

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41

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

CITY OF SANDY)
)
Petitioner,)
)
vs.)
)
CLACKAMAS COUNTY,)
)
Respondent,)
)
and)
)
BILL PARROTT,)
)
Intervenor-Respondent.)

LUBA No. 94-104
FINAL OPINION
AND ORDER

Appeal from Clackamas County.

John H. Hammond, Jr., West Linn, filed the petition for review and argued on behalf of petitioner. With him on the brief was Hutchison, Hammond, Walsh, Herndon, Darling & Gross.

Michael E. Judd, Chief Assistant County Counsel, Oregon City, filed a response brief on behalf of respondent.

Peggy Hennessy, Portland, filed a response brief and argued on behalf of intervenor-respondent.

HOLSTUN, Chief Referee; SHERTON, Referee; KELLINGTON, Referee, participated in the decision.

REMANDED 11/23/94

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 challenges a county decision granting a
4 conditional use permit to construct a building and conduct
5 activities in addition to those allowed under a prior
6 conditional use permit.

7 **MOTION TO INTERVENE**

8 Bill Parrot, the applicant below, moves to intervene in
9 this appeal proceeding on the side of respondent. There is
10 no opposition to the motion, and it is allowed.

11 **FACTS**

12 The 3.2 acre subject property is zoned Exclusive Farm
13 Use 20-Acre District (EFU-20). The property is located
14 close to the interchange between State Highways 26 and 212,
15 east of the rural center of Boring and northwest of the City
16 of Sandy. The subject property is located in an area of
17 mixed agricultural and rural residential use. There are a
18 significant number of commercial farms and rural residential
19 dwellings in the area.

20 In 1992, a conditional use permit (hereafter 1992
21 conditional use permit) was approved to allow certain
22 specified uses on the property as a "commercial activity in
23 conjunction with farm use." The 1992 conditional use permit
24 authorized "sale of livestock and horse trailers, enclosed
25 trailers for hauling nursery plants, flatbeds and tiltbeds
26 for the transportation of equipment, and accessories for

1 these trailers along with hitch and wiring installation."
2 Record 69. The 1992 conditional use permit approval was
3 subject to a number of conditions, including a condition
4 that the authorized commercial uses were limited to those
5 specified in the application.

6 On February 18, 1994, in response to allegations that
7 the commercial activities being conducted on the property
8 exceeded those authorized by the 1992 conditional use
9 permit, intervenor applied for conditional use approval to
10 carry out additional commercial activities on the property.
11 The county hearings officer's June, 1 1994 decision granting
12 intervenor's request for conditional use approval (1994
13 conditional use permit) is challenged in this appeal. The
14 1994 conditional use permit authorizes the following:

- 15 1. Sale of 3/4 ton or larger trucks, with a
16 maximum of 10 trucks on the property at one
17 time.
- 18 2. Rental of trucks and rental of the trailers
19 and other equipment intervenor is authorized
20 to sell under the 1992 conditional use
21 permit.
- 22 3. Sale of portable storage buildings.¹
- 23 4. Operation of mailbox, UPS and fax services.
- 24 5. Construction of a 4,800 square foot building
25 to house the operation.

¹The hearings officer's decision suggests that smaller storage units, such as are commonly sold in urban areas, will not be sold. However, the decision does not set any specific size limit on the portable storage buildings that may be sold.

1 **ASSIGNMENT OF ERROR**

2 Among the conditional uses allowable in the EFU-20 zone
3 are "[c]ommercial activities that are in conjunction with
4 farm uses[.]" Clackamas County Zoning and Development
5 Ordinance (ZDO) 401.06B.4. Petitioner contends that while
6 commercial farming uses in the area may on occasion have a
7 need for one or more of the services, equipment and items
8 the challenged conditional use permit authorizes intervenor
9 to sell or rent, the use authorized by the 1994 conditional
10 use permit is not properly viewed as a commercial activity
11 in conjunction with farm use. Petitioner contends the
12 activity authorized by the 1994 conditional use permit
13 includes services, equipment and items that are readily
14 available a short distance away in Boring or Sandy and will
15 attract a substantial number of nonfarm customers.

16 **A. Preliminary Issues**

17 **1. Legal Effect of the 1992 Conditional Use**
18 **Permit**

19 Petitioner's challenge in this appeal is limited to the
20 1994 conditional use permit. Petitioner may not, and does
21 not attempt to, challenge the propriety of the 1992
22 conditional use permit in this appeal. However, neither
23 does the 1992 conditional use permit obviate the requirement
24 that the applicant and the county demonstrate the commercial
25 activities authorized by the challenged 1994 conditional use
26 permit are properly viewed as commercial activities in
27 conjunction with farm use. In other words, for purposes of

1 our review of the challenged 1994 conditional use permit,
2 the 1992 conditional use permit is irrelevant.

