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

BEST BUY IN TOWN, INC. and TIMOTHY)
PERRI,)
)
Petitioners,) LUBA No. 98-051
)
vs.) FINAL OPINION
) AND ORDER
WASHINGTON COUNTY,)
)
Respondent.)

Appeal from Washington County.

William C. Cox, Portland, filed the petition for review and argued on behalf of petitioners.

Alan A. Rappleyea, Hillsboro, filed the response brief and argued on behalf of respondent.

HOLSTUN, Board Member; HANNA, Board Member, participated in the decision.

AFFIRMED 02/02/99

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 Petitioners appeal a county hearings officer's denial of their request to have a green
4 feedstock composting operation declared a farm use.¹

5 **FACTS**

6 Petitioners own 41.58 acres of land zoned exclusive farm use (EFU) where they
7 conduct a composting operation. Green feedstock is trucked to the property from off-site to
8 be composted and sold to area gardeners and farm users. The county brought an enforcement
9 action against petitioners for operation of a commercial business in a farm zone and for
10 placing fill in a flood plain. In response, petitioners applied to the county for a determination
11 that their business is a farm use allowed in an EFU zone. The county hearings officer
12 conducted a public hearing and concluded that petitioners' composting operation is not a
13 farm use.

14 **INTRODUCTION**

15 The question presented in this appeal is whether the hearings officer erred in his
16 determination that petitioners' composting operation does not qualify as a "farm use," within
17 the meaning of ORS 215.203(2)(a).² In their first assignment of error, petitioners argue that
18 the county misapplied the law in finding that the subject green feedstock composting use
19 does not involve "employment of the land," within the meaning of ORS 215.203(2)(a). The

¹Green feedstock material received on site includes yard debris, grass, leaves, tree trimmings and other vegetative and woody materials. Record 169.

²ORS 215.203(2)(a) provides in part:

"As used in this section, 'farm use' means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. 'Farm use' includes the preparation, storage and disposal by marketing or otherwise of the products or by-products raised on such land for human or animal use. * * *" (Emphases added)

1 parties dispute whether there is substantial evidence to support two important findings of fact
2 that were adopted by the hearings officer in deciding that question. We discuss each of those
3 findings and the evidence supporting those findings separately below under the first
4 assignment of error. In their second assignment of error, petitioners argue that the county
5 "misconstrued the applicable law and failed to base its findings * * * on substantial evidence
6 in the record." Petition for Review 7. Under the second assignment of error, petitioners
7 advance a number of arguments which we address separately below.³

8 **FIRST ASSIGNMENT OF ERROR**

9 **A. Farm Uses on the Subject Property**

10 The hearings officer found that the petitioners' composting operation is the only use
11 of the subject property that could qualify as a farm use. The hearings officer specifically
12 rejected arguments by the applicant below that there are farm uses, other than the composting
13 operation, that are currently being carried out on the subject property:

14 "The Applicant claims that certain farming activities are taking place on the
15 Site, including growing of [C]hristmas trees, raising of nursery stock and
16 clover. However, the evidence does not support these claims. A letter dated
17 December 29, 1997 * * * contains credible evidence that no farming activity
18 is currently taking place on the Site. Mr. Gary Vanderhy testified at the
19 Hearing that he lives about 3 miles from the Site, that he farms in the area,
20 and that he has not seen any crops on the Site. Dean Cox testified, in essence,
21 that no crops are grown on the Site, and that it has been at least two years
22 since any crop has been taken off the Site. Spencer Vanderhy testified as to
23 the conditions on the Site and that no crops were being grown on the Site. He
24 offered into evidence and showed a video, Opposer's Exhibit 12, which
25 supported his testimony that no crops were being brown on the Site. In the
26 Hearings Officer's judgement this testimony of the witnesses in opposition
27 clearly establishes that there are no crops being grown on the Site, that no
28 farming use is taking place on the Site, unless the 'green feedstock composting
29 business' is a farm use." Record 9-10.

30 Petitioners argue that the hearings officer erred because he "does not address the

³As explained below, we do not always address the arguments presented by petitioners in the order they are presented in the petition for review or under the assignment of error in which petitioners present the arguments.

