BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HOWARD GRABHORN and GRABHORN, INC.,
Petitioners,

vs.

WASHINGTON COUNTY,
Respondent,

and

ARTHUR J. KAMP,
Intervenor-Respondent.

LUBA No. 2015-018

FINAL OPINION
AND ORDER

Appeal from Washington County.

Wendie L. Kellington, Lake Oswego, filed the petition for review and argued on behalf of petitioners.

Jacquilyn Saito-Moore, Assistant County Counsel, Hillsboro, filed the respondent's brief on behalf of respondent.

Arthur J. Kamp, Beaverton, filed a response brief and argued on his own behalf.

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

AFFIRMED 01/21/2016

You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a hearings officer's decision denying their application for verification of a composting facility as a nonconforming use.

FACTS

Sometime in the 1950s the Grabhorn family began operating a landfill on portions of three parcels, tax lot 2302, tax lot 100 and tax lot 2600. The three tax lots are currently zoned Exclusive Farm Use (EFU) and consist of high-value farmland. In 1962, county zoning was first applied to the three parcels. The F-1 zone applied in 1962 did not allow a landfill operation (or "solid waste disposal site" in current regulatory parlance) as either a permitted or conditional use. The county zoned the property EFU in 1984. The EFU zone allows solid waste disposal facilities as a conditional use. However, the Land Conservation and Development (LCDC) administrative rules that apply to the EFU zone do not allow establishment of a solid waste disposal site on high value farmland, although existing solid waste disposal sites may continue and even be expanded on the same tract, even if they are nonconforming uses.

At all relevant times since 1962, the county has recognized the landfill operation on the Grabhorn property as a lawful nonconforming use. That landfill operation was closed in 2009. The focus of the current application is

the composting facility that petitioners currently operate on a six-acre portion of tax lot 2302. As explained below, under current regulations a composting facility is a particular type of solid waste disposal facility. Generally, the composting process as currently used at petitioners' facility involves receiving "feedstock" (yard debris, brush, stumps, and other woody debris), chipping the feedstock in a grinder, placing the ground-up feedstock into a pile, aerating the pile periodically by turning it with an excavator, and adding leaves, grass and water periodically to aid decomposition by microbes. Once the material in the pile is sufficiently decomposed or "cooked," in industry parlance, the material is screened to sort finer and coarser materials. The finer materials are placed in a separate curing pile for additional curing, and the coarser materials reground and placed back in the compost pile. The end product, compost, is sold to commercial customers, primarily for soil amendments.

One of the central disputes in this appeal is when the composting facility on petitioners' property was established. Petitioners took the position below that a recycling operation that included "composting" operated on the subject property prior to 1962, the date that contrary county zoning was first applied to the property, and therefore the composting facility is a lawfully established nonconforming use pursuant to ORS 215.130(5) and implementing county regulations. The hearings officer concluded, however, that a composting

facility, *i.e.* a facility that employs the biological decomposition of waste to produce "compost," did not begin to operate on the property until 1989, at the earliest. According to the hearings officer, while wood waste grinding and recycling operations occurred on the property prior to 1989, those operations did not constitute "composting." The hearings officer ultimately concluded that the composting facility did not exist in 1984, the date when the county zoned the property EFU, and therefore did not qualify as a lawfully established nonconforming use. Those conclusions are challenged in the first and second assignments of error.

A portion of the first, and the third and fourth assignments of error, concern several arguments based the complex regulatory and permitting history of the landfill and composting operations on the property. We briefly recount the relevant history.

In 1991 the county issued a land use compatibility statement (LUCS) at the request of the Department of Environmental Quality (DEQ), which verified the landfill operation as a lawful nonconforming use. One of the issues in this appeal is whether that 1991 LUCS also verified the composting facility as part of the nonconforming use, despite not using the words "compost" or "composting."

In 1997, DEQ adopted regulations governing composting facilities, and in 1999 issued a DEQ permit specifically for petitioners' composting facility. As noted, in 2009 the landfill operation closed, but the composting facility continued to operate. In 2009, petitioners sought renewal of the DEQ permit for the composting facility. To satisfy DEQ requirements to demonstrate that the composting facility is compatible with the county's land use regulations, petitioners took the position that the 1991 LUCS recognized the composting facility as a lawful non-conforming use, and requested that the county issue a LUCS to that effect. However, in a letter dated July 9, 2010, the county planning director stated that the county was unable to determine whether the 1991 LUCS included the composting facility, in part because the term "composting" was not used in the 1991 LUCS. Record 3306. The letter suggested that petitioners file an application to verify the composting facility as a nonconforming use. Instead, petitioners filed an action in circuit court challenging the July 9, 2010 letter, and seeking a declaratory ruling that the 1991 LUCS includes the composting facility. The circuit court dismissed the action, concluding that it lacked jurisdiction. Petitioners appealed to the Court of Appeals, which affirmed, after concluding that the July 9, 2010 letter was a "land use decision" subject to LUBA's jurisdiction, and jurisdiction to review that letter, or any county determinations regarding the scope of the 1991 LUCS,

lies with LUBA. *Grabhorn, Inc. v. Washington County*, 255 Or App 369, 297 P3d 524, *rev den* 353 Or 867 (2013).

