BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DONALD G. BARGE,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent,

and

JERRY DORIE and LINDA DORIE,
Intervenors-Respondent.

LUBA No. 2000-085

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Mark J. Greenfield, Portland, filed the petition for review and argued on behalf of petitioner.

Michael E. Judd, Assistant County Counsel, Oregon City, filed the response brief and argued on behalf of respondent.

Daniel H. Kearns, Portland, represented intervenors-respondent.

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

AFFIRMED 12/06/2000

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 county decision granting conditional use approval for a farm and feed store in a Rural Residential Farm/Forest-5 Acres (RRFF-5) zone.

MOTION TO INTERVENE

Jerry Dorie and Linda Dorie, the applicants below, move to intervene on the side of respondent in this appeal. There is no opposition to the motion, and it is allowed.[1]

FACTS

Although the RRFF-5 zone is not an Exclusive Farm Use (EFU) zone, the permissible uses in the RRFF-5 zone are similar to the permissible uses in the EFU zone.[2] ZDO 309.06(A) prohibits uses of land in the RRFF-5 zone that are not specifically authorized by ZDO 309. ZDO 309.05(A)(9) authorizes "[c]ommercial or processing activities that are in conjunction with timber and farm uses" as a conditional use in the RRFF-5 zone.[3]

Intervenors sought conditional use approval, under ZDO 309.05(A)(9), for a farm and feed store. The proposed farm and feed store would be located on a .48-acre parcel near the intersection of Stafford Road and Schatz Road in unincorporated Clackamas County. The subject property currently is used as a large animal veterinary clinic. Intervenors plan to remodel the existing building to house the proposed farm and feed store.

In the application, intervenors stated that the farm and feed store would sell both

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[1]Intervenors did not file a brief.

[2]One of the more significant differences between the two zones is that the RRFF-5 zone imposes a five-acre minimum lot size and allows single family dwellings as a permitted use. Clackamas County Zoning and Development Ordinance (ZDO) 309.03(A); 309.07(B). Approval of single family dwellings in EFU zones is significantly restricted, and minimum lot sizes are much larger.

[3]The language of ZDO 309.05(A)(9) is similar to the language of ORS 215.213(2)(c) and 215.283(2)(a), both of which authorize counties to allow "[c]ommercial activities that are in conjunction with farm use" in EFU zones. Although ZDO 309.05(A)(9) refers to both "timber and farm uses" the parties' arguments and the challenged decision focus almost exclusively on "farm" uses.

farm-related items and nonfarm-related items. The applicant estimated the nonfarm-related items would constitute 10 percent to 20 percent of total sales. Planning staff recommended that the application be denied, taking the position that although "goods not associated with farm uses [could be sold] on an incidental basis" ZDO 309.05(A)(9) requires that "a commercial activity [must be] primarily in conjunction with farm uses." Record 160-61.

The hearings officer approved the application. However, to address the concerns of staff and opponents of the application, he limited nonfarm-related sales to no more than "ten-percent of total gross annual sales." Record 10.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the commercial activities in conjunction with farm uses that are authorized under ZDO 309.05(9)(A) must sell farm-related items *exclusively*. Petitioner contends that "[b]y allowing * * * sales [of nonfarm-related items], even in a small amount, the Hearings Officer improperly construed and violated ZDO 309.05[(A)](9) * * *." Petition for Review 7.

The hearings officer found that the term "farm uses" in ZDO 309.05(A)(9) encompasses both "commercial farms" and "noncommercial farms," as those terms are defined in the ZDO. Record 5. The hearings officer also adopted the following findings:

> "The hearings officer finds that the proposed sales of hay and other types of livestock and poultry feed, veterinary supplies, horse grooming products and similar products are consistent with the types of farm uses in the area. Sales of gardening supplies including seeds, fertilizers, rakes, shovels and other implements are also consistent with (noncommercial) farming uses. Certain types of clothing also may be in conjunction with farm uses, *i.e.* riding helmets, riding boots, gloves and similar items." Record 6.

