BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DENNIS TYLKA, ADAM LEVERENZ, and DAVE PEIL, Petitioners, vs. CLACKAMAS COUNTY, Respondent, and JERRY HAGEN and ELAINE HAGEN, Intervenors-Respondent.	LUBA No. 94-017 FINAL OPINION AND ORDER

Appeal from Clackamas County.

Dennis Tylka, Adam Leverenz, and Dave Peil, Welches, filed the petition for review. Dennis Tylka and Adam Leverenz argued on their own behalf.

Michael E. Judd, Chief Assistant County Counsel, Oregon City, filed a response brief on behalf of respondent.

Steven L. Pfeiffer and Michael C. Robinson, Portland, filed a response brief. With them on the brief was Stoel Rives Boley Jones & Grey. Michael C. Robinson argued on behalf of intervenors-respondent.

SHERTON, Referee; HOLSTUN, Chief Referee, participated in the decision.

REMANDED 12/19/94

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioners appeal a county hearings officer's decision approving the expansion of an existing mobile home park as an alteration of a nonconforming use.

MOTION TO INTERVENE

Jerry Hagen and Elaine Hagen, the applicants below, move to intervene in this proceeding on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property, located in the rural community of Wemme, is 2.93 acres in size and is bordered on the north by U.S. Highway 26. The subject property is designated Low Density Residential by the Clackamas County Comprehensive Plan (plan) and is zoned Hoodland Residential (HR). The surrounding properties are also designated Low Density Residential and zoned HR. Immediately to the east of the northern portion of the subject property is a tavern. The property to the south of the subject property is undeveloped. The property to the west of the southern portion of the subject property is developed with a residence. An approximately 1.5-acre tax lot adjoining the northern portion of the subject property to the west, adjacent to U.S. Highway 26, is in common ownership with the

subject property.[1]

A mobile home park was established on the subject property in the 1950's, when the property was unzoned, and has been in operation continuously since then. On December 14, 1967, the county zoned the property Recreational Residential (RR). Mobile home parks were a conditional use in the RR zone. However, because conditional use approval for the mobile home park on the subject property was not obtained, it became a nonconforming use on December 14, 1967.[2] The nature and scope of the mobile home park use of the subject property at the time the use became nonconforming is a central issue in this case.

At present, the mobile home park consists of 11 mobile homes and a manager's residence. Except for two mobile homes, all structures are clustered on the northern half of the property. There are two access points from U.S. Highway 26 and one from the adjoining property to the east. Internal circulation is provided by two gravel drives. The property is generally level, with drainage to the west. Large trees, principally second growth Douglas

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[1]Whether the 1.5-acre tax lot is a separate legal parcel is unclear. The 1.5-acre tax lot is not included in the application that resulted in the challenged decision. However, the site plan approved by the county as part of the challenged decision shows the proposed new mobile home park access road as extending onto the eastern edge of the 1.5-acre tax lot and labels the 1.5-acre tax lot as "Future Development Area." Record 386.

[2]Mobile home parks are prohibited under the property's current HR zoning.

fir and western red cedar, are interspersed throughout the property.

On May 4, 1993, intervenors applied for approval of an alteration to a nonconforming use. The challenged decision describes intervenors' proposal:

> "[Intervenors] propose to alter the existing use by reconfiguring and upgrading the mobile home park. [Intervenors] propose to redevelop the site with 23 mobile home spaces, two RV [recreational vehicle] spaces, a manager's residence (mobile home), a 1,500 square-foot single-story community center building, a 1,200 square-foot single-story enclosed storage building and a 2,500 square-foot open space and recreation area. Additional alterations would include reducing the number of access points from three to one, realigning the internal access road system and providing an internal pedestrian circulation system." Record 407.

On July 20, 1993, the planning department issued a decision approving intervenors' application. The planning department's decision was appealed to the county hearings officer. After a public hearing before the hearings officer on September 8 and 29, 1993, the record was left open until October 29, 1993. On November 10, 1993, the hearings officer orally announced his decision approving intervenors' application. The hearings officer's final written decision was issued on January 21, 1994. On February 9, 1994, petitioners initiated this appeal challenging the January 21, 1994 decision.

On March 1, 1994, the county filed a Notice of Withdrawal with LUBA, informing LUBA that it was withdrawing

the challenged decision for reconsideration pursuant to ORS 197.830(12)(b).[3] On March 10, 1994, the chief assistant county counsel (hereafter county counsel) sent the hearings officer a letter, together with a copy of LUBA's notice to the parties that the challenged decision had been withdrawn. The letter states the county counsel "chose to withdraw the decision" because he had concerns about the adequacy of the findings, concerns shared by intervenors' attorney, and suggests that "this is an appropriate case to take advantage of the opportunity afforded by [ORS 197.830(12)(b)] to 'beef up' the findings." Record 469.

