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

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PAUL KUNKEL,)
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Petitioner,)
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vs.)
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WASHINGTON COUNTY,)
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Respondent,)
)
and)
)
RICHARD CAMPBELL, and C.T.&H.)
COMPANY,)
)
Participant-)
Respondents.)

LUBA No. 87-060
FINAL OPINION
AND ORDER

Appeal from Washington County.

Mark J. Greenfield, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Mitchell, Lang & Smith.

Cheyenne Chapman, Hillsboro, filed a respondent's brief on behalf of Respondent County.

Jeff Bachrach, Portland, filed a brief and argued on behalf of participant-respondents. With him on the brief was O'Donnell, Ramis, Elliott & Crew.

HOLSTUN, Referee; BAGG, Chief Referee, participated in the decision.

REMANDED 02/18/88

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 Petitioner appeals the county's approval of emergency
4 livestock disposal on a 160 acre parcel located in the county's
5 exclusive farm use (EFU) zone.

6 FACTS

7 Participant-respondents import lambs from New Zealand
8 through the Port of Portland. The lambs travel in lots of
9 27,000 animals by ocean carrier. The animals are quarantined
10 upon arrival for a minimum of 30 days under U.S. Department of
11 Agricultural (USDA) supervision. The USDA requires
12 participant-respondents to make arrangements for disposal of
13 sick or dead animals in the event disease or other catastrophic
14 events require destruction of part or all of a shipment. If a
15 significant part or all of a shipment must be destroyed,
16 available rendering facilities will not be sufficient to
17 dispose of the animals properly. The 160 acre site selected by
18 participant-respondents for emergency disposal is located in
19 Washington County's EFU zone.

20 On April 16, 1987, the Director of the Washington County
21 Department of Land Use and Transportation (Director) sent a
22 letter to participant-respondents' attorney stating the county
23 interpreted its EFU zone to allow use of the 160 acre parcel
24 for burial of lambs.¹ In his letter, the Director states
25 that a Type I permit would be required and would be conditioned
26 on compliance with all other required state and federal

1 permits.² On June 8, 1987, the Oregon Department of
2 Environmental Quality (DEQ) issued participant-respondents a
3 letter of authorization for a "temporary solid waste disposal
4 site." Record 12. In its letter of authorization, DEQ
5 acknowledged receipt of the April 16, 1987 letter from the
6 Director.

7 On June 10, 1987, the county issued a Type I approval for
8 the site. In its approval the county concluded the proposed
9 use is "a farm use." Record 9. Notice of the June 10, 1987
10 decision was mailed to the applicants (participant-respondents)
11 on June 12, 1987. The June 12 notice stated the 14 day appeal
12 period provided in the Washington County Community Development
13 Code (CDC) would expire on June 26, 1987. Under CDC 204-2, no
14 public notice of the proposed Type I review is required, and
15 only the applicant receives notice of a Type I decision after
16 it is rendered.³

17 Petitioner first became aware of the county's decision on
18 July 13, 1987 and filed his notice of intent to appeal with the
19 Board on July 20, 1987.

20 JURISDICTION

21 Respondent county and participant-respondents argue the
22 Board lacks jurisdiction in this matter because (1) the
23 decision is not a land use decision as that term is defined in
24 ORS 197.015(10), (2) petitioner failed to exhaust local rights
25 of appeal, and (3) petitioner's notice of intent to appeal is
26 not timely.

1 Neither is there any dispute that the county's decision is a
2 "final decision * * * [concerning] application of * * * [a]
3 land use regulation." Therefore, the county's decision
4 satisfies the statutory test and is subject to review by this
5 Board unless the exemption in ORS 197.015(10)(b) applies. The
6 exemption does not apply unless the decision is (1)
7 "ministerial," (2) "made under clear and objective standards in
8 an acknowledged * * * land use regulation", and (3) "no right
9 to a hearing is provided * * *." If the county's decision
10 falls within the ORS 197.015(10)(b) exemption, the circuit
11 court, rather than the Board, has review jurisdiction. See ORS
12 197.825(4)(a).

