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

D.E. PENLAND, KATHY PENLAND,)
RONALD DANYLUK, SUE DANYLUK,)
and ENID MADDING,)
Petitioners,)

vs.)

JOSEPHINE COUNTY,)
Respondent,)

and)

REDWOOD SANITARY SEWER SERVICE)
DISTRICT,)
Intervenor-Respondent.)

LUBA No. 94-199
FINAL OPINION
AND ORDER

Appeal from Josephine County.

Philip L. Nelson, Grants Pass, filed the petition for review and argued on behalf of petitioners. With him on the brief was Nelson & James.

No appearance by respondent.

James H. Boldt, Grants Pass, filed the response brief and argued on behalf of intervenor-respondent.

SHERTON, Chief Referee, participated in the decision.

REMANDED 04/27/95

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

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision of the board of county
4 commissioners approving a conditional use permit for a
5 compost storage building.

6 **MOTION TO INTERVENE**

7 Redwood Sanitary Sewer Service District, the applicant
8 below, moves to intervene in this proceeding on the side of
9 respondent. There is no opposition to the motion, and it is
10 allowed.

11 **FACTS**

12 Setting out the facts relevant to this appeal is made
13 difficult by the fact that the challenged decision does not
14 describe the subject property or its existing uses or
15 provide details regarding the proposed building.
16 Nevertheless, as far as we can tell, the following facts are
17 not in dispute.

18 The subject property is 8.42 acres in size and is owned
19 by the county. Intervenor's sewage treatment plant was
20 lawfully established on the subject property prior to the
21 property being zoned Rural Residential, one acre minimum
22 (RR-1). The surrounding properties, some of which are owned
23 by petitioners, are also zoned RR-1 and are developed for
24 rural residential use.

25 Intervenor began composting municipal sewage sludge on
26 the subject property in the winter of 1989-1990, after the

1 RR-1 zone was applied. Prior to that time, digested
2 municipal sewage sludge was trucked directly to approved
3 agricultural sites and spread in liquid form. Changes in
4 state sludge management regulations brought about the need
5 for a revised sludge treatment process. Record 385-J.

6 Members of the public bring yard debris to the subject
7 property, where it is ground or shredded to a suitable size,
8 mixed with digested sludge from the sewage treatment plant
9 and stored in piles on the subject property. After a period
10 of about 90 days, longer when it rains, biological processes
11 turn the mixture into compost, which is then sold to the
12 public, from the subject property, under the name "Jo-Gro."
13 The proposed building is intended to speed the composting
14 process by sheltering the piles of compost material from the
15 rain. As originally proposed, the building would be
16 approximately 15,000 square feet in area and 34 feet high.
17 Beyond that, the nature of the proposed structure is
18 unclear.

19 "Sewage disposal plants" are listed as a conditional
20 use in the RR-1 zone under Josephine County Zoning Ordinance
21 (JCZO) 8.025(2). "Non-hazardous waste disposal site" is
22 listed as a conditional use in the RR-1 zone under
23 JCZO 8.025(3). JCZO 1.006(173) defines "waste disposal
24 site" as:

25 "Land used for the disposal or handling of solid
26 wastes, including but not limited to dumps,
27 landfills, sludge lagoons, sludge treatment

1 facilities, composting plants and disposal sites
2 for septic tank pumping or cesspool cleaning by
3 the public or a solid waste collection service."
4 (Emphasis added.)

5 No conditional use permit has ever been issued for the
6 sewage treatment plant or for the composting operation. On
7 January 29, 1991, the county approved a development permit
8 for operation and storage of a compost grinder on the
9 subject property. Record 323-P to 323-S. The parties agree
10 this permit is only for the operation of the compost
11 grinder, not for the overall composting operation.

12 On January 15, 1993, intervenor applied for a
13 conditional use permit for the proposed compost storage
14 building. The application was reviewed by the county
15 hearings officer, who determined that evidence would be
16 limited to the proposed structure and that evidence
17 concerning the sewage treatment plant or overall composting
18 operation would not be accepted. Record 315. After a
19 public hearing, the hearings officer approved intervenor's
20 application, with conditions requiring, among other things,
21 (1) a vegetated berm along the south property line at the
22 same height as the existing berm along the east property
23 line "to create a site obscuring barrier," (2) planting of
24 additional trees on the berm along the east property line,
25 (3) that no chipper, sorter or other heavy equipment be
26 operated on weekends, holidays or between 7 p.m. and 7 a.m.
27 on any day, and (4) that within three years intervenor "make
28 a good faith effort to install a Conveyer Belt to move

1 materials from the building * * *." Record 318.

