

## BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CHRIS CORY and  
CURTIS HEINTZ,  
*Petitioners,*

vs.

CLACKAMAS COUNTY,  
*Respondent.*

LUBA No. 2002-181

## FINAL OPINION AND ORDER

## Appeal from Clackamas County.

William C. Cox and Gary P. Shepherd, Portland, filed the petition for review and William C. Cox argued on behalf of petitioners.

Michael E. Judd, Assistant County Counsel, Oregon City, filed the response brief and argued on behalf of respondent.

BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

AFFIRMED 06/18/2003

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

### Opinion by Briggs.

## **2 NATURE OF THE DECISION**

Petitioners challenge a county hearings officer determination that a nonconforming auto wrecking yard use was discontinued.

5 FACTS

6 Petitioners own property located at 7925 S. Zimmerman Road in Clackamas County,  
7 Oregon. The property was zoned Exclusive Farm Use (EFU) in 1976. However, for much of  
8 the last 30 years, several different businesses have used a 3.2-acre portion of the property  
9 (the site) as an auto wrecking and salvage yard facility (wrecking yard).

In mid-July 2001, the wrecking yard operator terminated its lease and removed its inventory from the property. Before the owner was able to find a new tenant, the property was forced into receivership. In June 2002, petitioners' predecessor-in-interest bought the property. In July 2002, petitioners inquired of Clackamas County staff regarding the status of the property's nonconforming use rights under Clackamas County Zoning and Development Ordinance (ZDO) 1206.01 and 1206.02.<sup>1</sup> During discussions between petitioners and county staff regarding allowed uses on the site, county staff informed petitioners that if an application for alteration of a nonconforming use was submitted, the 12-month

<sup>1</sup> ZDO 1206.01 provides:

“A nonconforming use may be continued although not in conformity with the regulations for the zone in which the use is located. Nonconforming use status applies to the lot(s) or parcel(s) upon which the nonconforming use is located and may not be expanded onto another lot or parcel except as provided under [ZDO] 1206.05. A change in ownership of, or a change of operator of, a nonconforming use shall be permitted.”

ZDO 1206.02 provides:

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

1 discontinuance provision under ZDO 1206.02 would be tolled while the application was  
2 pending before the county.

3 On August 8, 2002, petitioners applied for approval to alter a nonconforming use.  
4 Record 80. Petitioners took the position in that application that the wrecking yard use is a  
5 legally established nonconforming use and requested that the county approve conversion of  
6 the nonconforming use to a recreational vehicle storage lot. The county planning director  
7 issued a written decision finding that the nonconforming wrecking yard use on the site was a  
8 legally established nonconforming use. However, the planning director also found that the  
9 nonconforming use had been discontinued because the wrecking yard use ceased for more  
10 than 12 consecutive months, from mid-July 2001 until August 2002. Therefore, the planning  
11 director concluded that any right to continue or alter the nonconforming use was lost. The  
12 planning director then denied the application.

13 Petitioners appealed the planning director's decision to the county hearings officer.  
14 On December 11, 2002, the hearings officer issued a decision finding that petitioners failed  
15 to demonstrate that the legally established wrecking yard was not discontinued for 12  
16 months. The hearings officer also concluded that staff erred in advising petitioners that the  
17 12-month discontinuance period would be tolled during the pendency of an application for  
18 verification/alteration of a nonconforming use. The hearings officer denied the appeal and  
19 affirmed the planning director's decision. This appeal followed.

20 **ASSIGNMENT OF ERROR**

21 ORS 215.130(5), (7) and (10) and ZDO 1206.02 govern the question of whether the  
22 wrecking yard use has been discontinued.<sup>2</sup> See n 1 (setting out ZDO 1206.02). Petitioners

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<sup>2</sup> ORS 215.130 provides, in relevant part:

“(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. \* \* \*

\*\*\* \* \*\*\*

1 argue that the county misapplied the law in its finding that the nonconforming wrecking yard  
2 use had been discontinued because it had not been operational for over 12 months.  
3 According to petitioners, the county erred by (1) viewing the nonconforming wrecking yard  
4 use as a single use rather than a group of uses that comprised the wrecking yard business; (2)  
5 determining that the entire nonconforming use was discontinued on the date that the  
6 wrecking yard business closed; and (3) failing to toll the period of discontinuance during the  
7 pendency of the nonconforming use determination before the county.

