LUBA
APR 29 2024 AM09:17

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

FERGUSON CREEK INVESTMENT, LLC,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

LANDWATCH LANE COUNTY,
Intervenor-Respondent.

LUBA No. 2023-087

FINAL OPINION
AND ORDER

Appeal from Lane County.

Zack P. Mittge filed the petition for review and reply brief and argued on behalf of petitioner.

No appearance by Lane County.

Sean T. Malone filed the intervenor-respondent's brief and argued on behalf of intervenor-respondent.

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

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

REMANDED 04/29/2024

You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

Opinion by Rudd.

NATURE OF THE DECISION

Petitioner appeals a hearings official's decision denying an application for nonconforming use verification of a dwelling on an 82-acre property zoned Exclusive Farm Use-40 (EFU-40).

BACKGROUND

Petitioner appeals the hearing official's decision on remand from *Ferguson Creek Investment, LLC v. Lane County*, ___ Or LUBA ___ (LUBA No 2022-099, June 9, 2023) (*Ferguson I*).

ORS 215.130(5) provides, in part, 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." Consistent with ORS 215.130(5), Lane County Code (LC) 16.251 provides, in part:

> "Except as is hereinafter provided in this Chapter, the lawful use of a building or structure or of any land or premises lawfully existing at the time of the effective date of this Chapter or at the time of a change in the official zoning maps may be continued although such use does not conform with the provisions of this Chapter."

LC 16.251(1) provides:

> "(1) Verification of Nonconforming Use. The verification of a nonconforming use may be obtained subject to Type II procedures of LC Chapter 14. Verification of a nonconforming use is required prior to requesting approval to increase, restore, alter or repair a nonconforming use. When evaluating a request for verification, the following criteria shall apply:

1 "(a) To be valid, a nonconforming use must have been
2 lawfully established prior to the enactment of an
3 ordinance restricting or prohibiting the use.

4 "(b) The use must have been in actual existence prior to the
5 enactment of an ordinance restricting or prohibiting the
6 use or have proceeded so far toward completion that a
7 right to complete and maintain the use is deemed to
8 have vested in the landowner.

9 "(c) The nonuse of a nonconforming use of a structure or
10 property for a period in excess of two years will
11 prohibit the resumption of the nonconforming use. The
12 burden of proof for the verification of a nonconforming
13 use is upon the applicant."

14 Zoning was first applied to petitioner's property in March 1980.
15 Petitioner's property is currently improved with two outbuildings and two
16 dwellings. An aerial photograph of the property is provided below.

Record 658.

On September 1, 2021, petitioner applied to the county for nonconforming use verification of the smaller of the two dwellings, shown in the southeastern

portion of the property on the above aerial photograph.[1] This appeal concerns only the smaller dwelling. We refer to that dwelling as the Smaller Dwelling. The planning director denied petitioner's application. Petitioner appealed the planning director denial to the hearings official. The hearings official denied the nonconforming use verification for more limited reasons than the planning director.

ORS 215.213(1)(q) provides that the "[a]lteration, restoration or replacement of a lawfully established dwelling, as described in ORS 215.291" is a permitted use on land zoned EFU. The hearings official determined that the fact that alteration, restoration, and replacement of lawfully established dwellings is allowed meant that existing, lawfully established dwellings are conforming uses. The hearings official therefore denied the nonconforming use verification application. Petitioner appealed the denial to LUBA.

In *Ferguson I*, we remanded the decision, explaining that we

> "agree[d] with petitioner that the hearings officer misconstrued ORS 215.130, ORS 215.213(1)(q), and ORS 215.291 when they determined that ORS 215.213(1)(q) makes existing dwellings conforming uses eligible exclusively for alteration, restoration, or replacement under ORS 215.291 and therefore ineligible for a nonconforming use determination. On remand, the county should decide whether the subject structure is a nonconforming use." ___ Or LUBA at ___ (slip op at 14).

[1] The parties agree that the dwelling located near the center of the property was not constructed with required land use permits and is not the subject of this appeal.