2 Both intervenor and petitioners appealed the planning
3 commission decision to the board of commissioners. The
4 board of commissioners conducted an "on the record" review,
5 in which it too rejected any evidence or argument concerning
6 the overall sewage treatment plant or composting operation.
7 Record 17, 22-23. After public hearings for argument, the
8 board of commissioners denied the appeals and affirmed the
9 hearings officer's decision approving the subject
10 conditional use permit, but modified the condition
11 prohibiting operation of heavy equipment on weekends to
12 allow operation of a front end loader on Saturdays during
13 regular business hours. Record 37.

14 This appeal followed.

15 **SECOND, EIGHTH AND ELEVENTH ASSIGNMENTS OF ERROR**

16 Petitioners contend the hearings officer and board of
17 commissioners improperly refused to accept evidence
18 regarding the overall composting operation. Petitioners
19 also contend the challenged decision erroneously concludes
20 the existing composting operation is a lawful use of the
21 subject property. Petitioners argue that under
22 JCZO 8.025(3) and 1.006(173), the composting operation is a
23 "non-hazardous waste disposal site," which began operation
24 after the property was zoned RR-1, and requires conditional
25 use approval. According to petitioners, the county cannot
26 grant conditional use approval for the proposed compost

1 storage building unless it also grants conditional use
2 approval for the composting operation in which the proposed
3 building will be used.

4 We agree with petitioners that where approval is sought
5 for the construction of a building to serve an existing use,
6 whether that existing use is lawful is relevant to approval
7 of the proposed building. However, intervenor contends the
8 issue of the legality of the overall composting operation is
9 not timely raised in this appeal, because the record clearly
10 demonstrates petitioners have known about the existence of
11 the composting operation for several years. According to
12 intervenor, ORS 197.830(3) places a limit of 21 days from
13 when petitioners knew or should have known of the alleged
14 zoning ordinance violation on filing an appeal with LUBA.

15 ORS 197.830(3) provides:

16 "If a local government makes a land use decision
17 without providing a hearing * * *, a person
18 adversely affected by the decision may appeal the
19 decision to [LUBA] under this section:

20 " * * * * *

21 "(b) Within 21 days of the date a person knew or
22 should have known of the decision where no
23 notice [of the decision] is required."
24 (Emphasis added.)

25 ORS 197.830(3) applies only where a local government
26 makes a land use decision without providing a hearing and
27 petitioners subsequently attempt to challenge that decision
28 in an appeal to LUBA. As far as we can tell from the
29 decision and the record, prior to the challenged decision,

1 the county had never made a land use decision concerning the
2 legality of the composting operation on the subject
3 property.¹ Further, there is no dispute petitioners' appeal
4 of the land use decision challenged in this appeal was
5 timely filed. Therefore, ORS 197.830(3) does not apply.

6 The challenged decision includes, in several places,
7 determinations that the composting operation is a legal use
8 of the subject property. Record 22, 31, 32, 34. The
9 decision indicates the county believes the composting
10 operation is lawful under the JCZO because it is part of
11 normal sewage treatment plant operation.² However, the
12 basis for the county's interpretation of the JCZO in this
13 regard is unclear.³ The decision does not interpret and
14 apply arguably relevant provisions of the JCZO, such as the
15 previously cited JCZO 8.025(2) and (3) and 1.006(173),

¹Had the county previously made such a land use decision concerning the legality of the composting operation on the subject property, it would be entitled to rely on that decision and would not be required to reconsider the issue in the challenged decision. However, no party argues the county previously made such a land use decision.

²Accordingly, the county apparently does not believe the composting operation requires approval as an alteration of the nonconforming sewage treatment plant use or as a separate conditional use.

³We are required under ORS 197,829 and Clark v. Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992), to give considerable deference to the board of commissioners' interpretation of the JCZO. However, that interpretation must be expressed in the challenged decision and must go beyond a mere legal conclusion to be adequate for review. Gage v. City of Portland, 123 Or App 269, 860 P2d 282, on reconsideration 125 Or App 119 (1993), rev'd on other grounds 319 Or 308 (1994); Weeks v. City of Tillamook, 117 Or App 449, 453, 844 P2d 914 (1992); Larson v. Wallowa County, 116 Or App 96, 104, 840 P2d 1350 (1992).

