BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

J AND D FERTILIZERS, LTD., an Oregon corporation, dba D. STUTZMAN FARMS,	)	
Petitioner,	)	LUBA No. 90-073
vs.	)	FINAL OPINION AND ORDER
CLACKAMAS COUNTY,	)	
Respondent.	)	

Appeal from Clackamas County.

Steven Schwindt, Canby, filed the petition for review and argued on behalf of petitioner. With him on the brief was Reif and Reif.

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

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

AFFIRMED 09/20/90

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioner appeals a decision of the Clackamas County Hearings Officer determining that petitioner's stockpiling of chicken manure on a 3.45 acre parcel is not a principal use or a nonconforming use in the Exclusive Farm Use 20 Acre (EFU-20) zone.[1]

FACTS

Petitioner owns the subject 3.45 acre parcel (Lot 201) and two adjacent parcels to the south (Lots 500 and 600) which total 3.56 acres. Petitioner originally purchased Lots 201, 500 and 600 in 1973, when they were zoned Light Industrial (I-2). In 1975, petitioner sold Lot 201 back to its original owner. On September 1, 1976, the lots were rezoned EFU-20. Lot 201 was repurchased by petitioner in 1984. During 1988 and 1989, petitioner placed a 100 ft. by 300 ft. concrete pad and an elevator on Lot 201.

Petitioner conducts a fertilizer business on Lots 500 and 600, and has done so for approximately 20 years.[2] Petitioner currently uses Lot 201 for the stockpiling of

[1]The county's decision also determines petitioner does not have a vested right to stockpile chicken manure on the subject parcel. Petitioner does not challenge that determination.

[2]It is not clear from the record whether (1) Lots 500 and 600 are zoned for commercial or industrial use, (2) the fertilizer business has a conditional use permit as a commercial activity in conjunction with farm use in the EFU-20 zone, or (3) the business operates as a nonconforming use in the EFU-20 zone.

chicken manure in conjunction with its fertilizer business.[3] Petitioner obtains manure from chicken farms in the area and transports it to Lot 201. The chicken manure is stored on the concrete pad until it is transferred via the elevator, or conveyor, to the processing and packaging facilities on Lots 500 and 600.

On October 18, 1989, petitioner requested a determination from the county planning division that under the Clackamas County Zoning and Development Ordinance (ZDO) petitioner's use of Lot 201 for the stockpiling of chicken manure is (1) a principal (i.e., permitted outright) use in the EFU-20 zone, or (2) a valid nonconforming use. The planning division made determinations on these issues adverse to petitioner. Petitioner appealed the planning division's decision to the hearings officer. After public hearings, the hearings officer determined that petitioner's stockpiling of chicken manure on Lot 201 is neither a principal use in the EFU-20 zone, nor a nonconforming use. This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "The Hearings Officer erred when he found that the storage of chicken manure on [Lot 201] does not comply with Subsection 401.03 of the Clackamas County Zoning and Development Ordinance (ZDO)."

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[3]Whether petitioner used Lot 201 for the stockpiling of chicken manure at the time of the 1976 zone change to EFU-20, and has continued such use until the present, is an issue in this case.

ZDO 401.03.A lists the following principal uses permitted outright in the EFU-20 zone:

> "Farm uses as follows: The current employment of land, including that portion of such lands under buildings supporting accepted farm practices, for the purpose of obtaining profit in money by raising, harvesting, and selling crops or by the feeding[,] breeding, management and sale of, or produce of, livestock[,] poultry, fur-bearing animals or honeybees or for dairying 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."

Petitioner contends the same definition of farm use is found in ORS 215.203(2)(a).[4]

Petitioner contends that its storage of chicken manure on Lot 201 is an outright permitted farm use under either the first or second sentence of ORS 215.203(2)(a) and ZDO 401.03.A. Petitioner argues its storage activity comes within the first sentence quoted above because it is

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[4]Where county ordinance provisions correspond to a state statute, it is appropriate to interpret those ordinance provisions consistently with the statute, in light of any available authority for interpreting that statute. Joseph v. Lane County, ___ Or LUBA ___ (LUBA No. 89-048, September 11, 1989), slip op 14; Goracke v. Benton County, 12 Or LUBA 128, 135 (1984). Here the parties assume the definition of "farm use" in ZDO 401.03.A is identical to that found in ORS 215.203(2)(a). We agree that there is no significant difference, as applied to this case, between ZDO 401.03.A and the first two sentences of the current definition of "farm use" in ORS 215.203(2)(a). However, we note that ZDO 401.03.A is actually identical to the first two sentences of ORS 215.203(2)(a) as they existed before 1979 amendments deleted the phrase "including that portion of such lands under buildings supporting accepted farm practices" and added the word "primary" before the phrase "purpose of obtaining profit in money." Or Laws 1979, ch 480, § 1.

