BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ALEKSANDR KARTAVYKH
and LYUBOV KARTAVYKH,
Petitioners,

vs.

CLACKAMAS COUNTY,
Respondent.

LUBA No. 2016-070

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Gary M. Bullock, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Gary M. Bullock and Associates, PC.

Nathan K. Boderman, County Counsel, and Siddharth Hariharan, Certified Law Student, Oregon City, filed a response brief and argued on behalf of respondent.

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

AFFIRMED 11/23/2016

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

Petitioners appeal a county hearings officer decision that denies their renewed application for verification of a nonconforming use.

INTRODUCTION

A. The December 4, 2014 Initial Decision Denying Non-Conforming Use Verification

Petitioners purchased property from Frank Stone (Stone) in May 2007. Sometime before 1979, the county determined that Stone had a right to continue a "construction contractor's storage yard" as a nonconforming use on the property. Record 34. The Rural Residential Farm Forest – 5 Acre zoning that applies to the property does not allow that use as either a permitted or conditional use. At the time petitioners purchased the property from Stone in 2007, they believed Stone's nonconforming use had continued without interruption until the time of the sale of the property to petitioners in 2007. Beginning with their purchase of the property in 2007, petitioners stored and parked commercial trucks on the property.

On September 29, 2014, petitioners submitted an application to the county to verify their nonconforming use of the property and to alter the prior approved nonconforming use to allow commercial truck storage and parking. Record 37-42. On December 4, 2014, the county planning department denied the application, concluding that Stone discontinued his nonconforming use for more than 12 months before the property was sold in 2007. Record 30-36. In

reaching that conclusion, the planning department relied on testimony by neighboring property owners who took the position that Stone's nonconforming use of the property was interrupted for between one and six years prior to its sale in 2007. That December 4, 2014 decision was not appealed.

B. The Planning Director's March 28, 2016 Denial of the Reapplication

Subsequently petitioners refiled the same application. Petitioners were told by county planning staff that they must wait two years after the December 4, 2014 decision denying their first application, before submitting the same, or a substantially similar, application. Petitioners took the position that two of the exceptions to that two-year waiting requirement that are provided by the Clackamas County Zoning and Development Ordinance (ZDO) apply in this case, but the planning department disagreed. To resolve the dispute, petitioners filed an application for planning director review. In a March 28, 2016 decision, the planning director concluded that neither of those exceptions applied. Record 72-78. Petitioners then appealed the planning director's decision to the county land use hearings officer.

C. The Hearings Officer's June 2, 2016 Decision Affirming the Planning Director's Denial of the Reapplication

As relevant, ZDO 1307.16(K) provides:

> "Re-filing an Application: If a Type II or III land use permit application is denied, or a Type II or III land use permit is revoked pursuant to Subsection 1307.16(L), an applicant may re-file for

consideration of the same or substantially similar application only if:

> "1. At least two years have passed after either final denial of an application by the County or revocation of a permit; or
>
> "2. The review authority finds that one or more of the following circumstances render inapplicable all of the specific reasons for the denial:
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> "* * * * *
>
> "b. A mistake in facts, which was material to the application, was considered by the review authority;
>
> "c. There have been changes in circumstances resulting in new facts material to the application[.]"

1. A Mistake in Facts

In his June 2, 2016 decision, the hearings officer first considered the meaning of ZDO 1307.16(K)(2)(b): "[a] mistake in facts, which was material to the application, was considered by the review authority[.]" The hearings officer concluded that ZDO 1307.16(K)(2)(b) authorizes an applicant to submit "the same or substantially similar application" within two years of a denial if the applicant "establish[es] that the initial decision relied on information that was false [and] the false information was material to the application and [renders] inapplicable all of the specific reasons for denial."[1] Record 8.

