BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KAREN MORGAN,
Petitioner,

vs.

JACKSON COUNTY,
Respondent,

and

LARRY PERKETT and SUSAN PERKETT,
Intervenors-Respondents.

LUBA No. 2017-053

FINAL OPINION
AND ORDER

On remand from the Court of Appeals.

Wendie L. Kellington, Lake Oswego, filed the petition for review and argued on behalf of petitioner. With her on the brief was Kellington Law Group PC.

No appearance by Jackson County.

Erik J. Glatte, Medford, filed the response brief and argued on behalf of represented intervenors-respondents. With him on the brief was Huycke O'Connor Jarvis, LLP.

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

ZAMUDIO, Board Member, did not participate in the decision.

REMANDED 09/13/2018

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a hearings officer's decision verifying an automobile storage, repair and sales business as a nonconforming use.

BACKGROUND

This matter is on remand to LUBA from the Court of Appeals in *Morgan v. Jackson County*, 290 Or App 111, 414 P3d 917 (2018). We set out the facts in some detail in our prior decision, *Morgan v. Jackson County*, __ Or LUBA __ (LUBA No. 2017-053, Sept 22, 2017). We set out here additional facts and chronology relevant on remand.

In June 2016, intervenors filed an application with the county to verify an auto yard and three storage structures as a lawful nonconforming use (NCU).[1] As part of their application, intervenors provided evidence that they established an auto yard business on the subject property in 1971, prior to the date contrary zoning was first applied. On September 1, 1973, the county first applied zoning to the subject property, applying the Open Space Development 5 zone, which did not allow an auto yard use. In 1982, the property was

[1] As used by the hearings officer and the parties, the term "auto yard" refers to a commercial use involving the storage, repair and retail sales of used automobiles. Specifically, intervenors stated that their auto yard business includes the following components: (1) storage of impounded or abandoned vehicles, (2) purchase of used vehicles, (3) repair of used vehicles for the purpose of resale, and (4) the retail sale of used vehicles.

rezoned exclusive farm use (EFU), which likewise does not allow an auto yard use. Intervenors also submitted evidence that their auto yard business has existed in its current size and as it currently operates for at least 10 years prior to the date of its 2016 application.

County planning staff issued a tentative decision verifying intervenors' auto yard as a lawful NCU. Petitioner, an adjoining property owner, appealed. The hearings officer held a *de novo* hearing on December 19, 2016, holding the record open until February 13, 2017, during which petitioner argued that intervenors had failed to demonstrate that the auto yard use was a "lawful use" as of September 1, 1973, the relevant date for purposes of ORS 215.130(5), part of the statutory framework governing nonconforming uses within county jurisdiction. Specifically, petitioner argued that the auto yard use was not lawful when established, because at no time prior to 1973 had intervenors obtained a Department of Motor Vehicles (DMV) license under *former* ORS 481.305(1) (1971), which imposed potential criminal sanctions on operation of a business as a retail automobile dealer without the required license.

Petitioner also argued that any NCU auto yard use that had been lawfully established prior to 1973 had been affirmatively relinquished in 1987, when the county approved a home occupation use for an office in the dwelling, to be used for wholesaling used vehicles that are located off-site, so that intervenors could obtain a DMV business certificate for that wholesale use. Petitioner also argued that intervenors had failed to demonstrate the nature and extent of the

auto yard use had not been altered or expanded within the relevant time periods.

In an April 2017 hearings officer's decision, the county issued a decision verifying the nature and scope of intervenors' auto yard as an NCU. As discussed further below, the hearings officer concluded that the auto yard use had been lawfully established prior to September 1, 1973, because under a reading of our previous cases, compliance with the DMV licensing requirement was "not a factor in proving a use is lawfully established." Record 20. The hearings officer also concluded that intervenors had not relinquished the NCU by obtaining the 1987 zoning clearance sheet for a home occupation, and that intervenors had sufficiently demonstrated that the nature and extent of the auto yard use had not been altered or expanded within the relevant time frame, with the exception of three structures built in the 1990s, which the hearings officer excluded from the scope of the verified NCU.

LUBA reversed the hearings officer's decision, agreeing with arguments under petitioner's first subassignment of error to the second assignment of error that based on intervenors' undisputed noncompliance with *former* ORS 481.305(1) (1971) intervenors had failed as a matter of law to establish that their auto yard use was lawfully established prior to the date contrary zoning was applied. Our decision accordingly did not address the remaining assignments of error.

On appeal to the Court of Appeals, the court held that evaluation whether a nonconforming use was a "lawful use" at the time it became nonconforming is limited to noncompliance with local zoning or land use regulations, and does not include noncompliance with business or occupational licensing laws such as *former* ORS 481.305(1) (1971), even those that designate the unlicensed use as a crime. Accordingly, the court reversed our decision on that point, and remanded the unresolved issues in the appeal for our consideration.

