



1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a determination of the county  
4 hearings officer that the nonconforming use of a dwelling  
5 was lost through discontinuance of residential use.

6 **FACTS**

7 The subject property consists of five acres and is  
8 zoned Exclusive Farm Use (EFU-20). The challenged decision  
9 includes the following additional facts:

10 "[The] record establishes that at the time the  
11 subject property was zoned EFU-20, a single family  
12 residence had been lawfully established on the  
13 subject property. That dwelling was occupied by  
14 Ira K. McAllister until her death on November 3,  
15 1984. That residential use became a protected  
16 nonconforming use upon the application of the  
17 EFU-20 zoning district, as that zoning district  
18 does not allow a single family residence as a  
19 primary permitted use." Record 2.

20 The planning director determined that "there is not a  
21 protected nonconforming use to maintain a dwelling on the  
22 subject property." Record 1. Petitioner appealed the  
23 planning director's decision to the hearings officer. The  
24 hearings officer affirmed the decision of the planning  
25 director, and this appeal followed.

26 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

27 The challenged decision determines:

28 "After a review of all the affidavits, letters and  
29 testimony addressing the intermittent use and  
30 occupancy of the subject property, after the death  
31 of Ira T. McAllister, the Hearings Officer  
32 concludes that the dwelling was unoccupied, and no

1 lawful residential use was made of the subject  
2 property, for well in excess of 12 consecutive  
3 months. As such, the nonconforming use was lost  
4 pursuant to subsection 1206.02 of the [Clackamas  
5 County Zoning and Development Ordinance (ZDO)].

6 "Although the information presented is  
7 contradictory and very indefinite as to dates, it  
8 does seem clear that from the death of Ira T.  
9 McAllister in November 1984 until at least the  
10 Spring of 1987 no persons were residing in the  
11 residence (cabin) on the subject property. The  
12 only occupancy during any portion of that time  
13 period was by Bill and Yvonne Wagner, who  
14 apparently moved a travel trailer onto the  
15 property to do repairs. However, any residential  
16 use of a travel trailer was not a lawful use, as  
17 the record establishes that no zoning approval was  
18 sought or obtained to locate a travel trailer on  
19 the property. The nonconforming residential use  
20 cannot [be] maintained by the unlawful location of  
21 a travel trailer on the property for residential  
22 use." Record 2-3.

23 Under these assignments of error, petitioner contends  
24 the record shows petitioner's predecessor in interest  
25 intended to use the subject property for residential  
26 purposes and, therefore, no abandonment of the residential  
27 use of the property occurred. Petitioner also contends that  
28 (1) the county erred by determining the residential use of  
29 the property ceased for a period in excess of 12 months, and  
30 (2) the county's determination that the use was discontinued  
31 is not supported by substantial evidence in the whole  
32 record. We address these contentions separately below.

33 **A. Intent to Occupy for Residential Use**

34 ZDO 1206.01 provides:

35 "A nonconforming use may be continued although not

1 in conformity with the regulations for the zone in  
2 which the use is located."

3 This provision parallels ORS 215.130(5), which provides:

4 "The lawful use of any building, structure or land  
5 at the time of the enactment or amendment of any  
6 zoning ordinance or regulation may be continued. \*  
7 \* \*"

8 ZDO 1206.02 provides:

9 "If a nonconforming use is discontinued for a  
10 period of more than twelve (12) consecutive  
11 months, the use shall not be resumed unless the  
12 resumed use conforms with the requirements of the  
13 ordinance and other regulations applicable at the  
14 time of the proposed resumption."

15 This provision parallels and augments ORS 215.130(7), which  
16 provides:

17 "Any use described in subsection (5) of this  
18 section may not be resumed after a period of  
19 interruption or abandonment unless the resumed use  
20 conforms with the requirements of zoning  
21 ordinances or regulations applicable at the time  
22 of the proposed resumption."

