BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOHN EHLER, YVONNE EHLER
and BROKEN ARROW FARM,
*Petitioners,*

vs.

WASHINGTON COUNTY,
*Respondent,*

and

CHARLES PRENTICE, NADINE PRENTICE,
STEVEN HAUGEN and ELIZABETH LUX HAUGEN,
*Intervenors-Respondent.*

LUBA No. 2006-094

FINAL OPINION
AND ORDER

Appeal from Washington County.

Jeff N. Evans, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief were Gregory S. Hathaway, Christopher P. Koback and Davis Wright Tremaine LLP.

Christopher A. Gilmore, Assistant County Counsel, Hillsboro, filed a response brief and argued on behalf of respondent.

Caroline E.K. MacLaren, Portland, filed a response brief and argued on behalf of intervenors-respondent. With her on the brief were Stark Ackerman, Margaret Schroeder and Black Helterline LLP.

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

AFFIRMED 10/06/2006

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 a hearings officer's determination that petitioners need a development permit to place 100,000 cubic yards of fill on approximately 13 acres zoned for exclusive farm use (EFU).

**FACTS**

The subject property is a narrow, rectangular 19-acre parcel with predominantly high-value farm soils. The parcel is developed with a dwelling and outbuildings in the northern end. An unnamed stream crosses the parcel from east to west, dividing the northern third of the parcel from the southern two thirds. Approximately 13 acres lie south of the creek.

The subject property was farmed up until the 1990s. In 1995, the petitioners or their lessees or agents applied to Washington County for a grading and fill permit, which was approved. Two years later, Washington County prohibited further filling on the site because the petitioners and/or their agents had allowed the quantity and height of fill to exceed the amount and fill height allowed under the permit. In 2003, the county granted petitioners a second permit to place fill on their property. In 2005, the county issued an order prohibiting petitioner from adding more fill to site, after determining that petitioners had violated at least two conditions of approval in the 2003 permit.

Since 1995, when the property was first used as a landfill, at least 61,000 cubic yards of debris were placed on the property, including rocks, asphalt, chunks of cement, and large boulders from a large construction project. The debris was randomly placed on most of the 13-acre area south of the unnamed stream. Subsequently, petitioners bulldozed the rock and debris into two large piles, stripping much of the topsoil in the process and mixing it in with the rock piles. At present, most of the 13-acre area south of the stream has no topsoil. A portion at the southern end of the parcel has topsoil remaining.

In 2005, petitioners applied to the county for a grading permit to place approximately 150,000 cubic yards of fill on the 13-acre portion of the subject parcel south of the stream. The requested amount was later reduced to 100,000 cubic yards. The stated purpose of the fill is to restore the parcel to a farmable condition. The application proposes that the rock piles will be graded to reduce their height, and then fill would be placed on the 13 acres to a uniform height of about four feet above the existing grade, in three annual phases starting from the south end of the property. The application does not identify the source of the proposed fill, but petitioners represented that the fill would include topsoil, clay and organic subsoil. Petitioners propose to charge a fee to allow people to dump fill on the property.

There is no dispute that the proposed filling and grading constitutes "development" as defined by Washington County Community Development Code (CDC) 106.[1] CDC 201-1 requires a permit for all development unless that development is excluded from permit requirements pursuant to CDC 201-2. Petitioners asserted to the county that the proposed filling and grading is exempt from the requirement to obtain a development permit under CDC 201-2.12(G), which exempts "[c]ustomarily accepted agricultural activities, including preparation of land for cultivation[.]"[2]

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[1] CDC 106-57 defines "development" as "[a]ny man-made change to improved or unimproved real estate, including but not limited to * * * site alteration such as that due to land surface mining, dredging, grading construction of earthen berms, paving, improvements for use as parking, excavation or clearing."