On March 23, 1994, the hearings officer sent a letter to intervenors' attorney, with copies to the petitioners in this pending LUBA appeal. The letter states, in relevant part:

> "Pursuant to your request, enclosed please find a copy of my [handwritten] hearing notes from the public hearing held on September 29, 1993 in [this] matter. It is my understanding that, since the county has elected to withdraw the [hearings officer's decision] filed on January 21, 1994, you, as the attorney for the applicants propose to submit supplemental findings for my review, and you request to review the hearing notes for that

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[3]ORS 197.830(12)(b) provides:

> "At any time subsequent to the filing of a notice of intent to appeal and prior to the date set for filing the record, the local government * * * may withdraw its decision for purposes of reconsideration. If a local government * * * withdraws an order for purposes of reconsideration, it shall, within such time as [LUBA] may allow, affirm, modify or reverse its decision. * * *"

purpose. * * *" Record 445.

On April 11, 1994, intervenors' attorney mailed a 21-page revised findings document to the hearings officer. Copies of this document were not provided to petitioners. Record 423. On April 28, 1994, the hearings officer signed a new Findings and Decision document. This document appears to be identical to the revised findings document submitted by intervenors' attorney. The hearings officer sent the April 28, 1994 decision document to the planning department for filing, noting that it was submitted "pursuant to [the] March [1], 1994 action by the County withdrawing the previously issued Findings and Decision of the Hearings Officer under ORS 197.830(12)(b)." Record 400.

On May 4, 1994, the Board received the hearings officer's April 28, 1994 decision, submitted by the county as its decision on reconsideration. On May 24, 1994, petitioners refiled their notice of intent to appeal, challenging the April 28, 1994 decision.

FIRST ASSIGNMENT OF ERROR

A. Authority to Withdraw Decision

Petitioners contend the county counsel exceeded his authority by unilaterally deciding to withdraw the challenged decision. Petitioners argue the March 10, 1994 letter to the hearings officer from the county counsel indicates the county counsel, not the hearings officer, decided to withdraw the challenged decision. Record 469.

According to petitioners, this violates Clackamas County Zoning and Development Ordinance (ZDO) 1304.01, which provides that the "decision of the Hearings Officer shall be the final decision of the County * * *."

The county and intervenors (respondents) argue the county counsel properly acted as the local government's agent in withdrawing the challenged decision for reconsideration after this appeal was filed. Respondents argue nothing in ORS 197.830(12)(b), OAR 661-10-021 (LUBA's implementing rule) or ZDO 1304.01 prohibits the county counsel acting as the county's agent in this manner. Respondents further argue the hearings officer's adoption of revised findings, and his transmittal letter stating the modified decision was issued pursuant to the county's withdrawal of the previous decision under ORS 197.830(12)(b) (Record 400), indicate he concurred with the withdrawal.

OAR 661-10-075(6) requires the county to be represented by an attorney in this appeal proceeding. The county counsel represents the county in this appeal. Therefore, the county's notice of withdrawal was properly submitted by the county counsel. This Board is not authorized to inquire whether a document filed by an attorney representing a party in an appeal before this Board is specifically authorized by that party, and to reject the document if it is not so

authorized.[4] Gettman v. City of Bay City, ___ Or LUBA ___ (LUBA No. 94-171, October 5, 1994).

This subassignment of error is denied.

B. County Proceedings After Withdrawal

Petitioners contend the county's withdrawal of the hearings officer's initial decision, after it was appealed to LUBA, meant there no longer was a county decision in this matter, and any new county decision was required to be adopted by an impartial decision maker, without ex parte contacts and only after reviewing all the evidence in the record. See Fasano v. Washington Co. Comm., 264 Or 575, 507 P2d 23 (1973). Petitioners argue the county counsel's March 10, 1994 letter to the hearings officer and intervenors' submittal of proposed findings to the hearings officer after the withdrawal, without notice to petitioners, constitute impermissible ex parte contacts.[5] According to

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[4]In any case, the March 10, 1994 letter cited by petitioners does not establish that the county counsel acted without authorization from the hearings officer in withdrawing the hearings officer's initial decision. The letter states:

> "As we have discussed, I chose to withdraw the decision because of my concern that LUBA would find deficiencies in the findings * * *." (Emphasis added.) Record 469.

Petitioners provide no reason to conclude the prior "discussions" between the hearings officer and county counsel did not include authorization for the county counsel to withdraw the challenged decision.

[5]Petitioners also imply that communications between the county counsel and intervenors' attorney constituted ex parte contacts. We disagree. Because the county counsel is not the decision maker, communications between the county counsel and a party are not improper ex parte

petitioners, these ex parte contacts resulted in the hearings officer prejudging the contested matter.

