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

RICHARD MOODY and DENISE MOODY, )  
 )  
Petitioners, )  
 )  
vs. )  
 )  
DESCHUTES COUNTY, )  
 )  
Respondent, )  
 )  
and )  
 )  
JOYCE PENDERGRAFF, JIM RAY, )  
LARRY FREELAND, ARNIE VETTERICK, )  
CAROL VETTERICK, LINDA LOSCH, )  
RICHARD LOSCH, RICHARD WOLF, )  
SUNNY WOLF, DAVE LEHMANN, )  
MARY LEHMANN, MAGNUS MARKS, )  
JAMES KELLY and GENIE KELLY, )  
 )  
Intervenors-Respondent. )

LUBA No. 91-169  
FINAL OPINION  
AND ORDER

Appeal from Deschutes County.

Myer Avedovech, Bend, filed the petition for review and argued on behalf of petitioners. With him on the brief was Babb, Avedovech & Erwin.

Richard L. Isham, Bend, and Bruce W. White, Bend, filed the response brief, and Bruce W. White argued on behalf of respondent.

Greg Hendrix, Bend, filed a response brief on behalf of intervenors-respondent.

KELLINGTON, Referee; HOLSTUN, Chief Referee, participated in the decision.

AFFIRMED 01/21/92

You are entitled to judicial review of this Order.

1 Judicial review is governed by the provisions of ORS  
2 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal an order of the county commissioners  
4 denying an application for a conditional use permit for a  
5 commercial activity in conjunction with farm use.

6 **MOTION TO INTERVENE**

7 Joyce Pendergraff, Jim Ray, Larry Freeland, Arnie  
8 Vetterick, Carol Vetterick, Linda Losch, Richard Losch,  
9 Richard Wolf, Sunny Wolf, Dave Lehmann, Mary Lehmann, Magnus  
10 Marks, James Kelly and Genie Kelly move to intervene on the  
11 side of respondent. There is no objection to the motion,  
12 and it is allowed.

13 **FACTS**

14 The subject property consists of 25 acres and is zoned  
15 Multiple Use Agricultural (MUA-10).<sup>1</sup> Petitioners applied  
16 for conditional use approval "to allow construction of an  
17 equestrian arena for the breeding, boarding and training of  
18 horses" on the subject property. Record 198.

19 The hearings officer denied the application, but  
20 suspended his decision for a period of 120 days to allow  
21 petitioners an opportunity to seek an amendment to the MUA-  
22 10 zone "so that this use could be allowed as a conditional

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<sup>1</sup>The MUA-10 zone is not an exclusive farm use zone. According to the county's comprehensive plan (pages 118-119), land zoned MUA-10, while otherwise suitable for farm uses, is so committed to other types of uses that an exception to Statewide Planning Goal 3 (Agricultural Lands) was taken to allow other types of uses of such land.

1 use in the MUA-10 zone." Record 56. The county  
2 commissioners initiated a review of the hearings officer's  
3 decision and conducted a public hearing. The county  
4 commissioners affirmed the hearings officer's decision, but  
5 removed the condition that the decision be suspended pending  
6 petitioner's application for an amendment to the MUA-10  
7 zone. In addition, the county commissioner's determined,  
8 based on the hearings officers findings, that:

9       "\* \* \* the subject proposal is not a commercial  
10       activity in conjunction with a farm use and  
11       therefore this application is denied." Record 9.

12       This appeal followed.

13       **EXHAUSTION OF REMEDIES**

14       The county argues petitioners failed to exhaust their  
15 administrative remedies, and consequently, we lack authority  
16 over this appeal under ORS 197.825(2)(a).<sup>2</sup> According to the  
17 county, it was the county and not the petitioners who  
18 initiated review of the hearings officer's decision by the  
19 county commissioners. The county contends the county  
20 commissioners' review was limited to the issue of whether  
21 the hearings officer erred in suspending his decision for a  
22 period of 120 days, providing an opportunity for petitioners  
23 to seek an amendment to the Deschutes County Zoning and

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<sup>2</sup>ORS 197.825(2)(a) provides the jurisdiction of this Board:

"Is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review."

