BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

LAURA UNDERWOOD,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent,

and

ALEXANDER PAVICH,
Intervenor-Respondent.

LUBA No. 2019-075

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Rachel E. Kosmal McCart, Sandy, filed the petition for review and a reply brief and argued on behalf of petitioner. With her on the brief was Preserve Legal Solutions, PC.

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

Alexander Gund, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Swider Haver, LLP.

RYAN, Board Member; ZAMUDIO, Board Chair; RUDD, Board Member, participated in the decision.

AFFIRMED 12/18/2019

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a hearings officer's decision approving an application for alteration of a nonconforming use.

FACTS

The subject 7.10-acre property is located adjacent to and has direct access to US Highway 26. The property is zoned Farm Forest–10 Acres (FF-10) and improved with an existing 4,100 square foot building. In 2011, the then-owner of the property sought and received verification of the use of the existing building on the property for candy making and sales as a lawful nonconforming use. In 2018, the county approved an application to alter the approved nonconforming use to also allow indoor production of marijuana and processing of marijuana into concentrates. That 2018 approval included several conditions of approval, including one that limited the number of employees on site at any one time to 12, and another that limited light cast by exterior lighting between the hours of 7 pm and 7 am. Record 284-85.

In March 2019, intervenor-respondent (intervenor) applied for an alteration of the nonconforming use that was approved in 2018, to use the existing building on the property for a bakery and food processing business, with a shared commercial kitchen, food wholesaling, and delivery services. The application proposed that no more than 12 employees would be on the property at any one time. Record 297-98. The planning director approved the application with

conditions, including limiting the number of employees on site at any one time to no more than 12 and limiting loud noise outside the building between 10 pm and 5 am. Record 212-13.

Petitioner appealed the planning director's decision to the hearings officer. The hearings officer adopted and incorporated the planning director's findings, except that the hearings officer concluded that early morning use of the property for deliveries would result in greater adverse impacts to the neighborhood, contrary to the applicable Clackamas County Zoning and Development Ordinance (CCZDO) provisions governing alteration of a nonconforming use. Record 5-7. The hearings officer approved the application with an additional condition of approval limiting customer or vendor trips to the hours of 7 am and 7 pm. Record 9. This appeal followed.

ASSIGNMENTS OF ERROR

CCZDO 1206.06(B)(1) implements ORS 215.130(5) and (9).[1] CCZDO 1206.06(B)(1) provides that the county may approve an alteration of a nonconforming use if:

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[1] Although CCZDO 1206.06(B) contains slightly different wording than the statute, no party takes the position that the difference in the wording of the statute and the CCZDO is legally significant. ORS 215.130 provides, as relevant here:

> "(5) The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. Alteration of any such use may be permitted subject to subsection (9) of this section.

> "The alteration or change will, after the imposition of conditions pursuant to Subsection 1206.06(B)(4), have no greater adverse impact on the neighborhood than the existing structure, other physical improvements, or use[.]"

The hearings officer concluded that traffic impacts from the proposed alteration would not result in a greater adverse impact on the neighborhood based on evidence in the record regarding the projected maximum traffic that could be generated by the existing approved nonconforming use that was approved in 2018. The hearings officer concluded that the starting reference point for the comparison that is required by the statute is the level of traffic that could be generated based on the 2018 alteration application. Petitioner, on the other hand,

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> Alteration of any such use shall be permitted when necessary to comply with any lawful requirement for alteration in the use. Except as provided in ORS 215.215, a county shall not place conditions upon the continuation or alteration of a use described under this subsection when necessary to comply with state or local health or safety requirements, or to maintain in good repair the existing structures associated with the use. A change of ownership or occupancy shall be permitted.
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> "* * * * *
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> "(9) As used in this section, 'alteration' of a nonconforming use includes:
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> "(a) A change in the use of no greater adverse impact to the neighborhood; and
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> "(b) A change in the structure or physical improvements of no greater adverse impact to the neighborhood."

argued to the hearings officer that the reference point for the comparison that is required by the statute is the level of traffic that is currently generated by the use of the property for marijuana production and processing, which the evidence in the record demonstrates is lower than the level of traffic that the proposed alteration would generate.