While the *Grabhorn, Inc.* appeal was pending before the Court of Appeals, petitioners applied to the county for a franchise for the composting facility, pursuant to Washington County Code (WCC) 8.08.[1] WCC 8.08 is not part of the county's land use code, and a decision approving or denying an application for a franchise agreement is not typically processed as a land use decision or land use permit. However, because staff raised issues regarding the pending appeal and the nonconforming use status of the composting facility, the commissioners held a public hearing on the franchise application. On September 20, 2011, the commissioners made a tentative decision that the composting facility is a lawful nonconforming use and to approve the application. On October 4, 2011, the commissioners adopted staff findings concluding that the composting facility is a lawful nonconforming use, and

[1] In 2000, the county had granted a 10-year franchise agreement to petitioners to operate the solid waste disposal site, but the 2000 franchise agreement did not mention the composting facility and petitioners apparently did not pay franchise fees based on the composting operations. Record 5101-10. The 2010 application sought a franchise agreement for the composting facility.

directed staff to negotiate a franchise agreement with petitioners.[2] The parties refer to the October 4, 2011 decision as the "2011 franchise authorization." Arthur J. Kamp, intervenor-respondent (intervenor) in the present appeal, appealed the 2011 franchise authorization to LUBA, where that appeal was suspended.

Meanwhile, during the proceedings before the Court of Appeals on the appeal of the circuit court's decision regarding the July 9, 2010 letter, the county took the position that the 2011 franchise authorization constituted a determination that the composting operation is a lawful nonconforming use, and thus the appeal of the circuit court's decision regarding the July 9, 2010 letter was now non-justiciable and moot. The Court of Appeals disagreed that

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[2] The findings adopted October 4, 2011 state, in relevant part:

> "Chapter 8.08.440 requires that an applicant not be in violation of Chapter 8.08, state statutes or rules and regulations. The only issue is whether under land use laws, composting is allowed on applicant's site. At its regular meeting on September 20, 2011, the Board found that based on evidence presented by the applicant that the Grabhorn, Inc. composting operation is a lawful, non-conforming use based on the continuing composting operation on the site. Furthermore, based on the evidence submitted by the applicant, composting is part of the recycling business that has been ongoing and continuous since 1991, the last time a land use compatibility statement was issued for the property." Record 4725.

the 2011 franchise authorization mooted the appeal. Because the appeal of the 2011 franchise authorization was presently pending before LUBA, the Court concluded, the appeal of the circuit's court decision remained justiciable. 255 Or App at 375. The Court then proceeded to address the merits and, as noted, affirmed the circuit court decision to dismiss petitioners' action. The Court's decision became final in late 2013.

Thereafter, on January 21, 2014, the county and petitioners entered into a franchise agreement for the composting facility. Condition 1 of the 2014 franchise agreement required petitioners to file an application with the county to verify the composting facility as a nonconforming use.[3] Seven days later, LUBA granted the petitioner Kamp's motion for voluntary dismissal of his

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[3] Condition 1 states:

> "A requirement of this Franchise Agreement is that Franchisee has a valid land use. As a condition of approval the Franchisee must:
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> "(1) Submit an application with the Washington County Department of Land Use and Transportation for a Type II determination of a non-conforming use within ONE HUNDRED TWENTY (120) days of the Effective Date of this Agreement. 2) Have its application for a non-conforming use accepted as complete by the Washington County Department of Land Use and Transportation within ONE HUNDRED EIGHTY (180) days of submittal, and, 3) Receive a final non-conforming use determination for the Facility granted by the Washington County

appeal of the 2011 franchise authorization. *Kamp v. Washington County*, __ Or LUBA __ (LUBA No. 2011-098, January 28, 2014).

On May 21, 2014, petitioners submitted an application to verify the composting facility as a lawful nonconforming use, pursuant to Condition 1 of the 2014 franchise agreement. On October 10, 2014, county planning staff issued a decision verifying the composting facility as a nonconforming use, with conditions. Both petitioners and opponents appealed the decision to the hearings officer. The hearings officer conducted a hearing on the appeals and, on March 31, 2015, issued the decision challenged in this appeal, denying petitioners' application to verify the composting facility as a lawful nonconforming use. As noted, the hearings officer concluded that a composting facility did not exist on the property until 1989, at the earliest, after the date that EFU zoning was applied to the property in 1984. The hearings officer ultimately concluded that petitioners did not satisfy one of the elements for a lawful nonconforming use, that the use was lawfully established. The hearings officer rejected petitioners' arguments that the 1991 LUCS or the 2011

Department of Land Use and Transportation, after any appeals." Record 3738.

franchise authorization compelled the conclusion that the composting facility is a lawful nonconforming use.

The hearings officer also made subsidiary determinations, two of which are challenged in the fifth and sixth assignments of error.

With that introduction, we turn to the assignments of error. We first address the second assignment of error, which alleges procedural error.

SECOND ASSIGNMENT OF ERROR

A. First and Third Sub-Assignments: Date of Nonconformity

ORS 215.130(5) provides that the "lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued." Thus, an applicant for verification of a nonconforming use must establish that the building, structure or land was being lawfully used, or was lawfully established, at the time that zoning or regulations were imposed that would prohibit or require approval for that use. *Aguilar v. Washington County*, 201 Or App 640, 645, 120 P3d 514 (2005). The applicant for a nonconforming use must make that demonstration, even though ORS 215.130(10) and (11) limit how far back in time a local

government may require an applicant to demonstrate other essential elements of a nonconforming use, for example, the continuity of the use. *Id.* at 650.[4]

Thus, petitioners in the present case have the burden of demonstrating that a composting facility was lawfully established on the property on the date that that use became nonconforming. Petitioners argue that throughout the proceedings below the county and all other participants assumed that 1962 (the

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[4] ORS 215.130(10) and (11) provide, as relevant:

> "(10) A local government may adopt standards and procedures to implement the provisions of this section. The standards and procedures may include but are not limited to the following:
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> > "(a) For purposes of verifying a use under subsection (5) of this section, a county may adopt procedures that allow an applicant for verification to prove the existence, continuity, nature and extent of the use only for the 10-year period immediately preceding the date of application. Evidence proving the existence, continuity, nature and extent of the use for the 10-year period preceding application creates a rebuttable presumption that the use, as proven, lawfully existed at the time the applicable zoning ordinance or regulation was adopted and has continued uninterrupted until the date of application;
> >
> > "* * * * *
>
> "(11) For purposes of verifying a use under subsection (5) of this section, a county may not require an applicant for verification to prove the existence, continuity, nature and

date F-1 zoning was applied that for the first time rendered a solid waste facility a nonconforming use on the property) was the relevant target date for purposes of demonstrating that the composting facility met the lawfully established prong of the nonconforming use verification test. However, as noted above, in her final decision the hearings officer cited 1984, the date EFU zoning was first applied to the property, as the relevant date of nonconformity.

