verify that she has a right to continue to operate the go-kart track as a nonconforming use. The 2000 application

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[6] The Court of Appeals held that we misconstrued the ORS 215.130(10)(a) provision concerning rebuttable presumptions, *see* n 4, and disagreed with our conclusion that the county hearings officer provided the *de novo* hearing that ORS 215.130(8) and 215.416(11) require.

[7] ORS 215.427(3) generally requires that "approval or denial of [a permit] application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

was filed to take advantage of the limitation on an applicant's burden of proof that is imposed by ORS 215.130(11). The county planning director approved the application. Intervenors appealed that decision to the county hearings officer. The hearings officer reversed the planning director's decision and denied petitioner's application. This appeal followed.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR

Rather than address petitioner's assignments of error in the order they are presented, we first address the parties' major disagreements concerning the meaning and legal effect of ORS 215.130(11). We then consider the hearings officer's application of the judicial doctrines of issue and claim preclusion in this case and his conclusion that ORS 215.130(11) does not apply to petitioner's application as well as his conclusion that petitioner's application is barred by ZDO 1305.02(E), which generally provides that once an application for an administrative action is denied, the same or a substantially similar application may not be submitted for consideration for two years.[8]

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[8] ZDO 1305.02(E) provides:

> "Refiling: If an application for an administrative action * * * is denied, an applicant may refile for consideration of the same or substantially similar application only if:
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> "1. The Planning Director finds that one of the circumstances identified in a through e below, renders inapplicable all of the specific reasons for denial; or
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> "2. One of the reasons cited for denial involves a balance test and the Planning Director finds that one of the circumstances identified in a through e below affects a factor in the balance analysis and renders inapplicable all other reasons for denial.
>
> "a. *A change has occurred in * * * applicable law which is material to the application*; for the purposes of this provision, 'change' includes amendment to the applicable provisions or a modification in accepted meaning or application caused by an interpretation filed pursuant to 1305.01(K)[.]
>
> "* * * * *
>
> "3. In any event, a new application can be filed two (2) years after final denial of an application by the County." (Emphasis added.)

A. ORS 215.130(11)

1. The 20-Year Limit in ORS 215.130(11) is a Limit on an Applicant's Burden of Proof

ORS 215.130(11) is set out above at n 5. Intervenors first argue that ORS 215.130(11) simply limits what a county can *require* that an *applicant* prove. According to intervenors, ORS 215.130(11) does not limit the evidence that other parties can present. Specifically, intervenors argue that ORS 215.130(11) does not prohibit the county from (1) considering such non-applicant evidence that a nonconforming use was discontinued more than 20 years before the date of the application; (2) finding that the use was discontinued more than 20 years before the date of the application based on that non-applicant evidence; and (3) finding that a nonconforming use right was therefore lost through interruption.

Although intervenors' interpretation of ORS 215.130(11) may be textually possible, we reject it. As a practical matter, a county can never "require an applicant for verification [of a nonconforming use] to prove the existence, continuity, nature and extent of the use" for any period of time. What the county does in reviewing an application for verification of a nonconforming use is deny the application if the applicant fails to carry his or her burden of proof "to prove the existence, continuity, nature and extent of the use" for the requisite time period. *See Warner v. Clackamas County*, 25 Or LUBA 82, 86 (1993) (applicant for verification of nonconforming use has the burden of proof). The legal effect of ORS 215.130(11) on petitioner's application is to limit the requisite time period for which petitioner must prove the go-kart track continued to exist to no more than 20 years before the date of the 2000 application.[9] Evidence of any interruptions in the go-kart track use that may have occurred more than 20 years before the date of the 2000 application is irrelevant. In

[9] There is no dispute that the go-kart track legally existed in 1964 and became a nonconforming use at that time. The only dispute is whether the nonconforming use was thereafter interrupted for more than 12 months and the relevant time period that must be considered to determine whether the nonconforming use was interrupted.

this case the effect of ORS 215.130(11) is to make evidence of interruption before December 28, 1980, legally irrelevant.

If ORS 215.130(11) were construed in a manner that allows the county to accept and consider evidence from parties other than the applicant that would support a finding of interruption prior to that date, that would have the practical effect of requiring the applicant to produce contrary evidence to avoid denial of the application. As is frequently the case, the statute could have been worded more precisely, but we do not believe the legislature intended the 20-year limit in ORS 215.130(11) on an applicant's burden of proof to be so easily frustrated.[10]

To the extent the county's August 7, 2000 remand decision and our January 31, 2001 decision dismissing petitioner's appeal of that remand decision can be viewed as evidence, they also are irrelevant under ORS 215.130(11), because they are evidence of an interruption that occurred more than 20 years before the December 28, 2000 application was submitted.[11]

2. Retroactivity

The hearings officer based his decision, in part, on his finding that ORS 215.130(11) is not retroactive. We agree with the hearings officer that ORS 215.130(11) is not retroactive. However, we fail to see why the legislature's decision not to apply ORS 215.130(11) retroactively has any bearing on this case.

