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. 2001-108

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 and Ellen P. Hawes, 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; BRIGGS, Board Chair; BASSHAM, Board Member, participated in the decision.

AFFIRMED 11/01/2001

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 county land use legislation.

MOTION TO INTERVENE

Sabroso Company (Sabroso or intervenor), 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

We remanded the county's first LUCS in this matter, because the county did not follow statutorily required procedures governing permit decisions before reaching its earlier decision. *Farrell v. Jackson County*, 39 Or LUBA 149 (2000). The challenged decision responds to our remand.[1]

The subject property is located near Phoenix, Oregon and includes 88 acres. It is zoned for exclusive farm use (EFU) and part of the property is planted in a "grass hay crop," which requires irrigation. Most of the 88 acres have water rights, and irrigation water has been and currently is supplied to the subject property by the Talent Irrigation District (TID). Sabroso "employs a farmer to manage the irrigation, planting, fertilization and harvesting of" crops on the property. Record 246.

Sabroso is a supplier of processed fruit. The rinse water that results from washing fruit has historically been discharged into the Medford Regional Water Reclamation Facility (MRWRF). Sabroso wishes to apply that rinse water to the subject property. Applying rinse water to the subject property would reduce the amount of TID water needed to irrigate the property and eliminate the need to discharge rinse water into the MRWRF.

[1]Based on the county's first LUCS, DEQ issued a Water Pollution Control Facility Permit and a Water Quality General Permit for the disputed proposal, and the facility has been constructed.

Sabroso has constructed a 400-foot by 200-foot lined storage lagoon and two 15,000 gallon above-ground storage tanks on the property. Sabroso transports the rinse water from its Medford fruit processing plant to the subject property in 6,000-gallon tanker trucks.[2] The rinse water is blended with TID water and applied to the subject property at agronomic rates. The blending of rinse water with TID water apparently serves two purposes. At times of the year when crop irrigation needs are at their highest and rinse water is not sufficient to meet all the crops' needs, the percentage of TID water used will be increased to ensure that crop irrigation needs are met.[3] A second purpose for blending TID water and rinse water is to reduce the potential for odors from rinse water that is stored in the lagoon during times when rinse water production exceeds irrigation needs. Record 72. In addition to diluting the rinse water, Sabroso has installed four aerators, which reduce the potential for anaerobic conditions and their associated odors.[4]

FIRST ASSIGNMENT OF ERROR

Following our remand, petitioner presented detailed arguments to the county that the Sabroso facility is in violation of a number of federal, state and other requirements.[5] Petitioner contends that these allegations of violation of federal and state law must be resolved by the county before it issues its LUCS, because Jackson County Land

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[2]At times of peak plant production, 22 truck trips per day are required.

[3]A table attached to Sabroso's Operations, Management and Monitoring Plan shows the estimated comparative quantities of rinse water and TID water that will be used. Record 122.

[4]The facility was cited for producing odors in the past. Record 530-31. The continuing potential for odors from rinse water stored in the lagoon in the future is one of petitioner's primary concerns.

[5]Petitioner contends that blending TID water with rinse water violates the Federal Clean Waters Act. Petitioner also argues that Sabroso's pond violates the terms of its contract with TID with the result that TID is in violation of (1) the terms of its contract with the United States Department of the Interior and (2) certain Oregon Water Resources Department administrative rules.

Development Ordinance (JCLDO) 285.070(3) and 290.030(4) require that it do so.[6]

The hearings officer responded to petitioner's arguments concerning JCLDO 285.070(3) and 290.030(4) as follows:

> "* * * Objections were raised [concerning] the lawfulness of the application under various state and federal laws and regulations[.]
>
> "This is a LUCS application in which the Hearings Officer's jurisdiction - power to decide - is limited to 'all local planning requirements.' There are no local regulations applicable * * *. Similarly, whether all state and federal laws are complied with is not for the Hearings Officer to decide in connection with a land use application. * * *" Record 13.

