

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 BRUCE ANKARBERG,
5 *Petitioner,*

6
7 vs.

8
9 CLACKAMAS COUNTY,
10 *Respondent.*

11
12 LUBA No. 2001-136

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from Clackamas County.

18
19 Bruce Ankarberg, Portland, filed the petition for review and argued on his own
20 behalf.

21
22 Michael E. Judd, Assistant County Counsel, Oregon City, filed the response brief and
23 argued on behalf of respondent.

24
25 HOLSTUN, Board Chair; BASSHAM, Board Member; BRIGGS, Board Member,
26 participated in the decision.

27
28 AFFIRMED

03/14/2002

29
30 You are entitled to judicial review of this Order. Judicial review is governed by the
31 provisions of ORS 197.850.
32

NATURE OF THE DECISION

Petitioner appeals the county’s approval of an alteration to a nonconforming use.

FACTS

The applicant owns a .80-acre parcel in unincorporated Clackamas County. The parcel has been zoned R-10 (single family low density residential) since zoning was first applied to the property in 1965. At the time the zoning was applied, the property was used for commercial warehousing. In 1980, a warehouse building on the property burned down. Clackamas County Zoning and Development Ordinance (ZDO) allows replacement of nonconforming uses that are destroyed by fire. In 1981, the county granted approval of a request to replace the building that was destroyed by fire. That replacement building has never been constructed.¹ The applicant is currently using the property as part of his commercial towing business, which includes parking and storage of tow trucks, maintenance, dispatching, and overnight lodging for his drivers. The current use of the property is not a permitted use in the R-10 zone.

On April 12, 2000, the county planning director issued a decision in which he found “a nonconforming use for commercial warehousing and storage uses has been lawfully established and continued upon the subject property * * *.” Record 155. In reaching this conclusion, the planning director relied on photographs of the property that were taken before the 1980 fire, assessment records, and correspondence between the county and a prior owner of the property, as well as affidavits that were submitted to establish continued commercial storage use of the property after 1981. Notice of the April 12, 2000 decision was provided to the “[a]pplicant, Citizens Planning Organization, Agencies, and Property Owners

¹Although the approved replacement building was never constructed, commercial activities on the property continued in the remaining buildings on the property.

1 within 300 feet of [the property].” Record 151. That April 12, 2000 decision was not
2 appealed.

3 The present appeal involves an application to alter the nonconforming use to: (1)
4 permit the parking and storage of up to five commercial towing vehicles; (2) use a portion of
5 the existing house for related office purposes; and (3) use the warehouse structure for related
6 equipment storage. The planning director approved the application with conditions. An
7 opponent appealed the decision to the hearings officer, who affirmed the planning director’s
8 decision. This appeal followed.

9 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

10 ZDO 1206.05.B provides the pertinent approval criteria for alterations of
11 nonconforming uses:

12 “* * *The Planning Director, or designate, shall approve an alteration of a
13 nonconforming structure and/or other physical improvements, or a change in
14 the use * * * if:

15 “1. The alteration in the structure and/or physical improvements, or
16 change in the use, will, after the imposition of conditions as authorized
17 below, have no greater adverse impact on the neighborhood than the
18 existing use, structure(s) and/or physical improvements; and

19 “2. The nonconforming use status of the existing use, structure(s) and/or
20 physical improvements is verified pursuant to subsection 1206.06.
21 The verification and alteration requests may be combined as a single
22 application under this subsection.

23 “3. The Planning Director, or designate, may impose conditions of
24 approval on any alteration of a nonconforming use, structure(s) or
25 other physical improvements permitted under this section when
26 deemed necessary to ensure the mitigation of any adverse impacts.”²

²ZDO 1206.05.B implements ORS 215.130, which provides in pertinent part:

“(5) The lawful use of any building, structure or land at the time of the enactment of any zoning ordinance or regulation may be continued. Alteration of any such use may be permitted subject to subsection (9) of this section. Alteration of any such use shall be permitted when necessary to comply with any lawful requirement for alteration in the use. Except as provided in ORS 215.215, a county shall not place conditions

1 The county interpreted ZDO 1206.05.B to require the applicant in these proceedings
2 to re-verify the existence of a nonconforming use even though the existence of a
3 nonconforming use on the property had already been verified in 2000. As a consequence of
4 the county’s interpretation, much of the dispute below concerned the continuing validity,
5 nature, and scope of the underlying nonconforming use. Petitioner’s two assignments of
6 error combine and overlap arguments, however, together they express three challenges to the
7 decision: (1) the hearings officer did not determine the nature and extent of the underlying
8 nonconforming use; (2) the nonconforming use was lost because it was discontinued for
9 more than 12 consecutive months; and (3) the proposed alteration will have a greater adverse
10 impact on the neighborhood.

