BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRIENDS OF THE CREEK,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	LUBA No. 98-158
JACKSON COUNTY,	)	
	)	FINAL OPINION
Respondent,	)	AND ORDER
	)	
and	)	
	)	
CITY OF ASHLAND,	)	
	)	
Intervenor-Respondent.	)	

Appeal from Jackson County.

E. Michael Connors, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Davis Wright Tremaine.

No appearance by Jackson County.

Edward J. Sullivan, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Preston Gates and Ellis.

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

REMANDED 08/31/99

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 Petitioner challenges a county decision concerning the City of Ashland's proposal to
4 apply effluent and sludge from its waste water treatment plant (WWTP) onto land zoned
5 exclusive farm use (EFU).

6 **MOTION TO INTERVENE**

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

9 **FACTS**

10 The city operates a WWTP located inside the city's urban growth boundary next to
11 Interstate Highway 5 (I-5). The WWTP discharges treated effluent into Ashland Creek
12 which drains into Bear Creek. The Oregon Department of Environmental Quality (DEQ)
13 determined that Bear Creek is water-quality limited and determined that the city may no
14 longer discharge effluent into Ashland and Bear Creeks during certain times of the year
15 without advanced treatment. As an alternative to advanced treatment of effluent, the city
16 purchased approximately 846 acres of EFU-zoned land located across I-5 from the WWTP.
17 The subject property has historically been used as pasture. The city proposes to pipe both
18 liquid effluent and sludge from the WWTP to the subject property for disposal by land
19 application.

20 The effluent from the WWTP would be pumped to two effluent storage reservoirs—
21 one with 5 day storage capacity and one with 30 day storage capacity. The effluent storage
22 reservoirs will store effluent during times when discharge to Ashland Creek is not allowed
23 and effluent flows from the WWTP exceed the amount of effluent that can be immediately
24 applied to the land to irrigate crops. The two effluent storage reservoirs would occupy
25 approximately 21 acres of the subject property.

26 The sludge from the WWTP would be piped to two storage lagoons. The sludge

1 would be stored, thickened, and dried in the lagoons. Once the drying process is complete,
2 the dried sludge (or biosolids) will be stockpiled and then spread and worked into the soil on
3 the subject property.[1] The sludge drying bed would occupy approximately six acres; the
4 sludge stockpiling area would occupy approximately one acre.

5 The city's proposal includes an approximately 1,200 square foot structure for use as
6 an office, maintenance and storage building. Other support facilities include the necessary
7 pipelines, an access road, fencing and irrigation canal crossings. The final details of the
8 proposed farming operation are not yet complete. The city has not yet selected a farm
9 operator, nor has it identified the specific crops that would be raised on the subject property.
10 The city plans to select crops that meet the city's effluent and biosolid disposal needs and that
11 comply with various federal and state regulations. Record 41.

12 The city submitted an application for a conditional use permit for the disputed facility
13 on June 9, 1998. The city and county received letters opposing the application. Thereafter,
14 on July 24, 1998, the city withdrew its conditional use permit application and requested that
15 the county approve DEQ's Land Use Compatibility Statement. On August 4, 1998,
16 petitioner's representative sent a letter to the board of county commissioners (1) requesting
17 that the land use compatibility statement not be signed, (2) stating that the proposed facility
18 was not a permitted use in the EFU zone, and (3) objecting to any county decision approving
19 the facility without providing "a reasonable forum to discuss their concerns." Supplemental
20 Record 1.

21 In an August 25, 1998 letter to the city, the county acknowledged the city's
22 withdrawal of its conditional use permit application. The letter and the DEQ Land Use
23 Compatibility Statement signed by the county on August 25, 1998, both take the position that
24 the proposed facility is both a "public utility facility necessary for public service" and a

[1]Biosolids are sewage solids that have been processed to meet U.S. Environmental Protection Agency standards.

