

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

DAVID SENKOVICH, STAN OBERST, HOLLICE OBERST,
ROLF JUNG, CAROL JUNG, LAURENCE CHAVARIA, CONNIE
CHAVARIA, CHUCK GAMMEL, DIANE GAMMEL,
DIANE AVILA, ED AVILA, DON ANDERSON,
MARTHA NEWMAN, CLARISSE HEINHORST,
MARYANNE CREEL, JOHN WEBBER,
LARRI WHEELER, and CAROL WHEELER,
Petitioners,

vs.

LANE COUNTY,
Respondent,

and

LOST VALLEY CENTER, INC.,
Intervenor-Respondent.

LUBA No. 2017-064

FINAL OPINION
AND ORDER

Appeal from Lane County.

Sean T. Malone filed the petition for review and reply brief and argued on behalf of petitioners.

No appearance by Lane County.

Zack P. Mittge filed the intervenor-respondent's brief and argued on behalf of intervenor-respondent. Also on the brief was Hutchinson Cox.

RYAN, Board Chair; ZAMUDIO, Board Member, participated in the

1 decision.

2
3 RUDD, Board Member, did not participate in the decision.

4
5 REMANDED 09/18/2023

6
7 You are entitled to judicial review of this Order. Judicial review is
8 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a board of county commissioners' 2017 decision verifying the nature and extent of a retreat center/educational facility as a nonconforming use.

FACTS

In 1991, intervenor-respondent Lost Valley Center, Inc. (intervenor) sought and received from the county approval of its application for "Verification and Increase of a Nonconforming Use" under ORS 215.130, and Lane Code (LC) provisions that implement that statute, for Lost Valley Center, an existing retreat/educational facility on its approximately 76-acre property (1991 Decision).¹ Replacement Record (Record) 9-10. The 1991 Decision verified as nonconforming uses "agricultural and forestry uses, counseling, educational uses, seminars, conferences, retreats, religious uses, and residential uses[.]" Record 10. The 1991 Decision limited the nonconforming use to "150 resident students, 35 staff members and families, and 3,000 annual guests[.]" *Id.* The 1991 Decision also approved an alteration of the nonconforming use to allow 20 structures

¹ The 1991 Decision identified "Agriculture Workshops, Agroecology, Permaculture Design, Land Stewardship, Ecological Living, Energy Efficient Economical Construction, Solar Design, Sustainable Construction, Carpentry, Craft Workshops, Basketry Workshops, Food and Cooking Workshops, Personal Growth Workshops, and Spiritual and Healing Workshops" as activities on the property. Record 10.

1 identified in the application to be constructed. *Id.* After the 1991 Decision, “[a]
2 cabin, mobile home site, and staff housing” were constructed. *Id.*

3 In 2013, intervenor applied for “Verification and Alteration of a
4 Nonconforming Use” (2013 Application). Record 3501. The 2013 Application
5 sought “reverification and alteration of the nonconforming use that exists as the
6 Lost Valley Center to allow the rearrangement of authorized buildings on the
7 subject property.” Record 3504. The planning director’s decision verified the
8 extent of the use at the levels authorized in the 1991 Decision. Record 3320-25.
9 The planning director also approved intervenor’s request for an alteration of the
10 nonconforming use to allow a “re-orientation of the structures approved [in the
11 1991 Decision] to serve the nonconforming use.”² Record 2247 (hearings officer
12 decision describing planning director’s decision).

13 That decision was appealed to the hearings officer. The hearings officer
14 initially denied the application, and intervenor sought reconsideration and
15 submitted supplemental information. On reconsideration, the hearings officer
16 verified the extent of the nonconforming use and denied the request for an
17 alteration of the nonconforming use to construct the structures approved in the
18 1991 Decision. Record 23.

² Alterations of a nonconforming use are regulated under ORS 215.130(5), (8) and (9). *VanSpeybroeck v. Tillamook County*, 221 Or App 677, 681, 191 P3d 712 (2008).

1 Petitioners and others appealed that decision to the board of county
2 commissioners. The board of county commissioners elected not to hear the
3 appeal, adopted findings in support of that decision, and affirmed and adopted
4 the hearings officer's decision as the county's final decision. Record 3. This
5 appeal followed.³

6 **THIRD ASSIGNMENT OF ERROR**

7 Petitioners' third assignment of error is that the hearings officer's decision
8 is not supported by substantial evidence in the record or adequate findings
9 because the evidence in the record is that "the scope of the nonconforming use
10 has lessened over time and, therefore, it was error to verify the nonconforming
11 use at the levels authorized in 1991." Petition for Review 32. A brief explanation
12 of some of the findings is necessary in order to resolve petitioners' assignment of
13 error.

