BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TRI-RIVER INVESTMENT COMPANY,
Petitioner,

vs.

CLATSOP COUNTY,
Respondent,

and

BRAD POPE, TOMMIE BRUNICK, FITZ R. MOORE, JACK COFFEY, DEBORAH WOOD, and ANNIE OLIVER,
Intervenors-Respondent.

LUBA Nos: 98-159 and 98-160

Appeal from Clatsop County.

Jim L. Lucas, Banks, filed the petition for review and argued on behalf of petitioner.

No appearance by Clatsop County.

Elizabeth A. Baldwin, Astoria, filed the response brief on behalf of intervenor-respondent.

Joseph H. Hobson Jr., Salem, filed an amicus brief on behalf of Oregon Farm Bureau Federation.

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

AFFIRMED 11/12/1999

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

Opinion by Bassham.

NATURE OF THE DECISION

In this consolidated proceeding, petitioner appeals two county decisions that deny a proposed dog-raising operation on land zoned for Exclusive Farm Use (EFU).

MOTION TO INTERVENE

Brad Pope, Tommie Brunick, Fitz R. Moore, Jack Coffey, Deborah Wood, and Annie Oliver (intervenors) jointly move to intervene on the side of the county. There is no opposition to their motion, and it is allowed.

MOTION TO FILE AMICUS BRIEF

The Oregon Farm Bureau Federation (amicus) moves for leave to file an amicus brief pursuant to OAR 661-010-0052(1).[1] In its motion, amicus states that it has 20,000 members and has represented the interests of farmers, ranchers and agricultural land owners for over 77 years. The motion also states that its members have vital interests in the scope of activities that fall under the definition of "farm uses" at ORS 215.203, one of the main issues in this case. Although the motion does not explain how amicus' participation will significantly aid our review of the relevant issues, the amicus brief sets forth legislative history and statutory context that is pertinent to resolution of the issues in this case. Accordingly, amicus' motion is granted.

FACTS

Petitioner operates a dairy farm on property zoned EFU. Sometime prior to December 1997, petitioner became licensed by the United States Department of Agriculture as a dealer under the Animal Welfare Act, which allows petitioner to whelp and raise dogs for sale to

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[1]OAR 661-010-0052(1) provides:

> "A person or organization may appear as amicus only by permission of the Board on written motion. The motion shall set forth the interest of the movant and state reasons why a review of relevant issues would be significantly aided by participation of the amicus. * * *"

medical research facilities. Petitioner placed kennels in an existing pole barn and began raising up to 51 Labrador retrievers and Labrador mixes in the kennels. In December 1997, the county investigated and advised petitioner that its operation is a "kennel" that requires a conditional use permit under the county's zoning ordinance.

In April 1998, petitioner filed a conditional use application proposing to convert part of the dairy farm to a dog kennel, and to increase the number of dogs allowed to 250. A hearings officer conducted an evidentiary hearing on May 26, 1998, at which petitioner argued that no permit was required. Petitioner argued that raising dogs is "animal husbandry," and thus a "farm use" as defined at ORS 215.203(2), which is allowed as a matter of right on lands zoned EFU. On June 10, 1998, the hearings officer issued a decision that rejected petitioner's argument that no permit was required. However, the hearing officer approved the permit, subject to conditions.

Both petitioner and intervenors appealed the hearings officer's decision to the board of commissioners (commissioners). The commissioners treated both appeals as separate proceedings, but heard them both at the same hearing on July 22, 1998. Petitioner's appeal was on the record before the hearings officer, as petitioner had requested. In that appeal, petitioner argued that the hearings officer erred in rejecting petitioner's argument that raising dogs was an allowed farm use and not subject to conditional use criteria. Intervenors' appeal was also on the record before the hearings officer, with the exception of one issue, the management of the waste from the operation as it affected the conditional use criteria. The focus of intervenors' argument was whether the hearings officer erred in approving the permit.

On August 26, 1998, the commissioners issued an order denying petitioner's appeal and an order allowing intervenors' appeal, thus denying the permit.

