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

Appeal from Jackson County.

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.

No appearance by Jackson County.

H.M. Zamudio, Medford, filed the response brief and argued on behalf of intervenors-respondents. With her on the brief was Huycke O'Connor Jarvis, LLP.

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

REVERSED 09/22/2017

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 as a nonconforming use an automobile storage, repair and sales business.

MOTION TO INTERVENE

Larry Perkett and Susan Perkett (intervenors), the applicants below, move to intervene on the side of respondent. No party opposes the motion, and it is granted.

FACTS

The subject property is a 10-acre parcel zoned for exclusive farm use (EFU). The property is developed with a dwelling and three storage structures. Intervenors operate a so-called "auto yard" business on a 1.6-acre portion of the property, consisting of several activities: (1) the purchase of used vehicles, (2) the repair of used vehicles, (3) the retail sale of used vehicles, and (4) the storage of impounded or abandoned vehicles.

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 rezoned EFU, which also does not allow an auto yard use. On June 4, 2016, intervenors filed an application with the county to verify the auto yard, including use of the three storage structures, as a nonconforming use, pursuant to ORS 215.130(5)-(10) and Jackson County

Land Development Ordinance (LDO), chapter 11.[1] Intervenors supported the application with evidence that they established an auto yard business on the subject property in 1971, prior to the date contrary zoning was first applied. 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 the 2016 application.

County staff issued a notice of tentative decision verifying the auto yard as a lawful nonconforming use. Petitioner, an adjoining property owner, appealed the staff decision to the county hearings officer. The hearings officer held a *de novo* hearing on December 19, 2016, and afterward held the record open until February 13, 2017, during which petitioner presented testimony and arguments disputing that the auto yard use was lawfully established on the subject property prior to September 1, 1973. Petitioner also argued that any nonconforming auto yard business that had been lawfully established had been affirmatively relinquished in 1987, when the county issued intervenors a zoning clearance sheet authorizing a home occupation use for an office in the

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[1] 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." LDO 11.1.2(A) provides, in relevant part:

> "A use that was lawfully established before the effective date of this Ordinance but which no longer conforms to the uses or dwelling density allowed in the zoning district in which it is located, is considered nonconforming and is regulated * * * under Chapter 11 of this Ordinance * * *."

dwelling, to be used for wholesaling used vehicles that are located off-site, so that intervenor could obtain an Oregon Department of Motor Vehicles (DMV) business certificate for that use. Petitioner also argued that intervenors had failed to demonstrate that the nature and extent of the auto yard use had not been altered or expanded within the relevant time period.

On April 27, 2017, the hearings officer issued a decision verifying the auto yard as a nonconforming use. The hearings officer concluded that the auto yard use had been lawfully established prior to September 1, 1973, that intervenors had not relinquished the nonconforming use 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 the three storage structures, which the hearings officer excluded from the scope of the verified nonconforming use.

This appeal followed.

SECOND ASSIGNMENT OF ERROR

A. First Sub-Assignment of Error

In the first sub-assignment of error under the second assignment of error, petitioner argues that the hearings officer erred in concluding that intervenor demonstrated that the auto yard use was a "lawful use" on September 1, 1973, the relevant date for purposes of ORS 215.130(5). For the following reasons, we agree with petitioner.

Under ORS 215.130(10)(a), an applicant seeking to verify a nonconforming use can initially demonstrate the existence, continuity, nature and extent of the use for the 10 year period preceding the date of application.[2]

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[2] ORS 215.130(10) and (11) provide:

> "(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;
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> "(b) Establishing criteria to determine when a use has been interrupted or abandoned under subsection (7) of this section; or
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> "(c) Conditioning approval of the alteration of a use in a manner calculated to ensure mitigation of adverse impacts as described in subsection (9) of this section.
>
> "(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."