Although it is not entirely clear from the above-quoted findings, we understand the hearings officer to have agreed with Sabroso that the cited ordinance provisions do not require that the county conduct an independent inquiry or make an independent decision about whether petitioner's allegations concerning violations of federal and state law are well-founded. The hearings officer apparently agreed with Sabroso that *allegations* of violations of state or federal law are insufficient to implicate those ordinance provisions.

Although JCLDO 285.070(3) is not written in mandatory language, JCLDO 290.030(4) is. *See* n 6. However, the predicate for the mandate that the county "not consider [a] development action," *i.e.*, "[w]here a violation of * * * local ordinance, state, or federal law exists on a property," is somewhat ambiguous. If there were no dispute that a violation existed or there was a final adjudication by a court or a federal or state agency finding a

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[6]JCLDO Chapter 285 governs administration of the JCLDO. JCLDO 285.070 sets out land use permit application procedures. JCLDO 285.070(3) provides as follows:

> "[T]he [Roads, Parks and Planning Services] Department may refuse to accept, or later may reject and deny any application for a land use permit on property where a violation of federal, state or County law exists until the violation is remedied or will be remedied as part of the land use permit application."

JCLDO Chapter 290 sets out "Miscellaneous Provisions." JCLDO 290.030 governs "Enforcement." JCLDO 290.030(4) provides as follows:

> "Where a violation of any other local ordinance, state, or federal law exists on a property, the County shall not consider any development action under this Ordinance."

violation of federal or state law, and the violation had not yet been corrected, the mandate would clearly apply. The mandate might also apply if a notice of violation had been issued by a federal or state agency, even if no final court or agency decision concerning the violation had yet been entered.[7] However, petitioner does not argue that there is any such final court or agency adjudication or even that a notice of violation has been issued and remains unresolved. Although petitioner alleges that the disputed proposal violates state and federal law, Sabroso disputes those allegations. If we understand petitioner correctly, he argues that under JCLDO 285.070(3) and 290.030(4) his allegations concerning possible violations of federal and state law obligate the county to (1) make an independent determination concerning the merits of his allegations and (2) deny the application if it concludes that those allegations are meritorious.

Even if it is possible to read JCLDO 285.070(3) and 290.030(4) to impose such an obligation, we agree with the hearings officer that they do not. If the county intended those provisions to require that the county conduct an unofficial investigation into the merits of any *alleged* violations of state and federal law before considering a land use permit application, we believe they would have expressed that intent far more clearly. As far as we can tell, none of the allegations petitioner presents have resulted in any current enforcement action by responsible federal or state agencies, much less any final decision by an agency or court that the disputed facility violates state or federal law. Alleged violations are not sufficient to trigger the mandate of JCLDO 290.030(4) or the discretionary authority in JCLDO 285.070(3). In addition, neither JCLDO 285.070(3) nor JCLDO 290.030(4) imposes an affirmative obligation on the county to perform its own investigation concerning possible violations of state or federal law.

The first assignment of error is denied.

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[7]We need not and do not resolve that issue here.

SECOND ASSIGNMENT OF ERROR

Petitioner argues the hearings officer's findings that the proposal constitutes a farm use are not adequate and are not supported by substantial evidence in the record.

The hearings officer did not cite the ORS 215.203(2) definition of "farm use" as the legal standard that must be applied to determine whether the proposal is properly viewed as a farm use. However, his findings set out the relevant statutory language from ORS 215.203 and cite three LUBA decisions that discuss the statutory definition. The hearings officer's findings include the following:

> "5. Applicant's use of the subject property constitutes 'farm use' because it is *primarily for the purpose of obtaining a profit in money by raising, harvesting and selling crops*. That the proposal may also obviate the need to dispose of the rinse water into [the] regional [treatment] system, with associated cost savings, is irrelevant in considering whether it constitutes farm use.
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> "6. Water impoundments and the application of stored water as irrigation water to growing crops is an accepted farming practice common to farms of a similar nature to the subject property. It is necessary for the operation of such farms to obtain a profit in money, and is customary in conjunction with farm use of property. That [the] applicant may have other water available for use in irrigating the subject property is not relevant in determining whether applicant's proposal constitutes a 'farm use' and the source of the water is irrelevant to land use considerations." Record 11 (citations omitted; emphasis added).[8]