These appeals followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Petitioner argues that the county misconstrued the law and made a finding not supported by substantial evidence in finding that the proposed dog-raising operation is a "kennel" as defined in Land and Water Development and Use Ordinance (LWDUO) 1.030[2] and ORS 215.283(2)(m).[3] Petitioner argued to the county below, and argues here, that the proposed dog-raising operation is instead a farm use as defined in ORS 215.203(2)(a) because it involves the current employment of land for the primary purpose of obtaining a profit by "animal husbandry" within the meaning of ORS 215.203(2)(a).[4]

The county board of commissioners rejected petitioner's argument, finding that rather than a farm use, the proposed use was a "kennel," a nonfarm use conditionally allowed in the EFU zone. The county found that

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[2]LWDUO 1.030 defines "kennel" as

> "Any lot or premises on which four (4) or more dogs or cats at least four months of age are kept commercially for board, propagation, training or sale."

[3]ORS 215.283(2)(m) provides that:

> "The following nonfarm uses may be established, subject to the approval of the governing body or its designee in any area zoned for exclusive farm use subject to ORS 215.296:
>
> "* * * * *
>
> "(m) Dog kennels not described in subsection (1)(j) of this section."

The reference to "subsection (1)(j)" refers to ORS 215.283(1)(j), which provides that

> "The following uses may be established in any area zoned for exclusive farm use:
>
> "* * * * *
>
> "(j) The breeding, kenneling and training of greyhounds for racing."

[4]ORS 215.203(2)(a) provides in relevant 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. * * *" (emphasis added).

> "The County's [LWDUO] defines kennel in a way that includes the applicant's proposed use. * * * The applicant's proposed kennel is described in [the original application as]: "*The proposed use is the conversion of dairy barn facility into a kennel to raise dogs for commercial sale at regional locations.* Based on this, the board finds that the proposed use fits within the County's definition of 'kennel' [at LWDUO 1.030].
>
> "* * * The County's treatment of kennels as a conditional use is consistent with state law because the County's EFU zone is derived from ORS 215.203 through 215.311. In particular, the treatment of kennels in the County's EFU zone is the same as required by ORS 215.283(2)(m).
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> "* * * The County's definition of "kennel" is not contrary to any land use statute or to any DLCD administrative rule. 'Kennel' is not defined in ORS chapter 215 or in ORS chapter 197, the two principal county land use statutes. 'Kennel' is not defined in the Oregon Administrative Rules pertaining to land use (OAR chapter 660), or in the Statewide Planning Goals and Guidelines." Record II 47-48 (emphasis in original).

Further, the county rejected petitioner's argument that the scope of the term "kennel" as used in LWDUO 1.030 is confined to kennels that board or train animals:

> "* * * The [county] rejects this suggestion for two reasons. First, because it ignores the inclusion of the word 'propagation' in the [county's] definition of 'kennel.' Second, the applicant is urging the County to treat as a farm use something that the legislature apparently wished to handle separately. The applicable statute, ORS chapter 215, specifically lists 'kennels' apart from farm use. ORS chapter 215 even distinguishes between kennels for racing greyhounds and kennels for other dogs, so it appears unlikely to the [county] that the legislature intended also to distinguish between breeding and boarding kennels." Record II 48.

The challenged decision goes on to determine that the subject property is high-value farmland, and to conclude that, because OAR 660-033-0120 and LWDUO 3.567(12) prohibit new kennels from being established on high-value farmland, petitioner's application to establish a new kennel must be denied. Record II 13.

Petitioner does not dispute that the proposed operation involves the "propagation" of dogs and thus falls within the literal terms of the county's definition of "kennel" at LWDUO 1.030. However, petitioner argues that the county's definition is broader than the statutory term used in ORS 215.283(2)(m) and impermissibly includes activities falling within the

scope of "animal husbandry," a farm use allowed by right in EFU zones. Petitioner cites to *Linn County v. Hickey*, 98 Or App 100, 102, 778 P2d 509 (1989), a case involving a nonconforming kennel in an EFU zone, for the proposition that raising dogs is "animal husbandry" within the meaning of ORS 215.203(2)(a). In *Hickey*, the Court of Appeals agreed with the landowner that "in the absence of more specific legislation bearing on the subject, kennel operations constitute 'animal husbandry' and therefore come within the definition of 'farm use' [at ORS 215.203]." 98 Or App at 102. The court noted that in 1985 the legislature had adopted "more specific legislation" in the form of ORS 215.283(2)(m), although that provision was not applicable to the nonconforming use question use presented in *Hickey*. According to petitioner, *Hickey* establishes the principle that commercial operations involving the raising of dogs on EFU land constitute "animal husbandry" unless those operations fall within the scope of "more specific legislation" such as ORS 215.283(2)(m).