Petitioners contend that the hearings officer committed procedural error in using 1984 as the relevant date of nonconformity, without advising the parties that 1984, rather than 1962, was the relevant date. According to petitioners, they could have presented a great deal of evidence regarding composting on the property in 1984 had they known the hearings officer would use that date as the target date.

The county responds, and we agree, that petitioners have not demonstrated that the hearings officer's error in citing 1984 as the relevant date of nonconformity rather than 1962 is more than harmless error in the present case. The key conclusion in the hearings officer's decision is her finding that, based on the evidence in the whole record, petitioners have not demonstrated

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> extent of the use for a period exceeding 20 years immediately preceding the date of application."

that the composting operation existed on the property prior to 1989, at the earliest. The hearings officer reviewed all the evidence regarding use of the property back to 1962 and beyond, and ultimately rejected petitioners' claims that evidence of wood chipping or similar recycling operations prior to 1989 constituted "composting." We address and reject petitioners' direct challenges to that finding below, under the first assignment of error. Because we conclude that that key finding is supported by substantial evidence, it seems harmless error that in her ultimate conclusion the hearings officer erroneously cited 1984 rather than 1962 as the relevant date of nonconformity. Whether that date is 1962 or 1984, petitioners failed to demonstrate that the composting facility was lawfully established on the date zoning was applied that made that use non-conforming.

Moreover, petitioners have not demonstrated that the hearings officer's citation to 1984 rather than 1962 was prejudicial to petitioners' substantial rights. Petitioners have no substantial right to present evidence regarding the incorrect date of 1984. Any remand to correct the hearings officer's erroneous reference to 1984 would focus on the correct date of 1962. However, petitioners had a full opportunity to present, and did present, evidence intended to demonstrate that the composting facility was established on the property prior to 1962. As discussed below, the hearings officer addressed that

evidence, and chose not to rely on it, in favor of other, conflicting, evidence. For these reasons, petitioners have not demonstrated that the erroneous reference to 1984 rather than 1962 as the date of nonconformity constitutes procedural error prejudicial to petitioners' substantial rights.

B. Second Sub-assignment: Tax lot 2600

Petitioners also argue that the hearings officer committed procedural and substantive error in limiting her review to testimony of composting activities that occurred on tax lot 2302, the site of the current 6-acre composting facility. According to petitioners, undisputed testimony in the record shows that uses accessory to the composting facility occur on tax lot 2600, *e.g.* office functions and an employee lunchroom. Petitioners also cite to testimony that prior to the landfill closure in 2009, grinding and other activities that petitioners allege were part of the composting operation occurred on different parts of the subject property. Petitioners contend that the hearings officer erred by limiting her review to evidence submitted below regarding composting activities that occurred on tax lot 2302.

The hearings officer explained that she limited the scope of the nonconforming use verification to the uses on tax lot 2302, because that is the only tax lot that the application indicated was the subject of the request for verification. Record 11-12. The hearings officer noted that tax lot 2600

includes structures such as an office building and employee lunchroom that are accessory to the composting facility, however the hearings officer concluded that "there is no legal basis on which to expand the scope of the application beyond what is included within its scope by its own terms." *Id.* at 12.[5]

However, petitioners have not established that, in reviewing evidence submitted to address the limited question of whether the composting facility was lawfully established, the hearings officer limited her review to evidence regarding composting activities on tax lot 2302. The evidence and testimony that petitioners submitted, including the affidavits of Howard Grabhorn, discuss composting activities on all three tax lots. The hearings officer addressed that testimony, and nothing in her findings suggest that she reviewed only the testimony regarding composting uses on tax lot 2302. Read in

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[5] Those findings occur in a section of the decision addressing petitioners' challenge on local appeal to a condition imposed by the planning staff, which required petitioners to consolidate tax lot 2302 and 2600 into a single "tract" in order to comply with OAR 660-033-0130(18). That administrative rule allows a lawful nonconforming use on high-value farmland to continue or be expanded if the use is located on a "tract," *i.e.*, contiguous units of land within the same ownership. Grabhorn, Inc. owns tax lot 2302, while Howard Grabhorn owns tax lot 2600, and hence all components of the current composting facility are not located on the same "tract." The hearings officer agreed with petitioners that the condition of approval requiring consolidation of the two tax lots into a single tract was improper, for reasons we need not detail, but ultimately concluded that that appeal issue was moot based on denial

context, the portion of the decision that petitioners object to as limiting review to tax lot 2302 is addressing the scope of the use to be verified, not what evidence is considered for purposes of demonstrating that the composting use was lawfully established. In other words, the hearings officer was clarifying that the accessory facilities on tax lot 2600, the offices and employee lunchroom, etc., are not parts of the composting facility for which petitioners have requested verification. As the hearings officer explained, the application sought to verify only the components of the current composting facility that are located on tax lot 2302. The hearings officer carefully excluded from the scope of the verification request all non-composting uses that occur on the three tax lots. Record 12.[6] However, petitioners have not demonstrated that the hearings officer ignored testimony regarding composting activities that occurred on tax lots 2600 or tax lot 100, in resolving whether the evidence in the whole record demonstrated that the composting facility was lawfully established.

