BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WAYNE J. HIEBENTHAL, DAVID L. HIEBENTHAL and DELBERT BAILEY,
Petitioners,

vs.

POLK COUNTY,
Respondent,

and

MEDURI FARMS, INC.,
Intervenor-Respondent.

LUBA No. 2003-082

FINAL OPINION
AND ORDER

Appeal from Polk County.

Wayne J. Hiebenthal, David L. Hiebenthal and Delbert Bailey, Dallas, filed the petition for review. Wayne J. Hiebenthal and Delbert Bailey argued on their own behalf.

No appearance by Polk County.

Mark D. Shipman, Salem, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Saalfeld Griggs PC.

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

REMANDED 09/09/2003

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioners appeal a county decision approving a conditional use permit for a fruit processing facility.

MOTION TO INTERVENE

Meduri 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.

FACTS

Intervenor operates a fruit processing facility located on land zoned Exclusive Farm Use (EFU). The facility was first constructed in 1905, and has been owned by intervenor since 1993. Intervenor has substantially expanded the fruit processing business and its facilities since it acquired the subject property. Currently, intervenor employs approximately 40 persons year-round, and employs approximately four times that many on a seasonal basis.[1] In 2001, the main fruit drying facility was destroyed by fire. Petitioners appealed the county's "ministerial" approval of replacement facilities in *Hiebenthal v. Polk County*, 41 Or LUBA 316 (2002). We remanded the county's decision, concluding that the county could not approve an expansion of the prior nonconforming use through a ministerial decision. We also commented that at least some of the uses appeared to fall within the category of "commercial activities that are in conjunction with farm use," a use allowed pursuant to ORS 215.283(2)(a). 41 Or LUBA at 329.

On remand, the county reviewed an application for a conditional use permit to allow essentially the same types and levels of uses that the county had previously approved in its

[1] One of the underlying disputes in this matter is the extent to which intervenor's business is a pre-existing nonconforming use. The challenged decision takes the position that all of the buildings that have been built on the subject property since 1993, with the exception of on 700-foot section of the drying facility, have been constructed without land use approval and that the challenged decision is intervenor's attempt to legalize the use.

prior ministerial decision. The county approved the application for the proposed commercial activities that are in conjunction with farm use, subject to conditions. This appeal followed.

FIRST ASSIGNMENT OF ERROR

The fruit processing that occurs on the subject property includes: (1) receiving fresh and frozen fruit from growers; (2) infusing the fruit with fruit juices and other sweeteners; (3) drying the sweetened fruit; (4) packaging; and (5) shipping the processed fruit to customers, primarily institutions and secondary processors. While there is some dispute as to the percentage of fruit derived from the various sources, the hearings officer found that approximately 75 percent of the fruit processed at intervenor's facility is grown within Oregon, with 25 percent of that fruit being grown in the Willamette Valley. The remaining 25 percent is purchased from national and international fruit growers, including growers located in Mexico and Turkey. The closest fruit supplier is located approximately 12 miles from the subject property. The challenged decision requires that at least 50 acres of intervenor's property be planted in fruit trees, and requires that at least 25 percent of the crop harvested from those 50 acres be processed at intervenor's facility.

Petitioners argue that the disputed fruit processing facility does not qualify as a "commercial activit[y] that [is] in conjunction with farm use" within the meaning of ORS 215.283(2)(a) and Polk County Zoning Ordinance (PCZO) 136.050(I). Petitioners contend that the proposed use is more properly categorized as an industrial use, because none of the fruit processed is grown in the immediate vicinity of the subject property, and the waste generated by the facility requires industrial wastewater treatment. According to petitioners, the scale of intervenor's facility is far greater than is necessary to process the small volume of fruit that is purchased from area growers. Petitioners rely on *Craven v. Jackson County*, 308 Or 281, 779 P2d 1011 (1989), for the proposition that nonfarm uses such as a fruit processing facility may be allowed on EFU-zoned land only if the use is no larger than is necessary to enhance the farming activities of the local agricultural community. According to

petitioners, the proposed fruit processing facility does not support local farmers because: (1) a majority of the fruit is grown outside of the immediate area; and (2) wastewater and dust generated by the facility effectively eliminate agricultural use of adjoining properties.[2]

