

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

4 CLYDE COLLINS,)
5)
6 Petitioner,)
7)
8 vs.)
9)
10 KLAMATH COUNTY,)
11)
12 Respondent,)
13)
14 and)
15)
16 BERNARD L. SIMONSEN, OREGON)
17 CATTLMEN'S ASSOCIATION and)
18 KLAMATH CATTLEMEN'S ASSOCIATION,)
19)
20 Intervenors-Respondent.)

LUBA No. 96-113

FINAL OPINION
AND ORDER

21
22
23 Appeal from Klamath County.

24
25 Mark Runnels, Klamath Falls, filed the petition for
26 review and argued on behalf of petitioner. With him on the
27 brief was Spencer, Runnels, MacArthur & Porras.

28
29 Reginald R. Davis, County Counsel, Klamath Falls, filed
30 a response brief and argued on behalf of respondent.

31
32 Michael P. Rudd, Klamath Falls, filed a response brief
33 on behalf of intervenor-respondent Simonsen. With him on
34 the brief was Brandness, Brandness & Rudd.

35
36 Lindsay J. Slater, Salem, and David J. Hunnicutt,
37 Tigard, represented intervenors-respondent Oregon
38 Cattlemen's Association and Klamath Cattlemen's Association.

39
40 Joseph H. Hobson, Jr., Salem, filed an amicus curiae
41 brief on behalf of Oregon Farm Bureau Federation.

42
43 HANNA, Chief Referee; GUSTAFSON, Referee, participated
44 in the decision.

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REMANDED

01/27/97

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

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the board of county commissioners'
4 (commissioners) affirmance of a hearings officer's use
5 classification decision.

6 **MOTIONS TO INTERVENE**

7 **A. Motions to Intervene**

8 Bernard Simonsen (intervenor), owner of the subject
9 property, moves to intervene in this proceeding on the side
10 of respondent. There is no objection to the motion, and it
11 is allowed.

12 The Oregon Cattlemen's Association and Klamath
13 Cattlemen's Association move to intervene in this proceeding
14 on the side of respondent. There is no objection to the
15 motion, and it is allowed. However, neither association
16 submitted a response brief or appeared at oral argument.¹

17 **B. Motion to Appear as Amicus**

18 The Oregon Farm Bureau Federation moves to appear as
19 amicus in this proceeding. There is no objection to the
20 motion, and it is allowed.

21 **FACTS**

22 Petitioner complained to the county that intervenor
23 conducted cattle sales and related activities on

¹Because the Oregon Cattlemen's Association and Klamath Cattlemen's Association did not appear, all references to intervenor are to intervenor Bernard Simonsen.

1 intervenor's property without a conditional use permit to do
2 so, and requested administrative, perhaps enforcement,
3 action.² The planning director did not resolve petitioner's
4 complaint administratively because of a dispute concerning
5 the relationship between state statutes as recently
6 interpreted by the Oregon Supreme Court and several code
7 provisions, all pertaining to the regulation of the use of
8 exclusive farm use (EFU) land.³ Instead, the planning
9 director requested that a county hearings officer make a use
10 classification determination under Klamath County Land
11 Development Code (LDC) 12.070. The notice of the hearing
12 described the planning director's request as:

13 "Classification of use requested by the Planning
14 Director (Sec. 12.070) - are livestock sales/shows
15 permitted per Article 54 - EFU zone as conducted

²In a letter to the planning department, intervenor described the relevant history of the property:

"Bernard and Rhea Simonsen, owners of the Rocking AC Ranch, purchased the 17.6 acre parcel of land at 9390 Highway #140 East in 1992 with the intent of providing a primary residence for themselves and to utilize the facilities and land for the raising and marketing of purebred livestock as part of the Rocking AC Ranch. Subsequently, when asked if these facilities would be available for use by others, an opinion was received from the planning staff that, although the facilities could be used for sale of owned cattle, a CUP would be required to sell consigned or non-owned cattle. After lengthy hearings and appeals, that CUP was withdrawn after being approved by the County, due to technical flaws in the proceedings. Record 67.

Petitioner states, without any case citations, that LUBA remanded the county's approval of conditional use permits on two occasions.

³Brentmar v. Jackson County, 321 Or 481, 900 P2d 1030 (1995) (limiting county authority to regulate uses on exclusive farm use land).

1 at 9390 Hwy. 140 E." Record 100.

2 The LDC states that the intent of LDC 12.070 is to
3 allow

4 "a land use, activity, building or structure that
5 is not enumerated or otherwise defined by this
6 code [to] be classified, interpreted, or defined
7 without amendment to the language of this code."