1 JCZO 15.212,⁴ or JCZO 15.204 to 15.206 regarding alteration
2 of nonconforming uses.⁵ In addition, the findings are
3 inadequate for review because they do not state the facts
4 relied on by the county regarding the nature and
5 characteristics of the sewage treatment plant and composting
6 operations. Finally, the county improperly denied
7 petitioners the opportunity to submit evidence and argument
8 on the issue of the lawfulness of the composting operation.

9 The second, eighth and eleventh assignments of error
10 are sustained.⁶

11 **FIRST ASSIGNMENT OF ERROR**

12 Petitioners contend the county should have applied
13 Josephine County Comprehensive Plan (plan) Goals 3 and 8 in
14 making the challenged decision.

15 The challenged decision explains the county interprets

⁴JCZO 15.212 provides, in relevant part:

"Any use or structure which was lawfully established prior to the adoption of [the JCZO], and which is permitted as a conditional use * * *, shall be treated as an authorized use, and shall not require additional hearing review for alteration or improvement. * * *"

⁵We note petitioners do not contend the challenged decision exceeds the county's authority under ORS 215.130(5) and (9) to approve an alteration of a nonconforming use.

⁶Sustaining these assignments of error requires that the county reopen its evidentiary proceeding and determine a threshold issue regarding the lawfulness of the composting operation, which may also affect the remainder of its decision regarding conditional use approval for the proposed compost storage building. Therefore, we address the remainder of petitioners' assignments of error only to the extent they present issues of law, the resolution of which may assist the parties on remand.

1 plan Goals 3 and 8 as applying to county-wide policy
2 decisions and the development of implementing ordinances,
3 not to individual permit decisions. Record 26. We defer to
4 the board of commissioners' interpretation of these plan
5 provisions. ORS 197.829; Clark v. Jackson County, supra.

6 The first assignment of error is denied.

7 **SIXTH ASSIGNMENT OF ERROR**

8 Petitioners contend the county erred by not requiring
9 intervenor to submit evidence in response to "issues of
10 proof raised in the questionnaire, including but not limited
11 to conservation of property values and meeting LCDC goals."
12 Petition for Review 27.

13 The challenged decision explains petitioners' reference
14 to a "questionnaire" is to generalized questions on the
15 county's permit application form that are intended to give
16 county staff an understanding of an applicant's request.
17 Record 29. We agree with intervenor that questions on an
18 application form are not approval standards. In addition,
19 we note that because the county's plan and implementing
20 regulations are acknowledged by LCDC, the statewide planning
21 goals are not directly applicable to the challenged
22 decision. ORS 197.175(2); Byrd v. Stringer, 295 Or 311,
23 316-17, 666 P2d 1332 (1983).

24 **THIRD ASSIGNMENT OF ERROR**

25 **A. Reliance on Unidentified Rules**

26 Petitioners contend the county erred by relying on

1 certain "unidentified rules" for composting operations as a
2 basis for its decision to approve the subject conditional
3 use permit. Petitioners point to findings addressing JCZO
4 conditional use standards which state the proposed building
5 will "keep the composting operation in compliance with newly
6 drafted rules." Record 28.

7 We do not see that reference to unidentified rules is
8 in itself an error warranting reversal or remand. However,
9 we note that to the extent the county relies on the
10 existence of certain rules as a basis for finding compliance
11 with applicable standards, and that finding is challenged,
12 this Board will not be able to uphold such reliance if it
13 cannot identify and review the rules in question.

14 This subassignment of error is denied.

15 **B. Evidence Accepted After Record Closed**

16 Petitioners contend that during its deliberations on
17 December 8, 1993, the board of commissioners improperly
18 accepted into the record a letter from the City of Grants
19 Pass/Josephine County Air Quality Advisory Committee, dated
20 December 6, 1993, after the record was closed. Record 47,
21 49. Petitioners objected to acceptance of the letter.
22 Record 50. According to petitioners, this violates
23 Josephine County Land Use Hearing Rule (JCLUHR) 17(11),
24 which provides that in appeals to the board of commissioners
25 "no new matters or evidence shall be allowed." Petitioners
26 argue the contents of the letter are relevant to determining

1 compliance with conditional use permit approval standard
2 JCZO 15.213(1)(b):

3 "If impacts will result from the proposed use, why
4 adjoining property owners should bear the
5 inconvenience of a change in land use."

