

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal an order of the county hearings
4 officer denying their application for a determination that
5 the use of two structures is a lawful nonconforming
6 warehouse use and for permission to alter that nonconforming
7 warehouse use.

8 **FACTS**

9 The subject property consists of 267 acres and is zoned
10 General Agricultural District (GAD), an exclusive farm use
11 zone. Zoning was first applied to the subject real property
12 on December 14, 1967. Under the first zoning ordinance
13 applied in 1967 and all subsequent zoning provisions
14 applicable to the subject property, commercial warehouse use
15 of the property was and is prohibited.

16 The subject property is improved with a number of
17 structures. The dispute in this appeal concerns two of
18 these structures, one 80 ft. x 200 ft. and the other 80 ft.
19 x 163 ft. Historically, these two structures were used in
20 conjunction with other businesses located on the property,
21 for storage of materials used in and products sold by those
22 businesses.

23 Between 1967 and 1969, the two structures were used to
24 store "nonagricultural products" in connection with various
25 business ventures conducted on the property. Record 69,
26 163. Over time, the nature of those businesses changed and,

1 consequently, so did the nature of the products stored in
2 the two structures. From 1969 to 1984, the businesses that
3 utilized the two structures primarily sold commercial pellet
4 feeds. In addition, in 1977, a soil amendment business was
5 started on the property and the two structures were used to
6 store products connected with that business. On August 31,
7 1989, the soil amendment business declared bankruptcy and
8 ceased operations. The two structures containing the soil
9 amendment business' supplies and inventory sat idle until
10 December, 1990 when the stored contents were sold by the
11 bankruptcy trustee. In addition, in December, 1990, the
12 subject real property was sold to petitioners. Petitioners
13 desire to use the two structures as warehouses for storage
14 of the cedar fencing products of an off-site business, and
15 not for the purpose of storing supplies or inventory
16 associated with an ongoing business located on the subject
17 property. Record 157.

18 The hearings officer denied petitioners' request for a
19 nonconforming use determination and their request for
20 permission to alter that nonconforming use. This appeal
21 followed.

22 **FIRST ASSIGNMENT OF ERROR**

23 "The hearings officer misapplied the applicable
24 law and erred in determining that there is no
25 separately protected nonconforming use for the two
26 warehouse buildings."

1 **SECOND ASSIGNMENT OF ERROR**

2 "The hearings officer misapplied the applicable
3 law and erred in determining that the two
4 warehouse uses had discontinued in used [sic] for
5 a period of more than twelve (12) consecutive
6 months."

7 The first question under these assignments of error is
8 whether petitioners established the existence of a
9 nonconforming warehouse use of the two structures at issue
10 in this appeal. Assuming the first question is answered in
11 the affirmative, a second question is presented, whether
12 such warehouse use was discontinued for more than 12 months.
13 If so, the nonconforming use was lost under Clackamas County
14 Zoning and Development Ordinance (ZDO) 1206.02.

15 **A. Nonconforming Warehouse Use**

16 Petitioners claim the past use of the two structures is
17 properly considered a nonconforming warehouse use,
18 regardless of whether the structures were used to store
19 materials associated with, and inventory sold by, businesses
20 conducted on the subject property.

21 The county determined:

22 "[Petitioners] argue that at all times since the
23 date of restrictive zoning the two structures in
24 question have been utilized for various
25 warehousing activities, and that the proposed use
26 is also warehousing activity, and it should be
27 approved. This argument is in error. The
28 structures have, during most of the time between
29 1969 and today, been used for the storage of
30 materials in association with different business
31 ventures. However, those structures have not been
32 used for a separate warehousing business. There
33 is no separately protected nonconforming use of

1 [the two structures] for warehousing." Record 3.

2 We agree with the county. It is the nature and extent
3 of the prior lawfully established use which determines the
4 boundaries of permissible continued nonconforming use after
5 the application of a restrictive zoning ordinance. Polk
6 County v. Martin, 292 Or 69, 76, 636 P2d 952 (1981); City of
7 Corvallis v. Benton County, 16 Or LUBA 488, 496 (1988).