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of the request to verify the nonconforming use. Record 39.

[6] In addition to the office and employee lunchroom accessory uses on tax lot 2600, other uses on the three tax lots apparently include concrete and rock crushing, bio-bag production and soil stockpiling. Record 12. The hearings officer noted that these other uses may require independent land use proceedings to verify them as nonconforming uses. Record 13.

For the foregoing reasons, petitioners have not established that the hearings officer committed procedural error with respect to the scope of the application, or at least any procedural error that warrants remand. The second assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

A. Substantial Evidence regarding Composting Facility

Petitioners argue that the hearings officer's findings that the composting facility did not operate until 1989, at the earliest, are not supported by substantial evidence.[7]

The hearings officer's review of the evidence spans Record 24-32, and generally proceeds by first reviewing the documentary evidence regarding activities on the subject property since the 1960s, as reflected in the contemporaneous records of local governments and state agencies, specifically the county, Metro and DEQ, whose roles include regulation or inspection of solid waste facilities. The hearings officer concludes that this documentary

[7] Substantial evidence is evidence a reasonable person would rely on in making a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). In reviewing the evidence, LUBA may not substitute its judgment for that of the local decision maker. Rather, LUBA must consider all the evidence to which it is directed, and determine whether based on that evidence, a reasonable local decision maker could reach the decision that it did. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988).

evidence indicates that, prior to 1989, no "composting" as that term is currently understood (i.e. "cooking" or controlled decomposition of wood and plant wastes) occurred on the subject property. According to the hearings officer, the contemporary documentary evidence indicated that the only recycling activities on the subject property prior to 1989 was the grinding or chipping of woody wastes, which in the hearings officer's view is not sufficient to constitute "composting" or to produce "compost."

The hearings officer then addressed the evidence and testimony that petitioners submitted, including the declarations of Howard Grabhorn and others. According to the hearings officer, the declarations provide evidence that the Grabhorn facility did conduct composting prior to the early 1990s. Although the hearings officer found the declarations to be "somewhat persuasive," the hearings officer noted that there was no documentation to support the testimony that composting occurred prior to the 1990s. Record 30. The hearings officer then went on to discuss the differences between "mulch" and "compost," and concluded that while chipping and grinding operations occurred prior to the 1990s to produce coarse-ground "mulch," the evidence indicates that Grabhorn did not start producing "compost" until 1989, at the earliest. Ultimately, the hearings officer concluded that the evidence in the record "does not support the conclusion that the applicant was composting at

the time regulations came into effect which prohibited composting on high value EFU land." Record 32.

On appeal, petitioners argue that no reasonable decision maker would have chosen to rely on the documentary evidence the hearings officer relied upon, instead of the declarations and other evidence submitted by petitioners, to determine when composting began on the subject property. In their petition for review, petitioners recite some of those declarations. Petitioners emphasize the testimony of a former county employee who inspected the property in late 1990 and observed composting activities. Petitioners also cite the testimony of a Grabhorn employee who started working on the landfill in 1971, and testified that composting was occurring at that time. Finally, petitioners cite to the testimony of a commercial customer who testified that as early as 1985 he had observed on the property "cooking" piles of ground up brush and yard debris being made into mulch. Record 747. Petitioners contend that no reasonable decisionmaker would fail to be persuaded by sworn statements from these eye-witnesses, and instead rely on contemporaneous county, Metro and DEQ documents that were drafted for various unrelated purposes, and that are at best inconclusive regarding whether and what kind of recycling and composting activities were occurring on the property at any given time.

In our view, based on the evidence in the whole record, a reasonable decision-maker could have chosen to rely on the declarations and other evidence that petitioners submitted, to conclude that "composting," as that term is properly understood, was occurring on the subject property in 1962 when the property was zoned to prohibit solid waste facilities of any kind. However, we cannot say that that conclusion is compelled by the evidence in the whole record, or that a reasonable decision-maker could not have reached the contrary conclusion the hearings officer did: that composting as that term is properly understood did not occur on the subject property until 1989, at the earliest, long after the date a composting facility on the property became prohibited or required discretionary approval.

As the hearings officer's findings note, the county's code as early as 1969 distinguished between a landfill and a "composting plant," and defined composting to mean the biochemical degradation of organic waste under controlled conditions. Record 24. However, none of the county permits issued for the landfill in the 1970s and 1980s or other relevant county documents issued prior to the early 1990s mention composting occurring on the property. The hearings officer noted that a 1989 county publication described petitioners' yard debris recycling operation as "Grind only," as distinct from another facility which was described as "Grind & compost." The hearings officer

observed that the "appropriate inference from this evidence is that the County understood the difference between a facility that 'composted' under the County definition and a facility that only ground up yard debris." Record 26. According to the hearings officer, the county documentation was consistent with similar documentation from Metro and DEQ, which prior to the early 1990s include no mention of composting occurring on the subject property, and at best described recycling efforts on the property to involve only grinding of yard debris.

A reasonable decision-maker could infer, as the hearings officer did, from the omission of any mention of composting on the property in the contemporaneous documentation prior to the early 1990s that composting did not occur on the property prior to that period. That inference conflicts with the declarations of Howard Grabhorn and others, to the effect that composting ("cooking") occurred on the property in the 1970s and 1980s and, more importantly, prior to 1962, the date solid waste facilities, including composting facilities, became nonconforming on the property. The hearings officer resolved that conflict in the evidence by choosing to rely on the reasonable inferences to the contrary drawn from the county, Metro and DEQ documentation. We cannot say that that resolution of the conflicting evidence was unreasonable. Accordingly, the hearing officer's finding that petitioners'

composting facility was established after the date of nonconformance is supported by substantial evidence.