On June 22, 2018, we issued an order requesting supplemental briefing from the parties regarding what effect, if any, the court's ruling has on LUBA's review of the remaining issues on appeal. Both parties submitted supplemental briefing. We now address petitioner's remaining assignments and sub-assignments of error, which concern consistency with the provisions of ORS 215.130 and implementing county regulations. As background, we first discuss the relevant statutory and county regulations common to the remaining assignments of error.

FRAMEWORK OF ORS 215.130

ORS 215.130(5) provides that 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.[2] Generally, to verify a use as a lawful

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[2] ORS 215.130 provides, in relevant part:

> "(5) The lawful use of any building, structure or land at the time of the enactment or amendment of any

nonconforming use, the applicant must provide evidence to demonstrate (1) that the use was a lawful use that was established prior to the date contrary zoning was applied, (2) the nature and extent of the use on the date it became nonconforming, and (3) that the use has continued in its current nature and extent uninterrupted from that date to the present day. Alterations or expansions of a lawful nonconforming use are allowed, subject to county

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zoning ordinance or regulation may be continued.
* * *

"* * * * *

"(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.

"(8) Any proposal for the verification or alteration of a use under subsection (5) of this section, except an alteration necessary to comply with a lawful requirement, for the restoration or replacement of a use under subsection (6) of this section or for the resumption of a use under subsection (7) of this section shall be subject to the provisions of ORS 215.416.
* * *

"* * * * *

"(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."

approval under standards implementing ORS 215.130(9). *See* n 2. Alterations or expansions that occur after the date the use became nonconforming, but that have not received county review and approval, cannot be verified as part of the lawful nonconforming use unless and until reviewed and approved as expansions or alterations.

Under ORS 215.130(10), a county may adopt provisions to ease the evidentiary burdens of demonstrating the existence, continuity, nature and extent of the use back to the date the use became nonconforming, which in some cases, such as the present one, could be many decades prior to filing the application for verification. ORS 215.130(10)(a) provides that county land use regulations may allow an applicant to initially demonstrate the existence, continuity, nature and extent of the use only for a 10-year period immediately preceding the date of application.[3] Such evidence "creates a rebuttable

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[3] ORS 215.130(10) and (11) provide, as relevant:

> "(10) 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:
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> "(a) 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[.]" *Id.* Once the presumption is established, the presumption stands unless rebutted by a preponderance of the evidence in the record. *Lawrence v. Clackamas County*, 164 Or App 462, 468, 922 P2d 933 (1999). If the 10-year presumption is rebutted, the burden shifts back to the applicant to prove the existence, continuity, nature and extent of the use back in time to the date the use became nonconforming. However, pursuant to ORS 215.130(11), the applicant cannot be required to prove the existence, continuity, or the nature and extent of the use for a period exceeding 20 years from the date of the application. *See* n 3. Notwithstanding the 20-year limitation in ORS 215.130(11), the applicant must nonetheless demonstrate that the use was "lawful" when it was established, even if that date exceeds 20 years from the date of application. *Aguilar v. Washington County*, 201 Or App 640, 645-46, 120 P3d 514 (2005).

> 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;
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> "* * * * *
>
> "(11) 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."

LDO 11.8.1 implements ORS 215.130, in substantially similar terms.[4] With that overview, we turn to the remaining assignments and subassignments of error.

FIRST AND THIRD ASSIGNMENTS OF ERROR

Intervenors submitted evidence to the county in the underling proceeding that the auto yard use had existed and continued in its present nature and extent for 10 years preceding the date of application, *i.e.*, back to 2006, in order to establish a presumption under ORS 215.130(10)(a) that the auto yard use existed and continued in its current nature and extent since 1973, when it

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[4] LDO 11.8.1, Verification of Nonconforming Status, provides, in relevant part:

"(A) The application must be accompanied by documentation that establishes the approximate date that the use, structure, or sign was established; proof that the use, structure, or sign was lawfully established at the time it became nonconforming; and proof that the use has not been discontinued or abandoned, except as provided in Section 11.8.2 below. The Director may require or provide additional information if deemed necessary to permit an accurate determination.

"(B) Notwithstanding subsection (A) above, the applicant will not be required to prove the existence, continuity, nature, and extent of the use for more than a consecutive 10-year period immediately preceding the date of application. Documentation showing the use existed and was continued during this time period 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."

became nonconforming. That evidence included aerial photographs dating back to 2000, which showed a large fenced automobile yard approximately 1.6-acres in size with at least three structures and many parked vehicles. Petitioner submitted opposing evidence, including aerial photographs from the 1970s through the 1990s, intended to demonstrate that the auto yard use had not been established prior to 1973 or, if it had, that its nature and extent had changed dramatically since 1973. Among other things, the pre-2000 aerial photographs indicated that the three structures associated with the auto yard use did not exist on the property until the 1990s. The older aerial photographs from the 1970s also appear to show an auto yard operation that, to the extent it could be visibly discerned at all, was much less extensive than the current 1.6-acre operation. Other aerial photographs from the 1990s appear to show expansions in the size of the operation during that decade, compared to aerial photographs from the 2000s.