1 Development Ordinance (ZDO).

2 ZDO 22.32.015 provides that a party may appeal to the  
3 county commissioners within 10 days after the decision to be  
4 challenged is mailed to the appellant. ZDO 22.28.050  
5 governs appeals of decisions that are initiated by the  
6 county, and provides that the county may initiate review of  
7 a hearings officer's decision within 10 days following  
8 notice of the decision. Nothing in ZDO 22.28.050 states  
9 that such an appeal is necessarily limited to any particular  
10 issues. In addition, the county gave no notice that it  
11 intended its review to be limited to any particular issues,  
12 until after the 10 day appeal period had expired.

13 The purpose of the exhaustion requirement is to assure  
14 that the challenged decision is reviewed by the highest  
15 level local decision making body the code makes available,  
16 before an appeal to this Board is pursued. McConnell v.  
17 City of West Linn, 17 Or LUBA 502 (1989). In McConnell, the  
18 Board stated, under facts similar to those relevant to the  
19 county's exhaustion argument here, as follows:

20 "That a petitioner may not have filed an appeal of  
21 a lower level local decision to require review by  
22 the higher level local decision maker is not  
23 critical, so long as review by the higher  
24 authority occurs." Id. at 507.

25 Here, as in McConnell, the challenged decision was made  
26 by the highest level local decision maker possible, the  
27 county commissioners. In addition, petitioners appeared  
28 before the county commissioners. Accordingly, the

1 exhaustion requirements of ORS 197.825(2)(a) are satisfied.

2 **ASSIGNMENT OF ERROR**

3 "The county commission and hearings officer erred  
4 when it concluded that the proposed use is not a  
5 commercial activity in conjunction with farm use."

6 The proposal requests authorization to board horses for  
7 profit, among other things. ZDO 4.060(3)(C)<sup>3</sup> authorizes  
8 "commercial activities in conjunction with farm uses" as a  
9 conditional use in the MUA-10 zone. The Exclusive Farm Use  
10 20, 80, and 320 zones explicitly authorize as a conditional  
11 use the "boarding of horses for profit." These EFU zones  
12 also separately authorize "commercial activities in  
13 conjunction with farm use" as a conditional use.

14 The challenged decision states:

15 "\* \* \* farming enterprises must embrace farm uses  
16 as that term is defined statutorily.  
17 Unfortunately for the applicant, the term 'farm  
18 use' does not include the 'raising, breeding or  
19 training' of horses. (See ORS 215.203(2)(a)). In  
20 a nutshell, the breeding training and raising of  
21 horses is not a farm use as that term is defined  
22 statutorily and, therefore, whether or not the  
23 applicant is raising or training horses of their  
24 own does not constitute a farm use in which a  
25 commercial activity can be conducted in  
26 conjunction with. [The county], therefore,  
27 concludes that this use is not a commercial  
28 activity in conjunction with farm use as that term  
29 is defined statutorily and judicially." Record

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<sup>3</sup>It is not clear which version of the ZDO governs this appeal. This Board has only been furnished with a copy of ZDO "PL-15," which has apparently been amended. However, for purposes of this appeal, it does not matter which version of the ZDO applies. For convenience, the ZDO to which we refer in this opinion is PL-15.

1           56.

2           As we understand it, petitioners argue the underlying  
3 farm use of the property is the breeding and training of  
4 their own horses. Petitioners argue the county is wrong in  
5 concluding that the breeding and training of their own  
6 horses is not a farm use. Further, petitioners contend the  
7 boarding, breeding and training of horses belonging to  
8 others, for the purpose of making a profit, is a commercial  
9 activity in conjunction with their farm use of the property  
10 and, consequently, is allowable in the MUA-10 zone.