[2] CDC 201-1 prohibits any person from engaging in "development" without a development permit, unless CDC 201-2 excludes that activity from the requirement to obtain a development permit. CDC 201-2.12(G) excludes the following activities from the requirement for a development permit:

> "*Customarily accepted agricultural activities, including preparation of land for cultivation,* other than grading for roadwork or pads for structures. Unless waived by the Building Official * * *, these activities are subject to all of the following:
>
> "(1) No piping of drainages serving off-site properties;
>
> "(2) If fill is proposed, finished grade is no higher than adjacent property at the property line, or fill or excavation area is outside the district setbacks;
>
> "(3) Preserves existing drainage pattern, including direction and flow capacity and velocity of an existing drainage swale or channel. A drainage swale is

The hearings officer conducted a hearing, and on May 8, 2006 issued a decision concluding that petitioners had not carried their burden of proof that the proposed grading and fill is a "customarily accepted agricultural activity" for purposes of CDC 201-2.12(G), and therefore the proposed activity required a development permit. The hearings officer also concluded that, even if the proposed activity constituted a "customarily accepted agricultural activity," a development permit would be required because the proposal to grade and place fill in three annual phases failed to comply with the requirements of CDC 201-2.12(G)(7), which requires that the "grading area" be returned to farm use within one year of commencing site grading.

This appeal followed.

**FIRST ASSIGNMENT OF ERROR**

Under this assignment of error, petitioners contend that the hearings officer misconstrued CDC 201-2.12(G) and adopted findings not supported by substantial evidence.

**A. Interpretation of CDC 201-2.12(G)**

Petitioners first argue that the hearings officer misconstrued CDC 201-2.12(G) in concluding that the proposed grading and fill is not a customarily accepted agricultural activity exempt from the requirement to obtain a development permit. According to petitioners, CDC 201-2.12(G) is unambiguous in providing that "customarily accepted

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a local depression, which conveys water to or from an adjoining property. All ponds shall be located outside drainage channels;

"(4) Except for ponds, surface material is either topsoil or if utilized for nursery purposes, the material is commonly used to grow nursery crops;

"(5) Fill material does not contain hazardous or contaminated substances, putrescibles or material such as asphalt, concrete or tires;

"(6) Compliance with Oregon Administrative Rule Chapter 603, Division 95 (Agricultural Water Quality Management Program);

"(7) Grading area is returned to farm use within one calendar year of commencing site grading." (Emphasis added).

agricultural activity" includes "preparation of land for cultivation." Because the proposed grading and fill activity is intended to restore the land to farming use, petitioners argue, it constitutes "preparation of land for cultivation," and therefore is, without further inquiry, a "customarily accepted agricultural activity." Petitioners contend that the hearings officer erred in viewing CDC 201-2.12(G) to be ambiguous and requiring interpretation. Further, petitioners argue that in interpreting CDC 201-2.12(G) the hearings officer essentially created additional criteria that do not exist in that code provision.

The hearings officer found that the phrase "preparation of land for cultivation" is an example of a "customarily accepted agricultural activity," and that both phrases are ambiguous, capable of more than one reasonable meaning and requiring interpretation under the present circumstances. Specifically, the hearings officer found that given the nature and extent of the proposed grading and fill activities, in order to determine whether those activities constituted the "preparation of land for cultivation," it was necessary to determine whether the proposed activities are "customarily accepted agricultural activit[ies]."[3] The hearings officer concluded that petitioners had failed to demonstrate that the proposed activities are customarily accepted agricultural practices, noting the lack of evidence that it is

[3] The hearings officer's decision states, in relevant part:

> "The hearings officer finds that the phrase 'preparation of land for cultivation' is ambiguous, because it is capable of more than one reasonable meaning. Any land clearing, filling, grading or development could ultimately allow farming to occur in the future. However, the hearings officer finds that it would be inconsistent with the legislative policies reflected in the purpose and use regulations of the EFU zone and the rules and statutes that zone implements to construe the phrase 'preparation of land for cultivation' in CDC 201-2.12(G) to allow any development, with the mere promise of farm use to follow and without ongoing farm use of the land. The hearings officer finds that it is unreasonable to construe that phrase to prevent the County from reviewing the nature, scope, duration and other characteristics of the preparation in question, because it renders the term meaningless in CDC 201-2.12(G), contrary to the rules of statutory construction. Therefore, the hearings officer concludes that the County can review the nature, scope and other characteristics of the proposed preparatory activities to determine whether they qualify as customarily accepted agricultural activities." Record 20-21 (footnote omitted).

customary for farms of a similar size to import 100,000 cubic yards of fill, or to charge a fee to place fill on the site.