B. Collateral Attack on the 1991 LUCS and 2011 franchise authorization

In the alternative, petitioners argue that the hearings officer's conclusion that the composting facility was not lawfully established and therefore does not qualify as a lawful nonconforming use is an impermissible collateral attack on two final land use decisions: the 1991 LUCS and the 2011 franchise authorization. The hearings officer rejected those arguments below. We address each argument in turn.

1. 1991 LUCS

The 1991 LUCS described petitioner's landfill as "Demolition landfill and recycling," and concluded that the operation was a lawful, nonconforming use. Record 904. Petitioners contended to the hearings officer that the 1991 LUCS necessarily included the composting facility within the scope of the verification, as part of the landfill's "recycling" operations. The hearings officer disagreed, noting that the 1991 LUCS never mentions the word "composting." The hearings officer also noted that the only recycling activity that petitioners mentioned in seeking the LUCS was "turning demolition debris into usable mulch and wood chips." Record 8, 907. As noted, the hearings

officer concluded that production of mulch and wood chips did not constitute "composting."

On appeal, petitioners repeat their arguments made to the hearings officer that the 1991 LUCS should be construed to include the composting operation within the scope of the verified nonconforming landfill use. However, we agree with the county and intervenor that petitioners have not demonstrated that the hearings officer erred in concluding that the 1991 LUCS did not encompass the composting operation. The 1991 LUCS does not mention compost or composting. By 1991, county regulations had long distinguished between composting facilities and other types of solid waste disposal facilities. If petitioners wished to include the composting operations within the scope of the nonconforming use verification produced by the 1991 LUCS, it was incumbent on petitioners to make that request clearly and to provide the information necessary for the county to make that verification. However, petitioners apparently failed to mention the composting facility in their application materials and, as the hearings officer noted, the only information provided regarding the "recycling" component of the landfill was "turning demolition debris into usable mulch and wood chips." Record 907. The hearings officer did not err in concluding that the 1991 LUCS did not include the composting facility within the scope of the verification.

2. 2011 Franchise Authorization

Petitioners also contended below that finding that the composting facility is not a lawfully established nonconforming use is a collateral attack on the 2011 franchise authorization, which included a finding that the composting facility was a lawful nonconforming use. The hearings officer rejected that argument:

> "* * * The record does not reveal the reasons for the inconsistency between the 2011 findings and the 2014 franchise, the latter of which unequivocally requires that the applicant file the application now under review. The Hearings Officer concludes that the final signed Franchise Agreement should be viewed as controlling, not only because it is the authorization for the composting operation under County regulations, but because the 2011 Board actions were not undertaken as land use proceedings with the required notice and process. The Board conducted the review of the applicant's 2010 franchise application under its solid waste regulations, and then authorized the staff to negotiate the final franchise under those same regulations.
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> "The proceedings leading to this Final Order, as described herein, have been conducted consistent with applicable requirements for a Type II decision and Type III appeals under the CDC [County Development Code] and applicable state law, as described below." Record 10-11.

Petitioners dispute the conclusion that the 2014 franchise agreement is "controlling" over the 2011 franchise authorization. According to petitioners, the limited purpose of Condition 1 of the 2014 franchise agreement requiring petitioners to verify the composting facility as a nonconforming use was to

address certain aspects of the scope and extent of the nonconforming use, such as hours and days of operation, that were left unaddressed by the 2011 franchise authorization. Petitioners argue that Condition 1 was not intended to open the door for the county to revisit the basic conclusion, in the findings supporting the 2011 franchise authorization, that the composting facility was a lawful nonconforming use.

Petitioners also argue that the historical context of the 2014 franchise agreement does not support the hearings officer's conclusion that the 2014 franchise agreement controls over the 2011 franchise authorization. Petitioners argue that it is clear that the 2011 franchise authorization was a land use decision subject to LUBA's jurisdiction, as the Court of Appeals noted in *Grabhorn, Inc. v. Washington County.* Indeed, petitioners argue that, in that appeal, county counsel took the position before the Court of Appeals that the 2011 franchise authorization was a final land use determination that the composting facility was a lawful nonconforming use, in the course of arguing that the 2011 franchise agreement mooted the challenge to the July 9, 2010 county letter. We understand petitioners to argue that the county, by taking that position in *Grabhorn, Inc.*, is precluded from taking a contrary position in any future land use decision, including in the nonconforming use verification determination required by Condition 1 of the 2014 franchise agreement.

In addition, petitioners note that the 2011 franchise authorization was in fact appealed to LUBA, and that appeal was ultimately dismissed. Petitioners contend that Kamp's voluntary dismissal of the appeal of the 2011 franchise agreement rendered that decision a final land use decision that cannot be collaterally attacked in subsequent county land use decisions.

The county responds, and we agree, that the hearings officer did not err in concluding that the 2014 franchise agreement controls the 2011 franchise authorization. Condition 1 of the 2014 franchise agreement recites that "[a] requirement of the Franchise Agreement is that Franchisee has a valid land use." Record 3738, *see* n 3. To effect that purpose, Condition 1 requires petitioners to submit an application for a Type II determination of a nonconforming use, and receive a final nonconforming use determination for the composting facility. The stated purpose of obtaining that nonconforming use determination is to ensure that the composting facility is a "valid land use." There is nothing in Condition 1, or anything else cited to us, suggesting that Condition 1 was intended to address only scope or extent issues such as the hours or days of operation. Such issues would not go to the question of whether the composting facility is a "valid land use."

To establish that the composting facility is a "valid land use," petitioners must demonstrate that the use is a lawful nonconforming use, including that the

use was lawfully established prior to the date that prohibitive zoning was applied, as well as other essential elements of a nonconforming use, such as continuity or non-interruption within the prescribed period. The most straightforward reading of Condition 1 was that the county commissioners intended it to require petitioners to demonstrate that the composting facility is a "valid," *i.e.*, lawfully established, nonconforming use.