11 **A. April 12, 2000 Planning Director Decision**

12 A threshold issue that has some bearing on all three of petitioner’s challenges is the
13 extent to which the hearings officer may rely on the unappealed April 12, 2000 planning
14 director decision. The April 12, 2000 decision verified, pursuant to ZDO 1206.06, that a
15 valid nonconforming use of the property for commercial warehousing and storage existed on
16 the property in 1965 and that the nonconforming use had not thereafter been discontinued for
17 more than 12 consecutive months.³ Petitioner essentially challenges the findings and

upon the continuation or alteration of a use described under this subsection when
necessary to comply with state or local health or safety requirements, or to maintain
in good repair the existing structures associated with the use. A change of
ownership or occupancy shall be permitted.

“* * * * *

“(9) As used in this section, ‘alteration’ of a nonconforming use includes:

“(a) A change in 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.”

³In finding 7 of his decision, the planning director notes that some uses of the property since 1980 represented an unauthorized expansion of the nonconforming warehousing and storage uses. However, the planning director explained “that use of the remaining warehouse structure and the paved and concrete surfaced

1 conclusions that were included in the planning director’s April 12, 2000 decision that the
2 hearings officer considered in making the challenged decision.

3 In order to alter a nonconforming use, ZDO 1206.05.B(2) requires that the
4 nonconforming use be “verified pursuant to subsection 1206.06.” That is precisely what
5 occurred in the April 12, 2000 decision. We do not see that ZDO 1206.05.B(2) requires a
6 second verification of the nonconforming use if the nonconforming use has already been
7 verified.⁴ ZDO 1206.05.B(2) allows but does not require an applicant to combine a request
8 for verification of a nonconforming use with a request for alteration of a nonconforming use
9 in the same application. It follows that if such requests do not have to be combined, and if
10 the county already verified the existence of a nonconforming use “pursuant to [ZDO]
11 1206.06,” then the county need not repeat that verification in a subsequent application to
12 alter that nonconforming use.

13 The county speculates in its brief that our decision in *Lawrence v. Clackamas County*,
14 40 Or LUBA 507 (2001), *review pending*, compels the hearings officer’s interpretation that
15 ZDO 1206.05.B requires that the applicant in this proceeding re-verify the existence of a
16 nonconforming use in this proceeding. We do not agree. In *Lawrence*, we held that a final
17 land use decision, in which the county found that an applicant had failed to carry her burden
18 of proof to establish the continued existence of a nonconforming use, did not conclusively
19 establish as a fact that the nonconforming use had been discontinued. More precisely, we
20 held that in a second land use proceeding, which was initiated by the same applicant to
21 attempt to prove that the alleged nonconforming use had not been discontinued under a
22 different statutory burden of proof, the prior land use decision did not bar her second effort

area of the property for commercial warehousing and storage uses did not entirely cease during the succeeding years.” Record 154.

⁴An assertion by an opponent that the nonconforming use had been discontinued *after* the nonconforming use had been verified pursuant to ZDO 1206.06 might require the hearings officer to consider whether the nonconforming use had been subsequently discontinued, but that assertion was not made in the present case.

1 as a matter of law. 40 Or LUBA at 517-20. Nothing in *Lawrence* compels the interpretation
2 that the hearings officer adopted in this proceeding.

3 However, even if the hearings officer were correct in his position that the applicant
4 was required to again carry the burden of verifying the initial existence and continued
5 existence of the nonconforming use from 1965, for the reasons set forth later in this opinion
6 we agree with respondent that the hearings officer's findings that the applicant carried that
7 burden are adequate and supported by substantial evidence. In adopting those findings the
8 hearings officer relied on the April 12, 2000 decision as *evidence* of the current status of the
9 nonconforming use and specifically did not rely on the April 12, 2000 decision to establish
10 *as a matter of law* that the disputed nonconforming use existed in 1965 and was not
11 thereafter discontinued for more than 12 consecutive months.