1 evidence presented by the applicant which is clearly counter to the finding there is no 'farm
2 use' taking place on the site."⁴ Petition for Review 5 (footnote omitted).

3 As an initial point we do not agree that the hearings officer was obligated to address
4 in his findings the evidence that was submitted by the applicant. Miller v. City of Ashland,
5 17 Or LUBA 147, 158 (1988). Moreover, although he was not required to do so, the first
6 sentence of the findings quoted above accurately summarizes the transcribed applicant
7 testimony that petitioners include in their brief. See n 3.

8 In responding to petitioners' substantial evidence challenge, the county in its brief
9 simply cites to the hearings officer's findings. The only evidence cited in the hearings
10 officer's findings that we are readily able to locate in the record is the December 29, 1997
11 letter and the video tape identified as Opposer's Exhibit 12. The county does not include
12 transcripts or partial transcripts of the audio tapes of the testimony before the hearings officer
13 that is described in the findings. Neither does the county provide any other assistance in
14 locating the portion of the audio tapes where the testimony is located.⁵ Without some
15 assistance from the county, we will not search for that testimony on the audio tapes.⁶ See

⁴Petitioner includes in the petition for review the following partial transcript:

"Question: What do you grow on the property? Answer: Tim Perri, owner of Best Buy: 'We have grown clover and wheat, um, we have Christmas trees, and we have some nursery stock.' Question, 'Do you have any vetch or alfalfa there?' Answer, Tim Perri, 'Not right now, no.'..., 'In the lower field we have some vetch growing right now, but . . . and also clover. Question: 'And those have, what, already been discussed as the flood plain area'? Answer; Tim Perri 'Yes'. Question: What are you going to do with the material once you plant it in the spring and harvest it? What will you do with it?' Answer: Tim Perri, 'With the crop we will be able to sell and with the . . . remnants of the crop, we will be able to compost.'" Petition for Review 5-6 n 2.

To further support its position that the record includes evidence that there are farm uses on the property in addition to the disputed composting operation, petitioner cites to purchase orders, topographic maps, pictures, a letter and a lease, all of which are included in the record. Petition for Review 6 n 2.

⁵The record includes three audio-tapes of the hearings officer's December 18, 1997 hearing in this matter.

⁶However, we do note that the petitioner does not challenge the hearings officer's description of that testimony in the findings quoted in the text.

1 Eckis v. Linn County, 110 Or App 309, 313, 821 P2d 1127 (1991) (LUBA is not required to
2 search the record looking for evidence with which the parties are presumably already
3 familiar).

4 Nevertheless, we have reviewed the evidence cited by petitioners in their brief as well
5 as the video tape and December 29, 1997 letter referenced in the hearings officer's findings.
6 Our review of this evidence is not to independently analyze the evidence, but solely to
7 determine whether it is reasonable for the hearings officer to rely on that evidence in making
8 his findings. 1000 Friends of Oregon v. Marion County, 116 Or App 584, 587-88, 842 P2d
9 441 (1992). Based on that review, we conclude the hearings officer's finding that no farm
10 use is occurring on the subject property, unless the green feedstock composting business
11 qualifies as a farm use, is supported by substantial evidence. The December 29, 1997 letter
12 and the applicant's testimony are both somewhat general and conclusory and take opposing
13 positions concerning the existence of any "farm use" of the property, beyond the disputed
14 composting use. The video tape cited in the hearings officer's findings makes it clear that, at
15 most, small remnants of past farming or Christmas tree growing efforts on the subject
16 property remain scattered among the piles of debris that have been scattered over much of the
17 subject property.⁷ Notwithstanding the applicant's testimony to the contrary, and the other
18 evidence cited by petitioners in their brief, a reasonable person could conclude from the
19 video tape and the December 29, 1997 letter that the composting operation occupies the bulk
20 of the subject property and that there is no other use of the property that qualifies as farm
21 use.

⁷The video tape was shot from adjoining properties over the course of several days in April 1997. The video tape shows a large number of piles of debris located on the subject property. In some places it appears the debris has been dumped and left undisturbed for a long period of time. In other places the piles of material appear to be thirty feet high or more, and large dump trucks are shown dumping additional material. The video shows bulldozers pushing the material into large piles. The video also shows adjoining properties in cultivated farm uses, which contrast sharply with the current activity on the subject property.

