

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

3
4 HOWARD GRABHORN, and GRABHORN, INC.,
5 *Petitioners,*

6
7 vs.

8
9 WASHINGTON COUNTY,
10 *Respondent,*

11
12 and

13
14 ARTHUR J. KAMP,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2015-018

18 ORDER

19 **MOTION TO INTERVENE**

20 Arthur J. Kamp moves to intervene on the side of the respondent in this
21 appeal. There is no opposition to the motion and it is allowed.

22 **MOTION TO TAKE EVIDENCE**

23 The challenged decision is a hearings officer’s decision concluding that
24 petitioners have not established that their existing composting facility is a
25 lawful nonconforming use for purposes of ORS 215.130.¹ One of the things
26 that an applicant must demonstrate to verify a lawful nonconforming use is that
27 the use existed on the property before the date that contrary zoning or

¹ ORS 215.130(5) provides that “[t]he 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. * * *”

1 regulation was first applied. *Aguilar v. Washington County*, 201 Or App 640,
2 650, 120 P3d 514 (2005).

3 In the present case, the hearings officer concluded that petitioners failed
4 to establish that the composting facility existed on the site on or before the date
5 that contrary zoning was first applied to the property. Specifically, the hearings
6 officer concluded that the composting facility was established on the property
7 sometime around 1992, after the date contrary zoning or regulation was
8 applied. One portion of the hearings officer’s decision appears to identify the
9 date contrary zoning was first applied as 1984, when the subject property was
10 rezoned to Exclusive Farm Use (EFU).

11 On appeal to LUBA, petitioners moves to take evidence not in the
12 record, pursuant to OAR 661-010-0045.² Specifically, petitioners seek to place

² OAR 661-010-0045 provides, in relevant part:

“(1) Grounds for Motion to Take Evidence Not in the Record:
The Board may, upon written motion, take evidence not in
the record in the case of disputed factual allegations in the
parties’ briefs concerning unconstitutionality of the
decision, standing, ex parte contacts, actions for the purpose
of avoiding the requirements of ORS 215.427 or 227.178, or
other procedural irregularities not shown in the record and
which, if proved, would warrant reversal or remand of the
decision.* * *

“(2) Motions to Take Evidence:

“(a) A motion to take evidence shall contain a statement
explaining with particularity what facts the moving
party seeks to establish, how those facts pertain to the
grounds to take evidence specified in section (1) of
this rule, and how those facts will affect the outcome
of the review proceeding.”

1 before LUBA evidence outside the local record, in the form of photographs,
2 declarations and documents, pertaining to the use of the site in 1984, to
3 establish that the composting facility was existing on the site on that date. As
4 explained below, the motion is not well-founded.

5 We first set out the relevant facts and chronology, which we understand
6 to be undisputed. Petitioners own a 63-acre parcel on which a landfill (or “solid
7 waste disposal facility,” in modern regulatory parlance) was established
8 sometime prior to 1962, at a time when no county zoning applied to the
9 property. In 1962, the county zoned the property F-1, an agricultural zone.
10 The F-1 zone did not authorize a landfill, solid waste disposal facility or any
11 similar facility. At all relevant times since 1962, the county has treated
12 petitioner’s landfill as a lawful nonconforming use. That landfill, which closed
13 in 2009, is not directly at issue in this appeal.

14 At some point the subject property was rezoned to GFU-38, which also
15 did not allow landfills or similar facilities. In 1969 and 1971, the county
16 adopted zoning code amendments that we understand had the effect of
17 distinguishing between a landfill and a “composting plant.” Both types of
18 facilities apparently became conditional uses allowable in some county zones,
19 but not in the GFU-38 zone.

20 In 1984, the county rezoned the property to EFU, a zone subject to
21 statutes at ORS chapter 215 and to administrative rules at OAR chapter 660,
22 division 033. The county’s EFU zone in 1984 allowed a solid waste disposal
23 facility as a conditional use. Under current regulations governing the EFU
24 zone, new solid waste disposal facilities and composting facilities are generally

1 prohibited on high-value farmland. OAR 660-033-0120, Table 1.³ The
2 subject property qualifies as high-value farmland. However, existing facilities
3 on high-value farmland that are lawful nonconforming uses may be maintained,
4 enhanced or expanded. *Id.*; OAR 660-033-0130(18)(a).

5 According to the hearings officer, sometime in 1992 petitioners
6 established a small composting facility on the property. Petitioners took the
7 position before the county below that composting operations of some kind
8 commenced on the property prior to 1962, when county zoning was first
9 applied to the property.⁴

10 As noted, in 2009 petitioners closed the solid waste disposal operations.
11 Petitioners proposed to continue the composting facility, which had grown to
12 cover five acres. DEQ required petitioners to obtain a county decision that the
13 composting facility is a lawful use. Petitioners eventually filed an application
14 with the county requesting verification that the existing composting facility is a
15 lawful nonconforming use. County staff approved the application with
16 conditions. Neighbors, including intervenor-respondent Art Kamp, appealed
17 the staff decision to the hearings officer.