The hearings officer's decision assumes that a farm and feed store that sold only the above-described goods would qualify as a "[c]ommercial * * * activit[y] that [is] in conjunction with * * * farm uses" under ZDO 309.05(A)(9). We do not understand petitioner to question

that assumption and, therefore, we do not question that assumption either.[4] *See Neighbors for Livability v. City of Beaverton*, 168 Or App 501, 507, ___ P2d ___ (2000) (on appeal LUBA reviews the arguments of the parties rather than the appealed land use decision itself).

The hearings officer also found that some of the items that intervenors propose to sell are not the kinds of items that are sold by the commercial activities authorized by ZDO 309.05(A)(9).

> "The hearings office further finds that sales of feed and care products for domestic animals (dogs and cats) are not in conjunction with farm uses and exceed the scope of ZDO 309.05(A)(9). Sales of crafts, gift sundry and food items for human consumption also exceed the scope of allowed uses. Clothing sales, other than those noted above, also are unrelated to farm uses." Record 6.

In response to planning staff's position that the commercial activities authorized by ZDO 309.05(A)(9) must be primarily in conjunction with farm uses, the hearings officer found that such commercial activities may include incidental sales of nonfarm items to nonfarm customers.

> "The hearings officer finds that sales of incidental quantities of non-farm items should be permitted, provided such incidental sales do not exceed ten-percent of gross sales from the site. * * *" Record 6.[5]

Petitioner's first assignment of error challenges this finding. As noted earlier in this opinion, petitioner adopts an absolute reading of ZDO 309.05(A)(9), and argues that the commercial activities authorized by that subsection cannot be authorized to make any sales that are not in conjunction with farm uses.

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[4]In his argument under the fourth assignment of error, petitioner states:

> "Petitioner begins by noting that a feed store selling *only* farm and forest-related products could be an allowed conditional use in the RRFF-5 zone." Petition for Review 12 (emphasis in original).

[5]The hearings officer imposed a condition that specifically limits sales of nonfarm-related products to less than 10 percent "of total gross annual sales." Record 10.

Our decision in *Stroupe v. Clackamas County*, 28 Or LUBA 107 (1994), supports the hearings officer's interpretation of ZDO 309.05(A)(9) to permit incidental nonfarm sales. In *Stroupe*, the county hearings officer relied on the Supreme Court's decision in *Craven v. Jackson County*, 308 Or 281, 779 P2d 1011 (1989), to interpret and apply ZDO 309.05(A)(9) to deny a request for conditional use approval for a commercial activity because it was "not primarily directed to farm or forest uses." 28 Or LUBA at 110.[6] In affirming the hearings officer's decision, we explained the principle that was derived from *Craven* and applied by the hearings officer to ZDO 309.05(A)(9) in *Stroupe* as follows:

> "* * * The [S]upreme [C]ourt specifically referred to the sale of souvenirs as 'incidental' and concluded that such sales did not necessarily disqualify the winery in that case as a commercial activity in conjunction with farm use, because '[s]uch sales may reinforce the profitability of operations and the likelihood that agricultural use of the land will continue.' It is apparent from the [S]upreme [C]ourt's decision in *Craven* that the fact the winery was primarily a buyer and processor of grapes into wine, and only incidentally a seller of souvenirs, was important.
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> "* * * We conclude the hearings officer may, consistent with *Craven*, interpret ZDO 309.05(A)(9) as requiring that petitioners' *sales and purchases* be primarily to customers and from suppliers that constitute 'timber or farm uses' in the relevant rural area. To the extent petitioners contend *Craven*

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[6]Our decision in *Stroupe* quoted the following language from *Craven*:

