

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 KIIM STAVRUM and AMBER TUDOR,
5 *Petitioners,*

6
7 vs.

8
9 CLACKAMAS COUNTY,
10 *Respondent.*

11
12 LUBA No. 2014-101

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from Clackamas County.

18
19 Kiim Stavrum, Oregon City, filed a petition for review and argued on his
20 own behalf.

21
22 Nathan K. Boderman, Assistant County Counsel, Oregon City, filed a
23 response brief and Nathan K. Boderman and Keyra Loo, Certified Law Clerk,
24 argued on behalf of respondent.

25
26 RYAN, Board Chair; BASSHAM, Board Member; HOLSTUN, Board
27 Member, participated in the decision.

28
29 AFFIRMED 05/08/2015

30
31 You are entitled to judicial review of this Order. Judicial review is
32 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a decision by the county approving an application for a conditional use permit for a horse boarding facility.

FACTS

Petitioners’ property is a 4.89-acre parcel zoned Rural Residential Farm Forest 5-acre Minimum (RRFF-5). In addition to a residence and tennis court, the property contains a 16-stall barn, covered riding arena, and pasture. The existing 16-stall barn was constructed in late 2013/early 2014. The barn was not constructed in accordance with the state Structural Specialty Code, pursuant to a county-issued exemption for an “agricultural building.” Record 158-59. The barn has been constructed partially within the 10-foot side yard setback required by the county zoning ordinance. Record 8.

After the barn was constructed, petitioners began operating a horse boarding stable and riding arena on the property. The county instituted enforcement proceedings and petitioners subsequently applied for a conditional use permit to operate a horse boarding facility and riding arena on the property. The hearings officer approved the conditional use permit with conditions. This appeal followed.

FIRST ASSIGNMENT OF ERROR

The Clackamas County Zoning and Development Ordinance (ZDO) 309.03 lists primary uses allowed in the RRFF-5 zoning district. Three provisions of ZDO 309.03 are relevant to the first assignment of error and we set them out below.

A. ZDO 309.03(F)

One of the primary uses in the RRFF-5 zone is:

1 “F. Public and private parks, community gardens, campgrounds,
2 playgrounds, recreational grounds, hiking and horse trails,
3 pack stations, corrals, *stables*, and similar casual uses
4 *provided that such uses are not intended for the purpose of*
5 *obtaining a commercial profit[.]*” (Emphases added.)

6 “Stable, Boarding or Riding” is defined in ZDO 202 as:

7 “[p]remises that are used by the public for the training, riding,
8 boarding, public exhibition or display of livestock for commercial
9 or noncommercial purposes. An agricultural building, as defined
10 in Chapter 4 of the Uniform Building Code, or premises used for
11 the boarding, training or riding of three or less livestock other than
12 those of the operator of the premises shall not be a ‘stable’ for the
13 purposes of this Ordinance.”

14 Thus the definition of “stable” somewhat confusingly defines what a stable is,
15 and then immediately after that definition excludes from that definition (1) “an
16 agricultural building, as defined in Chapter 4 of the Uniform Building Code”
17 and (2) certain “premises” described in the definition.

18 The hearings officer concluded that the horse boarding facility is not a
19 primary use in the RRFF-5 zone under ZDO 309.03(F). The hearings officer
20 concluded that the facility is a “stable” within the meaning of ZDO 202, but
21 that it is “* * * intended for the purpose of obtaining a commercial profit,” and
22 therefore is not a primary use under ZDO 309.03(F). Rather, the hearings
23 officer concluded that the horse boarding facility is a conditional use in the
24 RRFF-5 zone under ZDO 309.05(A)(14).¹

25 Petitioners argue that the facility is not a “stable” as defined in ZDO 202
26 because it is “[a]n agricultural building, as defined in Chapter 4 of the Uniform

¹ ZDO 309.05(A)(14) provides that one type of conditional use in the RRFF-5 zone is “[c]ommerical recreational uses that exceed the limits of Subsection 309.03(F).”