1 "farm use," and that both uses are allowed as permitted uses in the county's EFU zone. The
2 land use compatibility statement states "[n]o review required."[2] Record 7. A copy of the
3 August 25, 1998 letter was sent to petitioner's representative, and petitioner filed its notice of
4 intent to appeal 21 days later, on September 15, 1998. This appeal followed.

5 **JURISDICTION**

6 As defined by ORS 197.015(10)(a), a final county decision that "concerns the * * *
7 application" of "[a] land use regulation" is a "land use decision," unless one or more of the
8 statutory exceptions listed in ORS 197.015(10)(b) apply. The challenged decision applies
9 the county's land use regulations.[3] However, the city argues that the challenged decision
10 qualifies for the exception to the statutory definition of land use decision that is provided by
11 ORS 197.015(10)(b)(A) for decisions "made under land use standards which do not require
12 interpretation or the exercise of policy or legal judgment." See Knapp v. City of
13 Jacksonville, 33 Or LUBA 457 (1997) (city decision to award a contract to improve a street);
14 Fechtig v. City of Albany, 31 Or LUBA 441 (1996) (fill permit issued under clear and
15 objective standards). The city argues that the exception provided by ORS 197.015(10)(b)(A)
16 applies here, and the appeal therefore must be dismissed.

17 We agree with petitioner that the standards under which the challenged decision was
18 made (whether the proposed facility is a "farm use," as defined by ORS 215.203 and a
19 "utility facility necessary for public service," within the meaning of ORS 215.283(1)(d)),
20 require "interpretation" and the exercise of "policy or legal judgment." There can be no
21 serious question that in considering whether the challenged facility qualifies as a "utility

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[2]We understand this statement to mean that the county takes the position that no hearing or right to request a local hearing is provided under the county's land use regulations.

[3]Although the county has adopted land use regulations that parallel the statutory EFU requirements, we cite the statutory provisions in this opinion rather than the county land use regulation provisions. See Kenagy v. Benton County, 112 Or App 17, 20 n 2, 826 P2d 1047 (1992)(county may not apply ordinance criteria that are inconsistent with the statutory EFU zone criteria).

facility necessary for public service" the county was required to exercise significant judgment. Applicable law requires that the county find that it is necessary to site such utility facilities on EFU-zoned land. McCaw Communications, Inc. v. Marion County, 96 Or App 552, 555-56, 773 P2d 779 (1989); Clackamas Co. Svc. Dist. No. 1 v. Clackamas County, ___ Or LUBA ___ (LUBA No. 98-047, December 17, 1998), slip op 5-7. Such a finding involves the exercise of "policy or legal judgment." For that reason alone, the challenged decision does not qualify for the exception provided by ORS 197.015(10)(b)(A).

The county was also required to exercise "policy or legal judgment" in concluding that the proposed use qualifies as a "farm use," within the meaning of ORS 215.203. In Knee Deep Cattle Company v. Lane County, 28 Or LUBA 288, 302-03 (1994), aff'd 133 Or App 120, 890 P2d 449 (1995), we reviewed a determination in a 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. We concluded that decision involved enough discretion that the exception provided by ORS 197.015(10)(b)(A) did not apply. The decision in this case that the proposed facility constitutes farm use involves the exercise of similar policy or legal judgment. See also 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).

Before turning to petitioner's assignments of error we note that the city includes the following arguments in contending that LUBA lacks jurisdiction over this matter:

> "If petitioner is correct, every farm use decision will require notice and hearing. If that be the case, the definition of 'residential' or 'single family' or 'six feet in height' are inexact and ambiguous, because they are subject to differing views of policy or judgment or interpretation. If that be so, every decision at the planning counter is a 'land use decision' which requires notice

1 and an opportunity to be heard. The exclusion in ORS [197.015(10)(b)]
2 would then be so narrow as to be meaningless. * * *" Intervenor-
3 Respondent's Brief 10-11.