> "The phrase upon which the validity of the [permit] turns is 'in conjunction with farm use,' which is not statutorily defined. We believe that, to be 'in conjunction with farm use,' the commercial activity must enhance the farming enterprises of the local agricultural community to which the EFU land hosting that commercial activity relates. The agricultural and commercial activities must occur together in the local community to satisfy the statute. Wine production will provide a local market outlet for grapes of other growers in the area, assisting their agricultural efforts. Hopefully, it will also make [the applicant's] efforts to transform a hayfield into a vineyard successful, thereby increasing both the intensity and value of agricultural products coming from the same acres. Both results fit into the policy of preserving farm land for farm use.
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> "Sales of souvenirs which advertise the winery may cause others to come to the area and buy the produce of the vineyards and farms roundabout. Such sales may reinforce the profitability of operations and the likelihood that agricultural use of the land will continue. At least LUBA could reasonably so find, as it did, and interpret the incidental sales of souvenirs with logos as being 'in conjunction with farm use.'" 308 Or at 289.

> requires otherwise, we reject the contention." *Stroupe*, 28 Or LUBA at 112-13 (citation omitted; emphasis in original).

Although the commercial enterprise at issue in *Stroupe* was found not to be primarily selling to and making purchases from farm and forest customers, the interpretation the hearings officer relied upon in the decision that is at issue in this appeal is consistent with our decision in *Stroupe*. We reject petitioner's argument that the hearings officer erred by granting conditional use approval for a farm and feed store simply because it would make incidental sales of nonfarm items to nonfarm customers.

Petitioner does not argue that limiting nonfarm sales to no more than 10 percent of total sales allows too high a percentage of nonfarm sales to ensure that such sales will be incidential. Even if the petition for review could be read to include such a challenge, there is no argument presented in support of that position. Absent such argument, we conclude that, as limited by the challenged decision, the proposed farm and feed store will be "primarily" a supplier of farm uses and, therefore, a permissible commercial activity under ZDO 309.05(A)(9).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

The condition of approval that the hearings officer imposed to ensure the disputed farm and feed store will sell primarily to farm customers is as follows:

> "Incidental sales of non-farm related products shall not exceed ten-percent of total gross annual sales. The applicant shall submit an annual report to the planning director summarizing the percentage of gross sales from the feed store. Sales shall be broken down by product type or category in sufficient detail to enable the planning director to distinguish between farm- and/or forest-related products and incidental, non-farm sales. The planning director shall have the authority to determine whether particular products qualify as farm- and/or forest-related or incidental sales consistent generally with the discussion above." Record 10.

Petitioner argues that the above-quoted condition constitutes an improper delegation of discretionary land use decision making to the planning director.

The county responds:

> "In considering this assignment [of error], it is important to focus on what the hearings officer actually did in his decision. Primarily, he decided that the proposed use was 'in conjunction with farm use' as long as nonfarm sales were limited to 10% of total sales, and imposed that condition. His decision did not delegate to the planning director the determination whether or not this operation constituted a permissible conditional use. In effect, he simply spelled out a mechanism for the hearings officer to *enforce* the condition, not to determine whether this criterion had been met. The planning director potentially has that role regarding any condition on any land use approval * * *." Respondent's Brief 5-6 (emphasis in original).

We agree with the county. The hearings officer found that the proposed farm and feed store was allowable under ZDO 309.05(A)(9) provided nonfarm sales were limited to 10 percent of total sales. The disputed condition imposes the required limit, and identifies the enforcement mechanism the county will employ to enforce that limit. The challenged condition does not improperly delegate land use decision making. *See Rhyne v. Multnomah County*, 23 Or LUBA 442, 447 (1992) ("Assuming a local government finds compliance * * * with all approval criteria during a first stage * * * where statutory notice and public hearing requirements are observed * * *, it is entirely appropriate to impose conditions of approval to assure those criteria are met and defer responsibility for assuring compliance with those conditions to planning and engineering staff as part of a second stage.").