13 It appears from the way the county defines Type I
14 development actions, the county intends Type I decisions to
15 fall within the ORS 197.015(10)(b) exemption. See footnote 2,
16 supra. The county's intent notwithstanding, each of the three
17 requirements in ORS 197.015(10)(b) must be satisfied before a
18 decision that would otherwise be subject to our jurisdiction is
19 exempted. Under the CDC, there is no right to a hearing in
20 Type I approvals. Because the county provided no right to a
21 hearing, the third requirement is met.

22 We turn now to the more difficult question. Did the county
23 render a "ministerial" decision under "clear and objective"
24 standards when it determined that "farm use" encompasses an
25 emergency burial site for up to 27,000 lambs.

26 One difficulty the county and this Board faces in

1 determining whether a decision is a land use decision subject
2 to our review is the lack of statutory definitions for the
3 operative terms in ORS 197.015(10)(b). Dictionary definitions
4 are not particularly helpful.⁵ There is, however, some
5 guidance from the courts. The Court of Appeals recently
6 described the purpose of ORS 197.015(10)(b) as follows:

7 "The purpose of ORS 197.015(10)(b) is to make certain
8 local government actions unreviewable as land use
9 decisions, because they are really nondiscretionary or
10 minimally discretionary applications of established
11 criteria rather than decisions over which any
12 significant factual or legal judgment may be
13 exercised. If particular decisions can automatically
14 flow from the existence of general standards which are
15 unaffected by factual variables, the decisions are
16 within the statute's scope." Doughton v. Douglas
17 County, 82 Or App 444, 449, 728 P2d 887 (1986) rev den
18 303 Or 74 (1987).

19 In Doughton v. Douglas County ___ Or LUBA ___ (LUBA No.
20 86-015, August 7, 1986), rev 82 Or App 444 (1986) this Board
21 reviewed the county's decision to issue a building permit for a
22 farm-related dwelling (farm dwelling). Under the county's
23 zoning ordinance, farm dwellings were a use permitted outright
24 in the EFU Zone. In Doughton, the Board first determined that
25 the applicable development standards were clear and objective.
26 However, the Board reasoned "the threshold question of how to
classify the proposal under the zoning ordinance so as to
determine which 'standards' govern its approval" was not itself
an application of 'standards,' required by ORS 197.015(10)(b)
to be "clear and objective." Doughton, supra, slip op at 9.
The Board concluded as long as the actual development standards

1 imposed on a use permitted outright were clear and objective
2 and there was no right to a hearing, such classification
3 decisions were exempted from the definition of land use
4 decision by ORS 197.015(10). Slip op at 10.

5 In reviewing this Board's decision in Doughton, the Court
6 of Appeals squarely rejected the Board's reasoning.

7 "The crux of our problem with LUBA's analysis is that
8 two questions, rather than only one - - whether the
9 proposed dwelling met the Section 3.4.200 standards
10 and whether it was one 'customarily provided in
11 conjunction with farm use' - - were involved in the
12 county's decision. We are not persuaded by LUBA's
13 characterization of the latter question as involving a
14 mere 'classification' of the permit application,
15 preliminary to the decision to approve or disapprove
16 it; that classification was part of the decision.
17 Both questions had to be answered affirmatively for
18 the permit to be approved and, for ORS 197.015(10)(b)
19 to apply, both questions had to be answerable by
20 reference to clear and objective standards. * * *

21 "We turn to whether there were clear and objective
22 standards pertaining to the [county's] determination.
23 [The zoning ordinance] contains no standards. It
24 simply states a requirement, without articulating
25 criteria for deciding when, whether and how the
26 requirement is satisfied." Doughton v. Douglas
County, 82 Or App at 448-449.

Because the existence of clear and objective standards for
classifying the proposed use a "farm use" is critical under
Doughton, we must determine what standards guided the county's
classification.⁶

In the county's EFU zone, one of the uses permitted through
the Type I procedure is "farm use as defined in ORS, Chapter
215." ORS 215.203(2)(a) defines farm use as follows:

"As used in this section, 'farm use' means the current
employment of land for the primary purpose of

1 obtaining a profit in money by raising, harvesting and
2 selling crops for the feeding, breeding, management
3 and sale of, or the produce of, livestock, poultry,
4 furbearing animals or honey bees or for dairying and
5 the sale of dairy products or any other agricultural
6 or horticultural use or animal husbandry or any
7 combination thereof. 'Farm use' includes the
8 preparation and storage of the products raised on such
9 land for human use and animal use and disposal by
10 marketing or otherwise." (emphasis added)

11 The county and participant-respondents rely on the
12 emphasized language from ORS 215.203(2)(a). The county argues
13 it simply allowed the "disposal" of lambs, a farm product, by
14 "marketing or otherwise," viz. land disposal of the lambs by
15 burial.

