

1                                   BEFORE THE LAND USE BOARD OF APPEALS

2                                   OF THE STATE OF OREGON

3  
4 RONALD M. WATSON, JR. and            )  
5 JENNIFER L. WATSON,                 )  
6   )  
7                    Petitioners,         )

8   )  
9            vs.                            )

LUBA No. 93-193

10   )  
11 CLACKAMAS COUNTY,                    )  
12   )  
13                    Respondent.         )

14   )  
15   )                    FINAL OPINION  
  AND ORDER

16 RONALD M. WATSON, CAROL D. WATSON, )  
17 and RON WATSON TRUCKING, INC.,     )  
18 an Oregon corporation,             )  
19   )  
20                    Petitioners,         )

LUBA No. 93-197

21   )  
22            vs.                            )

23   )  
24 CLACKAMAS COUNTY,                    )  
25   )  
26                    Respondent.         )

27  
28  
29            Appeal from Clackamas County.

30  
31            Paul D. Schultz, Oregon City, filed the petition for  
32 review and argued on behalf of petitioners. With him on the  
33 brief was Hibbard, Caldwell & Schultz.

34  
35            Stacy L. Fowler, Assistant County Counsel, Oregon City,  
36 filed the response brief and argued on behalf of respondent.

37  
38            SHERTON, Referee; KELLINGTON, Chief Referee; HOLSTUN,  
39 Referee, participated in the decision.

40  
41                                   AFFIRMED                                   04/29/94

42  
43            You are entitled to judicial review of this Order.  
44 Judicial review is governed by the provisions of ORS  
45 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal two county compliance hearings  
4 officer orders determining petitioners have violated the  
5 Clackamas County Zoning and Development Ordinance (ZDO) by  
6 parking, storing and maintaining commercial vehicles on  
7 their properties. The orders direct petitioners to  
8 (1) either cease such activity or obtain necessary permits,  
9 and (2) pay certain civil penalties.<sup>1</sup>

10 **FACTS**

11 Petitioners own and reside on adjoining parcels of land  
12 zoned Transitional Timber, 20 acres (TT-20). Petitioners in  
13 LUBA No. 93-197 also operate on their property a trucking  
14 business involving eight trucks. A petitioner in LUBA  
15 No. 93-193, Ronald M. Watson, Jr., is employed in his  
16 parents' trucking business and drives a truck home to his  
17 residence, parking it there overnight.

18 The TT-20 zone was first applied to petitioners'  
19 properties on June 18, 1979. Record 52. The parties agree  
20 that petitioners in LUBA No. 93-197 were operating a  
21 trucking business on their property at the time the TT-20  
22 zone was applied and that the operation of petitioners'

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<sup>1</sup>The challenged decisions also include provisions concerning compliance with the county Solid Waste and Waste Management Ordinance and the state Uniform Building Code. However, these portions of the decisions are not at issue in these appeals.

1 trucking business, including the parking, storage and  
2 maintenance of one truck, is a valid nonconforming use.<sup>2</sup>

3 On May 12, 1993, the county Department of  
4 Transportation and Development (DTD) notified petitioners in  
5 LUBA No. 93-197 that the DTD believed they were in violation  
6 of the ZDO. Record 162. On June 25, 1993, after further  
7 communications with petitioners, the DTD representative sent  
8 petitioners in LUBA No. 93-197 a letter agreeing that  
9 petitioners have a nonconforming use to park, store and  
10 maintain one truck on their property. The letter also  
11 informed them they could apply under ZDO Section 1206 for  
12 recognition of an expansion of that nonconforming use.  
13 Record 165. In addition, the DTD letter asked petitioners  
14 either to cease parking more than one truck on the subject  
15 property or to apply for a temporary permit. Id.  
16 Petitioners took no action to comply with the DTD request  
17 and did not apply for a nonconforming use determination  
18 under ZDO Section 1206.

19 On July 16 and 19, 1994, respectively, the DTD  
20 representative filed complaints against petitioners in LUBA  
21 Nos. 93-197 and 93-193 with the county compliance hearings  
22 officer. After a hearing, the compliance hearings officer  
23 issued the challenged orders.

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<sup>2</sup>Whether the nonconforming use of the subject property extends to parking, storage and maintenance of five trucks is a matter of dispute.

