

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

3
4 DANIEL FLAKE,
5 *Petitioner,*

6
7 vs.

8
9 CLACKAMAS COUNTY,
10 *Respondent.*

11
12 LUBA Nos. 2006-030 and 2008-134

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from Clackamas County.

18
19 Kenneth P. Dobson, Lake Oswego, filed a petition for review and represented
20 petitioner. With him on the brief was Buckley LeChevallier P.C.

21
22 D. Daniel Chandler, Oregon City, represented respondent.

23
24 HOLSTUN, Board Member; BASSHAM, Board Chair, participated in the decision.

25
26 RYAN, Board Member, did not participate in the decision.

27
28 DISMISSED

11/17/2008

29
30 You are entitled to judicial review of this Order. Judicial review is governed by the
31 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals two county land use compatibility statements.

CONSOLIDATION

Under OAR 661-010-0055, LUBA:

“may consolidate two or more proceedings, provided the proceedings seek review of the same or closely related land use decision(s) or limited land use decision(s).”

LUBA Nos. 2006-030 and 2008-134 seek review of closely related decisions. Accordingly, 2006-030 and 2008-134 shall be consolidated for LUBA review.

The county submitted separate records for LUBA No. 2006-030 and 2008-134, but those records are identical. In this opinion we simply cite to “Record.”

FACTS

Goodman Sanitation (Goodman) requested a land use compatibility statement (LUCS) from the county in March 2004.¹ Section C of the Oregon Department of Environmental Quality (DEQ) LUCS form asks the applicant to “[d]escribe the type of business or facility and services or products provided[.]” Goodman included the following in Section C:

“DEQ Approved Removal of Domestic Septage at Source. Transfer of Waste to an approved site where [there will be] storage, incidental use of an alkaline agent and application of Treated waste onto an approved site by DEQ.”
Record 8.

The county approved that LUCS on March 5, 2004. The 2004 LUCS includes a “yes” box and a “no” box to indicate whether the proposal “complies with all applicable land use laws.” The “yes” box is checked. Record 9. Following a place on the LUCS form where the county

¹ LUCS are one of the ways that state agencies ensure that proposed activities that require permits from the state agencies are activities that are permitted under applicable local government comprehensive plans and land use regulations.

1 is requested to “[I]st all local reviews or approvals that were required of the applicant” the
2 county wrote “None Required.” *Id.* The 2004 LUCS was not supported by any additional
3 findings. Petitioner appealed the 2004 LUCS to LUBA on February 28, 2006.² Over two
4 years later, on May 22, 2008, the county withdrew its 2004 LUCS for reconsideration
5 pursuant to ORS 197.830(13)(b).³

6 On July 17, 2008, the county issued a second LUCS (2008 LUCS) as its decision on
7 reconsideration. Section C of the 2008 LUCS states:

8 “Land Application of Lime/Alkaline Stab[i]lized Treated Domestic
9 Septage[.]” Record 2.

10 The 2008 LUCS is supported by the following findings:

11 “The Land Use Compatibility Statement asks whether ‘the business or facility
12 complies with all applicable land use requirements.’

13 “The LUCS describes the proposal as the ‘land application of lime/alkaline
14 stabilized treated domestic septage’ (‘TDS’). The proposal does not include
15 any new structures, grading or other land development, and is not a business
16 or facility. The land application of TDS is regulated by the Department of
17 Environmental Quality. See OAR 340, Division 50.

18 “The Clackamas County Zoning and Development ordinance does not
19 regulate the land application of TDS or other fertilizers.” Record 4 (footnote
20 omitted).

21 On August 7, 2008, petitioner filed a notice of intent to appeal the 2008 LUCS. The
22 2008 LUCS is the subject of LUBA No. 2008-134.

² Petitioner claimed that he did not receive actual notice of the 2004 LUCS until February 7, 2006.

³ ORS 197.830(13)(b) provides:

“At any time subsequent to the filing of a notice of intent and prior to the date set for filing the record, * * * the local government or state agency may withdraw its decision for purposes of reconsideration. If a local government or state agency withdraws an order for purposes of reconsideration, it shall, within such time as the board may allow, *affirm, modify or reverse* its decision. If the petitioner is dissatisfied with the local government or agency action after withdrawal for purposes of reconsideration, the petitioner may refile the notice of intent and the review shall proceed upon the revised order. * * *” (Emphasis added.)