16 Petitioner responds with a number of arguments in support
17 of its position that 215.203(2)(a) does not apply and does not
18 provide clear and objective standards.⁷

19 The legal correctness of the county's determination that
20 the proposed use is a farm use aside, ORS 215.203(2)(a) does
21 not provide clear and objective standards. Neither is the
22 meaning of "farm use" clear on its face. The county's
23 determination, in our view, required factual and legal
24 judgement; and, therefore, under Doughton, it is a land use
25 decision subject to our review.

26 Whether management of livestock can be interpreted broadly
enough to encompass the proposed use is not clear. Similarly,
disposal of farm products "by marketing or otherwise" is not a
clear and objective standard. Significant legal or factual
judgement is required to conclude such disposal encompasses the

1 proposed use.

2 In reaching our conclusion that ORS 215.203(2) (a) does not
3 provide clear and objective standards for determining whether
4 particular uses are farm uses, we are influenced by the
5 county's EFU Zone provisions for solid waste disposal sites as
6 a nonfarm use through a discretionary Type III procedure. The
7 code defines solid waste disposal site as follows:

8 "A site for the disposal of solid waste approved by
9 the governing body of a city or county or both and for
10 which a permit has been granted under ORS 459.245 by
11 the Department of Environmental Quality, together with
12 equipment, facilities or buildings necessary for its
13 operation." CDC 430-127.⁸

14 As discussed infra, the parties dispute the applicability
15 of the above-quoted provision since DEQ issued a letter of
16 authorization rather than permit under ORS 459.245. However,
17 even if CDC 430-127 is inapplicable because a permit has not
18 been issued by DEQ, the presence of a provision in the county
19 code for solid waste disposal sites as a nonfarm conditional
20 use argues against respondent and participant-respondents'
21 position.⁹ We do not believe it "automatically flows from
22 [the] general standards" in ORS 215.203(2) (a) and CDC 430-127
23 that DEQ's decision to issue a letter of authorization rather
24 than a permit allows the county to classify as a farm use a use
25 that would otherwise be a nonfarm conditional use. In our
26 view, the county's classification required significant factual
and legal judgement. Accordingly, the decision was a land use
decision subject to our jurisdiction. Doughton v. Douglas

1 County, supra.¹⁰

2 The lack of clarity regarding the scope of the ministerial
3 decision exemption created by ORS 197.015(10) (b) and its
4 relationship to ORS 215.416 and 227.175 which control
5 discretionary planning and zoning decisions, presents obvious
6 problems for local governments attempting to determine which
7 procedures should be followed in particular proceedings.¹¹
8 However, until the statutes are amended or Doughton is
9 overruled, we apply ORS 197.015(10) (b) as the Court of Appeals
10 directed.

11 B. Failure to Exhaust Administrative Remedies

12 Participant-respondents cite three sections of the CDC¹²
13 and argue that each section cited provides a procedure for
14 petitioner to seek local review of the decision challenge.
15 Participant argues that under Lyke v. Lane County, 70 Or App
16 82, 688 P2d 411 (1984) and Yoder v. City of West Linn, 13 Or
17 LUBA 87 (1985), petitioner is required to pursue
18 reconsideration and appeal because the CDC makes those remedies
19 available by right.

20 We agree with participant-respondents that when a local
21 government makes appeal or reconsideration available by right,
22 those remedies must be exhausted before bringing an appeal to
23 this Board. But see, Portland Audobon Society v. Clackamas
24 Co., 77 Or App 277, 712 P2d 839 (1986) (petitioner not required
25 to seek reconsideration after highest local decionmaker renders
26 final decision). Our difficulty with participant-respondents'

1 argument is that the sections it cites all limit the right to
2 appeal or reconsideration to "parties" in the local
3 proceedings. Under the CDC, petitioner was not a party in the
4 local proceeding. Indeed the county argues the petitioner "has
5 no right of appeal of Type I decisions under the code * * *."
6 Motion for Dismissal at 4.