Because ORS 215.130(11) significantly altered one of the substantive criteria (by altering the relevant time period for the continuance requirement) after the 1998 application was filed, we believe the hearings officer correctly found, based on ORS 215.427(3), that

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[10] Intervenors assert this would allow long-dormant uses to suddenly spring back to life as nonconforming uses. We do not see this to be the case. Under ORS 215.130(11), the purported nonconforming use must be in continuous operation for the 20 years immediately preceding the filing of the application. Long-dormant uses would not meet this requirement.

[11] We address intervenors' issue and claim preclusion arguments, based on these decisions, later in this opinion.

ORS 215.130(11) did not apply to the 1998 application. *See* n 7. We also agree that ORS 215.130(11) has no effect on the county's remand decision or our decision dismissing petitioner's appeal of that remand decision. The county's remand decision stands as a final decision by the county that petitioner lost her right to continue the go-kart track as a nonconforming use because it was interrupted more than 26 years before the 1998 application was submitted. The question presented in this appeal is whether the county must (1) consider the 2000 application and (2) apply the 20-year time period limit on petitioner's burden of proof in considering that application, which makes any interruption that may have occurred 28 years before the date of the 2000 application legally irrelevant. Because ORS 215.130(11) was in effect when the 2000 application was filed, its non-retroactivity does not affect the answer to that question.

B. Claim and Issue Preclusion

We understand the hearings officer to have concluded that if ORS 215.130(11) applies to this application, it would constitute the kind of change in "applicable law" that would allow the denied 1998 application to be resubmitted under ZDO 1305.02(E). *See* n 8. We agree. The hearings officer's conclusion that ORS 215.130(11) does not apply to this application and his resulting conclusions that the application is therefore barred by ZDO 1305.02(E) and would have to be denied even if it were not barred is based on the hearings officer's view that any consideration of (1) the *issue* of the continuity of petitioner's go-kart track use and (2) petitioner's *claim* of a nonconforming use is barred by judicial doctrines of issue and claim preclusion, as a result of the county's remand decision and our dismissal of petitioner's appeal of that decision.

The hearings officer's findings include the following:

> "Because the [prior] hearings officer decision denying recognition of the nonconforming use is final, the nonconforming use rights ended before 1971 as a matter of law. ORS 215.130(11) does not change that holding. Because the nonconforming use rights terminated before 1971, there was no legal nonconforming use in December, 1980 or thereafter. In effect, ORS

> 215.130(11) has no impact on this application, because there was no legal nonconforming use twenty years prior to the December 28, 2000 application.
>
> "* * * * *
>
> "The [county's remand decision in this matter] was litigated to a final judgment. As a result of that judgment, the nonconforming use rights terminated prior to 1971. The hearings officer finds that holding is conclusive as it applies to this year-2000 application. It is binding on the County under the doctrine of *res judicata* or claim preclusion. * * * Therefore, even if the application is [accepted], the application should be denied, because the go-kart track did not exist as a legal nonconforming use on December 28, 1980, twenty years prior to this year-2000 application.
>
> "* * * * *
>
> "Based on the findings and discussion herein and the public record in this case, the hearings officer hereby concludes that the application is not permitted * * *; that ORS 215.130(11) does not apply retroactively; and that the director's decision recognizing the continuing nature of the nonconforming use conflicts with the doctrine of claim preclusion. The use did not exist on December 28, 1980, therefore ORS 215.130(11) has no bearing on the nonconforming use, which the hearings officer already found expired before 1971. Therefore the hearings officer should grant the appeal and reverse the planning director decision." Record 7-8.

The hearings officer decision assumes that claim and issue preclusion apply in land use proceedings in general, and this case in particular. Claim preclusion bars relitigation of claims that were previously decided or could have been decided in a prior proceeding. *Drews v. EBI Companies*, 310 Or 134, 140-41, 795 P2d 531 (1990). Issue preclusion bars relitigation of an issue in subsequent proceedings when the issue has been determined by a valid and final determination in a prior proceeding. *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 103, 862 P2d 1293 (1993).

