

1 BEFORE THE LAND USE BOARD OF APPEALS

2
3 OF THE STATE OF OREGON

11/05/18 AM 10:00 LUBA

4
5 A WALK ON THE WILD SIDE,

6 *Petitioner,*

7
8 vs.

9
10 WASHINGTON COUNTY,

11 *Respondent.*

12
13 LUBA No. 2018-067

14
15 FINAL OPINION

16 AND ORDER

17
18 Appeal from Washington County.

19
20 Geordie Duckler, Tigard, filed the petition for review and argued on behalf
21 of petitioner.

22
23 Jacquilyn Saito-Moore, County Counsel, Hillsboro, filed the response
24 brief and argued on behalf of respondent.

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26 ZAMUDIO, Board Member; RYAN, Board Chair; BASSHAM, Board
27 Member, participated in the decision.

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29 RYAN, Board Chair, concurring.

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31 AFFIRMED

11/05/2018

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

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NATURE OF THE DECISION

Petitioner appeals a county hearing officer’s code enforcement decision.

FACTS

The subject property is zoned exclusive farm use (EFU) and identified as high-value farmland based on its soil.¹ Petitioner is an Oregon nonprofit corporation that operates an exotic animal rescue facility. Petitioner leases the subject property and keeps on the property a mix of domesticated animals, native wild animals, and exotic animals. Petitioner has constructed multiple enclosures on the subject property to house large exotic animals such as lions and tigers. Petitioner modified a barn on the subject property to house smaller exotic animals.

In August 2017, after multiple communications from the county advising petitioner that keeping exotic animals is not a permitted use on the subject property, county code enforcement issued notices of civil violations to petitioner’s executive director and secretary, as individuals, for violations of the Washington County Community Development Code (CDC). The notices alleged that in April 2017, petitioner violated the CDC by feeding and managing exotic animals on EFU property, failing to obtain permits for exotic animal structures,

¹ Washington County adopted a marginal lands system prior to 1993. *See* ORS 215.213 (providing uses permitted in EFU zones in counties that adopted a marginal lands system prior to 1993). It is not clear that any distinction between high-value farmland and marginal lands has any bearing on this proceeding.

1 and proposed sales of exotic animal dung and that in July 2017, petitioner
2 violated the CDC by feeding and managing exotic animals on EFU property.²
3 Record 1.

4 In November 2017, the county hearings officer held a code enforcement
5 hearing and subsequently suspended the proceeding to allow time for the county
6 to issue notices of civil violations to petitioner, the nonprofit corporation. On

² CDC 201-1 provides:

“201-1 Permit Required

“Except as excluded in Section 201-2, and Section 702, no person shall engage in or cause a development to occur, as defined in Section 106-57, without first obtaining a development permit through the procedures set forth in this Code. The Director shall not issue any permit for the construction, reconstruction or alteration of a structure or a part thereof without first verifying that a valid development permit has been issued. Development authorized by a development permit shall occur only as approved.” (Boldface in original.)

CDC 215-1 provides:

“No person shall engage in or cause to occur any development; erect, construct, reconstruct, alter, maintain, use or transfer any building or structure; or alter, use or transfer any land in violation of the Comprehensive Framework Plan including but not limited to this Development Code or the applicable Community Plan.”

CDC 340-7.1 provides that in the EFU zone, “[s]tructures or uses of land not specifically authorized by Section 340” are prohibited.

1 March 16, 2018, the county issued notices of civil violations to petitioner, as well
2 as each of petitioner’s corporate officers and executive director for violations that
3 occurred on April 18, 2017 and July 7, 2017. A code enforcement hearing was
4 scheduled for May 17, 2018. Petitioner filed a motion to dismiss the county
5 proceeding and sought a temporary restraining order and petition for writ of
6 review in the circuit court. The circuit court denied petitioner’s requested relief.
7 The county hearings officer denied petitioner’s motion to dismiss and issued a
8 final order imposing civil penalties for petitioner’s code violations.³ This appeal
9 followed.

10 **FIRST ASSIGNMENT OF ERROR**

11 Oregon land use law preserves land for agricultural uses by restricting uses
12 allowed in EFU zones. ORS 215.203.⁴ Those regulations do not define “farm

³ The hearings officer dismissed the notices of civil violations against the corporate officers and agents. Record 7.

⁴ ORS 215.203 provides, in part:

“(1) Zoning ordinances may be adopted to zone designated areas of land within the county as exclusive farm use zones. Land within such zones shall be used exclusively for farm use except as otherwise provided in ORS 215.213, 215.283 or 215.284. Farm use zones shall be established only when such zoning is consistent with the comprehensive plan.

