

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 JERRY COLLVER and SANDRA COLLVER,
5 *Petitioners,*

6
7 vs.

8
9 LANE COUNTY,
10 *Respondent.*

11
12 LUBA No. 2006-229

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from Lane County.

18
19 Michael M. Reeder, Eugene, filed the petition for review and argued on behalf of
20 petitioners. With him on the brief was Arnold Gallagher Saydack Percell Roberts & Potter,
21 PC.

22
23 Stephen L. Vorhes, Eugene, filed the response brief and argued on behalf of
24 respondent.

25
26 HOLSTUN, Board Member; BASSHAM, Board Chair; RYAN, Board Member,
27 participated in the decision.

28
29 AFFIRMED

04/24/2007

30
31 You are entitled to judicial review of this Order. Judicial review is governed by the
32 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a county hearings officer’s decision that imposes a civil penalty against petitioners for operating an espresso stand in a zoning district that does not permit espresso stands.

FACTS

The subject property is located in the county’s Rural Residential (RR) zone. The county’s RR zone allows “roadside stands.” Lane Code (LC) 16.290(2)(m).¹ Petitioners have operated a roadside stand on their property for over four years.² Sometime in May 2006, petitioners began selling espresso from an espresso stand located next to the roadside stand. The espresso stand is a small, square, wooden building, which is connected to the roadside stand by a wooden deck. Customers walk up to the espresso stand window and order their espresso drinks, in much the same way they walk up to the roadside stand to purchase vegetables and fruit.³ In mid-June 2006, the county initiated enforcement action

¹LC 16.290(2)(m) allows the following use in the RR zone:

“Roadside stand for the sale of any agricultural produce where more than one half of the gross receipts result from the sale of produce grown on the tract where the roadside stand is located.”

² The hearings officer provides the following description of the roadside stand and the produce sold from that stand:

“[Petitioners] operate a roadside stand on their property. From this stand they sell an assortment of agricultural produce grown on the property, including over 30 varieties of vegetables, several types of berries, fruits, herbs and flowers. * * * The roadside stand also sells CocaCola and other soft drinks, Minute Maid juice, and bottled water.” Record 2.

“[Petitioners] raise an amazingly large number of vegetables and, to a lesser degree, fruit, o[n] the subject property. They sell this produce from their roadside stand. From testimony, it appears that the fruits and vegetables are, at the most, cleaned off and placed raw into a container of some sort prior to sale. They are not cooked, roasted, or otherwise intensively prepared. In other words, there is no ‘value added’ component to the produce.” Record 3-4.

³ The hearings officer erroneously found at one point in his decision that customers could drive up to the espresso stand window and order and receive drinks without leaving their car. However, that error does not have any direct bearing on the critical rulings in the hearings officer’s decision.

1 against petitioners. Petitioners contend that the county first suggested that the enforcement
2 action might be resolved if petitioners could demonstrate that the proceeds from sale of
3 produce exceeded the proceeds from sale of espresso. However, the county later took the
4 position, and the hearings officer found, that (1) sales from the espresso stand do not qualify
5 as sales of “agricultural produce,” (2) the espresso stand may not remain as a use that is
6 “accessory” to the roadside stand and (3) sales from the espresso stand are not properly
7 viewed as “incidental” to sales at the roadside stand. The hearings officer ultimately
8 imposed a \$300 civil penalty. This appeal followed.

9 **FIRST ASSIGNMENT OF ERROR**

10 **A. Espresso is not Agricultural Produce**

11 In their first subassignment of error, petitioners allege the hearings officer erred by
12 interpreting the term “agricultural produce” not to include espresso and other coffee drinks.
13 Under LC 16.290(2)(m), a road side stand may sell “any agricultural produce.” *See* n 1. LC
14 16.090 provides definitions for terms used in the LC. LC 16.090 does not define
15 “agricultural produce.” LC 16.090 provides:

16 “Where terms are not defined [in LC 16.090], they shall have their ordinary
17 accepted meanings within the context with which they are used. Webster’s
18 Third New International Dictionary of the English Language, Unabridged,
19 Copyright 1981, Principal Copyright 1961, shall be considered as providing
20 ordinary accepted meanings.”

21 Webster’s Third New International Dictionary provides the following definitions:

22 “**agricultural** * * * **1 a** : of, relating to, or used in agriculture[.]” Webster’s
23 Third New Intern’l Dictionary, 43 (unabridged ed 1981).

24 “**produce** * * * **2** : agricultural products (as fresh fruits and vegetables)[.]”
25 *Id.* at 1810.

26 The hearings officer first stated petitioners’ primary contention in opposing the civil
27 penalty:

28 “[Petitioners] state that the selling of coffee is allowed within a roadside
29 stand, a use permitted by Lane Code 16.290(2)(m), arguing that the selling of

1 brewed coffee is permissible because the coffee bean qualifies as agricultural
2 produce and Lane Code 16.290(2)(m) allows *'the sale of any agricultural*
3 *produce'* from a roadside stand." Record 4 (emphasis in original).

