

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 HANS HENDGEN and SHAUNA HENDGEN,)
5)
6 Petitioners,)
7)
8 vs.)
9)
10 CLACKAMAS COUNTY,)
11)
12 Respondent.)
13
14

LUBA No. 92-038

FINAL OPINION
AND ORDER

15 On remand from the Court of Appeals.

16
17 John W. Shonkwiler, Tigard, represented petitioners.

18
19 Gloria Gardiner, Oregon City, represented respondent.

20
21 KELLINGTON, Referee; SHERTON, Chief Referee; HOLSTUN,
22 Referee, participated in the decision.

23
24 REMANDED 12/17/92

25
26 You are entitled to judicial review of this Order.
27 Judicial review is governed by the provisions of ORS
28 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal an order of the county hearings
4 officer denying their application for a determination that
5 the use of two structures is a lawful nonconforming
6 warehouse use, and for permission to alter that
7 nonconforming warehouse use.

8 **DECISION**

9 This appeal is on remand from the Court of Appeals.
10 Hendgen v. Clackamas County, 115 Or App 117, _____ P2d _____
11 (1992) (Hendgen). As relevant to this appeal, there are two
12 structures on the subject General Agricultural District
13 (GAD) zoned property. There is no dispute that those
14 structures predate the initial imposition of restrictive
15 zoning on the property on December 14, 1967. Various
16 businesses have used those two structures over the years,
17 and at least some of those businesses used these structures
18 to store business inventory.

19 In our initial decision in this matter, this Board
20 determined that (1) use of the subject structures did not
21 constitute a nonconforming independent warehouse use, and
22 (2) past use of the two structures for storage was at best
23 incidental to other commercial businesses, such that when
24 those businesses were discontinued for a period in excess of
25 one year, any nonconforming use of the two structures for

1 storage was lost.¹ The Court of Appeals disagreed, stating:

2 "If the issue came from the opposite direction,
3 LUBA's reasoning [on the existence of the
4 nonconforming use] would be correct. On-premise
5 sales and other business activities would not come
6 within the scope of an existing nonconforming use
7 that consisted only of storage. However, the
8 converse does not necessarily follow. The common
9 nucleus of both activities is storage. Short of
10 the point that it is abandoned or discontinued,
11 the intensity of the nonconforming use may be
12 reduced without its being lost, * * * although the
13 use may not be enlarged except through the
14 alteration process under ORS 215.130 and complying
15 local law. * * *

16 "* * * The abandonment issue, in turn, depends on
17 the answer to the first question. To the extent
18 that simple storage was part of any nonconforming
19 use that the previous owners were conducting and
20 that storage continued after they ceased business
21 operations, then we are unable to agree that the
22 cessation of the on-premises businesses was an
23 abandonment of the storage use.

24 "In sum, LUBA regarded the nature of the
25 businesses that employed the structures to be the
26 decisive inquiry. We think the more relevant
27 question is whether there is a common use that the
28 various operations share. * * *" (Emphasis in
29 original.) Hendgen, supra, 115 Or App at 120-21.

30 The challenged county decision determines the
31 following:

32 "* * * The structures have, during most of the
33 time between 1969 and today, been used for the
34 storage of materials in association with different
35 business ventures. However, those structures have

¹Clackamas County Zoning and Development Ordinance (ZDO) 1206.02 provides that if a nonconforming use is discontinued for a period in excess of twelve months, the nonconforming use may not be resumed unless it conforms with current ZDO requirements.

1 not been used for separate warehousing business.
2 There is no separately protected nonconforming use
3 of those structures." Record 3.

4 The decision goes on to determine that because the last
5 business which used the subject structures discontinued its
6 operations for more than twelve consecutive months, any
7 nonconforming use of those structures was lost.² Record
8 3-4.

9 Under the Court of Appeals decision, both LUBA and the
10 county proceeded from an incorrect premise. Both this Board
11 and the county assumed that storage alone could not
12 constitute a separately recognizable nonconforming use of
13 the subject property.³ Rather, the county and this Board
14 assumed that any storage was incidental to a business use,

²Under existing ZDO requirements, commercial warehousing is not a permitted use in the GAD zoning district.

³The challenged decision states:

"Although * * * it is not possible to determine exactly what use(s) were occurring on the property on the date of [imposition of] restrictive zoning, it is clear that the current use is completely different from the various nonconforming uses which were possibly occurring." Record 3.

The finding seems to state it cannot be ascertained "exactly" what uses were occurring on the date restrictive zoning was imposed, but also determines it is possible to determine a range of uses from the evidence submitted, and that the current use is unlike those uses. We infer from this finding that an adequate amount of evidence was produced below to establish that a use of the subject structures was evident on the date restrictive zoning was imposed, and that the general nature of that use could also be ascertained from such evidence. That the hearings officer was unable to determine "exactly" the nature of the use occurring on the date restrictive zoning was imposed, does not establish that he did not believe that some nonconforming use was established.

1 and that when the business use was discontinued, any
2 incidental storage use that may have been associated with
3 the business use was also discontinued, even though passive
4 storage of business inventory may have continued.

5 We remand to the county to determine whether storage
6 use of the two structures was an existing use that became a
7 separately recognizable nonconforming use on the date
8 restrictive zoning was imposed on the property. If the
9 county determines that storage became a nonconforming use of
10 the subject structures on the date restrictive zoning was
11 imposed, then the county must determine whether that storage
12 use was, at any time thereafter, discontinued for more than
13 twelve months and thereby lost.

14 The county's decision is remanded.