There is evidence in the record that supports the hearings officer's findings that hay is being grown on the property, that it will be sold at market value, and that irrigation is a common practice for hay crops in this area. Record 238-40, 246-47. We agree with the hearings officer that the source of the water that is being used to irrigate the crop is not relevant in determining whether the use is properly viewed as a farm use. *See Friends of the*

[8]The emphasized language in the hearings officer's findings closely parallels the first sentence of the ORS 215.203(2)(a) definition of farm use which, as relevant, states:

> "'[F]arm use' means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops * * *."

Creek v. Jackson County, 36 Or LUBA 562, 577 (1999), *aff'd* 165 Or App 138, 995 P2d 1204 (2000) ("source of the irrigation water is irrelevant"); *Swenson v. DEQ*, 9 Or LUBA 10, 19 (1983) ("source of the water [is] unimportant"). Similarly, in deciding whether the proposal is a farm use, it is irrelevant that TID water can be used for irrigating the crops instead of using rinse water as proposed. The hearings officer's findings are adequate to demonstrate that the proposal is properly viewed as a farm use, and those findings are supported by substantial evidence.

The second assignment of error is denied.[9]

THIRD ASSIGNMENT OF ERROR

In *Cox v. Polk County*, 39 Or LUBA 1 (2000), *rev'd and rem'd* 174 Or App 332, 25 P3d 970, *rev den* 332 Or 558 (2001) we held that a proposal to irrigate trees with pretreated industrial effluent was both a "farm use," within the meaning of ORS 215.203(2), and a "utility facility necessary for public service" (utility facility), within the meaning of ORS 215.213(1)(d) and 215.283(1)(d), and therefore must be approved as both.[10] Petitioner assigns error to the hearings officer's conclusion that the disputed proposal in this appeal is not properly viewed as a utility facility and therefore need not be approved as such.

In reversing our decision in *Cox*, the Court of Appeals did not consider whether a proposal could be both a farm use and a utility facility, because it concluded that even if such a dual identity is theoretically possible, the facility at issue in *Cox* was not properly viewed as a utility facility. The Court of Appeals reasoned that while irrigating poplar trees might have the practical effect of treating the wastewater that was used for irrigating the poplar

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[9]In 2001, the legislature amended ORS 215.213 and 215.283 to expressly provide that land application of recovered industrial process water to irrigate a farm use qualifies as a farm use. Or Laws 2001, ch 488, §§ 1 and 2. Those amendments became effective June 21, 2001.

[10]The significance of our holding was that while farm uses are allowed outright in EFU zones, at the time of our decision in *Cox*, approval of a utility facility in an EFU zone required a demonstration that it is not feasible to locate the utility facility inside an urban growth boundary. *Cox*, 39 Or LUBA at 15-17.

trees, that was not enough to make what is otherwise properly viewed as a farm use also a utility facility. The Court of Appeals discussed a number of dictionary and statutory definitions of "utility" and similar terms and then explained why it did not view the proposal at issue in that appeal as a utility facility:

