BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WILBUR RESIDENTS FOR A CLEAN NEIGHBORHOOD, JANET DIXON, KEVIN DIXON, DOROTHY BRANCH, ALICE MOHR, GLEN BYERS, BRUCE MOORE, CAROLYNE MOORE, ROSS BRANCH AND BOB WANLESS,	)	
Petitioners,	)	
vs.	)	
	)	LUBA No. 99-081
DOUGLAS COUNTY,	)	
	)	FINAL OPINION
Respondent,	)	AND ORDER
and	)	
HEARD FARMS, INC.,	)	
Intervenor-Respondent.	)	

Appeal from Douglas County

David A. Bahr, Eugene, filed the petition for review and argued on behalf of petitioners.

No appearance by respondent.

David B. Smith, Tigard, filed the response brief and argued on behalf of intervenor-respondent.

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

AFFIRMED 11/09/99

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

Petitioners appeal the county's approval of a conditional use permit allowing a solid waste disposal facility on land zoned for Exclusive Farm Use (EFU)-Grazing (FG).

MOTION TO INTERVENE

Heard Farms, Inc. (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

MOTION TO TAKE JUDICIAL NOTICE

On October 7, 1999, the date of oral argument, petitioners filed a motion to take judicial notice of and allow a judicial admission involving an October 5, 1999 letter from intervenor's attorney to the Douglas County Circuit Court. The letter pertains to a matter pending before the Circuit Court involving the same solid waste disposal facility at issue in this appeal. Based on alleged admissions in that letter, petitioners argue that LUBA should apply the doctrine of judicial estoppel to estop intervenor from asserting a position in the present appeal inconsistent with positions expressed in the letter.

With exceptions not relevant here, LUBA's review of a land use decision is confined to the local record of that decision. ORS 197.835(2)(a). Consistent with principles of judicial review and the mandate of ORS 197.835(2)(a), LUBA may take judicial notice of the enactments of governmental bodies pursuant to OEC 202. However, in reviewing a land use decision, LUBA does not repeat the role of the local finder of fact and may not take judicial notice of adjudicative facts pursuant to OEC 201. *Home Builders Assoc. v. City of Wilsonville*, 29 Or LUBA 604, 606 (1995). Petitioners do not attempt to establish that the October 5, 1999 letter from intervenor's attorney is law subject to judicial notice under OEC 202.

Petitioners' motion to take judicial notice of the October 5, 1999 letter is denied. Because petitioners' other motions depend upon our taking judicial notice of that letter, those motions are denied as moot.

FACTS

On September 3, 1998, intervenor filed an application for a conditional use permit to operate a solid waste disposal facility on tax lot 100, a 17.29-acre parcel zoned FG.[1] Surrounding lands are also zoned FG. The proposed facility would accept domestic septage from septic tanks in a number of communities in the county and southern Oregon. The application describes the proposed facility in relevant part as follows:

> "The subject facility is a septage treatment and disposal facility consisting of: a six thousand gallon screening station; a two stage lagoon system consisting of a primary or treatment lagoon, and a secondary or facultative lagoon; a chlorine dosing tank; and an effluent distribution system. Information is included on adjacent agricultural lands which are currently allocated for waste water reuse and biosolids application. Other agricultural lands are anticipated to be used for future biosolids application. These will be submitted for individual approval on a one time application basis.
>
> "* * * * *
>
> "Septage will be transported to the site by tank truck and discharged through the de-gritting station into the primary treatment lagoon. * * * The treatment plant operator will periodically use a portable pump to transfer sludge from the treatment lagoon to the facultative lagoon. * * *
>
> "After digestion in the primary lagoon, the effluent will be transferred to the secondary lagoon by gravity flow. Treatment will continue in the secondary lagoon by settling and biologic degradation.
>
> "* * * * *

[1]Intervenor's facility had been the subject of a separate application in 1996 for approval as a commercial use in conjunction with farm use. The county's approval of that application was appealed, resulting in a series of LUBA and appellate court decisions. *Wilbur Residents v. Douglas County*, 33 Or LUBA 412, *rev'd and rem'd* 151 Or App 523, 950 P2d 368 (1997), *rev den* 327 Or 83 (1998) (*Wilbur I*); on remand *Wilbur Residents v. Douglas County*, 34 Or LUBA 634, *aff'd* 156 Or App 518, 972 P2d 1229 (1998), *rev den* 328 Or 293 (1999) (*Wilbur II*).

