

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 ROBERT W. GREUNER,)
5)
6 Petitioner,)
7)
8 vs.)
9) LUBA No. 91-022
10 LANE COUNTY,)
11) FINAL OPINION
12 Respondent,) AND ORDER
13)
14 and)
15)
16 JAMES PETERSON, JR.,)
17)
18 Intervenor-Respondent.)

19
20
21 Appeal from Lane County.

22
23 Douglas M. DuPriest, Eugene, filed the petition for
24 review and argued on behalf of petitioner. With him on the
25 brief was Hutchinson, Anderson, Cox, Parrish & Coons, P.C.
26

27 No appearance by respondent.
28

29 James N. Welty, Eugene, filed the response brief and
30 argued on behalf of intervenor-respondent. With him on the
31 brief was Luvaas, Cobb, Richards & Fraser, P.C.
32

33 HOLSTUN, Referee; KELLINGTON, Chief Referee; SHERTON,
34 Referee, participated in the decision.
35

36 REVERSED 06/26/91
37

38 You are entitled to judicial review of this Order.
39 Judicial review is governed by the provisions of ORS
40 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner challenges a county decision approving a
4 special use permit for a dog training facility on land
5 located in the county's exclusive farm use zone.

6 **MOTION TO INTERVENE**

7 James Peterson, Jr., the applicant below, moves to
8 intervene in this proceeding pursuant to OAR 661-10-050.¹
9 Petitioner objects to the motion, arguing the motion was not
10 timely filed.

11 The motion to intervene and response brief were both
12 filed on May 8, 1991, the last day for filing a respondent's
13 brief.² Intervenor-respondent (hereafter intervenor) argues
14 he contacted the county regarding its intentions to appear
15 in this appeal prior to the time the petition for review was
16 filed, but did not learn the county would not file a brief
17 in this appeal until approximately one week before the
18 respondent's brief was due. Intervenor thereafter prepared
19 and filed the motion to intervene and its brief within the

¹OAR 661-10-050(1) permits applicants for local government land use approval to intervene in LUBA appeals challenging the local government's decision on their application. OAR 661-10-050(2) provides in part as follows:

"* * * In the interests of promoting timely resolution of appeals, a motion to intervene shall be filed as soon as is practicable after the notice of intent to appeal is filed."

²Under our rules, an intervenor-respondent must file the intervenor-respondent's brief "within the time for filing a respondent's brief * * *." OAR 661-10-050(3)(b).

1 time for filing the respondent's brief. Intervenor argues
2 petitioner was not prejudiced by his delay in filing the
3 motion to intervene, and the motion should be viewed as
4 timely filed under the circumstances.³

5 We agree with intervenor, and the motion to intervene
6 is allowed.

7 **FACTS**

8 The subject property includes approximately 36 acres
9 and is located one mile east of Dexter, Oregon, on the north
10 side of Highway 58. The property is zoned Exclusive Farm
11 Use - 40 Acre Minimum (E-40). Property to the east is owned
12 by petitioner and is also zoned E-40. In the past,
13 petitioner has leased his property for a variety of farm
14 uses, including the grazing of horses. Property to the west
15 and north is zoned Parks and Recreation and is occupied by
16 Elijah Bristow State Park. Properties farther to the west
17 and across Highway 58 to the south are zoned for rural
18 residential use.

19 The proposed facility would train dogs to be
20 "companions and protectors, such as those needed by
21 joggers." Record 198. The dogs would be housed in a 2800
22 square foot kennel and training would take place in a 2.5
23 acre fenced area adjoining the kennel as well as on trails

³Oral argument in this matter was delayed for one week. However, the delay in oral argument was caused by the Board's failure to notify intervenor of the initial time and date set for oral argument, not intervenor's delay in filing the motion to intervene.

1 on the subject property.⁴ Up to 50 dogs would receive
2 training at the same time. Training typically will take
3 approximately three months and does not require that the dog
4 owners be present on a daily basis. After initial training,
5 one-day refresher courses would be offered on Saturdays. It
6 is anticipated that between 15 and 20 dogs and owners will
7 attend the one-day refresher courses.