1 **B. Green Feedstock from Off-Site**

2 The hearings officer also found that "all the materials [used in the disputed
3 composting operation] are brought [from] off Site * * *." Record 12. Petitioners do not
4 explicitly challenge this finding, although the testimony transcribed in the petition for review
5 suggests that some wastes from existing farm uses on the subject property are used in the
6 composting operation. The December 29, 1997 letter and video tape constitute substantial
7 evidence for the hearings officer's finding that all of the green feedstock used in the
8 composting operation is obtained off-site. In particular, from the scale of the composting
9 operation shown on the video tape, the hearings officer could reasonably conclude that any
10 contribution of green feedstock to that composting operation from the remnants of any
11 former farming activity on the subject property is either miniscule or nonexistent.

12 The first assignment of error is denied.⁸

13 **SECOND ASSIGNMENT OF ERROR**

14 **A. Scientific Evidence that Composting is a Farm Use**

15 Petitioners argue that the expert testimony that they submitted during the hearings
16 below establishes that composting "is a 'farm use' within the scientific definition given that
17 term." Petition for Review 8. The short answer to petitioners' arguments under this
18 subassignment of error is that the relevant question is not whether agricultural experts
19 believe composting, in the abstract, falls within some scientific definition of "farm use." The
20 relevant question is whether petitioners' alleged composting operation qualifies as a "farm
21 use," as that term is defined in ORS 215.203(2)(a). We address the hearings officer's
22 consideration of that question below.

23 This subassignment of error is denied.

⁸Petitioners also argue under this assignment of error that the hearings officer erred by not addressing similarities between its composting operation and feedlots and a neighboring container nursery operation. We address those arguments under the second assignment of error.

1 **B. Hearings Officer Failed to Supply a More Exact Definition of "Farm**
2 **Use"**

3 Petitioners argue that the term "farm use" is either a "delegative" or "imprecise" term
4 under Springfield Education Assn. v. School Dist., 290 Or 217, 221-30, 621 P2d 547 (1980).
5 According to petitioners, because the term "farm use" is an "inexact or delegative" term and
6 LCDC has not adopted administrative rules to further refine the term, "respondent needed to
7 provide an exact definition * * * before it applied it to the facts before the hearings officer."
8 Petition for Review 13.

9 First, we do not agree that the term "farm use" in ORS 215.203(2)(a) is a "delegative
10 term." Indeed ORS 215.203(2)(a), quoted in part at n 2, devotes almost an entire page of the
11 Oregon Revised Statutes to defining the term "farm use" as well as other terms used in ORS
12 215.203(2) to define that term. Second, the county committed no error in failing to adopt
13 county legislation to clarify the legislature's definition of "farm use." Certainly LCDC is free
14 to clarify or supplement the meaning of imprecise legislation by adopting administrative
15 rules, so long as any such clarification or supplementation is consistent with the statutory
16 language. Lane County v. LCDC, 325 Or 569, 942 P2d 278 (1997). Whether the county
17 also has authority to engage in such clarification or supplementation is less certain. Lane
18 County, 325 Or at 583; Brentmar v. Jackson County, 321 Or 481, 496-97, 900 P2d 1030
19 (1995). However, even if the county does have such authority, it is not obligated to exercise
20 that power in advance of deciding whether petitioners' operation qualifies as a "farm use."

21 This subassignment of error is denied.

22 **C. Hearings Officer Erred by Relying on Staff's Position Concerning the**
23 **Composting Operation**

24 Petitioners contend that the staff improperly interpreted a memorandum from an
25 Assistant Attorney General to the Department of Environmental Quality as concluding that
26 "composting was not a 'farm use' * * *." Petition for Review 14. Petitioners contend that the
27 hearings officer improperly relied on that staff misinterpretation of the memorandum.

1 As petitioners correctly note, the cited memorandum does not conclude that
2 composting is not a farm use. Rather, the memorandum takes the position that, depending on
3 the facts in any particular situation, a composting operation in an EFU zone could be
4 considered:

- 5 "- a farm use
- 6 "- a commercial activity in conjunction with a farm use (conditional use)
- 7 "- a non-conforming use."⁹ Record 163.

