

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the county hearings
4 officer denying an application for a conditional use permit
5 for a personal use airport on land zoned for exclusive farm
6 use (EFU).

7 **MOTION TO INTERVENE**

8 Les Krambeal (intervenor) moves to intervene on the
9 side of the respondent. There is no opposition to the
10 motion, and it is allowed.

11 **FACTS**

12 We adopt our statement of facts from the challenged
13 decision:

14 "[Petitioner's] property is described as * * * Tax
15 Lots 1801, consisting of 16.4 acres, and 1802,
16 consisting of 86.28 acres. The property is zoned
17 EFU * * *. Currently, the property is used as a
18 horse breeding, boarding and training facility.
19 Hay is grown upon the property for feeding the
20 horses and for sale. A mobile home is situated
21 upon the property * * *.

22 "On all sides, the subject property is surrounded
23 by lands zoned EFU. To the north, the EFU
24 district extends approximately 1/4 mile, with
25 Rural Residential zoning beyond.

26 "The property contains a paved surface extending
27 generally north and south a distance of
28 approximately 2,000 feet, suitable for runway use.
29 [Petitioner's] proposal includes development on
30 Tax Lot 1802 of a building approximately 60 x 65
31 feet, for maintenance and storage of aircraft as
32 well as farm equipment.

33 "[Petitioner] currently operates Firefly Aviation

1 at the Shady Cove Airport. His business includes
2 scenic flights, construction, banner towing,
3 aerial photography, fire fighting and carrying
4 external loads. In his business, [petitioner]
5 utilizes two Bell UH-1 'Huey' and one R22 Robinson
6 helicopters. Applicant also owns a Cessna 'Ag
7 Wagon' fixed-wing aircraft and two gliders.
8 Although the Ag-Wagon is designed and typically
9 used for aerial applications on agricultural
10 lands, [petitioner] does [not] engage in
11 agricultural spraying or dusting and does not
12 propose to do so. The airplane is used for towing
13 banners and gliders.

14 "[Petitioner] proposes to move all of his aircraft
15 -- including several inoperable helicopters --
16 from Shady Cove to the subject property, and
17 store, service, maintain and fly from the new
18 location. [Petitioner] also anticipates that he
19 may acquire additional aircraft in the future and
20 would plan to store, maintain, and operate them
21 from the [subject] property. The business office
22 for Firefly Aviation would continue to be situated
23 in Shady Cove.

24 "[Petitioner] proposes to fly all of the aircraft
25 himself, except for those occasions when he wishes
26 to fly his glider. Then, he will have the tow
27 plane operated by an invited guest." Record 12-
28 14.

29 The county hearings officer denied petitioner's
30 application on June 25, 1997. This appeal followed.

31 **FIRST ASSIGNMENT OF ERROR**

32 Petitioner contends the hearings officer erred in
33 denying his application for a personal use airport when the
34 proposed commercial activities would be conducted
35 exclusively by petitioner. The term "personal use airport"
36 is defined in Jackson County Land Development Ordinance
37 (JCLDO) 218.025(16):

1 "An airstrip or helicopter pad restricted, except
2 for aircraft emergencies, to use by the owner and
3 by invited guests, on an infrequent and occasional
4 basis, and by commercial aviation activities in
5 connection with agricultural operations.^[1] No
6 aircraft may be based on a personal use airport
7 other than those owned or controlled by the owner
8 of the airstrip. Exceptions to the activities
9 permitted under this definition may be granted
10 through waiver action by the Oregon Department of
11 Transportation, Aeronautics Division in specific
12 instances. A personal use airport lawfully
13 existing on September 13, 1975, shall continue to
14 be permitted subject to all applicable rules of
15 the Oregon Department of Transportation,
16 Aeronautics Division." (Emphasis added.)

17 JCLDO 218.050(12) permits personal use airports as a
18 conditional use in the county's EFU district, subject to
19 standards stated in JCLDO 218.100(1) and (2).²

¹This phrase is similar, but not identical, to the parallel phrase in the definition of "personal use airport" in ORS 215.283(2)(g). The statutory definition begins:

"* * * an airstrip or helicopter pad restricted, except for aircraft emergencies, to use by the owner and, on an infrequent and occasional basis, by invited guests, and by commercial aviation activities in connection with agricultural operations.
* * *" (Emphasis added.)

The statutory definition places no limits on the amount of use by the owner, but limits the amount of use by invited guests, while through the relocation of the phrase "on an infrequent and occasional basis," the JCLDO definition appears to limit the amount of use by both the owner and invited guests. However, the challenged decision does not deny petitioner's application on this basis.

²JCLDO 218.100 provides, in relevant part:

"1) STANDARDS REQUIRED OF ALL CONDITIONAL USES: Conditional uses may be approved only when the following findings can be made:

1 Petitioner argues that JCLDO 218.025(16) should be
2 interpreted to establish two categories of uses permitted at
3 personal use airports: (1) use unrestricted as to type but
4 restricted to the owner (except for aircraft emergencies)
5 and to infrequent, invited guests; and (2) use for
6 commercial aviation activities by anyone (not just the owner
7 and guests) in connection with agricultural operations.
8 Petitioner advises that only he will use the proposed
9 airport, apart from occasions when he will be towed in a
10 glider by an invited guest. He contends that the fact that
11 the proposed use is a business use, including scenic
12 flights, construction, banner towing, aerial photography,
13 fire fighting and carrying external loads, does not

"(A) The use will not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use. [ORS 215.296(1)(a); OAR 660-33-120 & 660-33-130(5)(a)]

"(B) The use will not significantly increase the cost of accepted farm or forest practices on lands devoted to farm or forest use. [ORS 215.296(1)(b); OAR 660-33-120 & 660-33-130(5)(b)]

"(C) An applicant for a conditional use may demonstrate that A and B above will be satisfied through the imposition of conditions. Any conditions so imposed shall be clear and objective. [ORS 215.296(2)]

"2) SITE PLAN REQUIREMENTS: Uses subject to this section must show that adequate off-street parking and circulation have been provided for the proposed uses. A scaled plot plan, showing the existing and proposed structures, parking layout, circulation, ingress and egress, in compliance with Chapter 280 must be included with the conditional use permit application."