8 The hearings officer conducted a quasi-judicial hearing
9 at which he addressed five types of activities to determine
10 if a conditional use permit would be required to conduct
11 those activities.⁴ By answering "no" to the first four

⁴The hearings officer's decision states:

"The primary issues were whether the Klamath County Land Development Code requires a rancher or farmer, who is operating in an Exclusive Farm Use Zone, to obtain a conditional use permit to:

- "1. Show his or her equine, livestock or other agricultural products for the purpose of sale or to promote the general acceptance of a breed or type of agricultural product or to encourage other persons or businesses to produce such breed or type of agricultural product?
- "2. Sell his or her own equine, livestock or other agricultural product or products by auction or other methods?
- "3. Allow or assist other ranchers or farmers in the community to use his or her EFU land and the facilities thereon for the purpose of gathering, doctoring, docking, sorting, tagging, branding, shipping, receiving or selling such other farmer's or rancher's equine, livestock or selling and shipping other agricultural products?
- "4. Conduct or allow other members of the community to conduct activities such as, but not limited to, 4H, FFA, junior, social or agricultural shows or events. Examples of which are judged shows,

1 inquiries and "yes" to the fifth, the hearings officer
2 concluded that a conditional use permit would not be
3 required to conduct the described activities. Petitioner
4 appealed that decision to the commissioners, who affirmed
5 the hearings officer's decision. This appeal followed.

6 **FIRST ASSIGNMENT OF ERROR**

7 Petitioner argues that the notice announcing a
8 classification hearing was in error. Petitioner contends
9 that intervenor's sales activities are regulated under LDC
10 54.030(C), which allows stockyards and animal sales as a
11 conditional use. Petitioner therefore contends that the
12 action of the commissioners was actually an interpretation
13 of LDC 54.030(C) rather than their purported action under
14 LDC 12.070 of classifying a use not otherwise defined in the
15 code.⁵ Petitioner further argues that LDC 11.030 defines
16 stockyards and animal sales as the "temporary keeping of

meetings, team roping, playdays, amateur rodeo
events, horse meetings, team roping, playdays,
amateur rodeo events, horse riding, dressage, ranch
horse events, whether for youth or adults?

- "5. May a rancher or farmer show, or show and sell,
without a Conditional Use Permit, his or her
equine, livestock or other agricultural product or
products on EFU land upon which the equine,
livestock or other agricultural product or products
were raised, grown, fattened or harvested?"

The hearings officer's decision does not explain how the subjects of
inquiry were chosen, or if they pertain to proposed activities on the
subject property.

⁵The use allowed under LDC 54.030(C), "stockyards and animal sales," is
not identical to the use described in the hearing notice, "livestock
sales/shows."

1 transient livestock for auction, market sale, shipping or
2 slaughter." Thus, petitioner argues, because the term at
3 issue is already defined at LDC 11.030, the classification
4 proceeding was not allowed under LDC 12.070.

5 Intervenor suggests that the conditional use allowed
6 under LDC 54.030(C) and defined in LDC 11.030 can be read to
7 conflict with ORS 215.203(2) and 215.283. Intervenor argues
8 that, particularly in light of Brentmar v. Jackson County,
9 which restricts local government regulation of EFU land, the
10 county was required, in this case, to reconcile the apparent
11 conflict between the statutory provisions of ORS 215.203(2)
12 and 215.283(1) and the code provisions of LDC 54.030(C) and
13 LDC 11.030. Consequently, intervenors argue, the terms used
14 in LDC 54.030(C) and LDC 11.030 were an appropriate subject
15 for clarification.

16 Intervenor relies on two definitions in ORS 215.203(2)
17 to support his contention that the livestock sales and shows
18 use is allowed within the meaning of farm use. ORS
19 215.203(2) provides, in relevant part:

20 "(a) As used in this section, 'farm use' means the
21 current employment of land for the primary purpose
22 of obtaining a profit in money by raising,
23 harvesting and selling crops or the feeding,
24 breeding, management and sale of, or the produce
25 of, livestock, poultry, fur-bearing animals or
26 honeybees or for dairying and the sale of dairy
27 products or any other agricultural or
28 horticultural use or animal husbandry or any
29 combination thereof. 'Farm use' includes the
30 preparation and storage of the products raised on
31 such land for human use and animal use and

1 disposal by marketing or otherwise. 'Farm use'
2 also includes the current employment of land for
3 the primary purpose of obtaining a profit in money
4 by stabling or training equines including but not
5 limited to providing riding lessons, training
6 clinics and schooling shows. 'Farm use' also
7 includes the propagation, cultivation, maintenance
8 and harvesting of aquatic species. It does not
9 include the use of land subject to the provisions
10 of ORS chapter 321, except land used exclusively
11 for growing cultured Christmas trees as defined in
12 subsection (3) of this section or land described
13 in ORS 321.267 (1)(e) or 321.415 (5).

14 * * * * *

15 "(c) As used in this subsection, 'accepted farming
16 practice' means a mode of operation that is common
17 to farms of a similar nature, necessary for the
18 operation of such farms to obtain a profit in
19 money, and customarily utilized in conjunction
20 with farm use." (Emphasis added.)