The hearings officer agreed with petitioner that the aerial photographs prior to 2000 successfully rebutted any presumption that the three structures had existed as part of the nonconforming use since 1973, and ultimately the hearings officer concluded that the three structures cannot be verified as part of the lawful nonconforming use. However, for purposes of applying and rebutting the ORS 215.130(10)(a) presumption, the hearings officer analyzed

the structures separately from the remainder of the auto yard use.[5] The hearings officer concluded that petitioner's evidence was insufficient to rebut the presumption that intervenors had created with respect to the 10-year lookback period, that the auto yard use itself was established on the property prior to 1973, and had continued in its current nature and extent since then (with the exception of the three structures). The hearings officer ultimately verified the 1.6-acre auto yard use (with the exception of the three structures), including the purchase, repair and sale of several hundred vehicles per year, as a lawful nonconforming use.

Under the first assignment of error, petitioner argues that the hearings officer misconstrued ORS 215.130(10) and LDO 11.8.1(B), in finding that petitioner had failed to rebut the presumption regarding the existence, continuity and nature and extent of the auto yard use. According to petitioner,

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[5] The hearings officer's decision states:

> "The [LDO] 13.3(146) definition of lawfully established and Sections 11.3 and 11.8.1(A) provide a basis for requiring that the Structures and the Auto Yard Use are to be analyzed separately. As discussed below, Applicant provided substantial evidence of the Auto Yard Use and the Structures for purposes of the 10-year lookback period, establishing a rebuttable presumption of the lawful establishment, existence, nature and continuity of both the Auto Yard Use and the Structures. As is also discussed, Appellant's effort to defeat this presumption, which she must do by a preponderance of the evidence, is not adequate regarding the Auto Yard Use itself. It is, however, adequate for purposes of defeating the rebuttable presumption regarding the Structures." Record 22.

the evidence petitioner submitted demonstrated by a preponderance of the evidence that at least the nature and extent of the auto yard use had changed significantly since 1973, which means the hearings officer should have found the initial presumption fully rebutted, and therefore required the applicant to prove that the auto yard use existed and continued in its current nature and extent back at least to 1996, 20 years prior to the date of application, pursuant to ORS 215.130(11).

Relatedly, under the third assignment of error, petitioner argues that the hearings officer erred in applying the wrong evidentiary standard to the evidence both sides submitted regarding the existence, continuity and nature and extent of the auto yard use. Petitioner contends that the hearings officer repeatedly stated that the appropriate evidentiary standard to determine whether the applicant had met its burden to demonstrate the existence, continuity and nature and extent of the auto yard use within the relevant time period is whether the applicant's evidence constitutes "substantial evidence," that is, evidence that a reasonable person could rely upon to reach a conclusion, considering all the evidence in the record.[6] According to petitioner,

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[6] The hearings officer's decision states:

> "Appellant asserts that Applicant must submit 'evidence that demonstrates more likely than not that each of these four claimed nonconforming uses [was] lawfully established by September 1, 1973' when zoning was first imposed on the Property. This is an erroneous characterization of Applicant's burden of proof. The proof must meet the substantial evidence test—that is, it must

"substantial evidence" is the standard a reviewing body such as LUBA would apply to address evidentiary challenges raised in an appeal. *See Lawrence*, 164 Or App at 466 (substantial evidence review refers to the review of a decision maker's findings of fact). Petitioner contends that the correct evidentiary standard for the hearings officer to apply in adopting findings of fact, and to determine whether the applicant met its burden to demonstrate the existence, continuity, and nature and extent of the nonconforming use within the relevant time period, is whether the applicant's evidence represents the "preponderance of the evidence," that is, more likely than not, considering all the relevant evidence in the record. Petitioner argues that the hearings officer never evaluated or determined whether the applicant met that burden of proof.

We turn first to the issue raised under the third assignment of error, regarding the correct evidentiary standard.

Intervenors respond that the "substantial evidence" standard that the hearings officer applied is the correct evidentiary standard to apply to determine whether the applicant met its burden to establish the elements of a valid nonconforming use. Alternatively, intervenors contend that if the

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allow a reasonable person to conclude that the uses were so established." Record 4 (underline in original).

Thereafter, at several points in the decision, the hearings officer repeated that the applicant's burden of proof is met if the applicant presents "substantial evidence" on the elements of the nonconforming use. *See* Record 6, line 5; Record 6, line 16, Record 10, line 3; Record 22, line 6, and Record 23, at line 2.

hearings officer applied an incorrect standard of proof, that error is harmless and provides no basis for reversal or remand, because the hearings officer could have reached the same conclusions under a preponderance of the evidence standard. Intervenors argue that the county's decision can be affirmed notwithstanding inadequate or erroneous findings on this point, under ORS 197.835(11)(b), because the evidence in the record "clearly supports" a finding that the preponderance of the evidence demonstrates that all the elements of the nonconforming use verification are met.[7]