8 The county hearings official concluded the proposed
9 facility is a commercial kennel as that term is used in the
10 Lane Code (LC) and relevant statutes. The hearings official
11 further concluded the proposed facility satisfies applicable
12 approval criteria and approved the requested special permit
13 with conditions. The board of commissioners denied
14 petitioner's appeal of the hearings officer's decision, and
15 this appeal followed.

16 **FIRST ASSIGNMENT OF ERROR**

17 "Lane County misinterpreted Lane Code Section
18 16.212(4)(1) and ORS 215.213(2)(L), exceeded the
19 scope of its authority and made a decision
20 contrary to law, in approving a use that is not
21 allowed by law."

22 The central issue under the first assignment of error
23 is whether the above described facility was correctly
24 characterized by the county as a commercial dog kennel.

⁴The kennel facility would be built of sound restricting material and the outdoor fenced training area would include a trench filled with concrete along the fence to keep dogs from tunneling under the fence and escaping.

1 Petitioner contends the kenneling of dogs in the proposed
2 facility clearly will be a secondary use. No dogs other
3 than those receiving training to protect their owners will
4 be boarded and there will be no breeding at the facility.
5 Petitioner contends the proposed facility goes considerably
6 beyond what may properly be permitted within the E-40 zone
7 under LC 16.212(4)(1) as a "commercial kennel" or allowed in
8 EFU zones generally under ORS 215.213(2)(L) as a "dog
9 kennel."⁵

10 The uses that counties may allow within their EFU zones
11 are governed by statute. ORS 215.213; 215.283. Counties
12 may regulate uses within their EFU zones more stringently
13 than required by applicable statutes. Von Lubken v. Hood
14 River County, 104 Or App 683, 687, ___ P2d ___ (1991); Kola
15 Tepee v. Marion County, 99 Or App 481, 484, 782 P2d 955
16 (1989), rev den 309 Or 441 (1990). However, the uses that
17 counties may allow within their EFU zones are limited to
18 those specified in ORS 215.213 and 215.283. See Craven v.
19 Jackson County, 94 Or App 49, 54, 764 P2d 931, aff'd 308 Or
20 281 (1989); Newcomer v. Clackamas County, 94 Or App 33, 39,
21 764 P2d 927 (1988). Because Lane County has designated
22 marginal lands under ORS 197.247, ORS 215.213(1) to (3)
23 establish the uses that may be allowed on lands zoned for

⁵According to petitioner "[t]o call a canine training academy a kennel is like calling the Air Force Academy a boarding house." Petition for Review 13.

1 exclusive farm use in Lane County. As relevant, ORS
2 215.213(1) and (2) provide, as follows:

3 "(1) The following uses may be established in any
4 area zoned for exclusive farm use:

5 "* * * * *

6 "(L) The breeding, kenneling and training of
7 greyhounds for racing in any county over
8 200,000 in population in which there is
9 located a greyhound racing track or in a
10 county of over 200,000 in population
11 contiguous to such a county.

12 "* * * * *

13 "(2) The following uses may be established in any
14 area zoned for exclusive farm use subject to
15 ORS 215.296:

16 "* * * * *

17 "(L) Dog kennels not described in paragraph
18 (k) [sic L] of subsection (1) of this
19 section.

20 "* * * * *."⁶ (Emphases added.)