8           **A. Nonconforming Uses Discontinuance Determination**

9           **1. Wrecking Yard as One Use or as Several Component Uses**

10          Petitioners argue that the wrecking yard use is properly viewed as a collection of  
11 component parts: (1) wrecked automobile towing and receiving; (2) automobile storage; (3)  
12 parts salvage; (4) automobile wrecking; and (5) office uses relating to the wrecking business,  
13 including sales of parts and salvage metal. Petitioners contend that the evidence is undisputed  
14 that (1) the improvements on the subject property were constructed to support the  
15 nonconforming use; (2) all of the listed activities were occurring on the property when those  
16 uses became nonconforming in 1976; and (3) those uses continued, albeit at varying  
17 intensities, from 1976 until 2001. Petitioners contend that there is evidence in the record that,

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“(7)(a) Any use described in [ORS 215.130(5)] 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. \*\*\*

\*\*\* \* \* \*

“(10) A local government may adopt standards and procedures to implement the provisions of this section. The standards and procedures may include but are not limited to the following:

\*\*\* \* \* \*

“(b) Establishing criteria to determine when a use has been interrupted or abandoned under [ORS 215.130(7).]”

1 while the wrecking business itself ceased to operate, component uses continued on the  
2 property, in that (1) automobiles continued to be delivered and stored on-site; (2) the  
3 property owner dismantled some vehicles for parts; (3) parts were sold; (4) sales records  
4 were maintained on the property; and (5) the structures supporting the nonconforming uses  
5 remained on the property.

6 Even if some of those elements were discontinued from July 2001 until July 2002,  
7 petitioners contend that there is ample evidence to show that automobiles continued to be  
8 stored on the property at the time of the hearing on the application and that the owner  
9 removed automobile parts from vehicles on the site in late August 2001. Petitioners cite  
10 *Hendgen v. Clackamas County*, 115 Or App 117, 120, 836 P2d 1369 (1992) as support for  
11 their argument that component uses of the wrecking yard may continue even though the  
12 wrecking yard business itself ceased to operate in July 2002.

13 In *Hendgen*, various businesses used structures on the subject property for storage.  
14 The last business on the property ceased operations; however, the inventory from that  
15 business remained in the storage structures for 18 months after the business closed. The  
16 Court of Appeals concluded that in those circumstances LUBA erred in concluding that the  
17 entire nonconforming use, including the storage use, was discontinued when the business  
18 closed because (1) “simple storage” was a separate component of the businesses that had  
19 used the property; and (2) the storage use continued after the last on-premises business  
20 ceased operations. 115 Or App at 121.

21 The county distinguishes *Hendgen* on its facts. According to the county, the evidence  
22 shows that at the time the wrecking yard business closed, automobiles were hauled off the  
23 property, and the gates that were used to access the site were locked. The county also points  
24 to evidence that only a few parts were left on the shelves and that the records that were left  
25 on the property were limited to a few car titles. The county concedes that one or two vehicles  
26 were left outside the locked gates after the wrecking yard business closed in July 2001 and

1 that those vehicles were pulled onto the site sometime after that. However, the county  
2 disagrees with petitioners that that evidence is sufficient to establish that the storage and  
3 automobile parts aspects of the nonconforming use continued after the wrecking business  
4 closed. In the county's view, those incidental remains of the former business do not  
5 constitute a "continuation" of those uses in the manner described in *Hendgen*.