We agree with petitioner that the evidentiary standard the hearings officer should apply to determine whether the applicant met its burden of proof on the elements of a nonconforming use verification is more accurately described as a "preponderance of the evidence," rather than "substantial evidence." As the Oregon Supreme Court has explained, "substantial evidence" is not the standard a trier of fact should apply to adopt factual findings. Rather, the Court held:

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[7] ORS 197.835(11)(b) provides that:

> "Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

> "Substantial evidence * * * is the standard by which a court reviews a county's factual findings on a writ of review. *See* ORS 34.040(1)(c) (stating the standard of review for factual findings on a writ of review). It is not the standard by which the trier of fact makes a factual finding in the first place. The county's job as the trier of fact was to decide by a preponderance of the evidence what the estimated cost of constructing the planned homes was." *Friends of Yamhill County v. Bd. Of Comm'rs*, 351 Or 219, 246-47, 264 P3d 1265 (2011).

Friends of Yamhill County involved a writ of review proceeding on a vested right claim under Ballot Measure 37/49. For that reason, intervenors argue that *Friends of Yamhill County* is inapposite, and does not state a general proposition governing nonconforming use determinations, or land use decisions in general. However, writ of review proceedings are subject to the same review standard, substantial evidence, that governs LUBA's review. *Compare* ORS 34.040(1)(c) and ORS 197.835(9)(a)(C). As the Court of Appeals noted in *Lawrence*, 164 Or App 462, substantial evidence review refers to the standard a reviewing body (such as LUBA or the court) applies to evidentiary challenges to a trier of fact's factual determinations in a land use proceeding, including a nonconforming use verification. Intervenors do not cite any case suggesting that "substantial evidence" is the correct standard the initial trier of fact in a land use proceeding should apply in weighing the evidence or adopting findings of fact. We recently held to the contrary in *Warren v. Washington County*, __ Or LUBA __ (LUBA No. 2018-045, August 20, 2018) (slip op at 12) (the hearings officer's task is not to determine whether the applicant has provided substantial evidence to support compliance with

approval standards, but to weigh all of the evidence to determine whether the applicant has met its burden of proof to demonstrate that the approval standards are satisfied).

At the same time, we are not aware of any case establishing as a general rule that "preponderance of the evidence" represents the standard the trier of fact in land use proceedings must apply in weighing the evidence or adopting findings of fact. Nonetheless, "preponderance of the evidence" or something similar probably best articulates the appropriate evidentiary standard the initial trier of fact should apply in land use proceedings. The "substantial evidence" test that LUBA and the courts apply in their review is somewhat deferential to the local government fact-finder's evidentiary judgments. However, the fact-finder's evidentiary determinations themselves should not be deferential at all. *See Lawrence*, 164 Or App at 469 (on *de novo* appeal of a planning director's decision on a nonconforming use verification, the hearings officer errs in giving deference to the director's factual findings). The fact-finder's role in a *de novo* land use permit proceeding is to determine whether, based on the whole record, the applicant has met its burdens of proof and persuasion in establishing that the applicable permit standards are met. That determination is fundamentally non-deferential in nature. If the fact-finder instead expressly applies a deferential standard of review to determinate whether approval standards are met, such as the "substantial evidence" standard, then the fact-finder may have erred.

The foregoing view is even more appropriate in the context of a nonconforming use verification subject to ORS 215.130(10), which as interpreted in *Lawrence*, 164 Or App 462, establishes what is essentially a burden-shifting scheme between the applicant and opponents. To rebut a 10-year lookback presumption established under ORS 215.130(10)(a), the opponents have to demonstrate by a preponderance of the evidence (*i.e.*, more likely than not) that one or more elements of a valid nonconforming use were *not* met during some period prior to the 10-year lookback period. If that burden is met, and if the applicant thereafter provides no additional evidence, the application must be denied in whole or part. The burden at that point shifts back to the applicant to demonstrate that all elements of a valid nonconforming use were in fact met during the relevant time period, with an upper cap of 20 years from the date of application for the elements of existence, continuity, and nature and extent. If the applicant attempts but fails to meet that ultimate burden, the application must be denied in whole or part. In this context, it seems clear that the applicant's burden is not met by simply providing some evidence to controvert the evidence that opponents have used to establish, by a preponderance of the evidence, that elements of the claim have not been met. The applicant must shift the weight of the evidence enough in their favor to establish to the fact-finder, under a nondeferential standard of evidentiary review, that the elements necessary to verify the proposed use as a valid nonconforming use were in fact present within the relevant time frame.

In the present case the hearings officer expressly and inappropriately applied a deferential standard of review, the substantial evidence standard, in adopting findings of fact and in making the ultimate determination that intervenors had demonstrated that all the elements necessary to verify the proposed use as a nonconforming use (with the exception of the three structures) were met during the relevant time period. We agree with petitioner that this application of a deferential standard of evidentiary review constitutes error. We disagree with intervenors that such an error can be overlooked under ORS 197.835(11)(b), which allows LUBA to affirm a decision notwithstanding inadequate findings, where "the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts." The problem here is not a failure to recite adequate facts or legal conclusions, or to identify the approval standards or their relation to the facts, but a more fundamental error in applying an incorrect standard of evidentiary review. ORS 197.835(11)(b) does not authorize LUBA to affirm a decision under such circumstances, by reweighing the evidence under the correct standard of evidentiary review. For this reason, we agree with petitioner that remand is necessary under the third assignment of error, for the hearings officer to re-evaluate the evidence in the record under a non-deferential standard of evidentiary review.