That understanding of Condition 1 is also supported, in our view, by the context in which Condition 1 was imposed. On January 21, 2014, the date that the county and petitioners entered into the franchise agreement for the composting facility, Kamp's appeal of the 2011 franchise authorization had been pending and suspended at LUBA for almost three years. As the hearings officer noted, the 2011 franchise authorization was not processed as a land use decision according to the procedures and standards that would typically be required for a decision that verifies a nonconforming use. In addition, the findings attached to the 2011 franchise authorization simply state in relevant part that the composting facility is a lawful nonconforming use. *See* n 2. The finding is conclusory, and the remaining findings address few if any of the elements necessary to establish that a use is a lawful nonconforming use.

While it is unknown whether Kamp would have succeeded in challenging the 2011 franchise authorization in his appeal to LUBA, it is not at

all unlikely that the county and petitioners would have perceived that the 2011 franchise authorization was legally vulnerable to remand on appeal, due to procedural errors and failure to adopt adequate findings addressing the standards for verifying a nonconforming use. In this context, the most likely explanation for imposing Condition 1 was not, as petitioners contend, to tidy up loose ends such as the hours and days of operation. Viewed in this context, the most likely explanation for Condition 1 is that it was intended to provide the land use proceeding and application of ORS 215.130 standards needed to verify the composting facility as a nonconforming use, which, in all probability, would have been the result of any remand of the 2011 franchise authorization.[8] That understanding of Condition 1 is consistent with its plain text, which requires, without any limits or qualifications, that petitioners apply for and obtain a nonconforming use verification for the composting facility, pursuant to land use permit procedures, in order to demonstrate that the composting facility is a "valid land use."

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[8] It seems probable that at least Kamp believed that Condition 1 made it unnecessary to further challenge the 2011 franchise authorization. Immediately after the county and petitioners entered into the 2014 franchise agreement, Kamp moved to voluntarily dismiss his appeal of the 2011 franchise authorization. *Kamp v. Washington County*, __ Or LUBA __ (LUBA No. 2011-098, January 28, 2014). The timing of the issuance of the 2014 franchise

In sum, we agree with the hearings officer that on January 21, 2014, the 2014 franchise agreement became the controlling decision with respect to the nonconforming use status of the composting facility. Whether to moot the appeal of the 2011 franchise authorization, or for some other reason, the county and petitioners negotiated a franchise agreement that includes Condition 1. Condition 1 unreservedly requires petitioners to demonstrate that the composting facility is a valid land use. Pursuant to Condition 1, petitioners filed the application to verify the composting facility as a lawful nonconforming use. In that application, petitioners submitted affidavits and evidence to demonstrate that the composting facility was lawfully established prior to 1962, the date contrary zoning was imposed. The hearings officer evaluated that evidence under the standards that apply to an application to verify a nonconforming use, at ORS 215.130 and the county code. One of those standards is a requirement that petitioners demonstrate that the composting facility was lawfully established at the time contrary zoning was applied. The 2011 franchise authorization includes no findings supporting its bare conclusion that the facility was lawfully established at the time contrary zoning was applied. Absent the 2014 franchise agreement and Condition 1, the

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agreement and the voluntary motion to dismiss cannot be coincidental.

bare conclusion in the 2011 franchise authorization that the composting facility is a lawful nonconforming use might well be binding on future county land use reviews regarding the facility's nonconforming use status. However, the 2014 franchise agreement and Condition 1 effectively superseded whatever preclusive effect the 2011 franchise authorization might have otherwise had. In short, the hearings officer, in giving effect to Condition 1 and evaluating the application for nonconforming use verification under the applicable standards, did not "collaterally attack" the 2011 franchise authorization.

For similar reasons, we disagree with petitioners that county counsel's arguments to the Court of Appeals in *Grabhorn, Inc.*, with regard to the 2011 franchise authorization, compel the hearings officer to conclude that the composting facility is a lawful nonconforming use. County counsel argued only that the 2011 franchise authorization mooted the appeal of the June 9, 2010 letter, not that the 2011 franchise authorization would preclude the commissioners and petitioners from subsequently entering into a franchise agreement that compels petitioners to demonstrate, in a land use proceeding under the applicable land use standards, that the composting facility is a valid land use.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners argue that since 1991 the county has represented on multiple occasions the position that the composting facility is a lawful use, most expressly in the 2011 franchise agreement, in which the commissioners found that the composting facility is a lawful nonconforming use. Petitioners argue that they have relied upon these representations over the years, for example in obtaining a DEQ permit for the composting facility in 1999, and again in 2013. Petitioners contend that because petitioners have relied upon the county's representations that the composting facility is a lawful use, the county is now estopped from taking the position that the composting facility is not a lawful use.

The five elements of equitable estoppel are set out in *Oregon v. Portland Gen. Elec. Co.*, 52 Or 502, 528, 95 P 722 (1908). The proponent must establish that (1) the respondent made a false representation; (2) the false representation was made with knowledge of the facts; (3) the proponent was ignorant of the truth; (4) the false representation was made with the intention that it should be acted upon by the proponent; and (5) the proponent was induced to act upon the false representation. Petitioners argue that all five elements are met in the present case.

Kamp responds that the Court of Appeals has held that the doctrine of equitable estoppel does not bar a local government from applying and enforcing its zoning code. *See Clackamas County v. Emmert*, 14 Or App 493, 513 P2d 532 (1973); *Lane County v. Oregon Builders, Inc.*, 44 Or App 591, 606 P2d 676 (1980). The county responds that estoppel does not lie against the county, because at least three of the five elements identified in *Oregon v. Portland Gen. Elec. Co.* are not met. The county argues that the county made no false representations that the composting facility was lawfully established, that petitioners were hardly ignorant of the truth regarding whether the composting facility was lawfully established, and finally that petitioners have not demonstrated that they were induced to act upon the county's false representation.