6 We agree. Unlike *Hendgen*, the record in the present case does not establish that any  
7 component of the nonconforming use continued after the wrecking yard business closed.  
8 That the business owner failed to remove all of its property from the site, and that the  
9 property owner made efforts to deal with the several vehicles abandoned on the property do  
10 not establish that any part of the nonconforming use continued. Therefore, even assuming the  
11 nonconforming use consisted of several components, the hearings officer did not err in  
12 concluding that use had been discontinued.

13 **2. Discontinuance or Business Fluctuation**

14 Petitioners also argue that the hearings officer erred in concluding that the lack of  
15 activity on the property was not the result of normal fluctuations in the auto wrecking  
16 industry. Petitioners point to evidence to show that the levels of wrecking yard activity on  
17 the subject site fluctuated over time, based on the vehicle inventory and the market for used  
18 auto parts. Petitioners contend that there is evidence in the record that at one point it took  
19 two to three years to rebuild the inventory on the property after extensive crushing and sale  
20 of crushed autos from the property. Petitioners argue that the fluctuations in business activity  
21 is particularly great where, as here, the wrecking yard is operated by a succession of small  
22 business lessees.

23 According to petitioners, the owner of the property could not enter into a new lease  
24 for the site until the receiver had disposed of the prior lease. However, petitioners argue, the  
25 property owner diligently searched for new lessees in the interim, and never intended to let  
26 the nonconforming use lapse while the prior lessee's interests were being resolved.

1 Petitioners argue that all of these facts demonstrate that the inactivity on the site from mid-  
2 July 2001 until June 2002 is due to business fluctuations and not to a discontinuance of the  
3 auto wrecking use altogether.

4 The hearings officer agreed with petitioners that the wrecking yard business is  
5 cyclical. The hearings officer cited to evidence in the record that demonstrates that at times,  
6 the inventory of vehicles is substantially reduced as they are crushed for scrap metal, and that  
7 winter is a slow time for the wrecking business. However, the hearings officer rejected  
8 petitioners' argument that the cessation of business activities on the site can be explained by  
9 a normal business cycle fluctuation for wrecking yards in general or for the wrecking yard  
10 use on this site in particular.<sup>3</sup>

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<sup>3</sup> The hearings officer's decision states, in relevant part:

"\* \* \* [Petitioners] argued that the number of vehicles stored on the site fluctuated significantly over time, and the period after July 2001 merely reflects a low point in the historic fluctuation.

"i. [Petitioners are] correct that cyclical businesses may retain nonconforming use rights. *Tigard Sand and Gravel, Inc. v. Clackamas County*, 149 Or App 417, 424, 943 P2d 1106 (2001) A sporadic and intermittent use may give rise to a permitted nonconforming use. *Polk County v. Martin*, 292 Or 69, 76, 636 P2d 952 (1981). In addition,

'[c]hanges in the volume or intensity of a use generally do not constitute an impermissible change in a nonconforming use provided such changes are attributable to growth or fluctuations in business conditions and are not accompanied by alterations in the nature of, or physical structures employed by the nonconforming use.' *Coonse v. Crook County*, 22 Or LUBA 138 (1991).

"ii. Although [petitioners] failed to provide any evidence regarding the historic level of activity on this site, there is evidence in the record, including the testimony of the Wards, that the number of cars stored on this site fluctuated over time. They testified that the operator would bring in a car crusher and crush many of the cars on the site, selling the crushed cars for scrap metal. However there is no substantial evidence that the activities after July 2001 are consistent with the historic fluctuations. The Wards testified that the wrecking yard operator did not crush all of the cars on the site. The operator retained a certain number of vehicles for parts. In addition, the facility remained open to the public and the operator immediately began to rebuild the inventory of salvage vehicles on the site by accepting additional salvage vehicles. The operator continued to sell car parts from the site. This is consistent with the evidence submitted by [petitioners] of activities at other auto wrecking

