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

DEPARTMENT OF LAND CONSERVATION)
AND DEVELOPMENT,)
Petitioner,)
vs.)
CURRY COUNTY,)
Respondent,)
and)
NIELS MARTIN and JANICE MARTIN,)
Intervenors-Respondent.)

LUBA No. 96-214
FINAL OPINION
AND ORDER

Appeal from Curry County.

Celeste J. Doyle, Assistant Attorney General, Salem, filed the petition for review and argued on behalf of petitioner. With her on the brief was Theodore R. Kulongoski, Attorney General, Thomas A. Balmer, Deputy Attorney General, and Virginia L. Linder, Solicitor General.

No appearance by respondent.

David J. Hunnicutt, Tigard, filed the response brief and argued on behalf of intervenors-respondent.

GUSTAFSON, Referee; LIVINGSTON, Referee, participated in the decision.

REVERSED 01/31/97

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

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the county in which it
4 determined that a water extraction, bottling, and
5 distribution operation is an outright permitted use in the
6 county's Forest Grazing (FG) zone.

7 **MOTION TO INTERVENE**

8 Niels and Janice Martin (intervenors), the applicants
9 below, move to intervene on the side of respondent. There
10 is no opposition to the motion, and it is allowed.

11 **FACTS**

12 Intervenors conduct a water extraction, bottling and
13 distribution operation on their property, located in the
14 county's FG zone. In response to a "Request for Violation
15 Investigation," which challenged the legality of
16 intervenors' operation, the county planning staff determined
17 intervenors' operation is a commercial water processing,
18 bottling and distribution facility, which requires a
19 conditional use permit under the county's regulations.
20 Record 68, 104. Intervenors appealed that determination to
21 the planning commission, which concluded that the operation
22 is a "farm use" under Curry County Zoning Ordinance (CCZO)
23 3.051(7) and ORS 215.203(2)(a), and therefore allowed
24 outright in the FG zone. Record 254. Petitioner appealed
25 that determination to the county board of commissioners,
26 which affirmed the planning commission's determination and

1 adopted the decision petitioner now challenges.

2 **ASSIGNMENT OF ERROR**

3 Petitioner challenges the county's conclusion that
4 intervenors' water extraction, bottling and distribution
5 operation is a farm use under ORS 215.203(2)(a), and
6 therefore, an outright permitted use in the FG zone.¹

7 ORS 215.203(2)(a) defines "farm use" as follows:

8 "As used in this section, "farm use" means the
9 current employment of land for the primary purpose
10 of obtaining a profit in money by raising,
11 harvesting and selling crops or the feeding,
12 breeding, management and sale of, or the produce
13 of, livestock, poultry, fur-bearing animals or
14 honeybees or for dairying and the sale of dairy
15 products or any other agricultural or
16 horticultural use or animal husbandry or any
17 combination thereof. 'Farm use' includes the
18 preparation and storage of the products raised on
19 such land for human use and animal use and
20 disposal by marketing or otherwise. 'Farm use'
21 also includes the current employment of land for
22 the primary purpose of obtaining a profit in money
23 by stabling or training equines including but not
24 limited to providing riding lessons, training
25 clinics and schooling shows. 'Farm use' also
26 includes the propagation, cultivation, maintenance
27 and harvesting of aquatic species. * * *"
28 (Emphasis added.)

29 The county determined that intervenors' operation

¹CCZO 3.051 provides, in relevant part:

"The following uses and their accessory structures and uses are permitted outright [in the FG zone:]

** * * * *

"7. Farm use as defined in ORS 215.203(2)(a)."

1 constitutes "any other agricultural * * * use" as that term
2 is used in ORS 215.203(2)(a).² The county reached its
3 conclusion by relying definitions of "food" and "raw
4 agricultural commodity" from different sections of ORS Ch.
5 616. That chapter addresses, generally, Department of
6 Agriculture health and packaging regulations of food and
7 other commodities. As the word applies to ORS 616.695 to
8 616.755, which provide sanitary regulations for food and
9 food establishments, ORS 616.695(3) defines "food" as

10 "any article used, or intended to be used, for
11 food, ice, drink, confection or condiment, whether
12 simple or compound, or any part or ingredient
13 thereof or in the preparation thereof, and for
14 human consumption."

15 For purposes of ORS 616.205 to 616.426 and 616.900, which
16 address the "sale of adulterated, misbranded or imitation
17 foods," ORS 616.205(16) defines "raw agricultural commodity"
18 to mean:

19 "any food in its raw or natural state, including
20 all fruits that are washed, colored, or otherwise
21 treated in their unpeeled natural form prior to
22 marketing."

23 By combining these definitions that apply to distinct
24 and specific provisions of ORS chapter 616, the county
25 concluded that the water extraction, processing, bottling

²The county characterizes its decision as one of interpretation of its own code, to which we must defer under ORS 197.829 and Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992). To the contrary, the county's decision interprets ORS 215.203(2)(a). The deferential standard of ORS 197.829 does not apply. Rather, we must determine whether the county's interpretation of the state statute under review is correct.