7 Participant-respondents' argument that the petitioner
8 failed to exhaust local remedies requires us to read in rights
9 of appeal where none are provided. The CDC clearly limits
10 party status to the applicant and limits rights of appeal or
11 reconsideration to parties. Like the county, we do not
12 interpret the CDC to provide remedies the petitioner must
13 exhaust prior to appealing to this Board. While we recognize
14 under Cope v. City of Cannon Beach, ___ Or LUBA ___ (LUBA No.
15 87-023, August 8, 1987), petitioner would be required first to
16 exhaust remedies available by right before appealing to us, the
17 critical feature that triggers the exhaustion requirement is
18 the remedies must be available to petitioner -- here, they are
19 not.

20 C. Notice of Intent to Appeal Not Timely

21 Both respondent and participant-respondents argue whether
22 the county's decision became final on June 12, 1987, when
23 notice of the 14 day appeal period was given to the applicant,
24 or on June 26, 1987, when the appeal period expired,
25 petitioner's notice of intent to appeal filed July 20, 1987 was
26 not timely. ORS 197.830(7).

1 Petitioner argues he was not given notice of the
2 proceedings leading to the county's decision, and he was not
3 given notice of the county's decision. Petitioner says he
4 first learned of the county's decision on July 13, 1987 and
5 filed his notice of intent to appeal seven days later on July
6 20, 1987. Petitioner argues since he was entitled to notice
7 but did not receive notice and appealed within 21 days after
8 actually learning of the county's decision, his notice of
9 intent to appeal is timely.

10 The county code expressly provides that notice of Type I
11 decisions is limited to the applicant. Because we conclude the
12 county's decision was discretionary rather than ministerial,
13 the Type I procedure should not have been followed in this
14 case. Rather, notice and the opportunity for hearing is
15 required by ORS 215.416 and CDC 204. The 21 day appeal period
16 runs from the date petitioner received actual notice and the
17 appeal, therefore, is timely. League of Women Voters v. Coos
18 County, 82 Or App 673, 680-681, 729 P2d 588.¹³

19 First Assignment of Error

20 "The county improperly construed ORS 215.203(2)(a) in
21 concluding that the proposed use was a permitted 'farm
22 use' allowed outright in an exclusive farm use zone.
The county erred by not treating the application as a
use involving the application of standards and
discretion consistent with ORS 215.213(2)(k)."

23 Second Assignment of Error

24 "Washington County improperly construed the applicable
25 law and violated ORS 215.402, ORS 215.416, and CDC
26 Sections 204-4 and 340-4.1(J) by treating
ministerially a matter that involved discretion and

1 therefore required that petitioner be provided notice
2 and an opportunity to be heard. Doughton v. Douglas
3 County, 82 Or App 444 (1986)."

4 We previously determined that ORS 215.203(2) (a) does not
5 provide clear and objective standards for determining when a
6 proposed use is a farm use. In the first and second
7 assignments of error petitioner argues the county erred in
8 applying 215.203(2) (a) to conclude the proposed use is a farm
9 use. Petitioner argues the county erred by not concluding the
10 proposed use is a solid waste disposal site as that term is
11 defined in ORS 215.213(2) (k) and CDC 430-127. According to
12 petitioner, solid waste disposal site approvals require notice,
13 opportunity for a hearing, and a "permit" as that term is
14 defined in ORS 205.402(4).¹⁷

15 We take up petitioner's second assignment of error first.
16 CDC 340.4.1(J) allows solid waste disposal sites as a
17 conditional use in the EFU Zone through a discretionary Type
18 III procedure. In relevant part, solid waste disposal site is
19 defined in CDC Section 430-127.2 as follows:

20 "A site for the disposal of solid waste approved by
21 the local governing body of a city or county or both
22 and for which a permit has been granted under
23 ORS 459.245 by the Department of Environmental Quality
24 * * *."