Petitioners disagree that CDC 201-2.12(G) is ambiguous, arguing that the phrase "preparation of land for cultivation" should be read in isolation and should be understood to encompass any grading or fill activity intended to prepare land for cultivation, whether that activity is a "customarily accepted agricultural activity" or not. We disagree. The phrase "preparation of land for cultivation" is clearly a listed example of the broader class of "customarily accepted agricultural activity." Not all activities that can be described as "preparation of land for cultivation" necessarily fall within the class of "customarily accepted agricultural activit[ies]." In many cases it may be obvious that a proposed preparation of land for cultivation falls within the class of "customarily accepted agricultural activity," so that no further inquiry is necessary, but the present circumstance is not one of them. As the hearings officer recognized, given the past history of the subject property as a landfill, the scale and nature of the proposed fill, and the proposal to charge fees to allow soil to be deposited on the site, it was reasonable for the county to inquire into whether the proposed grading and fill activity is the "preparation of land for cultivation" that is a "customarily accepted agricultural activity" and exempt from permit requirements, or something else that may require a development permit. The hearings officer did not err in concluding that interpretation of CDC 201-2.12(G) is necessary, and further in evaluating whether the proposed grading and fill activity is a "customarily accepted agricultural activity."

Petitioners argue next that the hearings officer erred in interpreting CDC 201-2.12(G) to include an implicit requirement that there be an "ongoing farming operation" in order to qualify as a "preparation of land for cultivation" as a "customarily accepted agricultural activity." According to petitioners, the hearings officer impermissibly added an eighth requirement to the seven requirements listed in CDC 201-2.12(G).

Again, we disagree. The question before the hearings officer is how to categorize the proposed use. Is it the "preparation of land for cultivation" that is a "customarily accepted agricultural activity" and therefore exempt from the requirement to obtain a development permit? Or is it a different use (perhaps a hybrid use) that under the county's code would require a development permit? To answer that question, the hearings officer had to evaluate evidence and argument regarding what is a "customarily accepted agricultural activity." Any such inquiry is necessarily fact-specific. Among the facts the hearings officer considered was whether there is any ongoing agricultural activity on the property. If there were, that would lend (some) evidentiary support to petitioners' claim that the proposed grading and fill activity was indeed the preparation of land for cultivation and an agricultural activity, as opposed to something else, such as a landfill. Petitioners are correct that the absence of ongoing agricultural activity does not necessarily mean that grading and fill activity cannot constitute the "preparation of land" for *future* cultivation of lands currently not in agricultural use. However, the absence of ongoing agricultural activity, combined with the lack of specificity regarding petitioners' proposed future agricultural activity, has at least some bearing on the question before the hearings officer. In any case, it is clear that the hearings officer did not treat the existence of ongoing agricultural activity as a *requirement* to qualify under CDC 201-2.12(G); rather, he evaluated it only as a relevant fact in answering the question posed to him. Petitioners have not demonstrated that the hearings officer erred in doing so.

### B. Evidence Regarding Whether the Proposed Activity is a Customarily Accepted Agricultural Activity

Petitioners next challenge the hearings officer's treatment of evidence petitioners submitted to support their claim that the proposed activity is a "customarily accepted agricultural activity." Further, petitioners dispute the hearings officer's reliance on the absence of evidence that other, similar farms have (1) applied 100,000 cubic yards of fill, and (2) charged people a fee to place fill on agricultural land.

Petitioners argue that the hearings officer overlooked portions of letters submitted by the Oregon Department of Agriculture and the Tualatin Soil and Water Conservation District. The hearings officer concluded that the letters provide little support for petitioners' claim that the proposed grading and fill is a customarily accepted agricultural activity.[4] According to petitioners, fairly read, those two letters in fact provide significant support for petitioners' claim that the proposed grading and fill is a customarily accepted agricultural activity.

From our review of the two letters, the hearings officer's characterization of their contents seems more accurate to us than petitioners'. In any case, even if petitioners' characterization of the letters is more accurate, the relevant question is whether the hearings officer erred in concluding that the record as a whole does not support petitioners' claim that the proposed grading and fill is a customarily accepted agricultural activity. In the present posture, petitioners can prevail in an evidentiary challenge to the hearings officer's findings only if they demonstrate that no reasonable person could reach the conclusion the hearings officer did, considering the evidence in the whole record.[5] Petitioners make no attempt to do

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

> "The hearings officer finds that the written testimony from the Oregon Department of Agriculture and Tualatin Soil and Water Conservation District do not say that the proposed filling and grading is a customarily accepted agricultural activity. Each is phrased in terms of *if the County approves the permit, here is what you should do to promote farm use of the filled area…* While the letters acknowledge that fill could be placed on the property, they are hardly a ringing endorsement of that approach to remedying existing conditions on the site. Both characterize the site as in need of remediation. The Soil and Water Conservation District letter expressly raises the issue of excavation of the poor soils as an alternative to filling. Thus the only substantial evidence in support of the conclusion that the proposed filling and grading is a customarily accepted agricultural activity is from [petitioners' consultants]. The hearings officer finds that neither [letter] supports [the consultants'] testimony that the proposed filling and grading is a customarily accepted agricultural activity with corroborating evidence, and the substantial evidence in the record to the contrary—even from them—is far more persuasive." Record 20 (italics in original).