Doing so creates a rebuttable presumption that the use "lawfully existed at the time the applicable zoning ordinance or regulation was adopted and has continued uninterrupted until the date of application," even if the use became nonconforming more than 10 years ago. *See* n 2. If that presumption is rebutted, the applicant must demonstrate the existence, continuity, nature and extent of the use back in time to the date the use became nonconforming. *Id.* Pursuant to ORS 215.130(11), a county may not require the applicant to prove the existence, continuity, nature and extent of the use for a period exceeding 20 years immediately preceding the date of application. *Id.* Nonetheless, in all cases the applicant must demonstrate that the nonconforming use was a "lawful use" on the date it became nonconforming, even if that date is more than 20 years from the date of application. *Aguilar v. Washington County*, 201 Or App 640, 645-46, 120 P3d 514 (2005).

Petitioner contends that since 1971, state law has required intervenors to obtain a dealer license from the DMV to operate as a dealer or rebuilder of motor vehicles. Specifically, petitioner argues that between 1971 and 1973, ORS 481.305(1)(1971) prohibited any person from conducting the business of buying, selling, or dealing in motor vehicles, unless the person first obtains a "license from the [DMV] authorizing him to carry on or conduct such business."[3] Petitioner notes that ORS 481.990(8) (1971) provided that any

[3] ORS 481.305(1) (1971) provided:

violation of ORS 481.305 (1971) is "punishable, upon conviction, by a fine of not more than $500 or by imprisonment for not less than 30 days nor more than six months or both."[4] Petitioner argues that the record includes no evidence that intervenors obtained the required DMV dealer license for the auto yard use between 1971 and September 1, 1973.[5] According to petitioner, intervenors' use of their property for an auto yard without the required DMV dealer license between 1971 and 1973 means that the use was not only unlawful for purposes of ORS 215.130(5), but also a criminal act.

> "Except as provided in ORS 481.312, no person shall carry on or conduct in this state the business of buying, selling or dealing in new or used motor vehicles, trailers or semitrailers unless he has a license from the division authorizing him to carry on or conduct such business. Such license shall be furnished annually by the division, and shall run from January 1 of each year."

[4] The current cognates to the 1971 statutes appear in ORS chapter 822. ORS 822.005(3) provides that the offense of acting as a vehicle dealer without the required certificate is punishable as a Class A misdemeanor. ORS 822.009(2) provides for civil penalties for acting as a dealer without a certificate in an amount not to exceed $5,000 for each vehicle improperly sold.

[5] Petitioner also argues that the record includes no evidence that intervenors have *ever* obtained a DMV dealer license or certificate for the auto yard use, from 1973 to the present day. The hearings officer found that the county zoning authorization used to obtain a DMV dealer certificate in 1987 and renewed thereafter was for a separate use, limited to a home occupation on the property for the non-retail sale of off-site vehicles. Record 18. If that finding is correct, a point we do not and need not resolve, then the 1987 DMV dealer license and its subsequent renewals would appear to authorize only the home occupation use, not the auto yard use. Intervenors do not claim that they have obtained a DMV dealer license or certificate specifically for the auto yard use.

When petitioner raised this issue during the proceedings below, the hearings officer rejected the argument, based on two LUBA opinions, *Coonse v. Crook County*, 22 Or LUBA 138 (1991), and *Rogue Advocates v. Jackson County*, 69 Or LUBA 271 (2014). Petitioner argues that *Coonse* and *Rogue Advocates* are distinguishable, and the hearings officer erred in broadly construing those cases to stand for the categorical proposition that "compliance with state or federal permitting requirements is not a factor in proving a use is lawfully established." Record 20.

In *Coonse*, the issue was whether a structure that housed a portion of a nonconforming logging business rendered the use something other than a "lawful use," because the structure had allegedly been constructed in violation of fire code and uniform building code standards applicable on the date the use became nonconforming. We concluded that "lawful" as used in ORS 215.130(5) generally refers to applicable zoning and land use regulations, and concluded that the fire code and building code standards at issue were not the type of regulations that, if not met on the date the underlying use became nonconforming, could render an otherwise lawful use unlawful. However, we left open the possibility that "compliance with other federal, state or local regulations or licensing requirements that apply to some aspect of the use or structure are integrally related to the zoning or land use regulation requirements or for some other reason must be satisfied for a structure or a use to be 'lawful' as that term is used in ORS 215.130(5)." 22 Or LUBA at 144.

