

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

NATURE OF THE DECISION

Petitioner appeals a county hearings officer decision that denies her request for a determination that use of an existing dwelling on an exclusive farm use zoned property may be continued as a nonconforming use.

FACTS

In *Bradley v. Washington County*, 44 Or LUBA 36, *aff'd* 187 Or App 502, 68 P3d 274 (2003) (*Bradley I*), we remanded a county decision that denied petitioner’s request for a determination that the dwelling on the subject property qualifies as a nonconforming use. In this appeal, petitioner challenges the county’s decision on remand, in which the county again denies petitioner’s request.

A dwelling was first constructed on the subject one-acre property in 1940. By 1998, that dwelling was seriously dilapidated. In September 1998, petitioner signed an agreement to purchase the subject property from its owners. Record 268. That agreement was conditioned on petitioner being able to remove the existing dwelling and replace it with a new dwelling. On October 22, 1998, petitioner submitted an application to the county seeking approval to demolish the dwelling and replace it with a new one.¹ Record 269. In support of this application, to demonstrate that the dwelling had not been abandoned, petitioner submitted, among other things, some photographs. We refer to these photographs as the 1995 photographs, because they show the dwelling was occupied when the pictures were taken, and petitioner claims the photographs were taken in 1995.

¹ In an October 22, 1998 letter that accompanied that application, petitioners explained:

“* * * Even though it appears as [though] this home has been abandoned, I assure you it has not. This home was occupied by the owner’s daughter for several years. She moved out of the home in November of 1995 to allow her parents to sell the home. * * * Record 270.

1 The county responded to the October 22, 1998 application with a request for additional
2 information.² Petitioner resubmitted the application on November 10, 1998.³ The county thereafter
3 sent a letter to petitioner in which it indicated that the application would likely be denied.⁴ Petitioner
4 subsequently attempted to address the planning staff’s concerns, but in April 1999 withdrew the
5 1998 application. Record 338.

6 Petitioner submitted a second application in April 2001. Petitioner asked that the planning
7 staff consider “all previously submitted material including without limitation the support for the 1998
8 and 2001 applications.” Record 358. The 2001 application was denied by the planning director in
9 May 2002. Record 313. Petitioner appealed that decision to the county hearings officer. In

² In a November 5, 1998 letter, county planning staff explained:

“[P]lease provide some kind of timeline for the photos provided. I understand they are intended to demonstrate the house was lived in recently, but they would be more helpful if they had dates attached.

“* * *

*“All of your application materials are being returned to you, with the exception of the original application packet and the fees. Please resubmit the application * * *. All fees will be processed upon acceptance of a complete application which addresses the above item.”* Record 81 (emphasis added).

³ In a November 10, 1998 letter, petitioner offered the following explanation for the photographs:

“To answer your questions about the property, I have updated our application packet. First the pictures were taken in the fall of 1995, just before [the property owners’] daughter * * * moved out. I have indicated this on the page of photographs. * * *” Record 82.

⁴ In a November 18, 1998 letter, the county explains:

“As stated previously, the application meets the minimum standards for acceptance but would likely be denied. Pursuant to our telephone conversation of November 17, 1998, *the application is being returned to you, with the exception of the original packet and fees, rather than accepted for processing at this time. The original packet and fees will be processed upon resubmittal of a complete application.*

If you resubmit the application, please provide information to verify the occupancy of the house, such as written affidavits from postal carriers, utility records which indicate more than just minimal usage, etc. * * *” Record 83 (emphasis added).

1 August 2002, the county hearings officer also denied the application, and the county hearings
2 officer's decision was appealed to LUBA in *Bradley I*.