18 As relevant here, the hearings officer concluded that a composting
19 facility was not established on the property until approximately 1992, after the

³ “Composting” and “composting facility” are defined and regulated under DEQ’s rules at OAR chapter 340, division 093.

⁴ The hearings officer concluded that alleged composting operations prior to 1992 were limited to production of mulch from woody debris, which the hearings officer found did not constitute “composting” or the production of “compost” under county, DEQ, and other applicable definitions and regulations.

1 date that contrary zoning was applied that would prohibit or require county
2 approval for a composting facility. For some reason, the hearings officer's
3 findings identify the EFU zone, applied to the property in 1984, as the zone
4 change that first prohibited or regulated establishment of a composting facility
5 on the property:

6 “* * * As discussed in greater detail below, the weight of the
7 evidence leads the Hearings Officer to find the applicant did not
8 begin ‘composting’ until 1992. EFU zoning applied to the
9 property beginning in 1984. Therefore, the Hearings Officer finds
10 the composting occurring on the property was not established,
11 lawfully or otherwise, prior to zoning regulations prohibiting
12 composting on the property.” Motion to Take Evidence, Exhibit
13 B, 24.

14 To summarize, it appears that all parties below understood that the
15 zoning that first prohibited or regulated composting facilities on the subject
16 property was the F-1 zoning that was applied in 1962. All parties also seem to
17 agree that, although the zoning of the subject property has changed over the
18 years, the zoning of the subject property since 1962 has continuously
19 prohibited or regulated composting facilities on the subject property. The
20 hearings officer, in the finding quoted above, can be understood to suggest that
21 the 1984 EFU zoning was the zoning that first prohibited composting. With
22 that background, we turn to petitioner's motion to take evidence.

23 Petitioners move for LUBA to consider evidence outside the local
24 record, pursuant to OAR 661-010-0045. One ground for LUBA to consider
25 evidence outside the record is “disputed factual allegations” concerning
26 “procedural irregularities not shown in the record and which, if proved, would
27 warrant reversal or remand of the decision.” See n 2. Petitioners contend that
28 the hearings officer committed procedural error, when the hearings officer

1 concluded in her final decision that 1984 is the relevant year in which contrary
2 zoning was first applied, rather than 1962. According to petitioners, the
3 hearings officer failed to provide petitioners notice of that “change,” and failed
4 to provide an opportunity to submit evidence regarding whether the
5 composting facility lawfully existed on the site in 1984.

6 A second ground for LUBA to consider evidence outside the record is
7 disputed factual allegations concerning the “unconstitutionality of the
8 decision[.]” For essentially the same reasons described above, petitioners
9 argue that the hearings officer’s failure to provide it with an opportunity to
10 present evidence regarding whether the composting facility existed on the
11 property in 1984 violated petitioners’ due process rights under the Fourteenth
12 Amendment to the United States Constitution.

13 Under both grounds, petitioners seek to place before LUBA evidence, in
14 the form of photographs, declarations and documents, pertaining to the use of
15 the site in 1984, to establish that a composting facility existed on the site as of
16 the date EFU zoning was applied to the property.

17 Petitioners have not demonstrated a basis for LUBA to consider the
18 proffered extra-record evidence regarding use of the property in 1984. The
19 hearings officer found that petitioners’ composting facility was not established
20 on the property until 1992. If that finding is supported by substantial evidence
21 in the record, it does not matter whether the zoning that first prohibited a
22 composting facility was applied to the property in 1984 rather than in 1962.
23 The hearings officer’s possibly erroneous finding that the zoning that first
24 prohibited a composting facility was applied to the property in 1984 rather than
25 in 1962, is either harmless error or, at most, a basis for reversal or remand to
26 render a decision on petitioners’ application with a correct understanding of the

1 date when zoning that first prohibited a composing facility was applied to the
2 property.⁵ But the hearings officer's finding concerning the 1984 EFU zoning,
3 even if erroneous, is not accurately described as a procedural error or an
4 unconstitutional decision that might warrant granting a motion to take evidence
5 under OAR 661-010-0045. Accordingly, the motion to take evidence is denied.

6 **BRIEFING SCHEDULE**

7 The next event in this review proceeding is the filing of the record,
8 which is currently scheduled for August 3, 2015, after LUBA granted two
9 extensions. Filing of the motion to take evidence automatically suspended the
10 time limits for all events in this review proceeding. OAR 661-010-0045(9). If
11 LUBA denies the motion to take evidence, the time for all other events will run
12 from such date as is specified in LUBA's order. *Id.* Because it is not clear
13 whether the county has continued to prepare the record pending resolution of
14 the motion to take evidence, we shall set a new deadline for filing the record.
15 The record is due 21 days from the date of this order.

16 Dated this 12th day of August, 2015.
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22 _____
23 Tod A. Bassham
Board Chair

⁵ Although we need not and do not decide the question here, it does not appear that any party took the position below that the 1984 EFU zoning was the zoning that first prohibited a composing facility and that all parties understood it was the 1962 zoning that did so. Viewed in that context, the hearings officer's finding regarding to the 1984 zoning would seem to represent, at most, harmless error.