1   **JURISDICTION**

2           The county contends this Board does not have  
3 jurisdiction to review the challenged decisions. The county  
4 argues the challenged decisions are not "final"  
5 determinations with regard to what uses of petitioners'  
6 properties are allowed under the ZDO, but rather are simply  
7 determinations that petitioners are currently in violation  
8 of the ZDO. The county also argues this Board lacks  
9 jurisdiction because ORS 197.825(3)(a) provides that circuit  
10 courts retain jurisdiction over proceedings to enforce land  
11 use regulations and, under ORS 30.315 and 30.460, the county  
12 has implied authority to enforce its land use regulations  
13 through proceedings conducted by a county hearings officer  
14 rather than by filing a complaint in circuit court.

15           As relevant here, except as provided in ORS 197.825(3),  
16 discussed infra, the Board has exclusive jurisdiction to  
17 review local government land use decisions and limited land  
18 use decisions.<sup>3</sup> ORS 197.825(1). ORS 197.015(10)(a)(A)  
19 defines "land use decision," in relevant part, as follows:

20           "A final decision or determination made by a local  
21 government \* \* \* that concerns the \* \* \*  
22 application of:

23           "\* \* \* \* \*

24           "(iii) A land use regulation; \* \* \*

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<sup>3</sup>No party contends the challenged decisions are limited land use decisions, and we do not see that they are.

1           "\* \* \* \* \*"

2           The ZDO is a land use regulation. The challenged  
3 decisions apply the provisions of ZDO Section 403  
4 (Transitional Timber District) to the facts of these cases  
5 in determining that the parking, storage and maintenance of  
6 commercial vehicles on petitioners' properties is not  
7 allowed in the TT-20 zone. Clackamas County Compliance  
8 Hearings Officer Ordinance (CHO) Section 3 provides that  
9 "[i]n cases filed by the County with the Hearings Officer,  
10 the Hearing's Officer's decision shall be the County's final  
11 determination with regard to the issues decided." (Emphasis  
12 added.) We therefore conclude the challenged decisions  
13 satisfy the statutory definition of "land use decision."

14           ORS 197.825(3) provides, in relevant part:

15           "Notwithstanding [ORS 197.825(1)], the circuit  
16 courts of this state retain jurisdiction:

17           "(a) To grant declaratory, injunctive or mandatory  
18 relief in \* \* \* proceedings brought to  
19 enforce the provisions of an adopted  
20 comprehensive plan or land use regulations[.]

21           "\* \* \* \* \*"

22           However, the court of appeals has explained that the circuit  
23 court's jurisdiction to grant relief in enforcement  
24 proceedings under the above statute does not include the  
25 authority to make land use decisions in the process of  
26 granting that relief. Sauvie Island Agricultural v. GGS  
27 (Hawaii), Inc., 107 Or App 1, 5-6, 810 P2d 856 (1991). If  
28 the relief sought in a circuit court enforcement proceeding

1 requires that a land use decision be made, such relief is  
2 not available until the appropriate local government has  
3 first rendered the required land use decision. Id.

4 The provisions of ORS chapter 30 cited by the county  
5 authorize it to maintain civil proceedings in circuit court  
6 to enforce requirements of its ordinances, and to seek fees,  
7 fines, forfeitures and injunctions in doing so. However,  
8 they do nothing to change the fact that if a land use  
9 decision is made in a county proceeding to enforce its land  
10 use regulations, under ORS 197.825(1), LUBA has exclusive  
11 jurisdiction for initial review of that land use decision.  
12 Presumably, if no appeal to LUBA is filed, or after any such  
13 review by LUBA is complete and the county's decision is  
14 affirmed, the county may then seek to enforce its decision  
15 in a circuit court proceeding under ORS 197.825(3)(a).

16 Because the challenged decisions are "land use  
17 decisions" as defined by ORS 197.015(10)(a), this Board has  
18 review jurisdiction.

19 **FIRST ASSIGNMENT OF ERROR**

20 ORS 203.810 provides, as relevant:

21 "(1) As used in this section:

22 "(a) 'County law' means \* \* \* any ordinance  
23 enacted by a general law county.

24 "(b) 'County offense' means any crime or  
25 offense defined or made punishable by  
26 county law.

27 "(2) Except as may be provided otherwise by county  
28 law:

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"\* \* \* \* \*

"(b) The district attorney shall prosecute county offenses unless the county governing body elects to have the prosecution of such offenses conducted by a county counsel appointed pursuant to ORS 203.145.

"\* \* \* \* \*"

Petitioners contend the proceedings before the county compliance hearings officer violated ORS 203.810(2), in that the county was represented by a DTD staff person, not by the district attorney or county counsel. Petitioners argue no county ordinance provisions authorize a DTD staff member to prosecute county offenses in such proceedings.