We turn next the first assignment of error, under which petitioner argues that the hearings officer misconstrued the applicable law with respect to the

rebuttable presumption at ORS 215.130(10)(a). If we understand petitioner correctly, she argues that she presented evidence, in particular aerial photographs from the period from 1971 to the 1990s, intended to show in part that the nature and extent of the auto yard use had changed considerably since 1973, and bore little relationship in nature and extent to the current 1.6-acre operation with three structures and hundreds of vehicles that intervenors sought to verify. The hearings officer agreed that petitioner's evidence successfully rebutted the presumption regarding the three structures.[8] However, the hearings officer concluded that petitioner's evidence was insufficient to rebut the presumption with respect to the remainder of the auto yard use, which the hearings officer analyzed separately from the structures for purposes of applying the presumption and the 10-year look back period. Although it is not entirely clear, the hearings officer appears to have made the ultimate

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[8] In *Reeder v. Multnomah County*, 59 Or LUBA 240, 246 (2009), we considered but did not resolve the issue of whether ORS 215.130(10) and (11) impliedly impose a temporal limitation on the evidence that can be used to rebut a presumption established under ORS 215.130(10)(a), to exclude evidence that predates the 20-year lookback period. In the present case, the hearings officer apparently considered aerial photographs and other evidence older than 20 years from the date of the application, in order to conclude that petitioner had successfully rebutted the presumption with respect to the three structures. Petitioner obviously does not assign error to that approach, and intervenors have not cross-assigned error to that approach. Accordingly, we assume for purposes of this opinion that it is appropriate for the hearings officer to consider evidence that predates 20 years from the date of application, in order to determine whether the initial presumption established under ORS 215.130(10)(a) has been rebutted.

determinations regarding continuity, nature and extent of the auto yard use (minus the three structures) based on evidence from the 10-year lookback period from 2006 to 2016. For example, the hearings officer ultimately concluded that "[t]he physical extent of the Auto Yard Use is as depicted in the 2005 aerial photograph at Record 58, which the Hearings Officer finds to be representative of the extent [of the auto yard use] consistently since at least 2006." Record 30. On the other hand, the hearings officer also refers at times to the 20-year lookback period and to 1996, the key date under the 20-year lookback period.

We agree with petitioner that the hearings officer erred to the extent he limited his determinations regarding existence, continuity, nature and extent of the auto yard use based on the presumption established under ORS 215.130(10)(a) and the evidence from the period 2006 to 2016. The hearings officer does not explain why it is appropriate to analyze the three structures separately from other components of the auto yard use, except with reference to three LDO sections that, as far as we can tell, offer no support for that conclusion. In any case, the question is one of state law, and we see nothing in ORS 215.130(10) suggesting that if the presumption is successfully rebutted regarding the "existence, continuity, nature and extent" of the proposed nonconforming use that the county should continue to apply the presumption to make ultimate determinations regarding some components of the nonconforming use but not to others. The result of such a bifurcated analysis is

that the ultimate determinations regarding existence, continuity and nature and extent of the nonconforming use would be based on different bodies of evidence, some limited to the 10-year lookback period, and others including evidence from older time periods.

We hold that, where an opponent provides evidence sufficient to rebut the presumption under ORS 215.130(10)(a) regarding the existence, continuity, nature and extent of the proposed nonconforming use, the presumption no longer plays any role in the analysis. In such circumstances, the applicant has the burden of demonstrating that the use proposed for verification has existed and continued in its current nature and extent from the date the use became nonconforming, or 20 years prior to the date of application, whichever date is applicable.

As noted, some of the findings suggest that the hearings officer made ultimate determinations regarding the existence, continuity and nature and extent of the auto yard use based on evidence limited to the 10-year lookback period. If so, conducting that limited review was error. Because the decision must be remanded in any event under the third assignment of error for the hearings officer to apply a non-deferential standard of evidentiary review, remand is also appropriate for the hearings officer to ensure that ultimate determinations regarding the existence, continuity and nature and extent of the auto yard use are based on evidence submitted regarding the applicable 20-year period. In particular, as explained further under the fourth assignment of error,

below, the hearings officer must focus on the key date, 1996, and determine whether the applicant has met the appropriate burdens of proof and persuasion regarding the existence, continuity, nature and extent of the auto yard use at that time.

The first and third assignments of error are sustained, in part.

SECOND ASSIGNMENT OF ERROR

In four subassignments under the second assignment of error, petitioner argues the hearings officer erred in concluding that intervenors' auto yard existed and was lawfully established prior to September 1, 1973, the date restrictive zoning regulations were first applied. In our earlier decision we resolved only the first subassignment of error. We now consider the remaining three subassignments of error.

