BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

THE FRIENDS OF CLEAN LIVING, an Oregon non-profit organization,	)	
Petitioner,	)	
vs.	)	LUBA Nos. 98-150, 98-162, and 98-177
POLK COUNTY,	)	
Respondent,	)	FINAL OPINION AND ORDER
and	)	
CITY OF DALLAS,	)	
Intervenor-Respondent.	)	

Appeal from Polk County.

Wallace W. Lien, Salem, filed the petition for review and argued on behalf of the petitioner.

No appearance by Polk County.

Mark Irick, Dallas, filed the response brief and argued on behalf of the intervenor-respondent. With him on the brief was Shetterly, Irick, Shetterly & Ozias.

HOLSTUN, Board Chair; BASSHAM, Board Member; BRIGGS, Board Member, participated in the decision.

DISMISSED (98-150 and 98-162)
REMANDED (98-177) 08/31/99

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals three county decisions that conclude a proposal by the City of Dallas to dispose of industrial effluent on EFU-zoned land is a farm use.

MOTION TO INTERVENE

The City of Dallas (city) moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The city proposes to initiate a 3 to 5 acre poplar tree plantation to test its plan to irrigate poplar trees with industrial effluent. If this test project is successful, the city apparently plans ultimately to expand the poplar tree plantation to other portions of its 260-acre property. The city proposes to transport the effluent to the site in trucks and store the effluent in a holding pond to be constructed on the subject property. The effluent will not be treated on the subject property and all of the effluent will be applied to the poplar trees to be grown on the subject property.

In a Department of Environmental Quality (DEQ) Land Use Compatibility Statement (LUCS) dated June 12, 1997, respondent Polk County (county) determined that the city's proposal constitutes a use "permitted outright" in the EFU zone and that no public notice or hearing is required. Record 7 (LUBA No. 98-150). On September 4, 1998, petitioner appealed the June 12, 1997 LUCS to LUBA, in LUBA No. 98-150.[1]

On September 14, 1998, the county sent a letter to DEQ. That letter states that it is sent to provide additional findings concerning the June 12, 1997 LUCS. That letter provides additional explanation for why the county believes the proposal qualifies as a farm use and that no review or approval is required under county land use regulations. The county's

[1]Petitioner alleges it did not learn of the June 12, 1997 LUCS until September 1, 1998.

September 14, 1998 letter includes an attachment "submitted [to provide] additional information regarding the specifics of the proposed poplar tree plantation * * *." Record 6 (LUBA No. 98-162). The attachment is a letter to the county from its engineering consultant. Petitioner was provided a copy of the county's September 14, 1998 letter. On September 16, 1998, petitioner appealed that letter to LUBA, in LUBA No. 98-162.

On October 9, 1998, the county sent another letter to DEQ, in which it submitted "additional findings related to the [LUCS] for the City of Dallas poplar tree plantation." Record 6 (LUBA No. 98-177). In that letter, among other things, the county provides additional explanation for why the county believes the proposal constitutes a farm use. The letter also includes the following:

> "[T]his Land Use Compatibility Statement is an administrative matter which is within my power to determine under [Polk County Zoning Ordinance (PCZO) 111.010]; and * * * the decision was made under land use standards which did not require interpretation or the exercise of policy or legal judgment and is therefore not a land use decision under the provisions of ORS 197.015(10) and, accordingly, no public notice or hearing was required.
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> "This is the final decision of Polk County on this matter." Record 7 (LUBA No. 98-177).

On October 14, 1998, petitioner appealed that letter to LUBA, in LUBA No. 98-177.

The record in LUBA No. 98-150 was filed on September 25, 1998. The record in LUBA No. 98-162 was filed on October 2, 1998. A single petition for review challenging all three decisions and a motion to consolidate LUBA Nos. 98-150, 98-162, and 98-177 was received by LUBA on October 16, 1998—two days after the notice of intent to appeal was filed in LUBA No. 98-177 was filed and before the record in LUBA No. 98-177 was filed with LUBA. In an order dated October 20, 1998, LUBA consolidated these three appeals and stated "[p]etitioner shall have 21 days from the date the record in LUBA No. 98-177 is received by LUBA to file a modified petition for review incorporating any additional arguments it wishes to make based on the record in LUBA No. 98-177." The record in LUBA No. 98-177 was filed on November 4, 1998. Petitioner did not file a modified

petition for review. The city filed its brief on December 15, 1998; the county did not file a brief.