Petitioner's first assignment of error argues that the hearings officer improperly construed ORS 215.130(9) and CCZDO 1206.06(B)(1) because, according to petitioner, the statute requires a comparison of the actual traffic currently being generated by the nonconforming use that is proposed to be altered with the traffic that would be generated by the altered use. The second and third assignments of error are derivative of the argument under the first assignment of error. Therefore, we address the assignments of error together.

A. First and Second Assignments of Error

In her first assignment of error, petitioner argues that the hearings officer improperly construed CCZDO 1206.06(B)(1) and ORS 215.130(9) when he concluded that the traffic impacts to the neighborhood would be no greater than the traffic impacts under the approved 2018 alteration of the previous nonconforming use. Petitioner's second, and related, assignment of error argues that the hearings officer's findings are inadequate to explain why he concluded that the proposed alteration would not have a greater adverse impact on the neighborhood, because the findings fail to identify or explain how the existing, actual traffic generated by the marijuana production and processing facility will

not have a greater adverse impact on the neighborhood than the traffic generated by the proposed bakery and commercial kitchen nonconforming use. Petitioner argues:

> "[w]hether the existing nonconforming uses *could* generate substantial adverse traffic impacts on the surrounding neighborhood is a misinterpretation of ORS 215.130(9), which requires an assessment of the *actual* impacts on the neighborhood." Petition for Review 8 (emphases in original).

In support of her argument, petitioner cites *Spurgin v. Josephine County*, 28 Or LUBA 383 (1994), and *Kaimanu v. Washington County*, 70 Or LUBA 217 (2014).

Spurgin was an appeal of a decision verifying the nature and extent of a nonconforming use of a personal use airport after a zone change restricted use of personal use airports to resource-related uses. In *Spurgin*, LUBA did not reach the issue of whether the use had been altered in a way that complied with ORS 215.130(9) because LUBA concluded that the county improperly relied on the frequency of airport use that was allowed under Oregon administrative rules governing personal use airports to determine the "extent" of the nonconforming use. *Id.* at 391-93. *Spurgin* does not assist petitioner.

Kaimanu involved the application of Washington County's implementation of ORS 215.130(9)(a) in the context of an application for a special use permit to operate a school in an existing vacant structure that formerly contained office uses, and that did not satisfy applicable parking and setback

requirements. LUBA first questioned whether the county code provision implementing ORS 215.130(9) applied at all, where both the previous use and the proposed use were permitted uses in the zone, and the only potentially nonconforming situation was the structure that did not satisfy applicable parking and setback requirements. We concluded that the county improperly compared the impacts from the proposed school use to the impact of other uses permitted in the applicable zone. We also discussed with approval the hearings officer's conclusion that the appropriate referent under ORS 215.130(9) for determining whether the proposed alteration would have a greater adverse impact on the neighborhood was not the existing use of the building which, at the time of the application, was vacant. We speculated, but did not decide, that the appropriate referent could be the office use that existed prior to the building becoming vacant. Accordingly, *Kaimanu* supports an interpretation of ORS 215.130(9) that rejects as a referent the actual use of a property at the time of application, at least where the property is vacant but the nonconforming use has not been discontinued or abandoned.

In its response brief, the county argues that the hearings officer applied the correct referent. In support, the county cites *City of Corvallis v. Benton County*, 16 Or LUBA 488 (1988). In *City of Corvallis*, we concluded that "ORS 215.130(9)(a) requires a county decision approving a change in a nonconforming use to be based on findings comparing the impacts of the altered use with the impacts of the use which existed on the site when restrictive zoning was applied."

Id. at 497. The language of the statute at the time *City of Corvallis* was decided was identical to the language in the present statute, and defined "'alteration' of a nonconforming use" as "[a] change in *the use* of no greater adverse impact to the neighborhood." ORS 215.130(9)(a)(emphasis added.) In the present appeal, the use which existed on the site when restrictive zoning was applied was a candy-making and sales home occupation. This use was verified by the County in its 2011 nonconforming use verification.[2] In 2018, the county approved an alteration of the candy-making and sales use of the building to provide a facility for the production and processing of marijuana. Pursuant to ORS 215.130(9) and CCZDO 1206.06(B)(1), the 2018 alteration could not result in greater adverse impact on the neighborhood than that associated with the 2011 verified nonconforming use.