From that premise petitioner argues that the legislature intended that the scope of "kennels" under ORS 215.283(2)(m) include only commercial boarding kennels on EFU lands, and does not include operations where a landowner raises or propagates for commercial sale his own dogs on EFU land. Petitioner concedes that ORS 215.283(2)(m) does not express such a distinction, but argues that consideration of the statutory context and relevant case law demonstrates that the legislature did not intend ORS 215.283(2)(m) to govern the kind of operation proposed here.

Petitioner explains that the context of ORS 215.283(2)(m) includes ORS 215.283(1)(j), which allows "breeding, kenneling and training of greyhounds for racing" to be established in EFU zones, as a permitted use in those zones. In *Kang v. Dept. of Revenue*, 12 Or Tax 407 (1993), the Oregon Tax Court addressed whether a proposal to kennel, breed and train greyhounds on land zoned EFU is also a farm use eligible for preferential farm tax assessment:

> "* * * The legislature has, with some specificity, provided a limited definition of farm use. *See* ORS 215.203(2). That definition includes 'animal husbandry.' Generally, the breeding and kenneling of dogs might well be determined to be within the definition of farm use. However, by expressly placing that activity in the list of nonfarm uses, the legislature has determined that such use is not a farm use by its definition. By amending ORS 215.213 [the parallel provision to ORS 215.283 applicable to marginal lands counties] in 1985 to specifically provide for greyhounds in subsection (1)(L) and to provide for other dog kennels in subsection (2)(L), the legislature made it clear that breeding and kenneling dogs was not a farm use. * * *" *Id*. at 409 (footnotes omitted).

In response to *Kang*, the 1997 legislature amended the definition of "farm use" at ORS 215.203(2) to provide that the "current employment of land for farm use" includes "[l]and used for the primary purpose of obtaining a profit in money by breeding, *raising*, kenneling or training of greyhounds for racing." SB 58, Oregon Laws 1997, Chapter 862, codified at ORS 215.203(2)(b)(K) (emphasis added). Petitioner notes that ORS 215.203(2)(b)(K) provides that "raising" greyhounds is a farm use, while ORS 215.283(1)(j) mentions only the "breeding, kenneling and training" of greyhounds.[5] Petitioner argues that the differences between ORS 215.203(2)(b)(K) and ORS 215.283(1)(j) signify legislative understanding that "raising" dogs for profit is a different activity than either breeding, kenneling, or training dogs. The difference, argues petitioner, is that raising dogs, like raising any other animal for profit, is "animal husbandry" and hence a farm use under ORS 215.203(2)(a). Petitioner cites to legislative history of SB 58, particularly discussions in which it appears committee members understood that the effect of SB 58 was to clarify that raising greyhounds is on par with raising any other kind of dog or animal in EFU zones, an instance of animal husbandry. From that premise, petitioner argues that because the proposed

[5]The other major difference between ORS 215.203(2)(b)(K) and 215.283(1)(j) is that the former is phrased in the disjunctive, while the latter is phrased in the conjunctive. The parties do not assign any significance to this difference and, for purposes of this opinion, neither do we.

use involves raising dogs for profit, the county erred in applying its definition of "kennel" to an activity that falls exclusively within the definition of farm use.[6]

Resolution of these assignments of error rests on the meaning and scope of the term "kennel" used ORS 215.283(2)(m), considered in context.[7] Statutory interpretation is governed by the framework set out in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993), the first step of which is to examine the text and context of the statute, including prior judicial interpretations. *Holcomb v. Sunderland*, 321 Or 99, 105, 894 P2d 457 (1995).

This is not the first time this Board has addressed the meaning of the term "kennel" as used on ORS chapter 215. In *Greuner v. Lane County*, 21 Or LUBA 329, *aff'd* 109 Or App 160, 818 P2d 959 (1991), LUBA considered whether a proposal to train guide dogs on land zoned EFU was a "kennel" within the meaning of ORS 215.213(2)(L), a provision identical to ORS 215.283(2)(m) applicable to marginal lands counties. We explained that:

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[6]Amicus echoes petitioner's argument that "raising animals for profit" is animal husbandry and hence a farm use under ORS 215.203(2)(a). In addition, amicus points out that until 1978, kenneled dogs raised on a farm for commercial sale were taxed as part of the farm's inventory. *See* ORS 609.100(3) (providing that the county may establish a licensing fee for kenneled dogs when the dogs cease to be taxed as inventory under ORS 307.400). ORS 307.400(1) provides that "livestock, poultry, fur-bearing animals and bees are exempt from ad valorem taxation." Amicus argues that because "dogs" are not specifically listed in ORS 307.400, and because dogs are not "poultry, fur-bearing animals [or] bees," dogs must therefore be categorized as "livestock" under ORS 307.400(1). Because kenneled dogs for sale are "livestock" for purposes of ORS 307.400(1), amicus argues, such dogs must also be "livestock" for purposes of ORS 215.203(2)(a).