1. Claim Preclusion

Claim preclusion does not generally apply to local land use proceedings. Once an applicant has filed a new application, that application must be decided on its merits, even if the application is similar or identical to a prior application. *Durig v. Washington County*, ___ Or LUBA ___ (LUBA No. 2000-185, May 1, 2001), slip op 6, *aff'd* ___ Or App ___

(2001). Local land use proceedings do not, and are not intended to, have the preclusive and final effects of judicial and other types of proceedings where claim preclusion is applied. If one proposal for development is denied, land use ordinances anticipate and allow for additional attempts for modified, or even the same, development.[12] ZDO 1305.02(E) specifically anticipates and allows applications to be refiled. *See* n 8.

ZDO 1305.02(E) provides five circumstances under which an identical application may be refiled within two years of a final decision that denies the original application and further provides that, regardless of circumstances, an identical application may be refiled after two years. Petitioner's claim that she has a nonconforming use is not precluded by the county's second decision in her 1998 application. Petitioner's right to a limited burden of proof under ORS 215.130(11) is not affected by claim preclusion.

2. Issue Preclusion

When an issue has been decided in a prior proceeding, the prior decision on that issue may preclude relitigation of the issue if five requirements are met: (1) the issue in the two proceedings is identical; (2) the issue was actually litigated and was essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded had a full and fair opportunity to be heard on that issue; (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding; and (5) the prior proceeding was the type of proceeding to which preclusive effect will be given. *Nelson v. Emerald People's Utility Dist.*, 318 Or at 104.

The parties make a number of arguments regarding the first requirement, however, we believe the fifth requirement is dispositive—whether local land use proceedings are the

[12] For instance, if an applicant applies for a nonfarm dwelling but does not submit enough evidence to demonstrate the property is generally unsuitable for farm use, nothing prevents the applicant from subsequently filing a different application for a farm dwelling, even though the "claim" could have been brought in the nonfarm dwelling application. Furthermore, subject to local filing restrictions, such an applicant is not precluded from filing an identical nonfarm dwelling application and providing additional evidentiary support.

types of procedures to which preclusive effect will be given. We considered this question in *Nelson v. Clackamas County*, 19 Or LUBA 131 (1990). Contrary to intervenors' assertion, issue preclusion does not generally apply in local land use hearings. We stated that, in principal, issue preclusion *could* apply to local land use proceedings. After thoroughly considering the issue, however, we reached the conclusion that issue preclusion does not apply to local land use proceedings.

> "In conclusion, we believe the system of local government land use adjudications established by state statute and local regulations places primary importance on expeditious adjudications, contemporaneous application of the same approval criteria, as set out in comprehensive plans and local land use regulations, to all similarly situated applicants and the ability of a local government tribunal to make an independent determination on the application of those approval criteria to the facts before it. *This system is incompatible with giving preclusive effect to issues previously determined by a local government tribunal in another proceeding*." 19 Or LUBA at 140 (emphasis added); *See also Femling v. Coos County*, 34 Or LUBA 328, 334 (1998) (same).[13]

Moreover, even if issue preclusion applied here, it would merely preclude petitioner from arguing that the use was not discontinued between 1969 and 1971. Petitioner has not advanced that argument, as she contends that any discontinuance that may have occurred more than 20 years prior to the date of the 2000 application is effectively rendered legally irrelevant under ORS 215.130(11). We agree with petitioner. Issue preclusion does not bar petitioner from proceeding under ORS 215.130(11).

For the reasons explained above, we do not agree that claim or issue preclusion applies in this case. Therefore, ORS 215.130(11) applies and ZDO 1305.02(E) does not bar consideration of the 2000 application. Petitioner's assignments of error are sustained.

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[13] Intervenors also assert that nonconforming uses are a unique kind of land use decision to which claim and issue preclusion should apply even if they do not apply to other land use applications. Intervenors attempt to distinguish nonconforming use determinations because they apply to past facts and do not concern future development. We are not persuaded. Many other land use applications involve determinations of past facts: whether a lot was legally created, whether the present owner was the owner prior to a particular year, whether a parcel was previously part of a larger tract, etc. We see no reason to distinguish between nonconforming uses and other kinds of land use decisions.

CONCLUSION

Petitioner asks us to reverse the county's decision in her petition for review. However, at oral argument petitioner acknowledged that a number of issues must be determined on remand. The county must still determine the nature and extent of the nonconforming use, whether that nonconforming use was discontinued at any point in the 20 years preceding the date of the 2000 application, and whether any alteration of the use during that 20-year period conforms with standards governing alterations of nonconforming uses. Therefore, remand is the appropriate disposition. OAR 661-010-0071(2)(d). The county's decision is remanded.