1      The hearings officer's findings adequately explain why he believed that the lack of activity  
2      on the site was not reflective of the cyclical nature of the business as a whole or of past  
3      practices on the site itself. We therefore agree with the hearings officer's conclusion that the  
4      auto wrecking use ceased when the auto wrecking business located on the site ceased  
5      operations in mid-July 2002. That conclusion is supported by substantial evidence.<sup>4</sup>

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facilities in the region. \* \* \* The operators of those businesses testified that their businesses fluctuate significantly throughout the year, with winter being the slowest period. However there is no evidence that these businesses shut down and cease operations during this 'slow period.' They testified that they occasionally crush and sell the majority of their inventory of salvage automobiles. However they maintain a certain number of vehicles on the site and continue to rebuild their inventory by accepting additional salvage vehicles.

"iii. In this case there is no substantial evidence that the activities on the site since July 2001 are consistent with the historic fluctuations of the nonconforming use on this site or at other similar facilities. There is no substantial evidence that the wrecking yard operation is a sporadic and intermittent use [that] shuts down periodically. Nor is there any substantial evidence that the lack of activity on the site since July 2001 is attributable to normal fluctuations in the business conditions. The Wards and other neighbors testified that in July 2001 the operator crushed and removed all of the cars on the site and closed and locked the gates to the wrecking yard facility. The operator did not make any attempt to rebuild its inventory of salvage vehicles on the site nor did the facility remain open for parts sales. Therefore the hearings officer finds that, although the wrecking yard use on this site was a cyclical business and the number of vehicles stored on the site fluctuated over time, the [petitioners] failed to bear the burden of proof that the activities after July 2001 are consistent with that historic cyclical operation and is insufficient to maintain the right to continue the wrecking and salvage yard operation as a nonconforming use." Record 8.

<sup>4</sup> The decision sets out the evidence the hearings officer relied upon. The decision states, in relevant part:

- "a. There is substantial evidence in the record, in the form of written and oral testimony based on direct observations from 13 neighbors, that all auto wrecking and salvage activities within the wrecking yard ceased in mid-July 2001. \* \* \* Pacific Car Crushing removed all but two to four vehicles from the site, and the lessee, Northwest Recycling, Inc., locked the gates and ceased all business operations on the site. This is substantial evidence that the use was discontinued in mid-July 2001.
- "b. [Petitioners] dispute the neighbors' testimony and argue that the wrecking yard use continued until at least mid-August 2001.
  - "i. Mr. Carlson testified that 'after the conclusion of the Northwest Recycling lease [he] continued to dismantle and sell car parts...' \* \* \* However, there is no substantial evidence that Mr. Carlson continued the commercial wrecking yard business within the confines of the existing wrecking yard on the site. To the contrary, Mr. Carlson, who resided in the residence in

1           **B. Failure to Toll the Period of Discontinuance During the Pendency of the**  
2           **Nonconforming Use Verification Application**

3           Petitioners argue that county planning staff have, as a matter of course, tolled the time  
4           period for the discontinuance of a nonconforming use while an application to verify that  
5           nonconforming use is pending before the county. In the challenged decision, the hearings

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the northwest corner of [the subject property], states that he worked ‘on  
[his] own vehicles only. \* \* \*