12 **B. Nature and Extent of Nonconforming Use**

13 Petitioner argues that the decision does not establish the nature and extent of the
14 nonconforming use when it first became nonconforming in 1965.⁵ The hearings officer's
15 findings state:

16 "The planning director's April 12, 2000 decision * * * did not specify the
17 scope of the prior nonconforming use. Therefore it is hard to determine
18 whether the proposed use will have a greater adverse impact than the historic
19 use. But the applicant must bear the burden of proof that the proposed use
20 will not have a greater adverse impact than the historic use. Any doubts must
21 be resolved against the applicant.

22 "The planning director concluded that the site was previously used as a public
23 storage facility. The hearings officer finds that storage activities are largely
24 passive, and adverse impacts of that use were likely limited to visual impacts
25 of the building and vehicles, equipment and other items stored outside of the
26 buildings. In addition, patrons traveling to and from the site, maneuvering
27 vehicles on the site and loading/unloading stored items would have generated

⁵See *Spurgin v. Josephine County*, 28 Or LUBA 383, 390 (1994) (applicant for nonconforming use must establish the existence, scope, and nature of the alleged nonconforming use on the date it became nonconforming).

1 increased traffic, noise and other impacts on surrounding residential
2 properties.” Record 7.

3 The hearings officer’s decision also discusses the nature and extent of the disputed
4 nonconforming use in determining whether the proposed alteration will result in adverse
5 impacts on the neighborhood. Record 8-12.

6 The hearings officer agreed with the planning director’s conclusions in the April 12,
7 2000 decision that the site was previously used as a warehouse and storage facility. As
8 discussed earlier, the April 12, 2000 decision constitutes substantial evidence to support the
9 challenged decision. Although the hearings officer concedes that it is difficult to identify the
10 precise scope of the underlying nonconforming use, the decision clearly states that the
11 burden is on the applicant to demonstrate that the proposed alteration will not have greater
12 adverse impacts than the historic use of the property and that any doubts will be resolved
13 against the applicant. Record 7. As we explained in *Spurgin*:

14 “[A] county has some flexibility in the manner and precision with which it
15 describes the scope and nature of a nonconforming use. However, [a] county
16 may not, by means of an imprecise description of the scope and nature of the
17 nonconforming use, authorize a *de facto* alteration or expansion of the
18 nonconforming use. At a minimum, the description of the scope and nature of
19 the nonconforming use must be sufficient to avoid improperly limiting the
20 right to continue that use or improperly allowing an alteration or expansion of
21 the nonconforming use without subjecting the alteration or expansion to any
22 standards which restrict alterations or expansions.” 28 Or LUBA at 390-91
23 (footnote omitted).

24 The decision carefully analyzes numerous aspects of the proposed alteration
25 compared to the historic use of the property and restricts the proposed use in a number of
26 ways to ensure that the approved use will not have greater adverse impacts than the less
27 intense historic use. Significantly, petitioner neither challenges any of these findings, nor
28 identifies what he believes the scope and nature of the nonconforming use was on the date it
29 became nonconforming. We believe the decision is sufficient to identify the scope and
30 nature of the nonconforming use and that the decision is supported by substantial evidence.

1 **C. Continuance of Nonconforming Use**

2 In order to obtain approval of an alteration of a nonconforming use, the applicant
3 must establish that the “nonconforming use has not been subsequently abandoned or
4 discontinued.” ZDO 1206.06.B. The hearings officer found the April 12, 2000 decision to
5 constitute substantial evidence that the nonconforming use was not discontinued through
6 May 3, 2000. The hearings officer also found that the use was not discontinued subsequent
7 to the April 12, 2000 decision.

8 “By decision dated April 12, 2000, the planning director found that the
9 warehousing/storage use had been continued without interruption since it was
10 initially established. * * * That decision was not appealed and is final. It is
11 unclear whether that decision is binding on the hearings officer.

12 “However, the hearings officer finds that, even if the prior decision is not
13 binding, it is substantial evidence that the use continued without interruption.
14 There is no substantial evidence to the contrary. Unsupported testimony from
15 neighbors did not persuade the hearings officer that the use was * * *
16 interrupted. Therefore, the hearings officer finds that the use continued
17 without interruption until at least May 3, 2000 (the effective date of the April
18 12, [2000] decision).

19 “* * * Less than one year later, on February 6, 2001, the applicant established
20 a towing business on the site. He has continued to operate it there since. The
21 hearings officer finds that the proposed use—storage of tow trucks and
22 equipment and limited office functions—is consistent with the historic
23 nonconforming use of the property for vehicle storage and equipment
24 warehousing. Therefore the hearings officer finds that the use was not
25 discontinued. * * *” Record 7.