3 The sole basis for our remand in *Bradley I* concerned the hearings officer's reliance on
4 certain post-1995 photographs in finding that any nonconforming use right the property owners
5 might have to continue use of the disputed dwelling had been lost, because the dwelling had been
6 "abandoned or discontinued for more than one year by June 20, 1995." 44 Or LUBA at 44. We
7 set out the relevant part of our opinion in *Bradley I* below:

8 "Part of the confusion about when the photographs were taken is properly
9 attributed to the petitioner. Some statements made by petitioner can be read to
10 suggest that the photographs in the record are from 1995. Petitioner apparently
11 attached 1995 photographs to a prior application in this matter that was submitted
12 in 1998, but for some reason those photographs were not placed before the
13 hearings officer and are not in the record in this appeal. Petitioner argues that all of
14 the photographs in the record in this appeal were taken after the dwelling was
15 vacated in 1995 and after the dwelling suffered significant deterioration while it sat
16 empty. Assessing the magnitude of the hearings officer's error in assuming the
17 photographs referenced in the decision were taken in 1995 is complicated because
18 for the most part the hearings officer does not clearly identify the photographs he
19 relies on in the decision." *Id.* at 47.

20 In defending its hearings officer's August 2002 decision in *Bradley I*, the county argued that the
21 hearings officer's decision was supported by substantial evidence, notwithstanding the hearings
22 officer's erroneous understanding that photographs in the record in *Bradley I* were taken in 1995.
23 We rejected the county's argument:

24 "* * * The evidence that bears directly on the question of pre-1995 interruption of
25 residential use of the property is hardly overwhelming. The letters constitute
26 inconsistent remembrances of past events, none of which carry any particular
27 independent indicia of reliability. The reliability of the assessor's sheet and the
28 planning staff report, as evidence of pre-1995 interruption of residential use, is also
29 debatable. Contrary to the county's suggestion, the hearings officer seems to have
30 relied significantly on recent photographs, which he mistakenly believed were taken
31 in 1995, to corroborate the evidence he ultimately relied on. He also appears to
32 have relied in some measure on those same photographs in electing not to rely on
33 the representations in the letters from petitioner and the property owners. We
34 cannot tell from the decision and the record whether he would have decided the
35 question about pre-1995 interruption of residential use in the same way if he had

1 recognized that the photographs were recent photographs rather than photographs
2 that were taken in 1995. A remand is necessary for the hearings officer to decide
3 that question with a correct understanding of the dates those photographs were
4 taken.” *Id.* at 48 (footnote omitted).

5 Following our remand, the hearings officer reconsidered his earlier decision and again
6 denied the application. As relevant, the hearings officer explained his decision as follows:

7 “In denying the Applicant’s request for a determination that Applicant had a
8 nonconforming use right to replace an existing dwelling the Hearings Officer found *
9 * * ‘that the structure was abandoned or discontinued for more than one year by
10 June 20, 1995.’ LUBA found that the Hearings Officer in making this finding
11 seemed to have relied significantly on recent photographs, which the Hearings
12 Officer mistakenly believed were taken in 1995. LUBA remanded the decision to
13 allow the Hearings Officer to decide the question of interruption of pre 1995 use
14 based on the fact that certain photographs were taken after 1995.

15 “The Hearing Office has reviewed the evidence with the understanding that the
16 photos in the record were taken after 1995. * * * The Hearings Officer having
17 initially heard this matter, and having reviewed the record as directed by LUBA,
18 concludes that * * * the dwelling structure was abandoned or discontinued for more
19 than one year by June 20, 1995. The Hearings Officer relies on the [following
20 evidence]: (1) an April 26, 2002 letter from a neighbor in which he states ‘I have
21 never seen anyone occupy the house * * * in the 11 years I have lived here,’ * * *;
22 this same neighbor also testified and the Hearings Officer finds his testimony
23 credible[,] (2) an April 26, 2002 letter from another neighbor in which he states the
24 dwelling ‘has not been occupied since the late 1980’s and certainly not any time
25 after 1990,’ * * * (3) a general appraisal information sheet that includes a remark
26 that the house is abandoned,’ * * * (4) planning staff’s explanation of that remark,’
27 * * * and (5) a planning staff report that states that petitioner indicated in a 1996
28 meeting ‘that no one had lived in the structure since 1990.’

29 “The Hearings Officer is aware of the fact that the Applicant has challenged the
30 motives of the neighbors, who wrote letters in opposition to the proposal, disputes
31 the evidentiary value of the general appraisal information sheet and the staff’s
32 explanation of that sheet, and argues that petitioner never met with planning staff in
33 1996 and never made the statement about pre-1995 vacancy that the planning staff
34 report claims. As is often the case the Hearings Officer must decide what weight to
35 give the evidence presented and between conflicting testimonies.