21 ORS chapter 215 provides no definition of the term "dog
22 kennel." In the absence of a definition or expression of

⁶ORS 215.283(1)(j) and 215.283(2)(m) include identical provisions for "greyhound" "breeding, kenneling and training" and for "dog kennels." Prior to the adoption of Oregon Laws 1985, chapter 583, which adopted the language now codified at ORS 215.213(1)(L) and (2)(L) and 215.283(1)(j) and (2)(m), ORS chapter 215 made no explicit provision for dog kennels in EFU zones. See Linn County v. Hickey, 98 Or App 100, 778 P2d 509 (1989). In Linn County v. Hickey, the Oregon Court of Appeals concluded that "in the absence of more specific legislation bearing on the subject, kennel operations constitute 'animal husbandry' and therefore come within the definition of 'farm use.'" Id. at 102. However, the court also noted that more specific legislation was adopted by Oregon Laws 1985, chapter 583 to permit dog kennels as conditional uses in the EFU zone. Id. at 102 n 1.

1 legislative intent, the term dog kennel must be given its
2 plain and ordinary meaning. Sarti v. City of Lake Oswego,
3 106 Or App 594, 597, ___ P2d ___ (1991); Clatsop County v.
4 Morgan, 19 Or App 173, 176, 526 P2d 1393 (1974). "Kennel"
5 is defined in Webster's Third New International Dictionary
6 1236 (1961), in part, as follows:

7 "* * * a house for a dog or pack of hounds * * * :
8 an establishment for the breeding or boarding of
9 dogs * * * [.]"

10 "Board" is defined as "to provide with regular meals or with
11 regular meals and lodging for a compensation * * * [.]" Id.
12 at 243. As defined above, the term "dog kennel" includes
13 "boarding" and "breeding" facilities, but does not include
14 "training" facilities. See 3 Anderson, American Law of
15 Zoning § 16.11 (2nd rev ed 1977); 3 Anderson, American Law
16 of Zoning § 17.15 (3d rev ed 1986).

17 Moreover, if ORS 215.213(1) and (2) are construed as a
18 whole, those sections do not support intervenor's contention
19 that the provision for dog kennels in ORS 215.213(2)(L) is
20 intended to include facilities such as the proposed training
21 facility. We agree with petitioner that the three month
22 training program and follow-up training offered at the
23 facility is the primary service to be provided by the
24 proposed facility. The housing and boarding of the dogs
25 clearly is incidental to this primary purpose. Where the
26 legislature intended to allow intensive training of dogs, as
27 is allowed under ORS 215.213(1)(L) for greyhounds, it

1 specifically used the term "training" in addition to the
2 term "kennel."

3 Absent some expression of legislative intent to the
4 contrary, we assume the legislature intended that "kennel"
5 have the same meaning in ORS 215.213(1)(L) and
6 215.213(2)(L). Pense v. McCall, 243 Or 383, 389, 413 P2d
7 722 (1966); School District No. 17 of Sherman County v.
8 Dowell, 203 Or 168, 279 P2d 492 (1955). The legislature's
9 specific provision in ORS 215.213(1)(L) that greyhounds may
10 be trained as well as kenneled would be unnecessary unless
11 the term "kennel" does not include training, or at least
12 does not include the intensive kind of training required for
13 racing greyhounds. In view of the specific provisions for
14 greyhound training facilities, the legislature's failure to
15 provide specifically for dog training facilities in ORS
16 215.213(1) or (2) is at least some indication that the term
17 "dog kennel" does not include facilities where training of
18 dogs is the primary service offered and kenneling services
19 are only incidental to that primary service.

20 We conclude the term "kennel," as that term is commonly
21 understood, does not include the kind of training that is to
22 be carried out by the proposed facility. We further
23 conclude that ORS 215.213(1)(L) and 215.213(2)(L), when read
24 together, suggest such a broad interpretation of the term
25 was not intended by the legislature. Therefore, the county
26 may not, consistent with ORS 215.213(2)(L), allow the

1 proposed facility on the subject exclusive farm use zoned
2 property.

3 We also agree with petitioner that the county
4 incorrectly interpreted the LC as allowing the proposed
5 facility as a commercial kennel. LC 16.212(4)(1) allows
6 within the E-40 zone "Kennel, Commercial or Kennel,
7 Commercial Breeding." LC 16.090 provides the following
8 definitions of "Commercial Kennel" and "Commercial Breeding
9 Kennel":

10 "Kennel; Commercial. A place of business where
11 dogs are boarded. No more than two (2) of the
12 dogs shall be used for breeding purposes. The
13 term is not intended to include an animal hospital
14 or non-commercial kennel."