"current employment of land * * * for the purpose of obtaining profit in money by * * * any other agricultural * * * use or * * * any combination thereof." According to petitioner, it is clear that chicken manure is an agricultural product and that storing an agricultural product is a type of agricultural use.

Petitioner also argues that its storage of chicken manure on Lot 201 comes within the second sentence of the farm use definition quoted above because it is the "storage of the products raised on such land for man's use * * * and disposal by marketing or otherwise." Petitioner argues that the phrase "such land" in this sentence refers not to the subject parcel, but rather "generically to all land used for an agricultural use." Petition for Review 7. Petitioner contends this Board recognized the possibility of this interpretation of the phrase "such land" in ORS 215.203(2)(a) in Cook v. Yamhill County, 13 Or LUBA 137, 143 n 3 (1985). Petitioner also argues that in Reter v. State Tax Commission, 256 Or 294, 473 P2d 129 (1970), the Supreme Court recognized that farm use includes the storage of farm products not raised on the subject land.

Finally, petitioner argues the record shows that many farm products are brought from offsite, stored on farmland and later removed for processing elsewhere. Petitioner cites examples such as hay, rhubarb, silage, straw, filberts and hops. Petitioner argues that it would be unreasonable

to expect farmland owners to obtain conditional use permits for all such activities.

The county explains its interpretation of ZDO 401.03.A in its decision as follows:

> "* * * Farm use involves the employment of land for the production of farm products, such as the produce [sic] of poultry, and the ultimate marketing of such farm products. Farm use further specifically includes the preparation and storage of farm products raised on such land. * * * Farm use does not include the situation presented in this appeal, where the manure is produced on other properties, obtained by the applicant, transported to the subject property, and subsequently processed and sold as fertilizer." (Emphasis in original.) Record 2-3.

We agree with the county that the first sentence of the definition of farm use in ZDO 401.03.A and ORS 215.203(2)(a) identifies as farm use only the production of farm products for sale or otherwise obtaining a monetary profit. It is clear that petitioner's stockpiling of chicken manure obtained elsewhere on Lot 201 does not constitute the production of farm products. However, whether petitioner's stockpiling activity constitutes "storage of [farm] products raised on such land for * * * disposal by marketing or otherwise" (emphasis added), under the second sentence of the farm use definition, is a closer question.

Cook v. Yamhill County, supra, was a case concerning a zone change from an exclusive farm use zone to a resource industrial zone for a winery which would use grapes grown both onsite and offsite. In Cook, we assumed the parties'

interpretation of the above emphasized term "such land," in the statutory and ordinance definition of farm use, to be the land on which the preparation, storage or marketing takes place, but expressed no opinion on whether that interpretation was correct. Cook, therefore, provides no guidance to us in this case.

In Earle v. McCarthy, 28 Or App 541, 560 P2d 665 (1977), the Court of Appeals addressed whether a commercial warehouse for the storage of hops grown offsite was a "commercial activity * * * in conjunction with farm use" permissible as a conditional use in Marion County's exclusive farm use zone under the county code and then ORS 215.213(2)(b). The court pointed out that the code and statute defined "farm use" to include "the preparation and storage of the products raised on such land for man's use and disposal by marketing or otherwise." The court reasoned:

> "* * * since 'commercial activities that are in conjunction with farm use' is designated by the ordinance and the statute as 'nonfarm use,' then it must allow something more than what would be allowed as a 'farm use.' It is reasonable, therefore, to construe the term as including a warehouse for the commercial storage of agricultural products of lands other than that on which the warehouse is located. Accordingly, we hold that such a use is a permitted conditional use in an EFU zone." Earle v. McCarthy, 28 Or App at 542.

In Reter v. State Tax Commission, supra, the Supreme Court adopted an opinion of the Tax Court determining that

plaintiffs were entitled to farm use assessment for land under buildings used to treat, sort, package and store pears. The Tax Court stated that under ORS 215.203(2)(a), "farm use includes the employment of land for the storage of the farmer's products preparatory to the feeding or marketing of such products." (Emphasis added.) Reter v. Commission, 3 OTR 477, 479 (1969). The Tax Court found as follows:

> "* * * With the exception of a very small amount of fruit which is handled and stored for the Oregon State University experimental farm and one or two other individuals, all the fruit stored and packed comes from the plaintiffs' orchards and belongs to the plaintiffs.
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> "* * * The plaintiffs' land [used for pear preparation and storage] is contiguous to their orchard and with the minor exceptions mentioned, all the fruit belongs to the plaintiffs and the plant is a part of plaintiffs' agricultural operation." Id. at 480.