3 **2. Effect of Local Interpretation of**
4 **"Commercial Activities in Conjunction with**
5 **Farm Use"**

6 Intervenor contends the hearings officer's
7 interpretation of the meaning of "commercial activities in
8 conjunction with farm use," as that concept is used in ZDO
9 401.06B.4, is entitled to deference by LUBA. See ORS
10 197.829; Clark v. Jackson County, 313 Or 508, 514-15, 836
11 P2d 710 (1992). Intervenor is wrong for two reasons.

12 First, the challenged decision was rendered by the
13 county hearings officer, and this Board is not required to
14 defer to interpretations rendered by local decision makers
15 other than the local governing body. Gage v. City of
16 Portland 319 Or 308, 316-17, ___ P2d ___ (1994); Watson v.
17 Clackamas County, 129 Or App 428, 431-32, ___ P2d ___
18 (1994).

19 Second, the county's EFU-20 zone may not allow uses
20 that are not authorized by statutory EFU zoning provisions.
21 Kenagy v. Benton County, 112 Or App, 17, 20 n 2, 826 P2d
22 1047 (1992). The permissible uses in exclusive farm use
23 zones are established by state statute. "Commercial
24 activities that are in conjunction with farm use" are
25 specifically allowed by ORS 215.213(2)(c) and

1 215.283(2)(a).² The county may regulate or define
2 commercial activities that are in conjunction with farm use
3 more restrictively than required by state law and, in fact,
4 Clackamas County used to do so. Burkey v. Clackamas County,
5 17 Or LUBA 369, 374 (1989)(code provision allowing
6 "commercial activities that are exclusively used in
7 conjunction with farm use" is more restrictive than parallel
8 statutory provision lacking the "exclusively" requirement).
9 However, the scope and proper construction of the term
10 "commercial activities that are in conjunction with farm
11 use" is a question of state law. Kenagy v. Benton County,
12 supra. The hearings officer's understanding of the scope of
13 that term is not entitled to deference. The question is
14 whether the hearings officer's construction and application
15 of the term "commercial activities that are in conjunction
16 with farm use" in this case is correct.

17 **B. Decision**

18 As all parties recognize, the concept of "commercial
19 activities that are in conjunction with farm use" is not
20 defined by statute and is somewhat subjective. The term
21 must be construed in context with the exclusive farm use
22 statutory scheme, which favors preservation of agricultural
23 land for agricultural purposes and limits nonfarm uses.

²LCDC's Goal 3 (Agricultural Land) administrative rule also identifies "[c]ommercial activities in conjunction with farm use" as a use allowable on agricultural lands. OAR 660-33-120.

1 McCaw Communications, Inc. v. Marion County, 96 Or App 552,
2 555, 773 P2d 779 (1989). The provision of uses that in fact
3 are "commercial activities that are in conjunction with farm
4 use" furthers the statutory purpose of encouraging
5 agricultural uses. See Craven v. Jackson County, 308 Or
6 281, 779 P2d 1011 (1989).

7 Where a commercial use exclusively or primarily
8 purchases agricultural products directly from agricultural
9 uses, the connection between the commercial use and
10 agricultural uses is relatively easy to demonstrate. For
11 example, in Craven, the Oregon Supreme Court concluded a
12 winery qualified as a "commercial activity in conjunction
13 with farm use" and articulated the relevant characteristics
14 of the winery as follows:

15 "The phrase upon which the validity of the
16 [conditional use permit] turns is 'in conjunction
17 with farm use,' which is not statutorily defined.
18 We believe that to be 'in conjunction with farm
19 use,' the commercial activity must enhance the
20 farming enterprises of the local agricultural
21 community to which the EFU land hosting that
22 commercial activity relates. The agricultural and
23 commercial activities must occur together in the
24 local community to satisfy the statute. Wine
25 production will provide a local market outlet for
26 grapes of other growers in the area, assisting
27 their agricultural efforts. Hopefully, it will
28 also make [the applicant's] efforts to transform a
29 hayfield into a vineyard successful, thereby
30 increasing both the intensity and value of
31 agricultural products coming from the same acres.
32 Both results fit into the policy of preserving
33 farm land for farm use.

1 "Sales of souvenirs which advertise the winery may
2 cause others to come to the area and buy the
3 produce of the vineyards and farms roundabout.
4 Such sales may reinforce the profitability of
5 operations and the likelihood that agricultural
6 use of the land will continue. At least LUBA
7 could reasonably so find, as it did, and interpret
8 the incidental sales of souvenirs with logos as
9 being 'in conjunction with farm use.'" (Emphases
10 added.) Craven, supra, 308 Or at 298.

11 There were two relevant characteristics of the winery
12 at issue in Craven. It was a buyer of grapes from
13 agricultural enterprises in the area and a processor of
14 those grapes into wine. There was no dispute in Craven that
15 this was the primary purpose of the winery. The other
16 relevant characteristic of the winery was its sale of
17 souvenirs. So long as the nonfarm related aspect of the
18 venture, such as sale of souvenirs, is both incidental and
19 supportive of the primary purpose, it is a permissible part
20 of a commercial activity in conjunction with farm use. See
21 Stroupe v. Clackamas County, ___ Or LUBA ___ (LUBA No. 93-
22 136, September 29, 1994), slip op 7-8.