4 The city repeats and elaborates on this theme in its arguments responding to the second
5 assignment of error.

6 The frequency with which the jurisdictional issue presented in this appeal is repeated
7 in other appeals filed with LUBA confirms that some local governments believe the
8 exception to the statutory definition of land use decision for ministerial decisions under ORS
9 197.015(10)(b)(A) is broader than it actually is. See e.g. Thompson v. City of St. Helens, 30
10 Or LUBA 339, 343 (1996) (lot line adjustment); Warren v. City of Aurora, 23 Or LUBA 507,
11 510 (1992) (final subdivision plat approval); Von Lubken v. Hood River County, 20 Or
12 LUBA 208, 212 (1990) (county administrator's determination concerning the availability of
13 an appeal to the board of county commissioners); Komning v. Grant County, 20 Or LUBA
14 481, 491 (1990) (determination whether dwelling is permitted outright in the EFU zone and
15 "accessory" to an underlying nonconforming use). LUBA observed some time ago that there
16 are certain inherent problems in determining the scope of the exception created by ORS
17 197.015(10)(b)(A). See Kirpal Light Satsang v. Douglas County, 18 Or LUBA 651, 664 n
18 15 (1990) (discussing the problems involved in having jurisdictional and procedural
19 questions turn on post-decision review to determine whether particular decisions involve the
20 exercise of discretion).

21 However, the city somewhat overstates the consequence of our conclusion here that
22 the decision challenged in this appeal does not qualify for the ministerial decision exception
23 in ORS 197.015(10)(b)(A). In many cases it will be obvious that a proposed use is or is not a
24 farm use, and no exercise of "policy or legal judgment" will be required to make that
25 determination.[4] Similarly, whether a proposed use is "residential" or "single family" or

[4]The examples given in the city's brief are illustrative:

1 whether a height limit is met will generally not involve the exercise of legal or policy
2 judgment and can be made administratively and without notice and an opportunity for a
3 hearing. More fundamentally, unless a local government issues a written decision that
4 approves an activity regulated by a comprehensive plan or land use regulation, there likely is
5 no land use decision subject to LUBA review. OAR 661-010-0010(3); Friends of Clean
6 Living v. Polk County, ___ Or LUBA ___ (LUBA Nos. 98-150, 98-162, and 98-177, August
7 31, 1999), slip op 12. We seriously doubt that many of the activities noted in the city's brief,
8 if any (see n 4), require written approval from the county. However, in cases such as this
9 one, where there is a final written decision and the proposal is such that the county is
10 required to exercise "policy or legal judgment" in determining whether the proposal qualifies
11 as a "farm use," the challenged decision is a land use decision subject to our review. Further,
12 as we explain later in this decision, discretionary decisions such as the one challenged in this
13 appeal may constitute a "permit," as that term is defined by ORS 215.402(4), with attendant
14 requirements for notice and an opportunity for a local hearing.[5] Kirpal Light Satsang, 18 Or
15 LUBA at 664 n 15.

> "The practice in Oregon is not to require notice and hearing each time a farmer wishes to build a barn, fertilize a field, construct an animal waste lagoon or put cattle on the back forty acres. These practices sufficiently fall within the definition of 'farm use' to avoid notice and hearing requirements." Intervenor-Respondent's Brief 19-20 (footnote omitted).

[5]ORS 215.402(4) defines "permit" as follows:

> "'Permit' means discretionary approval of a proposed development of land under ORS 215.010 to 215.293, 215.317 to 215.438 and 215.700 to 215.780 or county legislation or regulation adopted pursuant thereto. 'Permit' does not include:
>
> "(a) A limited land use decision as defined in ORS 197.015;
>
> "(b) A decision which determines the appropriate zoning classification for a particular use by applying criteria or performance standards defining the uses permitted within the zone, and the determination applies only to land within an urban growth boundary;
>
> "(c) A decision which determines final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility which is otherwise