1 Several days later, on August 11, 2008, petitioner also filed an amended notice of
2 intent to appeal in LUBA No. 2006-030 to challenge the 2004 LUCS.⁴ For reasons that are
3 not clear to us, in addition to attaching a copy of the 2004 LUCS to his amended notice of
4 intent to appeal in LUBA No. 2006-030, petitioner also attached a copy of the 2008 LUCS
5 findings.

6 **JURISDICTION**

7 The county filed nearly identical motions to dismiss in LUBA No. 2006-030 and
8 LUBA No. 2008-134.

9 **A. LUBA No. 2006-030**

10 Petitioner's amended notice of intent to appeal appears to be based on a
11 misunderstanding of the legal effect of the county's withdrawal of the 2004 LUCS and its
12 adoption of the 2008 LUCS. Once the county withdrew the 2004 LUCS under ORS
13 197.830(13)(b), the county had three options. It could "affirm, modify or reverse" the 2004
14 LUCS. Regardless of which of those three options the county selected, the 2004 LUCS
15 would not survive as a separate decision. The 2008 LUCS is a modification of the 2004
16 LUCS. The county probably could have made that clearer, but we conclude that the legal
17 effect of the 2008 LUCS was to "modify" the 2004 LUCS. Therefore, the 2004 LUCS no
18 longer exists as a separate decision, and it follows that our review of the 2004 LUCS would
19 have no practical effect. Therefore, LUBA No. 2006-030 is moot. *Central Klamath County*
20 *CAT v. Klamath County*, 41 Or LUBA 524, 531 (2002); *Heiller v. Josephine County*, 25 Or
21 LUBA 555, 556 (1993); *Barr v. City of Portland*, 22 Or LUBA 504, 505 (1991).

22 LUBA No. 2006-030 is dismissed.

⁴ Under OAR 661-010-0021(5), if a petitioner wishes LUBA review of a decision on reconsideration following its withdrawal under ORS 197.830(13)(b), the petitioner is given the option to refile the "original notice of intent to appeal" or to file an "amended noticed of intent to appeal."

1 **B. LUBA No. 2008-134**

2 **1. The County’s September 24, 2008 Motion to Dismiss**

3 As relevant here, LUBA’s jurisdiction is limited to “land use decisions.” ORS
4 197.825(1). In its September 24, 2008 motion to dismiss LUBA 2008-134, the county argues
5 that under ORS 215.247, the 2008 LUCS is not a land use decision. ORS 215.247 provides:

6 **“Transport of biosolids to tract of land for application.** If biosolids are
7 transported by vehicle to a tract on which the biosolids will be applied to the
8 land under a license, permit or approval issued by the Department of
9 Environmental Quality under ORS 454.695, 459.205, 468B.050, 468B.053 or
10 468B.055 or in compliance with rules adopted under ORS 468B.095, the
11 transport and the land application are allowed outright, and a state or local
12 government license, permit or approval in connection with the use is not a
13 land use decision.”

14 We understand the county to argue in its motion to dismiss that the proposal that is the
15 subject of the 2008 LUCS is a proposal to transport biosolids to a tract on which those
16 biosolids will be applied to “land under a license, permit or approval issued by the
17 Department of Environmental Quality” under one or more of the statutes specified in ORS
18 215.247. The LUCS, presumably, was issued to allow the applicant to seek and receive
19 approval of the required DEQ permits.

20 ORS 468B.095 is one of the DEQ-related statutes listed in ORS 215.247. We note
21 that under ORS 468B.095, DEQ is directed to adopt rules for the use of “sludge” on
22 agricultural and silvicultural lands.⁵ As the LUCS findings note, DEQ has adopted such

⁵ ORS 468B.095 provides:

“The Environmental Quality Commission shall adopt by rule requirements for the use of sludge on agricultural, horticultural or silvicultural land including, but not limited to:

- “(1) Procedure and criteria for selecting sludge application sites, including providing the opportunity for public comment and public hearing;
- “(2) Requirements for sludge treatment and processing before sludge is applied;
- “(3) Methods and minimum frequency for analyzing sludge and soil to which sludge is applied;

1 rules. OAR Chapter 340, Division 50. As defined by OAR 340-050-0010(3), biosolids and
2 sludge is the same thing.⁶ OAR 340-050-0005(1) sets out the purpose of those rules:

3 “It is the purpose of these rules and best management practices to protect the
4 environment and public health in Oregon by prescribing the methods,
5 procedures and restrictions required for the safe handling and use of domestic
6 wastewater treatment facility solids, biosolids, biosolids derived products, and
7 domestic septage. These rules implement a program for biosolids and
8 domestic septage management which satisfies or exceeds minimum federal
9 regulations pertaining to land application.”

