

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

4  
5                                   JOHN GILMOUR,  
6   *Petitioner,*

7  
8   vs.

9  
10                                   LINN COUNTY,  
11   *Respondent,*

12  
13   and

14  
15                                   FRIENDS OF LINN COUNTY, GOAL ONE COALITION,  
16                                   KATIE KOHL, PAUL HARCUMBE, SUSAN MARESH,  
17                                   CHET HOUSER, REBECCA BOND and JESSICA PANKRATZ,  
18   *Intervenors-Respondents.*

19  
20   LUBA No. 2015-093

21  
22   FINAL OPINION  
23   AND ORDER

24  
25                                   Appeal from Linn County.

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27                                   Alan M. Sorem, Salem, filed the petition for review and argued on behalf  
28 of petitioner. With him on the brief was Saalfeld Griggs PC.

29  
30                                   No appearance by Linn County.

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32                                   Sean T. Malone, Eugene, filed the response brief and argued on behalf of  
33 intervenors-respondents.

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

37  
38                                   REVERSED

02/18/2016

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

1 Opinion by Ryan.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a board of county commissioners' decision that  
4 interprets statutory and local code provisions governing uses in the exclusive  
5 farm use zone.

6 **MOTION TO INTERVENE**

7 Friends of Linn County, Goal One Coalition, Katie Kohl, Paul  
8 Harcombe, Susan Maresh, Chet Houser, Rebecca Bond, and Jessica Pankratz  
9 (intervenors) move to intervene on the side of respondent. The motion is  
10 granted.

11 **REPLY BRIEF**

12 Petitioner moves to file a reply brief to respond to new matters raised in  
13 the response brief. The reply brief is allowed.

14 **FACTS**

15 Petitioner owns a 91.87-acre property zoned exclusive farm use, on  
16 which exists a large building that houses equipment that is used for  
17 compressing baled straw. Petitioner cuts the straw on his property, bales it in  
18 the field, and then transfers the bales to the straw compressing facility, where  
19 the bales are compressed and loaded onto trucks. Bales of straw that are cut and  
20 baled on other farms in the area are also brought to the compressing facility,  
21 compressed, and loaded onto trucks.

1           Petitioner submitted a request for an interpretation of the Linn County  
2 Development Code (LCC) pursuant to LCC 921.600 - 921.670, which provide  
3 the procedure for seeking and receiving an interpretation of the LCC. In the  
4 application, petitioner requested an interpretation of the LCC to determine if  
5 petitioner’s straw compressing operation described in the application consisted  
6 of “preparation” of a farm crop or “processing” of a farm crop.<sup>1</sup> Record 170-71.

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<sup>1</sup> The application provides the following description of the straw compressing operation on petitioner’s property:

“As you know Mr. Gilmour has a straw pressing operation that currently operates under a conditional use permit. I believe the facts are these as to the pressing operation:

“1. Mr. Gilmour compresses 3,000 to 5,000 tons of his own straw annually. This straw comes from his and his father’s grass seed farms;

“2. Mr. Gilmour compresses another 15,000 to 25,000 tons from other grass seed farms that he (John Gilmour) harvests from those farms’ fields by baling. This baled straw is then transported and stored and then compressed for loading into containers shipped mostly to Asian markets for sale. Nothing is added to any of this straw. The straw remains unchanged from the field to container except it is baled and then compressed;

“3. Mr. Gilmour bales all his own straw except on occasion he will purchase baled straw if the market dictates this is economically feasible. The preferred option is Mr. Gilmour bales all his own straw. The most baled straw ever purchased by Mr. Gilmour was up to 20% of the total compressed in that year. This was an unusual year. This is not the norm and it is a more

1 The planning director concluded that “a straw pressing facility [as described by  
2 petitioner in his application] constitutes ‘preparation and storage’ of farm  
3 products, and is classified as a farm use under LCC 920.100(B)(104),  
4 consistent with [Oregon Administrative Rule (OAR)] 660-033-0020(7) and  
5 ORS 215.203.” Record 168 (italics omitted).

6 Some of the intervenors appealed the planning director’s decision to the  
7 board of county commissioners. The board of commissioners conducted a  
8 public hearing and adopted a decision that concluded that petitioner’s straw  
9 compressing operation described in the application is not “farm use” within the  
10 meaning of ORS 215.203(2)(a) and the implementing LCC provisions because  
11 it is not “preparation” of farm products.<sup>2</sup> Having concluded that the operation

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expensive option than Mr. Gilmour himself baling all his straw  
himself.” Record 170.

<sup>2</sup> The decision includes the following description of the facts asserted by  
petitioner:

“Straw is ‘harvested’ from farms under the control of the operator  
of the straw pressing facility, and also from other farms in the  
local agricultural areas that are not under the control of the straw  
pressing facility operator;

“The straw is initially harvested by being baled on-site;

“At least 80 percent of the straw that is pressed is baled by the  
operator of the straw pressing facility, or his employees;

1 is not “farm use,” the board of county commissioners then concluded  
2 petitioner’s straw compressing operation constitutes the “processing” of the  
3 products pursuant to ORS 215.283(1)(r). Petitioner appealed the decision to  
4 LUBA.