> "Treated effluent will be applied to a selected grass crop on adjacent agricultural land at agronomic rates to enhance production. Hay will be removed from the field for use as animal fodder. Sludge from the treatment system will be incorporated into soils as a slow release fertilizer and soil amendment. Biosolid application areas will be selected from a pool of candidate agricultural sites in the vicinity. In the absence of suitable off-site [locations], already identified adjacent agricultural land is available for biosolid application. The following discussion includes only the currently identified available land for biosolids application, which is adjacent farmland already under contract to receive effluent and biosolids from the [facility]." Record 2076-77.

With respect to application of effluent and sludge, the application states:

> "It is expected that the sludge will be approximately 3% solids when it is time for removal from the storage pond. This low solids content will allow the sludge to be pumped to the land application sites. The sludge will be applied by irrigation. * * *
>
> "Irrigation with the biosolids will be accomplished by the treatment plant operator with the treatment plant operator's irrigation pumps also used for effluent application. * * *" Record 2082.

In addition to its application to the county, intervenor applied to and obtained from the Department of Environmental Quality (DEQ) two permits: (1) a solid waste disposal facility permit for the septic lagoons on tax lot 100, as required by ORS 459.245; and (2) a land application permit for disposal of treated waste onto a parcel adjacent to tax lot 100 (the Scardi property), as required by ORS 468B.050 and OAR chapter 340, division 50.

The county planning commission conducted hearings and approved the application on February 18, 1999. Petitioners appealed the planning commission's decision to the board of commissioners. On petitioners' motion, the board of commissioners appointed a hearings officer to resolve the appeal. The hearings officer conducted a review on the record before the planning commission and, on April 21, 1999, issued the challenged decision denying the appeal and approving the application.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

The county approved the proposed solid waste disposal facility pursuant to ORS

215.283(2)(j), which provides that a local government may allow as a nonfarm use on land zoned EFU:

> "A site for the disposal of solid waste approved by the governing body of a city or county or both and for which a permit has been granted under ORS 459.245 by the Department of Environmental Quality together with equipment, facilities or buildings necessary for its operation."

In the challenged decision, the hearings officer found that "[t]he nature, scope and extent of a proposed use a local government may approve are limited by the application and the notice required to be sent to nearby property owners." Record 6-7. The hearings officer examined the application and noted that it sought approval only for the operations conducted on tax lot 100, not operations conducted on the adjacent Scardi property. The hearings officer also relied upon intervenor's representation that no approval for land application of the treated waste product was sought in the proceedings before the county. Further, the hearings officer examined the notice of hearing and determined that it identified the subject property as tax lot 100 and did not describe the Scardi property or indicate that the applicant sought permission from the county to apply waste products to that property. The hearings officer concluded that "[b]ased upon the application, the public notice, and applicant's representation to the Planning Commission, * * * no part of this application seeks or permits applicant to apply treated wastewater or biosolids to any land." Record 8. Accordingly, the hearings officer rejected petitioners' arguments that the county must consider the operations on the Scardi property in determining whether the proposed facility complies with applicable approval criteria.

Petitioners argue that the county erred in failing to consider the Scardi property, on which the effluent and biosolids will be applied, as part of the geographic scope of the proposed facility in determining whether the facility complies with applicable conditional use criteria. According to petitioners, the proposed facility consists of a treatment component and a disposal component. The treatment component consists of the two septic lagoons and

associated structures. The disposal component entails irrigation pumps and a fixed system of in-ground irrigation pipes over 1,000 feet in length extending from the lagoons on tax lot 100 to the adjacent Scardi property, on which the treated waste will be applied. Petitioners argue that the county cannot approve a solid waste *disposal* facility pursuant to ORS 215.283(2)(j) without considering the disposal function that is the primary purpose of the facility.