MOTION TO STRIKE

The city moves to strike five parts of the petition for review. The city first moves to strike Appendix F to the petition for review, which is a portion of the city's comprehensive plan, as well as portions of the petition for review itself that refer to Appendix F. The city contends, correctly, that the attached portion of the city's comprehensive plan is not included in the record. However, we take official notice of the city's comprehensive plan and, accordingly, deny the first part of the city's motion to strike. Sunburst II Homeowners v. City of West Linn, 18 Or LUBA 695, 698, aff'd 101 Or 458, 790 P2d 1213 (1990); Murray v. City of Beaverton, 17 Or LUBA 723, 742-43 n 18 (1989); Faye Wright Neighborhood Planning Council v. Salem, 6 Or LUBA 167, 170 (1982); OEC 202(7).

The city next moves to strike Appendix G of the petition for review. Appendix G is composed of three pages from a feasibility study for the disputed proposal. That study is not included in the record and is not a document of which we may take official notice. For that reason, we grant the motion to strike Appendix G.[2]

The three remaining portions of the city's motion to strike all seek to strike statements in the petition for review on the basis that the statements are either not supported by the record or are contradicted by the record. Where a brief filed at LUBA includes allegations that are not supported by the record, we disregard such allegations, but we do not strike such allegations from the brief. Hammack & Associates, Inc. v. Washington County, 16 Or LUBA 75, 78, aff'd 89 Or App 40, 747 P2d 373 (1987).

We grant the city's motion to strike Appendix G. The remaining portions of the city's

[2]Petitioner argues that the feasibility study is incorporated into the city's comprehensive plan and that we may therefore take official notice of the study. We cannot determine from the documents available to us that the feasibility study was incorporated as part of the city's comprehensive plan, and we therefore deny petitioner's request that we take official notice Appendix G.

motion to strike are denied.

MOTION TO DISMISS

The city moves to dismiss each of the appeals that have been consolidated for our review.

A. LUBA Nos. 98-150 and 98-162

We agree with the city that LUBA Nos. 98-150 and 98-162 should be dismissed. In our view the "decision" challenged in this appeal is the LUCS. The LUCS was originally adopted by the county in the decision challenged in LUBA No. 98-150. That decision was modified by the decision challenged in LUBA No. 98-162 and again by the decision challenged in LUBA No. 98-177. These subsequent actions by the county specifically adopted modified findings in support of the LUCS.[3] Because we conclude below that the LUCS, together with the city's October 9, 1998 letter is properly before us in LUBA No. 98-177, review of the LUCS and supporting findings in LUBA Nos. 98-150 and 98-162 would have no practical effect. Those appeals are therefore moot. See Heiller v. Josephine County, 25 Or LUBA 555, 556 (1993) (LUBA appeal moot where decision on review is rescinded).

We grant the city's motion to dismiss LUBA Nos. 98-150 and 98-162.

B. LUBA No. 98-177

The city advances a number of arguments in support of its motion to dismiss LUBA No. 98-177. We address those arguments separately.

1. Failure to Exhaust Local Remedy

Under ORS 197.825(2)(a), LUBA jurisdiction "[i]s limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning [LUBA] for review[.]" Lyke v. Lane County, 70 Or App 82, 84, 688 P2d 411 (1984). According to the

[3]The LUCS is the record in LUBA No. 98-150. The records in LUBA Nos. 98-162 and 98-177 include the LUCS and the county's letters providing additional findings in support of the LUCS that precipitated those subsequent appeals.

city, if the challenged decision is a land use decision, it is also a "land use determination" within the meaning of PCZO 111.240(A).[4] Under PCZO 111.240(A), a land use determination may be appealed to the board of county commissioners. The city contends that the petitioner's failure to do so constitutes a failure to exhaust an available local remedy, and that this appeal must therefore be dismissed.