“(2)(a) As used in this section, ‘farm use’ means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of,

1 animal,” but provide that “farm use” includes “feeding, breeding, management
2 and sale of, or the produce of, livestock, poultry, fur-bearing animals or
3 honeybees or for dairying and the sale of dairy products or any other agricultural
4 or horticultural use or animal husbandry or any combination thereof[,]” stabling
5 or training equines, and “the propagation, cultivation, maintenance and
6 harvesting of aquatic, bird and animal species that are under the jurisdiction of
7 the State Fish and Wildlife Commission, to the extent allowed by the rules
8 adopted by the commission.” ORS 215.203(2)(a); see n 4. It is undisputed in this

livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. ‘Farm use’ includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. ‘Farm use’ also includes the current employment of land for the primary purpose of obtaining a profit in money by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows. ‘Farm use’ also includes the propagation, cultivation, maintenance and harvesting of aquatic, bird and animal species that are under the jurisdiction of the State Fish and Wildlife Commission, to the extent allowed by the rules adopted by the commission. ‘Farm use’ includes the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection. ‘Farm use’ does not include the use of land subject to the provisions of ORS chapter 321, except land used exclusively for growing cultured Christmas trees as defined in subsection (3) of this section or land described in ORS 321.267(3) or 321.824(3).”

1 case that petitioner keeps exotic wild animals on the property and keeping those
2 animals is not a “farm use” under ORS 215.203.

3 The hearings officer found that the petitioners do use the property for
4 certain “farm uses,” including “raising, breeding, and selling a variety of
5 livestock and poultry (horses, sheep, goats, pigs, cows, donkeys, alpaca, llamas,
6 chickens, turkeys, and ducks); selling livestock and poultry products (eggs and
7 meat); raising and selling fruit (Asian pears); and boarding and training horses.”
8 Record 5. There is no dispute that those uses are farm uses permitted on the
9 subject property. ORS 215.203(2)(a); OAR 660-033-0120 (providing uses
10 authorized on agricultural lands); CDC 106-79 (defining “farm use”); CDC 340-
11 2 through 340-5.⁵ However, the hearings officer also found that petitioner
12 engaged in unpermitted uses on the subject property:

13 “[O]n April 18, 2017, and July 7, 2017, [petitioner] was also
14 operating an exotic animal rescue facility and housing, feeding, and
15 keeping a variety of exotic animals on the site, including binturong,

⁵ CDC 106-79 defines “farm use” as defined by Oregon Revised Statutes (ORS).

CDC 340-2 provides: “Where words or terms are defined by ORS or OAR and are applicable to this Code, those definitions shall apply as defined herein (e.g., high-value farmland, tract, date of creation). Where words or terms are further defined by OAR Chapter 660, Division 33 Agricultural Land and are different from ORS, those definitions shall apply as defined in the OAR.”

CDC 340-3 lists uses permitted through a type I procedure in the EFU zone; CDC 340-4 lists uses permitted through a type II procedure; and CDC 340-5 lists uses permitted through a type III procedure. Keeping exotic animals is not listed.

1 caracal, coatimundi, crested porcupine, European lynx, Geoffroy's
2 cat, kinkajou, lion, Patagonian cavy, ring-tailed lemur, Siberian
3 lynx, tiger, wallaby, and zebra." Record 5.

4 The hearings officer concluded that housing, feeding, and keeping exotic
5 animals are not permitted "farm use[s]" and that the animal enclosures and barn
6 modifications constituted unpermitted improvements that existed on the site on
7 April 18, 2017, and July 7, 2017. Record 7. The hearings officer rejected
8 petitioner's argument that it had not violated the county code because it also used
9 the subject property for permitted farm uses. The hearings officer reasoned:

10 "The fact that [petitioner] is also operating a farm use on the
11 majority of the site is irrelevant. The existence of a farm use on EFU
12 land does not authorize any and all other uses on the site.
13 [Petitioner's] exotic animal rescue facility is a separate and
14 independent use from the farm use. It is not an accessory use or
15 hobby undertaken by a resident of the site. Under [petitioner's]
16 interpretation, so long as the majority of an EFU zoned property is
17 dedicated to farm use, any other use, for instance an auto repair shop
18 or a small retail market, would also be allowed on the same property.
19 This is clearly inconsistent with the plain language of the [CDC] and
20 state law." Record 5-6.