- “ii. [Petitioners] argue that the August 2, 2001 complaint regarding tires, a junk vehicle and a trailer ‘full of putrescible waste’ on the site demonstrates that the wrecking yard use continued to operate. \* \* \* However there is no substantial evidence that the items noted in this complaint related to activities within the wrecking yard or that they resulted from continuation of the nonconforming auto wrecking business. To the contrary, the complaint more likely relates to illegal dumping of autos and auto parts outside of the fenced wrecking yard that neighboring residents testified, and the photographs [in the record] show, continued to occur after the wrecking yard was closed. Tires and inoperable vehicles located inside the wrecking yard site would be consistent with the historic wrecking yard use and unlikely to generate complaints. In addition, the trailer ‘full of putrescible waste’ is more than likely related to the residential use on the site. Metal, plastic and other material generated in the auto salvage business is inert and nonputrescible. \* \* \* [The August 2, 2001] complaint is not sufficient to demonstrate that the nonconforming business continued to operate on the date the complaint was filed. \* \* \*
- “iii. [Petitioners] failed to provide any physical evidence to support \* \* \* testimony that the auto wrecking and salvage business continued after mid-July 2001; i.e., receipts for sales and/or purchase of salvage autos and auto parts.
- “iv. Mr. Zahler testified that Mr. Thom told him that the wrecking yard use continued until September 2001. However Mr. Zahler’s testimony conflicts with Mr. Thom’s own testimony \* \* \* that the use ceased in mid-July [2001].
- “v. The fact that the wrecking yard operator’s license and bond remained in effect until January 2002 does not show that the business operated, merely that it could do so. These documents were necessary to legally operate the wrecking yard between January and July 2001 and would have allowed the operator to continue operating for the remainder of 2001. However, the fact that the operator could have legally continued the use through the remainder of 2001 does nothing to prove that the operator actually did so.” Record 6-7 (italics in original).
- “g. Based on the above findings, the hearings officer finds that the nonconforming use has been discontinued for more than 12 consecutive months and may not be resumed or altered.” Record 9.

1      officer concluded that such tolling of the 12-month time period is inconsistent with ZDO  
2      1206.02.<sup>5</sup> Petitioners argue that this issue was raised for the first time during the hearing  
3      before the hearings officer and therefore they did not have a “reasonable opportunity to  
4      present arguments and evidence responsive to the hearings officer’s interpretation.” Petition  
5      for Review 16. Petitioners also allege that the hearings officer’s interpretation represents a  
6      change in the goalposts that is prohibited by ORS 215.427(3).<sup>6</sup>

7            The hearings officer found that the nonconforming wrecking yard use of the site  
8      ceased in mid-July 2001. The application for verification and alteration of the nonconforming  
9      use was filed on August 8, 2002. As a result, the hearings officer found that the  
10     nonconforming use ceased for more than 12 months, and could not be resumed. *See n 4.* As  
11     an alternative basis for his decision, the hearings officer found that even if the use had  
12     continued to September 2001, the staff practice of tolling the time of discontinuance during  
13     the pendency of a permit application concerning the nonconforming use is not consistent  
14     with the ZDO.

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<sup>5</sup> The decision states, in relevant part:

“The hearings officer finds that, even if the wrecking yard use continued to operate until August or September [2001], the nonconforming use has ceased for more than 12 consecutive months and may not be resumed. The applicant’s filing of an application to change the nonconforming use does not ‘stop the clock’ based on the plain meaning of the words in the ZDO. The ZDO prohibits the use from [being] discontinued for more than 12 consecutive months. If it is discontinued, it is discontinued. A hiatus in the use while an application is prepared and prosecuted is relevant to whether the use is discontinued. The filing of an application is merely an expression of the applicant’s intent to continue the use. The subjective intent of the owner to continue the use is irrelevant in determining whether a use has been discontinued or whether a discontinued use has been resumed. The passage of time alone prohibits resumption of use. *Sabin v. Clackamas County*, 20 Or LUBA 23, 30-31 (1990). \* \* \* The hearings officer finds that the County’s current practice of allowing the filing of an application to stop the running of the clock is inconsistent with the plain meaning of the ZDO.” Record 7.

<sup>6</sup> ORS 215.427(3) provides, in relevant part:

“If [a permit] application was complete when first submitted \* \* \* and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted.” (Emphasis added.)

1           As we explain above, there is substantial evidence in the record to support the  
2 hearings officer's conclusion that the wrecking yard use of the property ceased in mid-July  
3 2001. The hearings officer's interpretation is an alternative to that conclusion and thus any  
4 error in adopting that interpretation is not a basis for reversal or remand.

5           Petitioners' assignment of error is denied. The county's decision is therefore  
6 affirmed.