15 "Kennel; Commercial Breeding. A place of business
16 for the breeding and/or selling of dogs. The term
17 is not intended to include an animal hospital or
18 non-commercial kennel."

19 The above quoted definitions specifically provide that
20 kennels may be used for "boarding" and "breeding" but make
21 no mention of "training." Although the county's findings
22 point out that other kennels in Lane County apparently
23 provide some training, we are unable to determine from the
24 portions of the record cited by the parties whether the
25 intensive training proposed at the subject facility is
26 similar in type or degree to the training currently provided
27 at other facilities, or whether the other kennels mentioned

1 in the decision are in an exclusive farm use zone.⁷
2 Therefore, even if some incidental training may be provided
3 as part of the "boarding" services provided by commercial
4 kennels under LC 16.090, we agree with petitioner that the
5 proposed facility goes significantly beyond what may
6 correctly be termed "boarding."

7 Intervenor relies on our decisions in Cook v. Yamhill
8 County, 13 Or LUBA 137 (1985), and Hannan v. Yamhill County,
9 6 Or LUBA 83 (1982), in arguing that the county properly
10 interpreted the relevant statutes and LC provisions as
11 allowing the proposed facility. In Cook we upheld the
12 county's interpretation of the term "winery" as not being
13 limited to the principle use of making wine, but also
14 including on-premises tasting rooms. In Hannan we
15 considered the meaning of "boarding horses for profit" and
16 stated "[w]e think it is entirely reasonable that the
17 boarding of any live animal would include provisions for
18 exercise of the animal as well as its care and grooming."
19 Hannan, supra, 6 Or LUBA at 90. Both these decisions may
20 lend support to the notion that some incidental training may
21 be permissible as part of the "boarding" service offered by

⁷We also do not see how the actual practice at other kennels in the county has any bearing on the scope of the above LC definitions of commercial kennel and commercial breeding kennel. Even if it had some bearing, if the other kennels in the county provide only incidental training in conjunction with boarding and breeding, such training would not support a conclusion that a facility which is primarily a dog training facility and only provides boarding as a service incidental to the training is a "commercial kennel" as that term is defined in LC 16.090.

1 a commercial dog kennel. However, neither decision supports
2 a conclusion that the training facility at issue in this
3 appeal may be viewed as a dog kennel under ORS 215.213(2)(L)
4 or a "commercial kennel" under LC 16.212(4)(1).⁸

5 In view of our decision that the proposed facility is
6 allowed by neither ORS 215.213(2)(L) nor LC 16.212(4)(1),
7 the county's decision must be reversed.⁹ Although the
8 facility intervenor proposes may be permitted in other urban
9 or rural zones, it may not be allowed, consistent with ORS
10 215.213(2)(L) and LC 16.212(4)(1), on property zoned E-40.

11 The first assignment of error is sustained.

12 The county's decision is reversed.

⁸Intervenor argues at length that the impacts on adjoining properties from the proposed training facility, as conditioned, would be no greater than those that could be expected from a facility that offers only boarding. Although intervenor may well be correct, the point is irrelevant. It is the nature of the use itself, not its potential impacts, that determines what the proposed use is, i.e. whether the proposed facility is properly classified as a dog kennel. For example, we have little doubt that the proposed facility as conditioned might have no more adverse impacts on surrounding farm uses than exploration for geothermal resources or mining of aggregate, which are permissible uses in an exclusive farm use zone under ORS 215.213 and 215.283. However, such comparative adverse impacts have no bearing on whether the proposed facility is included among uses ORS 215.213 and 215.283 allow in the exclusive farm use zone.

⁹We therefore do not address petitioner's remaining assignments of error in which he contends the challenged facility violates LC and statutory criteria applicable to commercial dog kennels.