21 The parties agree that petitioner uses the property for permitted farm uses
22 and that housing, feeding, and keeping exotic animals are not permitted farm
23 uses. Petitioner does not dispute that the animal enclosures and barn
24 modifications are used to keep exotic animals. Petitioner does not argue that
25 keeping exotic animals is a "farm use"; rather, petitioner argues that because the
26 subject property is primarily used for "normal" farm use, petitioner may also use
27 the subject property and the unpermitted improvements for keeping exotic

1 animals. Petition for Review 16. The county responds that the hearings officer
2 correctly concluded that the farm uses do not legitimize the concurrent
3 unpermitted uses. We agree.

4 The challenged decision imposes penalties for violations for keeping
5 exotic animals and not for any of the permitted farm uses on the property. As the
6 county emphasizes, land that is planned and zoned for *exclusive* farm use must
7 be used *exclusively* for defined “farm uses” or listed exceptions. ORS 215.203;
8 ORS 215.213. Housing, feeding, and keeping exotic animals are not listed farm
9 uses or exceptions. The fact that petitioner also uses the property for permitted
10 farm uses does not shield the unpermitted uses from code enforcement action.

11 The first assignment of error is denied.

12 **SECOND ASSIGNMENT OF ERROR**

13 In the second assignment of error, petitioner contends that the hearings
14 officer misconstrued the applicable law by not dismissing the notices of civil
15 violations as untimely. Petitioner’s premise is that county code enforcement
16 action for violations of the CDC is subject to ORS Title 14, Chapters 131 through
17 153, which governs procedures in criminal matters generally. Chapter 153
18 governs violations and fines. ORS 153.030(1) provides:

19 “The procedures provided for in this chapter apply to violations
20 described in ORS 153.008. Except as specifically provided in this
21 chapter, the criminal procedure laws of this state applicable to
22 crimes also apply to violations.”

23 ORS 153.008(1)(c) provides that an offense is a “violation” if

1 “[t]he offense is created by an ordinance of a county, city, district or
2 other political subdivision of this state with authority to create
3 offenses, and the ordinance provides that violation of the ordinance
4 is punishable by a fine but does not provide that the offense is
5 punishable by a term of imprisonment. The ordinance may provide
6 for punishment in addition to a fine as long as the punishment does
7 not include a term of imprisonment.”

8 ORS 153.030(3) provides “The statute of limitations for proceedings under
9 this chapter is as provided in ORS 131.125.” ORS 131.125(8)(c) provides a six-
10 month limitation on prosecutions for violations.⁶ The cited violations occurred
11 on April 18, 2017 and July 7, 2017. The county issued the pertinent notices of
12 civil violations to petitioner on March 29, 2018, approximately 11 months after
13 the first violation and nine months after the second violation.

14 The county responds that ORS 131.125(8)(c) is inapplicable because the
15 land use violations were enforced under Washington County Code (WCC) 1.14,
16 which sets out county code compliance and enforcement procedures, and the
17 county has authority over land use code enforcement matters independent from
18 any statutorily derived authority in ORS Title 14. *See* Washington County

⁶ ORS 131.125(8)(c) provides:

“Except as provided in subsection (9) of this section or as otherwise expressly provided by law, prosecutions for other offenses must be commenced within the following periods of limitations after their commission:

“* * * * *

“(c) For a violation, six months.”

1 Charter, ch II, § 20 (f) (providing that the county shall have authority over matters
2 of county concern, including “[e]nacting and enforcing planning and zoning
3 ordinances and regulations in any part [of] the entire County outside cities”). The
4 county argues that the code enforcement procedures under WCC 1.14 are “in lieu
5 of” and not governed by the processes for prosecuting violations provided in ORS
6 153, and that ORS 153.030 expressly allows for county enforcement separate
7 from the violation provisions of ORS Title 14.

8 WCC1.14.010 provides:

9 “Washington County’s first preference is to encourage voluntary
10 compliance. To implement this philosophy the county will endeavor
11 to develop solutions based on individual situations and to provide
12 broad based public education. The assumption is that education of
13 citizens will solve most issues and our initial contacts with affected
14 citizens will be to take an understanding and helpful approach to
15 resolving potential enforcement issues.

16 “This code compliance process is for violations of:

- 17 “1. The Washington County Community Development
18 Code including any applicable provisions of the
19 Washington County Comprehensive Framework Plan
20 such as Community Plans and the Transportation
21 System Plan;
- 22 “2. Title 14 of the Washington County Code;
- 23 “3. Any conditions, requirements or other remedies of a
24 land use or building permits;
- 25 “4. Any conditions, requirements or other aspects of a
26 hearings officer’s order; or

1 “5. Failure to comply with the terms of a voluntary
2 compliance agreement.