Based on the above, the Tax Court concluded that plaintiffs' use of the land in question came within the ORS 215.203(2)(a) definition of farm use as "the preparation and storage of the products raised on such land for man's use * * * and disposal by marketing or otherwise."

Based on these opinions, we conclude that under ORS 215.203(2)(a) and ZDO 401.03.A, "the preparation and storage of [farm] products raised on such land for man's use * * * and disposal by marketing or otherwise," i.e. "farm use," does not require that all agricultural products

involved in such an operation be produced on the land where the preparation and storage takes place. However, we also conclude that an operation for the preparation or storage of agricultural products where none of the products are produced on the land where the preparation or storage takes place does not constitute farm use.[5] See Kunkel v. Washington County, 16 Or LUBA 407, 417 (1988) (emergency disposal of 27,000 lambs produced offsite is not a farm

[5]We believe that the Supreme Court's opinion in Craven v. Jackson County, 308 Or 281, ___ P2d ___ (1989), is consistent with this conclusion. In Craven, the Supreme Court reviewed a county decision approving a conditional use permit in an exclusive farm use zone for a winery, tasting room and related retail sales, as "commercial activities that are in conjunction with farm use" under ORS 215.283(2)(a). The winery was proposed in conjunction with the planting of a vineyard on the same property, and would process both grapes grown at the vineyard onsite and grapes grown at other vineyards. The court found that the winery and tasting room could be concluded to be either farm use or commercial activity in conjunction with farm use. It appears the court based its decision that the winery and tasting room could be considered farm use on the ORS 215.203(2)(b)(F) definition of the "current employment of land" for farm use as including "land under buildings supporting accepted farm practices," and the ORS 215.203(2)(c) definition of "accepted farming practice" as "a mode of operation that is common to farms of similar nature * * * and customarily utilized in conjunction with farm use." The court found that "[w]ineries, which process the yield of vineyards, and tasting rooms, which accompany the winery to promote its product, are 'accepted farming practices' because they are 'customarily utilized in conjunction with' vineyards." Id. at 285.

Thus, the most we can conclude from Craven is that a winery and tasting room in conjunction with a vineyard onsite, i.e., a preparation and storage operation which processes at least some agricultural products grown onsite, can be a farm use. In addition, we note the court expressed concern that interpreting as "farm use" any activity "for the primary purpose of obtaining a profit in money" through the marketing of farm products from any farmland could justify countless uses of agricultural land. According to the court, "[s]uch an interpretation could permit a shopping mall or supermarket as a farm use so long as the wares sold are mostly the products of a farm someplace." Id. at 288. We infer from this that the court rejected the prospective vintner's argument that a winery and tasting room could be a farm use even if they used no grapes grown onsite.

use).

In this case, the chicken manure stored on Lot 201 is entirely produced offsite, is not produced in any agricultural operation conducted by petitioner and is stored for future use in petitioner's adjacent fertilizer business. Under these circumstances, we agree with the county that petitioner's use of Lot 201 is not a farm use.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "The Hearings Officer erred when he found that there was no lawful nonconforming use of the property."

The county found as follows:

> "The better evidence is that on September 1, 1976 [Lot 201] was not being used for the stockpiling of chicken manure. * * * An aerial photograph taken on September 19, 1976 shows no evidence that [Lot 201] was being utilized for the stockpiling of manure. A second aerial photograph taken in 1980 also shows no evidence that [Lot 201] was being utilized for the stockpiling of manure, and in fact, shows that [Lot 201] was cultivated in conjunction with adjacent properties. Additional believable evidence has been presented that [Lot 201] has been used for the production of livestock at least until 1985.
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> "The applicant maintains that [Lot 201] was used for stockpiling manure off and on since the Stutzman's [sic] bought the fertilizer facility in 1973. Doug Stutzman testified that manure would be stored on [Lot 201] when hot spots developed in the stored manure on [Lots 500 and 600], and on other occasions for overflow storage. Unfortunately, there is no documentation of this usage, and no specification of dates when the storage would have occurred.

> "In summary, the applicant has failed to establish that an actual use of the subject property had been established as of September 1, 1976 for the stockpiling of chicken manure. Any limited use which might have occurred prior to that date would have lost its nonconforming status in any event, as there is no substantial evidence that the use continued without periods of nonuse of at least 12 months. In fact, the record reflects several periods of non-use in excess of 12 months. [ZDO 1206.02] provides that if a nonconforming use is discontinued for a period of twelve months, it shall not be resumed." Record 3-4.

