

1 Judicial review is governed by the provisions of ORS
2 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal an order of the county commissioners
4 denying an application for a conditional use permit for a
5 commercial activity in conjunction with farm use.

6 **MOTION TO INTERVENE**

7 Joyce Pendergraff, Jim Ray, Larry Freeland, Arnie
8 Vetterick, Carol Vetterick, Linda Losch, Richard Losch,
9 Richard Wolf, Sunny Wolf, Dave Lehmann, Mary Lehmann, Magnus
10 Marks, James Kelly and Genie Kelly move to intervene on the
11 side of respondent. There is no objection to the motion,
12 and it is allowed.

13 **FACTS**

14 The subject property consists of 25 acres and is zoned
15 Multiple Use Agricultural (MUA-10).¹ Petitioners applied
16 for conditional use approval "to allow construction of an
17 equestrian arena for the breeding, boarding and training of
18 horses" on the subject property. Record 198.

19 The hearings officer denied the application, but
20 suspended his decision for a period of 120 days to allow
21 petitioners an opportunity to seek an amendment to the MUA-
22 10 zone "so that this use could be allowed as a conditional

¹The MUA-10 zone is not an exclusive farm use zone. According to the county's comprehensive plan (pages 118-119), land zoned MUA-10, while otherwise suitable for farm uses, is so committed to other types of uses that an exception to Statewide Planning Goal 3 (Agricultural Lands) was taken to allow other types of uses of such land.

1 use in the MUA-10 zone." Record 56. The county
2 commissioners initiated a review of the hearings officer's
3 decision and conducted a public hearing. The county
4 commissioners affirmed the hearings officer's decision, but
5 removed the condition that the decision be suspended pending
6 petitioner's application for an amendment to the MUA-10
7 zone. In addition, the county commissioner's determined,
8 based on the hearings officers findings, that:

9 "* * * the subject proposal is not a commercial
10 activity in conjunction with a farm use and
11 therefore this application is denied." Record 9.

12 This appeal followed.

13 **EXHAUSTION OF REMEDIES**

14 The county argues petitioners failed to exhaust their
15 administrative remedies, and consequently, we lack authority
16 over this appeal under ORS 197.825(2)(a).² According to the
17 county, it was the county and not the petitioners who
18 initiated review of the hearings officer's decision by the
19 county commissioners. The county contends the county
20 commissioners' review was limited to the issue of whether
21 the hearings officer erred in suspending his decision for a
22 period of 120 days, providing an opportunity for petitioners
23 to seek an amendment to the Deschutes County Zoning and

²ORS 197.825(2)(a) provides the jurisdiction of this Board:

"Is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review."

1 Development Ordinance (ZDO).

2 ZDO 22.32.015 provides that a party may appeal to the
3 county commissioners within 10 days after the decision to be
4 challenged is mailed to the appellant. ZDO 22.28.050
5 governs appeals of decisions that are initiated by the
6 county, and provides that the county may initiate review of
7 a hearings officer's decision within 10 days following
8 notice of the decision. Nothing in ZDO 22.28.050 states
9 that such an appeal is necessarily limited to any particular
10 issues. In addition, the county gave no notice that it
11 intended its review to be limited to any particular issues,
12 until after the 10 day appeal period had expired.

13 The purpose of the exhaustion requirement is to assure
14 that the challenged decision is reviewed by the highest
15 level local decision making body the code makes available,
16 before an appeal to this Board is pursued. McConnell v.
17 City of West Linn, 17 Or LUBA 502 (1989). In McConnell, the
18 Board stated, under facts similar to those relevant to the
19 county's exhaustion argument here, as follows:

20 "That a petitioner may not have filed an appeal of
21 a lower level local decision to require review by
22 the higher level local decision maker is not
23 critical, so long as review by the higher
24 authority occurs." Id. at 507.

25 Here, as in McConnell, the challenged decision was made
26 by the highest level local decision maker possible, the
27 county commissioners. In addition, petitioners appeared
28 before the county commissioners. Accordingly, the

1 exhaustion requirements of ORS 197.825(2)(a) are satisfied.

2 **ASSIGNMENT OF ERROR**

3 "The county commission and hearings officer erred
4 when it concluded that the proposed use is not a
5 commercial activity in conjunction with farm use."

6 The proposal requests authorization to board horses for
7 profit, among other things. ZDO 4.060(3)(C)³ authorizes
8 "commercial activities in conjunction with farm uses" as a
9 conditional use in the MUA-10 zone. The Exclusive Farm Use
10 20, 80, and 320 zones explicitly authorize as a conditional
11 use the "boarding of horses for profit." These EFU zones
12 also separately authorize "commercial activities in
13 conjunction with farm use" as a conditional use.