1 disqualify it from inclusion in the first category of
2 permitted uses.

3 The challenged decision relies upon our opinions in
4 Todd v. Douglas County, 14 Or LUBA 307 (1986) and Rodgers v.
5 Douglas County, 17 Or LUBA 122 (1989). In Todd the
6 applicant, a corporation with a sole shareholder, was in the
7 logging business. It owned one airplane used by the
8 shareholder to view timber sales and to carry equipment and
9 parts for the logging business. The county approved a
10 conditional use permit for a personal use airport. The
11 petitioners contended that use of the airstrip in connection
12 with the logging business was neither a personal use nor a
13 commercial aviation activity in connection with agricultural
14 operations. We disagreed, stating:

15 "We must reject petitioners' claim that the
16 statute impliedly excludes the proposed use
17 because it is commercial in nature yet not a
18 'commercial aviation activity in connection with
19 agricultural operations' described in ORS
20 215.213(2)(h).^[3] The statute allows commercial
21 aviation activities in connection with farming in
22 addition to personal use by the airstrip owner.
23 Allowance of this additional use category does not
24 restrict the scope of the principal type of use
25 allowed by the statute. The county concluded the
26 proposed strip is for the personal use of the
27 owner. That conclusion was not an erroneous
28 interpretation of the applicable law." 14 Or LUBA
29 at 308-09 (emphasis in original, footnote

³ORS 215.213(2)(h) is identical to ORS 215.283(2)(g). Although petitioner refers to ORS 215.213(2)(h), it is ORS 215.283(2)(g) which is at issue in this appeal.

1 omitted).

2 In Rodgers the applicant proposed a runway, fuel
3 storage, night land lights and electronic navigational aids,
4 as well as two hangars to house the applicant's aircraft
5 which included a Lear Jet, a Gulfstream Turbo Commander and
6 a helicopter. The applicant proposed to use these aircraft
7 for pleasure and for the purpose of traveling directly from
8 his home to a business located in southern California. We
9 stated:

10 "Petitioners' basic premise is that a personal use
11 airport within land zoned for exclusive farm use
12 or, in this case, the county's FF zone, is only
13 permissible if it is in furtherance of some
14 agricultural (or forestry) activity. We find
15 neither the county ordinance nor the state statute
16 so restrict personal use airports. Nothing in the
17 code or the ordinance requires that a personal use
18 airport be limited to agricultural activities.
19 Rather, the provisions allow personal use airports
20 with no restrictions on purpose except that the
21 use be 'personal' to the owner, and that any
22 commercial aviation activity must be in
23 conjunction with agricultural operations. That
24 is, personal use airports are conditionally
25 permitted; and commercial aviation activities are
26 permitted at such airports if 'in connection with
27 agricultural operations.' The quoted language
28 limits commercial aviation activities but does not
29 limit private use by the owner at personal use
30 airports. We so held in Todd * * * , and we see
31 no reason to depart from that decision in this
32 review proceeding." 17 Or LUBA at 126-27.

33 The challenged decision states:

34 "If Rodgers was merely intended to affirm Todd,
35 the language chosen was unfortunate. In Rodgers,
36 LUBA clearly said that commercial aviation
37 activities can only be conducted at personal use

1 airports if in connection with agricultural
2 activities, whereas in Todd, it implied that a use
3 could be commercial in nature, yet not
4 agricultural, and still be allowed if personal to
5 the owner." Record 17-18.

6 We need not conclude that Rodgers overturns Todd in
7 order to affirm the challenged decision. As the dissent
8 pointed out in Todd, under ORS 215.203 to ORS 215.337,
9 agricultural lands are to be used for agricultural purposes.
10 Where the legislature has provided for certain exceptions,
11 such as the personal use airport, these exceptions should be
12 strictly construed. The business use approved in Todd was
13 personal to the applicant, in that the use of the airport
14 was incidental to conduct of the private business of the
15 applicant. There is a qualitative difference between that
16 use and the airport uses proposed by petitioner, which would
17 be his business.

18 We understand "use by the owner" in the statute and
19 ordinance to mean "use by the owner for the owner."
20 Petitioner's "personal use airport" would not be limited to
21 his own personal use or even his own personal business use,
22 but would primarily serve the passengers and customers who
23 paid him to fly. It cannot be allowed as a conditional use
24 under ORS 215.283(2)(g) or JCLDO 218.025(16).

25 The first assignment of error is denied.

26 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

27 Because we agree with the county that the disposition
28 of the "personal use airport" issue requires the application

1 be denied, we do not reach the county's finding that
2 petitioner failed to demonstrate compliance with JCLDO
3 218.100(1) and (2). That finding provides a second basis
4 for denial, and is the subject of the second and third
5 assignments of error.

6 The county's decision is affirmed.