However, amicus fails to point out that ORS 307.400 distinguishes between "livestock" and "inventory." Farm inventory is not addressed under ORS 307.400(1), but rather under ORS 307.400(2), which provides that "[a]ll inventory shall be exempt from ad valorem taxation." Accordingly, the fact that kenneled dogs can be considered farm inventory under ORS 609.100(3) and ORS 307.400(2) does not support the proposition that they are also considered "livestock" for purposes of ORS 215.203(2)(a).

[7]Because kennels are conditional nonfarm uses listed in ORS 215.283(2)(m), the county may apply supplemental requirements than those imposed by the statute. *Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995). However, neither the challenged decisions nor intervenors appear to take the position that the county can define "kennel" to include activities that fall within the definition of "farm use" at ORS 215.203(2)(a). Instead, the county asserts in the challenged decisions that the definition of "kennel" at LWDUO 1.030 implements and is coextensive with the term "kennel" at ORS 215.283(2)(m). Consequently, the determinative issue in this case is the meaning and scope of the term "kennel" in ORS 215.283(2)(m).

> "ORS chapter 215 provides no definition of the term 'dog kennel.' In the absence of a definition or expression of legislative intent, the term dog kennel must be given its plain and ordinary meaning. * * * 'Kennel' is defined in Webster's Third New International Dictionary 1236 (1961), in part, as follows:
>
> > "' * * * a house for a dog or pack of hounds * * * : an establishment for the breeding or boarding of dogs * * * [.]'
>
> "'Board' is defined as 'to provide with regular meals or with regular meals and lodging for compensation * * *[.]' *Id.* at 243. As defined above, the term 'dog kennel' includes 'boarding' and 'breeding' facilities, but does not include 'training' facilities." 21 Or LUBA at 333-34 (citations omitted).

Our analysis in *Greuner* is the appropriate starting place in the present case. As explained in *Gruener*, the plain dictionary meaning of "kennel" as used in ORS 215.283(2)(m) denotes "an establishment for the breeding and boarding of dogs." Webster's Third New International Dictionary 274 (1981 ed.) defines "breeding" in relevant part as "the propagation of plants or animals, *esp*: such propagation for the purpose of improving the plants or animals (as by selection after controlled mating or, esp. in plants, hybridization)." Further, Webster's defines "propagation" in relevant part as "natural reproduction: production of young : natural increase (as a kind of organism) in numbers[.]" *Id.* at 1817. Thus, based solely on consideration of the plain meaning of ORS 215.283(2)(m), the county's definition of "kennel" at LWDUO 1.030 to include the "propagation" of dogs is consistent with its statutory progenitor.

The more difficult question is whether, as petitioner argues, the context of ORS 215.283(2)(m) demonstrates legislative intent to narrow the scope of ORS 215.283(2)(m) in a manner that removes the kind of operation proposed here from the ambit of the term "kennel," as used in that provision. As explained above, petitioner points to the differences in wording between ORS 215.203(2)(b)(K) and 215.283(1)(j) as evidence of legislative understanding that "raising" greyhounds for profit, and by inference, dogs in general, is a distinct activity that constitutes "animal husbandry" and hence is a farm use as defined at ORS 215.203(2)(a). *See* ns 3 and 4 and related text.

We disagree with petitioner that the context of ORS 215.283(2)(m) demonstrates that the intended meaning of "kennel" used in that provision is narrower than the plain dictionary definition of that term. We generally agree with the court in *Kang* that in 1985 when the legislature listed "dog kennels" and the "breeding, kenneling and training of greyhounds for racing" at ORS 215.283(2)(m) and 215.283(1)(j), respectively, it necessarily removed activities described by those terms from the otherwise broad ambit of "animal husbandry," and thus from the definition of "farm use" at ORS 215.203(2)(a). When, in 1997, the legislature modified ORS 215.203(2)(b) to include "breeding, raising, kenneling or training of greyhounds for raising" within the scope of the terms "current employment" of land for farm use, it restored to ORS 215.203(2) a limited portion of what it had previously removed. However, the scope of what it restored is limited to the terms of ORS 215.203(2)(b)(K), which pertains only to certain listed activities involving a specified breed of dogs, greyhounds, and then only those greyhounds used for racing. Nothing in the text of ORS 215.203(2)(b)(K) implies an intent to alter the scope of activities involving *other* dog breeds that fall within the plain terms of ORS 215.283(2)(m). Indeed, the implication runs the other way: the fact that the legislature felt compelled to specify those activities involving greyhounds that constitute a farm use implies that identical activities involving other dog breeds are not farm uses.