1 The challenged decision is a land use decision subject to our review jurisdiction.

2 **STANDING**

3 The city challenges petitioner's standing. The city contends that petitioner's August 4 4, 1998 letter was inadequate to constitute a local appearance challenging the land use 5 compatibility statement approval.[6] The letter filed on behalf of petitioner by its 6 representative, makes it clear that petitioner does not agree that the proposal may be allowed 7 as a permitted use in the EFU zone and opposes approval of the land use compatibility 8 statement without providing a local hearing to consider the matter. The letter also states that 9 if the land use compatibility statement is approved "it may result in yet another legal 10 challenge to this particular project * * *." Supp Rec 1. The letter is clearly adequate to 11 constitute a local appearance and, for that reason alone, petitioner has standing to bring this 12 appeal.

13 Finally, to the extent the city argues we may not find that petitioner has standing in 14 this appeal based on the August 4, 1998 letter, because the portion of the petition for review 15 addressing standing fails to allege that petitioner appeared below or that the August 4, 1998 16 letter constitutes an appearance, we reject the argument. Our rules simply require that the 17 petition for review "[s]tate the facts that establish petitioner's standing." OAR 661-010-

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> authorized by and consistent with the comprehensive plan and land use regulations; or
>
> "(d) An action under ORS 197.360(1)."

We consider whether the challenged decision constitutes a "permit," as that term is defined by ORS 215.402(4) below in our discussion of the first assignment of error.

[6]Under ORS 197.830(2):

> "[A] person may petition [LUBA] for review of a land use decision or limited land use decision if the person:
>
> "(a) Filed a notice of intent to appeal the decision * * *; and
>
> "(b) Appeared before the local government, special district or state agency orally or in writing."

0030(4)(a). Our rules do not require that such allegations of fact appear in any particular form or any particular portion of the petition for review. Freels v. Wallowa County, 17 Or LUBA 137, 140 (1988); cf. Schatz v. City of Jacksonville, 21 Or LUBA 214 (1991) (allegations of standing in reply to motion to dismiss). As petitioner points out, the statement of facts that establishes that petitioner appeared below and therefore has standing appear on page 8 of the petition for review.

FIRST ASSIGNMENT OF ERROR

Petitioner argues the county erred by failing to provide notice and an opportunity for a hearing in making its decision that the proposed WWTP expansion is a permitted use in the EFU zone.

A. Preliminary Issue

The city points out that the only legal requirement expressly cited under the first assignment of error as support for petitioner's argument that the county was required to provide notice and an opportunity for a hearing in this matter is OAR 660-033-0120(1). That administrative rule identifies uses that are "allowed" and uses that "may be approved, after required review" in EFU zones. With regard to "allowed" uses, the rule explains:

> "Authorization of some [allowed] uses may require notice and the opportunity for a hearing because the authorization qualifies as a land use decision pursuant to ORS Chapter 197. * * *"

The above-quoted language from the rule at least suggests that the criterion that determines whether authorization of particular uses in the EFU zone requires notice and the opportunity for a hearing is whether the decision authorizing the use is a "land use decision."

The city argues that OAR 660-033-0120(1) does not itself require notice and a hearing when particular permitted uses are allowed in the EFU zone. Rather, according to the city, the rule simply points out that notice and hearing may be required for some uses because they are land use decisions. As the city correctly notes, there is nothing in the definition of "land use decision" at ORS 197.015(10), or elsewhere as far as we know, that

requires that all land use decisions require notice and an opportunity for a hearing. The relevant statutory requirement that counties provide notice and an opportunity for a hearing appears at ORS 215.402 to 215.428 and applies to "permits," as that term is defined and limited by ORS 215.402(4). The city argues that because petitioner neither cites these statutory provisions nor alleges that the challenged decision is a "permit," within the meaning of ORS 215.402(4), we should deny the first assignment of error.

