

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                    On remand from the Court of Appeals.

30  
31                    Paul D. Schultz, Oregon City, represented petitioners.

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33                    Scott H. Parker and Stacy L. Fowler, Assistant County  
34 Counsel, Oregon City, represented respondent.

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

38  
39                    AFFIRMED    01/30/95

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

1 Opinion by Sherton.

2 **NATURE OF THE DECISIONS**

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.

8 **INTRODUCTION**

9 On April 29, 1994, we issued a final opinion and order  
10 affirming the compliance hearings officer's decisions.  
11 Watson v. Clackamas County, 27 Or LUBA 164 (1994)  
12 (Watson I). Our decision was appealed to the Court of  
13 Appeals. The Supreme Court subsequently held, in Gage v.  
14 City of Portland, 319 Or 308, 877 P2d 1187 (1994), that the  
15 deferential standard for review of local government  
16 interpretations of local enactments articulated in Clark v.  
17 Jackson County, 313 Or 508, 836 P2d 710 (1992), is  
18 inapplicable to interpretations of local legislation by  
19 local government hearings officers.

20 In reviewing Watson I, the Court of Appeals then  
21 determined that if hearings officers' interpretations of  
22 local enactments are not entitled to deference under Clark,  
23 neither are they entitled to deference under ORS 197.829,  
24 which is applicable to this appeal. Watson v. Clackamas  
25 County, 129 Or App 428, 431-32, 879 P2d 1309, rev den 320 Or  
26 407 (1994) (Watson II). The court remanded this appeal to

1 us, with instructions to reconsider the interpretive issues  
2 presented in petitioners' third and fourth assignments of  
3 error, without according Clark-style deference to the  
4 compliance hearings officer's interpretation of relevant  
5 local legislation.<sup>1</sup> Id.

6 **THIRD ASSIGNMENT OF ERROR**

7 In Watson I, 27 Or App at 171, we described  
8 petitioners' arguments:

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

24 In Watson I, 27 Or LUBA at 172, we discussed the  
25 compliance hearings officer's interpretation of the ZDO, as  
26 follows:

27 "The challenged decision explains the principal  
28 uses permitted outright in the TT-20 zone under  
29 ZDO 403.03 are resource and resource-related uses,  
30 not commercial uses. The decision further

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<sup>1</sup>Petitioners' third assignment of error also included a constitutional argument. However, we rejected that argument in Watson I, 27 Or LUBA at 173, and the Court of Appeals' decision in Watson II does not affect our ruling on that issue.

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

9 Based on the above, we conclude the compliance hearings  
10 officer's interpretation of ZDO Section 403 as not allowing  
11 petitioners in LUBA No. 93-193 to park, store and maintain a  
12 commercial truck on their TT-20 zoned property is reasonable  
13 and correct. McCoy v. Linn County, 90 Or App 271, 752 P2d  
14 323 (1988).

15 The third assignment of error is denied.

16 **FOURTH ASSIGNMENT OF ERROR**

17 In Watson I, 27 Or App at 173, we described  
18 petitioners' arguments:

19 "With regard to the decision challenged in LUBA  
20 No. 93-197, petitioners contend the compliance  
21 hearings officer erred in not considering their  
22 argument that their nonconforming use extends to  
23 the parking, storage and maintenance of five  
24 trucks, not just one truck.<sup>[2]</sup> Petitioners argue  
25 their business grew to five trucks between 1979  
26 and 1987, during which period their business  
27 qualified as a home occupation and did not require  
28 a permit. According to petitioners, the  
29 compliance hearings officer erred in determining

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<sup>2</sup>Although the county has not adopted any decision determining that a nonconforming use of the subject property exists, the parties agree that petitioners in LUBA No. 93-197 were operating a trucking business on the subject property at the time the TT-20 zone was first applied and that the operation of petitioners' trucking business, including the parking, storage and maintenance of one truck, is a valid nonconforming use.

1           that their nonconforming use claim must be  
2           determined in a separate proceeding under the ZDO,  
3           because the ZDO provides no procedure for  
4           determining whether a nonconforming use has been  
5           established." (Emphasis in original.)

6           Petitioners also argue that the Clackamas County Compliance  
7           Hearings Officer Ordinance (CHOO) gives the compliance  
8           hearings officer jurisdiction over all complaints concerning  
9           a violation of the ZDO and places no restrictions on the  
10          compliance hearings officer's authority to make all  
11          determinations necessary to decide whether a violation of  
12          the ZDO has occurred.

13          The challenged decision states:

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

23           "Under Section 1301 of the [ZDO, petitioners] may  
24           make application to the Land Use Hearings Officer  
25           to establish their right to a use of their  
26           property outside of the [current ZDO]. The County  
27           has invited [petitioners] in the past on more than  
28           one occasion to file such an appropriate land use  
29           application, but [petitioners] have elected not to  
30           do so.<sup>[3]</sup>

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<sup>3</sup>For instance, on June 25, 1993 the county Department of Transportation and Development notified petitioners in LUBA No. 93-197 by letter that any contention their nonconforming use had been enlarged or expanded to more than one truck would have to be reviewed in an administrative action under ZDO Section 1206 ("Nonconforming Use"). Record 165.