[5] 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. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984). In reviewing the evidence, we may not substitute our judgment for that of the

so. The hearings officer evaluated a great deal of testimony, including the two letters, and concluded that the evidence in the whole record contrary to petitioners' position was "far more persuasive." In arguing that the hearings officer failed to give the proper weight to the two letters, petitioners are in effect asking us to reweigh the evidence before the hearings officer. That we cannot do.

In a similar vein, petitioners argue that the hearings officer erred in basing his decision, in part, on petitioners' failure to identify any other farms that have applied such a large volume of fill to such a small area to prepare land for cultivation and farm use.[6] According to petitioners, there is no dispute that adding fill dirt to land to prepare the land for cultivation is a customary farm practice; the fact that the subject property is unique and requires a relatively large volume of fill over a small area to restore it to agricultural use does not mean that the proposed fill is not a customarily accepted agricultural practice.

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local decision maker. Rather, we must consider and weigh 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). If there is substantial evidence in the whole record to support the county's decision, LUBA will defer to it, notwithstanding that reasonable people could draw different conclusions from the evidence. *Adler v. City of Portland*, 25 Or LUBA 546, 554 (1993). Where the evidence is conflicting, if a reasonable person could reach the decision the county made, in view of all the evidence in the record, LUBA will defer to the county's choice between conflicting evidence. *Mazeski v. Wasco County*, 28 Or LUBA 178, 184 (1994), *aff'd* 133 Or App 258, 890 P2d 455 (1995).

[6] Petitioners cited to the following finding:

> "The hearings officer finds that the substantial evidence that the applicant provided to respond to the 'customarily accepted agricultural practice' issue does not respond precisely to the applicable standard. The written and oral testimony is that no one has filled or has knowledge of others who have filled 13 acres of their 19-acre farm property with 100,000 cubic yards of material over a three-year period. There is no testimony or evidence that farm use of the site after proposed filling will produce a profit in money. Therefore there is not substantial evidence in the record that the applicant intends to use a mode of operation that is common to farms of a similar nature; there is no analysis of farms of a similar nature; no 19-acre farms are identified where a profit in money from farming has resulted from the application of 100,000 cubic yards of fill. What the evidence supports is a conclusion that the site is unique. But the 'customarily accepted agricultural activity' rule does not have a corollary for property where non-customary means have to be used to make the property capable for cultivation. What the applicant proposes is not customary, because it is not common to farms of a similar nature and is not commonly used in conjunction with farm use. It would be an uncommon activity to place 100,000 cubic yards of fill on a 19-acre farm. That the site is uncommon does not change the law." Record 21 (footnote omitted).

We disagree with petitioners that the hearings officer erred in considering evidence or the lack of evidence that other farms have placed similar volumes of fill on such a limited area in order to produce a profit in money from farming. Any inquiry into what is a customarily accepted agricultural activity necessarily requires evaluating what practices other similar farms have engaged in. The fact that no other farms have engaged in grading and fill at the scale and manner proposed here is some indication that the proposed grading and fill is not a "customarily accepted agricultural activity." Although CDC 201-2.12(G) does not impose an explicit limit on the volume or depth of fill, it seems obvious that evaluation of volume or depth is a legitimate consideration in answering the question posed to the hearings officer. For example, a proposal to place fill at volumes or in a manner that exceeds agronomic necessity would tend to suggest that the proposal is something other than a customarily accepted agricultural activity.[7] The hearings officer did not err in taking into account the lack of evidence that other farms have placed similar volumes of fill on such a limited area.