14 The challenged decision states:

15 "* * * farming enterprises must embrace farm uses
16 as that term is defined statutorily.
17 Unfortunately for the applicant, the term 'farm
18 use' does not include the 'raising, breeding or
19 training' of horses. (See ORS 215.203(2)(a)). In
20 a nutshell, the breeding training and raising of
21 horses is not a farm use as that term is defined
22 statutorily and, therefore, whether or not the
23 applicant is raising or training horses of their
24 own does not constitute a farm use in which a
25 commercial activity can be conducted in
26 conjunction with. [The county], therefore,
27 concludes that this use is not a commercial
28 activity in conjunction with farm use as that term
29 is defined statutorily and judicially." Record

³It is not clear which version of the ZDO governs this appeal. This Board has only been furnished with a copy of ZDO "PL-15," which has apparently been amended. However, for purposes of this appeal, it does not matter which version of the ZDO applies. For convenience, the ZDO to which we refer in this opinion is PL-15.

1 56.

2 As we understand it, petitioners argue the underlying
3 farm use of the property is the breeding and training of
4 their own horses. Petitioners argue the county is wrong in
5 concluding that the breeding and training of their own
6 horses is not a farm use. Further, petitioners contend the
7 boarding, breeding and training of horses belonging to
8 others, for the purpose of making a profit, is a commercial
9 activity in conjunction with their farm use of the property
10 and, consequently, is allowable in the MUA-10 zone.

11 Respondent and Intervenors-respondent (respondents)
12 argue the breeding, boarding and training of horses is not a
13 farm use at all. They also argue that because "boarding of
14 horses for profit" is not listed as a conditional use in the
15 MUA-10 zone, but is specifically listed as a conditional use
16 in other zones, the MUA-10 zone does not authorize the
17 boarding of horses for profit as conditional use.

18 Neither the ZDO nor any statute of which we are aware
19 lends direct support to the idea that the raising or
20 breeding of one's own horses is not a farm use. Indeed, the
21 breeding and raising of livestock are among the activities
22 included in the ZDO and statutory definitions of farm use.
23 Further, there is no support in either the ZDO or statutory
24 provisions for a determination that horses are not
25 livestock. See ORS 609.010 (listing horses as livestock
26 within the meaning of the statutes governing livestock

1 districts); ZDO 1.030(63) (defining the term "livestock" as
2 "Domestic animals of types customarily raised or kept on a
3 farm"). Consequently, to the extent the county determined
4 the raising and breeding of one's own horses is not a farm
5 use under the ZDO, we believe the county is wrong.

6 The next question is whether the proposed use at issue
7 in this appeal, which includes the boarding of horses
8 belonging to others for profit, is properly considered a
9 "commercial activit[y] in conjunction with farm use," as
10 that phrase is used in ZDO 4.060(3)(C). We conclude it is
11 not.

12 In the EFU-20, 80 and 320 zones the "boarding of horses
13 for profit" is specifically listed as a conditional use. In
14 those zones, "commercial activities in conjunction with farm
15 use" is also specifically listed as a conditional use.⁴
16 Therefore, it is relatively clear that when the county used
17 the phrase "commercial activities in conjunction with farm
18 use" in its EFU zones, it did not intend that such uses
19 include "boarding of horses for profit." If it had, the
20 specific provision for "boarding of horses for profit" in
21 those EFU zones would be unnecessary. See Sarti v. City of

⁴We note that "[c]ommercial activities that are in conjunction with farm use" are also listed as uses that may be conditionally established in areas zoned for exclusive farm use under ORS 215.213(2)(c); ORS 215.283(2)(a). The "boarding of horses for profit" is separately listed as a use which may be conditionally allowed under ORS 215.213(2)(j), and is listed in ORS 215.283(1)(p) as a use which may be allowed subject to restrictions the county wishes to impose.

1 Lake Oswego, 106 Or App 594, 597, 809 P2d 701 (1991);
2 Clatsop County v. Morgan, 19 Or App 173, 526 P2d 1393
3 (1974).

4 ZDO 4.060(3)(C), governing the MUA-10 zone, also lists
5 "commercial activities in conjunction with farm use" as a
6 conditional use but does not list the "boarding of horses
7 for profit" as a conditional use.

8 Although we recognize the MUA-10 zone is not an EFU
9 zone, we do not believe it is appropriate to apply a
10 different and more expansive interpretation to the words
11 "commercial activities in conjunction with farm use" when
12 those words are used in the MUA-10 zone. Rather, absent
13 some indication to the contrary in the zoning ordinance, we
14 assume the county intended those words to have the same
15 meaning when they are used in different places in the zoning
16 ordinance. Because it is relatively clear the county did
17 not intend "commercial activities in conjunction with farm
18 use" to include the "boarding of horses for profit" in the
19 EFU 20, 80 and 320 zones, we conclude the county did not
20 intend that "commercial activities in conjunction with farm
21 use" include "boarding of horses for profit" in the MUA-10
22 zone.

23 In accordance with the above, petitioners' proposal,
24 which includes the boarding of horses for profit, is not an
25 allowable use in the county's MUA-10 zone.

26 The county's decision is affirmed.

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