BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TIMOTHY B. FARRELL,
Petitioner,

vs.

JACKSON COUNTY,
Respondent,

and

SABROSO COMPANY,
Intervenor-Respondent.

LUBA No. 2000-081

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Timothy B. Farrell, Phoenix, filed the petition for review and argued on his own behalf.

No appearance by Jackson County.

Steven W. Abel, Portland, and Ty K. Wyman, Portland, filed the response brief. With them on the brief was Stoel Rives, LLP. Steven W. Abel argued on behalf of intervenor-respondent.

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

REMANDED 11/22/2000

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a Department of Environmental Quality (DEQ) Land Use Compatibility Statement (LUCS), in which the county determines that a proposal to reuse process water from a fruit processing facility "complies with all applicable local land use requirements." Record 6.

MOTION TO INTERVENE

Sabroso Company (Sabroso), the applicant below, moves to intervene in this appeal on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

Sabroso wishes to apply process water from its fruit processing facility, located in the City of Medford, onto Exclusive Farm Use (EFU)-zoned land located in the county.

> "* * * The process water is derived during the rinsing and fruit preparation of pears, peaches, grapes, apples, berries and a variety of other fruits. During rinsing and fruit preparation, sugars, starches, and small bits of fruit puree enter the process water. Sabroso's fruit processing rinse water is high in sugars and low in nutrients (i.e. nitrogen and phosphorous). The process water does [not] contain any domestic or human waste; domestic wastewater is discharged to the City of Medford sanitary sewer system. Sabroso intends to irrigate the process water at agronomic rates on the existing clover, vetch, and junegrass cover crop on a portion of a privately owned 88-acre EFU zoned agricultural site. The site is located in Jackson County, on the corner of Colver and Hartley Road, approximately 1 mile south of Phoenix, Oregon * * *. The site consists of Tax Lots 100, 500, 600 and 700.
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> "Sabroso will truck the process water to the site, discharge into a 3.7 million gallon (400 feet x 200 feet) aerated storage pond, and irrigate the process water at an agronomic rate. The storage pond will be located in the southwest corner of tax lot 500. Fresh water will be supplied by the Talent Irrigation District (TID) to supplement the process water to meet crop water demand. Anticipated irrigation equipment consists of an electric powered pump, aluminum hand lines or wheel lines, and sprinkler nozzles. * * *" Record 7.

Sabroso is seeking Water Pollution Control Facility and Water Quality General Permits from DEQ. In reviewing applications for such permits, DEQ requires that applicants

submit a LUCS to the affected local government. The purpose of the LUCS is to determine whether the proposal is consistent with the local government's comprehensive plan and land use regulations. As relevant, the LUCS requires that the county answer three questions. The first question asks whether "[t]he business or facility complies with all applicable local land use requirements[.]" Record 6. The county answered that question "yes." *Id*. The second question asks the county to "[l]ist all local reviews or approvals that were required of the applicant before the LUCS consistency was determined[.]" *Id*. The county answered:

> "[The u]se was determined to meet the definition of farm use. The pond will be used to store water that will be used to supplement irrigation water from the Talent Irrigation District for primarily summer watering of crops grown on the property." *Id*.

Finally, the county is asked to indicate whether public notice and a hearing are required. The county answered "no." *Id*.

The LUCS is dated May 11, 2000, and it was issued administratively, without providing a public hearing and without providing notice and an opportunity for a local appeal.

STANDING

Where a local government makes a land use decision without providing a hearing, a person who is adversely affected by that decision may appeal it to LUBA. ORS 197.830(3). Intervenor argues that even if the challenged LUCS is properly viewed as a land use decision, there is no support in the record in this matter for petitioner's allegations in the petition for review that he will be adversely affected by the disputed proposal.

Petitioner's reply brief includes an affidavit in which petitioner alleges that he owns tax lot 800, which adjoins tax lots 600 and 700. Tax lots 600 and 700 are two of the four tax lots where the proposed facility will be located. Petitioner argues he is therefore within sight and sound of the proposal. We do not understand intervenor to dispute these allegations.

Petitioner has adequately demonstrated that he is within sight and sound of the subject property. Therefore, he is presumptively adversely affected by the challenged decision and has standing to bring this appeal.[1] *Walz v. Polk County*, 31 Or LUBA 363, 369 (1996).

DECISION

There is no dispute that the facility at issue in this appeal is a proposed development of land. There is also no dispute that in issuing the challenged LUCS, the county applied its comprehensive plan and land use regulations to determine the proposal complies with the provisions of the comprehensive plan and land use regulations.[2] Therefore, if the county was required to exercise discretion in issuing the challenged LUCS, there are procedural and jurisdictional consequences that flow from that exercise of discretion. *Kirpal Light Satsang v. Douglas County*, 18 Or LUBA 651, 664 n 15 (1990). The procedural consequence is that the challenged decision is a "permit," as that term is defined by ORS 215.402(4).[3] Before the county can issue such a permit, it must either conduct a public hearing or provide notice and an opportunity for a local appeal. ORS 215.416(3) and (11). The jurisdictional consequence is that the challenged decision is a land use decision because it *does not* qualify for the exception to the statutory definition of land use decision that is provided at ORS 197.015(10)(b)(A) for certain nondiscretionary decisions that would otherwise constitute

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[1]Petitioner also notes that had notice and a public hearing been held in this matter, petitioner would have been entitled to written notice of the public hearing.