23 In Sabin v. Clackamas County, 20 Or LUBA 23, 30-31  
24 (1990), we rejected arguments nearly identical to  
25 petitioner's. Specifically, we stated:

26 "Petitioners argue the residential use of the  
27 property continues to exist in perpetuity,  
28 notwithstanding that the structure on the property  
29 is no longer occupied or maintained as a  
30 residence, so long as petitioners establish that  
31 they did not intend to 'abandon' the residential  
32 use of the property. Petitioners cite Renken v.  
33 Young, 300 Or 352, 711 P2d 954 (1985) and Dober v.  
34 Ukase Investment Co., 139 Or 626, 10 P2d 356  
35 (1932), for the principle that a nonconforming use  
36 cannot be abandoned without a demonstration that  
37 the owner possess an intent to abandon the

1 nonconforming use.

2 "Regardless of what the cases cited by petitioners  
3 say about the elements required to establish  
4 'abandonment' of a water right, ZDO 1206.02 does  
5 not predicate loss of a nonconforming use on  
6 abandonment. ZDO 1206.02 states that a  
7 nonconforming use shall not be resumed if it has  
8 been 'discontinued' for more than 12 months. It  
9 appears that under ZDO 1026.02, a nonconforming  
10 use is lost if not used for a specified period of  
11 time, regardless of any subjective intent to  
12 continue the use at sometime in the future.  
13 Therefore, ZDO 1206.02 operates in the nature of a  
14 forfeiture, as described in Renken v. Young,  
15 supra. \* \* \*" (Emphases in original.)

16 We believe this determination applies equally here.  
17 Specifically, while there may be evidence establishing  
18 petitioner and petitioner's predecessors in interest  
19 intended to maintain residential use of the property, such  
20 evidence alone does not compel a finding that the  
21 nonconforming residential use of property was not lost under  
22 ZDO 1206.02.

23 This subassignment of error is denied.

24 **B. Discontinuation**

25 **1. Interpretation**

26 As we understand it, petitioner argues the county  
27 erroneously interpreted its code to mean that a  
28 nonconforming residential use of property is discontinued,  
29 if for a period of more than 12 months no one was residing  
30 in the dwelling on the subject property. Petitioner argues  
31 that because people slept on the subject property in a  
32 travel trailer, and did some maintenance work on the

1 property while there, residential use was made of the  
2 subject property.

3 The ZDO does not define the term "discontinued."  
4 However, it is apparent from the challenged decision that  
5 the county interprets ZDO 1206.02 to mean that a  
6 nonconforming residential use is "discontinued" if the  
7 dwelling that was the site of that nonconforming residential  
8 use was not resided in for the requisite period.<sup>1</sup> Thus, the  
9 county interprets its own code to mean that occasionally  
10 staying on the subject property in a travel trailer does not  
11 constitute residential use of the property. This  
12 interpretation is not clearly contrary to the express words,  
13 context or policy of ZDO 1206.02. Clark v. Jackson County,  
14 313 Or 508, 515, 836 P2d 710 (1992). The interpretation of  
15 ZDO 1206.02 expressed in the challenged decision is not  
16 clearly wrong and, therefore, we defer to it. West v.  
17 Clackamas County, 116 Or App 89, 94, \_\_\_\_ P2d \_\_\_\_ (1992).

18 This subassignment of error is denied.

19 **2. Evidentiary Support**

20 The county determined that residential use of the  
21 subject property was discontinued for more than 12 months  
22 based on the facts that (1) the dwelling itself was

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<sup>1</sup>There is no dispute that the prior nonconforming use was residential use of the dwelling which existed on the subject property. This is not a situation in which the previous nonconforming residential use consisted of moving a travel trailer onto the subject property to enable people to stay there. See Rhine v. City of Portland, 120 Or App 308, \_\_\_\_ P2d \_\_\_\_ (1993); Hendgen v. Clackamas County, 115 Or App 117, 836 P2d 1369 (1992).

