

JAN 13 1 41 PM '89

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

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

JAMES BURKEY,)
)
Petitioner,)
)
vs.)
)
CLACKAMAS COUNTY,)
)
Respondent.)

LUBA No. 88-077
FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Kathie F. Steele, Oregon City, filed the petition for review and argued on behalf of petitioners.

Michael E. Judd, Oregon City, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 01/13/89

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

1 Opinion by Sherton.

2 NATURE OF THE DECISION

3 Petitioner appeals a decision of the Clackamas County
4 hearings officer denying his application for a conditional use
5 permit to use an existing building for preparation, packaging
6 and sale of potting mixes, soil conditioners and fertilizers.

7 FACTS

8 Petitioner's property consists of approximately 95 acres.
9 The Clackamas County Comprehensive Plan designates the property
10 as Agricultural. The property is zoned General Agricultural
11 District (GAD). The property is presently used primarily for
12 row crops and includes several accessory buildings.

13 Petitioner proposes to lease a portion of the property to a
14 business which prepares, packages and sells potting mixes, soil
15 conditioners and fertilizers at wholesale. These operations
16 would be limited to an existing 40 by 100 foot building, an
17 adjacent concrete pad and the area immediately surrounding the
18 building. The raw materials used in making the firm's products
19 include barkdust and sawdust from local mills, chicken manure
20 from local farms, peat moss, worm castings, pumice, perlite,
21 vermiculite and granular nitrogen.

22 After a public hearing, the hearings officer issued a
23 decision denying petitioner's application on August 10, 1988.
24 That decision became final on September 2, 1988, when the
25 hearings officer issued an order denying petitioner's request
26 for a rehearing. This appeal followed.

1 FIRST ASSIGNMENT OF ERROR

2 "The Hearings Officer's findings and decision are not
3 supported by substantial evidence in the whole record."

4 SECOND ASSIGNMENT OF ERROR

5 "The Hearings Officer's determination that the
6 application did not meet the criteria of Section 1203
7 of the county's Zoning Development Ordinance was in
8 error and lacked evidentiary support. Petitioner
demonstrated compliance with all applicable criteria.
There was no legal or factual basis for denying
petitioner's application."

9 The Clackamas County Zoning and Development Ordinance (ZDO)
10 requires conditional uses in the GAD district to satisfy the
11 criteria of ZDO 1203. ZDO 402.06.A.2. ZDO 1203 requires in
12 part that "the use is listed as a conditional use in the
13 underlying district." ZDO 1203.01.A.

14 ZDO 402.06.B.4 lists the following as a conditional use in
15 the GAD district:

16 "Commercial activities that are exclusively used in
17 conjunction with farm use, and cannot be located in
another zoning classification."

18 ZDO 402.03.A defines "farm use" as follows:

19 "The current employment of land, including that
20 portion of such lands under buildings support
21 accepting [sic] farming practices, for the purpose of
22 obtaining profit in money by raising, harvesting and
23 selling crops, or by the feeding, breeding, management
24 and sale of, or [the] produce of, livestock, poultry,
25 fur-bearing animals or honeybees or for dairy and the
sale of dairy products and any other agricultural or
horticultural use or animal husbandry or any
combination thereof. Farm use includes the
preparation and storage of the products raised on such
land for man's use and animal use and disposal by
marketing or otherwise."

26 The hearings officer denied petitioner's application on the

1 ground that the proposed use does not satisfy ZDO 1203.01.A,
2 because it is not listed as a conditional use in the GAD
3 district. The hearings officer's finding states:

4 "The use is not listed as a conditional use in the
5 underlying district. As pointed out above, subsection
6 [402.06.B.4] of the ZDO requires that the use be
7 exclusively used in conjunction with farm use
8 (Emphasis added). 'Farm uses' are defined in
9 subsection 402.03A of the ZDO and include the
10 preparation and storage of the products raised on such
11 land for man's use or animal use and disposal by
12 marketing or otherwise, but the definition does not
13 include the processing of the various minerals and
14 other materials which are not the product of farm or
15 forest lands or uses as is here proposed. Nor can it
16 be said that the end product is used exclusively in
17 conjunction with farm use as the applicant testified
18 that a substantial percentage of the product is
19 marketed at retail to homeowners." Record 6.

20 In other words, the hearings officer concluded that the
21 proposed commercial activity would not be "exclusively used in
22 conjunction with farm use" because it would neither (1) process
23 exclusively materials that are the product of farm or forest
24 uses; nor (2) produce an end product which is used exclusively
25 in conjunction with farm use. In the first two assignments of
26 error, petitioner challenges both of the hearings officer's
bases for finding noncompliance with ZDO 1203.¹ We address
the challenges to each basis for the decision separately.