8 However, the planning staff report does not, as petitioners allege, simply conclude that
9 composting is not a farm use. To the contrary, the planning staff report expressly recognizes
10 that, depending on the facts, a composting operation might be allowable in an EFU zone
11 under any of the four possible legal theories identified in the Assistant Attorney General's
12 memorandum. Record 148.

13 This subassignment of error is denied.

14 **D. Hearings Officer Failed to Consider Similarities Between Petitioners'**
15 **Composting Operation and Other Farm Uses**

16 Petitioners argue that the hearings officer erred by not identifying the characteristics
17 required to qualify as "any other agricultural or horticultural use" under ORS 215.203(2)(a)
18 or discussing the similarities between the subject composting operation and traditional farm
19 uses.¹⁰

20 We reject petitioners' argument that the hearings officer was obligated in this quasi-
21 judicial proceeding to develop a list of the salient characteristics of "other agricultural or
22 horticultural use[s]." We are aware of no legal requirement that the hearings officer develop

⁹The Assistant Attorney General's memorandum also states that a composting facility might also qualify as a solid waste facility under ORS 459.049. Such solid waste facilities are allowed in EFU zones as conditional uses under ORS 215.283(2)(j).

¹⁰The similarities identified in the petition for review include: "traffic demands, and use of farm implements and farming techniques such as plowing, windrowing and storage * * *." Petition for Review 14.

1 such a list where the legislature failed to do so, and petitioners cite no such legal authority.
2 Additionally, even if the subject composting operation uses farm implements or farming
3 techniques that are similar to certain unspecified farming operations, or generates similar
4 traffic, we fail to see how the hearings officer erred by not discussing such similarities. That
5 a nonfarm use may have certain operational characteristics that are similar to a farm use does
6 not mean that the nonfarm use is a farm use.

7 This subassignment of error is denied.

8 **E. The Hearings Officer Misconstrued the First Sentence of ORS**
9 **215.203(2)(a) in Concluding that Petitioners' Composting Operation does**
10 **not Satisfy the ORS 215.203(2)(a) requirement that the operation involve**
11 **"employment of the land."**

12 Petitioners contend that the compost operation falls within the first sentence of ORS
13 215.203(2)(a). See n 2. As relevant to this subassignment of error, that part of the statutory
14 definition of "farm use" requires that there be a "current employment of land for the primary
15 purpose of obtaining a profit in money by * * * agricultural or horticultural use * * *." The
16 hearings officer interpreted the statutory requirement for "employment of land" to require a
17 nexus between the asserted farm use and the farm land. The hearings officer concluded that
18 the required nexus is not satisfied where none of the green feedstock that is used to make the
19 compost is produced on-site and none of the compost that is produced is used in agricultural
20 operations conducted on-site.

21 We agree with the hearings officer's interpretation of the statute. A composting
22 operation that receives all or substantially all of the green feedstock that is used to produce
23 compost from off-site and sells that compost for use off-site might qualify as a commercial
24 activity in conjunction with farm use under ORS 215.213(2)(c) and 215.283(2)(a), but it is
25 not a "farm use," as that term is defined under ORS 215.203(2)(a).

26 Petitioners' arguments to the contrary under this subassignment of error are
27 unpersuasive. Petitioners' attempt to analogize its composting operation to the mushroom

1 growing operation in Horacek v. Yamhill County, 17 Or LUBA 82 (1988) ignores an
2 important factual difference in that case. In Horacek, the mushroom growing operation
3 constituted a farm use because it raised a crop—mushrooms. Petitioners' compost is not a
4 crop.

5 Petitioners' reliance on J and D Fertilizers v. Clackamas County, 20 Or LUBA 44,
6 aff'd, 105 Or App 11, 803 P2d 280 (1990) is also misplaced, for several reasons. In J and D
7 Fertilizers chicken manure was hauled to and then stored on an EFU-zoned parcel. 20 Or
8 LUBA at 45-46. The chicken manure was later transferred to another site for processing. Id.
9 The narrow question presented in J and D Fertilizers was whether such temporary storage of
10 chicken manure on an EFU-zoned site constituted a farm use within the meaning of ORS
11 215.203(2)(a). We held that because none of the chicken manure in that case was produced
12 on-site, the storage of the chicken manure on the EFU-zoned parcel was not a farm use. Id.
13 at 50.