8 Zoning was first applied to the property in December
9 1967. The record establishes, at best, that between 1967
10 through 1989, the two structures were used as an incident to
11 other businesses located on the property to store materials
12 associated with those businesses. At no time were the two
13 structures ever held out as independent storage units,
14 available to rent to others for a fee. Any nonconforming
15 use of the two structures from 1967 through 1989 was as part
16 of the operations of on-site businesses, and not as
17 independent warehouses storing items unconnected with
18 businesses on the property.¹

19 This subassignment of error is denied.

20 **B. Abandonment of Nonconforming Use**

21 Under this subassignment of error, petitioners argue

¹Warner v. Clackamas County, 111 Or App 11, ___ P2d ___ (1992), does not require a different result. In Warner, both this Board and the Court of Appeals determined that intermittency and frequency of an alleged nonconforming use are relevant to the scope of a nonconforming use, but not to determining whether a nonconforming use exists in the first place. Here, there was never any independent warehouse use of the two structures, intermittent, infrequent or otherwise.

1 the county erroneously determined that even if there once
2 was a nonconforming warehouse use of the two structures, it
3 was discontinued under ZDO 1206.02, which provides:

4 "If a nonconforming use is discontinued for a
5 period of more than twelve (12) consecutive
6 months, the use shall not be resumed unless the
7 resumed use conforms with the requirements of the
8 [ZDO]."

9 Petitioners argue that even though the soil amendment
10 business, which stored its business materials and inventory
11 in the two structures, discontinued its operations pursuant
12 to a bankruptcy proceeding in 1989, the two structures
13 continued to be used to store materials and inventory until
14 the bankruptcy trustee sold those materials and inventory
15 15 months later. Petitioners contend under these
16 circumstances, the storage use of the two structures was not
17 discontinued during the bankruptcy proceedings within the
18 meaning of ZDO 1206.02.

19 Under the above subassignment of error, we determine
20 that any nonconforming use of the two structures from 1967
21 through 1989 was as part of ongoing businesses (most
22 recently a soil amendment business) conducted on the subject
23 property. When the soil amendment business declared
24 bankruptcy and ceased its operations on August 31, 1989, it
25 discontinued any such nonconforming use of the two
26 structures as well. The fact that materials associated with
27 the soil amendment business and that business' inventory
28 occupied space in the two structures until sold by the

1 bankruptcy trustee in December 1990, is not the equivalent
2 of the continuation of the soil amendment business of which
3 the two structures were a part.

4 In summary, (1) the soil amendment business ceased its
5 operations for a period of more than twelve months, (2) the
6 only sales made connected to that business were those
7 associated with the liquidation of business assets, and (3)
8 such bankruptcy liquidation sales occurred more than
9 12 months after business operations ceased. Because the
10 active soil amendment business use was discontinued for more
11 than twelve months, the soil amendment business use of the
12 two structures was necessarily also discontinued for that
13 period. Accordingly, any nonconforming use of the two
14 structures was discontinued for more than 12 months and lost
15 under ZDO 1206.02.

16 This subassignment of error is denied.

17 The first and second assignments of error are denied.²

18 **FIFTH ASSIGNMENT OF ERROR**

19 "The hearings officer's findings are not supported
20 by substantial evidence in the record as a whole."

21 In this assignment of error, petitioners challenge the
22 evidentiary support for the county's determinations that the
23 nature of the uses of the two structures on the date of

²In view of our disposition of the first and second assignments of error, no purpose would be served by considering the third and fourth assignments of error.

1 restrictive zoning is unclear, because they allege there is
2 a great deal of evidence in the record about those uses.
3 Petitioners also challenge the evidentiary support for the
4 county's determination that no active use was made of the
5 property during the bankruptcy proceedings, because there is
6 evidence that the structures stored materials associated
7 with that business and its inventory during those
8 proceedings.

9 The county found that it could not determine exactly
10 what use of the two structures existed on December 14, 1967,
11 the date restrictive zoning was initially applied. However,
12 the county also found that even if the use of the two
13 structures was as described by petitioners from 1967 through
14 1989, that use did not establish the existence of a
15 nonconforming independent warehouse use of the two
16 structures. We uphold the county's latter determination,
17 supra. Therefore, petitioners' arguments concerning the
18 evidentiary support for the finding that the nature of the
19 use of the two structures on the date zoning was applied to
20 the property is unclear, provide no basis for reversal or
21 remand of the county's decision.

22 We hold above that the storage of products from the
23 defunct soil amendment business during the bankruptcy
24 proceedings does not establish continuation of the
25 nonconforming soil amendment business adequate to avoid the
26 continued use requirements of ZDO 1206.02. Consequently,

1 petitioners' arguments concerning the existence and weight
2 of evidence that the two structures contained products
3 awaiting liquidation during bankruptcy proceedings provide
4 no basis for reversal or remand of the challenged decision.

5 The fifth assignment of error is denied.

6 The county's decision is affirmed.