Petitioners further argue the hearings officer's proceedings after withdrawal violated ZDO 1303.09 ("Limitations on Hearings Officer"). According to petitioners, ZDO 1303.09 does not allow the hearings officer to communicate with intervenors regarding the subject application without providing petitioners an opportunity to participate, or to consider the county counsel's letter or the proposed findings submitted by intervenors without giving petitioners an opportunity to rebut such findings.

Respondents argue LUBA has previously held that ORS 197.830(12)(b) sets no requirements for a local government's proceedings after withdrawal of its decision and allows withdrawal for the sole purpose of adopting revised findings. ONRC v. City of Seaside, 26 Or LUBA 645 (1994). Respondents further argue intervenors' submittal of proposed findings to the hearings officer after withdrawal is analogous to the prevailing party, after a tentative oral decision, submitting proposed findings to the local decision maker, which LUBA has previously determined does not constitute an unlawful ex parte contact. Caine v. Tillamook County, 25 Or LUBA 209, 233 (1993). Respondents also argue petitioners have the burden of demonstrating that the

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communications. McKenzie v. Multnomah County, 27 Or LUBA 523, 532, aff'd 131 Or App 177 (1994).

hearings officer was biased or prejudged the subject application, and petitioners have failed to make such a demonstration. Heiller v. Josephine County, 23 Or LUBA 551, 554 (1992).

The county argues ZDO 1303.09 does not apply in this situation, but does not explain why that is so. Intervenors argue that no violation of ZDO 1303.09 occurred, because the proposed findings themselves do not constitute an ex parte contact and intervenors' transmittal letter does not discuss any issue involved in the case. Intervenors alternatively argue any violation of ZDO 1303.09 is, at most, a procedural error which provides a basis for reversal or remand only if petitioners demonstrate their substantial rights were prejudiced, which petitioners have failed to do. Intervenors further argue ZDO 1303.09 does not give petitioners a substantial right to rebut ex parte contacts, if those contacts do not contain new evidence.

To establish actual bias or prejudgment on the part of a local decision maker, petitioners have the burden of showing the decision maker was biased or prejudged the application and did not reach a decision by applying relevant standards based on the evidence and argument presented. Eppich v. Clackamas County, 26 Or LUBA 498, 505 (1994); Heiller v. Josephine County, supra. That the hearings officer accepted proposed findings from intervenors, and subsequently adopted those findings as his

own, is insufficient to establish bias or prejudgment. In addition, we do not see that petitioners' Fasano rights to present and rebut evidence were violated, as petitioners do not allege that intervenors' letter or proposed findings contain new evidence.

ORS 197.830(12) simply provides that if a local government withdraws a challenged decision for reconsideration, it shall "affirm, modify or reverse its decision." Neither ORS 197.830(12) nor OAR 661-10-021 establishes any requirements regarding the nature of the local government proceedings conducted after withdrawal. ONRC v. City of Seaside, supra. However, we agree with petitioners that after a withdrawal pursuant to ORS 197.830(12)(b), a local government must make a new final decision. Therefore, the local government must follow any applicable requirements its own land use regulations impose for making such a decision.

ZDO Section 1303 governs the conduct of county hearings officer proceedings. ZDO 1303.09 provides, in relevant part:

> "LIMITATIONS ON HEARINGS OFFICER: The Hearings Officer shall not:
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> "A. Communicate, directly or indirectly, with any party or his representatives in connection with any issue involved except upon notice and opportunity for all parties to participate; [nor]
>
> "B. Take notice of any communications, reports, staff memoranda, or other materials prepared

> in connection with the particular case unless the parties are afforded an opportunity to contest the material so noted[.]
>
> "* * * * *"

Nothing in the wording of ZDO 1303.09A limits its application to communications made prior to the closing of the evidentiary record. Similarly, nothing in the wording of ZDO 1303.09B exempts proposed findings from the class of "any communications, reports, staff memoranda, or other materials prepared in connection with the particular case * * *." (Emphases added.) We therefore conclude ZDO 1303.09 is applicable to the hearings officer's proceedings after withdrawal of the challenged decision, and that it prohibits the hearings officer from receiving communications from intervenor without providing petitioners an opportunity to participate and from considering intervenors' proposed findings without providing petitioners an opportunity for rebuttal.[6] Additionally, ZDO 1303.09B prohibits the hearings officer from receiving communications from the county counsel regarding the subject proceeding without providing petitioners an opportunity for rebuttal.