14 As we have already noted, petitioners rely on the first sentence of ORS 215.203(2)(a)
15 in arguing that their composting operation is a farm use. The portion of our decision in J and
16 D Fertilizers that petitioners attempt to rely upon is based on the second sentence of ORS
17 215.203(2)(a), not the first sentence.¹¹ Therefore J and D Fertilizers has no direct bearing on
18 this case.

19 Petitioners also ignore our holding in J and D Fertilizers, ignore the facts in that case
20 and attempt to rely on dicta in our opinion where we stated that storage of chicken manure
21 might constitute a farm use (under the second sentence of ORS 215.203(2)(a)) if some or all

¹¹The second sentence of ORS 215.203(2)(a) defines "farm use" as including:

"[T]he preparation, storage and disposal by marketing or otherwise of the products or by-
products raised on such land for human or animal use." (Emphasis added.)

The required nexus with the EFU-zoned land that we articulated in J and D Fertilizers was based on the
emphasized language in the second sentence of ORS 215.203(2)(a).

1 of the chicken manure was produced on-site. However, as we have already concluded, this
2 appeal does not present a case where some or all of the green feedstock is produced on-site.
3 To the contrary, the green feedstock is produced off-site and hauled to the subject property.
4 To the extent J and D Fertilizers has any bearing on this appeal, it supports the hearings
5 officer's conclusion that the disputed composting operation is not a farm use, because all the
6 green feedstock is produced off-site.¹²

7 In summary, we agree with the hearings officer that under the first sentence of ORS
8 215.203(2)(a), a farm use must involve "the current employment of land" for one or more of
9 the agricultural or horticultural uses described in the statute.¹³ We need not and do not
10 attempt to identify the precise nature of the nexus with the land that is required by the first
11 sentence of ORS 215.203(2)(a). Whatever the precise nature of that nexus may be, it clearly
12 is not met by a composting operation where all of the compost inputs are produced off-site
13 and hauled to subject property and all of the compost produced is sold for use off-site. Such
14 an operation may in a literal sense "occupy" the land, but it involves no "current employment
15 of the land."

16 Petitioners argue that their composting operation involves just as much of a "current
17 employment of land" as a container nursery or feedlot.¹⁴ Our response to that argument is
18 twofold. First, the question of whether a particular container nursery or feedlot would
19 qualify as a farm use under ORS 215.203(2)(a) or some other statutory provision was not

¹²We also note that the Court of Appeals withheld comment on our dicta in J and D Fertilizers and did not reach the question of whether the storage of chicken manure would constitute a farm use under the second sentence of ORS 215.203(2)(a) if some or all of the chicken manure was produced on-site.

¹³We agree with petitioners that the legislature's use of the words "or any other agricultural or horticultural use" in ORS 215.203(2)(a) makes the question of what uses may qualify as farm uses under that statutory language somewhat open-ended. However, the requirement that such "other agricultural or horticultural" uses involve "current employment of land" is a separate question under the statute.

¹⁴We understand petitioners to contend that a nursery that grows plants in containers for sale and use off-site and an operation that raises animals on feed produced entirely off-site do not employ the land any more than petitioners' composting operation.

1 before the hearings officer and is not before LUBA in this appeal. Second, it may well be
2 that the statutory requirement that a farm use constitute a "current employment of land" is
3 sufficiently unclear and subjective that some uses that the legislature might consider to be
4 farm uses will not qualify. If so, legislative clarification or rulemaking by LCDC may be
5 warranted. In our view, any statutory ambiguity currently present in ORS 215.203(2)(a) does
6 not warrant ignoring the statutory requirement that a farm use involve the "current
7 employment of land." To hold that petitioners' operation involves a "current employment of
8 land" would render those words meaningless.