3 “This code compliance process is in lieu of the process for violations
4 provided for under Chapter 153 of the Oregon Revised Statutes and
5 Chapters 1.08 and 1.12 of the Washington County Code.”

6 WCC 1.14 does not contain any time limitation for enforcement actions
7 for violations of the county’s land use code. The county explains that the lack of
8 a statute of limitations within WCC 1.14 is intentional because building and land
9 use violations are often long-range and ongoing, and the goal of code
10 enforcement is not punishment but reaching and maintaining code compliance.
11 According to the county, a statute of limitations on code enforcement proceedings
12 would remove the current flexibility in reaching code compliance.

13 We agree with the county that the statute of limitation in ORS
14 131.125(8)(c) is inapplicable to county land use code enforcement proceedings
15 under WCC 1.14. ORS 153.030(4) expressly provides that “Nothing in this
16 chapter affects the ability of any other political subdivision of this state to provide
17 for the administrative enforcement of the charter, ordinances, rules and
18 regulations of the political subdivision, including enforcement through
19 imposition of monetary penalties.”⁷ WCC 1.14 provides a separate enforcement

⁷ ORS 153.030 provides:

“(1) The procedures provided for in this chapter apply to violations described in ORS 153.008. Except as specifically provided in this chapter, the criminal procedure laws of this state applicable to crimes also apply to violations.

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- “(2) Notwithstanding subsection (1) of this section, ORS 153.633 and all other provisions of this chapter and of the criminal procedure laws of this state do not apply to violations that govern the parking of vehicles and that are created by ordinance or by agency rule.
- “(3) The statute of limitations for proceedings under this chapter is as provided in ORS 131.125.
- “(4) This chapter does not affect the ability of a city described in ORS 3.136 (1) to engage in the activities described in ORS 3.136 (3). Nothing in this chapter affects the ability of any other political subdivision of this state to provide for the administrative enforcement of the charter, ordinances, rules and regulations of the political subdivision, including enforcement through imposition of monetary penalties. Except for ordinances governing the parking of vehicles, administrative enforcement as described in this subsection may not be used for any prohibition designated as an offense.
- “(5) Nothing in this chapter affects the ability of any political subdivision of this state to establish rules relating to administrative enforcement as described in subsection (4) of this section, including rules providing for the use of citations or other procedures for initiating administrative enforcement proceedings.
- “(6) Nothing in this chapter affects the ability of any political subdivision of this state to conduct hearings for administrative enforcement as described in subsection (4) of this section, either before a hearing officer or before the governing body of the political subdivision.
- “(7) Nothing in this chapter affects the ability of any political subdivision to bring a civil action to enforce the charter, ordinances, rules and regulations of the political subdivision, or to bring a civil action to enforce any order for

1 procedure under the county’s land use regulation authority. Code enforcement
2 proceedings under WCC 1.14 are not subject to the six-month limitation in ORS
3 131.125(8)(c). Accordingly, the hearings officer did not err in not dismissing the
4 notices of civil violations as time-barred.

5 The second assignment of error is denied.

6 The county’s decision is affirmed.

7 Ryan, Board Chair, concurring.

8 I agree with our resolution of this case. I write separately only to point out
9 that under the Court of Appeals’ holding in *Thomas v. Wasco County*, 284 Or
10 App 17, 392 P3d 741 (2017), *rev den* 362 Or 666 (2018), LUBA may lack
11 jurisdiction over decisions that arise from county code enforcement proceedings,
12 even where those proceedings are brought pursuant to provisions of the local
13 government’s land use regulations and possibly even where the decision
14 determines whether the use or activity is allowed or not allowed under the local
15 government’s land use regulations. No party raises such jurisdictional arguments
16 in the present case, and we are not called upon in this case to determine which

administrative enforcement as described in subsection (4) of
this section.

“(8) Nothing in ORS 153.042 affects the authority of any political
subdivision of this state to provide for issuance of citations
for violation of offenses created by ordinance on the same
basis as the political subdivision could under the law in effect
immediately before January 1, 2000.”

1 code enforcement decisions are and are not subject to LUBA's jurisdiction under
2 the reasoning in *Thomas*. In a future appeal of such a decision, LUBA would
3 benefit from briefing from the parties on LUBA's jurisdiction over such a
4 decision.