The hearings officer's acceptance of communications

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[6]Although we have previously stated that allowing the prevailing party to submit proposed findings to the decision maker does not constitute an impermissible ex parte contact, and that there is no "right" to rebut proposed findings, we have always qualified such statements with a phrase such as "absent a local code provision to the contrary." Sorte v. City of Newport, 26 Or LUBA 236, 244-45 (1993); Caine v. Tillamook County, supra. ZDO 1303.09 is a local code provision to the contrary.

from intervenors and the county counsel and proposed findings from intervenors, without providing petitioners an opportunity for rebuttal, violated ZDO 1303.09. Intervenors argue that a violation of ZDO 1303.09 is a procedural error and, therefore, provides a basis for reversal or remand only if petitioners' substantial rights are prejudiced. ORS 197.835(7)(a)(B). However, even if a violation of ZDO 1303.09 is regarded as merely a procedural error, ZDO 1303.09 itself gives parties substantial rights to full participation in, and opportunity to rebut materials submitted during, a hearings officer's proceeding. Those substantial rights afforded to petitioners by ZDO 1303.09 were prejudiced here.

This subassignment of error is sustained.[7]

The first assignment of error is sustained, in part.

PRELIMINARY ISSUE

Respondents assert that issues petitioners seek to raise in several of their remaining assignments of error have been waived, because they were not raised in the county proceedings, as required by ORS 197.763(1) and

[7]Sustaining this subassignment of error requires us to remand the county's decision. OAR 661-10-071(2)(c). On remand, the hearings officer will have to reopen the local proceedings, at least to provide petitioners with an opportunity to respond to intervenors' previous communication and proposed findings. Consequently, we address the remainder of petitioners' assignments of error only to the extent they raise legal issues, the resolution of which could be helpful to the parties on remand.

ORS 197.835(2).[8]

Petitioners argue they are entitled to raise new issues in this appeal under ORS 197.835(2)(b), because the county's notice of the public hearing before the hearings officer was defective. According to petitioners, the notice of hearing did not indicate the proceeding would include determinations concerning whether a protected nonconforming use exists on the subject property and the extent of any such nonconforming use.

ORS 197.763(3)(a) requires a local government's notice of an initial quasi-judicial land use hearing to "[e]xplain the nature of the application and the proposed use or uses

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[8]ORS 197.763(1) provides, in relevant part:

> "An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised with sufficient specificity so as to afford the [local government decision maker], and the parties an adequate opportunity to respond to each issue."

ORS 197.835(2) provides, in relevant part:

> "Issues [raised before LUBA] shall be limited to those raised by any participant before the local hearings body as provided in ORS 197.763. A petitioner may raise new issues [before LUBA] if:
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> "(a) The local government failed to follow the requirements of ORS 197.763; or
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> "(b) The local government made a land use decision * * * which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final action."

which could be authorized." ORS 197.835(2)(a) allows us to consider issues raised by petitioners, regardless of whether they were raised below, if the local government's notice did not comply with ORS 197.763(3)(a). Similarly, ORS 197.835(2)(b) allows us to consider issues raised by petitioners, regardless of whether they were raised below, if the local government's "notice of the proposed action did not reasonably describe the local government's final action."

Here, the county's notice of the hearings officer's September 8, 1993 hearing stated the "Subject" was "Expansion of a Nonconforming Use." Record 268. The notice also stated the "Proposal" was an appeal of county "staff approval of the expansion of the existing mobile home park which is a Nonconforming Use." (Emphases added.)

As demonstrated by the quoted provisions, the county's hearing notice suggests the county had already determined that the existing mobile home park qualifies as a nonconforming use, and that the only issue to be addressed in the subject proceeding is whether to approve an expansion of the existing nonconforming use. In fact, the county had not previously determined whether there is a protected nonconforming use of the subject property and, if so, the

nature and extent of that nonconforming use.[9] The county's final decision concerning intervenors' proposal includes a determination that a nonconforming use of the subject property exists, as well as approval for expansion of the nonconforming use.

We agree with petitioners that the county's notice of hearing failed to adequately describe the nature of the application and the uses which could be authorized, as required by ORS 197.763(3)(a), and failed to reasonably describe the county's final action pursuant to ORS 197.835(2)(b). Either of these deficiencies in the hearing notice means that petitioners may raise issues in this appeal regardless of whether they were raised below.