9 Finally, we note that the parties' arguments focus exclusively on the words of the first
10 sentence of ORS 215.203(2)(a) and ignore the rest of that statute as well as the statutory
11 context provided by the remaining statutory EFU zoning provisions. As the question
12 presented in this appeal is essentially a question of statutory interpretation, both the text and
13 context of ORS 215.203(2)(a) are to be considered. PGE v. Bureau of Labor and Industries,
14 317 Or 606, 610, 859 P2d 1143 (1993); Southern Pacific Trans. Co. v. Dept. of Rev., 316 Or
15 495, 498, 852 P2d 197 (1993) (the context for a statute includes "other statutes on the same
16 subject"). As noted earlier in this opinion, we interpret the language of the second sentence
17 of ORS 215.203(2)(a) requiring that the "storage and disposal * * * of the products or by-
18 products raised on such land" to require more of a connection with the land than using an
19 EFU-zoned site to temporarily store chicken manure that is produced on other sites. We
20 believe it is consistent with that construction of the second sentence of ORS 215.203(2)(a), to
21 interpret the language in the first sentence of ORS 215.203(2)(a) which requires "the current
22 employment of land," to require more of a connection with the land than hauling green
23 feedstock produced off-site to the site, taking steps to convert the green feedstock into mulch,
24 and then selling the mulch for use off-site.

1 We also believe that this interpretation is consistent with the statutory context of ORS
2 215.203(2)(a). ORS 215.213(1)(y) lists as a nonfarm use "the processing of farm crops."¹⁵
3 But for "processing of farm crops" to qualify as a permissible nonfarm use in the EFU zone,
4 one quarter of the processed farm crops must be produced on-site. Similarly, ORS
5 215.213(1)(t) and 215.452 allow wineries as a nonfarm use in the EFU zone, but require that
6 the grapes processed at the winery come from an on-site vineyard or from contiguous
7 vineyards. We do not believe the legislature intended that the definition of "farm use" in
8 ORS 215.203(2)(a) should encompass uses that have a far more tenuous connection with the
9 EFU zoned site than these "nonfarm uses." The requirement in the first sentence that the
10 farm use involve a "current employment of the land" avoids such a result.

11 This subassignment of error is denied.

12 **F. Void for Vagueness**

13 Petitioners argue

14 "another way of classifying [Petitioners'] allegation of error is that the
15 standards upon which [Petitioners were] judged are void for vagueness. The
16 standards by which [Petitioners were] judged are not clear enough for an
17 applicant to know what he must show during the application process."
18 Petition for Review 18.

19 Petitioners go on to argue that they are in a position of not knowing whether their
20 actions are permitted by law and that such imprecise statutory language violates petitioners'
21 right to due process and equal protection under the Fourteenth Amendment to the U.S.
22 Constitution and their right to equal privileges and immunities under Article I, section 20 of
23 the Oregon Constitution.

24 Petitioners make no attempt to develop their void for vagueness argument and we
25 reject it for that reason. Kegg v. Clackamas County, 15 Or LUBA 239, 247 n 10 (1987);

¹⁵We have no occasion to consider in this appeal whether petitioners' composting operation might qualify as a "processing of farm crops" under ORS 215.213(1)(y).

1 Constant v. Lake Oswego, 5 Or LUBA 311, 327 (1982). Moreover, two of the cases that
2 petitioners cite but do not discuss under this subassignment of error have no bearing on
3 petitioners' constitutional arguments. Sun Ray Dairy v. OLCC, 16 Or App 63, 73-74, 517
4 P2d 289 (1973) (state agency required to adopt rules under the Administrative Procedures
5 Act prior to ruling on application for liquor license under broad statutory standard); Lee v.
6 City of Portland, 57 Or App 798, 802, 646 P2d 662 (1982) ("ORS 227.173(1) does not
7 require perfect standards, but only standards that are clear enough for an applicant to know
8 what he must show during the application process."). The third case cited by petitioners,
9 Anderson v. Peden, 284 Or 313, 326, 587 P2d 59 (1978), holds that prior rulemaking to
10 articulate standards in advance of processing a conditional use permit was not required under
11 the Fourteenth Amendment. Anderson lends no support to petitioners' constitutional
12 arguments under this subassignment of error.

13 The second assignment of error is denied.

14 The county's decision is affirmed.