Intervenor responds that the only limitation on commercial uses in conjunction with farm use is whether the proposed use will violate the standards set out in ORS 215.296(1).[3] According to intervenor, the hearings officer properly found that the fruit processing facility will enhance local markets for fruit growers in the area, will provide an incentive for the owner of the subject property to grow fruit that will be processed at the facility and, as conditioned, will not significantly affect agricultural practices occurring on adjacent and nearby properties consistent with ORS 215.296(1). In addition, intervenor asserts that the conditions of approval imposed by the challenged decision will ensure that any conflicts with adjacent agricultural activities are minimized. Intervenor states that the conditions of approval include: (1) compliance with Oregon Department of Environmental Quality (DEQ)

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[2] At oral argument, petitioners also argued that fruit processing facilities must be limited to the scale allowed by ORS 215.283(1)(u). ORS 215.283(1)(u) allows, as a use permitted in an EFU zone:

> "A facility for the processing of farm crops located on a farm operation that provides at least one-quarter of the farm crops processed at the facility. The building established for the processing facility shall not exceed 10,000 square feet of floor area exclusive of the floor area designated for preparation, storage or other farm use or devote more than 10,000 square feet to the processing activities within another building supporting farm uses. A processing facility shall comply with all applicable siting standards but the standards shall not be applied in a manner that prohibits the siting of the processing facility."

However, that argument is not included in the petition for review and, therefore, we do not consider it further.

[3] ORS 215.283(2)(a) permits "commercial activities that are in conjunction with farm use." ORS 215.296(1) provides, in relevant part:

> "A use allowed under ORS * * * 215.283(2) may be approved only where the local governing body or its designee finds that the use will not:
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> "(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or
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> "(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use."

waste water disposal requirements; (2) the application of dust suppression agents on the gravel roads fronting the processing facilities on the south and west; (3) limitations on noise and light sources so that the fruit processing activities will have a minimal impact on neighboring farm residences.

In *Craven*, the Oregon Supreme Court dealt with the question of whether a winery that would receive grapes from growers in the area, and would include a tasting and sales room where wine and winery related retail items would be sold was properly categorized as a "farm use" that might be permitted outright on EFU-zoned land, or whether it was a "commercial activit[y] that [is] in conjunction with farm use" under ORS 215.283(2)(a), that could be permitted provided the use complied with applicable conditional use criteria.[4] The Court analyzed each aspect of the proposed use, concluding that (1) growing grapes fell within the definition of "farm use" set out in ORS 215.203(2)(a); and (2) wineries and tasting rooms are "accepted farming practices" because they are "customarily utilized in conjunction with" vineyards.[5] The Court also concluded that a winery building may be constructed prior to the maturation of grapes on the property, as a "nonresidential building customarily provided in conjunction with farm use" pursuant to ORS 215.283(1)(f), provided the "structure's size and capacity must be proportional and commensurate to the existing level of dedication of land in that immediate area to the crop for which the structure is suited."[6]

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[4] *Craven* was decided before the legislature amended ORS 215.283(2) to refer to the criteria set out in ORS 215.296.

[5] "Accepted farming practices" are uses that are allowed in EFU zones without further review. ORS 215.203(2)(c) defines "accepted farming practices" as:

> "[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."

[6] The current version of ORS 215.283(1)(f) allows "other buildings" customarily provided in conjunction with farm use rather than "nonresidential buildings" as the statute provided at the time in *Craven*. The minor change in language does not affect our resolution of the assignment of error.

Craven, 308 Or at 286. Turning to the retail sales aspect of the proposed use, the Court held that such retail uses could be allowed as commercial activities that are in conjunction with farm use, so long as the commercial activity "enhance[s] the farming enterprises of the local agricultural community to which the EFU land hosting that commercial activity relates." *Id.* at 289.

As *Craven* makes clear, the limitation on the size of a proposed use that is connected to agricultural activities and how that proposed use is categorized under the EFU statutory scheme is dependent on whether an applicant seeks to have the use approved outright as a "farm use" pursuant to ORS 215.203(2)(a), an "accepted farming practice" pursuant to ORS 215.203(2)(c), an "other building customarily provided in conjunction with farm use" pursuant to ORS 215.283(1)(f) or a "facility for the processing of farm crops" pursuant to ORS 215.283(1)(u). There is no such limitation for uses permitted under ORS 215.283(2)(a). The only limitations placed on uses that may be permitted as "commercial uses in conjunction with farm use" within the meaning of ORS 215.283(2)(a) are that the proposed use must: (1) "enhance the farming enterprises of the local agricultural community to which the EFU land hosting that commercial activity relates;" and (2) satisfy ORS 215.296. *Craven*, 308 Or at 289 and ORS 215.283(2).