To the extent we may consider the legislative history of SB 58 that petitioner cites, that history does not address ORS 215.283(2)(m) and has no discernible bearing on the meaning of that provision. Petitioner may be correct that SB 58 evinces legislative understanding that "raising" dogs for commercial purposes is "animal husbandry." However, petitioner's supposition begs the question of what distinguishes "raising" dogs from other activities commonly associated with dog kennels. Although petitioner characterizes the proposed use in this case as a dog "raising" operation, petitioner does not dispute that part of the proposed operation involves the breeding, *i.e.* the propagation or natural increase, of dogs

for commercial sale. It follows that even if petitioner is correct that "raising" other types of dogs besides racing greyhounds is animal husbandry and an allowed farm use, the county properly treated the proposed use as involving the propagation of dogs and thus as a conditional nonfarm use subject to the county's regulation.

We conclude that the county's finding that the proposed use is a "kennel" under ORS 215.283(2)(m) and LWDUO 1.030 because it involves the propagation of dogs does not misconstrue the applicable law and is supported by substantial evidence.

The first and second assignments of error are denied.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that, even if the proposed use is a kennel, the county misconstrued the law in denying the kennel on the grounds that the subject property has high value farm soils, because as a matter of law the soils on the subject property are not high value farm soils.

Petitioner explains that the predominant soil type for the subject property is Coquille-Clatsop Complex, 12A, rated Class IVw. The other soil type present on the property is Walluski Silt Loam, 71B, rated Class IIe, which is indisputably a high-value soil. LWDUO 3.567(12) prohibits the establishment of a new kennel on EFU land if the land is comprised of "high-value farmland." *See also* OAR 660-033-0090 and 660-033-0120. ORS 215.710(4) and OAR 660-033-0020(8)(d) provide that:

> "* * * high-value farmland, if west of the summit of the Coast Range and used in conjunction with a dairy operation on January 1, 1993, includes tracts composed predominantly of the following soils in Class III or IV or composed predominantly of a combination of soils described in subsection (1) of this section and the following soils:
>
> "* * * * *
>
> "(d) Subclassification IVw, specifically, Coquille."

During the proceedings before the hearings officer, DLCD submitted a letter into the record that states:

> "* * * [W]e disagree with the applicant's assertion that the Coquille-Clatsop Complex soil should not be recognized as a high-value soil. A minority inclusion of Clatsop soils is not sufficient to warrant a conversion. It is clear that Coquille soil is the dominant feature, therefore the Coquille Soil Series is controlling. In any event, the presence of the Coquille soils in combination with the Walluski soils should be sufficient to designate the tract high-value." Record I 516.

Accompanying DLCD's letter was a chart listing high-value soils for Clatsop County, developed and distributed by DLCD. The list includes Coquille-Clatsop Complex, 12A. Record 518.[8]

The hearings officer concluded that the Coquille soils on the subject property are not those described in ORS 215.710(4)(d):

> "The Legislature specifically adopts, by reference, the soils classes, soil ratings or other soil designations used or made in [ORS 215.710], as those of the Soil Conservation Service of the USDA [United States Department of Agriculture], in its publications made before November 4, 1993, which would include the USDA *Soil Survey of Clatsop County* published in 1982. * * *
>
> "That soil survey states that there are a number of series of Class IVw soils, including the Chitwood series, the Coquille series, the Coquille variant, and the Croquib series. When the legislature says 'specifically,' that is what is meant. Only the Coquille series of the Class IV w soils, for dairy farms west of the Coast Range (as of January 1, 1993), are the Class IV w soils which constitute high value farmland.
>
> "Thus, I conclude that DLCD is wrong in its opinion as to whether the predominant soil type for this parcel constitutes 'high-value farmland.' The legislature's determination pre-empts any determination by any other agency in this state, and we are all bound by what the Legislature has determined constitutes the soil types in a particular geographic area * * *[.]" Record 220.

