

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

4 LARRY KELLY FARMS, INC., H. R. )  
5 BRYANT, PATRICIA BRYANT,        )  
6 NIKOLAUS THIERJUNG, and HELENE )  
7 THIERJUNG,                         )

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LUBA No. 93-151

MARION COUNTY,

Respondent,

and

NEIL MILLER and KIM MILLER,

Intervenors-Respondent.

FINAL OPINION  
AND ORDER

Appeal from Marion County.

M. Chapin Milbank, Salem, filed the petition for review and argued on behalf of petitioners.

Jane Ellen Stonecipher, Assistant Legal Counsel, Salem, filed the response brief and argued on behalf of respondent. With her on the brief was Robert C. Cannon, County Legal Counsel.

Robert L. Engle, Woodburn, represented intervenors-respondent.

HOLSTUN, Referee; SHERTON, Referee, participated in the decision.

REMANDED

01/10/94

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision granting conditional use  
4 approval for a dog kennel.

5 **MOTION TO INTERVENE**

6 Neil Miller and Kim Miller, the applicants below, move  
7 to intervene on the side of respondent. There is no  
8 opposition to the motion, and it is allowed.

9 **FACTS**

10 The subject 73 acre property is located in an exclusive  
11 farm use zone. The dogs that would be housed at the  
12 proposed facility fall into two categories. Some dogs would  
13 be boarded at the facility and would also receive field  
14 training off-site. Other dogs would be brought to the  
15 facility for boarding only. All dogs would be exercised  
16 outside twice a day on-site for up to three hours. This  
17 exercise would include basic obedience training, teaching  
18 the dogs to heel, sit and come when called.

19 **FIRST AND THIRD ASSIGNMENTS OF ERROR**

20 **A. Escaped Dogs**

21 Petitioners first complain the county fails to  
22 acknowledge evidence in the record that serious damage can  
23 be caused by escaped dogs.<sup>1</sup>

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<sup>1</sup>At no point under these assignments of error do petitioners identify the approval criteria they believe the challenged decision violates. Marion County Zoning Ordinance (Rural) (MCZO Rural) 136.040(d)(1) imposes the following approval criterion:

1           The difficulty with this argument is that the county  
2 does not dispute that dogs can cause great damage when  
3 allowed to run loose in rural areas.     The challenged  
4 decision is based on findings that explain the building  
5 design, redundant restraining fences and the practice of  
6 training the dogs on-leash mean the dogs will not escape  
7 and, therefore, will not interfere with farming operations.  
8 Petitioners offer no reason to question the county's  
9 rationale in this regard, and we therefore reject the first  
10 assignment of error.

11           **B.     Interference With Normal Farming Operations**

12           Petitioners' entire argument under the third assignment  
13 of error is as follows:

14           "The petitioners testified at length and in  
15 writing about the issue of restrictions on their  
16 farm use when neighbors engaged in non-farm  
17 operations. They noted increased insurance rates,  
18 OR-OSHA Regulations and affect [sic] of prior  
19 boarded dogs escaping.

20           "The letter from the aerial [applicator] indicates  
21 that if a non-farm activity is permitted at the  
22 Miller location it will force a curtailment of  
23 their spraying operation.     This alone is a  
24 significant impact on the farming neighbors."  
25 (Record citations omitted.)     Petition for Review  
26 7-8.

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"The use will not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding lands devoted to farm or forest use."

We assume failure to comply with the above criterion forms the basis for the first and third assignments of error.

1           The decision explains the proposed kennel will be  
2 located on four acres of a 73 acre parcel. It will be  
3 buffered from adjoining farms by a hop field, orchard and  
4 fir trees. The kennel is over a mile from the western  
5 boundary of the property, 500 feet from the southern  
6 boundary and 150 feet from the northern boundary. Except  
7 during the twice daily exercise periods, the dogs will be  
8 either inside the kennel building or engaged in training  
9 off-site.

10           Respondent contends the cited OR-OSHA regulations  
11 concern standards for application of pesticides and worker  
12 protection, have no relevance to the operation of the kennel  
13 and do not show the kennel will interfere with the  
14 application of pesticides on adjacent properties.

15           With regard to aerial spraying, respondent contends the  
16 letter cited by petitioners does not say aerial spraying  
17 will be curtailed by the proposed kennel. Rather it  
18 expresses fear that allowing nonfarm uses in agricultural  
19 areas will lead to governmental regulations limiting aerial  
20 spraying. Respondent points out petitioners make no effort  
21 to explain why dogs are any more likely to be affected by  
22 aerial spraying than are livestock.

23           Finally, respondent points out the applicants are farm  
24 operators and in the crop spraying business and testified  
25 that the kennel would not interfere with farm practices. In  
26 view of the above, respondent contends the evidentiary

1 record is sufficient to demonstrate that the kennel will be  
2 well buffered and will not interfere with accepted farming  
3 practices on adjoining properties. We agree with  
4 respondent.