In *Macfarlane v. Clackamas County*, 70 Or LUBA 126, 131 (2014), LUBA held that we will no longer entertain arguments based on equitable doctrines, unless the proponent first establishes that LUBA has the authority under its governing statutes to reverse, remand or affirm a land use decision based on exercise of equitable doctrines. LUBA is a creature of statute, and can only exercise the limited powers granted by the legislature. Because petitioners have not identified any basis for LUBA to reverse or remand the

hearings officer's decision based on equitable estoppel, the arguments under this assignment of error fail for that reason alone.

In addition, as intervenor Kamp notes, petitioners identify no authority for LUBA to apply equitable estoppel in a manner that would bar the county from correctly applying its land use laws and regulations regarding the nonconforming use status of the composting facility. *Clackamas County v. Emmert* and *Lane County v. Oregon Builders, Inc.*, can be read to suggest that, while a local government acting in a proprietary capacity might be subject to equitable estoppel, estoppel does not lie against a local government's application of its comprehensive plan or zoning code, in an exercise of its police powers. If there is any authority to the contrary, petitioners do not cite it.

Finally, we agree with the county that, even if LUBA has authority to reverse or remand a land use decision based on equitable estoppel, and that equitable estoppel can be invoked to force the county to grant a land use approval that is contrary to state law and county code, petitioners have not established that all elements of equitable estoppel are met in this case. In *DLCD v. Benton County*, 27 Or LUBA 49, 62, *aff'd* 128 Or 637 (1994), LUBA held that (assuming equitable estoppel applies) that the "false representation" element is met only if there is a misrepresentation of material fact, not of a

conclusion drawn from the facts or a conclusion of law. Here, the 2011 franchise authorization concluded that the composting facility is a lawful nonconforming use, which is not a statement of material fact, but a conclusion of law or mixed conclusion of law and facts. Thus, petitioners have not demonstrated that the county made a misrepresentation of material fact, or that the "false representation" element of equitable estoppel is met.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners contend next that the county is "preempted" from changing its position regarding the lawfulness of the composting facility, because DEQ has issued a DEQ composting facility registration for the facility.

On April 2, 2013, DEQ issued a composting facility registration to petitioners. The registration authorizes petitioners to operate a composting facility in compliance with, among other things, the 2011 franchise authorization. Record 4353-54. According to petitioners, once the county has advised DEQ that the composting facility is compatible with the county's land use regulations, and DEQ has acted on that advice and issued the DEQ registration, the county is thereafter "preempted" by DEQ regulations from revoking the 2011 franchise authorization or otherwise taking a position contrary to the advice it provided to DEQ. Petitioners contend that for the state

solid waste regulatory program to function, exercise of local land use authority must be limited to processes reserved to local governments *before* DEQ authorizations are issued. Once the 2013 DEQ registration issued, petitioners argue, the county lost any authority to declare that the composting facility is not a lawful nonconforming use.

Petitioners cite to OAR 340-018-0050(2)(a)(E), a DEQ administrative rule providing that "[a] local government may withdraw or modify its compatibility determination any time prior to issuance of [a DEQ] permit."[9]

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[9] OAR 340-018-0050(2) is part of DEQ's state agency coordination program, and provides, in relevant part:

> "[DEQ] shall rely on the compatibility procedures described in * * * [DEQ's state agency coordination program document] to assure compatibility with an acknowledged comprehensive plan, which include but may not be limited to the procedures described below:
>
> "(a) An applicant's submittal of a LUCS which provides the affected local government's determination of compatibility:
>
> "(A) A LUCS shall be submitted with a [DEQ] application or required submittal information;
>
> "(B) [DEQ] shall rely on an affirmative LUCS as a determination of compatibility with the acknowledged comprehensive plan unless otherwise obligated by statute;
>
> "(C) If [DEQ] concludes a local government LUCS review and determination may not be legally sufficient,

The negative implication, petitioners argue, is that once the local government issues its compatibility determination to a state agency for the purpose of issuing state agency permits, the local government thereafter lacks authority to modify or withdraw its statement of compatibility. Petitioners contend that the 2011 franchise authorization operated as a compatibility determination or was relied upon by DEQ for that purpose.

> [DEQ] may deny the permit application and provide notice to the applicant. In the alternative, when the applicant and local government express a willingness to reconsider the land use determination, [DEQ] may hold the permit application in abeyance until the reconsideration is made;
>
> "* * * * *
>
> "(E) A local government may withdraw or modify its compatibility determination any time prior to the issuance of a permit;
>
> "* * * * *
>
> "(G) If a local government land use compatibility determination or underlying land use decision is appealed subsequent to [DEQ's] receipt of the LUCS, [DEQ] shall continue to process the action unless ordered otherwise by LUBA or a court of law stays or invalidates a local action;
>
> "(H) If a LUCS is successfully appealed after [DEQ] has issued a permit, [DEQ] may either proceed to revoke or suspend the permit or may decide to wait until the land use appeals process is exhausted."

However, petitioners have not established that under DEQ's rules or any other authority cited to us issuance of the 2013 DEQ registration "preempts" further county land use decisions regarding whether the composting facility qualifies as a lawful nonconforming use. OAR 340-018-0050(2)(a)(E) does not state, or necessarily imply, that a local government cannot withdraw or modify a land use compatibility determination after issuance of a DEQ permit. As intervenor Kamp points out, OAR 340-018-0050(2)(a)(G) and (H) allow the agency to issue a permit while the LUCS decision is on appeal, and clearly tie the ultimate fate of the DEQ permit to the outcome of the appeal and, presumably, the outcome of any county decisions on remand that might modify the LUCS determination. *See* n 9. That undercuts petitioners' argument that OAR 340-018-0050(2)(a)(E) should be read to the effect that issuance of a DEQ permit "preempts" further local government actions regarding a LUCS determination.