INTRODUCTION TO REMAINING ASSIGNMENTS OF ERROR

In determining whether to approve a proposed use of property as an alteration of a nonconforming use, where the local government has not previously determined that a nonconforming use exists, there are generally four inquiries that the local government must make. Cf. Spurgin v. Josephine County, ___ Or LUBA ___ (LUBA no. 94-087, December 8, 1994), slip op 4-5 (determining whether an existing use of property may continue as a nonconforming use). First, did the use lawfully exist at the time the

[9]As is explained in more detail below, such determinations must be made before the county can determine whether to allow an expansion of any existing nonconforming use.

zoning which first made the use unlawful was applied? Second, what was the nature and extent of the use at the time it became nonconforming? Third, if the use lawfully existed at the time restrictive zoning was applied, has the use been discontinued or abandoned such that the right to continue the use or that part of the use as a nonconforming use was lost? Fourth, to the extent the proposed use constitutes an alteration of the lawfully established nonconforming use, structure or physical improvements, does that alteration comply with the standards governing alteration of nonconforming uses?[10]

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[10]The statutory provisions governing county decisions concerning continuation, discontinuation, replacement and alteration of nonconforming uses are set out in ORS 215.130(5) through (9) as follows:

> "(5) The 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. Alteration of any such use may be permitted to reasonably continue the use. Alteration of any such use shall be permitted when necessary to comply with any lawful requirement for alteration in the use. A change of ownership or occupancy shall be permitted.
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> "(6) Restoration or replacement of any use described in subsection (5) of this section may be permitted when restoration is made necessary by fire, or other casualty or natural disaster. Restoration or replacement shall be commenced within one year from the occurrence of the fire, casualty or natural disaster.
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> "(7) Any use described in subsection (5) of this section may not be resumed after a period of interruption or abandonment unless the resumed use conforms with the requirements of zoning ordinances or regulations applicable at the time of the proposed resumption.

As explained below, we agree with petitioners that the county's findings are inadequate to answer the second of the above inquiries. Because the county failed to adequately establish the nature and extent of the nonconforming use at the time it became nonconforming, and this determination is an essential starting point for answering the third and fourth inquiries, we do not address several assignments of error made by petitioners concerning the adequacy of the county's response to the third and fourth inquiries.

FOURTH ASSIGNMENT OF ERROR

Petitioners contend the county's determination regarding the existence of a nonconforming use of the subject property for a mobile home park violates "petitioners' right of procedural due process under the 5th Amendment of the United States Constitution." Petition for Review 24. Petitioners argue the county has no "clear and precise" standards for making such a determination and,

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"(8) Any proposal for the alteration of a use under subsection (5) of this section, except an alteration necessary to comply with a lawful requirement, for the restoration or replacement of a use under subsection (6) of this section or for the resumption of a use under subsection (7) of this section shall be subject to the provisions of ORS 215.416.

"(9) As used in this section, 'alteration' of a nonconforming use includes:

"(a) A change in the use of no greater adverse impact to the neighborhood; and

"(b) A change in the structure or physical improvements of no greater adverse impact to the neighborhood."

therefore, its determination is "arbitrary and capricious." Id. Petitioners further complain they were not provided "a clear and precise process for effectively submitting proof and arguments contesting [the county's determination that a nonconforming use exists]." Id. Finally, petitioners contend the county's proceeding was not conducted as a "contested case" under ORS 215.402, as required by ORS 215.130(8) for alterations of nonconforming uses, and petitioners were handicapped because they did not understand the process used by the county.[11]

Intervenors argue that petitioners' constitutional arguments are insufficiently developed to warrant review. Joyce v. Multnomah County, 23 Or LUBA 116, 118, aff'd 114 Or App 244 (1992). We agree. We have repeatedly held that we will not consider claims of constitutional violations where the parties raising such claims do not supply legal argument in support of the claims. Perry v. Yamhill County, 26 Or LUBA 73, 77 (1993); Joyce v. Multnomah County, supra; Van Sant v. Yamhill County, 17 Or LUBA 563, 566 (1989); Mobile Crushing Company v. Lane County, 11 Or LUBA 173, 182

[11]Petitioners also complain the ZDO provides insufficient guidance with regard to what regulations, other than the provisions of ZDO 1206.06 ("Alterations and Changes"), apply to the alteration of a nonconforming use. However, as petitioners concede that ZDO 1206.06 establishes standards for the alteration of a nonconforming use, petitioners do not contend the county has no standards for approving alterations to a nonconforming use. Under another assignment of error, petitioners contend the county erred by not applying particular ZDO provisions, in addition to ZDO 1206.06, in approving the alteration of a nonconforming use. We address those arguments infra.

(1984).