[1] We question the hearings officer's interpretation of ZDO 1307.16(K)(2)(b). A mistake in facts would seem more logically to be a case where one or more of the material facts found are clearly at odds with the evidence. For example a finding that a building is set back 10 feet, when all the evidence in the record is that the building is set back 20 feet, would be a

In their reapplication petitioners submitted evidence in support of the reapplication that had not been presented to the county prior to its December 4, 2014 denial decision.[2] Petitioners took the position that because the planning department rendered its decision without the benefit of all relevant information, the "Mistake in Facts" prong of ZDO 1307.16(K)(2) applies here and their reapplication should have been considered. The hearings officer rejected that argument, concluding that "not considering the entire universe of facts, including those not in the record, does not constitute mistakes in fact that render the reason for denial inapplicable." Record 9.

The hearings officer then concluded that the planning department's reliance on opponent testimony to conclude that Stone's nonconforming use was discontinued for over one year, testimony that petitioners characterized as "self-serving," similarly did not qualify as a mistake in facts. The hearings officer explained why that opponent testimony could reasonably take different positions regarding the length of time Stone's nonconforming use was discontinued.[3] Record 10. The hearings officer concluded that the fact that

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mistake in facts. However, no party questions the hearings officer's interpretation of ZDO 1307.16(K)(2)(b) and we do not question it further.

[2] The most significant new information appears to be a declaration signed by Stone's tax consultant. In that declaration, the tax consultant took the position that Stone operated his business without interruption until 2009, two years after the property was sold to petitioners. Record 163-65.

[3] The hearings officer explained:

there was testimony that conflicted in some respects does not establish that the testimony was false or that there was a material mistake in facts.

> "While the new evidence submitted by the applicants might well have been substantial evidence that the County could have relied upon in the initial decision to verify the nonconforming use, that does not establish that the testimony from the neighbors was false. In the initial application, at least six neighbors testified about the nature, scope, and continuance of Stone's use. Some of those neighbors have lived near the property for over thirty years. The neighbors all testified that the nature and scope of the current use exceeds that by Stone. The neighbors all testified that Stone had discontinued the nonconforming use for at least one year before the applicants purchased the property. While the neighbors' testimony was not identical, it was similar. The greatest discrepancy among the testimony was about when Stone's business use of the property was discontinued. The neighbors' testimony ranged from one * * * year to six [years before applicant purchased the property]. While that may seem like a large discrepancy (and most of the neighbors testified it was discontinued one to two years before the sale of the property), as the neighbors explained in the current case's public hearing, Stone was in the process of building a new house in Wallowa County and moved some of his equipment to the site of the new house. The neighbors also testified that Stone was in declining health which also reduced his business operation. Finally, the neighbors testified that Stone transferred much of the business to his son who lives nearby, and his son continued much of the business operation. All of these circumstances help explain how Stone's gradual discontinuance of the nonconforming use could be construed somewhat differently by the different neighbors." Record 10.

2. Change in Circumstances Resulting in New Facts

With regard to the subsection (c) prong of ZDO 1307.16(K)(2), petitioners argued that due to "misrepresentations by neighboring property owners," petitioners were required to seek out "new facts that they were previously not aware of" to support their contentions. Record 11. Petitioners contended this course of events qualified as a change in circumstances resulting in new facts. The hearings officer characterized that argument as "creative," but he rejected the argument, concluding that petitioners had not identified any *new* facts and instead were relying on "old facts that were not placed in the earlier record." Record 12.

D. Summary

For purposes of this appeal to LUBA, where petitioners seek review of the hearings officer's June 2, 2016 decision, the nature of that decision and the decisions that preceded it is important. The planning department's December 4, 2014 decision denying petitioners' application for nonconforming use verification is the only decision that has been rendered on the merits of whether petitioners have a right to operate a nonconforming use on their property. The subsequent decisions by the planning department, the planning director and the county hearings officer were all limited to the issue of whether petitioners may resubmit the same application for reconsideration sooner than two years after

December 4, 2014.[4] All of those decisions have concluded that petitioners may not do so, for essentially the same reasons.