23 Similarly, the Oregon Court of Appeals had little
24 difficulty concluding a hop warehouse that would store hops
25 grown by many hops growers, and sell string and burlap used
26 in hop production, qualified as a commercial activity in
27 conjunction with farm use. Earle v. McCarthy, 28 Or App
28 541, 560 P2d 665 (1977). In Earle, it appears all of the
29 warehouse's purchases and sales were to commercial hops
30 growers.

1 Craven and Earle stand for the relatively
2 straightforward proposition that a commercial activity in
3 conjunction with farm use must be either exclusively or
4 primarily a customer or supplier of farm uses. That
5 proposition also was the basis for the Land Conservation and
6 Development Commission's decision in Balin v. Klamath
7 County, 3 LCDC 8, 19 (1979), where LCDC concluded a farm
8 implement and irrigation equipment dealership qualified as a
9 commercial activity in conjunction with farm use. However,
10 in reaching that conclusion, LCDC identified another
11 consideration:

12 "Clearly the statute is not intended to allow the
13 establishment of grocery stores and gas stations
14 on agricultural lands solely because they are
15 situated in a primarily agricultural area and
16 serve primarily agricultural needs. However, it
17 can and should be read to express a legislative
18 judgment that commercial activities limited to
19 providing products and services essential to the
20 practice of agriculture directly to the
21 surrounding agricultural businesses are
22 sufficiently important to justify the resulting
23 loss of agricultural land. The record shows that
24 such an enterprise is proposed and is needed."
25 (Emphasis added.) Id.

26 The above quoted language makes the point that even if
27 a commercial activity primarily sells to farm uses, that may
28 not be sufficient to allow the commercial activity to
29 qualify as a commercial activity in conjunction with farm
30 use. There is a second inquiry that must be satisfied. The
31 products and services provided must be "essential to the
32 practice of agriculture." While farmers must eat and farm

1 equipment frequently operates on gasoline, that is not
2 sufficient to make grocery stores or gas stations commercial
3 activities in conjunction with farm use. The connection
4 must be closer to the "essential practice of agriculture."
5 In the cases cited above, that connection was found to be
6 satisfied by a winery, a hops warehouse, and a farm
7 implement and equipment business.

8 Turning to the use allowed by the disputed 1994
9 conditional use permit, we conclude the use falls
10 substantially short of the winery, the hops warehouse or the
11 farm implement and equipment business found to be commercial
12 activities in conjunction with farm use in Craven, Earle and
13 Balin. As petitioner correctly notes, there is no reason to
14 believe the trucks, trailers, and equipment intervenor is
15 authorized to sell and rent under the conditional use
16 permit, will be purchased or rented exclusively or primarily
17 by farms or farmers in the area.³ The same holds true for
18 the mail box, UPS and fax services. There is evidence that
19 some of intervenor's expected sales and rentals will be to
20 farm uses, but it is equally clear from the record that
21 there is a potentially large number of customers for the
22 items and services intervenor will offer that are not farm
23 uses. The record in this case is inadequate to demonstrate

³Petitioner contends that because the business allowed by the 1994 conditional use permit is located at the intersection of two busy state highways, a short distance from a city and rural center, it will in fact attract many nonfarm customers.

1 sales and rentals will be primarily to farm uses in the area
2 and, for that reason, is inadequate to demonstrate that the
3 authorized use is a "commercial activity in conjunction with
4 farm use." See Chauncey v. Multnomah County, 23 Or LUBA
5 599, 606-07 (1992).

6 Moreover, we agree with petitioner that while the 1994
7 conditional use permit includes some conditions which the
8 hearings officer found would reduce the likelihood that the
9 allowed use would serve primarily nonfarm customers, those
10 conditions are inadequate to assure a commercial activity
11 that is sufficiently related to the "essential practice of
12 agriculture." Balin, supra.

13 The most obvious example of the lack of a relationship
14 between the use allowed by the 1994 conditional use permit
15 and the "essential practice of agriculture" is the mailbox,
16 UPS and fax services. Although it may be true that these
17 services are needed and would be used by migrant farm
18 workers in the area, such services do not possess the
19 required connection to the "essential practice of
20 agriculture." They are more like the sale of gasoline and
21 food. Similarly, the sale and rental of portable buildings,
22 trucks, trailers and other equipment lacks the required
23 connection to the "essential practice of agriculture." It
24 is true that such items could be used by farm uses, however,
25 they are all purchased and rented by a variety of other

1 commercial and noncommercial uses as well.⁴ We leave open
2 the possibility that conditions might be imposed to make
3 intervenor's operation sufficiently like the farm implement
4 and irrigation equipment dealership found to qualify as a
5 commercial activity in conjunction with farm use in Balin.
6 However, the use allowed by the 1994 conditional use permit
7 lacks a sufficient connection to the "essential practice of
8 agriculture."

9 The assignment of error is sustained.

10 The county's decision is remanded.

⁴As petitioner points out, 3/4 ton or larger trucks have a variety of nonagricultural applications. Horse trailers may be purchased or rented by anyone with a horse, whether or not they are farmers.