Regarding petitioners' statutory argument, petitioners fail to identify specific statutory provisions applicable to "contested cases," as defined in ORS 215.402, with which they contend the county's proceeding did not comply. However, petitioners do make a focused argument that the county lacks standards in its regulations to govern its determination concerning the existence of a nonconforming use of the subject property. We therefore consider whether the county's determination that a nonconforming use of the subject property exists complies with the requirement of ORS 215.416(8) that "[a]pproval 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."[12]

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." It is this right to continue a lawfully established use that is generally described as the protected "nonconforming use" right, although ORS 215.130(5) does not use or define the term "nonconforming use." However, ZDO

[12]A county determination concerning the existence of a nonconforming use is a "permit," as defined in ORS 215.402(4). Komning v. Grant County, 20 Or LUBA 481, 492-93 (1990); see Pienovi v. City of Canby, 16 Or LUBA 604, 606 (1988) (city determination concerning existence of nonconforming use is "permit" under parallel definition in ORS 227.160(2)).

Section 202 defines "nonconforming use" as follows:

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

Additionally, ZDO 1206.01 ("Status") provides a "nonconforming use may be continued although not in conformity with the regulations for the zone in which the use is located."[13]

The county argues that the above ZDO provisions constitute sufficient legal standards on which it may base a determination concerning the existence of a protected nonconforming use right. The county further argues that it is not required to codify in its zoning ordinance all the fine points of nonconforming use case law established in decisions of the Oregon appellate courts.

The Oregon Court of Appeals has recently explained that it does not construe ORS 227.173(1) (the provision parallel to ORS 215.416(8) applicable to cities) "to require standards and criteria to be set forth in an ordinance with a level of specificity that states which standards are applicable to all particular circumstances and how they might apply." (Emphasis in original.) BCT Partnership v. City of Portland, 130 Or App 271, 276, ___ P2d ___ (1994).

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[13]ZDO Section 1206 ("Nonconforming Use") includes additional provisions implementing ORS 215.130(5) through (9) with regard to the discontinuation, restoration, replacement, maintenance and alteration of nonconforming uses.

The court concluded that, "if an ordinance contains provisions that can reasonably be interpreted and explained as embodying the standards and criteria applicable to the particular decision, it is specific enough to satisfy ORS 227.173." Id.

We see no reason to construe ORS 215.416(8) to require any more specificity in standards and criteria than is required by the similarly-worded ORS 227.173(1). The ZDO 202 definition of "nonconforming use," together with the provision of ZDO 1206.01 stating that a "nonconforming use may be continued," embody the standards applicable to determining the existence of a protected nonconforming use right sufficiently to satisfy ORS 215.416(8). The county may properly base its determination concerning the existence of a nonconforming use of the subject property on these ZDO provisions. We also agree with the county that it may consider relevant legal principles concerning the existence of nonconforming uses that are set out in the opinions of the Oregon appellate courts and this Board, without having to adopt such principles as county regulations.

The fourth assignment of error is denied.

SECOND, THIRD AND NINTH ASSIGNMENTS OF ERROR

As we understand it, petitioners do not dispute that at some point prior to 1967, a mobile home park had been lawfully established on the subject property. However, petitioners do contend the record does not contain

substantial evidence to support a determination that the subject property was used as a mobile home park on December 14, 1967, when restrictive zoning was first applied.[14] In addition, petitioners contend the county's findings are inadequate to establish the nature and extent of any mobile home park use in existence on the subject property when retrictive zoning was first applied.[15]

Petitioners specifically argue the challenged findings are conflicting with regard to the number of mobile home units existing at the time the mobile home park became nonconforming. Petitioners also argue the findings fail to address the issue of whether the entire mobile home park in existence at the time the use became nonconforming was located on the subject 2.93 acres.[16] Finally, petitioners argue the findings fail to establish whether in 1967, when the restrictive zoning was applied, the subject property was

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[14]This evidentiary challenge is inextricably intertwined with the evidentiary challenge described in n 15. We do not address either.

[15]Petitioners also contend the record does not contain substantial evidence to support a determination concerning the nature and extent of such mobile home park use. However, because the county's determination of the nature and extent of the nonconforming use existing in 1967 is inadequate, as explained in the text, there is no point in reviewing the adequacy of the record to support that determination.

[16]Petitioners contend there is evidence in the record that the mobile home park use in existence in 1967, when restrictive zoning was first applied, included mobile homes located on other property, in addition to the subject 2.93 acres. Record 42. Petitioners argue that use of property other than the subject 2.93 acres cannot establish a protected right to nonconforming use of the 2.93 acres.

used by recreational vehicles (RVs). According to petitioners, the ZDO regulates RV facilities as a type of use separate and distinct from mobile home/trailer parks and, therefore, there can be a nonconforming use of the subject property as an RV facility only if it was used as an RV facility in 1967, when restrictive zoning was applied.[17]