1 and distribution amounts to "other agricultural use" for
2 purposes of ORS 215.203(2)(a), finding:

3 "The Board concludes that the applicants' existing
4 water extraction and water bottling operation is
5 an 'other agricultural use' under ORS
6 215.203(2)(a) and a 'farm use' within the meaning
7 of CCZO 3.051(7). Water is a food and a raw
8 agricultural commodity. Bottled water is
9 regulated as a food under ORS Chapter 616. The
10 Oregon Department of Agriculture has the
11 responsibility of administration of all regulatory
12 legislation applying to food products and
13 agricultural commodities. The Department
14 regulates bottled water. * * * The Board
15 concludes, as a matter of interpretation, that the
16 existing water processing, water bottling, storage
17 and distribution facility located on the subject
18 property is a farm use and permitted outright
19 under Section 3.051(7) of the CCZO." Record 7.

20 Neither the county nor intervenors provide any
21 legislative history or other authority to support the use of
22 definitions of "food" and "raw agricultural commodity" in
23 ORS chapter 616 to define "farm use" under ORS
24 215.203(2)(a). The subject matter of ORS chapter 215 is
25 distinct and separate from that of ORS chapter 616, and
26 nowhere do we find an indication that the definitions of the
27 two chapters were intended to apply to each other. We find
28 no reasonable basis upon which to conclude that by
29 characterizing water as a food, and thus, a raw agricultural
30 commodity for purposes of specific Department of Agriculture
31 health and packaging regulations, the legislature intended
32 "other agricultural * * * uses" in ORS 215.203(2)(a) to

1 include the extraction, bottling and distribution of water.³

2 The language and the context of the definition of "farm
3 use" in ORS 215.203(2)(a) also indicates no such intent.
4 Petitioner correctly points out that ORS 215.203(2)(a)
5 provides a "long list of specific activities that all relate
6 to crops and livestock." Petition for Review 6. Each of
7 the uses listed relate in some way to activities, such as
8 the raising, breeding, or harvesting of some sort of plant
9 or animal. While the catch-all phrase "any other
10 agricultural * * * use" allows for further expansion of that
11 list, petitioner argues that phrase should be limited to
12 "the same kind or class of things specifically listed" and
13 not expanded to include "non-organic material such as
14 water." Id.

15 Intervenors respond that in order to provide meaning to
16 the phrase "other agricultural uses" in ORS 215.203(2)(a),
17 the phrase must be given a "broad" definition that includes
18 intervenors' operation. Intervenors argue:

19 "'Any other' is a very broad phrase that, by its
20 ordinary meaning, creates new, additional uses,
21 rather than limiting uses to those listed before.
22 Therefore, if LUBA adopts Petitioner's argument
23 and construes 'farm use' to include only uses

³The Department of Agriculture notified the county that the definitions of ORS Ch. 616 do not define land uses, stating:

"It is important to note that ORS 616.695 through 616.755 * * * relates only to "Sanitary Regulations for Food and Food Establishments" and should not be construed to define what is or is not farm use under Oregon's land use laws." Record 267.

1 similar to those listed prior to the 'or any other
2 agricultural' language, LUBA would render
3 meaningless the words 'any other.' Such an
4 interpretation would ignore the legislature's
5 words, which is contrary to Oregon law." Response
6 Brief 5.

7 Intervenors appear to argue that, because the list of
8 specific uses in ORS 215.203(2)(a) is exhaustive, limiting
9 "any other agricultural * * * use" to "uses similar to those
10 listed" somehow equates to limiting the applicability of
11 that phrase to those uses "listed before." Intervenors'
12 conclusion is unwarranted. Intervenors have not established
13 that, as a matter of law, the list of uses enumerated in
14 215.203(2)(a) is so exhaustive that there remains no other
15 use of a similar kind or class that could fall into the
16 category of "other agricultural uses." Therefore, we reject
17 intervenors' argument that to provide any meaning to the
18 phrase "any other agricultural * * * use" we must find that
19 the phrase is intended to include an entirely different kind
20 or class of use than those enumerated.⁴

21 There is no indication in the language of ORS
22 215.203(2)(a) that "other agricultural * * * use" should
23 include uses other than those relating to plants or animals.
24 In the absence of evidence that the legislature intended,

⁴Even if "other agricultural uses" could be construed to include uses of a kind or class of other than those listed, intervenors have provided no explanation of what other kinds or classes of uses could fall within their "broad" definition of that phrase and, more specifically, have provided no authority upon which a conclusion could be reached that water extraction, processing and distribution would be among the kind or class contemplated.

1 through the use of the phrase "any other agricultural * * *
2 uses," to add an entirely different kind or class of uses to
3 the definition of "farm use," we conclude that phrase was
4 intended to define as other "agricultural uses" only other
5 uses of the same kind or class as those listed.

6 The definition of "farm use" in ORS 215.203(2)(a) does
7 not include the extraction, processing and bottling of a
8 mineral resource such as water. Therefore, the county's
9 determination that intervenors' water extraction, bottling
10 and distribution operation is allowed outright in the FG
11 zone as a farm use under ORS 215.203(2)(a), is incorrect as
12 a matter of law.

13 The county's decision is reversed.