The county commissioners rejected the hearings officer's conclusion on this point:

> "* * * The County finds that the hearings officer's interpretation is not supported by substantial evidence in the record. The applicant bears the burden of proving that the proposal complies with applicable criteria, including those restrictions on kennels on high-value farmland. While the

[8]As far as we can tell from the record, the DLCD chart of Clatsop County high-value soils has not been adopted by rule and has no authoritative function. It is simply DLCD's opinion regarding which Clatsop County soils are high-value soils under the statute and rule.

> hearings officer and the applicant *may* be right that this site is not high-value farmland, the Board finds that evidence in the record is not sufficient to support this conclusion. The applicant had an opportunity to provide supporting evidence, such as legislative history or citations to court cases supporting this interpretation, or expert testimony from a soil scientist demonstrating that the site is not high-value farmland. This kind of supporting evidence is not in the record. * * * Record II 13 (emphasis in original).

The commissioners also adopted a finding that:

> "[t]he presence of Coquille soils in combination with the Walluski soils is sufficient to designate the soil high-value." Record II 13.

Petitioner argues that ORS 215.710(4)(d) and OAR 660-033-0020(8)(d) refer "specifically" and plainly to the "Coquille" subcategory of Class IVw soils, and that, as a matter of law, the "Coquille" subcategory does not include soils such as Coquille-Clatsop complex.

Petitioner does not explain the relationship between Coquille soils and the Coquille-Clatsop complex. Each of the soils listed at ORS 215.710(3) and (4) consist of a single soil type, and does not mention any soil complexes, which lends some support to petitioner's thesis that the statute is directed at specific soils and does not include complexes in which listed soils are present. The description of Coquille-Clatsop complex, 12A, in the county soil survey states that the complex is composed 60 percent of "Coquille soils and similar inclusions," 30 percent "Clatsop soils and similar inclusions" and ten percent of "contrasting inclusions." Record 464. That description appears to treat "Coquille soils" as separate soils that are aggregated with Clatsop soils to form the Coquille-Clatsop complex. The portions of the county soil survey in the record discuss two types of Coquille-Clatsop complex, 11A and 12A, as well as a "Coquille Variant." Record 464-65. However, the survey does not list "Coquille soils" as a soil that exists apart from being aggregated in a complex. Neither does the survey list "Clatsop" soils as a soil that exists apart from its aggregation with Coquille soils. The survey also discusses "Clatsop Series," "Coquille Series," and "Coquille Variant" without explaining what soils are included in those series. Record 466-68. The relationship

among these various soils, whether "Coquille soils" exist separately or are always mapped as a complex, and how to categorize soil complexes under the survey and under the statute, is not self-evident. We cannot determine, from this record, how Coquille soils are categorized, or the consequences of their inclusion in the 12A Coquille-Clatsop complex. The parties' briefs on this point are not helpful.[9]

In the challenged decision, the county concludes that petitioner failed to carry its burden of proof that the subject property was not high-value farmland. Petitioner challenges this finding as being misdirected, because the record demonstrates that as a matter of law the subject property is not high-value farmland. However, petitioner failed to provide to the county, and fails to provide to us, a sufficient basis from which to draw that conclusion. As explained above, it is by no means clear that the reference in ORS 215.710(4)(d) to "Coquille" soils excludes soils in which Coquille soils form the predominant part of a soil complex.

Further, even if petitioner had established that ORS 215.710(4)(d) does not include soil complexes such as Coquille-Clatsop complex, petitioner does not challenge the county's alternative finding that "the presence of Coquille soils in combination with the Walluski soils is sufficient to designate the soil high-value." Record 13. We understand the county to have found that the property is high-value farmland because it is "composed predominantly of a combination of soils described in [ORS 215.710(1)]" and Coquille soils. ORS 215.710(4). That is, the county found that, considering the combination of high-value Walluski soils described in ORS 215.710(1) and the Coquille soils that make up 60 percent of the Coquille-Clatsop complex, the subject property is predominantly composed of high-value soils.

[9]Petitioner cites to a portion of the legislative history to the effect that the definition of high-value soil was intended primarily to protect coastal dairy farmers from undergoing pressure from lot of record dwellings, from which petitioner infers that they were not intended to prevent dairy farmers from supplementing their income with nonfarm activities. Be that as it may, the rules implementing ORS 215.710 prohibit the establishment of new dog kennels on lands predominated by high-value soils, and petitioner offers no basis to conclude that the administrative rules are in conflict with the statute.