FIRST ASSIGNMENT OF ERROR

Petitioners' first assignment of error is set out below:

> "Respondent erred by improperly construing CCZDO 1206 to conclude that the nonconforming use of the Property had been discontinued by the previous property owner for at least 12 consecutive months prior to Petitioners' purchase of the Property in 2007." Petition for Review 6.

ZDO 1206.03(A) provides that "[i]f a nonconforming use is discontinued for a period of more than 12 consecutive months, the use shall not be resumed unless the resumed use conforms to the requirements of this Ordinance and other regulations applicable at the time of the proposed resumption." In the argument in support of the first assignment of error, petitioners argue:

> "Because CCZDO 1206[.03(A)] requires that a discontinuance of 'more than 12 consecutive months' be established by the evidence, the neighbor's imprecise information regarding the nature and extent of Stone's nonconforming use cannot meet the evidentiary burden. Moreover, the language of the ordinance is important; for a nonconforming use to lapse due to discontinuance, that discontinuance must exist for *more than* 12 *consecutive* months. CCZDO 1206.03(A). Therefore, any 'business' use of the Property by Stone would effectively reset the 12-month clock for the purposes of the application of CCZDO 1206. Thus, for example, in the '1 to 2 years' prior to the sale mentioned by one objector, any business use of the Property by Stone would have reset the CCZDO 1206 clock. Respondent cannot say with any certainty

[4] There is no dispute that the application that led to this appeal is the same application that led to the December 4, 2014 initial decision.

> that the evidence presented by Petitioners' opponents established a definite and consecutive 12-month period of discontinuance by CCZDO 1206." Petition for Review 8-9.

LUBA is required to reverse or remand the hearings officer's June 2, 2016 decision if the hearings officer: "[m]ade a decision not supported by substantial evidence in the whole record; [or] [i]mproperly construed the applicable law[.]" ORS 197.835(9)(a)(C) and (D). Petitioners' nominal legal theory under the first assignment of error is that the county misconstrued ZDO 1206.03(A) by failing to appreciate that under ZDO 1206.03(A), discontinuance of Stone's nonconforming use for less than 12 *consecutive* months would not preclude resumption of the nonconforming use, so long as the nonconforming use was resumed before the discontinuance lasted 12 consecutive months. There are at least two related problems with that argument. First, the hearings officer made no determination regarding whether Stone discontinued his nonconforming use for a period of 12 consecutive months or more, and the hearings officer's decision is the only decision that is before us in this appeal. Second, even if the planning director and planning department in the initial verification decision failed to appreciate that any discontinuances of Stone's nonconforming must have been for 12 *consecutive* months to preclude resumption of the nonconforming use, that would be a mistake or misconstruction of *law*. Such a mistake of law does not qualify as a "mistake in [material] facts" or a change "in circumstances resulting in new [material] facts," within the meaning of ZDO 1307.16(K)(2)(b) and (c) that

would allow petitioners to submit the same application less than two years after the planning department's December 4, 2014 decision denying petitioners' request for nonconforming use verification.

While petitioners' nominal legal theory in the first assignment of error is that the county misconstrued applicable law, ORS 197.835(9)(a)(D), some of the arguments in support of the first assignment of error are substantial evidence challenges. But those challenges are directed at the planning department's December 4, 2014 decision, not the hearings officer's June 2, 2016 decision, which is the only decision that is before us in this appeal. We note that petitioners also suggest at several points in their argument that the opponents failed to carry their burden of proof. As the applicants, it is petitioners, not the opponents, who bear the burden of proof concerning whether Stone's nonconforming use was discontinued for more than 12 consecutive months. *Fasano v. Washington Co. Comm.*, 264 Or 574, 586, 507 P2d 23 (1973); *Murphy Citizens Advisory Comm. v. Josephine County*, 28 Or LUBA 274 (1994). A county may not shift that burden to opponents of land use approval. *Andrews v. City of Prineville*, 28 Or LUBA 653, 659 (1995).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners' second assignment of error is nominally a substantial evidence challenge that is directed at the hearings officer's June 2, 2016 decision. However, petitioners' substantial evidence challenge in fact is