5 The third assignment of error is denied.

6 **SECOND ASSIGNMENT OF ERROR**

7 As the kennel facility was originally proposed, a great  
8 deal more training would have occurred on-site. As  
9 explained above, the majority of training at the approved  
10 facility will occur off-site rather than on-site.<sup>2</sup>  
11 Petitioners contend that because the approved facility still  
12 includes on-site training, and training kennels are not  
13 allowed in the EFU zone, the challenged decision must be  
14 remanded.<sup>3</sup>

15 The challenged decision recognizes the issue presented  
16 under this assignment of error and explains, "on its face,  
17 the training portion of the application would merit denial  
18 without regard to an examination of the [approval] criteria  
19 listed in MCZO 136.040(d)." Record 7.

20 However, the opinion goes on to explain that the  
21 training to be offered at the subject facility is

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<sup>2</sup>The challenged decision includes the following condition: "No training, except that which is accessory to boarding will be conducted on-site." Record 11.

<sup>3</sup>Kennels are a conditional use in the EFU zone. MCZO Rural 136.030(s). MCZO Rural 136.300 defines "kennel" as "[a]ny \* \* \* premises on which 4 or more dogs and/or cats over the age of 4 months are kept for sale, lease, boarding, or racing."

1 "incidental and appropriate to the function of a boarding  
2 kennel." Record 8. On that basis the county approved the  
3 application. In adopting these findings the county relied  
4 on testimony from the applicant that most boarding kennels  
5 provide some form of exercise and that the training provided  
6 at the proposed facility is simply an adjunct of that  
7 exercise function, with no more impacts on adjoining  
8 properties than exercising dogs without also training them.

9 In Gruener v. Lane County, 21 Or LUBA 329, 336, aff'd  
10 109 Or App 160 (1991), we concluded the county improperly  
11 approved a training kennel in an EFU zone.<sup>4</sup> However, we  
12 left open the possibility that "some incidental training may  
13 be permissible as part of the 'boarding' service offered by  
14 a commercial dog kennel." (Emphasis in original.) Id; see  
15 also Hannan v. Yamhill County, 6 Or LUBA 83, 91 (1982)  
16 (concluding that "boarding horses for profit" may reasonably  
17 include provisions for exercising horses, as well as their  
18 care and grooming).

19 Neither the challenged decision nor the evidentiary  
20 record establishes what kinds of exercise or training is  
21 customarily provided as an incident to boarding kennels.  
22 Respondent attaches a transcript to its brief which shows

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<sup>4</sup>In Gruener, we construed both the county's EFU zoning provisions and the relevant statutory provisions upon which those county EFU zoning provisions were based to preclude approval of dog training kennels. The court of appeals limited its decision to the county EFU zoning provisions. Gruener v. Lane County, 109 Or App 160, 162, 818 P2d 959 (1991).

1 one of the applicants testified about other kennels and  
2 stated that kennels frequently provide some training on-  
3 site. However we cannot tell from that testimony whether  
4 the referenced kennels are boarding kennels or whether they  
5 offer exercise and training comparable to what is proposed  
6 at the disputed kennel.

7 We agree with petitioners that the challenged decision  
8 is not supported by adequate findings, and the findings that  
9 were adopted are not supported by substantial evidence in  
10 the record. Before the county can approve the disputed  
11 kennel as a boarding kennel permissible in its EFU zoning  
12 district, it must adopt findings establishing the amount of  
13 outside exercise and training that is customary at boarding  
14 kennels.<sup>5</sup> Those findings must be supported by substantial  
15 evidence. Once the county has done that, it may be possible  
16 to establish that the proposed up to three hours a day of  
17 on-site outside exercise and training is consistent with the  
18 outside exercise and training that is customary at boarding  
19 kennels.

20 Finally, we also noted in Gruener, supra, 21 Or LUBA at  
21 336 n 8, that the question of whether the kennel proposed in

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<sup>5</sup>Since the applicable zone is an EFU zone, the statutory limitations applicable in EFU zones apply directly to the challenged decision. Kenagy v. Benton County, 115 Or App 131, 136, 838 P2d 1076 (1992). However, petitioners do not argue the challenged decision violates the EFU statutory requirements. Therefore, we limit our discussion in this decision to the relevant MCZO Rural provisions. However, the EFU statutes also limit the county's interpretive discretion in construing the meaning of its EFU zone. 1993 Or Laws, ch 792, § 43.

1 that case was properly viewed as a boarding kennel was  
2 independent of the impacts of the facility on adjoining  
3 uses. See Kittleson v. Lane County, 21 Or LUBA 286, 292  
4 (1990). Therefore, even if the county establishes that  
5 boarding kennels customarily provide three hours of daily  
6 outside exercise, it would not necessarily follow that it is  
7 permissible to allow a kennel that provides three hours of  
8 daily outside training, simply because the training might  
9 not have any more adverse impacts on adjoining properties  
10 than would exercising the dogs for the same period.

11 The second assignment of error is sustained.<sup>6</sup>

12 The county's decision is remanded.

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<sup>6</sup>Petitioners also suggested at oral argument, but do not argue in their brief, that the training that will be provided off-site should be considered in determining whether the proposed kennel is properly viewed as a training kennel. We reject this argument.