1 On September 15, 2023, the county received petitioner's request that the
2 county conduct remand proceedings. Remand Record 51. On September 26,
3 2023, the planning director requested "that the Hearings Official make their
4 decision based on the existing record and evidence without a hearing on remand,
5 allowing for additional briefing by the parties as the Hearings Official determines
6 to be appropriate." Remand Record 50. On September 29, 2023, the hearings
7 official opened the record for submittal of legal argument. Remand Record 47.
8 On November 28, 2023, the hearings official issued their decision. Remand
9 Record 2. The hearings official concluded that they could "do nothing to improve
10 upon [the planning director's decision]," incorporated the planning director's
11 earlier decision in their findings and denied the application. This appeal followed.

12 **PRESERVATION OF ERROR**

13 OAR 661-010-0030(4)(d) requires, in part, that each of petitioner's
14 assignments of error "demonstrate that the issue raised in the assignment of error
15 was preserved during the proceedings below" or "state why preservation is not
16 required." Intervenor-respondent (intervenor) argues that petitioner's
17 demonstration of preservation of its second, third, and fourth assignments of error
18 through block citations to multiple pages in the record is inadequate to
19 demonstrate preservation. The second assignment of error cites 23 pages, the
20 third assignment of error cites eight pages, and the fourth assignment of error
21 cites five pages.

In *Rosewood Neighborhood Association v. City of Lake Oswego*, ___ Or LUBA ___ (LUBA No 2023-035, Nov 1, 2023), the petitioner cited 131 pages as evidence of preservation of its second assignment of error. We concluded that the petitioner failed to demonstrate the second assignment of error was preserved as it "require[d] respondents to engage in a search for a needle in a haystack." *Id.* at (slip op at 11). Although we agree with intervenor that the use of parentheticals and quotes would more clearly demonstrate preservation, we agree with petitioner that it has adequately demonstrated that the second, third and fourth assignments of error were preserved.

FIRST ASSIGNMENT OF ERROR AND PART OF SECOND ASSIGNMENT OF ERROR

Petitioner's first assignment of error and part of petitioner's second assignment of error are that the hearings official misconstrued the law because they repeat their error from *Ferguson I.* Petition for Review 5, 14. Intervenor responds that other findings by the hearings official make clear that they understood the extent of our decision in *Ferguson I* and intended to abide by it. We will reverse or remand a local government decision where the local government misconstrued the law. ORS 197.835(9)(a)(D).

In the body of their decision, the hearings official stated, "*See* Findings 1 and 2 of original Planning Director decision. Findings 1 and 2 are incorporated by reference herein." Remand Record 4. Finding 1 includes the following:

"The applicant does not make clear the basis on which continued

> use of a lawfully established dwelling would be nonconforming under current EFU zoning. Nor is it evident to staff how such use could possibly be nonconforming given that the alteration, replacement, and restoration of lawful dwellings – existing or formerly existing – is listed as a permitted outright use under current zoning and state law." Record 396.

This finding is representative of hearings official findings and is contrary to our decision in *Ferguson I.* Record 396-97. In a footnote in their decision, the hearings official stated, "Regarding the September 1, 2022, Hearings Official staff report, Section III(a) addresses the issue that provided the basis for the Hearings Official's original decision, which was overturned by LUBA. Accordingly, that portion of the staff report is not incorporated herein; the remainder is." Remand Record 4. In the following footnote, the hearings official wrote, "Regarding staff's September 22, 2022 open record memorandum, the final paragraph of page 3 and the first paragraph of page 4 relate to the issue overturned by LUBA. Accordingly, those paragraphs are not incorporated herein." Remand Record 5.

The hearings official made inconsistent findings, including findings that are incorrect for the reasons we set out in *Ferguson I.* Intervenor argues that this is a "hyper-technical" argument and harmless error. The findings that are inconsistent with *Ferguson I* will not be a basis for reversal or remand if there is another valid basis for denial. *Yamhill Creek Solar, LLC v. Yamhill County*, 78 Or LUBA 245, 251 (2018) ("Where a local government denies a land use application on multiple grounds, LUBA will affirm the decision on appeal it at

1 least one basis for denial survives all challenges."). Intervenor argues that there
2 are valid, alternative reasons for denial.

