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

JERRY H. DERRY and)
PAUL W. TAMM,)
)
Petitioners,)
)
vs.)
)
DOUGLAS COUNTY,)
)
Respondent,)
)
and)
)
STEVEN BUSCH,)
)
Intervenor-Respondent.)

LUBA No. 94-109
FINAL OPINION
AND ORDER

Appeal from Douglas County.

Jerry H. Derry and Paul W. Tamm, Oakland, filed the petition for review. Paul W. Tamm argued on his own behalf.

Paul E. Meyer, Assistant County Counsel, Roseburg, filed a response brief and argued on behalf of respondent.

David A. Stoll, Roseburg, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Danny Lang and Associates.

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

REMANDED 11/01/94

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

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county order determining that a
4 proposal to raise a large number of pigs in confined areas
5 is a use similar to a farm use and, therefore, a use that is
6 permitted outright in the county's Exclusive Farm Use (EFU)
7 zone.

8 **MOTION TO INTERVENE**

9 Steven Busch, the applicant below, moves to intervene
10 on the side of respondent in this appeal proceeding. There
11 is no objection to the motion, and it is allowed.

12 **FACTS**

13 The subject property is a 7.63 acre parcel planned and
14 zoned EFU. The subject parcel abuts the municipal
15 boundaries of the City of Oakland. Intervenor has conducted
16 a pig operation on the subject property for some time.
17 Intervenor requested permission from the county planning
18 department to construct several buildings for raising a
19 large number of pigs in confined places.

20 This is the second appeal of a county determination
21 concerning the intervenor's application. We remanded the
22 county's first decision on the bases that (1) ex parte
23 contacts had not been timely disclosed, and (2) the county
24 had improperly determined that the applicant had no burden
25 of proof to bear in seeking approval of his application.
26 Derry v. Douglas County, 26 Or LUBA 25 (1993).

1 On remand, the county planning commission conducted an
2 evidentiary hearing on the proposal. After the public
3 hearing, the planning commission determined the proposed pig
4 operation does not constitute a feedlot and, therefore, does
5 not require conditional use approval. Petitioners appealed
6 the planning commission decision to the board of
7 commissioners. Only two of the three county commissioners
8 voted on the application after the hearing.¹ These two
9 commissioners each voted differently on the application --
10 one voted to sustain the planning commission decision and
11 the other voted to overturn it. In the challenged decision,
12 the board of commissioners determines the legal effect of
13 the one-to-one vote is to sustain the planning commission's
14 decision that intervenor's proposal does not constitute a
15 feedlot. Because of this determination, the board of
16 commissioner's decision appends the planning commission
17 decision as the county's decision on the merits of the
18 proposal. This appeal followed.

19 **FIRST ASSIGNMENT OF ERROR**

20 "The county erred in concluding that the legal
21 effect of a 1-1 vote of the Board of County
22 Commissioners on a motion to affirm the Planning
23 Commission's decision is to uphold that decision.
24 * * *"

25 Douglas County Land Use and Development Ordinance

¹The third commissioner abstained. There is no argument in this appeal concerning the propriety of the third commissioner's decision to abstain, and we take no position concerning it.

1 (LUDO) 2.700(6) provides that where two of the three members
2 of the decision making body -- here the board of
3 commissioners -- fail to agree, the decision being reviewed
4 stands.

5 Petitioners cite previous decisions of this Board
6 holding that in the absence of something to the contrary in
7 the local code, a tie vote of a decision maker amounts to
8 the failure of an applicant to carry the burden of proof at
9 the appellate level, and has the legal effect of denying the
10 application under review. Strawn v. City of Albany, 20 Or
11 LUBA 344, 350-51 (1990). However, this Board has made it
12 clear the general rule articulated in Strawn only applies
13 where nothing in the local code provides to the contrary.
14 Here, the local code contains a provision which specifically
15 governs a situation where the highest level decision maker
16 fails to reach the required majority decision to affirm or
17 reverse the decision on review. In addition, the challenged
18 decision explicitly interprets LUDO 2.700(6) to mean that
19 where the board of commissioners fails to reach a majority
20 decision, the lower level decision stands. The
21 interpretation of LUDO 2.700(6) by the board of
22 commissioners is not "clearly wrong," and is entitled to
23 deference. ORS 197.829; Clark v. Jackson County, 313 Or
24 508, 836 P2d 710 (1992); Zippel v. Josephine County, 128 Or
25 App 458, 461, _____ P2d _____ (1994).