1 building Code[.]” However, petitioners do not develop any argument in
2 support of their assertion that the facility is an “agricultural building.” Absent
3 any developed argument as to why the facility is an “agricultural building”
4 petitioners’ argument provides no basis for reversal or remand. *Deschutes*
5 *Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

6 In an argument that is exceedingly difficult to understand, petitioners
7 argue that the hearings officer erred in concluding that the horse boarding
8 facility is a “stable” as defined in ZDO 202. Petition for Review 7-8. The
9 county responds that the evidence in the record supports a conclusion that all
10 16 of the horse stalls in the barn are in use and more than three stalls are in use
11 by horses other than those of petitioners. From those facts, the county reasons
12 the barn is not excluded from the ZDO definition of “stable” as “premises used
13 for the boarding * * * of *three or less* livestock *other than those of the operator*
14 *of the premises* * * *.” (Emphases added.) We agree with the county.

15 Finally, petitioners argue that the hearings officer erred in concluding
16 that the facility is “intended for the purpose of obtaining a commercial profit”
17 and therefore is not a primary use in the zone under ZDO 309.03(F).
18 “Commercial” and “commercial profit” are not defined in the ZDO. The
19 hearings officer relied on the definition of “commercial” in Merriam-Webster’s
20 Online Dictionary-“the buying and selling of goods and services”-and
21 concluded that petitioners’ facility is selling the service of stabling horses in
22 the barn and training horses. Record 8. Petitioners argue that the term
23 “commercial” is limited to the selling of goods, and does not include services
24 such as boarding and training horses.

25 Our standard of review in this appeal is governed by ORS
26 197.835(9)(a)(D), and under that statute we must determine whether the

1 hearings officer “[i]mproperly construed the applicable law,” “without
2 according the deference required by *Clark*.”² *Gage v. City of Portland*, 319 Or
3 308, 317, 877 P2d 1187 (1994). We agree with the county that the hearings
4 officer correctly construed the term “commercial,” by reference to a dictionary
5 definition, to include the selling of the services that petitioners are providing,
6 horse boarding and training.

7 **B. ZDO 309.03(B)(2) and (7)**

8 ZDO 309.03 identifies the following uses as primary uses in the RRFF-5
9 zone:

10 “B. Current employment of land for general farm uses,
11 including:

12 “ * * * * *

13 “2. Feeding, breeding, selling, and management of
14 livestock, poultry, fur-bearing animals, or honeybees;

15 “ * * * * *

16 “7. Any other agricultural use, horticultural use, animal
17 husbandry, or any combination thereof[.]”

18 Petitioners argue that the facility is a primary use under ZDO 309.03(B)(2).
19 According to petitioners, the facility is allowed as a primary use for
20 “management” of “livestock.”³ Petitioners also argue that the facility is
21 allowed as a primary use for “animal husbandry” under ZDO 309.03(B)(7).
22 Petition for Review 8-10.

² ORS 197.835(9)(a)(D) requires that LUBA “reverse or remand a land use decision” if the “local government” “[i]mproperly construed the applicable law[.]”

³ The county agrees that horses are “livestock.” Response Brief 11 n 10.

1 The county responds that petitioners’ arguments that the horse boarding
2 facility is a primary use under ZDO 309.03(B)(2) or (7) provide no basis for
3 reversal or remand of the decision. That is so, the county argues, because
4 petitioners applied for a conditional use permit and having so applied, the
5 criteria applicable to conditional use permits are the only criteria that the
6 county may consider in determining whether to approve the application, and
7 that LUBA may consider in determining whether the county erred. Stated
8 differently, we understand the county to argue that determining whether a
9 proposed use is a primary use or a conditional use is not required by any
10 approval criterion, and therefore the argument is outside of LUBA’s scope of
11 review under ORS 197.835(9)(a)(A)-(D). The county also argues that
12 petitioners could have requested a planning director interpretation under ZDO
13 1308 to determine whether the use is a primary use or a conditional use but
14 failed to do so.

15 We disagree with the county that petitioners are precluded from arguing
16 to LUBA that the facility is a primary use under ZDO 309.03 simply because
17 the conditional use approval criteria at ZDO 1203.01 do not require
18 consideration of the issue. ORS 197.835(9)(a)(D) requires LUBA to reverse or
19 remand a decision when the local government “improperly construed the
20 applicable law[.]” The “applicable law” could include the primary use
21 provisions in ZDO 309.03. Further, we are aware of nothing in the ZDO or any
22 other statute or rule that prohibits a party from submitting an application for a
23 conditional use permit “under protest” to settle an ongoing enforcement matter
24 and then arguing to the local government that the proposed use is not a
25 conditional use at all, but rather is a permitted use. That is an issue that the
26 local government would be required to decide. *Recovery House VI v. City of*

1 *Eugene*, 150 Or App 382, 387-88, 946 P2d 342 (1997). Certainly the
2 availability of a planning director interpretation under the provisions of ZDO
3 1308 does not make submitting an application for an interpretation mandatory.