3 We agree with intervenor that these findings are an alternative basis for
4 denying the application. Petitioner was, however, still required to appeal these
5 findings. *McGovern v. Crook County* concerned an appeal following remand of
6 a decision approving a partition and two non-farm dwellings on EFU land. 60 Or
7 LUBA 177 (2009). The county made a finding that petitioner had waived the
8 issue of the legality of a prior boundary line adjustment. The county also made
9 findings on the merits. We explained that "to challenge the findings on the merits
10 petitioner was obligated to assign error to the waiver finding, and demonstrate in
11 the petition for review that that finding is incorrect or unsupported by the
12 evidentiary record." *Id.* at 183.

13 "Where the local government makes an explicit finding that a
14 particular issue * * * is * * * not properly before the local
15 government, but as a precaution adopts alternative findings
16 addressing the merits of the issue, a petitioner cannot invoke
17 LUBA's review authority to challenge the alternative findings on
18 the merits unless the petitioner assigns error to the explicit finding
19 that the issue was * * * not properly before the local government,
20 and demonstrates that the finding is erroneous." *Id.* at 182-83.

21 The first assignment of error and part of the second assignment of error are
22 sustained.

1 **REMAINDER OF SECOND ASSIGNMENT OF ERROR**

2 **A. ORS 215.130(5)**

3 Petitioner argues that the hearings official misconstrued ORS 215.130(5)
4 and made a decision not supported by substantial evidence when they determined
5 the Smaller Dwelling did not become a nonconforming use in 1980. Petition for
6 Review 18.

7 The hearings official concluded that petitioner failed to establish that the
8 Smaller Dwelling became a legal nonconforming use at the time of the property's
9 zoning in 1980, because the 1980 zoning allowed farm dwellings. Thus, if the
10 dwelling existed in 1980, it would have conformed with the zoning. The hearings
11 official explained that petitioner reported:

12 "[T]he 1977 EFU zoning provisions that were in effect when the
13 property was first zoned allowed outright 'one-single-family
14 dwelling per lot provided in conjunction with farm use as defined in
15 this Chapter' * * * and that the present EFU zoning of the subject
16 property restricts residential use. Otherwise, the applicant does not
17 expressly indicate at what point the [Smaller Dwelling] residential
18 farm house use became nonconforming or on what basis.

19 "Insofar as the applicant's position might be that the 1980 zoning
20 allowing outright only dwellings that were in conjunction with farm
21 use would have rendered any continued residential nonconforming,
22 that position is not supported by available evidence even if the
23 property were to have been in residential use at the time. County
24 records indicate that the subject property was part of a larger 315
25 acre property in farm use until [the property owners divided the
26 property]." Record 397.

1 Intervenor responds that this issue is superfluous because the physical dwelling
2 on the property in 1980 no longer exists. Response Brief 29.
3 LC 10.305-05 (1976) provided, in part:

4 "[T]here exist lots, structures, and uses of land and structures which
5 were lawful before this Chapter was passed or amended, *but which*
6 *would be prohibited, regulated, or restricted under the terms of this*
7 *Chapter or future amendments.*

8 "*It is the intent of this Chapter to permit these nonconformities* to
9 continue until they are removed or abandoned, but not to encourage
10 their survival." (Emphases added.)

11 The LC described "nonconformities" as "uses of land and structures which
12 were lawful before this Chapter was passed or amended, but which would be
13 prohibited, *regulated, or restricted* under the terms of this Chapter or future
14 amendments." (Emphasis added). The EFU zoning first applied in 1980 regulated
15 dwellings, which were not previously regulated by the county, and existing
16 dwelling uses became nonconformities, that is nonconforming uses in the zone,
17 in 1980. The fact that dwellings were not also *prohibited* does not mean that the
18 dwelling was conforming after 1980.
19 This subassignment of error is sustained.

