

BEFORE THE BOARD OF COUNTY COMMISSIONERS
FOR THE COUNTY OF KLAMATH

IN THE MATTER OF THE APPEAL OF THE)
USE CLASSIFICATION FOR BIO-WASTE)
MANAGEMENT CORPORATION)

ORDER No. 90- 145

THIS MATTER came before the Board of County Commissioners on the appeal of Lydia Gay Gentry, Kathleen L. Bessey, Dean and Laura Olsen, Merwin Arnett, Henry Heryford, Ronald Heryford, Joseph M. Kingsbury, Francis J. Flower and Concerned Citizens for Quality Klamath Living of a Decision of the Klamath County Hearings Officer dated November 15, 1989, Klamath County No. 68-69. The appellants were represented by their attorney, D. Michael Wells. In addition to the appellants, Bob Flowers, Lewis Furber and James Flowers appeared to present arguments. The applicant, Bio-Waste Management Corporation, appeared through its President, Edwin S. Mundy III, and submitted written argument.

Also present were Carl Shuck, Planning Director; Michael L. Spencer, County Counsel, LeAnne Mitchell, Recording Secretary and other members of the public.

FACTS

The Board of County Commissioners finds the following historical facts to be accurate and supported by substantial evidence in the record and makes said findings of fact as general findings.

In 1988, the applicant applied for site plan approval through the Planning Department for a biomedical waste incinerator on an

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approximately 30-acre site near Worden, zoned Heavy Industrial, and particularly described as Klamath County Tax Account No. 4008-34CB-300. The applicant had received an Air Contaminant Discharge Permit from the Department of Environmental Quality. The Planning Director, operating under the requirement existing at that time, classified the use as "Scrap Operations" and issued site plan approval without a public hearing. That decision was appealed to the Land Use Board of Appeals, the Court of Appeals and review was denied by the Oregon Supreme Court. The essence of the final decision in that process was that the issuance of the site plan approval without a public hearing was improper and the matter was remanded to Klamath County.

Prior to that remand, on February 28, 1989, the Land Development Code was amended to provide a hearings process for use classifications not clearly defined within the Code. KCLDC 90.005. The applicant subsequently requested a use classification pursuant to that section and on November 3, 1989, the Klamath County Hearings Officer held a public hearing to determine the appropriate use classification after proper notice was given. The Hearings Officer issued his FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION on November 15, 1989, and the present appeal was filed within the time provided by the Land Development Code.

ISSUES RAISED ON APPEAL

The appellants raised the following issues:

1. There is no substantial evidence to support Findings of Fact Nos. 4, 5, 6, 8 and 9 in that the only evidence was that evidence already in the Planning Department file from the DEQ hearings and other historical information.
2. There is no substantial evidence to support Finding of Fact No. 11 that the facility is not or might not be dangerous.
3. The hearings officer excluded evidence of possible effects from the facility's operation and for that reason cannot conclude that there was no evidence regrading adverse effects.
4. It was legal error for a use determination to be made while the prior site plan approval was being appealed.
5. The Hearings Officer's conclusion that the use is not a "public utility" was erroneous.
6. The Hearings Officer's conclusion that the use is not a "public service" was erroneous.
7. The Hearings Officer's conclusion that the Klamath County Land Development Code mandated a conclusion that the use be classified as "scrap operations" was erroneous.
8. The Hearings Officer's conclusion that the use would also be classified "General Industrial" was erroneous.
9. The Hearings Officer's conclusion that his decision was quasi-judicial rather than legislative was erroneous, and did not state the applicable burden of proof.
9. The denial of standing to Concerned Citizens for Klamath Quality Living was in error.

Bob Flowers, Lewis Furber and James Flowers also argued that the denial of standing to individuals who did not appeal the Hearings Officer's decision was in error; that the use should not be sited in Worden; that no outside medical waste should be allowed; and that the Planning Commission should review the matter.

SCOPE OF REVIEW

The scope of review in this matter is limited to the record made on the decision being appealed. LDC 33.005.