27 A. Exclusive Use of Products of Farm or Forest Use

28 Petitioner argues the county erred in interpreting
29 "commercial activities that are exclusively used in conjunction
30 with farm use" not to include a use which employs non
31 farm/forest products (in this case, minerals) as 0.1% of its

1 raw materials. Petitioner argues that the use of 0.1% minerals
2 in the preparation of a product of the proposed use "is
3 insignificant in determining the meaning of 'farm use.'"
4 Petition for Review 10.

5 Petitioner also argues that the record does not contain
6 substantial evidence to support the hearings officer's finding
7 that the proposed use will include processing of minerals and
8 other materials not the product of farm or forest use.
9 Petitioner points out that his request for reconsideration
10 states that the proposed use will produce fertilizer that is
11 100% chicken manure and potting soil that is composed of peat
12 moss, bark dust and sawdust, with only 0.1% other ingredients.

13 The county argues that the GAD district severely restricts
14 the types of commercial activities that are allowed in that
15 zone. The county asserts that the hearings officer was correct
16 in interpreting ZDO 402.06.B.4 to require the applicant to
17 establish that the proposed use would process exclusively farm
18 products.

19 The county also argues that the record clearly shows "at
20 least some" of the raw materials to be employed in the proposed
21 use are not generated by farming operations. Respondent's
22 Brief 3. The county points out that petitioner's letter to the
23 Department of Environmental Quality (Record 52) states that the
24 final products will include peat moss, worm castings, pumice,
25 perlite, vermiculite and granular nitrogen, and contends that
26 none of these are generally considered farm products. The

1 county further argues that the 0.1% minerals amount cited by
2 petitioner appears in the record only in petitioner's request
3 for rehearing, and was not in the record before the hearings
4 officer when he made his decision on August 10, 1988.

5 We agree with the county that the additional facts cited by
6 petitioner concerning the percentage composition of the
7 fertilizer and potting soil to be produced were submitted to
8 the hearings officer only in petitioner's request for
9 reconsideration. Petitioner does not assign as error the
10 hearings officer's denial of his request for reconsideration.
11 Therefore, petitioner's letter to the DEQ was the only evidence
12 in the record before the hearings officer concerning this issue
13 when he made his decision on August 10, 1988.²

14 A finding is supported by substantial evidence when, in
15 light of all the relevant evidence in the record, a reasonable
16 person could make that finding. Younger v. City of Portland,
17 305 Or 346, 360, 752 Or 262 (1988). Petitioner's letter to the
18 DEQ states, in part:

19 "The raw materials used in our projects include some
20 or all of the following:

21 "Peat Moss	Pumice
"Worm Castings	Pearlite
"Saw Dust	Vermiculite
"Bark Dust	Granular Nitrogen
"Chicken Manure"	

23
24 Record 52. A reasonable person could find, on the basis of
25 this letter, that the proposed use would process minerals and
26 other materials which are not the product of farm or forest

1 use. We, therefore, conclude that the challenged finding is
2 supported by substantial evidence in the record.

3 The GAD district is an exclusive farm use (EFU) zone
4 adopted by the county pursuant to ORS 215.203 and Statewide
5 Planning Goal 3 (Agricultural Lands). ORS 215.283(2)(a)
6 provides that "commercial activities that are in conjunction
7 with farm use" may be allowed in an EFU zone, subject to
8 approval by the county governing body or its designate. The
9 "commercial activities that are exclusively used in conjunction
10 with farm use" (emphasis added) standard of ZDO 402.06.B.4 is
11 worded more stringently than the statute. Therefore, we agree
12 with the county that it is appropriate to interpret this
13 provision to restrict severely the commercial activities
14 allowed in the GAD zone. We find the county's interpretation
15 of the ZDO 402.06.B.4 standard to not include a use which would
16 process an unspecified amount of minerals, and other materials
17 that are not farm or forest products, to be reasonable and
18 correct. McCoy v. Linn County, 90 Or App 271, 275-276, 752 P2d
19 323 (1988).³

20 B. Product Used Exclusively in Conjunction with Farm Use

21 Petitioner argues that the record does not contain
22 substantial evidence to support the hearings officer's
23 conclusion that the product of the proposed use "is not used
24 exclusively in conjunction with farm use because '... a
25 substantial percentage of the product is marketed at retail to
26 homeowners.'" Petition for Review 11, quoting Record at 6.

1 Petitioner argues the record shows he did not testify that a
2 substantial percentage of the product is marketed at retail to
3 homeowners, but rather that a substantial portion is sold to
4 nursery operations and the balance is sold at retail outlets.

5 The county argues that the record shows the ultimate
6 consumers of the products of the proposed use would not be
7 limited to farmers. According to the county, while there is
8 not definitive evidence in the record that a majority of the
9 product will be used for other than farm use, there is
10 substantial evidence in the record that at least some of the
11 product will ultimately be sold at retail to homeowners. The
12 county maintains this evidence is sufficient to support its
13 decision that the products of the proposed use would not be
14 "exclusively used in conjunction with farm use," as required by
15 ZDO 402.06.B.4.