In *Rogue Advocates*, we cited *Coonse* to support our conclusion that failure to obtain a Department of Environmental Quality (DEQ) air quality permit required to operate an asphalt batch plant, prior to the date the use that included the batch plant became nonconforming, did not render the use unlawful, for purposes of ORS 215.130(5) or LDO 11.1.2. Our analysis emphasized the main holding in *Coonse*, that the "lawful use" language of ORS 215.130(5) is chiefly concerned with compliance with then-applicable zoning ordinances or land use regulations. We ultimately concluded that nothing in ORS 215.130(5) through (11) "makes compliance with state or federal agency operating permits such as a DEQ air quality permit relevant to verification of a nonconforming use." 69 Or LUBA at 280.

On appeal, petitioner argues that *Rogue Advocates* is distinguishable, and that the present case should be viewed under the contingency we noted in *Coonse*, for circumstances where "compliance with other federal, state or local regulations or licensing requirements that apply to some aspect of the use or structure are integrally related to the zoning or land use regulation requirements or for some other reason must be satisfied for a structure or a use to be 'lawful' as that term is used in ORS 215.130(5)." Petitioner argues that the DEQ air quality permit at issue in *Rogue Advocates* was, as LUBA characterized it, an *operating* permit for the asphalt batch plant, intended to regulate emissions from a piece of equipment, rather than a permit to authorize the use itself. In the present case, petitioner argues, the DMV dealer license was required, in the

words of ORS 481.305(1) (1971), to "authoriz[e]" the use itself, the business of buying and selling vehicles, and does not simply regulate some aspect of the use to reduce pollution or externalities created by the use, or to ensure that the use does not exceed applicable operating performance measures. Similarly, in *Coonse*, petitioner argues that the fire code and building code regulations at issue applied to the structure that housed a portion of the nonconforming use, a logging-related business, but did not apply to authorize or regulate the use itself.

Intervenors respond that the hearings officer correctly concluded that whether intervenors possessed DMV dealer licenses in 1973 is not relevant to whether the auto yard use was "lawfully established" for purposes of LDO 11.1.2, or a "lawful use" for purposes of ORS 215.130(5). Intervenors argue that "lawful" and "lawfully established" must refer to uses that are not prohibited by applicable *land use* laws, and should not include uses governed by other laws that regulate conduct or activities for reasons having nothing to do with land use. Because no land use laws applied at all to the property prior to 1973, intervenors argue that the auto yard use was therefore not prohibited by any land use law, and hence was a "lawful" and "lawfully established" use.

As local support for the foregoing, intervenors note that LDO 13.3(146) defines the term "lawfully created/established" to mean "[a]ny building, structure, use, lot or parcel that complied with land use laws and local standards, if any, in effect at the time of its creation or establishment, whether

or not it could be created/established under this Ordinance." Intervenor argues that that definition controls the meaning of "lawfully established" as that term is used in LDO 11.1.2, and thus the only laws relevant to whether a use has been "lawfully established" are "land use laws and local standards, if any[.]"

Even if intervenors are correct that "lawfully established" as used in LDO 11.1.2 is concerned only with whether uses or structures comply with "land use laws and local standards," the definition of "lawfully established/created" at LDO 13.3(146) does not limit the meaning of "lawful use" in ORS 215.130(5). As explained in *Coonse*, the statutory term "lawful use" is not concerned only with whether the use complied with state or local land use laws, but may also be concerned with whether the use complied with state, federal or local non-land use laws, regulations or licensing requirements that are either (1) integrally related to zoning or land use requirements, or (2) for some other reason must be satisfied for a use to be "lawful." While the DMV dealer license requirement may not be "integrally related" to zoning or land use requirements, we agree with petitioner that it is the type of authorization that must be obtained in order for the land use activity of conducting an auto yard to be a "lawful use."