## 5 **JURISDICTION**

6 In their response brief, intervenors argue that LUBA lacks jurisdiction  
7 over the appeal, arguing that the county’s interpretation of the relevant LCC  
8 provisions is not a “land use decision” as defined in ORS 197.015(10)(a),  
9 because it is not a “final decision” as required by the statute.<sup>3</sup>

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“The baled straw is then transported to the straw pressing facility, located on [EFU] land, where it is stored, compressed, loaded into containers then shipped to market;

“The land on which the straw pressing is occurring is 91 acres, the majority of the acreage is farmed in grass seed, and a majority of the land is being used for the primary purpose of obtaining a profit in money from the farm use of the land;

“The straw remains unchanged from its harvested form, except that it is first baled in the field and then further compressed at the pressing facility before shipment.” Record 4-5.

<sup>3</sup> ORS 197.015(10)(a) defines land use decision to include:

“(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

- “(i) The goals;
- “(ii) A comprehensive plan provision;
- “(iii) A land use regulation; or

1           The county’s decision that interprets various provisions of the LCC is a  
2 land use decision as defined in ORS 197.015(10)(a), because the decision  
3 concerns the application of LCC procedures for seeking and obtaining an  
4 interpretation of the LCC, and the application of LCC provisions that  
5 implement ORS 215.203 and ORS 215.283, discussed later in this opinion. The  
6 county applied the LCC to petitioner’s application for an interpretation, and  
7 issued a written decision that interprets the LCC. There was no right of further  
8 local appeal. In doing so, the county made a “final decision” within the  
9 meaning of ORS 197.015(10)(a).

10 **FIRST ASSIGNMENT OF ERROR**

11           ORS 215.203(2)(a) provides in relevant part that:

12           “As used in [ORS 215.203 et seq], \* \* \*‘Farm use’ includes the  
13 preparation, storage and disposal by marketing or otherwise of the  
14 products or by-products raised on such land for human or animal  
15 use. \* \* \*”

16 OAR 660-033-0020(7) provides:

17           “(a) ‘Farm Use’ as that term is used in ORS chapter 215  
18 and this division means ‘farm use’ as defined in ORS  
19 215.203.

20  
21           “(b) As used in the definition of ‘farm use’ in ORS  
22 215.203 and in this division:

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          “(iv) A new land use regulation[.]”

1                   “(A) ‘Preparation’ of products or by-products  
2                   includes but is not limited to the cleaning,  
3                   treatment, sorting, or packaging of the products  
4                   or by-products; and  
5

6                   “(B) ‘Products or by-products raised on such land’  
7                   means that those products or by-products are  
8                   raised on the farm operation where the  
9                   preparation occurs or on other farm land  
10                  provided the preparation is occurring only on  
11                  land being used for the primary purpose of  
12                  obtaining a profit in money from the farm use  
13                  of the land.”

14 In his first assignment of error, petitioner argues that the county improperly  
15 construed ORS 215.203(2)(a) and the LCDC rule and LCC implementing  
16 provisions when it determined that the straw pressing operation described in  
17 petitioner’s application does not constitute “farm use.”<sup>4</sup> According to  
18 petitioner, the straw pressing operation described in his application constitutes  
19 “farm use” because it is “preparation \* \* \* of the products or by-products  
20 raised on such land for human or animal use[.]” ORS 215.203(2)(a).  
21 Intervenor’s respond that the straw pressing operation described in petitioner’s  
22 application is not “preparation” because the straw is subjected to an enhancing  
23 procedure when it is pressed at the straw pressing facility located on the subject  
24 property. Rather, intervenor’s respond, the board of commissioners correctly  
25 found that the straw pressing operation is “processing” of a farm product, a use

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<sup>4</sup> LCC 920.100(B)(104)(b)(i) and (vi) implement the statutory and rule provisions.



1 allowed in the EFU zone under ORS 215.283(1)(r), subject to statutory  
2 requirements and county siting standards.

3 The county’s decision is an interpretation of a land use regulation that  
4 implements a state statute, and we owe no deference to the local government’s  
5 interpretation. *Kenagy v. Benton County*, 115 Or App 131, 134, 838 P2d 1076  
6 (1992). “Preparation” is not defined in ORS 215.203(a) or OAR 660-033-  
7 0020(7). In order to ascertain the legislature’s intent in using the undefined  
8 word “preparation,” we look to the dictionary definition. As relevant,  
9 “preparation” is defined to mean:

10 “**1 a:** the action or process of making something ready for use or  
11 service[.]” *Webster’s Third New Int’l Dictionary* 1790  
12 (unabridged ed 2002).