The hearings officer agreed with the planning director's conclusions that traffic associated with the proposed use would not result in a greater adverse impact on the neighborhood and adopted and incorporated the planning director's findings. The planning director found:

> "The maximum number of employees on-site at any one time is proposed to remain at 12—the same number of employees allowed on-site for the existing nonconforming uses. Those existing legal nonconforming uses have already relied on delivery trucks of varying sizes visiting the property, as well as passenger cars, trucks, and small loading vans, without restriction on the number or size of

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[2] The 2011 nonconforming use verification decision is not in the record.

> any vehicle visiting the property or any restrictions on the time they can visit. Despite the flexibility on vehicle traffic given to the existing uses, the applicant estimates that the proposed alterations will only generate 10-15 cars to the property per day, delivery vehicles 3-5 times per week, and larger box trucks 1-3 times per month (a standard Type II Home Occupation Permit available to this property would allow as many as *30 vehicle trips* to the property each day and even *daily* trips by a vehicle exceeding a gross vehicle weight rating of 11,000 pounds). The applicant also states that deliveries are largely expected to occur between 9:00 am and 5:00 pm." Record 218 (emphases in original).

ORS 215.130(5) provides that "[t]he 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*." (Emphasis added.) An alteration to a nonconforming use is, in essence, a permissible continuation of the original nonconforming use. The alteration analysis under ORS 215.130(9) requires a comparison between the proposed alteration and the original nonconforming use, to which the right to continue is attached, and subsequent lawful alterations. We agree with the county that the statute supports an interpretation that the reference point for comparing the impacts of the altered use is the use that was approved in 2011 as modified by the 2018 alteration. The hearings officer found:

> "While the use of the property has apparently been declining in recent months, the approved nonconforming use has not yet been discontinued. Therefore, the applicant is entitled to rely on the approved nonconforming use, which would generate as much if not more, traffic than the proposed alteration." Record 6 n 3.

Petitioner does not assign error to that finding or argue that the nonconforming use that was approved in 2018 has been discontinued. *See*

CCZDO 1206.03(A) ("If 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 circumstances of this case, we agree with the county that it could rely on the 2018 approval as evidence of the nature and extent of the nonconforming use, and use the 2018 approval as the reference point for evaluating whether the proposed alteration would result in "no greater adverse impact to the neighborhood." ORS 215.130(9)(a).

Petitioner's interpretation of the statute adds the word "actual" before the word "use" in ORS 215.130(9), in violation of ORS 174.010. There is nothing in the language of the statute that requires the county to compare the actual number and types of vehicle trips generated by the approved use at the time the application to alter the use is submitted, which in the present case are less than the vehicle trips that could be generated by the approved use at any given time because intervenor was transitioning the marijuana production and processing use to a new, different site when it applied for the alteration. Record 6 n 3 (noting that the use of the property has apparently been declining in recent months); Record 214 (explaining that in March 2019 intervenor received Oregon Liquor Control Commission approval to transfer their license to a new site). Accordingly, we conclude that the hearings officer correctly interpreted ORS 215.130(9) and CCZLDO 1206.06(B)(1).

As noted, petitioner's second assignment of error is derivative of her first assignment of error. Petition for Review 8-9 ("As set forth in the First Assignment of Error, Respondent's only finding regarding the adverse impacts of the traffic generated by the existing nonconforming uses merely described the lack of legal restrictions pertaining to such traffic. Respondent did not make any findings about the number and types of vehicles coming and going from the Property, the frequency of such traffic, the days and hours during which such traffic occurred, or the impacts of any of these factors on the surrounding neighborhood."). For similar reasons, we reject petitioner's second assignment of error that argues that the hearings officer failed to adopt findings addressing the actual traffic generated by the 2018 approved uses.

We also reject petitioner's argument because the hearings officer did adopt findings addressing the traffic impacts from the proposed altered use, and petitioner does not address those findings or explain why they are inadequate. Record 5-6 (adopting and incorporating the planning director's findings, which discuss the projected traffic from the proposed nonconforming use, and concluding that the projected traffic would be less traffic than has been generated by the approved nonconforming use); Record 218-19 (planning director's findings regarding traffic impacts). Apart from her derivative argument, petitioner does not refer to or otherwise explain why those findings are inadequate.