36 “Applicant subsequent to the remand requested a new hearing on this matter to
37 present additional evidence. The Hearings Officer does not read LUBA’s opinion
38 as requiring a new hearing. The parties to this matter have had ample opportunity to
39 present evidence and argument supporting their positions and therefore the Hearings

1 Officer has not granted the request for a new hearing.” Record 6-7 (footnotes
2 omitted).

3 **FIRST ASSIGNMENT OF ERROR**

4 After our remand in *Bradley I*, but before the hearings officer rendered his decision on
5 remand, petitioner’s attorney provided those 1995 photographs to the county’s attorney and wrote
6 a letter to the hearings officer requesting an evidentiary hearing. As relevant that letter states:

7 “Central to [petitioner’s] appeal and LUBA’s decision was the evidence relating to
8 the County’s conditional use standards. One problem was the dates of the photos.
9 Part of the confusion was because Ms. Bradley, with her 1998 application,
10 submitted photos showing the house in use prior to the home being vacated. As of
11 the hearing before you, the photos could not be located by either the County or Ms.
12 Bradley. Since then, Ms. Bradley has informed us that she has located some
13 photos that will shed some light on the condition of the dwelling and the
14 discontinuance issue. Holding an additional hearing will remove any confusion and
15 ensure that the decision is based on all relevant facts.

16 “[Petitioner] respectfully requests that a hearing, at which evidence may be
17 submitted, is held on remand. * * *” Record 10.

18 Simply stated, petitioner argues that county planning staff lost the 1995 photographs.⁵
19 Petitioner claims she found copies of the 1995 photographs following our remand in *Bradley I*.⁶
20 Petitioner argues that because the county was responsible for the loss of what petitioner describes
21 as “vital and conclusive” evidence, it was “adding insult to injury” for the hearings officer to refuse to
22 reopen the evidentiary record so that the 1995 photographs could be considered by the hearings
23 officer on remand. Petition for Review 7.

⁵ The county disputes that argument, and contends that it returned the 1995 photographs to petitioner in 1998.

⁶ Earlier in this appeal, petitioner argued “[f]ollowing remand, petitioner located the negatives of the photographs which had been submitted with [the 1998] application.” Record Objection and Motion to Take Evidence 2. Later petitioner submitted an affidavit in which petitioner states “[f]ollowing remand by this Board, I located copies of the photographs submitted with the original application.” October 20, 2003 Affidavit of Connie Bradley 2. Reading petitioner’s argument and affidavit, it is not clear whether petitioner asserts she found duplicate copies of the 1995 photographs or found the negatives.

1 There are a number of problems with petitioner’s argument under the first assignment of
2 error. First, nothing in our decision in *Bradley I* obligated the city to reopen the evidentiary record
3 on remand, and petitioner cites no other legal requirement that the evidentiary record be reopened
4 on remand or legal standard that the hearings officer should have applied to determine whether to
5 grant petitioner’s request to reopen the record. Second, petitioner appears to be relying largely or
6 entirely on the county’s alleged responsibility for the loss of the 1995 photographs that were
7 attached to the 1998 application for her argument that the hearings officer should have reopened the
8 record on remand. However, petitioner did not communicate that position to the hearings officer.
9 Petitioner’s letter does not say that county planning staff lost the 1995 photographs that were
10 attached to the 1998 application, only that “the photos could not be located by either the County or
11 [petitioner].” Record 10. Just as importantly, the letter does not clearly say that the photographs
12 that petitioner found after our decision in *Bradley I* are copies of the 1995 photographs, only that
13 petitioner “has located some photos that will shed some light on the condition of the dwelling and the
14 discontinuance issue.” *Id.*