The city's position might have merit, except that the challenged decision gives no hint that it is a "land use determination" for which there is a right of appeal to the board of county commissioners. Neither was the decision processed by the county as a land use determination. To the contrary, the planning director's decision that is challenged in LUBA No. 98-177 expressly states that it "is the final decision of Polk County on this matter" and that it is an "administrative matter" for which no "notice or hearing" is required. Fairly read, the decision states that there is no local right of appeal, and petitioner did not fail to exhaust an available local remedy by not attempting to appeal that decision to the board of county commissioners. See Shaffer v. City of Salem, 137 Or App 583, 905 P2d 1175 (1995) (petitioner not required to attempt further local appeal of a "facially authoritative and facially final dismissal of his appeal to the city council").

2. Untimely Notice of Intent to Appeal

The decision challenged in LUBA No. 98-177 was mailed to petitioner on October 9, 1998. The notice of intent to appeal in LUBA No. 98-177 was filed with LUBA on October 14, 1998. The city contends that on October 14, 1998 the city's decision was not final, because PCZO 111.310 provides that a "Polk County Land Use Action does not become

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[4]PCZO 111.240(A) provides:

> "Type A Procedure. This procedure shall apply to * * * land use determinations; and all other listed uses as specified. Under this procedure, the Planning Director shall render a final decision or, alternatively, may refer the matter to the Hearings Officer as provided under Section 111.260. Decisions under this procedure may be appealed to the Board of Commissioners." (Emphasis added.)

effective or final sooner than ten days after the decision was mailed."[5] Intervenor-Respondent's Brief 12. The city argues that because the county's decision was not yet "final" when the notice of intent to appeal was filed in LUBA 98-177, the appeal must be dismissed.[6]

There are two problems with the city's argument. First, as we have already discussed, it does not appear that the county views its decision in this matter as a "land use determination" within the meaning of PCZO 111.240. PCZO 111.310 is limited to land use determinations and therefore does not apply. Even if it did, as petitioner points out, that code section delays the "effective date" of land use actions, it does not delay the date the decision becomes final, for purposes of appeal. If PCZO 111.310 is read in its entirety, it is clear that the effective date is delayed to correspond to deadlines for appeal and clearly does not delay the date the decision becomes final for purposes of appeal.

3. Failure to File a Timely Petition for Review

As previously noted, the petition for review in this matter was filed on October 16, 1998, or 19 days before the record in LUBA No. 98-177 was filed on November 4, 1998. Our October 20, 1998 order consolidating this appeal allowed petitioner 21 days to file a modified petition for review, but petitioner elected not to do so.

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[5]PCZO 111.310 provides:

> "EFFECTIVE DATE. Land use actions granted under [PCZO] 111.240 become effective on the 10th day after mailing of the notice of the decision or after the regular meeting of the Polk County Board of Commissioners following such mailing, whichever is later. However, if the matter has been called up by the Board [of County Commissioners] under [PCZO] 111.290, or the matter has been appealed under [PCZO] 111.280, the land use action does not become effective until the Board has taken final action. A final decision by the Board of Commissioners shall not be effective until 21 days after mailing of the decision. An appeal of a land use action by the Board of Commissioners to the Land Use Board of Appeals stays all proceeding by all parties in connection with the matter until the appeal has been resolved."

[6]Under ORS 197.825(1) LUBA has jurisdiction to review land use decisions. Under ORS 197.015(10)(a) a land use decision must be a "final" decision. Therefore LUBA only has jurisdiction to review "final" decisions. Hemstreet v. Seaside Improvement Comm., 16 Or LUBA 748, 752, aff'd 93 Or App 73, 761 P2d 533 (1988); CBH v. City of Tualatin, 16 Or LUBA 399, 405 n 7 (1988).

The city argues the petition for review was not timely filed and this appeal therefore must be dismissed. The city relies on OAR 661-010-0030(1) which, as relevant, provides:

> "The petition for review * * * shall be filed with the Board within 21 days after the date the record is received or settled by the Board. * * * Failure to file a petition for review within the time required by this section * * * shall result in dismissal of the appeal * * *.