Petitioner offers no factual, legal or other type of challenge to this finding. We have held on numerous occasions that LUBA must affirm a decision denying a permit application, where the petitioner at LUBA fails to challenge one of several independent bases for denial. *Port Dock Four, Inc., v. City of Newport,* ___ Or LUBA ___ (LUBA No. 98-061, March 25, 1999) slip op 7, *aff'd* 161 Or App 199, ___ P2d ___ (1999); *Garre v. Clackamas County,* 18 Or LUBA 877, 881, *aff'd* 102 Or App 123, 792 P2d 117 (1990); *Scott v. City of Portland,* 17 Or LUBA 197, 203-04 (1988). For the foregoing reasons, we conclude that petitioner's arguments under this assignment of error do not establish a basis to reverse or remand the challenged decisions.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner contends that the county committed several procedural errors that prejudiced petitioner's substantial rights.[10]

A. Bias

Petitioner explains that, during a meeting to consider intervenor's request for a delay in the appeal proceeding, the commission chairperson, Westbrook, stated that intervenor "has been operating close to a year unlawfully," and that intervenor's kennel was "unlawful at this point." Record II 30. At the August 26, 1998 hearing, petitioner challenged Westbrook's qualifications to hear the appeals pursuant to LWDUO 6.210,[11] arguing that Westbrook's

[10]Because we concluded in discussing the first three assignments of error that the county's denial is legally correct and supported by substantial evidence, there is arguably no purpose served in addressing petitioner's procedural assignments of error. However, it is possible that, if we sustain petitioner's fourth assignment of error, the resulting remand might involve the introduction of evidence that bears on one or more of the legal and evidentiary bases for the county's denial. *See Schwerdt v. City of Corvallis*, 163 Or App ___, ___ P2d ___ (A10673, October 13, 1999) slip op 5 (notwithstanding that LUBA resolved the merits of the appeal adversely to petitioner, remand to correct a procedural violation is not purposeless, where new evidence and findings may result on remand). Accordingly, we conclude that it is appropriate to reach petitioner's procedural assignments of error.

[11]LWDUO 6.210 provides:

previous comments reflected prejudgment on the merits of its appeal: whether the proposed use is a farm use that does not require a permit. The chairperson's response is reflected in the minutes of that hearing:

> "Westbrook referred to a letter submitted by [petitioner's attorney] stating he believed that she, Westbrook, was biased toward [petitioner's] appeal. Westbrook clarified that [her] comments were related to [petitioner's attorney's] request to delay making a decision on the hearing. * * * [The decision not to delay the hearing was] made based on the request for delay not discussing the merits of the appeal. Stated she does not have any bias and is ready to hear the appeal." Record II 93-94.

We do not understand petitioner to argue that LUBA should conclude, based on the cited portions of the record, that the chairperson was biased or had prejudged the merits of petitioner's appeal.[12] Instead, petitioner contends that the county committed procedural error when the other members of the commission failed to conduct a vote on the chairperson's qualifications, as provided in LWDUO 6.245.[13] However, LWDUO 6.245 merely states that the other members of the commission "may" vote on the qualifications of a member. Petitioner does not cite to any place in the record where petitioner requested that the commission vote on the chairperson's qualifications. We conclude that petitioner has not

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> "* * * [A] party to a hearing or a member of a hearing body may challenge the qualifications of a member of the hearing body to participate in the hearing and decision regarding this matter. The challenge shall state by affidavit the facts relied upon by the challenger relating to a person's bias, prejudgment, personal interest, or other facts from which the challenger has concluded that the member of the hearing body cannot participate in an impartial manner. Except for good cause shown, [the] challenge shall be delivered by personal service to the Planning Director not less than (48) hours preceding the time set for hearing. The Director shall attempt to notify the person whose qualifications are challenged prior to the meeting. The challenge shall be incorporated into the record of the hearing."

[12]If that is petitioner's position we reject it; the cited statements are not sufficient to establish prejudgment or bias.

[13]LWDUO 6.245 provides:

"* * * [D]isqualification for reasons other than the member's own judgment may be ordered by a majority of the members of a hearing body present and voting. The member who is the subject of the motion for disqualification may not vote on the motion."

established that the commission violated LWDUO 6.245 or otherwise prejudiced petitioner's substantial rights to challenge the chairperson's qualifications.

This subassignment of error is denied.