Petitioners argue that ORS 215.283(2)(j) includes within the scope of the proposed use all "equipment, facilities or buildings necessary" for operation of the disposal facility. Petitioners contend that the fixed piping linking the septic lagoons with the Scardi property constitutes "equipment" or "facilities" necessary to operate the facility, because disposal of the treated waste is necessary and the pipes are the means by which the application proposes to dispose of the waste. At oral argument, petitioners explained that the "site for the disposal of solid waste" at issue here is the site "for which a permit has been granted under ORS 459.245" by DEQ. Therefore, petitioners argue, the county must consider the entire site, including the Scardi property, that is subject to the solid waste permit issued by DEQ.

Intervenor responds that the hearings officer properly determined that the scope of the proposed use for purposes of the county's application of its conditional use criteria is limited to tax lot 100. With respect to petitioners' arguments under ORS 215.283(2)(j), intervenor argues that the equipment and facilities used to apply the treated waste onto the Scardi property are not "necessary" for operation of the solid waste disposal facility, because other properties besides the Scardi property can be used for that purpose, if and when intervenor obtains the necessary landowner and DEQ approvals. With respect to the DEQ permits, intervenor argues that one permit governs the treatment facility and a separate permit governs the application of wastes on the Scardi property, which reflects the statutory regulatory scheme. Intervenor contends that the DEQ permits are not determinative of the scope of the proposed solid waste disposal facilities for purposes of the county's consideration under ORS 215.283(2)(j) and corresponding local provisions.

Intervenor also points out that in *Wilbur I*, the Board addressed whether the scope of this same facility, then proposed as a commercial use in conjunction with farm use, included agricultural land on which treated waste would be applied. LUBA noted that "[t]he challenged decision does not establish, control or limit where the treated waste product will be applied and states only that it 'will be pumped to near-by agricultural lands where it will be applied as liquefied fertilizer.' These unspecified agricultural lands are *not* 'the property' which is the subject of the notice [required by ORS 197.763]." 33 Or LUBA at 417 (record citation omitted). The Court of Appeals affirmed that part of the Board's decision, noting that the identity and whereabouts of the land on which the treated waste would be applied are "wholly speculative." 151 Or App at 526. We understand intervenor to suggest that, like the decision at issue in *Wilbur I*, the present decision also does not purport to determine where the treated waste can be applied, and thus the scope of the proposed use in this case should also be limited to tax lot 100.

We agree with petitioners that the scope of the "solid waste disposal facility" allowed by ORS 215.283(2)(j) in EFU zones is coextensive with the facility for which DEQ grants a permit pursuant to ORS 459.245. The statute identifies the relevant "site" for purposes of the county's approval of a solid waste disposal facility as the site for which a DEQ permit has been granted pursuant to ORS 459.245. Thus, the county erred to the extent it narrowed the scope of the proposed use to something less than that required by ORS 215.283(2)(j).

However, the permit DEQ granted pursuant to ORS 459.245 governs only the treatment facility on tax lot 100. DEQ granted intervenor a separate permit for land application of wastes on the Scardi property pursuant to ORS 468B.050. Record 291. The separate permits DEQ granted in this case reflect a bifurcated regulatory structure set forth in the relevant statutes and implementing regulations, which separately regulate "solid waste disposal sites" and land application of treated waste. OAR 340-093-0030(30) defines a solid waste "disposal site" to include "sludge lagoons" and "sludge treatment facilities." The