The city's argument that the petition for review was not filed "within 21 days" after November 4, 1998, is technically correct, if OAR 661-010-0030 is read to establish a window of time (i.e. the 21 day period following the date the record was filed) within which the petition for review must be filed. However, as petitioner points out, OAR 661-010-0030 can also be interpreted to establish a fixed deadline, or point in time (the date 21 days after the record is filed) by which the petition for review must be filed. If the latter interpretation is adopted, the petition for review was timely filed.

Our rule was not written to address the somewhat unusual circumstance where a petitioner in a consolidated appeal challenging three separately adopted versions of essentially the same decision, each with their own record, elects to file a single consolidated petition for review prior to the date the record in the final appeal is filed with LUBA. In that unusual circumstance, we believe petitioner's construction of our rule is correct, and we adopt it as our own.

4. The ORS 197.015(10)(b)(A) Exception for Ministerial Decisions

The county's decision concerns the application of its EFU zoning provisions; and therefore, under ORS 197.015(10)(a), is a land use decision unless one of the exemptions provided by ORS 197.015(10)(b) applies.[7] ORS 197.015(10)(b)(A) exempts from the statutory definition of "land use decision," and thus also exempts from LUBA's review

[7]As defined by ORS 197.015(10)(a) land use decisions include final local government decisions that concern the application of land use regulations. The county's EFU zone, part of the PCZO, is a land use regulation. The county also applied other portions of its PCZO in concluding that no notice or opportunity for a hearing is required under the PCZO.

jurisdiction under ORS 197.825(1), certain nondiscretionary decisions that would otherwise fall within the definition of land use decision.[8] As the Court of Appeals explained in Doughton v. Douglas County, 82 Or App 444, 449, 728 P2d 887 (1986):

> "The purpose of ORS 197.015(10)(b) is to make certain local government actions unreviewable as land use decisions, because they are really nondiscretionary or minimally discretionary applications of established criteria rather than decisions over which any significant factual or legal judgment may be exercised. If particular decisions can automatically follow from the existence of general standards which are unaffected by factual variables, the decisions are within the statute's scope."[9] (Emphasis added.)

The county decision that is challenged in this appeal specifically finds that it "was made under land use standards which did not require interpretation or the exercise of policy or legal judgment and is therefore not a land use decision under the provisions of ORS 197.015(10) * * *." Record 7 (LUBA No. 98-177).

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[8]As relevant in this appeal, LUBA's jurisdiction is limited to "land use decisions." ORS 197.825(1). ORS 197.015(10)(b) includes the following exceptions to the statutory definition of land use decision for certain ministerial decisions:

> "(A) Which [are] made under land use standards which do not require interpretation or the exercise of policy or legal judgment;
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> "(B) Which [approve or deny building permits] under clear and objective land use standards[.]"

[9]At the time of the Court of Appeals' decision in Doughton, ORS 197.015(10)(b) provided the following exemption from the statutory definition of land use decision:

> "[M]inisterial decision[s] of a local government made under clear and objective standards contained in an acknowledged comprehensive plan or land use regulation and for which no right to a hearing is provided by the local government under ORS 215.402 to 215.438 or 227.160 to 227.185."

ORS 197.015(10)(b) was amended in 1989 to incorporate the current language in ORS 197.015(10)(b)(A) which exempts decisions "made under legal standards that do not require interpretation or the exercise of factual or legal judgment." See n 8. The 1989 statutory language parallels the interpretation of ORS 197.015(10)(b) (1985) in Doughton, but may actually narrow the prior statutory exception as it was described by the Court of Appeals in Doughton. The 1989 statutory revision did not include the requirement that the "factual or legal judgment" be "significant." Hollywood Neigh. Assoc. v. City of Portland, 22 Or LUBA 789, 795-96 (1991).