14 In their findings, the board of commissioners concluded that:

15 "With a couple of exceptions, the data showed a large decline in
16 guest attendance for five of the years between 2004 and 2011. A
17 large part of this decline can be attributed to the recession. If these
18 years are excluded from the calculations, then the Center would
19 have averaged over 2050 guests per year. The data also indicated
20 that the staffing during the examination period was steady and close
21 to what the Applicant currently claims. However, the data does not
22 support a finding that the annual number of guests was anywhere

³ Shortly after the notice of intent to appeal was filed in 2017, the parties agreed to suspend the appeal to pursue a resolution of the dispute. In 2023, petitioners moved to reactivate the appeal.

1 near the 3,000 guests per year. Only during two years during this 21-
2 year period did the client population exceed 3,000 guests and
3 generally the documented number was in the high 1,000's or low
4 2,000's. Therefore, the annual guest population * * * should be
5 around 2,000; plus or minus a few hundred individuals. This is more
6 generous than the Applicant's estimate of 1,713 * * * but probably
7 more accurate. Nevertheless, it is two-thirds of that verified by the
8 County in 1991." Record 11.⁴

9 The hearings officer found that the average number of guests between 1993 and
10 2013 was 1,725; the average number of staff members between 1993 and 2015
11 was 16; and the average number of students between 1993 and 2015 was 84.⁵
12 Record 24-25. We do not understand petitioners to assign error to that finding,
13 and, in fact, petitioners agree that the number of guests between 1993 and 2013
14 was "roughly 2,000 annual guests." Petition for Review 41 n 5.

15 However, the hearings officer also concluded that "the scope and intensity
16 of the 1991 [Decision] must be confirmed." Record 25. In that finding, petitioners
17 understand the hearings officer to have concluded that the extent of the
18 nonconforming use in 2013 was the same as the extent authorized by the 1991
19 Decision, which, as noted, authorized the nonconforming use to allow "150
20 resident students, 35 staff members and families, and 3,000 annual guests[.]"
21 Record 10. Petitioners argue that because between 1993 and 2013 the

⁴ The hearings officer's nearly identical findings are at Record 21.

⁵ ORS 215.130(11) provides that "[f]or 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."

1 nonconforming use operated below the maximum levels authorized in the 1991
2 Decision, the hearings officer erred in verifying the extent of the use at the
3 maximum levels authorized in that decision.

4 Intervenor responds that the extent of the uses authorized in the 1991
5 Decision did not require that intervenor operate at that level in order to maintain
6 the extent of the nonconforming use verified in the 1991 Decision. However, we
7 agree with petitioners that the hearings officer's finding that "the scope and
8 intensity of the 1991 [Decision] must be confirmed" is confusing, at best, and
9 does not identify with specificity the extent of the nonconforming use in 2013.
10 More specifically, the hearings officer's finding confirming the "scope and
11 intensity of the 1991 Decision" is inadequate because it does not make clear the
12 number of guests, staff, and students that are allowed as part of the use of the
13 property, based on the extent of the use during the relevant time period from 1993
14 to 2013. *See* n 5.

15 Petitioners also argue that the board of commissioners improperly
16 construed the applicable law when they excluded the decline in use during the
17 years 2004 through 2011, because they concluded that the decline was due to "the
18 recession." Record 11, 21. However, petitioners do not argue that the board of
19 commissioners should have concluded that the extent of the use was even lower
20 because of the low operating levels between 2004 and 2011. In fact, petitioners
21 agree with the county that the extent of the use is "[two-thirds] of what were

1 established in the 1991 decision.” Petition for Review 42; Record 11.
2 Accordingly, petitioners’ arguments provide no basis for reversal or remand.

3 The third assignment of error is sustained, in part.

4 **FIRST ASSIGNMENT OF ERROR**

5 Petitioners’ first assignment of error concerns what the application refers
6 to as “microbusinesses.” Record 3506. During the proceedings below, petitioners
7 and others argued that several business names were then associated with the
8 subject property that were not identified in the 1991 Decision, and that the
9 existence of some businesses associated with the property constituted a change
10 in the use verified in the 1991 Decision. The board of commissioners and the
11 hearings officer addressed the issue, explaining:

12 “Over the years, the Lost Valley Educational Center has hosted
13 various on-site businesses. Testimony indicates that these
14 businesses have supported the broader educational agenda of the
15 organization and have all originated with staff who brought those
16 businesses with them to the centers. One example given concerned
17 Ananda Reeves, who had been teaching personal growth for over 40
18 years, had her own website, and her own business name. After she
19 joined Lost Valley Educational Center as staff in 2015, she rented
20 space from the Center for her business and taught marketing skills
21 to Lost Valley Center students. An examination of the business
22 invoices submitted by the Applicant document that the Center has
23 always served as a location for outside organizations for training.
24 Sometimes the training is provided by Center staff and sometimes it
25 is provided by an outside organization, with the Center only
26 providing lodging, meals and meeting rooms. Arguably, there is
27 little difference between a situation where training is provided by a
28 Center staff’s business or by an outside organization. Indeed, it is
29 very common for the Center to host well-known speakers who use

1 the Center's facilities for training and educational purposes."
2 Record 11, 21.