APPLICABLE CODE CRITERIA

1. LDC 90.002 provides for the following use types:

- A. Residential (Article 31)
- B. Civic (Article 92)
- C. Commercial (Article 93)
- D. Industrial (Article 94)
- E. Agricultural (Article 95)
- F. Extractive (Article 96)

2. LDC 90.003 provides:

The following rules shall apply where a lot contains uses which resemble two or more different use types and which are not classified as accessory uses.

- A. Separate Classification of Several Establishments - The principal uses conducted on a lot by two or more individual establishments, managements, or institutions shall be classified separately into use types.
- B. Separate Classification of Different Major Categories of Uses Conducted by Individual Establishment - If the principal uses on a lot by an individual establishment, management, or institution appear to fit under two or more different categories or use types--in effect, Residential, Civic, Commercial, Industrial, Agricultural, or Extensive--the principal uses shall be classified under each appropriate category.

- C. Classification of Different Uses Within Same Category of Use Types, Conducted by Individual Establishment - If the principal uses conducted on a lot by an individual establishment, management, or institution resemble two or more different use types within the same category of use types (See B Above), all such principal uses shall be classified in the use type whose description most closely portrays the overall nature of such uses. However, when the principal uses have any of the characteristics of the following list of use types, all such principal uses shall be classified in one of the use types on the list. If the principal uses resemble more than one of the use types on the list, the uses shall be classified in the most appropriate use type, except that any commercial uses shall be classified within the scrap operations use type if they have any of its characteristics.

Animal Sales and services: auctioning
 Animal waste processing
 Light industrial
 Heavy industrial
 Extensive impact services and utilities
 Scrap operations
 Wholesaling, storage and distribution:
 heavy
 Mining and processing

3. LDC 90.005 provides:

If a use is not clearly within the definition of that use as contained in this code, and if the classification of such use is not mandated by any other portion of this code, the determination of use shall be made by the Hearings Officer . . . The Hearings Officer shall consider the functional, product or compatibility characteristics of the proposed use and shall classify the use in the use type which contains uses which have characteristics most like those of the proposed use.

4. SECTION 92.009 - EXTENSIVE IMPACT SERVICES AND UTILITIES

The Extensive Impact Services and Utilities use type refers to public services and utilities which have substantial impact on surrounding land uses. Such uses

may be conditionally permitted in any zone which the public interest supersedes the usual limitations placed on land use and transcends the usual restraints of zoning for reasons of necessary location and community-wide interest. Typical places or uses are sanitary landfills, airports, detention and correction institutions, fairgrounds, fire stations, parks, public sports arena, vehicular raceways, microwave relay stations or other communication structures, electrical transmission lines, substations, and electrical generation facilities.

5. SECTION 93.015 - FUNERAL AND INTERMENT SERVICES

Funeral and interment services refers to establishments primarily engaged in the provision of services involving the care, preparation or disposition of human dead other than in cemeteries. The following are funeral and interment services use types:

- A. Funeral and Interment Services: Cremating - Crematory services involving the purification and reduction of the human body by fire. Typical uses include crematories or crematoriums.

6. SECTION 93.024 - SCRAP OPERATIONS

The Scrap Operations use type refers to places of business primarily engaged in storage, dismantling or other processing of used or waste materials which are intended for re-use in their original form. Typical uses include junk yards or paper salvage yards.

7. SECTION 94.003 - GENERAL INDUSTRIAL

The General Industrial use type refers to industrial plants primarily engaged in manufacturing, compounding, processing, assembling, packaging, treatment or fabrication of materials and property.