In the second subassignment of error, petitioner argues that aerial imagery in the record refutes intervenors' claims that an auto yard of any size and scope existed on the property before 1973, instead showing that automobiles associated with the use started appearing at the site only in 1975, after the use became nonconforming. In the third subassignment of error, petitioner argues that intervenors affirmatively relinquished the auto yard retail sales and storage uses they had on the property when they accepted a 1987 county land use decision that approved as a home occupation the use of an office in the dwelling for the wholesale marketing of off-site vehicles. In the fourth subassignment of error, petitioner argues that whatever auto yard use

may have existed on intervenors' property prior to 1973, when restrictive land use regulations came into effect, was so minimal that at best it constituted a "home occupation," which at the time was a use permitted outright, meaning that it did not require any land use approval, and therefore could not constitute a nonconforming use.

1. First Subassignment of Error

As noted above, the Court of Appeals disposed of petitioner's first subassignment of error by concluding that intervenors' failure to obtain required DMV certificates is not relevant evidence regarding whether intervenors' auto yard was lawfully established, because "ORS 215.130(5), which refers to the lawful use of buildings, structures, and land, does not refer to compliance with the former dealer licensing statute [*former* ORS 481.305(1)]." 290 Or App at 120 (2018). Accordingly, the court held LUBA erred in reversing the hearings officer's decision on the basis of the DMV licensing violation and reversed our decision on this subassignment.

For the reasons stated in the Court of Appeals' decision, the first subassignment of error under the second assignment of error is denied.

2. Second Subassignment of Error

Under the second subassignment of error, petitioner argues that aerial imagery in the record demonstrates that no auto yard existed at all on the property in 1973, but instead shows that discernible evidence of an auto yard use did not appear until 1975. The hearings officer found the aerial

photographs from this period to be "inconclusive" regarding the existence of the auto yard use prior to 1973, and instead relied on affidavits submitted by intervenors to conclude that an auto yard use of some extent was established on the property prior to September 1, 1973.[9]

Petitioner argues that no reasonable decision maker would rely upon affidavits attempting to recollect the nature and timing of events over 40 years in the past, when the objective evidence in the record, aerial photographs, show no sign of an auto yard use on the property until 1975. Petitioner also contends that the hearings officer failed to consider another piece of contemporaneous objective evidence, a 1973 county land use inventory map for the area, which shows no indication of a commercial use on the subject property in 1973. Record 230-34.

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[9] The hearings officer's decision states:

> "Both [intervenor] and [petitioner] provided numerous aerial photographs of the Property over the years, commencing in the late 1960s to 2016. [Petitioner] also submitted evidence from an aerial photography specialist to interpret some of those exhibits. Record 902-908. The specialist's observations are not well explained by [petitioner], but they do not compel any conclusion regarding the existence of the auto yard prior to 1973. One aerial of the Property in 1975 clearly shows its presence. Record 238. Other aerials from the same general period are inconclusive. Record 239-40." Record 17 (footnote omitted).

In the omitted footnote, the hearings officer states that the 1975 aerial photograph was "submitted to establish that the use had been expanded since inception," an issue that the hearings officer addresses elsewhere in the decision. *Id.* at n 5.

As discussed under the first and third assignments of error, remand is necessary for the hearings officer to apply a nondeferential standard of evidentiary review in fact-finding to support the ultimate determinations regarding the elements of a nonconforming use, including whether the use was "lawfully established" at the time of contrary zoning. LDO 11.8.1(A); *see* n 4. We understand petitioner to argue that an essential component of establishing that a use was "lawfully established" for purposes of LDO 11.8.1(A) is that the use actually existed on the property prior to the date contrary zoning was first applied. We agree with petitioner that the LDO 11.8.1(A) "lawfully established" standard necessarily requires sufficient proof that the use was actually established—was in fact in existence—on the subject property prior to the date contrary zoning was applied.[10] On remand the hearings officer should adopt new findings based on a non-deferential standard of evidentiary review, addressing aerial photographs and other evidence regarding whether the use existed at all on the subject property prior to September 1, 1973. In so doing the hearings officer should consider to the extent appropriate the 1973 land use inventory map cited by petitioner. The present decision and record include no

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[10] Under ORS 215.130(11), the county cannot require the applicant to demonstrate the "existence, continuity, nature and extent" of the use for more than 20 years from the date of application. However, that 20-year temporal limit does not restrict code requirements to prove that the use was "lawfully established" prior to the date contrary zoning was applied. *Aguilar*, 201 Or App at 649-51.

indication that the hearings officer considered that map or petitioner's arguments thereon. That observation aside, it would be premature to resolve petitioner's evidentiary challenges to the county's findings regarding the LDO 11.8.1(A) "lawfully established" requirement.

The second subassignment of error under the second assignment of error is sustained, in part.