We decline to read the first assignment of error as narrowly as the city argues we should. Petitioner's failure to cite ORS 215.402 to 215.428 as authority for its position that the challenged decision required notice and an opportunity for a hearing does not require that we reject the assignment of error. It is clear from its brief that the city is aware that ORS ORS 215.402 to 215.428 require notice and an opportunity for a hearing for land use decisions that constitute "permits" under ORS 215.402(4). Indeed, the city argues in its brief that the challenged decision does not constitute a "permit" decision, within the meaning of ORS 215.402(4). Intervenor-Respondent's Brief 14. Petitioner and the city presented additional argument on the question of whether the challenged decision constitutes a "permit" at oral argument in this matter. In this circumstance, although the question is a close one, we believe it is appropriate to consider whether the city was required by ORS 215.402 to 215.428 to provide notice and an opportunity for a hearing in this matter. See Hilliard v. Lane County Commrs., 51 Or App 587, 595, 626 P2d 905 (1981) (LUBA may not invoke "technical requirements of pleading having no statutory basis").

B. The Challenged Decision is a Permit that Requires Notice and an Opportunity for a Hearing

The statutory definition of "permit" is set forth above at n 5. The challenged decision is a permit if it involves "discretionary approval of a proposed development of land" under the statutes authorizing county land use planning or under county regulations adopted to implement those statutes. The proposal includes the construction of effluent and sludge lagoons, an office/maintenance/storage structure, pipes and certain other improvements

1 necessary to irrigate crops with effluent and add biosolids to the land. The proposal clearly
2 is a "proposed development of land," within the meaning of ORS 215.402(4). For the
3 reasons set forth in our discussion of jurisdiction above, the challenged decision also is
4 "discretionary." Therefore, the challenged decision is a "permit," as ORS 215.402(4) defines
5 that term, and notice and an opportunity for a hearing are required under ORS 215.416. The
6 county's failure to do so constitutes procedural error.

7 Under ORS 197.835(9)(a)(B) LUBA will reverse or remand a land use decision
8 where a local government "[f]ailed to follow the procedures applicable to the matter before it
9 in a manner that prejudiced the substantial rights of the petitioner." As we explained in
10 Muller v. Polk County, 16 Or LUBA 771, 775 (1988):

11 "Under ORS 197.835[(9)(a)(B)] * * * the 'substantial rights' of parties that
12 may be prejudiced by failure to observe applicable procedures are the rights to
13 an adequate opportunity to prepare and submit their case and a full and fair
14 hearing."

15 Petitioner argues the county's failure to provide notice and an opportunity for a hearing
16 prejudiced its substantial rights because the petitioner was thereby cut out of the decision
17 making process entirely and prevented from presenting its views concerning a number of
18 factual issues that it argues have a bearing on whether the proposal qualifies as a "farm use."
19 We agree with petitioner. Friends of Clean Living, slip op at 13.

20 The first assignment of error is sustained.

21 **SECOND ASSIGNMENT OF ERROR**

22 The challenged decision includes the following discussion concerning the disputed
23 facility:

24 "Jackson County Land Development Ordinance Chapter 218.030(12) and
25 ORS 215.283(1)(d) allow for utility facilities necessary for public service in
26 the Exclusive Farm Use zoning district as a permitted use. Statewide
27 Planning Goal 3, and OAR 660-033-0120 state that farm uses are also allowed
28 in an Exclusive Farm Use zoning district.

1 "Your statement of intent on the Land Use Compatibility Statement clarifies
2 that this utility facility is necessary for public service and will provide for
3 agricultural use of the Exclusive Farm Use zoned land. Pasture grasses, hay,
4 alfalfa and other crops are to be irrigated with treated effluent from the
5 WWTP, and soil will be enhanced through application of biosolids. All water
6 and biosolids transported to or stored on the site will be applied for the
7 purposes of enhancing agricultural production. The effluent will be stored in
8 ponds on the site and then sprayed on the site. The biosolids will be stored in
9 lagoons, air dried then land applied through tilling practices. The property
10 will be farmed to ensure effective use of the effluent as irrigation water and
11 efficient use of biosolids as fertilizer and soil amendment.