11          Respondent and Intervenors-respondent (respondents)  
12 argue the breeding, boarding and training of horses is not a  
13 farm use at all. They also argue that because "boarding of  
14 horses for profit" is not listed as a conditional use in the  
15 MUA-10 zone, but is specifically listed as a conditional use  
16 in other zones, the MUA-10 zone does not authorize the  
17 boarding of horses for profit as conditional use.

18          Neither the ZDO nor any statute of which we are aware  
19 lends direct support to the idea that the raising or  
20 breeding of one's own horses is not a farm use. Indeed, the  
21 breeding and raising of livestock are among the activities  
22 included in the ZDO and statutory definitions of farm use.  
23 Further, there is no support in either the ZDO or statutory  
24 provisions for a determination that horses are not  
25 livestock. See ORS 609.010 (listing horses as livestock  
26 within the meaning of the statutes governing livestock

1 districts); ZDO 1.030(63) (defining the term "livestock" as  
2 "Domestic animals of types customarily raised or kept on a  
3 farm"). Consequently, to the extent the county determined  
4 the raising and breeding of one's own horses is not a farm  
5 use under the ZDO, we believe the county is wrong.

6 The next question is whether the proposed use at issue  
7 in this appeal, which includes the boarding of horses  
8 belonging to others for profit, is properly considered a  
9 "commercial activit[y] in conjunction with farm use," as  
10 that phrase is used in ZDO 4.060(3)(C). We conclude it is  
11 not.

12 In the EFU-20, 80 and 320 zones the "boarding of horses  
13 for profit" is specifically listed as a conditional use. In  
14 those zones, "commercial activities in conjunction with farm  
15 use" is also specifically listed as a conditional use.<sup>4</sup>  
16 Therefore, it is relatively clear that when the county used  
17 the phrase "commercial activities in conjunction with farm  
18 use" in its EFU zones, it did not intend that such uses  
19 include "boarding of horses for profit." If it had, the  
20 specific provision for "boarding of horses for profit" in  
21 those EFU zones would be unnecessary. See Sarti v. City of

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<sup>4</sup>We note that "[c]ommercial activities that are in conjunction with farm use" are also listed as uses that may be conditionally established in areas zoned for exclusive farm use under ORS 215.213(2)(c); ORS 215.283(2)(a). The "boarding of horses for profit" is separately listed as a use which may be conditionally allowed under ORS 215.213(2)(j), and is listed in ORS 215.283(1)(p) as a use which may be allowed subject to restrictions the county wishes to impose.

1 Lake Oswego, 106 Or App 594, 597, 809 P2d 701 (1991);  
2 Clatsop County v. Morgan, 19 Or App 173, 526 P2d 1393  
3 (1974).

4 ZDO 4.060(3)(C), governing the MUA-10 zone, also lists  
5 "commercial activities in conjunction with farm use" as a  
6 conditional use but does not list the "boarding of horses  
7 for profit" as a conditional use.

8 Although we recognize the MUA-10 zone is not an EFU  
9 zone, we do not believe it is appropriate to apply a  
10 different and more expansive interpretation to the words  
11 "commercial activities in conjunction with farm use" when  
12 those words are used in the MUA-10 zone. Rather, absent  
13 some indication to the contrary in the zoning ordinance, we  
14 assume the county intended those words to have the same  
15 meaning when they are used in different places in the zoning  
16 ordinance. Because it is relatively clear the county did  
17 not intend "commercial activities in conjunction with farm  
18 use" to include the "boarding of horses for profit" in the  
19 EFU 20, 80 and 320 zones, we conclude the county did not  
20 intend that "commercial activities in conjunction with farm  
21 use" include "boarding of horses for profit" in the MUA-10  
22 zone.

23 In accordance with the above, petitioners' proposal,  
24 which includes the boarding of horses for profit, is not an  
25 allowable use in the county's MUA-10 zone.

26 The county's decision is affirmed.

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