3. Third Subassignment of Error

Under the third subassignment of error, petitioner argues that intervenors affirmatively relinquished the auto yard vehicle sales and storage uses existing on the property when a 1987 county land use decision, a "Zoning Clearance Sheet," approved a "wholesale auto business" to be operated from an office in intervenors' dwelling as a home occupation. According to petitioner, the 1987 decision had the effect of limiting intervenors' nonconforming auto yard use to only "wholesale auto business" activities. In response, intervenors argue they did not "affirmatively relinquish" their nonconforming use.

Petitioner relies on *Morris v. Clackamas County*, 27 Or LUBA 438 (1994), for the proposition that a nonconforming use is abandoned when a property owner receives a land use approval for a related use. We agree with intervenors that this is an overly broad statement of the holding in *Morris*, and that the hearings officer correctly concluded that *Morris* does not support petitioner's contention.

Morris involved a mobile home that was a nonconforming use in the applicable zone. The owner sought and obtained county approval to allow the mobile home to be used as temporary residence for an elderly relative, a conforming use in the zone, and renewed that temporary permit for some years. The owner also obtained a permit for a second, permanent dwelling, on condition that the second dwelling be the only permanent dwelling located on the property. Many years later, the owner took the position that the mobile home could lawfully remain as a second permanent dwelling on the property, as a nonconforming use. The county concluded, and LUBA affirmed, that the owner's voluntary conversion of the mobile home to a conforming use, a temporary dwelling for a relative, eliminated the mobile home's status as a nonconforming use.

In the present case, in 1987 intervenors sought and obtained a Zoning Clearance Sheet for the home occupation wholesale auto business. Record 34-47. However, unlike the owner in *Morris*, intervenors did not convert their nonconforming use to a different, conforming use. The hearings officer found that the home occupation wholesale auto business, which involves only an office space and no on-site storage or handling of automobiles, is a distinct and different use from the auto yard use, which concerns the on-site storage, repair and retail sale of repaired automobiles. Essentially, intervenors added a different conforming use to their property, but did not purport to or intend thereby eliminate the nonconforming auto yard use. Accordingly, the hearings

officer correctly concluded that the 1987 approval of a home occupation wholesale auto business did not cause intervenors to affirmatively relinquish the nonconforming auto yard vehicle sales and storage uses on the property.

The third subassignment of error under the second assignment of error is denied.

4. Fourth Subassignment of Error

Under the fourth subassignment of error, petitioner argues that the 1973 land use code allowed as a permitted use without land use approval a "home occupation," and that the evidence in the record establishes that prior to 1975 any auto yard use on the property was so minimal in nature and extent that it would be properly categorized as either a "home occupation" or a hobby use accessory to residential use of intervenors' dwelling.[11] According to petitioner, in 1975 this home occupation or hobby use had expanded in nature and extent to outgrow the permissible bounds and limitations applicable to a home occupation or a hobby use, and only at that point went from a *lawful*

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[11] Petitioner notes Article III, Section 1.2 lists "home occupation" as a permitted use in the Open Space Development-5 zone, and cites to the following definition of "home occupation" from the 1973 land use code:

> "An occupation carried on by the residents of a dwelling as a secondary use of the property, provided the residential character of the property is maintained and the occupation is conducted in such a manner as not to give an outward appearance of a business in the ordinary meaning of the term, nor infringe upon the right of neighboring residents to enjoy the peaceful occupation of their homes." Record 1355.

conforming use to an *unlawful nonconforming* use. Because the auto yard use became nonconforming only *after* the date contrary zoning was applied in 1973, petitioner argues that the hearings officer erred in concluding that the nonconforming use was lawfully established on the property prior to September 1, 1973.

The hearings officer did not adopt any findings addressing petitioner's foregoing argument that what use existed prior to 1973 was a lawful conforming use, either a home occupation or hobby, and became "nonconforming" only in 1975 when it expanded significantly beyond the permissible scope of a home occupation or hobby use. Intervenors respond that no findings are required, because petitioner's argument is an illegitimate attempt to avoid ORS 215.130(11), which prohibits the county from requiring the applicant to prove the "nature and extent" of the use more than 20 years before the application date. According to intervenors, the premise for petitioner's theory that the auto yard use was a conforming home occupation or hobby is that the "nature and extent" of the auto yard use was minimal before 1975, consistent with a conforming home occupation or hobby use, and became "nonconforming" only when the nature and extent changed in 1975. However, intervenors argue that that theory, if considered by the hearings officer, would effectively compel the applicant to submit evidence regarding the "nature and extent" of the auto yard use more than 20 years prior to the date of application, contrary to ORS 215.130(11).