12 "We find this proposal to be in compliance with State Law and Jackson
13 County land use regulations." Record 5.

14 Petitioner concedes that "farm use" and "utility facilities necessary for public service"
15 are permitted uses in the EFU zone. ORS 215.203(1); 215.283(1)(d). However, petitioner
16 argues that the facility that is proposed by the city in this case is neither a "farm use" nor a
17 "utility facility necessary for public service," as a matter of law. Accordingly, petitioner
18 argues we should reverse the county's decision rather than simply remand the decision to the
19 county to provide the opportunity for a local hearing that is required by statute. OAR 661-
20 010-0071(1)(c); Younger v. Jackson County, 32 Or LUBA 177, 181 (1996); McKay Creek
21 Valley Assoc. v. Washington County, 23 Or LUBA 85, 90, aff'd 114 Or App 95, 834 P2d
22 482, adhered to as modified 116 Or App 299, 841 P2d 651 (1992), rev den 317 Or 396
23 (1993).

24 **A. Farm Use**

25 Petitioner argues the proposed facility does not constitute a farm use for three
26 reasons. First, petitioner argues the primary purpose of the proposed facility is to serve
27 urban needs, not to obtain "a profit in money" by engaging in farming activities.[7] Second,

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[7]The statutory definition of farm use begins with the following:

"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

1 petitioner argues the storage and processing facilities need not be located on the subject
2 EFU-zoned property and do not themselves increase agricultural productivity. Third,
3 petitioner argues that because the effluent and sludge is produced off-site, storage and
4 processing of the effluent and sludge cannot constitute a farm use under our decision in J and
5 D Fertilizers v. Clackamas County, 20 Or LUBA 44, aff'd 105 Or App 11, 803 P2d 280
6 (1990). We address each of petitioner's points separately below.

7 **1. Primary Purpose is to Serve Urban Needs**

8 It is undisputed that the city's primary motivation in proposing to pipe both the
9 effluent and the sludge to the subject property and then applying that effluent and sludge to
10 the land is to avoid the cost that would otherwise be incurred to dispose of that effluent and
11 sludge in other ways. The production of crops on the subject property is a means to that end,
12 rather than the end itself. The question then is whether the primary motivation of a particular
13 land owner, in and of itself, necessarily makes a use that would otherwise qualify as a "farm
14 use," as that term is defined by ORS 215.203(2)(a), something other than a farm use.

15 Petitioner's argument is based entirely on the following language in ORS
16 215.203(2)(a):

17 "As used in this section, 'farm use' means the current employment of land for
18 the primary purpose of obtaining a profit in money by raising, harvesting and
19 selling crops * * *."

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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. * * *" (Emphasis added.) ORS 215.203(2)(a).

This lengthy definition of "farm use" is followed by ORS 215.203(2)(b) which sets out a number of examples of "'current employment' of land for farm use * * *." We discuss one of those examples later in this opinion.

Petitioner argues we must treat the city's undisputed primary motivation in this matter as being the "primary purpose" for the use of the subject property, with the result that the proposed use of the subject property is not a "farm use."

There are at least two problems with petitioner's argument. First, we do not believe the legislature intended, by requiring that the land be currently employed "for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops" to require an inquiry into the primary actual motivation of particular land owners. Such an inquiry could easily have the anomalous result of having a farm that is indistinguishable from its neighbor fall outside the ORS 215.203(2)(a) definition of farm use, simply because its owner happened to be primarily motivated by something other than the monetary return that is realized from selling the crops that are raised on the property.[8] Although we need not and do not attempt to determine here the precise meaning of that statutory language, we reject petitioner's interpretation.

The second problem with petitioner's argument is that it does not consider subsection (b) of ORS 215.203(2). As relevant, ORS 215.203(2)(b) provides:

> "'Current employment' of land for farm use includes:
>
> "* * * * *
>
> "(F) [L]and under buildings supporting accepted farm practices * * *[.]"