4 The hearings officer then rejected petitioners' interpretation of LC 16.290(2)(m):

5 "That coffee beans can be considered agricultural produce is undeniable as
6 they are the seeds of the coffee plant. The question, however, is whether the
7 finished product qualifies as 'produce.' Coffee sold at espresso stands is three
8 steps removed from the time where the raw beans are harvested. The beans
9 are roasted, powdered, and then exposed to hot water * * * that is forced as
10 steam through the beans. Condiments are also usually added.

11 "The term 'produce' is not defined in the Lane Code. * * * The dictionary
12 definition most applicable to the current issue defines 'produce' as
13 'agricultural products' and parenthetically lists fresh fruits and vegetables as
14 examples. It should be noted that the definition modifies the phrase 'fruits
15 and vegetables' with the adjective 'fresh,' implying that they are in their 'raw'
16 state. The question becomes how much processing of an agricultural product
17 can occur before the product loses its status as 'produce.'

18 "The [petitioners] seem to argue that the intensity of processing or the adding
19 of value to agricultural produce is irrelevant. The problem with that argument
20 is that if the definition of 'produce' is expanded to include the unlimited
21 processing of agricultural products then there would be little to distinguish the
22 roadside stand from other commercial ventures except that the [Lane] Code
23 requires the 50 percent of the revenues be derived from produce that was
24 grown on the property. For instance, a person raising potatoes, wheat,
25 chickens and pigs in a rural residential district could turn a roadside stand into
26 a de facto breakfast diner that served hash browns, eggs, bacon and pancakes.
27 The [petitioners] could open a pie shop with the blackberries, strawberries,
28 apples, and raspberries that they grow. Carrying this argument to its illogical
29 conclusion, a roadside stand could sell breakfast cereal, canned soup, and
30 brownie mix as almost all of the edibles in the average grocery store started
31 out as raw produce before they reached the shelf." Record 4 (footnotes
32 omitted).

33 The hearings officer then went on to speculate that the legislative intent in allowing roadside
34 stands in the RR zone was to permit seasonal sale of fresh produce from the small scale
35 "hobby" farms that are frequently located in the RR zone. Record 4-5.

36 Petitioners first complain that the hearings officer "never affirmatively states whether
37 espresso (or coffee) is agricultural produce." Petition for Review 5. It is sufficiently clear
38 from the above-quoted findings that the hearings officer found that while coffee beans

1 qualify as agricultural produce, espresso and other coffee drinks that require significant
2 value-added processing do not qualify as agricultural produce.

3 Petitioners next fault the hearings officer’s decision for including only a “semblance”
4 of the analysis that is required under *PGE v. Bureau of Labor and Industries*, 317 Or 606,
5 610-12, 859 P2d 1143 (1993). The template set out in *PGE* is applied by the courts and
6 LUBA in cases where it is necessary to interpret the meaning of statutes and other
7 legislation. In this case, the hearings officer did not have to proceed past the first level of
8 analysis under *PGE*: “the text of the statutory provision itself is the starting point for
9 interpretation and is the best evidence of the legislature’s intent.” *PGE*, 317 Or at 610. To
10 understand the meaning of the undefined term “agricultural produce,” the hearings officer
11 consulted Webster’s Third New International Dictionary, as LC 16.090 directs, to determine
12 the “ordinary accepted meaning” of that term. The hearings officer considered petitioners’
13 contention that agricultural produce remains agricultural produce, no matter how much that
14 agricultural produce may later be refined or changed in character. However, as the hearings
15 officer explained, the definition in Webster’s Third New International Dictionary suggests
16 agricultural produce must remain in its raw or natural state to remain agricultural produce.
17 Based on that definition, the hearings officer rejected petitioners’ proffered interpretation
18 that agricultural produce remains agricultural produce, no matter how much it is processed or
19 refined. The hearings officer’s analysis is entirely consistent with the *PGE* template.

20 Petitioners also argue the hearings officer was improperly influenced by perceived
21 adverse impacts from the espresso stand and should have limited himself to interpreting the
22 words used in the LC 16.090 definition of roadside stand. The hearings officer does
23 speculate about the county’s legislative intent in allowing roadside stands in the RR zone.
24 That speculation follows the conclusion that the hearings officer had already reached based
25 on the text of LC 16.290(2)(m) and the dictionary definitions of the operative terms. We see

1 no error in the hearings officer’s attempt to understand what the intended purpose of
2 allowing roadside stands in the RR zone was.

3 Petitioners next focus on the “any agricultural produce” language in LC
4 16.290(2)(m). *See* n 1. Petitioners attempt to equate “any” agricultural produce with
5 agricultural produce in “any” form, no matter how much it may have been processed and no
6 matter how much it may have been refined. The hearings officer rejected that reading of LC
7 16.290(2)(m) and so do we. Just because “any” agricultural produce may be sold from a
8 roadside stand, that does not mean that a product that begins as agricultural produce remains
9 agricultural produce no matter how much it is subsequently processed or refined.