Petitioner challenges the above quoted findings. Petitioner argues that the record is replete with evidence that Lot 201 was used to store chicken manure in September 1976, and has been so used in every year since. Petitioner also argues that the September 19, 1976 aerial photograph is not good evidence that chicken manure was not being stored on Lot 201, because the intensity of use was dependent on the time of year, and "it was important to have dry weather to store [chicken manure] on this open lot." Petition for Review 10.

Petitioner contends the testimony of Doug Stutzman establishes petitioner's continuing use of Lot 201 to store chicken manure. Record 29-31, 147-148. Petitioner also asserts the owners of Lynden Farms testified that they had delivered chicken manure to the site since 1970. Record 101 and 132. Petitioner also argues that a letter from a neighboring property owner establishes that the use of Lot 201 for chicken manure storage predates 1976.

Record 146. Petitioner also cites a letter from the owner of Lot 201 from 1975 to 1984, as establishing that petitioner was allowed to use Lot 201 in conjunction with its fertilizer business during that period. Record 130.

The county argues there is substantial evidence in the record in support of its determination that a nonconforming use of Lot 201 has not been established. The county cites testimony by a county environmental specialist and by neighboring property owners that the land has been in pasture until recently, and a letter by the Canby Fire Marshall referring to petitioner's "new manure storage area." Record 48, 50, 116-117, 133. The county also points to testimony by Shane Stutzman, an employee of petitioner, that manure has been stored on Lot 201 only three times in the past eight years. Record 22. According to the county, this supports its finding that there have been several periods of nonuse exceeding 12 months.

The county also contends that the evidence cited by petitioner is not to the point. According to the county, Doug Stutzman gave no testimony as to when or how often manure was stored on Lot 201. The county contends the owners of Lynden Farms simply state they have provided petitioner with chicken manure for 15 to 20 years, but do not say where on petitioner's property that manure has been stored. The county argues the letter from the previous owner of Lot 201 simply states that petitioner was allowed

to use Lot 201, but does not establish what use petitioner actually made of Lot 201.

We understand petitioner to challenge the evidentiary basis for the county's determination that there is no nonconforming use of Lot 201 for chicken manure storage. However, the proponent of a nonconforming use, in this case petitioner, bears the burden of proving that a nonconforming use was lawfully established. Webber v. Clackamas County, 42 Or App 151, 154, 600 P2d 448, rev den 288 Or 81 (1979); Sabin v. Clackamas County, ___ Or LUBA ___ (LUBA No. 90-077, September 19, 1990), slip op 8-9. In order to overturn a county determination that a nonconforming use does not exist on evidentiary grounds, it is not sufficient for petitioner to show there is substantial evidence in the record to support its position, rather the "evidence must be such that a reasonable trier of fact could only say petitioner['s] evidence should be believed." Baughman v. Marion County, ___ Or LUBA ___ (LUBA No. 88-117, April 12, 1989), slip op 5; Morley v. Marion County, 16 Or LUBA 385, 393 (1988); Weyerhauser v. Lane County, 7 Or LUBA 42, 46 (1982).

The nature and extent of the lawful use in existence at the time the use became nonconforming determine the scope of permissible continued use. Polk County v. Martin, 292 Or 69, 364 P2d 952 (1981); City of Corvallis v. Benton County, 16 Or LUBA 488, 497 (1988). In this case, any use of Lot 201 for chicken manure storage in conjunction with

petitioner's fertilizer business became nonconforming on September 1, 1976. The only evidence in the record to which we are cited that Lot 201 was intermittently used for such storage at that time is the testimony of Doug Stutzman that "through the 70's" there were times when petitioners stockpiled manure on Lot 201, and a statement by a neighboring property owner that he "believes" the use of "the property" for stockpiling of chicken manure "to comfortably predate the designation in [September], 1976, of the present zoning." Record 30, 146. However, this evidence is nonspecific with regard to the dates, nature and extent of the alleged use. We cannot say that a reasonable trier of fact could only find that this evidence is adequate to establish the existence of a nonconforming use.[6]

The second assignment of error is denied.

The county's decision is affirmed.

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[6]Furthermore, under ZDO 1206.02, any right to a nonconforming use existing on September 1, 1976 would be lost if the use was discontinued for a period in excess of 12 months. There is substantial evidence in the record, particularly in the testimony of Shane Stutzman, to support the county's finding that there were several periods of nonuse of Lot 201 for chicken manure storage which exceeded 12 months.