

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JUL 19 2 35 PM '84

3 GEORGE FAIRMONT, BRUCE and )  
 4 VI LYTLE, JOHN WARD, LARRY )  
 and BARBARA CAUDILL, BEA )  
 5 PARKER, DONALD JORDAN, DICK )  
 and RITA WHITE, GEORGE and )  
 6 ANITA MALMSTROM, ROBERT and )  
 HAZEL WATERLUND, )  
 7 ALVIN and GLORIA EARLE, MEI )  
 and CHERYL HOLBROOK, INEZ )  
 8 HOLBROOK, BILL and KATHY )  
 STEWMAN, )  
 9 )  
 Petitioners, )  
 10 )  
 vs. )  
 11 )  
 JOSEPHINE COUNTY, )  
 12 )  
 Respondent. )

LUBA No. 84-025

FINAL OPINION  
AND ORDER

14 Appeal from Josephine County.

15 Patrick J. Kelly, Grants Pass, filed the Petition for  
Review and argued the cause on behalf of Petitioner.

16 Christopher D. Mecca, Grants Pass, filed a response brief  
17 and argued the cause on behalf of Intervenor Thomas and Gaye  
Hayes.

18 No appearance by Josephine County.

19 DUBAY, Referee; BAGG, Chief Referee; KRESSEL, Referee;  
20 participated in the decision.

21 REVERSED IN PART, REMANDED IN PART. 07/19/84

22 You are entitled to judicial review of this Order.  
23 Judicial review is governed by the provisions of ORS 197.850.  
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1 Opinion by DuBay.

2 NATURE OF THE DECISION

3 This is an appeal from an order approving the expansion of  
4 an existing agricultural use in a Rural Residential (RR) Zone.  
5 Intervenors applied to enlarge a barn to increase the number of  
6 calves in a veal feeding operation from 100 to 200.

7 FACTS

8 Intervenors purchased the property in 1981. At that time  
9 the property was zoned for agricultural use, and the veal  
10 feeding operation was considered a permitted use. Intervenors  
11 planned to establish a 200 calf operation, but found financing  
12 a facility that large was not then possible. Accordingly, a  
13 barn adequate for 100 calves was built. In addition, land was  
14 cleared and leveled in anticipation of building the larger  
15 facility.

16 In September, 1981, after intervenors purchased the  
17 property, the county adopted a new zoning ordinance. The zone  
18 designation for the property was changed to Rural Residential.  
19 Although agricultural uses are allowed in the RR Zone,  
20 commercial feedlots are specifically excluded. The new zoning  
21 ordinance also provided the following definition of "commercial  
22 feedlot":

23 "Commercial Feedlot. A lot or portion of property  
24 where 10 or more livestock are penned and fed for the  
25 purpose of preparing them for resale or slaughter, and  
26 in which the land area is incapable of producing  
sufficient forage to support the number of animals  
confined. This definition is intended to apply only  
to activities carried on as commercial enterprises;

1 and, therefore, does not apply to the feeding of  
2 animals accessory to a dairy use or other permitted  
3 use, or to the fattening of animals solely for the  
4 domestic use of the property owner, or to the penning  
5 and feeding of animals for display or show." Section  
6 14.050(24), Josephine County Zoning Ordinance.

7 On the assumption the use was not permitted in the RR Zone,  
8 intervenors applied to the county for a permit to expand a  
9 permitted nonconforming use. They asked to increase the size  
10 of the barn to handle 200 calves at a time. The county  
11 hearings officer found the veal operation met the ordinance  
12 definition of a commercial feedlot and therefore was not a  
13 permitted use in the RR Zone. The hearings officer also  
14 concluded the proposal did not meet the ordinance criteria for  
15 expansion of a nonconforming use.

16 On appeal, the county commissioners found the veal farming  
17 operation was not a commercial feedlot as defined in the  
18 ordinance and, consequently, was not a prohibited use in the RR  
19 Zone. In reaching this conclusion the commissioners noted the  
20 calves were raised in a barn and were therefore "an  
21 agricultural product as that term is commonly known, and not a  
22 feedlot as that term is commonly known." Record 10. On this  
23 basis, the commissioners reversed the hearings officer.

#### 24 FIRST ASSIGNMENT OF ERROR

25 Petitioners challenge the county's conclusion the veal  
26 operation should be treated as a permitted agricultural use  
instead of a nonconforming use in the RR Zone. Petitioners say  
the veal operation meets the ordinance definition of a

1 "commercial feedlot," and the commissioner's conclusion is a  
2 misapplication of the ordinance.

3 Petitioners break down the ordinance definition of  
4 commercial feedlot into four components:

- 5 1. A lot or portion of the property used to pen  
livestock.
- 6 2. Ten or more livestock are penned.
- 7 3. The livestock are fed for commercial purpose or  
8 resale or slaughter.
- 9 4. The land area is insufficient to supply forage to  
support the number of animals confined.