[2]The county apparently believed the determinative comprehensive plan and land use provisions were those that allow farm uses in EFU zones as outright permitted uses. We assume the county's comprehensive plan and land use regulations generally incorporate the statutory EFU provisions.

[3]ORS 215.402(4) provides the following definition:

> "'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. * * *"

land use decisions.[4] LUBA has exclusive jurisdiction to review land use decisions. ORS 197.825(1).

Petitioner argues the county was required to exercise discretion in issuing the disputed LUCS. Intervenor argues the county exercised no discretion because it is not possible to conclude under the relevant statutes that the proposal is anything other than a farm use.[5] If petitioner is correct, we have jurisdiction and the LUCS must be remanded so that the county can comply with the notice and hearing requirements of ORS 215.416(3) and (11). If intervenor is correct, we do not have jurisdiction and this appeal must be dismissed.

The question presented here is not a question of first impression. On two recent occasions, we remanded LUCS decisions involving somewhat similar proposals. *Friends of the Creek v. Jackson County*, 36 Or LUBA 562 (1999), *aff'd* 165 Or App 138, 995 P2d 1204 (2000); *Friends of Clean Living v. Polk County*, 36 Or LUBA 544 (1999). In both cases we concluded the county's determination that those proposals constituted permitted farm uses required the exercise of sufficient interpretive discretion to make them "permits," as defined by ORS 215.402(4).

The facts in this case, with one exception, appear to be indistinguishable from the

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[4]In relevant part, ORS 197.015(10)(a)(A) defines "land use decision" to include:

> "A final decision or determination made by a local government or special district that concerns the * * * application of:
>
> "* * * * *
>
> "(ii) A comprehensive plan provision; [or]
>
> "(iii) A land use regulation[.]"

ORS 197.015(10)(b)(A) provides that the ORS 197.015(10)(a) definition of land use decision *does not include* a local government decision, "[w]hich is made under land use standards which do not require interpretation or the exercise of policy or legal judgment."

[5]ORS 215.203(2)(b) lists a number of examples of "'[c]urrent employment' of land for farm use[.]" One of those examples is "[w]ater impoundments lying in or adjacent to and in common ownership with farm use land[.]" ORS 215.203(2)(b)(G).

material facts in *Friends of Clean Living*, where the county proposed to truck pretreated industrial effluent to a holding pond and then apply the effluent at agronomic rates to a poplar tree farm. The one exception is that the irrigation "water" in *Friends of Clean Living* was pretreated industrial effluent. However, we do not agree with intervenor that this difference in the nature of the irrigation water obviates the need to exercise discretion in determining whether this proposal constitutes a "farm use," as ORS 215.203(2) defines that term. No useful purpose would be served in setting out here the lengthy statutory definition of "farm use" or repeating our explanations in the above-noted cases for why determining whether such facilities are properly viewed as "farm uses" requires the exercise of "interpretation or the exercise of policy or legal judgment," making the exception provided by ORS 197.015(10)(b)(A) inapplicable. *Friends of the Creek*, 36 Or LUBA at 568-70 and *Friends of Clean Living*, 36 Or LUBA at 553-58.

As was the case in *Friends of the Creek* and *Friends of Clean Living*, we expressly do not decide here that the county's decision that the challenged proposal is properly viewed as a farm use is incorrect. In fact, we note that following our remand in *Friends of Clean Living* the county conducted a public hearing and again concluded that the proposal at issue in that case is a farm use. That county decision on remand was appealed to LUBA and we agreed with the county that the proposal in that case is properly viewed as a farm use. *Cox v. Polk County*, ___ Or LUBA ___ (LUBA No. 2000-030, November 2, 2000). However, as our decision in *Cox* makes clear, the county's conclusion that the proposed facility is a farm use may not be a complete answer to the questions that are posed in the LUCS. The LUCS asks whether the proposed facility is allowed under the county's comprehensive plan and land use regulations and, if so, whether notice, hearing and discretionary review are required for approval. In *Cox* we concluded that the facility proposed there was both a farm use and a utility facility and therefore must also be approved as a utility facility under ORS 215.283(1)(d). *Cox*, slip op 13-15.

We do not decide here whether the proposed facility is a "utility facility," within the meaning of ORS 215.283(1)(d). However, we note that petitioner argues that the challenged facility is properly viewed as a utility facility. Petition for Review 9. The LUCS does not address that question, and answering that question clearly will require that the county exercise discretion and interpret the relevant statutes. *Friends of the Creek*, 36 Or LUBA 567.

In conclusion, the LUCS requires that the county determine whether the proposed facility "complies with all applicable local land use requirements." Record 6. Based on the arguments presented by the parties, at a minimum, that will require that the county determine whether the proposal is a farm use and whether it is a utility facility necessary for public service. Both of those determinations require the exercise of sufficient discretion that the challenged decision constitutes both a "land use decision" and a "permit," as those terms are defined by ORS 197.015(10) and 215.402(4).

The county's decision is remanded to provide the (1) notice and hearing or (2) notice of the decision and opportunity for local appeal that is required by ORS 215.416(3) and (11).