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Citing *1000 Friends of Oregon v. LCDC (Curry Co.)*, 301 Or 447, 724 P2d 268 (1986) and *Hammack & Associates, Inc. v. Washington County*, 89 Or App 40, 747 P2d 373 (1987), petitioner argues that an exception to Goal 14 (Urbanization) must be approved to allow *urban* uses to locate on *rural* lands. Petitioner contends the RRFF-5 zone is a rural zone, and because no exception to Goal 14 was approved when the subject property was zoned RRFF-5, the commercial activities authorized by ZDO 309.05(A)(9) must be limited to rural uses. Petitioner argues that because the disputed farm and feed store will make sales

of nonfarm-related items and those sales are likely to be made to residents in nearby urban areas, the farm and feed store is properly viewed as an urban use. As an urban use, petitioner argues, the disputed farm and feed store therefore may not allowed under ZDO 309.05(A)(9).

The county answers that a "feed store in an existing 2,100 sq. ft. building with 90% of its sales in conjunction with farm use * * * is clearly not an urban use * * *." Respondent's Brief 7. The county argues the farm and feed store at issue in this appeal bears no similarity to the outdoor amphitheater with seating for thousands of people that was found to be an urban use in *Hammack & Associates, Inc.* We agree with the county. The disputed farm and feed store does not become an urban use simply because 10 percent of its sales are nonfarm-related items and its customer base may include residents in nearby urban areas.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner argues the hearings officer erred "by amending the application and then determining that the amended proposal is allowed as a conditional use in the RRFF-5 zone." Petition for Review 12. According to petitioner, the approved farm and feed store, as conditioned by the hearings officer, is so different from the use the applicants proposed in the application that the hearings officer should have denied the request and required that the applicants submit a new application. Petitioner contends the hearings officer's failure to do so prejudiced petitioner's substantial rights and requires remand.

ORS 215.416(4) specifically provides that "[t]he approval [of a permit] may include such conditions as are authorized by statute or county legislation." ZDO 1303.09 provides that "[a]pproval of any administrative action request may be granted subject to conditions * * *." We have held that counties are under no obligation to impose conditions of approval to allow permit applications to be approved. *Simonson v. Marion County*, 21 Or LUBA 313,

325 (1991).[7] Although the county may not be obligated to develop and apply conditions that would make a land use proposal comply with applicable approval criteria, the county clearly has authority to do so if it wishes. Petitioner may be correct that, at some point, imposing conditions of approval could so change an application for land use approval that imposing such conditions is improper and a new application must be required. However, even if that general proposition is correct, the condition that petitioner objects to in this case does not come close to violating that general proposition. The applicant proposed that sales of nonfarm items would constitute 10 percent to 20 percent of total sales. The hearings officer's condition limits those nonfarm sales to no more than 10 percent of total gross annual sales. This is the kind of change that is a foreseeable result of the public hearing and review process that is required by statute. We agree with the county that such a condition of approval is a kind of "run-of-the-mill" condition that local governments routinely impose in reviewing and approving land use permits to ensure that relevant approval criteria are satisfied. Respondent's Brief 8. The hearings officer did not err in attaching the disputed condition without requiring a new permit application.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioner's fifth assignment of error challenges the hearings officer's failure to tape record all of the April 19, 2000 public hearing in this matter. The assignment of error was included solely in anticipation that the county might argue that petitioner waived his right to

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[7] *But see* ORS 197.522, which was adopted after our decision in *Simonson*, and provides:

> "A local government shall approve an application for a permit, authorization or other approval necessary for the subdivision or partitioning of, or construction on, any land that is consistent with the comprehensive plan and applicable land use regulations or shall impose reasonable conditions on the application to make the proposed activity consistent with the plan and applicable regulations. A local government may deny an application that is inconsistent with the comprehensive plan and applicable land use regulations and that cannot be made consistent through the imposition of reasonable conditions of approval."

raise the issues presented in his other four assignments of error, because the portion of the public hearing that was recorded does not show petitioner raised the issues that are presented in those assignments of error. However, because the county does not assert a waiver defense, the fifth assignment of error provides no basis for reversal or remand.

The fifth assignment of error is denied.

The county's decision is affirmed.