10 Petitioners argue the record shows each of these elements exist  
11 in this case.

12 The findings do not comment on these elements of the  
13 definition but appear to distinguish the intervenors' operation  
14 from commercial feedlots because the animals are not penned out  
15 of doors but are kept inside a barn. The findings include no  
16 discussion or interpretation of the ordinance definition, only  
17 the conclusion this veal operation is not a commercial feedlot  
18 "as commonly known."

19 The county must apply the existing ordinances. Where  
20 ordinances are ambiguous, of course, deference may be given to  
21 the local interpretation. Fifth Avenue Corp. v. Washington  
22 Co., 282 Or 591, 581 P2d 50 (1978); Bienz v. City of Dayton, 29  
23 Or App 761, 566 P2d 904 (1977). Interpretation is called for,  
24 however, only where the ordinance is ambiguous. Miller v. City  
25 Council of Grants Pass, 39 Or App 589, 591 P2d 1088 (1979).

1 The county implies the ordinance definition is ambiguous.  
2 The ambiguity is the claimed failure of the definition to  
3 specify whether inside and outside keeping of animals are  
4 included.

5 The county interpreted the words "on a lot or portion of  
6 the property" to exclude animals kept inside a barn. By making  
7 this distinction between inside and outside animal pens, the  
8 county restricted the scope of the "commercial feedlot"  
9 definition. In doing so, the commissioners changed the meaning  
10 of the ordinance to exclude inside animal pens.

11 We agree with petitioner there is no ambiguity. The  
12 definition is stated in broad terms about where animals are  
13 kept: on all or part of the property. Any distinction between  
14 inside and outside animals pens is not apparent in the wording  
15 of the definition. Even though the desirability for such  
16 distinction may be apparent to the county when confronted by  
17 the facts in this proceeding, the proper method to modify the  
18 definition to exclude certain kinds of animal pens is by  
19 amendment of the ordinance. Here, however, the plain meaning  
20 of the definition includes all animals kept anywhere on the  
21 property. Intervenors' veal operation, therefore, falls within  
22 the definition of "commercial feedlot." The county  
23 misconstrued the ordinance definition.

24 We therefore sustain this assignment of error.

25 SECOND ASSIGNMENT OF ERROR

26 Section 50.010 of the county ordinance allows alteration of

1 a nonconforming use under certain enumerated conditions.<sup>1</sup> In  
2 this assignment of error petitioners contend there were no  
3 findings, supported by substantial evidence, that the required  
4 conditions exist. Therefore, according to petitioners'  
5 argument, the order is in violation of the county zoning  
6 ordinance.

7 The findings show the county based its decision solely on  
8 the ground the veal operation is a permitted use, not a  
9 nonconforming use. Therefore, the county apparently did not  
10 deem it necessary to address each criterion listed in §50.010.  
11 Even so, there are findings bearing on the criterion  
12 restricting alterations that would constitute a nuisance to the  
13 public and adjoining neighbors.<sup>2</sup> These findings, limited as  
14 they are, do not address each of the criterion in §50.010 of  
15 the zoning ordinance. The ordinance requires each of the  
16 listed conditions must exist to permit alteration of a  
17 nonconforming use. There is, therefore, no basis in the  
18 findings to show compliance with §50.010. Consequently, we  
19 sustain this assignment of error.

20 The decision of the county misreads an unambiguous  
21 provision of the county zoning ordinance and approves a  
22 prohibited use of property in the county's Rural Residential  
23 Zone. Pursuant to OAR 661-10-070(1)(A)(3), we therefore  
24 reverse the decision that the proposal is a permitted use under  
25 the county zoning ordinance. As the county did not address all  
26 applicable ordinance criteria regarding alteration of a

1 preexisting nonconforming use, the matter is remanded for  
2 further consideration. To approve the application the county  
3 must find the proposal satisfies the criteria in §50.010 of the  
4 county zoning ordinance.

5 Reversed in part and remanded in part.

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FOOTNOTES

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"Section 50.010 - Non-Conforming Uses. "...A non-conforming use may be altered or reconstructed upon approval of the Zoning Commission where the following conditions exist:

6 "1. There is no other suitably zoned land available  
7 in the vicinity that would accomodate (sic) the  
8 use.

8 "2. The alteration or reconstruction of the  
9 non-conforming use shall not constitute an  
10 excessive nuisance condition to the public or to  
11 the use of adjoining properties.

10 "3. The alteration or reconstruction is limited to  
11 the same type and intensity of use or to a use  
12 more conforming to the provisions of this  
13 Ordinance.

13 "4. The non-conforming use is located on a tract of  
14 land isolated from other similar uses, and it  
15 would be contrary to the Comprehensive Plan to  
16 permit the introduction of similar uses by  
17 rezoning of the tract.

16 "5. The use can be maintained in compliance with any  
17 conditions the Commission finds necessary to  
18 ensure the continued compatibility of the use  
19 with adjoining land uses."

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See Footnote 1, §50.010(2), supra. The findings noted the manure holding pond was approved by DEQ for 200 head of calves, and traffic patterns resulting from the commercial operation would not be extraordinary. In addition the findings note there was varied testimony regarding odor from the operation, but no findings were made whether or not odor was a problem.