In a case with many similarities to the present case, LUBA relied on the language in ORS 215.203(2)(b)(F) to conclude that a proposal to apply effluent on EFU-zoned land constituted a farm use. Swenson v. DEQ, 9 Or LUBA 10 (1983).

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[8] An example of such a farm would include a farm operation that is marginally profitable, where the farmer continues the farming operation primarily because the farmer is dedicated to continuing the family farm. Such a farmer's primary reason for continuing the farm might have little to do with the profit realized from the farm. Under petitioner's argument, such a farm would not constitute farm use while the next door neighbor's identical farm would constitute a farm use, if the next door neighbor was primarily motivated by the profit derived from the farm.

1 In Swenson, the applicant proposed to (1) pipe effluent from a cannery to a 20 acre
2 holding pond on EFU-zoned property, (2) treat the effluent at the holding pond, and (3) spray
3 irrigate that treated effluent on a 9.87 acre farm. We pointed out that the purpose of the
4 project in Swenson was to dispose of wastewater rather than to make a profit on the irrigated
5 crops. Id. at 17. Nevertheless we concluded the proposal constituted a farm use, because
6 "[t]he land occupied by the irrigation equipment can be considered land in current
7 employment for farm use in the same way that 'land under buildings supporting accepted
8 farm practices' is land in farm use." Id. at 17-18. In reaching that conclusion we stated that
9 irrigation was an accepted farming practice and the source of the irrigation water is
10 irrelevant.

11 The only apparent significant factual difference between Swenson and the present
12 appeal is the part of the current proposal to dry and apply sludge to the land. However, just
13 as irrigation is indisputably an accepted farming practice, it seems equally obvious that
14 fertilizing and taking other appropriate actions to improve the productivity of the soil is also
15 an accepted farming practice. [9]

16 We reject petitioner's argument that the city's primary motive in this case for applying
17 effluent and biosolids to the subject property is such that, as a matter of law, the proposal
18 cannot be viewed as a farm use.

19 **2. Storage, Distribution and Processing Facilities**

20 We next turn to the question of whether the facilities that will be used to irrigate the
21 crops and add biosolids to the soil cannot properly be considered farm uses.

22 The disputed facilities include the pipes needed to transfer the effluent and sludge, the
23 effluent reservoir, the sewage lagoon, and the on-site storage, maintenance and office
24 structure. It is certainly possible that all of these facilities fall within the express provisions

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[9] The record includes two studies discussing the use of biosolids and effluent on crops. Record 116-47.

1 ORS 215.203(2)(a) for "on-site * * * equipment and facilities used for [farm use]." See n 7.
2 Moreover, the facilities in this appeal do not appear to be materially different than the
3 facilities that we found to qualify as a farm use in Swenson, based on ORS 215.203(2)(b)(F).
4 Petitioner makes two additional arguments that we address briefly. First, petitioner
5 argues that some of the proposed facilities such as the sludge lagoon need not be located on
6 the subject property. The fact that it might be possible to locate some of the facilities off the
7 subject property and outside the EFU zone is not determinative. ORS 215.203(2)(a)
8 expressly permits "on-site * * * equipment and facilities" used for "farm use." Even if that
9 statute implicitly requires that such equipment and facilities have some minimal connection
10 with farm use, the facilities proposed by the city certainly appear to be closely connected
11 with the proposed irrigation and crop growing activities. Finally, we note that petitioner
12 points out that the reservoirs are sized more to accommodate the needs of the WWTP to
13 dispose of effluent than the needs of the agricultural operation on the subject property for
14 effluent for irrigation purposes. However, we see no reason why the particular requirements
15 of a provider of water or effluent for irrigation cannot be considered in sizing irrigation
16 storage facilities on farm property.[10] Swenson, 9 Or LUBA at 18-19.
17 We reject petitioner's argument that the proposed storage, distribution and processing
18 facilities cannot, as a matter of law, qualify as a farm use.
19 **3. Effluent and Sludge Produced Off-Site**
20 Petitioner argues that because all of the effluent and sludge is produced off-site, the
21 disputed proposal cannot constitute a farm use under the reasoning in our decision in J and D
22 Fertilizers. In J and D Fertilizers, we considered whether a facility that received chicken