20 **B. ORS 215.130(11)**

21 For purposes of verifying a nonconforming use, "a county may not require
22 an applicant for verification to prove the existence, continuity, nature and extent
23 of the use for a period exceeding 20 years immediately preceding the date of
24 application." ORS 215.130(11). That statute imposes a 20-year "look back"

period. An applicant for verification of a nonconforming use is not required to prove that a use was continuous from a date when it was lawful, and is only required to prove that the use was continuous for the 20-year look back period. *Grabhorn v. Washington County*, 279 Or App 197, 203, 379 P3d 796, *rev den*, 360 Or 568, 385 P3d 79 (2016); *Aguilar v. Washington County*, 201 Or App 640, 650, 120 P3d 514 (2005), *rev den*, 340 Or 34, 129 P3d 183 (2006); *Lawrence v. Clackamas County*, 180 Or App 495, 504, 43 P3d 1192, *rev den*, 334 Or 327, 52 P3d 435 (2002). Here, that look back period extends back to September 2001. Thus, to prove the existence of a nonconforming use, petitioner must establish (1) that the dwelling existed and was lawful in 1980, and (2) that the use continued uninterrupted from September 2001 to September 2021. ORS 215.130(11) prohibits the county from requiring petitioner to establish continuity of use of the dwelling from 1980 to September 2001.

Petitioner argues that the hearings official misconstrued ORS 215.130(11) when they concluded that nonconforming use status was lost because evidence in the record is that the use of the Smaller Dwelling was abandoned in the 1990s. Petition for Review 15. Petitioner also argues that the hearings official misapplied ORS 215.130(11) and made inadequate findings unsupported by substantial evidence when they concluded "that the dwelling was constructed in the late 1990's or early 2000's, or that there was insufficient evidence to demonstrate that the subject dwelling existed or was inhabited on September 1, 2001." *Id.* Petitioner argues that ORS 215.130(11) bars hearings official consideration of

1 the status of the Smaller Dwelling prior to 2001, twenty years before petitioner's
2 application. Intervenor argues that if the Smaller Dwelling was built after zoning
3 was imposed, it is not a nonconforming use legally allowed to continue, and that
4 substantial evidence supports the hearings official's conclusion that the Smaller
5 Dwelling is not the same physical structure as the 1980 dwelling.[2]

6 *Reeder v Multnomah County* provides a helpful overview of ORS
7 215.130(11) which "prohibits counties from requiring an applicant to 'prove the
8 existence, continuity, nature and extent of the use for a period exceeding 20 years
9 immediately preceding the date of application.'" 59 Or LUBA 240, 244 (2009).
10 In *Reeder* we explained:

> 11 "The effect of ORS 215.130(11) is to render 'legally irrelevant'
> 12 evidence regarding the existence, continuity or nature and extent of
> 13 the use for the period exceeding 20 years from the date of
> 14 application. *Lawrence v. Clackamas County*, 40 Or LUBA 507, 515
> 15 (2001), *aff'd* 180 Or App 495, 43 P3d 1192 (2002) (evidence that a
> 16 nonconforming use was discontinued more than 20 years prior to the
> 17 date of the application is legally irrelevant and not a basis to deny
> 18 the nonconforming use verification). *Id.* at 247.
>
> 19 "ORS 215.130(11) prohibits counties from requiring that an

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[2] Landwatch made this argument to the hearings official, positing:

> "While [petitioner] may have demonstrated that the 1947 dwelling was lawfully established – as it was prior to land use regulations – the subsequent dwelling in the 'general location' of the first has not been shown to have been lawful because [petitioner] has not carried its burden to establish that it is the same dwelling that was established in 1947." Remand Record 23.

1 applicant for a nonconforming use verification prove the 'existence,
2 continuity, [or] nature and extent' of the nonconforming use more
3 than 20 years prior to the date of application. '[N]ature and extent'
4 are listed separately from both 'existence' and 'continuity,' and all
5 three matters are clearly subject to the prohibition." *Id.* at 248.