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

5 In Watson I, 27 Or LUBA at 174-75, we discussed this  
6 interpretive issue, as follows:

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

17 "ZDO Section 202 defines 'nonconforming use' as  
18 follows:

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

24 "ZDO Section 1206 ('Nonconforming Use') includes  
25 provisions governing the continuation,  
26 discontinuation, restoration, replacement,  
27 maintenance and alteration of nonconforming uses.  
28 ZDO Section 1301 ('Administrative Process')  
29 establishes county procedures for a general type of  
30 administrative proceeding called an 'administrative  
31 action.' ZDO 1301.01(A)(1) defines an  
32 'administrative action' as a proceeding in which  
33 'the legal rights, duties, or privileges of  
34 specific parties under [the ZDO] are required to be  
35 determined only after a hearing at which specific  
36 parties are entitled to appear and be heard.'

37 "ZDO Section 1206, together with the definition of  
38 nonconforming use in ZDO Section 202, indicate the  
39 county's intent to regulate nonconforming uses  
40 under the ZDO. Rather than separately setting out

1 procedures for each type of proceeding covered by  
2 the ZDO, ZDO Section 1301 establishes a general  
3 set of procedures for all administrative actions  
4 under the ZDO. Further, a proceeding to determine  
5 the existence or expansion of a nonconforming use  
6 fits the ZDO definition of administrative action.  
7 \* \* \*

8 In addition to the above, we note we have long held  
9 that a local government determination of the existence of a  
10 nonconforming use concerns the application of land use  
11 regulations and requires the exercise of discretion.  
12 Consequently, it is both a "land use decision," as defined  
13 in ORS 197.015(10), and a "permit," as defined in  
14 ORS 215.402(4). Pienovi v. City of Canby, 16 Or LUBA 604,  
15 606-07 (1988) (applying parallel definition of "permit"  
16 applicable to cities); see Komning v. Grant County, 20  
17 Or LUBA 481, 492 (1990).

18 As a "permit," a determination concerning the existence  
19 of a nonconforming use must comply with the statutory  
20 requirements for permit proceedings in ORS 215.402 to  
21 215.428. The administrative action process established in  
22 ZDO Section 1301 is designed to comply with these statutory  
23 requirements for permit proceedings. Additionally, in  
24 reviewing a Clackamas County county hearings officer's  
25 decision concerning the existence and expansion of a  
26 nonconforming use, we recently held that ZDO 1206.01  
27 ("Status"), together with the definition of "nonconforming  
28 use" in ZDO Section 202, provide legal standards for a  
29 county determination of the existence of a nonconforming use

1 sufficient to comply with ORS 215.416(8).<sup>4</sup> Tylka v.  
2 Clackamas County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 94-017,  
3 December 19, 1994), slip op 19-20.

4 Based on the above, we conclude it is reasonable and  
5 correct for the compliance hearings officer to interpret ZDO  
6 Sections 1206 and 1301 as establishing a process for  
7 determining the existence of nonconforming uses. The  
8 remaining question is whether it was also reasonable and  
9 correct for the compliance hearings officer to interpret  
10 these ZDO provisions as being the sole process for obtaining  
11 a county determination on the existence of a nonconforming  
12 use.

13 With regard to other permit processes established under  
14 the ZDO (e.g., conditional use permit), there is no question  
15 the sole method to obtain such approval is through the ZDO  
16 process. For instance, one could not defend against an  
17 enforcement proceeding under the CHOO by arguing that the  
18 compliance hearings officer could grant, or find the  
19 defendant is entitled to, a conditional use permit for the  
20 offending use.<sup>5</sup>

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<sup>4</sup>ORS 215.416(8) provides:

"Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county."

<sup>5</sup>There is no real basis for treating determinations of the existence of a nonconforming use differently, except for the historical fact that prior

1           In addition, we note that while the CHOO authorizes the  
2 compliance hearings officer to enforce the ZDO, it does not  
3 authorize the hearings officer to grant permits pursuant to  
4 the ZDO.     However, CHOO Section 10 does authorize the  
5 compliance hearings officer to postpone or continue  
6 enforcement proceedings for good cause, which could  
7 presumably include allowing the defendant time to seek a  
8 determination of the existence of a nonconforming use under  
9 ZDO Sections 1206 and 1301.<sup>6</sup>

10           In conclusion, the compliance hearings officer  
11 interpreted the CHOO and ZDO as requiring the nonconforming  
12 use issues raised by the petitioners in LUBA No. 93-197 to  
13 be determined through an administrative action pursuant to  
14 ZDO Sections 1206 and 1301.     That interpretation is  
15 reasonable and correct.     McCoy v. Linn County, supra.

16           The fourth assignment of error is denied.

17           The county's decisions are affirmed.

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to the creation of the present system of land use laws and review of land use decisions by this Board, only circuit courts had jurisdiction to determine the existence of a vested right or nonconforming use. These determinations historically were not made through the local government land use permitting process.     See Forman v. Clatsop County, 297 Or 129, 681 P2d 786 (1984).

<sup>6</sup>As we noted in Watson I, 27 Or LUBA at 175 n 8, 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.