> "Based on those plain meanings and statutory usages, we understand the phrase 'utility facility,' as used in ORS 215.283(1)(d) (1997), to mean equipment or apparatus, whether standing alone or as part of a structure, that functions to perform or provide, in whole or in part, a service such as the production, transmission, delivery or furnishing of electricity or natural gas, the purification of drinking water, or the treatment of solid or liquid waste. The equipment comprising the facility need not be extensive or complex[.] However, at a minimum, the facility must include some equipment or apparatus that itself performs the relevant production, transmission or similar function or service. * * *
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> "Based on the above understanding of the legislature's intended meaning of the phrase 'utility facility,' we conclude that the project at issue in this case is not a utility facility. In particular, to the extent that the project includes 'equipment'—including the irrigation equipment that will be used to apply the effluent to the trees and, perhaps, the manmade holding pond—that equipment does not itself perform the function at issue, namely, treatment of the effluent. Rather, 'treatment' of the effluent on the project site, if any, occurs as a result of uptake of components of the effluent by the poplar trees and/or binding of other components with the soil. Thus, even assuming that LUBA was correct that those processes constitute 'treatment' of the effluent, the treatment is not accomplished by the installed equipment or apparatus. Stated another way, a project or site in which the equipment or apparatus that is present does not itself perform the critical function or functions that constitute the 'service' at issue, and in which, conversely, the significant processes are naturally occurring ones, is not a utility facility within the meaning of ORS 215.283(1)(d) (1997). Accordingly, LUBA erred in determining that, because nitrogen in the effluent is taken up by the trees and because other elements in the effluent bind with the soil, the project in this case constitutes a utility facility—specifically, a wastewater treatment facility.
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> "In summary, we conclude that the project is not a utility facility within the meaning of the provisions of ORS 215.283(1)(d) (1997) at the time of the application for this project and that LUBA erred in holding otherwise. Because we so conclude, we need not consider whether LUBA erred in determining that a project can constitute two uses and in determining that such a project must meet the requirements for each." 174 Or App at 343-45 (footnotes omitted).

For purposes of resolving the legal issue presented in this assignment of error, with one possible exception, the facility in *Cox* and the facility at issue here are identical in all material respects. In both cases wastewater is transported from an urban area to a rural EFU-zoned property. That wastewater is placed in a reservoir that was constructed on the property to store the wastewater. The wastewater is then piped to and spray irrigated onto a crop, which is later harvested and sold. Impurities or pollutants in the wastewater are removed to some extent through this irrigation process through naturally occurring forces. The possible difference in this case is the presence of aerators in Sabroso's lagoon.[11]

Petitioner contends that the aerators in Sabroso's lagoon are the "facilities" that were absent in *Cox*. According to petitioner, Sabroso's aerators reduce the rinse water's biological oxygen demand (BOD) and therefore "treat" the rinse water. Petitioner contends Sabroso's proposal is therefore properly viewed as a utility facility.

Although the aerators do reduce the rinse water's BOD, we conclude the aerators do not "treat" the rinse water as we used that term in our decision in *Cox* and as we understand the Court of Appeals to use that term in its decision in *Cox*. As we have already noted, the most significant concern with the disputed proposal is the potential for rinse water that is stored in the lagoon to become anaerobic and generate offensive odors. Sabroso's Operations, Management and Monitoring Plan explains:

> "Nuisance odors will be prevented through a number of mechanisms and recognized best management practices [(BMPs)]. Sabroso's planned BMPs include quick delivery from the processing facility to the site; freshwater dilution and aeration in the pond; and proper and quick land application including proper sprinkler and nozzle sizing. Prolonged process water irrigation on the site is not expected and application rates will not exceed soil water infiltration capacity so ponding will be prevented. Intense odors are not expected because of the process water quality and the management proposed above. Therefore, odors are not expected to limit process water application." Record 72-73.

[11]In our decision in *Cox*, we did not indicate whether the lagoon in that case included aerators.

> "Aerators are placed in the pond to provide mixing and introduce air into the pond water. The process water is high in BOD and additional oxygen helps to reduce the BOD and maintain aerobic conditions in the pond water. Aerobic conditions greatly reduce the potential for adverse odors. Mixing of the process water with the TID water in the pond helps provide uniform application of nutrients throughout the irrigation season." Record 85.

Sabroso's Water Pollution Control Facility Permit includes a condition that makes it clear that the purpose of the aerators is to control odor.[12]

In summary, while potential for odors is a concern, and the aerators are one of the means used to address that concern, the treatment of the rinse water that is provided by Sabroso's facility is essentially identical to the treatment that the Court of Appeals found to be insufficient to make the facility in *Cox* a utility facility. In both cases the noxious qualities of the wastewater were reduced by the soil the wastewater was applied to and the plants growing in that soil. While the aerators do reduce rinse water BOD, they are not employed for the purpose of "treating" the rinse water. Rather, they are employed to control odors, which is a collateral concern. We do not believe the Court of Appeals would view the aerators as treatment facilities.[13]

The third assignment of error is denied.