6 Acceptance of the December 6, 1993 letter was a
7 procedural error, to which petitioners objected. Such a
8 procedural error provides a basis for reversal or remand
9 only if petitioners' substantial rights are prejudiced.
10 ORS 197.763(7)(a)(B). We have previously held that where a
11 local governing body improperly accepts potentially relevant
12 new evidence while conducting an on-the-record review of a
13 lower level decision maker's decision, and does not provide
14 petitioners an opportunity to rebut that new evidence,
15 petitioners' substantial rights are prejudiced. Wicks v.
16 City of Reedsport, ___ Or LUBA ___ (LUBA No. 94-139,
17 March 8, 1995) slip op 12.

18 The letter in question is arguably relevant to
19 determining "why adjoining property owners should bear the
20 inconvenience" of the proposed use under JCZO 15.213(1)(b).
21 However, intervenor contends no such determination had to be
22 made in this case, because the challenged decision
23 determines there will be no adverse impacts from the
24 proposed building and, therefore, "no explanation of why the
25 adjoining property owners must bear the inconvenience is
26 necessary." Record 28.

27 Because we sustain others of petitioners' assignments

1 of error, the record of the county proceeding will have to
2 be reopened and compliance with JCZO 15.213(1)(b) will be
3 reconsidered. Unless the county once again determines there
4 will be no impacts from whatever conditional use its
5 decision approves, the subject letter will be relevant and
6 the county must provide petitioners an opportunity to rebut
7 it.

8 This subassignment of error is sustained.

9 The third assignment of error is sustained, in part.

10 **REMAINING ASSIGNMENTS OF ERROR**

11 The remaining assignments of error present several
12 overlapping issues, three of which raise questions of law
13 addressed below.

14 **A. Public Benefit**

15 Petitioners contend the challenged decision is not
16 based on a demonstration of "public benefit" from the
17 proposed use. However, petitioners identify no legal
18 requirement that there be public benefit from the proposed
19 use.

20 This subassignment of error is denied.

21 **B. Reliance on Conditions Not Part of Application**

22 Petitioners contend that in determining under
23 JCZO 15.213(1)(b) that the proposed use would not have
24 adverse impacts on adjoining properties, the county
25 improperly relied on "conditions" which are neither part of
26 intervenor's application nor imposed by the challenged

1 decision. According to petitioners, such conditions include
2 a building height limitation of 25 feet (where the RR-1 zone
3 allows 35 feet) and requiring a solid, insulated wall on the
4 side of the building closest to dwellings on adjoining
5 property.⁷ Record 28, 29.

6 We agree with petitioners that the county relies on the
7 24-foot height limitation and the solid insulated wall in
8 determining compliance of the proposed building with
9 approval standards. We also agree that such features are
10 not included in intervenor's application or explicitly
11 imposed as conditions. We have previously determined that
12 where a local government relies on particular features of a
13 proposed use to assure compliance with approval standards,
14 it must assure there is an adequate reason to assume such
15 features actually will be part of the proposal. Collins v.
16 Klamath County, 26 Or LUBA 434, 437 (1994). Intervenor
17 points to testimony by its representatives expressing a
18 willingness to abide by at least the 25-foot height
19 limitation. However, where a limitation is necessary to
20 assure compliance with applicable approval standards, more
21 than an expression of current intentions by the applicant is

⁷Petitioners also point to references in the decision to requirements for vegetated berms. The hearings officer's decision, which is incorporated into the board of commissioners' decision by reference (Record 37), explicitly imposes a condition requiring such berms on the east and south sides of the subject property. Record 318. Petitioners' argument goes more to whether such berms are adequate to provide the stated mitigation of impacts, an evidentiary issue which we do not address in this opinion.

1 required. Neste Resins Corp. v. City of Eugene, 23 Or LUBA
2 55, 67 (1992).

3 This subassignment of error is sustained.

4 **C. Conveyor Belt Condition**

5 Petitioners contend the county "lacked jurisdiction to
6 impose the conveyor belt [requirement] as a condition."
7 Petition for Review 47. However, petitioners fail to
8 explain the basis for this contention, and we will not
9 supply legal argument for petitioners. Deschutes
10 Development v. Deschutes County, 5 Or LUBA 218, 222 (1982).

11 This subassignment of error is denied.

12 The county's decision is remanded.