25 As noted earlier, the language in CDC 430-127.2 is
26 identical to ORS 215.213(2) (k) which allows discretionary
27 approval of solid waste disposal sites in EFU Zones. The
28 proposed use appears to meet the definition of solid waste
29 disposal site as defined in ORS Chapter 459, see footnote 8,

1 supra, except that a "permit has not been issued by DEQ under
2 ORS 459.245." Rather, DEQ issued a letter of authorization for
3 the proposed use. Participant-respondents argue letters of
4 authorization are an exemption from the permit requirement of
5 ORS 459.205 and 459.245. ORS 459.215; OAR 340-61-027.¹⁵

6 We believe the ORS 215.213(2)(k) requirement that the solid
7 waste disposal site be granted a DEQ permit under ORS 459.245
8 only makes it clear that ORS 215.213(2)(k) is not intended to
9 allow solid waste disposal sites which have not been approved
10 by DEQ under 459.205 through 459.245. DEQ approves solid waste
11 disposal sites either by granting a permit under ORS 459.245
12 or, if the site is "not likely to create a public nuisance,
13 health hazard, air or water pollution or other serious
14 problem," by letter of authorization. ORS 459.215; OAR
15 340-61-027.

16 The literal reading of ORS 215.213(2)(k) argued by
17 participant-respondent would have the effect of making DEQ the
18 judge of whether a solid waste disposal site comes within the
19 scope of ORS 215.213(2)(k), solely by virtue of DEQ's form of
20 approval. Also participant-respondent's view would allow more
21 hazardous solid waste disposal sites as a conditional use but
22 prohibit less hazardous disposal sites as a conditional use
23 unless the less hazardous disposal sites could qualify as a
24 farm use.

25 We do not have the benefit of either LCDC's or DEQ's view
26 of ORS 215.213(2)(k). Our conclusion is, therefore, not

1 without doubt. However, because we also conclude that ORS
2 215.203(2)(a) may not be interpreted to allow the proposed
3 emergency burial of 27,000 lambs as a farm use, the city's
4 decision must be remanded in any event.

5 We need not and do not decide whether incidental burial of
6 dead livestock could ever qualify as a farm use. However, the
7 scale, source¹⁶ and lack of management and animal husbandry
8 connection with the property all argue against defining the
9 proposed use as a farm use. We conclude the proposed use is
10 not a farm use as that term is defined in ORS 215.203(2)(a).

11 The first two assignments of error are sustained.

12 Third Assignment of Error

13 "Washington County exceeded its jurisdiction, acted
14 unconstitutionally, and failed to follow the procedure
15 applicable to the matter before it in a manner that
16 prejudiced petitioner's substantial rights, by
17 approving a sheep burial site on land zoned EFU
18 without providing petitioner notice and an opportunity
19 to be heard."

17 Fourth Assignment of Error

18 "Washington County's decision must be remanded because
19 the county failed to adopt findings showing compliance
20 with reasonable standards as required by
21 ORS 215.213(2), ORS 215.416(7) and CDC 340-4."

22 We previously determined the county's decision was
23 discretionary approval. Under the CDC, discretionary approvals
24 require notice to property owners within 500 feet of the
25 property.¹⁷ See footnote 3, supra. Notice to such adjoining
26 property owners is also required by ORS 215.416(5). Also,
because the use approved is a solid waste disposal site (a

1 nonfarm use for which discretionary approval is required under
2 ORS 215.213(2)(k) and CDC 340-4.1(J)), notice and a hearing are
3 required before approval. ORS 215.416(5); CDC 204-4. Doughton
4 v. Douglas County, 88 Or App 198, ___ P2d ___ (1987).

5 CDC 340-4.2 requires that the county adopt findings in
6 support of its decision to grant Type III approvals. In
7 addition, discretionary approvals require findings under
8 ORS 215.416(9).

9 "Approval or denial of a permit shall be based upon
10 and accompanied by a brief statement that explains the
11 criteria and standards considered relevant to the
12 decision states the facts relied upon in rendering the
13 decision and explains the justification to the decision
14 based on the criterion, standards and facts set
15 forth." ORS 215.416(9).