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[12]The condition states "[t]he wastewater residence time in the storage pond shall be minimized or the wastewater shall be aerated in order to manage and control potential anaerobic conditions and objectionable odors under all operating conditions." Record 58.

[13]In arguing that the aerators are not treatment facilities, Sabroso contends that the rinse water could be applied directly to the hay crop. Respondent's Brief 4, 17. The pages in the record that Sabroso cites in support of that position include a report that was prepared for Sabroso. Record 234-45. That report takes the position that the rinse water could be applied directly to the crops. Record 244.

Although we do not agree with petitioner that the DEQ permits in the record establish that the aerators are required to "treat" the rinse water, neither do those permits clearly establish that the rinse water may be applied directly to the crops. As far as we can tell, the DEQ permits do not expressly address that question one way or the other. We assume that question is not addressed because the plan is to deposit the rinse water in the lagoon rather than to apply rinse water directly to the crops. For the reasons explained in the text, we agree with Sabroso that the purpose for installing the aerators is odor control, which is a collateral concern, rather than part of the "treatment" of the rinse water, which occurs through irrigation of the hay crop and the natural processes that occur as part of that irrigation.

FOURTH ASSIGNMENT OF ERROR

ORS 197.763(6)(e) provides that after the record is closed, the applicant is entitled to at least seven days to submit final written arguments in support of a quasi-judicial permit application. However, the statute states that such final written arguments "shall not include any new evidence." Petitioner argues that the following portion of Sabroso's final written argument improperly presents new evidence:

> "Last, to the extent there remains a question whether Sabroso is required to obtain a section 404 fill permit from the U.S. Army Corps of Engineers under the federal clean water act, *see* exhibit 31, for purposes of its regulatory authority, the Corps has stated:
>
> > "'we generally do not consider the following waters to be "Waters of the United States." * * *
> >
> > "'(c) Artificial Lakes or *ponds* created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stockwatering, *irrigation*, settling basins, or rice growing.' 33 CFR Parts 320 through 330, Regulatory Programs of the Corps of Engineers; Final Rule, 51 Fed. Reg. 41206, 4121 (November 13, 1986) (emphasis [Sabroso's]).
>
> "Accordingly, Sabroso is not required to obtain a section 404 permit to comply with the federal clean water act." Record 23.

The reference to "exhibit 31," is to an Oregon Division of State Lands (DSL) notification form, which states that no removal-fill permit is required by DSL because it does not regulate ponds for farm use if they are created from uplands. That notification form also indicates, however, that "[a] permit may be required by the Corps of Engineers[.]" Record 144.

We agree with petitioner that the quoted language, which Sabroso attributes to the U.S. Army Corps of Engineers, is properly viewed as evidence of the Corps position concerning the requirement for a section 404 permit for the disputed pond. However, even if it is new evidence that was improperly submitted as part of final legal argument under ORS 197.763(6)(e), petitioner makes no attempt to explain why this evidence that the Corps does not require a fill permit for a facility like the one at issue in this appeal is *relevant* evidence.

We assume that petitioner believes this evidence is relevant to the arguments he presents under his first assignment of error that Sabroso's facility is being operated in violation of federal law. However, we have already rejected petitioner's interpretation of JCLDO 285.070(3) and 290.030(4). As we have already explained, *allegations* of violation of federal or state law do not trigger the requirements of those ordinance provisions. The statement attributed to the Corps appears to have been submitted to respond to such allegations. Therefore, any procedural error the county may have committed by accepting that part of Sabroso's final legal argument for its evidentiary value could not have prejudiced petitioner's substantial rights and provides no basis for reversal or remand under ORS 197.835(9)(a)(B). *Donnell v. Union County*, ___ Or LUBA ___ (LUBA No. 2001-090, October 11, 2001), slip op 14; *Dept. of Transportation v. City of Eugene*, 38 Or LUBA 814, 837-38 (2000).

The fourth assignment of error is denied.

The county's decision is affirmed.