26 The first assignment of error is denied.

1 **SECOND ASSIGNMENT OF ERROR**

2 "The county erred in not finding that
3 [intervenor's] operation is a feedlot, or
4 sufficiently similar to a feedlot, to require a
5 conditional use permit under LUDO * * *
6 3.3.100(15). * * *"

7 LUDO 1.090 defines the term "feedlot" as follows:

8 "Any structure, pen or corral wherein cattle,
9 sheep, horses, goats and swine are maintained in
10 close quarters for the purpose of fattening such
11 livestock for shipment to market." (Emphasis
12 supplied.)

13 The only question before us concerns the county's
14 interpretation of the term "feedlot" as used in the LUDO.
15 If intervenor's proposed operation is a feedlot, then
16 intervenor must secure a conditional use permit to engage in
17 the disputed pig operation. However, if intervenor's
18 proposed operation is not a feedlot, then intervenor does
19 not require a conditional use permit to conduct his pig
20 operation. As we understand it, there is no dispute that
21 intervenor's proposed pig operation involves a large number
22 of confined animals and that those animals are fattened and
23 sold to a market. The dispute here concerns the kind of
24 market to which the animals are sold.²

25 The disputed portion of the county's definition of

²The challenged planning commission decision reserves the question of whether the proposal will maintain pigs in "close quarters." Supplemental Record 12. In this regard, the parties agree that if we sustain this assignment of error, we should remand the challenged decision for a determination of whether the pigs are proposed to be confined in "close quarters" within the meaning of the LUDO 1.090 definition of "feedlot".

1 "feedlot" is that portion which provides that animals held
2 in a feedlot are prepared for "shipment to market." The
3 challenged decision interprets the term "shipment to market"
4 to mean "shipment to final market -- meaning shipment to
5 slaughter." Supplemental Record 12-13.

6 Petitioners argue the LUDO definition of feedlot, and
7 specifically the term "shipment to market," is unambiguous
8 and should be applied to mean what it says. Petitioners
9 contend it is incorrect for the county to add the word
10 "final" to the LUDO definition of feedlot.

11 Intervenor argues that we must defer to the county's
12 interpretation of the definition of feedlot, and
13 specifically the interpretation of the scope of the market
14 to which animals are shipped under Clark, supra, and ORS
15 197.829. Intervenor argues the county's interpretation is
16 not clearly wrong.

17 The deference required by Clark and ORS 197.829 applies
18 only to interpretative decisions made by a governing body.
19 Gage v. City of Portland, 319 Or 308, ___ P2d ___ (1994);
20 Watson v. Clackamas County, 129 Or App 428, 431-32, ___ P2d
21 ___ (1994). Here, as we explain under the first assignment
22 of error, the interpretative decision under review was
23 adopted by the planning commission, and not the governing
24 body, due to the inability of the board of commissioners to
25 reach a majority decision. This Board does not owe the
26 deference required by Clark and ORS 197.829 to an

1 interpretation of the planning commission.

2 The relevant portion of the LUDO 1.090 definition of
3 the term "feedlot" unambiguously provides that a feedlot
4 involves the preparation of animals for market. The LUDO
5 says nothing about shipment to final or any other specific
6 kind of market. The challenged planning commission
7 interpretation of LUDO 1.090, limiting its scope to only
8 "final" markets is, therefore, neither reasonable nor
9 correct. McCoy v. Linn County, 90 Or App 271, 752 P2d 323
10 (1988).

11 The second assignment of error is sustained.

12 The county's decision is remanded.

13