We do not agree with the county's finding that its decision qualifies for the exception provided by ORS 197.015(10)(b)(A). We recognize that the county understandably may be uncertain about the scope of the exception provided by ORS 197.015(10)(b)(A). As we explain in Friends of the Creek v. Jackson County, ___ Or LUBA ___ (LUBA No. 98-158, August 31, 1999), slip op 6, decided this day:

> "The frequency with which the jurisdictional issue presented in this appeal is repeated in other appeals filed with LUBA confirms that some local governments believe the exception to the statutory definition of land use decision for ministerial decisions under ORS 197.015(10)(b)(A) is broader than it actually is. See e.g. Thompson v. City of St. Helens, 30 Or LUBA 339, 343 (1996) (lot line adjustment); Warren v. City of Aurora, 23 Or LUBA 507, 510 (1992) (final subdivision plat approval); Von Lubken v. Hood River County, 20 Or LUBA 208, 212 (1990) (county administrator's determination concerning the availability of an appeal to the board of county commissioners); Komning v. Grant County, 20 Or LUBA 481, 491 (1990) (determination whether dwelling is permitted outright in the EFU zone and "accessory" to an underlying nonconforming use). LUBA observed some time ago that there are certain inherent problems in determining the scope of the exception created by ORS 197.015(10)(b)(A). See Kirpal Light Satsang v. Douglas County, 18 Or LUBA 651, 664 n 15 (1990) (discussing the problems involved in having jurisdictional and procedural questions turn on post-decision review to determine whether particular decisions involve the exercise of discretion)."

As long as the applicability of the exception to the definition of "land use decision" provided by ORS 197.015(10)(b)(A) and (B) depends on the clarity and objectivity of the land use standards that are applied and the scope of the statutory definition of "permit" in ORS 215.402(4) and 227.160(2) depends on whether "approval of a proposed development of land" is "discretionary," a certain amount of uncertainty is inevitable. Under the current statutory scheme the local government does not learn whether its understanding of the scope of those statutory concepts is consistent with LUBA's or the appellate courts' understanding until individual decisions are appealed and the appeal is decided.[10]

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[10]Questions concerning whether city and county comprehensive plans and land use regulations are consistent with the statewide planning goals are generally resolved as a matter of law when those documents are acknowledged under ORS 197.251 and 197.625. With limited exceptions, goal compliance questions may

We turn to the question of whether the county correctly concluded that the challenged decision qualifies for the exception to the statutory definition of land use decision provided by ORS 197.015(10)(b)(A). The county was required to find that the city's proposal to transport treated effluent from an industrial facility located within the city's urban growth boundary to a test project to grow poplar trees on EFU-zoned land and apply that effluent constitutes a farm use. The county's conclusion that the proposal constitutes a farm use may well be correct. However, the legal merits of the county's decision aside, we cannot agree that the decision does not involve the exercise of "interpretation or * * * policy or legal judgment." See Knee Deep Cattle Company v. Lane County, 28 Or LUBA 288, 302-03 (1994), aff'd 133 Or App 120, 890 P2d 449 (1995) (land use compatibility statement that a wastewater treatment facility is properly viewed as incidental to the permitted use it serves, rather than as a separately regulated use); Flowers v. Klamath County, 98 Or App 384, 780 P2d 227 (1989) (whether medical waste incinerator is allowed as a "scrap operation"); Hollywood Neigh. Assoc. v. City of Portland, 22 Or LUBA 789 (1991) (decision that methadone dispensing facility qualifies as a "medical clinic"); Kunkel v. Washington County, 16 Or LUBA 407, 413 (1988) (decision that emergency disposal site for dead animals is a farm use).

In Kunkel, we concluded that the ORS 215.203(2) definition of "farm use" does not provide "clear and objective standards." The definition of "farm use" set out at ORS 215.203(2) is lengthy and multifaceted.[11] We do not agree that the county was able to apply

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not be raised in challenges of individual land use decisions that are governed by those acknowledged land use provisions. ORS 197.835(5); Byrd v. Stringer, 295 Or 311, 666 P2d 1332 (1983). However, questions concerning whether acknowledged local procedures that allow certain decisions to be rendered ministerially conflict with statutory requirements are not settled by acknowledgment under existing law. Questions concerning whether a particular decision is a ministerial decision exempt from review by LUBA or a "permit" for which notice and an opportunity for a public hearing is required under ORS 215.416(3) and 227.175(3) can be raised in appeals of those individual decisions rendered pursuant to the acknowledged land use provisions. Questions of compliance with statutory requirements do not become inapplicable to counties after acknowledgment. Newcomer v. Clackamas County, 92 Or App 174, 186 n 5, 758 P2d 369, adhered to as modified, 94 Or App 33, 764 P2d 927 (1988).