10 If ORS 215.247 applies, it has two potentially significant consequences. First, under
11 ORS 215.247, the transport and land application of biosolids as described in ORS 215.247 is
12 allowed outright, presumably notwithstanding any county zoning to the contrary. Second,
13 any county “license, permit or approval” that is issued in connection with such activity is not
14 a land use decision. We understand the county to argue that ORS 215.247 applies and it
15 makes the county’s 2008 LUCS something other than a land use decision. If the county is
16 correct, LUBA does not have jurisdiction to review the 2008 LUCS to determine if the
17 LUCS correctly interprets and applies the county’s land use regulations.

“(4) Records that a sludge applicator must keep;

“(5) Restrictions on public access to and cropping of land on which sludge has been
applied; and

“(6) Any other requirement necessary to protect surface water, ground water, public
health and soil productivity from any adverse effects resulting from sludge
application.”

⁶ OAR 340-050-0010(3) provides:

“‘Biosolids’ means solids derived from primary, secondary, or advanced treatment of
domestic wastewater which have been treated through one or more controlled processes that
significantly reduce pathogens and reduce volatile solids or chemically stabilize solids to the
extent that they do not attract vectors. This term refers to domestic wastewater treatment
facility solids that have undergone adequate treatment to permit their land application. *This
term has the same meaning as the term ‘sludge’ in ORS 468B.095, and the term ‘sewage
sludge’ found elsewhere in OAR Chapter 340.*” (Emphasis added.)

1 **2. Petitioner’s Response**

2 Petitioner did not file a written response to the county’s September 24, 2008 motion
3 to dismiss in LUBA No. 2008-134. However, petitioner did file a written response to the
4 county’s nearly identical August 29, 2008 motion to dismiss in LUBA No. 2006-030. In that
5 response, petitioner argued that the property where the biosolids are to be applied is zoned
6 Timber (TBR) and that ORS 215.247 applies only in exclusive farm use (EFU) zones.
7 Response to Motion to Dismiss 2-3. In that response, petitioner did not dispute the county’s
8 contention that the proposal in this case is a proposal to apply biosolids to land under a DEQ
9 permit that will be issued pursuant to one or more of the statutory authorities set out in ORS
10 215.427. The county filed a reply to petitioner’s response on September 24, 2008. A part of
11 that county reply is set out below:

12 “* * * Respondent’s motion to dismiss relies only on ORS 215.247, which is
13 clear, and self contained * * * [.]”

14 “On its face, ORS 215.247 is not limited to exclusive farm use zones. Where
15 biosolids are transported by vehicle under a DEQ approval, the transport and
16 land application are outright uses, and a local government approval is not a
17 land use decision.

18 “The placement of ORS 215.247 in Chapter 215 is of no legislative
19 significance. The provision was passed in 2001, and was not made part of
20 ORS 215, as noted in the statute: ‘Note: 215.246 to 215.251 were enacted
21 into law by the Legislative Assembly but were not added to or made a part of
22 ORS chapter 215 or any series therein by legislative action.’ * * *” Reply in
23 Support of Motion to Dismiss 3.

24 Oregon Laws 2001 chapter 488 includes several sections that amend sections of the
25 EFU zoning statute. But Oregon Laws 2001 chapter 488 section 5, which adopts what is
26 now codified at ORS 215.247, is not an amendment of the EFU zoning statute and the
27 legislature did not direct that Oregon Laws 2001 chapter 488 section 5 be added to the EFU
28 zoning statute. The county is correct that nothing in the text of ORS 215.247 limits its
29 application to EFU zones. We also note that ORS 468B.095, which provides context, directs
30 the Environmental Quality Commission to adopt rules “for the use of sludge on agricultural,

1 horticultural or silvicultural” lands. That directive clearly seems to envision more than EFU-
2 zoned lands. Petitioner has not responded to the county’s argument that the application of
3 ORS 215.247 is not limited to EFU zones. Absent some argument to the contrary, we agree
4 with the county that ORS 215.247 is not limited to county decisions regarding EFU-zoned
5 properties. It follows that LUBA does not have jurisdiction to determine whether the county
6 correctly determined that the application of treated domestic septage (*i.e.*, biosolids) to TBR-
7 zoned property is not regulated by the county.

8 LUBA No. 2008-134 is dismissed.