In this case, the "farming enterprises of the local community" are small-scale fruit growers who testified that, prior to intervenor's fruit processing activity, they had a limited or non-existent market for their fruit. They also testified that if intervenor's conditional use permit is approved, they have an incentive to continue their agricultural endeavors. In addition, the conditions of approval require intervenor to establish its own orchards, thereby providing for continued agricultural production on the subject property. That evidence is sufficient to establish that the proposed use will "enhance the farming enterprises of the local

agricultural community" and is therefore a "commercial activit[y] that [is] in conjunction with farm use" within the meaning of ORS 215.283(2)(a).[7]

The first assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

PCZO 136.060 provides, in relevant part:

> "To ensure compatibility with farming and forestry activities, the * * * hearings body shall determine that a use authorized by [PCZO 136.020(I)] meet the following requirements:
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> "(A) The proposed use will not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; and
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> "(B) The proposed use will not significantly increase the cost of accepted farm or forest practices on lands devoted to farm or forest use."[8]

Petitioners argue that the hearings officer's conclusion that the fruit processing facility does not significantly increase the cost of accepted farm practices or force a significant change in accepted farm practices is not supported by substantial evidence. Petitioners argue that evidence in the record demonstrates that their farm activities have been significantly hampered by the expansion of the fruit processing operations. Petitioners contend that traffic associated with the facility has increased dust, and has resulted in nearby roads being blocked as semi-trucks wait to access the loading areas and as workers arrive and leave the facility. Petitioners further argue that the noise from the dryer and the horns from the trucks have disturbed cattle and have made it difficult to perform certain farm chores. Petitioners also point out that intervenor violated DEQ wastewater discharge rules in the past, and contend that it is unlikely that intervenor will be complying with those rules in the future. According to petitioners, the impact of these conflicts has resulted in the need to: (1)

[7] We address petitioner's contentions that ORS 215.296 is not satisfied in our discussion under the third assignment of error.

[8] ORS 215.296(1) imposes the identical standards. *See* n 3 (setting out ORS 215.296(1)).

dredge irrigation ditches to clear out the wastewater residue; (2) purchase additional cattle feed to compensate for the decline in hay production caused by dust; and (3) limit the types of farming operations to those that are not affected by fruit wastewater, dust or noise. Petitioners argue that, at the very least, the size of the fruit processing facility should be reduced to eliminate dust and traffic conflicts, to reduce the noise from the dryers, and to reduce the wastewater generated by the facility.

Intervenor responds that there is evidence in the record that petitioners overstate both their existing agricultural practices and the impact of the fruit processing activities on those practices. In addition, intervenor points out that the hearings officer imposed conditions of approval to ensure that the anticipated impacts will not *significantly* affect accepted farm and forest practices on nearby properties.

As a review body, we are authorized to reverse or remand the challenged decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff'd* 108 Or App 339, 815 P2d 233 (1991). In reviewing the evidence, we may not substitute our judgment for that of the local decision maker. Rather, we must consider all the evidence in the record to which we are directed, and determine whether, based on that evidence, the local decision maker's conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

The hearings officer adopted five and a half pages of findings addressing PCZO 136.060. With respect to traffic, the hearings officer relied on a traffic analysis performed by intervenor's traffic engineer to conclude that the number of vehicles using the nearby gravel roads "fall well below capacity and below normal levels for these types of roadways." Record 33. The hearings officer found, to the extent that dust may have an impact on nearby

farm practices, that the dust generated by the trucks could be minimized by the imposition of conditions that require dust suppression. The hearings officer imposed conditions of approval that require that venting from the fruit dryer be placed to direct exhaust noise back onto the subject property rather than toward the farm to the west, and that semi-trucks be equipped with special back-up beepers to lessen the noise from trucks backing into the loading areas. The hearings officer concluded that those conditions are adequate to ameliorate the incidental impact the noise generated by the fruit processing facility has on neighboring farm practices. Finally, the hearings officer cited to evidence in the record regarding intervenor's actions to comply with DEQ regulations and concluded that the efforts that intervenor had undertaken to correct wastewater discharge violations is a reasonable indicator of intervenor's good faith attempts to comply with DEQ regulations, and imposed conditions of approval that require continued compliance with those regulations. All of the hearings officer's conclusions are supported by substantial evidence. Petitioners' disagreement with those conclusions does not mean they are not supported by substantial evidence.