directed at findings that the planning department adopted in its December 4, 2014 decision that Stone discontinued his nonconforming use for more than 12 consecutive months. Petitioners' substantial evidence challenge is not directed at the findings that the hearings officer adopted in his June 2, 2016 decision regarding whether the same application the planning department denied in its December 4, 2014 decision can be resubmitted less than two years after that decision under ZDO 1307.16(K)(2)(b) or (c) because it was based on a "mistake in [material] facts," or "[t]here have been changes in circumstances resulting in new [material] facts[.]"

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners' third assignment of error is set out below:

> "Respondent erred by incorrectly applying CCZDO 1307.16(K)(2)(b) in its determination that the County's finding of discontinuance was not materially based on a 'mistake in facts.'" Petition for Review 16.

The third assignment of error, unlike the first two assignments of error, is aimed at the correct decision, *i.e.*, the hearings officer's June 2, 2016 decision rejecting petitioners' contention under ZDO 1307.16(K)(2)(b) that petitioners should be allowed to resubmit the same nonconforming use verification application that the planning department denied on December 4, 2014, less than two years after that decision. The relevant question under ZDO 1307.16(K)(2)(b) is whether that December 4, 2014 planning department decision was based on a "mistake in [material] facts[.]" The hearings officer's

unchallenged interpretation of ZDO 1307.16(K)(2)(b) was that the December 4, 2014 decision would have been based on a mistake in material facts if it was based on "information that is false." Record 8.

As noted earlier, the opponent testimony that the planning department relied on was in some respects inconsistent. However, the hearings officer found that those inconsistencies are explainable and the inconsistencies fall short of showing the testimony was "demonstrably false." Record 11. The hearings officer reasoned that because the planning department's December 4, 2014 decision "was not based on false information, the decision was not based on a mistake in facts material to the application." *Id*.

Petitioners argue that "it is clear from the record that at least some of the neighbors' testimony was indeed 'demonstrably' false, in that the neighbors' accounts of Stone's discontinuance of his business were inconsistent." Petition for Review 17. The hearings officer flatly rejected petitioners' contention that *inconsistent* testimony is the same thing as *false* testimony:

> "The County was required to weigh the conflicting evidence and decide which was more believable, and the County sided with the neighbors. Even with the new evidence submitted by the applicants, I do not see that they have established that the information provided by the neighbors was false. I think there is conflicting evidence as to whether the nonconforming use was discontinued - I do not see that any of that evidence is demonstrably false. Given that the initial decision was not based on false information, the decision was not based on a mistake in facts material to the application." Record 11.

In more than one place the hearings officer suggested in his June 2, 2016 decision that with the new evidence submitted by petitioners the evidentiary record might be such that, viewed in its entirety, a reasonable person might rely on that evidence to find that Stones' nonconforming use was not discontinued for more than 12 consecutive months before the property was sold to petitioners in 2007. But that determination, if it is to be made, must be made in a second decision on the merits of the application that was denied by the planning department on December 4, 2014. As we have already noted the hearings officer did not consider that application on its merits.

The issue in this appeal is different: whether the planning department's December 4, 2014 decision that Stone's nonconforming use was discontinued for a period of more than 12 continuous months before it was sold in 2007 was based on "a mistake in [material] facts[.]" The hearings officer concluded that the planning department's December 4, 2014 decision was based on inconsistent opponent testimony. But the hearings officer concluded that a decision based on inconsistent testimony is not the same thing as a decision based on "a mistake in [material] facts[.]" The hearings officer concluded that was the case, even if petitioners' new evidence is taken into consideration. We agree with the county that petitioners have not established that the hearings officer conclusions are based on a misconstruction of ZDO 1307.16(K)(2)(b).

The third assignment of error is denied.

The county's decision is affirmed.