6 "To give effect to the language to ORS 215.130(11), the county can
7 require the applicant to prove the 'nature and extent' of the use only
8 for the 20 year period preceding the date of application. Thus,
9 evidence that the nonconforming use was, for example, expanded
10 25 years prior to the date of application without required approvals
11 would not be a basis for the county to refuse to verify that expansion,
12 in determining the nature and extent of the nonconforming use. As
13 a practical matter, that means that any expansions that the applicant
14 demonstrates existed 20 years prior to the date of application are part
15 of the 'nature and extent' of the nonconforming use, even if
16 evidence is available indicating that those expansions were made
17 without required approvals more than 20 years ago but after the use
18 became nonconforming." *Id.* at 249.

19 "[N]otwithstanding ORS 215.130(11), an applicant for
20 nonconforming use verification must still show that the use was
21 lawfully established prior to the time the zoning ordinance that
22 prohibited or regulated the use was first applied to the property, even
23 if that date is more than 20 years prior to the date of application for
24 verification." *Id.* at 247-48.

25 To summarize, petitioner must establish that the Smaller Dwelling was
26 lawfully established prior to 1980, even if this requires looking back more than
27 twenty years before the date of the application for nonconforming use
28 verification. However, once that is established, the county is not allowed to
29 consider changes to the nonconforming use beyond September 2001, more than
30 twenty years prior to petitioner's application.

1 ORS 215.130(5) and (9) set out when alteration of a nonconforming use
2 may be allowed. ORS 215.130(5) provides, in part, "Alteration of any
3 [nonconforming use] may be permitted subject to subsection (9) of this section.
4 Alteration of any such use shall be permitted when necessary to comply with any
5 lawful requirement for alteration in the use." ORS 215.130(9) provides:

6 "As used in this section, 'alteration' of a nonconforming use
7 includes:

8 "(a) A change in the use of no greater adverse impact to the
9 neighborhood; and

10 "(b) A change in the structure or physical improvements of no
11 greater adverse impact to the neighborhood."[3]

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[3] LC 16.251(11) provides:

"Alterations of a nonconforming use may be permitted to continue the use in a reasonable manner subject to prior submittal and approval of an application pursuant to Type II procedures of LC Chapter 14 and consistent with the intent of ORS 215.130(9), and be evaluated pursuant to criteria expressed in LC 16.251(12) below. Alteration of any such use must be permitted when necessary to comply with any lawful requirement for alteration in the use."

LC 16.251(12) provides:

"Criteria for Decision. When evaluating a proposal for increase, restoration, alteration or repair, the following criteria shall apply:

"(a) The change in the use will be of no greater adverse impact to the neighborhood.

"(b) The change in a structure or physical improvements will cause no greater adverse impact to the neighborhood.

1 ORS 215.130(5) and (7) establish that the county may regulate
2 abandonment of a nonconforming use such that "[a]ny use described in [ORS
3 215.130(5)] may not be resumed after a period of interruption or abandonment
4 unless the resumed use conforms with the requirements of zoning ordinances or
5 regulations applicable at the time of the proposed resumption."[4] ORS
6 215.130(7)(a).

7 The hearings official found "available County records appear to indicate
8 that the subject dwelling was not lawfully established in that it is either an entirely
9 new structure or a substantial restoration of the former structure that occurred
10 without required planning and building approvals, and likely occurred between
11 1998 and 2004." Record 396. The hearings official's findings state in part:

12 "Based on aerial photo evidence and other evidence addressed
13 below, the available evidence indicates that the two dwellings and
14 outbuildings shown on the applicant's site plans, septic facilities and
15 connections to septic facilities or wells and any electric connections
16 were installed in the late 1990s or early 2000s without required land
17 use approvals or building permits.

18 "* * * * *

"(c) Other provisions of this Chapter, such as property development standards, are met."

[4] LC 16.251(5) provides: "Discontinuance of a Nonconforming Use. When a non-conforming use of a structure or property is discontinued for a period in excess of two years, the structure or property shall not thereafter be used, except in conformance with the zone in which it is located."