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[10]For example, we do not understand petitioner to argue that a farmer who needs irrigation water in the summer months could not construct a reservoir on the farm to receive water when it is more abundant in the winter. By analogy, in this case, the effluent that may be used for irrigation is simply more abundant at particular times of the year. We need not consider here whether a reservoir that is significantly out of scale with and bears no reasonable relationship to the needs of the farm where it is located could be considered "facilities used for" "farm use," within the meaning of ORS 215.203(2)(a).

1 manure from off-site and stockpiled that material on the subject property until it could be
2 transferred to a fertilizer facility on another site for processing was a farm use under ORS
3 215.203(2)(a). The language of ORS 215.203(2)(a) (1989) that was at issue in that case
4 provided "[f]arm use includes the preparation and storage of products raised on such land for
5 * * * disposal by marketing or otherwise." None of the chicken manure was produced on the
6 subject property in J and D Fertilizers, and none of the processed fertilizer was used on the
7 subject property.

8 J and D Fertilizers is inapposite for at least two reasons. First, because the effluent
9 and sludge will be processed on-site and used on-site, the facts in this case are materially
10 different. Second, here the county is not relying on the same statutory language that was at
11 issue in J and D Fertilizers. There is nothing in our opinion in J and D Fertilizers that would
12 require the county to conclude, as a matter of law, that the proposed facility is not a farm use.

13 **B. Utility Facility Necessary for Public Service**

14 Under McCaw Communications, Inc., 96 Or App at 556, applicants for "utility
15 facilities necessary for public service" in EFU zones, under ORS 215.283(1)(d),

16 "must establish and the county must find that it is necessary to situate the
17 facility in the agricultural zone in order for the service to be provided."

18 OAR 660-033-0130(16) codifies the Court of Appeals holding in McCaw Communications,
19 Inc.[11] We recently discussed the requirements for citing utility facilities necessary for public
20 service on EFU zones in Clackamas Co. Svc. Dist. No. 1 v. Clackamas County.[12]

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[11]OAR 660-033-0130(16) provides:

"A facility is necessary if it must be situated in an agricultural zone in order for the service to be provided."

[12]We note that Oregon Laws 1999, chapter 816, sections 1-3 adopt new statutory requirements for siting utility facilities necessary for public service in EFU zones. These new statutory requirements become effective October 23, 1999.

1 The challenged decision simply concludes the proposed facility constitutes a utility
2 facility necessary for public service, but does not include findings addressing considerations
3 that must be addressed under ORS 215.283(1)(d), as that statute has been interpreted in
4 McCaw Communications, Inc. and OAR 660-033-0130(16). We do not agree with the city
5 that we can determine on this record that these considerations are satisfied in this case.
6 However, neither do we agree with petitioner that we can determine from the challenged
7 decision and record, as a matter of law, that the proposal could not be approved as a utility
8 facility necessary for public service in an EFU zone. The parties dispute the relevant facts
9 that would be necessary to determine whether the proposed facility could be approved as a
10 utility facility necessary for public service.
11 The second assignment of error is denied.
12 **CONCLUSION**
13 Because we conclude that the challenged decision constitutes a "permit," as that term
14 is defined by ORS 215.402(4), and the county failed to provide the notice and opportunity
15 for hearing that is required by ORS 215.416, the challenged decision must be remanded so
16 that the county can provide the required notice and opportunity for hearing. However, we
17 reject petitioners arguments under the second assignment of error that the proposed facility
18 cannot, as a matter of law, be approved as a "farm use" or a "utility facility necessary for
19 public service."
20 The county's decision is remanded.