21 This Board is required to defer to a local governing
22 body's interpretation of its own enactment, unless that
23 interpretation is contrary to the express words, purpose or
24 policy of the local enactment or to a state statute,
25 statewide planning goal or administrative rule which the
26 local enactment implements. ORS 197.829; Gage v. City of
27 Portland, 319 Or 308, 316-17, 877 P2d 1187 (1994); Clark v.
28 Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992).
29 This means we must defer to a local government's
30 interpretation of its own enactments, unless that
31 interpretation is "clearly wrong." Goose Hollow Foothills
32 League v. City of Portland, 117 Or App 211, 217, 843 P2d
33 992 (1992).

34 We agree with intervenors that the commissioners could

1 conclude that there is a conflict between what the state
2 statutes allow outright as farm uses and what farm uses are
3 subject to restriction under the county code. Furthermore,
4 we agree with intervenors that the county must interpret LDC
5 54.030(C) to avoid any conflict with state statutes. The
6 county appropriately used the quasi-judicial proceeding
7 allowed under LDC 12.070 to clarify the use subject to this
8 dispute.

9 The first assignment of error is denied.

10 **SECOND ASSIGNMENT OF ERROR**

11 Petitioner argues:

12 "The Board made no specific findings as to any
13 definitions of '*farm use*' and '*stockyard and*
14 '*animal sales*'. The purported findings by the
15 Board is [sic] actually a Conclusion and does not
16 address any specifics. The Board finding
17 discusses the custom, culture, and past history,
18 but again makes no specific findings as to what
19 these are, or how they apply to this property."
20 (Emphasis in original.) Petition for Review 4-5.

21 Intervenor urges LUBA to defer to the county's
22 interpretation of its ordinance.

23 While this Board is required to defer to a local
24 governing body's interpretation of its own enactment, unless
25 that interpretation is "clearly wrong" (Goose Hollow
26 Foothills League v. City of Portland, supra), in this
27 assignment of error, petitioners challenge the adequacy of
28 the findings, not a code interpretation on which those
29 findings are based.

30 The notice of hearing identified the request as

1 "Classification of use * * * as conducted at 9390 Hwy.
2 140E."

3 The commissioners' findings state:

4 "A literal reading of the code indicates the 'Farm
5 Use' and 'Stockyard and Animal Sales' definitions
6 in the Code appear to not be consistent with each
7 other when applied to the factual situation at
8 issue. In order to find consistency between the
9 two sections, the Board has looked to the custom,
10 culture, and past history of Klamath County and
11 the State of Oregon as they apply to agricultural
12 practices in this State. The Board has determined
13 that the Hearings Officer correctly determined
14 that the practices at issue fall under the
15 definition of 'Farm Use' and not 'Stockyard and
16 Animal Sales.'" Record 2.

17 Findings must (1) identify the relevant approval
18 standards, (2) set out the facts which are believed and
19 relied upon, and (3) explain how those facts lead to the
20 decision on compliance with the approval standards. Heiller
21 v. Josephine County, 23 Or LUBA 551, 556 (1992); see also,
22 Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 20-
23 21, 569 P2d 1063 (1977); Vizina v. Douglas County, 17 Or
24 LUBA 829, 835 (1989).

25 The challenged decision does not relate the general
26 findings to the property at issue, and therefore does not
27 establish that the proposed use complies with the approval
28 standards. For this reason, the findings are inadequate to
29 support the challenged decision classifying the use
30 conducted at the subject property.

31 The second assignment of error is sustained.

1 **THIRD ASSIGNMENT OF ERROR**

2 Petitioner argues that the challenged decision "was
3 made in part in a [secret] meeting in violation of Oregon
4 Law and in violation of the Klamath County Land Development
5 Code." Petition for Review 5. Petitioners object that the
6 commissioners violated the public meetings law, ORS 192.610
7 to 192.690, when they held an executive session during the
8 course of the public hearing in order to consult with their
9 legal counsel.⁶ Petitioner also relies on LDC 31.000(G),
10 which states "[a]ll evidence, testimony, deliberation, and
11 decision shall be made before the public, shall be recorded,
12 and shall be made a part of the record[,]" to support his
13 contention that the executive session was impermissible.

14 LDC 31.000(G) does not preclude the commissioners' off
15 the record consultation with its counsel. Moreover, if
16 there was otherwise a violation of the public meetings law,
17 ORS 192.680 provides for enforcement of the provisions of
18 ORS 192.610 to 192.690 by the circuit court for the county
19 in which the governing body ordinarily meets. LUBA has no
20 jurisdiction to enforce the provisions of ORS 192.610 to
21 192.690.

22 The third assignment of error is denied.

23 The county's decision is remanded.

⁶The county states that during the executive session the commissioners discussed potential litigation that could be filed against the county pertaining to this case.