13 Although not specifically defined in OAR 660-033-0020(7)(a), “[p]reparation”  
14 is described in OAR 660-033-0020(7)(b)(A) as including without limitation  
15 “cleaning, treatment, sorting, or packaging of the products \* \* \* [.]”  
16 “Preparation,” therefore, includes “packaging” of the straw. Compressing the  
17 baled straw is similar to or the same as packaging that straw.

18 We conclude that under the plain meaning of the word “preparation,” the  
19 act of compressing straw in the manner and under the conditions described in  
20 petitioner’s application and the decision constitutes preparation of the straw,  
21 and could also constitute packaging the straw under OAR 660-033-  
22 0020(7)(b)(A). As far as we are informed, the compression simply makes the

1 bales easier to transport to their eventual end use as feed, but does not change  
2 the straw in any way, or change the fact that it is ready for use as feed after it is  
3 baled and remains ready for use as feed after it is compressed.

4 We recognize that the concepts of “preparation” and “processing” in the  
5 exclusive farm use zoning context are sufficiently subjective, ambiguous and  
6 potentially overlapping that there will be occasions where a case can be made  
7 for determining that a particular use is “preparation,” and therefore a farm use,  
8 or “processing” and therefore something other than a farm use. While a change  
9 in the assumed facts in this case might lead us to a different conclusion, we  
10 conclude the proposed use is essentially an extension of the initial baling of the  
11 straw, which occurs in the field, that is simply further preparation in the  
12 facility, and therefore accurately characterized as a farm use. We agree with  
13 petitioner that the straw compressing operation that is described in the  
14 application and the decision constitutes “farm use” because it is the  
15 “preparation \* \* \* of the products \* \* \* raised on such land for human or  
16 animal use.” The county improperly construed ORS 215.203(2)(a) and OAR  
17 660-033-0020(7)(b) when it concluded otherwise. ORS 197.835(9)(a)(D).

18 The first assignment of error is sustained.

19 **SECOND ASSIGNMENT OF ERROR**

20 As relevant here, ORS 215.283(1)(r) authorizes in the exclusive farm use  
21 zone:

1            “[a] facility for the processing of farm crops \* \* \* if the facility is  
2            located on a farm operation that provides at least one-quarter of  
3            the farm crops processed at the facility[.] \* \* \* If a building is  
4            established or used for the processing facility or establishment, the  
5            farm operator may not devote more than 10,000 square feet of  
6            floor area to the processing facility or establishment, exclusive of  
7            the floor area designated for preparation, storage or other farm use.  
8            A processing facility or establishment must comply with all  
9            applicable siting standards but the standards may not be applied in  
10           a manner that prohibits the siting of the processing facility or  
11           establishment.”

12        LCC 928.320(B)(20) implements ORS 215.283(1)(r). In the decision, the board  
13        of county commissioners concluded that the straw pressing operation described  
14        in the application constitutes “processing” within the meaning of ORS  
15        215.283(1)(r) and LCC 928.320(B)(20). However, the board of county  
16        commissioners concluded that the straw compressing operation described in the  
17        application is not authorized under ORS 215.283(1)(r) because petitioner’s  
18        farm operation did not provide “at least one-quarter of the farm crops processed  
19        at the facility[.]” Record 7-8. In his second assignment of error, petitioner  
20        argues that the county committed a procedural error that prejudiced his  
21        substantial rights when it concluded that the straw processing operation  
22        described in the application was not authorized under ORS 215.283(1)(r) and  
23        LCC 928.320(B)(20), because, petitioner argues, petitioner did not seek an  
24        interpretation under ORS 215.283(1)(r) and the LCC, and the county did not  
25        provide notice that it would interpret those provisions. Petition for Review 29.

1           We sustain the first assignment of error and conclude that the county  
2 erred in concluding that the straw compression operation described in the  
3 application and the decision is not a “farm use” allowed in the exclusive farm  
4 use zone pursuant to ORS 215.203(2)(a). Accordingly, the board of county  
5 commissioners’ additional conclusion that the straw compressing operation  
6 described in the application is “processing” under ORS 215.283(1)(r)  
7 improperly construes that statute. However, because we reverse the decision  
8 based on the county’s incorrect conclusion described in the first assignment of  
9 error, we need not address petitioner’s second assignment of error.

10   **DISPOSITION**

11           ORS 197.835(9)(a)(D) allows LUBA to reverse or remand a decision  
12 where the local government “[i]mproperly construed the applicable law[.]”  
13 OAR 661-010-0071(1)(c) provides that LUBA will reverse a decision where  
14 the decision violates a provision of applicable law, and is prohibited as a matter  
15 of law. The county’s determination that the straw compression operation  
16 described in petitioner’s application and the decision is not a “farm use,” as  
17 defined in ORS 215.203(2)(a), is prohibited as a matter of law. Accordingly,  
18 the proper disposition is reversal.

19           The county’s decision is reversed.