B. Disclosure of Personal Interest and Ex Parte Communications

Petitioner also argues that the chairperson did not adequately disclose her communications with a party in opposition to petitioner, and her involvement with an organization that is not a party but which, according to petitioner, is adverse to petitioner's proposed use.

Petitioner does not cite to evidence that any undisclosed ex parte communications occurred, but instead refers to a motion to take evidence not in the record that petitioner filed during this proceeding before LUBA. In that motion, petitioner explained that the chairperson had disclosed during the proceedings below that (1) one of the intervenors, Brad Pope, was her pets' veterinarian; (2) that she served on a non-profit corporation with him, and (3) that she tried to limit her ex-parte contacts with Pope. An affidavit attached to the motion stated that the chairperson is co-founder and current secretary of Clatsop County Friends of Animals (CCFOA), and that Pope is the current president of that organization.

In its motion, petitioner argued that the chairperson's disclosure was inadequate and sought to subpoena the minutes, membership list and financial records of CCFOA to establish that the chairperson has undisclosed financial interests in that group and has had undisclosed ex parte contacts with intervenor with respect to petitioner's proposed use. LUBA denied petitioner's motion, for reasons that do not need repeating here.[14] For present purposes, we understand petitioner to argue that, based on the allegations in its motion to take evidence, the Board should conclude that the chairperson's disclosure was inadequate. Specifically, petitioner argues that the disclosure (1) failed to specify that the "non-profit

[14]*Tri-River Investment Co. v. Clatsop County*, ___ Or LUBA ___ (LUBA Nos. 98-159/160, Order on Motion to Take Evidence Not in the Record, March 5, 1999).

corporation" was in fact the CCFOA, an organization that petitioner believes is opposed to the proposed use, and (2) failed to describe the substance of any ex parte communications with intervenor Pope, as required by ORS 215.422(3).[15] According to petitioner, the chairperson's inadequate disclosure prevented petitioner from challenging that disclosure and exercising its right to rebut the substance of any ex parte communications.

However, petitioner offers no evidence other than speculation that undisclosed ex parte communications occurred between the chairperson and Dr. Pope. Absent some reason to believe undisclosed ex parte communications occurred, there is no basis to conclude that the chairperson's disclosures are inadequate. Nor has petitioner demonstrated that the chairperson's involvement with CCFOA creates a conflict of interest. There is no evidence that CCFOA, which is not a party to these cases, is opposed to petitioner's proposed use. Further, even if the chairperson's disclosure was inadequate for any of the reasons petitioner alleges, petitioner has not demonstrated that he objected to that inadequate disclosure during the proceedings below. *Wicks v. City of Reedsport*, 29 Or LUBA 8, 13 (1995).

This subassignment of error is denied.

C. Staff Report

Petitioner also argues that the county prejudiced petitioner's rights "by not giving an adequate opportunity to rebut evidence contained in a late arriving staff report that presented

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[15]ORS 215.422(3) provides:

> "No decision or action of a planning commission or county governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:
>
> "(a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and
>
> "(b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related."

two new issues." Petition for Review 19. The petition for review does not explain what new evidence or issues were presented in the staff report, or why its late arrival prejudiced its substantial rights. However, petitioner refers to Record 581, which is a letter from petitioner's counsel objecting to a staff report dated August 19, 1999. The letter, dated August 26, 1999, objects to use of the staff report at the August 26, 1999 hearing because the applicant did not receive a copy of the staff report until August 25, 1999. The letter argues that the staff report takes a new position regarding the issue of high-value soils, and contains staff positions on the applicability of several local provisions, but does not identify any new evidence contained in that report.

Intervenor responds, and we agree, that petitioner has not demonstrated either that the August 19, 1998 staff report was untimely, or, if it was, that petitioner's substantial rights were violated thereby. ORS 197.763(4)(b) requires that any staff report used at the hearing "shall be available at least seven days prior to the hearing." Petitioner's letter states that it did not receive a copy until the day before the hearing, but does not allege or attempt to establish that the staff report was not "available" at least seven days prior to the hearing. Even if the staff report was not available during the entire minimum period required by ORS 197.763(4)(b), petitioner has not demonstrated that its unavailability during part of that period prejudiced its substantial rights. Petitioner does not identify any "evidence" in the staff report that petitioner lacked an opportunity to rebut, nor has petitioner demonstrated that it lacked opportunity during the August 26, 1998 hearing to adequately respond to any issues raised in the August 19, 1998 staff report.

This subassignment of error is denied.

The fourth assignment of error is denied.

The county's decision is affirmed.