The county contends the enforcement proceedings resulting in the challenged decisions were not prosecutions of county offenses governed by ORS 203.810. The county also argues that even if ORS 203.810 does apply to such proceedings, CHO 4, 6(A)(4) and 7(C) indicate the county has provided "by county law" for representation of the county by a county staff member other than the district attorney or county counsel.

CHO 4 states a proceeding before the compliance hearings officer "shall be initiated only by a County department filing a complaint" with the compliance hearings officer. CHO 4 also provides that "[e]mployees of the [DTD] are authorized to sign and file complaints on behalf of the County." CHO 6(A)(4) requires the compliance hearings

1 officer to inform each party in writing "[w]hether an  
2 attorney will represent the county in the matters to be  
3 heard \* \* \*." (Emphasis added.) CHO 7(C) states "[p]arties  
4 may elect to be represented by counsel \* \* \*." (Emphasis  
5 added.)

6 We agree with the county that these CHO provisions,  
7 interpreted together, authorize representation of the county  
8 by a non-attorney DTD staff member in enforcement  
9 proceedings before the compliance hearings officer.  
10 Therefore, even if ORS 203.810 does apply to such  
11 proceedings, a point we do not decide, county law provides  
12 for county representation in such proceedings by county  
13 staff members other than the district attorney or county  
14 counsel, and the county has not violated ORS 203.810(2).

15 The first assignment of error is denied.

16 **SECOND ASSIGNMENT OF ERROR**

17 As relevant here, CHO 9(A)(5) provides that an order of  
18 the compliance hearings officer may require a party to:

19 "Pay to Clackamas County a civil penalty, the  
20 amount of which shall be determined by  
21 ORS 203.065(1) or by any other specific rule or  
22 statute which in the judgment of the [Compliance]  
23 Hearings Officer forms the basis for a decision  
24 that the respondent is in violation of the [ZDO]."  
25 (Emphasis added.)

26 In addition, ZDO 102.03 ("Violations") provides:

27 Violation of any provision of this Ordinance is  
28 punishable upon conviction, by:

29 "A. A fine of not more than [\$100] for each day

1 of violation where the offense is a  
2 continuing offense but such fine may not  
3 exceed [\$1,000].

4 "B. A fine of not more than [\$500] where the  
5 offense is not a continuing offense."<sup>4</sup>  
6 (Emphases added.)

7 The challenged decisions impose civil penalties for  
8 violation of the ZDO in the amounts of \$100 (LUBA  
9 No. 93-193) and \$250 (LUBA No. 93-197). Petitioners argue  
10 the compliance hearings officer had no authority to require  
11 payment of civil penalties as part of the challenged  
12 decisions, because the ZDO itself does not provide for civil  
13 penalties. According to petitioners, because the ZDO  
14 provides for fines, rather than civil penalties, there is no  
15 basis on which the compliance hearings officer could  
16 determine the amount of a civil penalty authorized under  
17 CHO 9(A)(5).

18 Petitioners' argument is based on the premise that  
19 there is a critical difference between the "civil penalties"  
20 authorized by CHO 9(A)(5) and the "fines" of not more than  
21 \$500 or \$1,000 authorized by ZDO 102.03. However,  
22 petitioners do not explain what the legal basis for such a  
23 distinction is. We note that whereas ORS 203.065(1)  
24 authorizes maximum "fines" of \$500 or \$1,000 for violations  
25 of county ordinances, ORS 203.065(2) provides that the

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<sup>4</sup>ORS 203.065(1) similarly provides that violation of a county ordinance is punishable "by a fine of not more than \$500 for a noncontinuing offense and a fine of not more than \$1,000 for a continuing offense."

1 violator of a county ordinance may be made "the defendant in  
2 a civil proceeding by the county seeking redress of the  
3 violation." (Emphasis added.) We see no reason why the  
4 compliance hearings officer could not base his determination  
5 of the amount of the civil penalty to be paid by petitioners  
6 on the amounts of the fines allowed for violations of the  
7 ZDO under ZDO 102.03.<sup>5</sup>

8 The second assignment of error is denied.

9 **THIRD ASSIGNMENT OF ERROR**

10 With regard to the decision challenged in LUBA  
11 No. 93-193, petitioners argue the county incorrectly  
12 interpreted its TT-20 zoning provisions not to allow  
13 petitioner Ronald M. Watson, Jr., to bring the commercial  
14 truck he is employed to drive home at night, park it in his  
15 yard overnight and drive it to work in the mornings.  
16 According to petitioners, the TT-20 zone does not  
17 specifically govern the types of vehicles residents use to  
18 get to and from their work. Petitioners further argue the  
19 TT-20 zone does not impose a complete prohibition on the use  
20 of commercial vehicles because farm and forest uses are two  
21 of the principle permitted uses in this zone.