The third assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

PCZO 119.100 provides:

> "Discontinuance of * * * any conditional use for a continuous period of six (6) months shall be deemed an abandonment of such conditional use."

Because the conditional use approved is seasonal in nature, the hearings officer concluded that it was more appropriate to extend the period of discontinuance to one year.[9] Petitioners argue:

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[9] The hearings officer's findings state, in relevant part:

> "PCZO * * * 119.100 states that discontinuance of * * * any conditional use for a continuous period of six months shall be deemed an abandonment of such conditional use. However, because the proposed commercial activity in this case (farm product processing) most likely will be seasonal, the discontinuance of the proposed conditional use for a one-year period

> "In direct conflict with [PCZO 119.100], the Hearings Officer['s] decision allows the subject conditional use to be discontinued for more than six months * * *. Because the Hearings Officer's decision is inconsistent with the express language of the PCZO, this decision must be reversed or remanded." Petition for Review 21.

PCZO 119.060 permits a hearings officer to change the requirements of the ordinance, provided a concurrent variance request is submitted.[10] Here, the hearings officer adopted a condition of approval that is flatly inconsistent with PCZO 119.100. In the absence of some evidence that the hearings officer imposed the condition in response to a variance request, we conclude that the hearings officer erred in extending the time that the use may be discontinued in order to avoid the legal conclusion that the conditional use has been abandoned.[11]

The second assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

Petitioners argue that the fruit processing facility is a much more intensive use than the EFU-zoned property can sustain. According to petitioners, the wastewater that is generated by the facility and dispersed over intervenor's orchards has killed the orchards, and has drained into petitioner Bailey's ditches. Petitioners contend that such a use is not

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> would be reasonable and appropriate for constituting an abandonment of this proposed conditional use." Record 39.

[10] PCZO 119.060 provides, in relevant part:

> "Any reduction or change of * * * requirements of the ordinance must be considered as varying the ordinance and must be requested as a concurrent variance request, as described in [PCZO] 119.050."

PCZO 119.050 provides:

> "Variances may be processed concurrently and in conjunction with a conditional use application and when so processed will not require an additional public hearing or additional filing fee."

[11] However, we note that a seasonal fluctuation in business activity might not necessarily equal a "discontinuance," "interruption," or "abandonment." *Polk County v. Martin*, 292 Or 69, 76, 636 P2d 952 (1981).

consistent with a Statewide Planning Goal 3 (Agricultural Lands) guideline that requires local "development actions" "not exceed the carrying capacity of [air, land and water resources of the planning area]."[12] Petitioners argue that they raised this issue below, but that the hearings officer did not address this concern in the challenged decision.

Failure to address a specific issue raised by a party below, where that issue is relevant to compliance with an applicable approval criterion, is a basis for remand. *Moore v. Clackamas County*, 29 Or LUBA 372, 381 (1995). However, we do not agree with petitioners that the cited guideline imposes an approval standard for a permit for a use authorized under ORS 215.283(2) and local implementing regulations. Absent a more focused argument from petitioners that explains why such is the case, we decline to conclude that the planning guideline provides an approval standard in this case.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

PCZO 136.050(I) requires that at least "a portion [of the farm products processed as a commercial use in conjunction with farm use must be] produced by the subject farming operation." The fruit processing facility is located on tax lot 201. Intervenor also owns tax lots 200 and 600, which are adjacent to tax lot 201. Combined, the three tax lots include 105.04 acres. Record 21. The hearings officer found that approximately 50 acres of the subject property, comprised of tax lots 200, 201 and 600, was planted in fruit trees in 2000. As discussed earlier, the hearings officer conditioned approval of the fruit processing facility upon a showing that 50 acres of the subject property will be planted with crops that will, in part, be processed at the facility.