FINDINGS OF FACT

After fully reviewing the record of the proceedings before the Hearings Officer and having considered the arguments of the appellants, the arguments of other parties granted standing and of the applicant, the Board of County Commissioners finds the

following facts to be supported by substantial evidence in the record and to be relevant to the matter under appeal:

1. The Board finds, based upon the applicant's testimony before the Hearings Officer and information contained in DEQ documents (Record Exhibits D, E and F) and the County Planning Department Staff Report (Record Exhibit H) that the applicant is a private corporation which has proposed the operation of a biomedical waste incinerator.
2. The Board finds, based upon information contained in DEQ documents (Record Exhibits D, E and F) that the proposed use will receive biomedical wastes, including biological cultures and other contaminated laboratory wastes; pathological (tissue) waste, blood and blood products; "sharp" wastes such as needles, syringes and blades; isolation room waste; and chemotherapy waste, only from medical facilities producing such wastes; i.e., hospitals and doctors offices. The Board further finds, based upon information in Record Exhibit F, that no hazardous wastes will be accepted at the facility.
3. The Board finds, based upon information in DEQ documents (Record Exhibits D, E and F), that the proposed use will incinerate the biomedical wastes at 1800 degrees F. and will operate up to 22 hours daily, 7 days per week, 50 weeks per year. At full capacity it will burn about 11 tones of biomedical waste per day.
4. The Board finds, based upon information in DEQ documents (Record Exhibits D, E and F), that the incinerator will result in

an ash that will not be recycled, and which will be transported from the site of the proposed use for disposal elsewhere.

5. The Board finds, based upon the DEQ documents (Record Exhibits D, E and F) that DEQ has issued all necessary permits for the proposed incinerator, and that the proposed incinerator will provide the safest disposal method for biomedical waste, will contain the most technically advanced pollution control systems available, and will result in complete destruction of any toxins or disease.

5. The Board of County Commissioners takes official notice of its Order dated November ____, 1989, prohibiting the acceptance of applications for the siting of any waste incinerator until such time as the Planning Commission can establish criteria for the siting of such incinerators. As such this decision has no impact on any future applications and is limited to the particular application before the Board.

6. The Board finds, based upon the applicant's testimony and application, DEQ information (Record Exhibits D, E and F), and County Planning Staff information (Record Exhibit H) that the functional, product and compatibility characteristics of the proposed use are:

Functional Characteristics: Incinerating, storing, processing, treating, packaging.

Product Characteristics: Biomedical waste, used materials, no reuse.

Compatibility Characteristics: Emissions of permitted amounts of ash and chemicals.

CONCLUSIONS OF LAW

The Board of County Commissioners make the following conclusions of law in regards to this appeal.

1. The Board concludes that the decision of the Hearings Officer to deny standing to Concerned Citizens for Klamath Quality Living was in error and therefore the Board grants standing to that organization. However, both during the original hearing and during the appeal hearing, that group's representative, D. Michael Wells, stated that all of the evidence presented on behalf of the other appellants would be the same as the evidence presented on behalf of this group and that no additional evidence would be presented. For this reason, the Board further concludes that the denial of standing is harmless error since it did not exclude any additional evidence.

2. The Board concludes that the arguments of various parties that the Hearings Officer improperly restricted testimony is irrelevant. Other than Concerned Citizens for Klamath Quality Living, no one who was denied standing filed an appeal. No evidence has been called to this Board's attention that should have been admitted but which was not admitted. Testimony regarding concerns that individuals had about the potential affects on them specifically did not rise to the level of evidence about the potential impact of the proposed incinerator since such statements would be conclusory and not supported by any actual evidence.

3. The Board concludes that the matter before it is a use classification which, under the Code, is intended to be based upon the proposed use. The Board concludes, therefore, that testimony regarding the actual operation and location of the proposed use is not necessary or relevant to that classification. If the actual use differs from the proposed use in a way that changes the use classification, then the applicant would be in violation of the site plan approval and subject to appropriate sanctions. Consequently, the Board concludes that the use classification may be based solely upon evidence in the record relating to what the applicant proposes to do. However, even if evidence relating to the actual use was relevant to the use classification, the Board concludes that there is no evidence in the record showing that the actual use differs in any relevant way from the proposed use.

4. The Board concludes that the proposed use is not clearly within the definitions of use types contained in the Code. Therefore, the Board concludes that the procedure contained in KCLDC 90.005 is the procedure that must be utilized to classify the proposed use.