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<sup>5</sup>In determining whether an ostensibly civil proceeding is actually a criminal prosecution, one factor among several considered by the appellate courts is the prescribed penalty. However, the courts' consideration of this factor is based on the magnitude, context and purpose of a prescribed financial penalty, not on whether it is termed a "fine" or a "civil penalty" by the governing legislation. See Brown v. Multnomah County Dist. Ct., 280 Or 95, 104-05, 570 P2d 52 (1977); Jackson County v. Roark, 124 Or App 505, 511, 863 P2d 491 (1993).

1           Petitioners further argue that if ZDO Section 403 can  
2 be interpreted by the county to prohibit the parking of a  
3 truck on TT-20 zoned property in the circumstances presented  
4 by LUBA No. 93-193, then the ordinance "is void for  
5 vagueness and is, therefore, violative of the due process  
6 requirements of the State and Federal Constitutions."  
7 Petition for Review 10. According to petitioners, the ZDO  
8 is a criminal statute because violations of the ZDO are  
9 punishable by "fines." According to petitioners, this means  
10 the correct standard for our review is whether a reasonable  
11 person reading ZDO Section 403 would be apprised that the  
12 conduct of petitioners in LUBA No. 93-193 is prohibited.

13           This Board is required to defer to a local government's  
14 interpretation of its own enactments, unless that  
15 interpretation is contrary to the express words, policy or  
16 context of the local enactment.<sup>6</sup> Clark v. Jackson County,  
17 313 Or 508, 514-15, 836 P2d 710 (1992). This means we must  
18 defer to a local government's interpretation of its own  
19 enactments, unless that interpretation is "clearly wrong."  
20 Goose Hollow Foothills League v. City of Portland, 117 Or  
21 App 211, 217, 843 P2d 992 (1992).

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<sup>6</sup>ORS 197.829, enacted in 1993, basically codifies the Clark v. Jackson County decision, with the exception that we are not required to defer to a local government's interpretation of its regulations if that interpretation is contrary to a state statute, statewide planning goal or administrative rule which the regulations implement. However, here there is no contention that with regard to parking, storage and maintenance of commercial trucks in the TT-20 zone, ZDO Section 403 implements a state statute, goal or rule.

1           The challenged decision explains the principal uses  
2 permitted outright in the TT-20 zone under ZDO 403.03 are  
3 resource and resource-related uses, not commercial uses.  
4 The decision further explains that whereas ZDO 403.03 does  
5 not specifically state that parking, storage and maintenance  
6 of commercial trucks is prohibited in the TT-20 zone,  
7 ZDO 403.07 prohibits "uses of land not specifically  
8 mentioned in [ZDO Section 403]." On the other hand,  
9 petitioners point to no provision of ZDO Section 403 which  
10 they contend specifically allows the activity in question.

11           The county's interpretation of ZDO Section 403 as not  
12 allowing petitioners in LUBA No. 93-193 to park, store and  
13 maintain a commercial truck on their TT-20 zoned property is  
14 not inconsistent with the words, policy or context of  
15 ZDO Section 403, and we defer to it.

16           Petitioners' argument that ZDO Section 403, if  
17 interpreted in this manner, is unconstitutionally vague is  
18 premised entirely on petitioners' contention that the ZDO is  
19 a "criminal" ordinance. The only reason given by  
20 petitioners for this contention is that under ZDO 102.03,  
21 violations of the ZDO are punishable by "fines." As we  
22 explain in n 5, supra, the courts consider several factors  
23 in determining whether a proceeding is civil or criminal in  
24 nature. The fact that the governing legislation describes  
25 the financial penalties that may be imposed for violations  
26 as "fines" is not, of itself, a sufficient basis for

1 determining that such proceedings are criminal in nature.  
2 Cf Brown v. Multnomah County Dist. Ct., supra; Jackson  
3 County v. Roark, supra.