[11]ORS 215.203(2)(a) provides:

that definition in this case without "interpretation or the exercise of policy or legal judgment."[12] Because the city's decision involved interpretation and the exercise of policy or legal judgment, it does not qualify for the exception provided by ORS 197.015(10)(b)(A). The challenged decision is a land use decision subject to our review jurisdiction.

Finally, we note the city argues that if LUBA concludes here that the ORS 215.203(2) definition of "farm use" is a "land use standard which [requires] interpretation or the exercise of policy or legal judgment," then there would be a statutory land use decision "every time a farmer wanted to plant wheat or raise cattle on EFU land." Intervenor-Respondent's Brief 15-16 n 8. Although we have already acknowledged the problems presented under the present statutory definitions of "land use decision" and "permit," the city's hypothetical concern with the consequence of our decision that the LUCS is a land use decision is

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> "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. 'Farm use' also includes the current employment of land for the primary purpose of obtaining a profit in money by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows. 'Farm use' also includes the propagation, cultivation, maintenance and harvesting of aquatic species and bird and animal species to the extent allowed by the rules adopted by the State Fish and Wildlife Commission. 'Farm use' includes the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection. 'Farm use' does not include the use of land subject to the provisions of ORS chapter 321, except land used exclusively for growing cultured Christmas trees as defined in subsection (3) of this section or land described in ORS 321.267(1)(e) or 321.415(5)."

This lengthy definition of "farm use" is followed by ORS 215.203(2)(b) which sets out eleven examples of "'current employment' of land for farm use." One of those examples is "land under buildings supporting accepted farming practices." ORS 215.203(2)(b)(F). ORS 215.203(2)(c) defines "accepted farming practice" as "a mode of operation that is common to farms of a similar nature, necessary for the operation of such farms to obtain a profit in money, and customarily utilized in conjunction with farm use."

[12]For example, petitioner disputes that the proposal constitutes "current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops." The county appears to base its decision, in part, on a finding that the proposal constitutes an "accepted farming practice," within the meaning of ORS 215.203(2)(c). See n 11. Record 7 (LUBA No. 98-177). Resolving these issues requires interpretation and the exercise of policy and legal judgment.

misplaced. We do not understand the PCZO to require that a LUCS or other written decision be issued to authorize planting wheat or raising cattle in the EFU zone. Without such a written decision, there likely can be no land use decision subject to LUBA review. As previously noted, a land use decision must be a final decision. Under our rules, a final decision must be a written decision. OAR 661-010-0010(3)(a).

The city's motion to dismiss is denied.

FIRST ASSIGNMENT OF ERROR

Petitioner was provided notice of the decision challenged in LUBA No. 98-177, but the county did not provide an opportunity for a hearing. Petitioner argues that an opportunity for a hearing is required by ORS 215.416(11)(a), and that the county erred by failing to provide that opportunity.

Assuming the challenged decision is a "permit," as that term is defined by ORS 215.402(4), petitioners are correct that the county must either (a) provide a hearing before making its decision or (b) provide notice of its decision and an opportunity to request a local appeal. ORS 215.416(3); 215.416(11)(a). As defined by ORS 215.402(4), a "permit" includes "discretionary approval of a proposed development of land * * *." The challenged decision is based on assumed facts and under those assumed facts includes a proposal to construct a lagoon to store effluent. That aspect of the proposal clearly constitutes "development," within the meaning of ORS 215.402(4). For the reasons already explained above under our discussion of the city's motion to dismiss, we also conclude the decision involved the exercise of significant discretion and, therefore, is "discretionary." Therefore, the challenged decision is a permit and the requirements of ORS 215.416 apply. We agree with petitioner that the county erred by failing to provide an opportunity for a local hearing in this matter. ORS 215.416(3); 215.416(11)(a).

The county's procedural error provides a basis for reversal or remand under ORS 197.835(9)(a)(B) if petitioner's substantial rights were thereby prejudiced. Petitioner alleges

its substantial rights were prejudiced because it was completely deprived of its right to present its arguments to the county that the proposal does not qualify as a farm use. As we explained in Muller v. Polk County, 16 Or LUBA 771, 775 (1988) a party's substantial rights under ORS 197.835(9)(a)(B) include "the rights to an adequate opportunity to prepare and submit their case and a full and fair hearing." We agree with petitioner that its substantial rights were prejudiced.