15 Finally, beyond petitioner’s failure to communicate to the hearings officer the legal position
16 she now asserts in the first assignment of error, there is little evidence in the record that county
17 planning staff were responsible for the absence of those photographs from the record in *Bradley I*.
18 Petitioner relies largely on language in county planning staff’s November 18, 1998 letter which
19 states in part that the “application is being returned to you, with the exception of the original packet
20 and fees,” as demonstrating that the county retained the 1995 photographs. *See* n 4. However,
21 that language is ambiguous at best, and the county’s earlier November 5, 1998 letter includes a
22 similar statement that the “application materials are being returned to you, with the exception of the
23 original packet and the fees.” *See* n 2. There is no dispute that the county returned the 1995
24 photographs to petitioner at the same time it sent the November 5, 1998 letter shortly after the
25 1998 application was first submitted, so that petitioner could attempt to date those photographs.
26 *See* n 3.

1 Given that petitioner did not advise the hearings officer that she believed it would be error to
2 refuse to reopen the evidentiary record following our remand in *Bradley I*, and because it is at least
3 questionable that county planning staff were responsible for the absence of those photographs from
4 the record in *Bradley I*, we agree with the county that it was not error for the hearings officer to
5 deny petitioner’s request to reopen the record following our remand in *Bradley I*.⁷

6 The first assignment of error is denied.

7 **SECOND ASSIGNMENT OF ERROR**

8 Petitioner argues that the hearings officer’s finding in his decision on remand that use of the
9 dwelling had been discontinued for more than one year by June 20, 1995 is not supported by
10 substantial evidence.

11 We discussed petitioner’s evidentiary challenge at some length in *Bradley I*. As relevant
12 here, we concluded that the documents and testimony that the hearings officer relied on to find that
13 use of the dwelling had been discontinued and the documents and testimony that petitioner
14 submitted to support a contrary finding were “hardly overwhelming.” 44 Or LUBA at 48.
15 Nevertheless, we concluded that the evidence was such that a reasonable decision maker could
16 have adopted either finding. It was the “hardly overwhelming” and conflicting nature of the evidence
17 that led us to conclude that “the photographs noted in the decision assume[d] added significance.”
18 44 Or LUBA at 47. It was the hearings officer’s apparently mistaken belief that those photographs
19 were taken in 1995 that led to our remand in *Bradley I*. In his decision on remand, the hearings
20 officer reconsidered the evidence with the understanding that the photographs in the record postdate
21 1995 and reached the same conclusion he reached in *Bradley I*. We continue to believe that the
22 evidence is such that the hearings officer could reasonably adopt the finding he adopted on remand
23 or the contrary finding that petitioner urges. Therefore, the hearings officer’s finding on remand is

⁷ We also note that the 1995 photographs would only constitute the “vital and conclusive” evidence petitioner now contends they are if petitioner can establish that they were actually taken in 1995. It is unclear how petitioner proposed to establish that the pictures were taken in 1995, and we do not understand the county to concede that the 1995 photographs were taken in 1995.

1 supported by substantial evidence. *See Douglas v. Multnomah County*, 18 Or LUBA 607, 617
2 (1990) (where reasonable persons could reach contrary conclusions based on conflicting evidence,
3 either conclusion is supported by substantial evidence).

4 The second assignment of error is denied.

5 **THIRD ASSIGNMENT OF ERROR**

6 Petitioner’s third assignment of error is included “to preserve the error.” Petition for Review
7 18. We understand the third assignment of error to have been included to preserve petitioner’s
8 arguments regarding an issue that it was unnecessary for LUBA to address in *Bradley I.*⁸ With our
9 disposition of the first two assignments of error, it is unnecessary for us to address that issue in this
10 appeal or to remand the county’s decision to address that issue. Because no purpose would be
11 served by considering petitioner’s third assignment of error, we do not do so.

12 The county’s decision is affirmed.

⁸ That issue is whether the property owners have made continuous efforts since 1995 to sell the disputed property. Even if petitioner had been able to convince the hearings officer that use of the disputed dwelling had not been discontinued for any period of more than one year before 1995, petitioner concedes that the dwelling became vacant in the fall of 1995 and has remained unoccupied since that date. Under Washington County Community Development Code 440-4, the post 1995 vacancy would not result in a loss of nonconforming use rights, provided the property owners made continuous “bona fide efforts to market the property” since 1995.