16 The only evidence in the record relevant to this issue is
17 petitioner's testimony. The relevant testimony consists of the
18 following statements:

19 " * * * I can't tell you what the breakdown of their
20 production is, but I do know that they sell a
21 substantial quantity of it to people like the Oregon
22 Bulk Company over in the Aurora area, Gill's Nursery
23 uses it. All the people that are creating nursery
24 stock that's grown in containers must use this kind of
25 materials, and, that is the substantial portion of the
26 end market, but by no means exclusively." Record 18.

27 "Well, there certainly is a considerable amount of the
28 material that is bagged and sold at retail outlets
29 throughout the United States, but I couldn't tell you
30 - my knowledge of marketing isn't adequate to tell you
31 percentages, I'm sorry."

1 " * * * * *

2 "Well, I'm sure it is [marketed for retail to
3 homeowners] because it's sold at, you know, Payless
4 stores, at Fred Meyers, and K-Mart's; what [the
operator] does is he bags private labeled materials
for at least one retailer that I'm aware of."
Record 23.

5
6 We are authorized to reverse or remand the challenged order
7 if the county made a decision not supported by substantial
8 evidence in the whole record. ORS 197.835(8)(a)(C); Sellwood
9 Harbor Condo Assoc. v. City of Portland, ___ Or LUBA ___ (LUBA
10 Nos. 87-079 and 87-080, April 1, 1988), slip op 12; Bonner v.
11 City of Portland, 11 Or LUBA 40, 52 (1984). In this case, the
12 county's decision is that the proposed use does not come within
13 ZDO 402.06.B.4 because the end products are not used
14 exclusively in conjunction with farm use.⁴

15 The above-quoted testimony includes statements that (1) a
16 "considerable amount" of the product is sold at retail outlets,
17 and (2) the operator of the proposed use bags products for at
18 least one retailer. This is evidence which a reasonable mind
19 could accept as adequate to support the conclusion that the
20 products of the proposed use are not used exclusively in
21 conjunction with farm use.

22 Because we reject petitioner's challenges to the county's
23 two bases for denial of the conditional use permit application,
24 we deny the first and second assignments of error.

25 //
26 //

1 THIRD ASSIGNMENT OF ERROR

2 "The Hearings Officer exceeded his range of discretion
3 by denying an application for a use allowed in an
4 agricultural zone as a conditional use under
ZDO 402.06(B)(4)."

5 Petitioner argues that his conditional use permit
6 application is in full compliance with the criteria allowing
7 the proposed use as a conditional use in the GAD zone.
8 According to petitioner, the hearings officer did not have
9 discretion to deny an application for a use allowed under
10 ZDO 402.06.B.4, and the Board should order the application
11 approved.

12 In ruling on petitioner's first and second assignments of
13 error, we upheld the county's determination that the proposed
14 use is not allowed under ZDO 402.06.B.4. Therefore, the
15 hearings officer did not exceed his discretion by denying the
16 conditional use permit application.

17 The third assignment of error is denied.

18 The county's decision is affirmed.

1 FOOTNOTES

2
3 1

4 It is not clear from the above-quoted findings whether the
5 hearings officer interpreted "commercial activities that are
6 exclusively used in conjunction with farm use" to require
7 either (1) the use employ exclusively the products of farm or
8 forest use, or (2) the end products of the use be used
9 exclusively in conjunction with farm use; or to require both
10 (1) and (2). In its brief, the county takes the position
11 ZDO 402.06.B.4 requires either (1) or (2), not both. However,
12 because of our disposition of petitioner's challenges, infra,
13 we need not determine which interpretation the hearings officer
14 adopted.

15
16 2

17 The hearings officer's decision did not become final until
18 the order denying the request for rehearing was issued.
19 ZDO 1304.03.E. It is, therefore, appropriate that the request
20 for rehearing and order denying the request be included in the
21 record of the county proceedings filed with LUBA. See
22 Consolidated Rock Products, Inc. v. Clackamas County,
23 Or LUBA _____ (LUBA No. 88-090; Order on Record Objections,
24 January 5, 1989). However, since the request for rehearing was
25 denied, the fact that the request for rehearing is part of the
26 record submitted to us does not make the facts contained
therein part of the record before the hearings officer when the
county's decision was made.

17
18 3

19 We do not determine whether an interpretation of
20 ZDO 402.06.B.4 to not allow an otherwise acceptable commercial
21 use which employs nonfarm products as 0.1% of its raw materials
22 is reasonable and correct.

21
22 4

23 Petitioner may also challenge the specific finding that he
24 testified "a substantial percentage of the product is marketed
25 at retail to homeowners." (Emphasis added.) Record 6. This
26 finding is not, however, essential to the county's decision.
In order to deny a conditional use permit application for
failure to satisfy ZDO 1203.01.A and 402.06.B.4, as the county
interprets these sections, the county need only determine that
some of the product of the proposed use is not used in
conjunction with farm use.