After a local government determines that a nonconforming use was lawfully established, it must identify the nature and extent of the nonconforming use. See Hendgen v. Clackamas County, 23 Or LUBA 285, 287, rev'd on other grounds 115 Or App 117 (1992); Warner v. Clackamas County, 22 Or LUBA 220, 227 (1991), aff'd 111 Or App 11 (1992); Smith v. Lane County, 21 Or LUBA 228, 237 (1991); City of Corvallis v. Benton County, 16 Or LUBA 488, 497 (1988). This requirement is important because the protected right to continue a nonconforming use is a right to continue the nature and extent of use that existed at the time the use became nonconforming. Polk County v. Martin, 292 Or 69, 366 P2d 952 (1981); Spurgin v. Josephine County, supra, slip op at 9-10. Additionally, we note it is the proponents of a nonconforming use that have the burden of producing evidence from which a local government can make an adequate

[17]Under the ZDO, an RV facility is a type of "service recreational facility," which is listed as a conditional use under the current HR zoning of the property. ZDO 312.05(6). According to petitioners, if no nonconforming use of the subject property as an RV facility exists, the proposed use of the subject property as an RV facility can be approved only if the standards of ZDO 813.01D for RV camping facilities are met.

determination of the nature and extent of the nonconforming use. Warner v. Clackamas County, 25 Or LUBA 82, 86 (1993).

As we explained in Spurgin, supra, slip op at 10-11:

> "[A] county has some flexibility in the manner and precision with which it describes the scope and nature of a nonconforming use. However, [a] county may not, by means of an imprecise description of the scope and nature of the nonconforming use, authorize de facto alteration or expansion of the nonconforming use. At a minimum, the description of the scope and nature of the nonconforming use must be sufficient to avoid improperly limiting the right to continue that use or improperly allowing an alteration or expansion of the nonconforming use without subjecting the alteration or expansion to any standards which restrict alterations or expansions." (Footnote omitted.)

Under ORS 215.130(9) and ZDO 1206.06A(2), an alteration of a nonconforming use may be allowed only if it has "no greater adverse impact on the neighborhood."[18] Therefore, in this case, the county's description of the nature and extent of the nonconforming use must be specific enough to provide an adequate basis for determining which aspects of intervenors' proposal constitute an alteration of the nonconforming use and for comparing the impacts of the proposal to the impacts of the nonconforming use that intervenors have a right to continue.

With regard to identifying the nature and scope of the

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[18]An alteration of a nonconforming use may include expansion of the nonconforming use, provided the "no greater adverse impacts" standard of ORS 215.130(9) is satisfied. Gibson v. Deschutes County, 17 Or LUBA 692, 702 (1989).

nonconforming use, the challenged decision states:

> "This record establishes that a lawful nonconforming use was established on the subject property for the operation of a mobile home/trailer house and RV park at the time of restrictive zoning on December 14, 1967. * * * Although the record does not clearly establish the exact number of mobile homes, trailer homes or RVs which were on the property on December 14, 1967, there is substantial evidence that there were a significant number of those units, up to 28." (Emphasis added.) Record 405-06.

However, the decision also states:

> "* * * Although the Hearings Officer cannot determine with certainty the number of mobile homes/trailer houses and RV units which were on the property at the time of restrictive zoning, that number would have been between 10 to 20 units. * * *." (Emphasis added.) Record 407.

Read together, the above findings state there were somewhere between 10 and 28 mobile homes, trailers and RVs on the subject property at the time the use became nonconforming. We agree with petitioners that this is an insufficient description of the nature and extent of the nonconforming use. Although absolute precision with regard to the number of units on the property when the use became nonconforming may not be required, a range of 10 to 28 units clearly provides an inadequate basis for defining the parameters of the protected nonconforming use right.

Additionally, we agree with petitioners that under the ZDO, mobile home/trailer parks and RV facilities are separate and distinct uses. Any determination that the subject property was used as both a mobile home/trailer park

and RV facility at the time restrictive zoning was applied must include determinations regarding the extent the property was used for each use. The county cannot simply determine use in terms of a total number of interchangeable mobile home/trailer/RV units. Also, to the extent the evidence in the record raises an issue concerning whether any mobile home/trailer park and RV facility existing when restrictive zoning was applied occupied land other than the subject 2.93 acres, the county must address this issue in its findings. Use of property other than the subject 2.93 acres as part of a nonconforming mobile home park would not establish a right to continue the part of the nonconforming use located on other property on the subject 2.93 acres.

The second, third and ninth assignments of error are sustained.

SEVENTH ASSIGNMENT OF ERROR

ZDO Section 825 is entitled "Mobile Home and Trailer Parks." ZDO 825.01J provides:

> "No unit enlargements or expansions of any trailer or mobile home park shall be permitted unless the existing one is made to conform substantially with all the requirements for new construction for such an establishment."

With regard to the applicability of ZDO Section 825, the findings state:

> "The sole criterion for alteration of a nonconforming use is the ZDO criteria [sic] applicable to alteration of nonconforming uses.