The first and second assignments of error are denied.

B. Third Assignment of Error

1. Traffic Impacts

In her third assignment of error, petitioner argues that there is not substantial evidence in the record to support the hearings officer's conclusion that the proposed alteration would not cause greater adverse traffic impacts than the existing approved use. ORS 197.835(9)(a)(C). Again, petitioner's argument in the third assignment of error is derivative of her first assignment of error. Petition for Review 10 ("As noted in the First Assignment of Error, the amount of the traffic the existing nonconforming uses *could* generate is not the standard for measuring increased adverse impacts. Rather, the standard is how much traffic the existing nonconforming uses *actually* generate." (Emphases in original)). According to petitioner, the evidence in the record is that the traffic generated by the use operating on the property at the time the application was submitted demonstrates that the traffic generated by the existing use on the property amounts to "employees coming and going, maybe four cars a day, plus * * * if FedEx showed up[.]" Petition for Review 10 (citing Audio Recording, Hearings Officer Hearing, May 23, 2019, at 35:23). According to petitioner, that evidence undercuts the hearings officer's conclusion that the proposed alteration would not cause any greater adverse traffic impacts, because the evidence in the record is that the proposed bakery and food production use would generate "10 - 15 cars per day, 3 - 5 delivery trucks per week, and 1 – 3 larger box trucks per month."

Record 5-6 (footnote omitted). Petitioner argues that, accordingly, the hearings officer's decision is not supported by substantial evidence in the record.

The county responds, and we agree, that where an argument is derivative of other arguments made by the petitioner, the derivative argument provides no independent basis for reversal or remand. *Seabreeze Assoc., LP v. Tillamook County*, 71 Or LUBA 218, 221 (2015).

We also agree with the county that the hearings officer's decision that the proposed use will not have a greater adverse impact on the neighborhood than the existing approved use is supported by substantial evidence in the record. In findings adopted and incorporated by the hearings officer, the planning director explained the evidence in the record is that the existing 2018 approved use allows up to 12 employees and relies on delivery trucks and small loading vans, without restriction on the number of visits. Record 5, 218, 285. Accordingly, the evidence in the record is that the existing approved use could generate at least 24 passenger car trips per day (12 employees entering the property once per day and leaving the property once per day), and an unlimited number of delivery truck and loading van visits. The planning director compared those trips to the estimated trips from the proposed use (10 to 15 cars per day, delivery trucks three to five times per week and larger box trucks one to three times a month), and concluded that the proposed uses will not have any greater adverse impact on the neighborhood. Record 219. A reasonable person could rely on the evidence in the record regarding the traffic that could be generated by the existing approved use to

conclude that the proposed alteration would not have any greater adverse impact on the neighborhood than the existing approved use. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988).

2. Noise and Vehicle Light Impacts

Finally, in a portion of her third assignment of error, petitioner argues that the condition of approval that the hearings officer imposed that limits the hours of operation to 7 am to 7 pm is insufficient to mitigate adverse noise and vehicle light impacts to the neighborhood. Petitioner argues that evidence in the record demonstrates that delivery trucks with back up beepers will potentially visit the property and cause noise disturbances outside of those hours, and that during the winter months, a vehicle visiting even during the approved hours of operation, at 7 am or after 5 pm, will use vehicle lights.

Petitioner does not address the evidence in the record that the approved use of the property, which is, again, the referent, already incurs delivery truck visits with no limit on the hours of operation, and presumably those delivery trucks have and use back up beepers, and lights when it is dark out. Accordingly, petitioner has failed to establish that the use will have a greater adverse impact on the neighborhood than the use approved in 2018, which includes no limits on

hours of operation.[3] Accordingly, we agree with the county that substantial evidence in the record supports the hearings officer's conclusion that as conditioned, the proposed alteration will not have any greater impact on the neighborhood with respect to noise and vehicle lights than the existing approved nonconforming use.

The third assignment of error is denied.

The county's decision is affirmed.

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[3] The 2018 alteration included a condition of approval that limited the hours during which light from inside a building could be visible outside to between 7 am and 7 pm. Record 284.