We agree with intervenors. Petitioner's theory rests on an alleged expansion of the "nature and extent" of an existing use in 1975, which petitioner argues had the effect of transmuting the use from a conforming land use category to a different, unlawful or nonconforming land use category. Even if that theory is intended to challenge only the lawful establishment element of a nonconforming use, there is no way to give effect to it without compelling the applicant to submit evidence regarding the nature and extent of the use during periods that are more than 20 years prior to the date of application, which ORS 215.130(11) expressly prohibits. Giving effect to petitioner's theory might not violate ORS 215.130(11) in other circumstances, for example, where the difference between a conforming and nonconforming use turns on something other than the physical extent of the use or its level of intensity. However, in the present circumstances, the hearings officer cannot consider petitioner's theory without impermissibly requiring intervenors to submit evidence to establish the nature and extent of the use more than 20 years prior to the date of application. The hearings officer's failure to adopt findings addressing that theory therefore does not provide a basis for reversal or remand.

The fourth subassignment of error under the second assignment of error is denied.

The second assignment of error is sustained, in part.

FOURTH ASSIGNMENT OF ERROR

Under the fourth assignment of error, petitioner argues the hearings officer erred in failing to require the applicants to submit evidence demonstrating the nature and the extent of the nonconforming use to the date 20 years prior to the application. Relatedly, petitioner argues that the hearings officer erred in verifying the scope of the auto yard use to include storage, repair and sales of hundreds of vehicles per year, based solely on evidence from the period following the year 2000, when petitioner argues the auto yard use assumed its present size and form, rather than on evidence focused on the year 1996, the critical date under ORS 215.130(11).

Intervenors respond that the hearings officer has some flexibility in describing the scope and nature of a nonconforming use, and does not err in drawing inferences regarding the nature and extent of the use from an incomplete record spanning 20 or more years. We generally agree with intervenors that it will seldom be the case that information is available about the nature and extent of a nonconforming use precisely on a critical date, either the date the use became nonconforming or the date 20 years prior to the date of application, whichever is applicable. In many cases it may be appropriate to draw inferences or interpolate conclusions from evidence on either side of the critical date. *See Spurgin v. Josephine County*, 28 Or LUBA 383, 390-91 (1994) (a county has some flexibility in the precision with which it describes the nature and extent of a nonconforming use, as long as an imprecise

description does not authorize *de facto* alteration or expansion of the nonconforming use); *Warner v. Clackamas County*, 25 Or LUBA 82, 86 (1993) (the decision maker may draw reasonable inferences from imprecise evidence regarding the nature and extent of a nonconforming use). Nonetheless, the applicant must submit information sufficient to demonstrate the nature and extent of the use as of the relevant date, and the decision maker must ensure that expansions or alterations that may have occurred *after* the relevant date are not verified as part of the lawful nonconforming use.

Under the first and third assignments of error, we concluded that remand was necessary for the hearings officer to apply the correct standard of evidentiary review, under a correct application of ORS 215.130(10)(a) and 215.130(11). As explained, under ORS 215.130(11), the critical date in the present case is 20 years prior to the date of application, or 1996, and the nature and extent of the nonconforming auto yard use that can be verified is limited to the nature and extent of the use that existed on that date. Accordingly, it would be premature to address the specifics of petitioner's challenges to the current set of findings. Nonetheless, we note that petitioner may well be correct that, based on aerial photographs in the record, the physical scope and extent of the auto yard use appears to have changed significantly between 1994 and 2000, even without regard for the three structures built during that period. *Compare* Record 1519 (1994 aerial photograph) and Record 1518 (2000 aerial photograph).

Petitioner correctly argues that any changes or expansions in the nature or extent of the use that occurred after the key date, 1996, cannot be verified as part of the nonconforming use, but can only be approved as an alteration of the nonconforming use. As noted under the first and third assignments of error, above, the hearings officer appeared to make ultimate determinations regarding the nature and extent of the auto yard use, including how many vehicles can be stored, repaired and sold on the property, based primarily if not exclusively on evidence from the period 2006 to 2016. For example, with respect to verifying the maximum number of automobiles that may be sold, the hearings officer cited evidence from the period 2006 to 2013 to determine that up to 136 automobiles may be sold per year. Record 31. However, the decision also notes that intervenors' affidavits indicate that only 56 automobiles were sold in 1996. Record 24. While sales numbers will vary from year to year, and consideration may be given to legitimate business fluctuations, the focus of the inquiry must be on the nature and extent on the critical date, 1996, and care must be taken to ensure that the determination of nature and extent of the use as of the critical date does not inadvertently constitute *de facto* approval of expansions or alterations that occurred after that date. As discussed under the third assignment of error, the hearings officer appears to have erroneously regarded 2006 as the critical date for purposes of verifying the nature and extent of the auto yard use. Remand is necessary for the hearings officer to

adopt ultimate findings regarding nature and extent of the use based on evidence related to the correct time period.

This assignment of error is sustained, in part.

CONCLUSION

We have sustained several assignments and sub-assignments of error that relate to the legal standards that must be applied, in determining whether intervenors met their burden of demonstrating the elements of a lawful nonconforming use. Remand is necessary under the sustained portions of those assignments and subassignments of error to apply the correct legal standards to the evidence. Given that disposition, we have refrained as much as possible from addressing or resolving a number of challenges to the present findings of fact or the sufficiency of the evidence in the record.

The county's decision is remanded.