In the present case, the legal and procedural landscape is quite complicated, but as we understand the circumstances the 2013 DEQ registration did not foreclose further county actions regarding the nonconforming use status of the composting facility. The 2013 DEQ registration required petitioners to comply with the 2011 franchise authorization, among other requirements. DEQ was presumably aware that the

2011 franchise authorization was then on appeal, and that the determination that the composting facility is a lawful nonconforming use could be overturned on appeal or otherwise revisited as a result of the parties' choices. The 2011 franchise authorization directed staff to negotiate a franchise agreement with petitioners. Record 4724. The outcome of that negotiation was the 2014 franchise agreement, including Condition 1, which as explained above required petitioners to file an application for a nonconforming use verification, in order to demonstrate that the composting facility is a "valid land use." As discussed above, the 2014 franchise agreement had the practical effect of unsettling the conclusion in the 2011 franchise authorization that the composting facility is a lawful nonconforming use. Although we cannot be sure, it seems at least possible that Condition 1 was negotiated under the shadow of the pending appeal of the 2011 franchise authorization, and perhaps was intended to moot that appeal. Because the 2013 DEQ registration required petitioners to comply with the 2011 franchise authorization, which in turn required negotiations to reach a final agreement, it is not inconsistent with the 2013 DEQ registration for petitioners to comply with the negotiated conditions in that agreement, including filing a nonconforming use verification application to establish that the composting facility is a valid land use.

In sum, petitioners have not demonstrated that further county land use proceedings regarding the nonconforming use status of the composting facility are preempted by, or otherwise inconsistent with, the 2013 DEQ registration.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

After concluding that the composting facility was not lawfully established prior to application of contrary zoning, the hearings officer went on to consider whether the composting facility could be approved as an "alteration" to the nonconforming landfill use. The hearings officer noted that the application did not request approval of the composting facility as an alteration, and indeed petitioners had taken the position that no changes to the composting facility had occurred over time that would require approval as alterations. Accordingly, the hearings officer concluded that she lacked authority to consider whether the composting facility could be approved as an alteration of the landfill use.

However, the hearings officer went on to offer several observations regarding the nature and extent of the composting facility, the need for approval of alterations, and the potential outcome of any application seeking approval as an alteration.

Specifically, the hearings officer concluded that the size of the composting facility had increased significantly since 1994, from .6 acres in 1994 to 4.8 acres in 2014, a 700 percent increase. Further, the hearings officer found that the compost feedstock increased from 14,919 tons in 1994 to 58,484 tons in 2014, an increase of 292 percent. According to the hearings officer, such expansions would require approval as alterations to the composting facility. The hearings officer noted, however, that CDC 440-6.2.B(3) places a one-time, ten percent limitation on the expansion in area of a lawful nonconforming use. The hearings officer concluded that if an application for alteration were properly before her, she would be inclined to conclude that petitioners would have the right to operate a composting facility that is at most .66 acres in size.

On appeal, petitioners challenge those observations, arguing that the hearings officer failed to recognize evidence that the composting operation in 1994 was not limited to the .6 acres of the "cooking" compost pile, but also included feedstocks located elsewhere on the property, which have subsequently been relocated to tax lot 2302. Petitioners also argue that the hearings officer erred in concluding that any growth in the footprint of the compost pile necessarily constitutes an "alteration," as opposed to the natural growth of the business, or growth in response to lawful requirements.

The county responds, and we agree, that the hearings officer's observations regarding the need for and the likelihood of obtaining approvals for alterations constitute only dicta. The hearings officer's primary conclusion is that the application did not request approval of any alterations, and therefore the hearings officer lacked authority to approve alterations. Petitioners do not challenge that primary conclusion. The hearings officer's ruminations regarding the need for and likelihood of obtaining approval of alterations are not alternative findings, but rather simply speculative dicta regarding the need for and the potential outcome of future land use reviews. Accordingly, petitioners' challenge to those dicta can provide no basis for reversal or remand.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

One of the local appeal issues petitioners raised to the hearings officer was a challenge to one aspect of the planning staff's decision, namely, that the application for nonconforming use verification constituted a request for "development," with the result that certain code standards that apply to "development permits," such as grading standards, applied to composting operations. The hearings officer concluded that this appeal issue was "moot," apparently because petitioners had failed to establish that the composting

facility is a lawful nonconforming use. Record 39. In addition, the hearings officer concluded that the appeal issue was insufficiently developed, because petitioners had not "identified any distinction that would apply to the nonconforming use analysis based on whether or not the action is a 'development permit.'" *Id.*

On appeal to LUBA, petitioners argue that the hearings officer erred in concluding that the appeal issue was insufficiently developed. We understand petitioners to argue that the hearings officer should have addressed and resolved that appeal issue. Petitioners argue on the merits that county grading standards are preempted by DEQ regulations, and that the planning director erred in imposing conditions requiring petitioners to comply with the grading standards.

However, petitioners do not challenge the hearings officer's primary conclusion that this appeal issue is "moot." Petitioners do not explain why LUBA should resolve the sixth assignment of error, given that we have rejected petitioners' challenges to the hearings officer's conclusion that petitioners have not established that the composting facility is a lawful nonconforming use. Petitioners' arguments under the sixth assignment of error do not provide a basis for reversal or remand.

The sixth assignment of error is denied.

The county's decision is affirmed.