definition of a solid waste "disposal site" contains an express exception for "land application units" subject to the exception in OAR 340-093-0030(81)(b). OAR 340-093-0030(81)(b) excludes from the definition of "solid waste" any "[m]aterials used for fertilizer, soil conditioning, humus restoration, or for other productive purposes * * * used on land in agricultural operations and the growing or harvesting of crops and the raising of fowls or animals, provided the materials are used at or below agronomic application rates." In short, it appears that DEQ chose, consistent with ORS 459.245, 468B.050 and their implementing regulations, to regulate the treatment component and land application component of the proposed use separately. Because ORS 215.283(2)(j) is expressly limited to disposal facilities permitted under ORS 459.245, the county did not err in failing to consider or approve other components of the proposed use regulated under other provisions of law.[2]

We also disagree with petitioners that land application of treated wastes on the Scardi property is "necessary" for operation of the proposed solid waste disposal facility, and thus must be considered and approved along with that facility. ORS 215.283(2)(j) allows the county to approve a solid waste disposal site, "together with equipment, facilities or buildings necessary for its operation." While petitioners may be correct, as an abstract proposition, that ultimate disposal of the waste treated on tax lot 100 is necessary, land application of wastes on the Scardi property or any particular property is not "necessary" for operation of the treatment facility that the DEQ permitted under ORS 459.245. As the application contemplates, intervenor intends to seek the permission of other landowners for land application of treated waste, which will presumably require a separate DEQ permit under ORS 468B.050. However, as petitioners conceded at oral argument, those lands may

[2]Presumably the county could adopt regulations governing components of a proposed solid waste disposal facility not governed by the DEQ permit issued pursuant to ORS 459.245. *See* ORS 215.296(10) (counties can establish standards and impose conditions in addition to statutory standards in approving uses allowed under ORS 215.283(2)). However, petitioners do not argue that the county's land use regulations establish any standards in addition to those provided in ORS 215.283(2)(j).

be located some distance from the treatment facility in different counties and receive the treated waste by truck shipment. In that circumstance, such lands will not be linked to the treatment facility by any "equipment, facilities or buildings" whatsoever. ORS 215.283(2)(j) allows the county to authorize necessary infrastructure on the "site for the disposal of solid waste," but does not require the county to consider or approve off-site infrastructure that is not necessary for the use permitted under ORS 215.283(2)(j).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

The hearings officer determined that the proposed facility complied with Douglas County Land Use Development Ordinance (LUDO) 3.3.150(2), which implements, embodies and duplicates ORS 215.296(1). Both LUDO 3.3.150(2) and ORS 215.296(1) require a finding that a use such as the proposed solid waste disposal facility not

> "a. Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or
>
> "b. Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use."

ORS 215.203(2)(c) defines the phrase "accepted farming practices" to mean "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." However, in applying LUDO 3.3.150(2), the planning commission and hearings officer relied on a definition of "accepted farming practices" offered by intervenor that differs from ORS 215.203(2)(c). Intervenor defined "accepted farm practices" to mean

> "the implementation or application of horticultural, land management, and animal husbandry methods and practices which are necessary and appropriate in order to successfully employ the land in farm use. Farm practices include, but are not limited to, plowing and tilling the soil, planting seed for crops, application of fertilizers and pesticides, irrigation, burning of crop residue, and erecting and maintaining fences." Record 22.

The hearings officer found that, while the terms of the two definitions differed,

intervenor's definition encompasses everything in ORS 215.203(2)(c) and goes beyond the statute in listing specific examples of accepted farming practices. The hearings officer saw no error in applying intervenor's definition rather than ORS 215.203(2)(c).