4 The county provides no substantive response to petitioners’ arguments
5 that the facility is a primary use under ZDO 309.03(B)(2) or (7). The hearings
6 officer appears not to have considered the argument, and did not adopt any
7 findings regarding ZDO 309.03(B)(2) or (7).

8 Under ORS 197.829(2), LUBA is authorized to interpret county land use
9 regulations in the first instance, in cases where the local government has failed
10 to do so. We conclude that ZDO 309.03(B)(2) or (7) do not authorize
11 petitioners’ proposed horse boarding facility as a primary use. ZDO 309.03(B)
12 does generally allow “[c]urrent employment of land for general farm uses,”
13 including the farm uses listed in subsections (1) through (7), and in the absence
14 of any additional language in the ZDO addressing “stables,” petitioners might
15 well be correct that their proposed horse boarding facility is one of the general
16 farm uses described in ZDO 309.03(B)(2) or (7). However, additional
17 language in ZDO 309.03(F) specifically addresses the exact use that petitioners
18 are proposing, “stables,” and allows *non-commercial* stables as a primary use.
19 ZDO 309.03(5)(A)(14) treats *commercial* stables as a conditional use. Given
20 the structure of the ZDO and the existence of more specific provisions
21 addressing non-commercial stables as primary uses and commercial stables as
22 conditional uses, we disagree with petitioners that the proposed facility is a
23 primary use under the more general farm uses described in ZDO 309.03(B)(2)
24 or (7).

25 The first assignment of error is denied.

1 **SECOND ASSIGNMENT OF ERROR**

2 In their second assignment of error, petitioners argue that ZDO
3 309.03(F) is “unconstitutionally vague” and overbroad. Petition for Review
4 14. Petitioners also argue that the county’s decision is a taking under Article I,
5 Section 18 of the Oregon Constitution.⁴

6 The county responds, and we agree, that petitioners’ constitutional
7 arguments are insufficiently developed for our review, and accordingly they are
8 rejected. *Joyce v. Multnomah County*, 23 Or LUBA 116, 118, *aff’d* 114 Or
9 App 244 (1992).

10 The second assignment of error is denied.

11 **THIRD ASSIGNMENT OF ERROR**

12 In their third assignment of error, we understand petitioners to argue that
13 the county’s enforcement procedure violates Article 1, Section 20 of the
14 Oregon Constitution and the Fourteenth Amendment to the U.S. Constitution
15 because the county enforces the ZDO based on complaints received, and
16 accordingly similarly situated violators of the ZDO are treated differently.⁵

17 Arbitrary application of facially neutral laws could implicate Article I,
18 section 20 of the Oregon Constitution. *In re Gatti*, 330 Or 517, 534, 8 P3d 966
19 (2000) (*citing State v. Clark*, 291 Or 231, 239, 630 P2d 810 (1981)). However,

⁴ Article I, section 18 of the Oregon Constitution states that “[p]rivate property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation[.]”

⁵ Article 1, Section 20 of the Oregon Constitution provides in relevant that “[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.” We assume their arguments under the Fourteenth Amendment to the U.S. Constitution to be arguments under the Equal Protection Clause.

1 petitioners' argument is without merit. Absent evidence of selective
2 enforcement based on an unjustifiable standard such as race, religion or other
3 arbitrary classification, the enforcement of an ordinance against one violator
4 and not others is not violative of equal protection standards and must be
5 upheld. *Medford Assembly of God v. City of Medford*, 12 Or LUBA 167, 174
6 (1984), *aff'd* 72 Or App 333, 339-40, 695 P2d 1379 (1985).

7 Moreover, petitioners do not explain how the county's enforcement
8 procedures are at all relevant to the decision challenged in this appeal, a
9 decision to approve a conditional use permit. Finally, petitioners have not
10 demonstrated that they were treated differently than similarly situated
11 applicants for a permit for a horse boarding facility or than similarly situated
12 operators of horse boarding facilities in the RRFF-5 zone.

13 The third assignment of error is denied.

14 The county's decision is affirmed.