26 Initially, petitioner argues that the use was discontinued during the period between
27 1981 and 1989. Petitioner, however, does not specifically challenge the hearings officer’s
28 finding that there was no substantial evidence that the use had been discontinued. The
29 hearings officer specifically rejected petitioner’s testimony as “unsupported.” Petitioner
30 directs us only to the portion of the April 12, 2000 decision discussing the use of the property
31 during the 1980s. The April 12, 2000 decision, however, ultimately found that the use had
32 not been discontinued.

1 Petitioner also argues that the 1981 decision required, as a condition of approval, that
2 construction of the replacement building begin within a reasonable time. According to
3 petitioner, because the various owners of the property never built the replacement building,
4 the entire nonconforming use was discontinued. The April 12, 2000 decision, however,
5 addressed this issue and specifically found that although the right to reconstruct the
6 replacement building was lost, the majority of the nonconforming use survived the fire and
7 was not discontinued. Record 154. The fact that the replacement building approved in 1981
8 was not built provides no basis for reversal or remand of the challenged decision.

9 Substantial evidence is evidence that a reasonable person would rely on in reaching a
10 decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). We have
11 consistently held that planning staff reports can constitute substantial evidence. *Scott v. City*
12 *of Portland*, 17 Or LUBA 197, 202 (1988); *Grover's Beaver Electric Plumbing v. Klamath*
13 *Falls*, 12 Or LUBA 61, 64 (1984); *Meyer v. Portland*, 7 Or LUBA 184, 197 (1983), *aff'd* 67
14 Or App 274, 678 P2d 741 (1984). The April 12, 2000 decision is sufficiently similar to a
15 planning staff report that we believe it also may constitute substantial evidence in the
16 absence of evidence that would raise questions concerning its evidentiary value. Petitioner
17 does not direct us to evidence in the record that undermines the findings or conclusions of the
18 April 12, 2000 decision. We conclude the April 12, 2000 decision is evidence a reasonable
19 person could rely on in reaching the decision the hearings officer adopted in this case. *Dodd*,
20 317 Or at 179.

21 **D. No Greater Adverse Impact**

22 The remaining approval criterion requires the applicant to demonstrate that the
23 alteration, after imposition of conditions, will “have no greater adverse impact on the
24 neighborhood than the existing use * * *.” ZDO 1206.05.B(1).

25 Petitioner argues that the hearings officer’s finding that the proposed alteration will
26 have no greater adverse impact on the neighborhood misconstrues the applicable law by not

1 determining the nature and extent of the underlying nonconforming use. As discussed
2 earlier, the hearings officer identified the nature and extent of the underlying nonconforming
3 use and compared the proposed alteration to that use.

4 Petitioner also argues that the proposed alteration will have a greater adverse impact
5 on the neighborhood. The hearings officer's decision includes a detailed comparison of the
6 proposed uses with the historic uses of the property, prohibits some of the current uses of the
7 property, restricts the proposed uses, and imposes numerous conditions of approval in an
8 attempt to ensure that the proposed alteration will not result in greater adverse impacts on the
9 neighborhood.⁶ Petitioner again does not challenge any of the hearings officer's findings or
10 explain why he believes the conditions are inadequate to achieve their intended purpose.

11 In sum, the hearings officer: (1) adopted detailed findings, which explain both the
12 hearings officer's understanding of the historical nonconforming use and its impacts and the
13 likely impacts of the proposed use; (2) recognized that certain aspects of the proposed
14 alteration would increase adverse impacts beyond those generated by the historical
15 nonconforming use; and (3) denied certain parts of the request and imposed conditions to
16 limit the altered nonconforming use so that it would not have such increased adverse effects.
17 In this circumstance, petitioner's expression of disagreement with the hearings officer's
18 ultimate conclusion that the approved alteration will not "have greater adverse impact on the
19 neighborhood than the existing use" is insufficient to demonstrate error.

20 The first and second assignments of error are denied.

21 The county's decision is affirmed.

⁶For example, the hearings officer's decision prohibits dispatching trucks from the property, vehicle maintenance and repairs, and use of a travel trailer for overnight lodging. In addition, the decision restricts outdoor activities to the hours of 7:00 AM to 10:00 PM, limits storage to five trucks, and requires fencing to screen the use from neighbors. Record 8-12.