> ZDO [Section] 825 applies to new mobile home and trailer parks, not nonconforming uses. Otherwise, ZDO 1206.06 would be unnecessary." Record 417-18.

Petitioners argue the hearings officer's interpretation regarding the applicability of ZDO Section 825 is unreasonable because it is contrary to the express language of ZDO 825.01J stating that expansion of an existing mobile home/trailer park is not allowed unless the existing park is brought into compliance with the requirements for a new park. Petitioners further argue that recognizing ZDO Section 825 as applicable to the proposal would not make ZDO 1206.06 useless, because there are many nonconforming uses other than mobile home/trailer parks.

Respondents point out the challenged decision also contains the following findings relevant to this issue:

> "* * * The Hearings Officer takes official notice of ZDO 1201.01, which provides '[a]ll applications * * * for alteration of a nonconforming use shall be evaluated under the specific criteria listed within this Ordinance.' [T]his section [means] that the application is judged exclusively by the criteria in ZDO 1206.06(A).
>
> "Moreover ZDO [Section 825] applies to new uses. If an alteration to a nonconforming use had to comply with [this section], there would be no need to comply with ZDO 1206.06(A). * * *" Record 417.

Respondents argue that if a request to enlarge or expand a nonconforming mobile home park had to comply with the requirement of ZDO 825.01J to bring the mobile home park into compliance with the requirements of the ZDO for

establishment of a new mobile home park, the requirements for altering such a nonconforming use under ZDO 1206.06 would be made a nullity. Respondents contend it is reasonable to interpret the ZDO as making ZDO 1206.06 the only criterion applicable to alteration of a nonconforming mobile home park, even if ZDO 825.01J does not specifically include the words "except for alteration of a nonconforming use."

Under Gage v. City of Portland, 319 Or 308, 316-17, ___ P2d ___ (1994), and Watson v. Clackamas County, 129 Or App 428, 431-32, ___ P2d ___ (1994), we are not required to defer to interpretations of local enactments by a decision maker other than the local governing body. When reviewing an interpretation of a local enactment by a hearings officer, our acceptance or rejection of the interpretation is determined solely by whether the interpretation is right or wrong. McCoy v. Linn County, 90 Or App 271, 275-76, 752 P2d 323 (1988); Gage v. City of Portland, ___ Or LUBA ___ (LUBA No. 93-030, November 23, 1994), slip op 5.

The hearings officer's interpretation that ZDO Section 825 does not apply to mobile home/trailer parks that are nonconforming uses is reasonable, except with regard to ZDO 825.01J, quoted above. By its express terms, ZDO 825.01J applies to "unit enlargements and expansions" of existing mobile home/trailer parks, where the existing park does not "substantially" conform to the applicable ZDO

requirements for establishment of a new mobile home/trailer park. As explained above, ZDO 202 defines "nonconforming use" as a use "which was legally established prior to the adoption of any provision of this ordinance with which the building, structure or use does not comply." (Emphasis added.) Therefore, provided it was legally established, an existing mobile home/trailer park that does not comply with ZDO requirements applicable to establishment of a new mobile home/trailer park is, by definition, a nonconforming use. If ZDO 825.01J does not apply to nonconforming mobile home/trailer parks, it is a nullity.

On the other hand, if ZDO 825.01J does apply to nonconforming mobile home/trailer parks, ZDO 1206.06 (governing alterations of nonconforming uses) is not a nullity. At a minimum, ZDO 1206.06 would continue to apply to alterations of nonconforming uses other than mobile homes/trailer parks, and to alterations of nonconforming mobile home/trailer parks that are not "unit enlargements or expansions." ZDO 1201.01, which was relied on by the hearings officer as a basis for determining that the subject application is governed solely by ZDO 1206.06, simply states that a number of different types of applications (e.g., zone changes, conditional uses, variances, as well as alterations of nonconforming uses) "shall be evaluated under the specific criteria listed within this Ordinance," i.e. the ZDO. It does not identify which provisions in the ZDO are

specific criteria for a particular type of application.

Based on the above, we conclude it is unreasonable to interpret ZDO 825.01J to be inapplicable to nonconforming mobile home/trailer parks. However, there may be a number of reasonable ways in which ZDO 825.01J could be interpreted to apply to nonconforming mobile home/trailer parks. For instance, interpreting and applying ZDO 825.01J in the context of the subject application may require additional interpretation and application of terms in ZDO 825.01J, such as "unit enlargement and expansion" or "conform substantially." Because the challenged decision must be remanded in any case, we believe it is the county that should interpret and apply ZDO 825.01J to the subject application in the first instance.

The seventh assignment of error is sustained.

The county's decision is remanded.