1 unoccupied during that time period, and (2) the only  
2 residential use of the subject property occurred in a travel  
3 trailer unlawfully moved onto the property.<sup>2</sup> Thus, the  
4 county determined that the only actual residential use which  
5 was made of the subject property during the requisite 12  
6 month period was to accommodate a travel trailer in which  
7 people occasionally slept.

8 Although there is evidence in the record that  
9 occasionally people slept in the dwelling on the subject  
10 property, there is also evidence that such occasional  
11 occupation of the dwelling did not occur within 12 months  
12 after the death of Ira T. McAllister. Further, there is no  
13 dispute that the travel trailer was used for sleeping  
14 purposes on the subject property without the benefit of  
15 required permits. Therefore, the county could reasonably  
16 determine that such unlawful use of the subject property was  
17 not adequate to perpetuate the nonconforming residential  
18 use.

19 At best, there is conflicting believable evidence in  
20 the record. In such circumstances, the choice of evidence  
21 to believe belongs to the county, and we will not disturb  
22 that choice here. Angel v. City of Portland, 22 Or  
23 LUBA 649, 659, aff'd 113 Or App 169 (1992).

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<sup>2</sup>There is no contention that the county's determination regarding the  
unlawfulness of moving the travel trailer onto the property, is erroneous.  
For purposes of this opinion, we assume this determination to be correct.

1 This subassignment of error is denied.

2 The first and second assignments of error are denied.

3 **THIRD ASSIGNMENT OF ERROR**

4 "The Clackamas County land use hearings officer  
5 erred in concluding that estoppel cannot lie  
6 against Clackamas County."

7 Petitioner purchased the subject property from the  
8 county at a price she argues is consistent only with  
9 residential use of the property and not with the farm uses  
10 for which the subject property is principally zoned.  
11 Petitioner also argues that the deed which conveyed the  
12 subject property to her fails to include the disclaimer  
13 required by ORS 93.040.<sup>3</sup>

14 Assuming that either the county or this Board has the  
15 authority to entertain arguments that a local government is  
16 estopped from applying its land use regulations to  
17 particular property, petitioner has not adequately alleged  
18 estoppel here. See Pesznecker v. City of Portland, \_\_\_ Or  
19 LUBA \_\_\_\_ (LUBA No. 93-027, June 15, 1993). In Crone v.  
20 Clackamas County, 21 Or LUBA 102, 108 (1991), we quoted the  
21 following elements of equitable estoppel as stated by the

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<sup>3</sup>ORS 93.040(1) requires the following disclaimer in deeds transferring fee title to real property:

"This instrument will not allow the use of the property described in this instrument in violation of applicable land use laws and regulations. Before signing or accepting this instrument, the person acquiring fee title to the property should check with [the] appropriate city or county planning department to verify approved uses."

1 Oregon Supreme Court:

2 "[T]here must (1) be a false representation;  
3 (2) it must be made with knowledge of the facts;  
4 (3) the other party must have been ignorant of the  
5 truth; (4) it must have been made with the  
6 intention that it should be acted upon by the  
7 other party; (5) the other party must have been  
8 induced to act upon it.' Coos County v. State of  
9 Oregon, 303 Or 173, 180-81, 743 P2d 1348 (1987)  
10 (quoting from Oregon v. Portland General Electric  
11 Co., 52 Or 502, 528, 95 P 722 (1908))."

12 Here, at a minimum, petitioner fails to allege (1) the  
13 county made a false representation, (2) that the county was  
14 aware of the true facts, (3) that the county intended that  
15 petitioner act on those facts, and (4) that petitioner was  
16 induced to rely on some false representation made by the  
17 county. It is petitioner's burden to establish a basis for  
18 reversal or remand of the challenged decision, and  
19 petitioner fails to do so here. Deschutes Development v.  
20 Deschutes County, 5 Or LUBA 218, 220 (1982).

21 The third assignment of error is denied.

22 The county's decision is affirmed.