Finally, petitioners argue that the hearings officer erred in considering whether it is customary for farmers to charge a fee to allow people to place good-quality soil on their farm.[8] According to petitioners, it is irrelevant whether petitioners must pay for topsoil or

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[7] In this respect, we note that the hearings officer found that petitioners proposed to place four feet of soil on a three to five acre portion of the property south of the creek where filling did not occur in the past and where soils currently exist to a depth that has supported agricultural uses in the past. Record 23. Petitioners' consultant testified that at least part of this southern portion is currently farmable. Record 12. That portion presumably retains the high-value farm soils that once predominated on the subject property. Petitioners do not explain why it is a customarily acceptable farming practice to cover high-value farm soils with four feet of soil of indeterminate quality.

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

> "The hearings officer also finds that there is no substantial evidence in the record that it is a customary practice for farmers to charge people to place good-quality fill on their farm. On the contrary, what is more common is for farmers to pay for good quality soil. * * * Therefore charging people to place fill on the site contributes to the conclusion that what is proposed is not a customarily accepted agricultural activity. It contributes to the conclusion that the applicant proposes a landfill for soil and subsoil if not for demolition debris generally. That conclusion is certainly not rebutted by the past use of the site by the applicant and his lessees

whether they charge a fee to those who need a place dispose of such soil. Petitioners contend that as long as the proposed fill complies with CDC 201-2.12(G)(4) and (5), that is, includes only topsoil and does not include hazardous or contaminated substances, putrescibles, or material such as asphalt, concrete or tires, the county has no authority to consider or regulate private financial arrangements such as how fill is procured.

Again, the question before the hearings officer was whether the proposed fill is a customarily accepted agricultural activity that is allowed in the EFU zone without a development permit, or something else that may require a development permit. Whether it is customary for farmers to charge a fee to persons seeking to deposit soil of unspecified agricultural quality on their farm land is a relevant consideration in answering that question, particularly given the history of the subject property as a landfill, the lack of ongoing agricultural activity, and the unspecified nature of future agricultural activities. The hearings officer did not err in considering evidence or the lack of evidence regarding fees, among other considerations, in answering the question posed to him.

In sum, petitioners have not demonstrated that the hearings officer misconstrued the applicable law or made a decision unsupported by substantial evidence. The first assignment of error is denied.

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and agents. The failure of the applicant to identify the source for the fill material contributes to the conclusion that the proposed filling is not a customarily accepted agricultural activity, because there is no certainty about the quality of the fill, which would be an important to a farmer who plans to cultivate that land for a profit.

"* * * The hearings officer finds that charging a fee to place fill on the site affects the nature of the use. It becomes a profit-making enterprise other than a farm use. The applicant has no motivation to use the property for farming when he can profit from its use for other purposes. The applicant did not show that the fee would be the minimum necessary to pay for proposed filling and grading, assuming that was a legitimate purpose. The applicant did not proposed any limit to the fees charged. He did not show that it is feasible to get people to pay to place 100,000 cubic yards of suitable fill material, or what the applicant will do if that does not happen. It is not apparent how much money will be made from the landfilling process as compared to the farm use of the property, but given the very limited agricultural use envisioned, it appears the tail will wag the dog. It makes the proposal appear as a Trojan Horse at the gates of the County's high value farmland." Record 21-22.

**SECOND AND THIRD ASSIGNMENTS OF ERROR**

In the second assignment of error, petitioners challenge the hearings officer's alternative conclusion that the proposed grading and fill does not comply with CDC 201-2.12(G)(7), which requires that the "grading area [be] returned to farm use within one calendar year of commencing site grading." In the third assignment of error, petitioners challenge the hearings officer's alternative conclusion that the proposed grading and fill activity does not comply with CDC 410-3.1, which is a code provision applicable to grading permits requiring that the proposed activity not create a site disturbance greater than required.

Because we have affirmed the hearings officer's determination that petitioner's proposed grading and fill activities is not a customarily accepted agricultural activity, we need not address the hearings officer's alternative conclusion that the proposal fails to satisfy one of the seven requirements that would apply if it were a customarily acceptable agricultural activity.

Similarly, any error the hearings officer may have made in addressing CDC 410-1.3 does not provide a basis for reversal or remand. Petitioners' only argument under the third assignment of error is that they do not need a grading permit, because the proposed activity qualifies as a customarily accepted agricultural activity that is exempt from the requirement to obtain a permit of any kind under CDC 201-2.12. That argument fails, given our rejection of petitioners' arguments under the first assignment of error that the proposed activity is exempt from permit requirements under CDC 201-2.12. Accordingly, we do not reach the second assignment of error, and we deny the third assignment of error.

The county's decision is affirmed.