The first assignment of error is sustained. On remand, the county must either provide a hearing or provide notice and an opportunity for a local hearing in this matter.[13]

SECOND AND THIRD ASSIGNMENTS OF ERROR

Under these assignments of error, petitioner alleges the challenged decision is not supported by adequate findings or substantial evidence. Because we conclude under the first assignment of error that the challenged decision must be remanded to provide an opportunity for a hearing, it is likely that new evidence will be added to the record and that the county will adopt additional findings. Therefore, we do not consider petitioner's challenge to the county findings or petitioner's substantial evidence challenge.

FOURTH ASSIGNMENT OF ERROR

Under this assignment of error we understand petitioner to allege the county erred as a matter of law in concluding the challenged facility is a "farm use." Petitioner first argues that the primary purpose of the disputed facility is not for "obtaining a profit in money by raising, harvesting and selling crops." Petitioner argues the city's proposed facility will actually lose money:

> "If the primary purpose for the proposed use is for obtaining a profit in money from selling crops, Polk County has to 'show me the money' and perhaps the

[13]Petitioner also argues that notice and an opportunity for a local hearing is required by PCZO 111.270. In view of our conclusion that notice and an opportunity for a local hearing is required by ORS 215.416(3) in any event, we need not and do not consider whether the PCZO also requires notice and an opportunity for a hearing. Kenagy v. Benton County, 112 Or App 17, 20 n 2, 826 P2d 1047 (1992). We note, however, that while the relevant PCZO provisions employ different terminology, they parallel the relevant statutory permit provisions.

> [city] needs to hire a financial planner. What rational farmer would enter into such a multi-million dollar losing proposition? After 25 years of 'farm use' all the [city] will have to show is a multi-million dollar loss from the sale of poplar trees. As a prerequisite to a farm use, the primary purpose of the facility needs to be for obtaining a profit by growing crops. The financial projections dispel that purpose." Petition for Review 20.

Petitioner goes on to argue that the county should have considered whether the disputed proposal constitutes a "utility facility necessary for public service," within the meaning of PCZO 110.587.[14] Under PCZO 136.040(Q) such facilities are not permitted outright, but rather require administrative review and approval with the opportunity for a hearing.

The city will be free on remand to address petitioner's first argument that the proposal cannot qualify as a "farm use" because it would not involve "the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops * * *." We specifically do not address that argument here. Much of petitioner's argument under this assignment of error relies on a study that is not included in the record and was improperly attached to its petition for review. We earlier granted the city's motion to strike that study. Assuming the evidence in that study is relevant, it may be considered by the county on remand. However, because it is not properly part of the record in this appeal, it can play no role in our decision.

Because the challenged decision must be remanded to provide an opportunity for a hearing in any event, we do not further consider petitioner's arguments under the fourth assignment of error except to specifically reject the suggestion in those arguments that the city may not, as a matter of law, ultimately find that the disputed facility may be approved as

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[14]PCC 110.587 defines "Utility Facility Necessary for Public Service" as follows:

> "A major physical component of an enterprise that performs an essential public service, such as a * * * sewage treatment facility * * *. However, this does not include components such as poles, wires, cables, lines or pipes."

a farm use. The evidentiary record will be opened on remand and evidence submitted during those proceedings could well have some bearing on each of the issues petitioner raises under the fourth assignment of error. In considering those issues, it may be, as the city notes in its brief, that our decision in Swenson v. DEQ, 9 Or LUBA 10 (1983) supports the city's view in this case that the disputed proposal constitutes a farm use. Moreover our decision in Friends of the Creek may also have some bearing on the issues petitioner raises. After providing the required hearing, and considering any relevant evidence and argument on the issues, the city will have an opportunity to specifically consider those decisions in addressing the relevant statutory provisions and adopting the findings required by ORS 215.416(9).[15]

The county's decision in LUBA No. 98-177 is remanded.

[15]ORS 215.416(9) provides:

> "Approval or denial of a permit * * * shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."