16 Here, while the county's decision does contain findings,
17 the county did not apply the correct criteria. Because the
18 county based its approval on an erroneous interpretation of
19 ORS 215.203(2)(a), the county's findings fail to address or
20 demonstrate compliance with ORS 215.213(2)(k) and CDC 340-4
21 which set forth and identify applicable criteria.

22 The third and fourth assignments of error are sustained.

23 The county's decision is remanded.

FOOTNOTES

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3 1
4 Only four acres of the 160 acre site would be required to
bury 27,000 lambs.

5 2
6 The county code defines Type I development actions as
follows:

7 "Type I development actions involve permitted uses or
8 development governed by clear and objective review
9 criteria. Type I actions do not encompass
10 discretionary land use decisions. Impacts have been
11 recognized by the development standards. The intent
and purpose of the District is not a consideration of
approval in Type I uses." CDC 202-1.1.

12 3
13 The CDC also provides for other types of development
14 actions. Type II development actions "generally involve uses
15 or development for which review criteria are reasonably
16 objective, requiring only limited discretion." CDC 202-2.1.
17 Type III development actions require "the exercise of
discretion and judgment when applying the development criteria
* * *." CDC 202-3.1. Type II and III both require notice to
adjoining property owners within 500 feet if the property is in
a rural area. Type II and III approvals provide rights of
appeal to those receiving notice, and Type III approvals
require a public hearing. CDC 204.

18 4
19 Land use regulation is defined in ORS 197.015(11) to
20 include a "zoning ordinance * * * establishing standards for
implementing a comprehensive plan."

21 5
22 Dictionary definitions of the terms are as follows:

23 "Ministerial Duty. One regarding which nothing is left to
24 discretion - a simple and definite duty, imposed by a law,
and arising under conditions admitted or proved to exist.
25 * * * It arises when an individual has such a legal
interest in its performance that neglect of performance
26 becomes a wrong to such individual. * * *" Black's Law

1 Dictionary (Fourth Edition 1968).

2 "Clear. * * * Free from obscurity or ambiguity: easily
3 understood: unmistakable * * * free from doubt * * *."
4 Webster's New Collegiate Dictionary (Ninth Edition 1987).

4 "Objective. * * * Limited to choices of fixed alternatives
5 and reducing subjective factors to a minimum." Webster's
6 New Collegiate Dictionary (Ninth Edition 1987).

6 LCDC requires clear and objective standards in its Goal 5
7 administrative rule, OAR 660-16-010(3), and Goal 10 Rule,
8 OAR 660-07-015, but does not define "clear and objective."

8
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9 In Doughton there were no standards in the zoning ordinance
10 for determining whether a proposed use was a farm dwelling.
11 The Court concluded the previous decisions of this Board made
12 it clear that question was "not susceptible to a clear and
13 objective ministerial resolution." Doughton v. Douglas County,
14 supra at 449. See Matteo v. Polk County, 11 Or LUBA 259, aff,
15 Polk County v. Matteo, 70 Or App 179, ___ P2d ___ (1984);
16 Matteo V. Polk County, 14 Or LUBA 67 (1985).

13
14 7

14 Petitioner argues that because the lambs are imported from
15 New Zealand and their only connection with the property would
16 come at the time of burial, the lambs are not "raised on such
17 lands" and the property is not "currently employed for farm
18 use" as required by ORS 215.203(2)(a). Petitioner argues
19 "disposal", as used in ORS 215.203(2)(a), does not encompass
20 mass burial of lambs not raised on the property. Finally,
21 petitioner notes DEQ refers to the use as a solid waste
22 disposal site, not a farm use, in its letter of authorization.

19
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20 The definition in CDC 430-127 is identical to
21 ORS 215.213(2)(k) which provides that solid waste disposal
22 sites may be allowed within EFU zones if the site "meets
23 reasonable standards adopted by the governing body."

22 "Solid waste is defined as "all putrescible and
23 nonputrescible wastes, including but not limited to * * * dead
24 animals * * *." ORS 459.015(19) "Disposal site means land and
25 facilities used for the disposal handling or transfer of * * *
26 solid wastes * * *. ORS 459.005(8).