3 **A. First, Third, and Fourth Subassignments**

4 Petitioners' first, third and fourth assignments of error include overlapping
5 arguments, and we address them together. Petitioners' first subassignment of
6 error is that "[t]he county misconstrued applicable nonconforming law by failing
7 to determine whether the businesses or micro-businesses on the subject property
8 and verified as a nonconforming use were originally part of the 1991 [Decision]."
9 Petition for Review 17. Petitioners fault the county's findings for failing to
10 evaluate specific businesses that are associated with the property as
11 nonconforming uses. Petition for Review 19-20. Petitioners' third subassignment
12 of error is that "the [county] made inadequate findings regarding businesses and
13 micro-businesses." Petition for Review 26. Petitioners argue that the businesses
14 associated with the property are a "change of use" and the hearings officer's
15 findings fail to address the issue. *Id.* Similarly, petitioners' fourth subassignment
16 of error argues that there is not substantial evidence in the record to support the
17 hearings officer's finding. Petition for Review 27.

18 Intervenor responds that the 1991 Decision verified the nonconforming use
19 of the property as an educational center for both on-site and off-site educational
20 programs, and that petitioners have not identified any requirement in ORS
21 215.130 that required the county to, as petitioners argue, "identify specific
22 businesses as nonconforming uses" either in 1991 or in the challenged decision.
23 Petition for Review 22. We agree. A nonconforming use determination requires

1 the local government to identify the *uses* that are lawfully established on the
2 property, regardless of the operational or organizational status of those uses.
3 *Hendgen v. Clackamas County*, 115 Or App 117, 836 P2d 1369 (1992). In
4 *Hendgen*, various businesses used structures on the subject property for storage.
5 The last business on the property ceased operations; however, the inventory from
6 that business remained in the storage structures for 18 months after the business
7 closed. The Court of Appeals concluded that in those circumstances, LUBA erred
8 in concluding that the entire nonconforming use, including the storage use, was
9 discontinued when the business closed because (1) “simple storage” was a
10 separate component of the businesses that had used the property; and (2) the
11 storage use continued after the last on-premises business ceased operations. 115
12 Or App at 121.

13 Petitioners’ arguments do not establish that the county failed to identify
14 the uses that are lawfully established on the property. Petitioners’ first, third and
15 fourth subassignments of error are denied.

16 **B. Second Subassignment**

17 Petitioners’ second subassignment of error is that the county adopted
18 inconsistent findings. Petitioners argue that the planning director’s initial
19 decision that verified the nonconforming use and approved an alteration of the
20 nonconforming use included a condition that barred “any new uses that were not
21 previously contemplated and approved under [the 1991 Decision], such as uses
22 akin to on-site microbusiness incubators that provide space or support for small-

1 scale business start-ups.” Record 3322. Petitioners argue that the finding quoted
2 above conflicts with condition 2.

3 Intervenor responds, and we agree, that condition 2 is not part of the
4 county’s final decision and therefore, petitioners’ argument provides no basis for
5 reversal or remand. The hearings officer rejected intervenor’s application for an
6 expansion, but verified the nonconforming use, and the board of commissioners
7 also verified the nonconforming use, adopting its own findings and also adopting
8 the hearings officer’s findings. Condition 2 is not part of the county’s final
9 decision and accordingly, any inconsistency between the county’s final decision,
10 which does not include condition 2, and the condition is not a basis for reversal
11 or remand.

12 Petitioners’ second subassignment of error is denied.

13 The first assignment of error is denied.

14 **SECOND ASSIGNMENT OF ERROR**

15 In three related, overlapping subassignments of error, petitioners argue that
16 intervenor’s proposal to lease portions of the property to resident staff pursuant
17 to long-term, transferable leases is a change in the use verified in the 1991
18 Decision. The board of commissioners found:

19 “The Appellants suggest that the 99-year transferable ground leases
20 are a change in use. These leases are offered to staff as an incentive
21 to stay with the Center. It is unclear how the financial arrangements
22 for the same accommodations have any bearing on the scope or
23 intensity of the non-conforming use. The staff will live on the
24 subject property regardless and the method of how they pay for that

1 privilege is irrelevant.” Record 13.

2 Intervenor responds, and we agree, that petitioners have not developed any
3 argument to support their claim that a long-term lease qualifies as a “use” of
4 property. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220
5 (1982). Absent any developed argument, petitioners’ second assignment of error
6 provides no basis for reversal or remand.

7 The second assignment of error is denied.

8 The county’s decision is remanded.