10 Finally, petitioners cite a dictionary definition of “agriculture” and argue that because
11 the dictionary definition of agriculture encompasses “preparation of [agricultural] products
12 for use,” agricultural produce must include preparation of coffee beans into coffee drinks and
13 espresso.⁴ Petitioners’ attempt to borrow the broader meaning of the term “agriculture” and
14 graft that broader meaning onto the more circumscribed concept of agricultural produce,
15 while creative, is unavailing.

16 In conclusion, we can agree with petitioners that there is some ambiguity in the
17 dictionary definition of produce. The hearings officer found that the reference in the
18 definition to “fresh” suggests that something that begins life as “agricultural produce” loses
19 that identity at some point when it is processed to change its raw characteristics. There is
20 nothing reversibly wrong with that reading of the definition. There is nothing reversibly
21 wrong with the hearings officer’s conclusion that while selling coffee beans may be

⁴ Webster’s Third New International Dictionary includes the following definitions for “agriculture:”

“**agriculture** * * * **1 a** : the science or art of cultivating the soil, harvesting crops, and raising livestock : HUSBANDRY, FARMING **b** : the science or the art of the production of plants and animals useful to man and in varying degrees the preparation of these products for for man’s use and their disposal (as by marketing)[.]” Webster’s Third New Intern’l Dictionary, 44 (unabridged ed 1981).

1 accurately described as selling “agricultural produce,” selling lattes and other coffee drinks
2 that are made with water, milk, a variety of natural and artificial flavorings and ground
3 roasted coffee beans is something other than selling agricultural produce.

4 The first subassignment of error is denied.

5 **B. Incidental Sale of Espresso and Coffee Drinks is Permitted at a Roadside**
6 **Stand**

7 Because LC 16.290(2)(m) does not expressly prohibit incidental sale of items other
8 than agricultural products, petitioners argue LC 16.290(2)(m) must be interpreted to allow
9 incidental sale of espresso and coffee drinks in conjunction with the roadside stand. Absent
10 some other general LC provision that broadens the concept of “permitted uses” to encompass
11 other “incidental uses,” reading the lack of an express prohibition against incidental uses in
12 LC 16.290(2)(m) as a mandate to allow incidental uses is a strained reading of LC
13 16.290(2)(m). Petitioners do not argue that there is such a generally applicable LC provision
14 concerning incidental uses.

15 The hearings officer first points out that although other county contested case
16 decisions have concluded that incidental sale of retail items is permitted at “farm stands,”
17 those decisions were based on statutory and LC language that expressly allows incidental
18 sale of retail items at “farm stands” in exclusive farm use zones, and there is no such express
19 language allowing incidental sale of retail items at “roadside stands” in RR zones.⁵ As an
20 additional response to petitioners’ contention that incidental sale of espresso and coffee
21 drinks is allowed under LC 16.290(2)(m) as part of petitioners’ roadside stand, the hearings
22 officer adopted the following findings:

23 “Finally, [petitioners] query whether the County would begin enforcement
24 action against them for selling ‘crushed ice, smoothies, or candy bars’ as part
25 of the roadside stand? Technically, the sale of those items would not fall

⁵ ORS 215.213(1)(u)(A) specifically authorizes “sale of retail incidental items” at a “farm stand.” LC 16.212(3)(q)(i) includes identical language.

1 under the definition of a roadside stand, but, as a practical matter, it is
2 unlikely that they would ever appear on the County’s enforcement radar. (e.g.,
3 sale of soft drinks from the [petitioners’] cooler.) The [petitioners’] sale of
4 coffee, however, has not been incidental to the farm stand. It is not an item
5 that is buried amongst the cucumbers and canning tomatoes but rather is a
6 product that is intended to attract customers on its own merits. It produces
7 revenue that is about one fifth of that of the roadside stand. It is provided
8 through its own structure, an espresso cart that is designed in a fashion similar
9 to all the other espresso carts that seemingly appear on every city street
10 corner. * * *” Record 5.⁶

11 Even if it might be possible to allow “incidental” sale of espresso as part of
12 petitioners’ roadside stand, notwithstanding that LC 16.290(2)(m) does not mention
13 “incidental” uses, as the hearings officer explains, petitioners’ actual sale of espresso from
14 their cart was not “incidental” to its sale of agricultural produce at the roadside stand. To the
15 contrary, sale of espresso has been a significant part of petitioners’ total sales.

16 This subassignment of error is denied.

17 The first assignment of error is denied.

18 **SECOND ASSIGNMENT OF ERROR**

19 Under their second assignment of error, petitioners request that LUBA “extinguish
20 the [county’s] enforcement action and [order the county to] refund the \$300 penalty.” The
21 second assignment of error is predicated on a LUBA decision to sustain petitioners’ first
22 assignment of error. Because we do not sustain the first assignment of error, we need not and
23 do not consider the second assignment of error further.

24 The county’s decision is affirmed.

⁶ Earlier in his opinion, the hearings officer noted that there was evidence that between August 24, 2006 and September 26, 2006, petitioners sold over \$4,560 worth of produce and approximately \$973 worth of coffee and espresso drinks from the espresso stand. Record 3.