25 ///

26 ///

2 The county's and participant-respondent's positions are
3 even more tenuous in view of the statement in DEQ's letter of
4 authorization that a permit would likely be required for the
5 proposed use if extensions are sought beyond six months the
6 letter of authorization is effective. Record 11-12.

6 While it is possible that we misread Doughton to preclude
7 application of ORS 197.015(10)(b) to classification decisions
8 unless there are clear and objective standards to guide the
9 classification decision itself, we are unable to avoid the
10 language quoted supra at page 7 which says such standards are
11 required.

12 We note there is language in Doughton suggesting that if
13 the Court were faced with a classification decision other than
14 a farm dwelling, it might view ORS 197.015(10)(b) somewhat
15 differently. However, that language is not sufficient to
16 undercut the Court's clear rejection of this Board's attempt to
17 distinguish the classification decision in Doughton. An
18 example of proper application of ORS 197.015(10)(b) cited by
19 the Court seems to accept as a given that there could be no
20 question approval of a single family dwelling in the EFU Zone
21 would qualify under ORS 197.015(10)(b), if there were a legal
22 presumption the dwelling was provided in conjunction with farm
23 use. 82 Or App at 449. However, absent clear and objective
24 standards to define "single family dwelling", extended or
25 nontraditional families, intensive home occupations and other
26 situations can easily make it less than clear that a proposed
27 dwelling is classified properly as a single family dwelling.
28 In the Board's opinion in Doughton, we noted there are other
29 situations where questions regarding proper classification may
30 arise.

20 If a county's decision is discretionary rather than
21 ministerial, notice and an opportunity for hearing are required
22 by ORS 215.416(5). In cases where it is uncertain whether the
23 decision is discretionary, the county could elect to provide
24 notice and an opportunity for hearing. We note CDC 202-5.3
25 expressly provides an option to provide notice and an
26 opportunity for hearing in cases of uncertainty.

25 The sections cited by participant-respondent provide in
26 relevant part:

26 ///

1 "202-5.1 The Director shall determine whether an
2 application or decision is a Type I, Type II or III action
3 in accordance with the standards set forth above.
4 Questions as to the appropriate procedure shall be resolved
5 in favor of the Type providing the greatest notice and
6 opportunity to participate. The decision of the director
7 is not subject to appeal on its own, but may be challenged
8 as an error in an appeal of the decision on the proposed
9 development. * * *

6 "202-1.3 Type I development actions shall be decided by
7 the Director without public notice or hearing. Notice of a
8 decision shall be provided to the applicant or the
9 applicant's representative. The decision may be
10 reconsidered pursuant to Section 208 or appealed by the
11 applicant as provided in Section 209 of this article. The
12 hearing shall be conducted as a Type III hearing except
13 that only the applicant shall be entitled to notice."

10 "209-1 A decision of the review authority may be appealed
11 only if within fourteen (14) calendar days after written
12 notice of the decision is provided to the parties;

12 209-1.1 A party files a complete petition for review with
13 the Director."

14 _____
15 13

15 Participant-respondents also seem to argue petitioner is
16 attempting to collaterally attack DEQ's letter of
17 authorization. We read the petition for review to challenge
18 the county's Type I approval only. Because DEQ's decision is
19 not before us, we express no position on DEQ's letter of
20 authorization.

18 _____
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19 "'Permit' means discretionary approval of a proposed
20 development of land under ORS 215.010 to 215.438 or county
21 legislation or regulations adopted pursuant thereto."
22 ORS 215.402(4).

22 _____
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23 After oral argument, petitioner submitted a memorandum in
24 which he stated that if the participant-respondents are correct
25 that the proposed use does not qualify as a solid waste
26 disposal site, the proposed use is not allowed at all in the
27 EFU Zone, and the county's decision must be reversed.

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The fact the animals are from New Zealand is not determinative. The result in this appeal would be the same if the lambs were from an EFU Zone in an adjoining county.

17
Petitioner alleges, and no party contests, he would be entitled to notice had the county followed Type II or Type III procedures.

18
We find it unnecessary to base the right to notice and a hearing on petitioner's constitutional right to due process. See, Doughton v. Douglas Co., 88 Or App at 200.