Another reason to reject the categorical position apparently taken by the hearings officer in this appeal—that determining whether a use was "lawful" requires reference only to land use laws—is that many jurisdictions and areas in this state had no land use laws at all until the 1970s, and many

nonconforming uses were established long before the first adoption of comprehensive plans, zoning ordinances and land use regulations, or the statewide planning program for that matter. The legislature, in adopting ORS 215.130(5), was presumably aware of this fact, and possibly that is why the legislature chose to refer broadly to a "lawful use," without limitation to a use that is lawful considering only land use laws. In circumstances where the use became nonconforming under the very first zoning or land use regulations applied to the subject property, that inquiry into whether the use was "lawful" would be perfunctory under the hearings officer's view. That inquiry would begin and end with the finding that the use was established prior to the adoption of the first zoning ordinance or land use regulations, and therefore it would be irrelevant whether the use was in fact at that time unlawful under state, federal or other local laws. We agree with petitioner that, as we suggested in *Coonse*, the unrestricted term "lawful" as used in ORS 215.130(5) potentially encompasses applicable laws other than zoning and land use regulations.

Returning to petitioner's arguments under ORS 481.305(1)(1971), we agree with petitioner that that statute required DMV authorization to engage in the use itself, the buying, selling and rebuilding of cars. Unlike the DEQ operating permit at issue in *Rogue Advocates*, the DMV licensing requirement at ORS 481.305(1) (1971) was not merely concerned with regulating an aspect of the use, in order to reduce externalities, mitigate impacts, ensure safety, or

further similar objectives, related to a use that was otherwise allowed. ORS 481.305(1) (1971) was concerned with whether a specific use or activity should be allowed at all. We conclude that where an applicable local, state or federal law requires authorization of the use itself, such authorization must be obtained on or before the date the use becomes nonconforming, in order for the use to be a "lawful use" for purposes of ORS 215.130(5).

That conclusion is even more self-evident where, as here, the applicable law not only prohibited the use unless authorized, but provided criminal penalties for engaging in the use, absent authorization. It is difficult to understand how a use or activity that the applicable law *criminalizes* can possibly constitute a *lawful* use, under any definition of that term.

For the foregoing reasons, we agree with petitioner that the hearings officer erred in concluding that compliance with ORS 481.305(1) (1971) was not relevant to determining whether the auto yard use was a "lawful use" prior to September 1, 1973. Accordingly, we sustain the first subassignment of error to the second assignment of error.

DISPOSITION

Given the foregoing, we question whether it is necessary to resolve the second subassignment of error to the second assignment of error, and the first, third and fourth assignments of error, all of which concern evidentiary challenges to various findings or the standards used to evaluate the evidence. Intervenors did not argue below, and do not argue on appeal, that they in fact

obtained the DMV licenses required by ORS 481.305(1) (1971) prior to September 1, 1973. The hearings officer made no findings on that point, given his conclusion that such evidence was not relevant. As explained above, such evidence is relevant to whether the auto yard use is a "lawful use" for purposes of ORS 215.130(5), and indeed would be essential to establish that point, on which intervenors bear the burden of proof. Absent some indication or assertion from intervenors that they in fact obtained the required DMV licenses prior to September 1, 1973, we see no basis to avoid the conclusion that the hearings officer's decision verifying the auto yard use as a lawful nonconforming use "violates a provision of applicable law and is prohibited as a matter of law." OAR 661-010-0071(1)(c).[6] Accordingly, the appropriate

[6] OAR 661-010-0071 provides, in relevant part:

> "(1) The Board shall reverse a land use decision when:
>
> "* * * * *
>
> "(c) The decision violates a provision of applicable law and is prohibited as a matter of law.
>
> "(2) The Board shall remand a land use decision for further proceedings when:
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> "(a) The findings are insufficient to support the decision, except as provided in ORS 197.835(11)(b);
>
> "(b) The decision is not supported by substantial evidence in the whole record;

disposition of this appeal is reversal rather than remand. That being the case, we see no reason to address the remaining subassignments and assignments of error, which, if sustained, would result only in remand under OAR 661-010-0071(2). *See* n 6.

We do not address the second subassignment of error to the second assignment of error, or the first, third or fourth assignments of error.

The county's decision is reversed.

> "(c) The decision is flawed by procedural errors that prejudice the substantial rights of the petitioner(s); [or]
>
> "(d) The decision improperly construes the applicable law, but is not prohibited as a matter of law[.]"