Petitioners do not argue that the definition of "accepted farming practices" used by the hearings officer is inconsistent with the definition at ORS 215.203(2)(c), or that application of one definition in this case supported a different result than application of the other. Nor do petitioners challenge the hearings officer's determination that intervenor's definition encompasses all activities included in ORS 215.203(2)(c). Petitioners merely argue that the two definitions are different and that it is reversible error for the county to use a definition of "accepted farming practices" that is different than the one at ORS 215.203(2)(c). However, petitioners offer no authority for their categorical argument. County legislation and land use decisions must be consistent with applicable statutory requirements. *Marquam Farms Corp. v. Multnomah County*, 147 Or App 368, 380, 936 P2d 990 (1997). However, petitioners have not attempted to establish that the definition used by the county is inconsistent with ORS 215.203(2)(c). Petitioners have not established that the differences between the two definitions are such that application of intervenor's definition constitutes reversible error. Absent that demonstration, petitioners' arguments under this assignment of error do not provide a basis for reversal or remand.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

The hearings officer found compliance with LUDO 3.3.150(2) based on analysis of accepted farming practices on "surrounding lands," the scope of which the planning commission and hearings officer limited to the five parcels located wholly or partially within 500 feet of tax lot 100. The area of "surrounding lands" defined by the county corresponds to the lands whose landowners must be sent written notice of hearing, pursuant to ORS 197.763(2)(a)(C) and implementing local provisions. The planning commission's findings on

this point stated:

> "[C]ommon sense seems to indicate that, given the nature of the facility, and what the Commission observed during its site visit, that if there are no significant impacts to the immediately adjoining agricultural uses (those within 500 feet), any impact such as sight, sound or smell would be considerably less to the more remote properties. Given the direct experience of adjoining property owners (that operation of the facility since December 1997 has not forced any significant change to their allowed agricultural uses, and has not significantly increased the cost of any accepted farm or forest practices), together with its observation of the site and the following analysis, the Commission concludes that the evidence presented meets the criteria of LUDO 3.3.000 and 3.3.150(1)[.]" Record 68-69.

The hearings officer also concluded that the 500-foot limitation was sufficient to demonstrate compliance with LUDO 3.3.150(2) and ORS 215.296(1):

> "Even accepting petitioners' argument that the range of potential impacts should steer the definition of the 'surrounding area,' the Planning Commission fairly concluded that whatever conclusions it reached with respect to such impacts on property within 500 feet could be extrapolated to lands lying beyond that distance. This is particularly true given the evidence that accepted farming practices within 500 feet of the subject property were typical for the county's FG zone and, presumably, lands lying further than 500 feet from the subject property." Record 29.

Petitioners argue that nothing in either ORS 215.296(1) or LUDO 3.3.150(2) authorizes the county to limit the scope of "surrounding lands" to lands within 500 feet of the subject property, and that the county should examine any impacts on accepted farming practices on nearby lands identified in the record, regardless of the distance from the proposed facility. According to petitioners, there was evidence submitted below that potential seepage from the lagoons into the high groundwater table in the area might affect grazing operations on lands that rely on wells and groundwater for watering cattle, including lands owned by those petitioners located further than 500 feet from tax lot 100. Petitioners submit that the potential for disease spread to livestock or the cost of prophylactic veterinary intervention to prevent disease are significant impacts to accepted farming practices that were not considered because the county chose to limit the scope of "surrounding lands" to lands within 500 feet of tax lot 100.

Intervenor responds that, even if limiting the geographic scope of "surrounding lands" for purposes of LUDO 3.3.150(2) to parcels within 500 feet of tax lot 100 was error, it was harmless error. According to intervenor, the commission and hearings officer found that the farming practices, including grazing, on lands within 500 feet of tax lot 100 were typical of those beyond 500 feet. The hearings officer reasoned that, if the proposed treatment facility on tax lot 100 did not force a significant change in or increase the cost of accepted farming practices on parcels within 500 feet, the county could reasonably conclude, *a fortiori*, that the facility would not impact the similar farming practices on lands further than 500 feet.