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[12] Goal 3, Guidelines, Planning, paragraph 2, provides:

> "Plans providing for the preservation and maintenance of farm land for farm use, should consider as a major determinant the carrying capacity of the air, land and water resources of the planning area. The land conservation and development actions provided for by such plans should not exceed the carrying capacity of such resources."

Petitioners argue that the hearings officer's conclusion that the fruit processing facility is located on a 105.04-acre tract, and that 50 acres of that tract can be put to orchard use is not supported by substantial evidence. Petitioners point to evidence that at least a 24-acre portion of tax lot 600 is included in a list of adjacent farming operations, and is not properly included in the 105.04-acre total.[13] According to petitioners, the hearings officer relied on testimony from intervenor to conclude that the 50-acre planting requirement could be met.[14] However, petitioners argue, that evidence is not reliable, because it assumes that the subject property includes 215 acres, 110 acres more than are actually included in tax lots 200, 201 and 600.

Petitioners also dispute the evidence from intervenor that intervenor is growing fruit on its property. Petitioners point to evidence in the record that undermines that evidence, and argue that, in light of the contravening evidence, the hearings officer's conclusion that at least 50 acres of the subject property is planted in fruit trees is not supported by substantial evidence.

The hearings officer found that

> "PCZO 136.050(I) is the sort of provision that breeds contention, in that it does not expressly quantify the term 'portion.' [Opponents are] undoubtedly correct in asserting that one or two pieces of fruit would not constitute a 'portion' by any reasonable interpretation, but it is less clear that a 'significant' amount of crops processed must originate on the subject property * * *. Moreover, PCZO 136.050(I) does not expressly state whether the 'portion,' whatever amount that may be, must come from crops currently growing when the application is submitted, or may come from proposed plantings. Opponents predicate their arguments on the allegedly poor yield of current plantings. Applicant points out, on the other hand, that in *Craven*, the

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[13] It is not clear from the record or petitioners' arguments whether tax lot 600 includes only 24 acres, or whether it is larger. However, the actual size of tax lot 600 is not material to our resolution of this assignment of error.

[14] Petitioners cite to intervenor's comments at Record 71, which state:

> "* * * [Thirty] acres of the subject property is currently planted in Cherries and 85 acres are planted in prunes. Further * * * another 100 acres of the property will be planted in Cherries."

> applicant had planted only some of its property, and was not yet harvesting any grapes from its own land [when the conditional use permit for the winery and associated commercial activities was approved.]
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> "* * * Based on a review of year 2000 aerial photos, the subject [property] is planted in approximately 50 acres of mature orchard trees. The Hearings Officer finds that in order to satisfy the 'portion' requirement and provide for alternative means to market farm products such as direct sales and still ensure that the proposed processing facility is established in conjunction with the existing farming operation on the subject [property], the applicant * * * must process at least 25% of its 5-year average of harvested orchard crop from the subject [property] at the proposed processing facility. The Hearings Officer finds that a five-year reporting requirement would allow for fluctuations in the local economy and agricultural markets. The applicant shall retain at least 50 acres of orchard trees on the subject [property.] Verification of the required volume shall be established by submission of 5-year crop harvest and processing records for the subject [property] and a signed affidavit from the orchard manager to the Polk County Planning Division. The first crop report and affidavit is due to the Planning Division after the harvest of the 2005 crop. * * * A condition to this effect shall be included in any approval of the application." Record 31.

It is fairly clear from the record that the subject property includes approximately 105 acres and is comprised of tax lots 200, 201 and 600. The fact that there may be evidence that inadvertently includes a portion of tax lot 600 in a list of adjacent farming operations, and does not include it with the remainder of property owned by intervenor does not undermine the evidence relied upon by the hearings officer that the subject property encompasses 105 acres. Also, contrary to petitioners' assertions, the hearings officer did not rely on testimony from intervenor about the number of acres that are or will be planted to conclude that a portion of the subject property currently contains *any* productive orchard. Rather, the hearings officer concluded that the standard is satisfied if intervenor: (1) plants 50 acres in fruit trees that will produce a first yield by 2005 at the latest; (2) keeps 50 acres in active agricultural cultivation; and (3) processes at least 25 percent of the yield from the 50 acres at intervenor's fruit processing facility. Petitioners' assignment of error provides no basis for reversal or remand.

The fifth assignment of error is denied.

The county's decision is remanded.