1 "* * * [T]he evidence supports the conclusion that a 'farm house' structure was developed in the location of the subject dwelling in the late 1940s and the structure existed in some form until 1984, if not 1992, and was used as a residence until the late 1970s. The land partition records for M19-83 and the related septic evaluation permit SI84-176 indicate that County staff and the property owners at the time recognized the residential use of the property had been abandoned and that the 'old abandoned house' was no longer connected to septic facility of any kind, and may never have been connected to water, and that it was no longer fit for occupancy if it was still standing at all." Record 398.

12 We agree with petitioner that the hearings official misconstrued the law. Local
13 code may not be interpreted inconsistently with the state law that it implements.
14 *Johnson v. Jefferson County*, 56 Or LUBA 72, 91, *aff'd*, 221 Or App 156, 189
15 P3d 30 (2008), *rev dismissed*, 347 Or 259, 218 P3d 541 (2009). Although the
16 hearings official is required to evaluate whether a dwelling became a
17 nonconforming use, even if that inquiry requires looking more than 20 years in
18 the past, the hearings official may not consider whether the use was abandoned
19 or substantially altered prior to 2001 and is limited to considering the 20-year
20 look back period set out in ORS 215.130(11). *Reeder*, 59 Or LUBA at 249.

21 *Rogue Advocates v. Jackson County* concerned an appeal of a
22 nonconforming use verification of a batch plant. 69 Or LUBA 271 (2014). A
23 concrete batch plant was operated on the property starting in 1963. Zoning
24 prohibiting batch plants was applied to the property in 1973 and the batch plant
25 became nonconforming. An asphalt batch plant was installed on the property in
26 2001. We explained that replacement of a concrete batch plant with an asphalt
27 batch plant, even if they were determined to be the same use, constituted at a

minimum alteration requiring county review and approval. We remanded the approval "for the hearings officer to verify the nature and extent of the lawful nonconforming batch plant use, without considering as part of the verified use any unapproved alterations that occurred" during the 20-year look back period. *Id.* at 286. Similarly here, the hearings official's consideration of whether the Smaller Dwelling was abandoned or altered is limited to the 20-year look back period immediately preceding the September 2021 date of petitioner's application.

Petitioner argues that there is not substantial evidence to support the hearings official's conclusion that "there was insufficient evidence to demonstrate that the subject dwelling existed or was inhabited on September 1, 2001." Because we sustain petitioner's argument that the hearings official misconstrued ORS 215.130(11) and new findings are required, it is premature for us to address the substantial evidence challenge.

The second assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the hearings official misapplied the law and made a decision not supported by adequate findings because they denied the application based on abandonment of the use before September 2001, which is the earliest date that the hearings official may consider when verifying the nature and extent of the use. Petition for Review 23. The hearings official found:

"The application materials and other available records indicate that

> the residence was unoccupied and considered to have been abandoned when the former property owners applied to partition the property in February of 1983, but physically remained in some from until sometime after County Assessment & Taxation appraisal staff conducted a site inspection in February of 1992 and determined the former farmhouse residence to be a miscellaneous building having only salvage value." Remand Record 3.

For the reasons set out in our resolution of the second assignment of error, we agree with petitioner that the hearings official misapplied the law by considering evidence outside the 20-year look back period. Because we sustain this element of the appeal, the hearings official will be required to make new findings on remand, and it is unnecessary for us to address the evidence relied upon.

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

Petitioner's fourth assignment of error is that the hearings official's findings are inadequate and are not supported by substantial evidence because the findings improperly rely upon staff speculation relating to a letter from an electric utility concerning service to the property and statements by intervenor. Adequate findings identify the relevant criteria, the facts relied upon, and how the facts lead to the conclusion that the criteria are or are not met. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). Substantial evidence is evidence a reasonable person would rely on in making a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). We will reverse or remand a local government decision that is not supported by substantial evidence in the

1 whole record. ORS 197.835(9)(a)(C). However, because new findings are
2 required, it is premature for us to address the fourth assignment of error.
3 The decision is remanded.