We agree with petitioners that it is inconsistent with ORS 215.296(1) to limit the scope of analysis under that statute to an arbitrary distance from the subject property, where doing so results in failure to consider substantial evidence in the record of significant impacts from the proposed use to accepted farming practices on lands beyond that distance. However, petitioners do not challenge the planning commission's conclusion that there are no significant impacts on farming practices on lands within 500 feet of tax lot 100, nor the finding that those practices are typical of farm practices in the FG zone, nor the hearings officer's extrapolation of that conclusion to lands beyond 500 feet. Petitioners also do not challenge the planning commission's findings "that compliance with the requirements of the DEQ permit will protect water quality and avoid the potential impacts by preventing seepage [from the septic lagoons], that there is no credible risk of overflow from flooding, and that adequate precautions have been made to prevent surface runoff." Record 70-71. Given these unchallenged findings, we agree with intervenor that the county's having limited its analysis under LUDO 3.3.150(2) and ORS 215.296(1) to lands within 500 feet of the subject property is, at most, harmless error.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

LUDO 3.39.050 requires a finding that the "proposed use is or may be made compatible with existing adjacent permitted uses and other uses permitted in the underlying zone." The LUDO does not define "adjacent." However, the county treated the scope of "adjacent" permitted uses against which the compatibility of the propose must be measured the same as the scope of "surrounding lands" for purposes of LUDO 3.3.150(2): parcels wholly or partially within 500 feet of tax lot 100.

Petitioners argue that the county erred in interpreting two dissimilar terms, "adjacent" and "surrounding," to denote the same area, contrary to the rule of statutory construction that the same words used throughout an enactment should be given the same meaning, and different words should be given different meanings. Further, petitioners argue that "adjacent" lands may include parcels located further than 500 feet from the subject property, and thus the county erred in limiting the geographic scope of adjacent lands to parcels at least partially within 500 feet.

Intervenor responds that the county's application of LUDO 3.39.050 is consistent with LUBA's discussion of that same provision in *O'Mara v. Douglas County*, 25 Or LUBA 25, *rev'd and rem'd on other grounds*, 121 Or App 113, 854 P2d 470, *rev'd* 318 Or 72, 862 P2d 499 (1993). In *O'Mara*, the Board held that the county must apply the "adjacent" language of LUDO 3.39.050 consistently with the county's comprehensive plan, which defines "adjacent land" to mean "parcels adjoining at a common boundary line or point, or which are situated within the near vicinity of each other." 25 Or LUBA at 37. Intervenor argues, and we agree, that the 500-foot scope of analysis is consistent with the definition in the county's comprehensive plan and *O'Mara*, because it clearly identifies an area that includes parcels abutting the subject property and those within the near vicinity.

In resolving the third assignment of error, we agreed with petitioners that the county may not arbitrarily limit its analysis under LUDO 3.3.150(2) to surrounding lands within 500

feet of tax lot 100, although we found that limitation to be at most harmless error in this case, in light of the county's other, unchallenged findings. It is petitioners' argument under this assignment of error, and not the county's 500 foot limitation, that threatens to combine "adjacent" for purposes of LUDO 3.39.050 with the "surrounding lands" used in LUDO 3.3.150(2). Petitioners' arguments under this assignment of error do not provide a basis to reverse or remand the challenged decision.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioners argue that the county improperly interpreted LUDO 3.39.050 to limit consideration of compatibility to uses on lands wholly or partially within 500 feet of the subject property, because the county's interpretation conflicts with the plain language of LUDO 3.39.050. Even if the county properly restricted its analysis, petitioners argue, the county erred in failing to include the Scardi property as part of the proposed use for purposes of determining which permitted uses in the FG zone were "adjacent" and therefore whether the proposed facility is compatible with those permitted uses, as required by LUDO 3.39.050.

Petitioners do not explain how the county's interpretation conflicts with any language in LUDO 3.39.050. As we explained in the fourth assignment of error, the county's interpretation is consistent with the definition of "adjacent" in the county's comprehensive plan and with previous interpretations of LUDO 3.39.050. We held in the first assignment of error that the county did not err in failing to include the Scardi property as part of the proposed use. Petitioners' arguments under this assignment of error do not provide a basis for reversal or remand.

The fifth assignment of error is denied.

The county's decision is affirmed.