4 The third assignment of error is denied.

5 **FOURTH ASSIGNMENT OF ERROR**

6 With regard to the decision challenged in LUBA  
7 No. 93-197, petitioners contend the compliance hearings  
8 officer erred in not considering their argument that their  
9 nonconforming use extends to the parking, storage and  
10 maintenance of five trucks, not just one truck. Petitioners  
11 argue their business grew to five trucks between 1979 and  
12 1987, during which period their business qualified as a home  
13 occupation and did not require a permit. According to  
14 petitioners, the compliance hearings officer erred in  
15 determining that their nonconforming use claim must be  
16 determined in a separate proceeding under the ZDO, because  
17 the ZDO provides no procedure for determining whether a  
18 nonconforming use has been established.

19 The challenged decision states:

20 "[Petitioners] contend they are not subject to the  
21 [ZDO] because they had established a nonconforming  
22 use of the subject property as a trucking business  
23 \* \* \*. To the extent [petitioners] have a viable  
24 nonconforming use [of] their property, that issue  
25 must be raised and litigated in a different forum.  
26 This code compliance hearings process is not a  
27 land use hearings process. Therefore, this issue  
28 is not properly before this Hearings Officer.

29 "Under Section 1301 of the [ZDO, petitioners] may  
30 make application to the Land Use Hearings Officer

1 to establish their right to a use of their  
2 property outside of the [current ZDO]. The County  
3 has invited [petitioners] in the past on more than  
4 one occasion to file such an appropriate land use  
5 application, but [petitioners] have elected not to  
6 do so.<sup>[7]</sup>

7 "Simply put, [petitioners] are in the wrong forum  
8 to adjudicate the land use issue they have raised.  
9 No decision on the merits of that issue is made  
10 here." Record 19-20.

11 We have no doubt the county can choose to establish  
12 procedures for determinations concerning nonconforming uses  
13 as part of its ZDO and, if it does so, can require that  
14 parties seek a determination regarding the existence or  
15 expansion of a nonconforming use through such ZDO  
16 procedures, rather than allowing such issues to be initially  
17 determined in its code enforcement process. The only  
18 question is whether the county has done so here.

19 ZDO Section 202 defines "nonconforming use" as follows:

20 "A dwelling, structure or use which was legally  
21 established prior to the adoption of any provision  
22 of this ordinance with which the building,  
23 structure or use does not comply."

24 ZDO Section 1206 ("Nonconforming Use") includes provisions  
25 governing the continuation, discontinuation, restoration,  
26 replacement, maintenance and alteration of nonconforming  
27 uses. ZDO Section 1301 ("Administrative Process")

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<sup>7</sup>For instance, the county's June 25, 1993 letter to petitioners in LUBA No. 93-197 informed them that any contention their nonconforming use had been enlarged or expanded to more than one truck, after initial application of the TT-20 zone, would have to be reviewed in an administrative action under ZDO Section 1206 ("Nonconforming Use"). Record 165.

1 establishes county procedures for a general type of  
2 administrative proceeding called an "administrative action."  
3 ZDO 1301.01(A)(1) defines an "administrative action" as a  
4 proceeding in which "the legal rights, duties, or privileges  
5 of specific parties under [the ZDO] are required to be  
6 determined only after a hearing at which specific parties  
7 are entitled to appear and be heard."

8 ZDO Section 1206, together with the definition of  
9 nonconforming use in ZDO Section 202, indicate the county's  
10 intent to regulate nonconforming uses under the ZDO. Rather  
11 than separately setting out procedures for each type of  
12 proceeding covered by the ZDO, ZDO Section 1301 establishes  
13 a general set of procedures for all administrative actions  
14 under the ZDO. Further, a proceeding to determine the  
15 existence or expansion of a nonconforming use fits the ZDO  
16 definition of administrative action. It is within the  
17 discretion afforded the county by ORS 197.829 and Clark v.  
18 Jackson County, supra, for the county to interpret these ZDO  
19 provisions as requiring the nonconforming use issue  
20 petitioners in LUBA No. 93-197 seek to raise to be  
21 determined through an administrative action pursuant to ZDO  
22 Sections 1206 and 1301.<sup>8</sup>

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<sup>8</sup>We note there is no allegation here that the county initiated or prosecuted its code enforcement proceeding before giving petitioners ample opportunity to seek a nonconforming use determination through an administrative action under the ZDO, or that the decision challenged in LUBA No. 93-197 precludes petitioners from seeking such a determination in the future.

- 1 The fourth assignment of error is denied.
- 2 The county's decisions are affirmed.