5. The Board concludes that the burden of proof called for by KCLDC 31.008, when applied to a proceeding under KCLDC 90.005, requires the applicant to provide sufficient information to allow the classification of the use. The concept of burden of proof as used in courts is clearly not applicable to this matter.

6. As to the effect of LDC 90.003 - CLASSIFYING COMBINATIONS OF PRINCIPAL USES, the Board concludes that paragraphs A clearly does not apply to this matter, and no party argues otherwise. As to paragraphs B and C, the Board concludes that this proposed use presents a single principal use--the incineration of biomedical waste--and therefore these paragraphs, which apply to combinations of more than one principal use, are not relevant to this matter.

7. The Board concludes that it was not error for the Hearings Officer to consider this matter while an appeal on a prior site plan approval was pending before the Oregon Supreme Court, because this matter is a separate application being considered under provisions of the Land Development Code not in existence when the original site plan application was filed. In reaching this conclusion, the Board considered Standard Insurance Co. v. Washington County, ___ Or LUBA ___ (LUBA No 88-109, 1989), and particularly language in that opinion referring to a county's continuing jurisdiction to make a new decision in new proceedings for property that may be the subject of an appeal. (Standard Insurance, slip opinion at 11.)

8. LDC 33.008 provides that the appeal authority may modify the decision of the hearing body. The Board concludes that a modification of the Hearings Officer's decision is appropriate. For that reason, the Board concludes that a complete discussion of the issues raised on appeal regarding the sufficiency of any findings of fact or conclusions of law by the Hearings Officer is

unnecessary and the Order of the Hearings Officer is set aside by this Order and this Order is entered in its place.

9. In determining, pursuant to LDC 90.005, how this use should be classified, the Board concludes that it should compare the proposed use with use types that have similar characteristics. After reviewing the characteristics of the proposed use and the use type descriptions in the Code, the Board concludes, and no party argues otherwise, that the following four use types have characteristics like those of the proposed use: Extensive Impact Services and Utilities (KCLDC 92.009), Funeral and Interment Services: Cremating (KCLDC 93.015 A), Scrap Operations (KCLDC 93.024) and General Industrial (KCLDC 94.003).

10. The Board concludes, based upon KCLDC 92.009, that the Extensive Impact Services and Utilities use type exhibits the following functional, product and compatibility characteristics:

Functional Characteristics: Functions associated with the provision of public utilities and public services as described under Product Characteristics.

Product Characteristics: Encompasses public utilities as defined in the Code (providing for telephone, telegraph, water, gas, petroleum, heat, light, water, electricity, television, transportation, sewage, storm water) and public services (not defined in the Code but including such uses mentioned in KCLDC 92.009 as sanitary landfills, airports, correction institution, fairgrounds and parks).

Compatibility Characteristics: Substantial impact on surrounding land uses, public interest supersedes usual land use restrictions to allow siting in special locations.

In comparing the functional, product and compatibility characteristics of the proposed use and the Extensive Impact

Services and Utilities use type, the Board concludes, based upon the Board's Finding of Fact No. 7 and the above characteristics, that the proposed use is not very similar to the use type. The Board believes that to fall within the Extensive Impact Services and Utilities use type definition, a use must be either a public utility or a public service (this relates to both functional and product characteristics). The Board concludes that the proposed use is not a public utility because it does not involve the treatment or disposal of sewage or any of the other activities within the definition of "public utility" in KCLDC Article 11.

In addition, the Board concludes that even if the proposed use is a public service, it is not the kind of public service that was intended to be within this use type. The Board bases this conclusion on the language in KCLDC 92.009 describing this use type as covering public utilities and services which have substantial impact on surrounding land uses (this relates to compatibility characteristics). The Board concludes, based upon the DEQ documents in the Record, that the proposed use will not have a substantial impact on surrounding land uses because the use has obtained all necessary DEQ permits which contain conditions that limit any impacts of the use to acceptable levels. Even if evidence relating to the actual operation of the incinerator is relevant to the matter before the Board, the Board is not persuaded by arguments of the appellants that the impacts would be or are significant. The Board bases this conclusion on its belief that

these arguments are conclusory and not based on evidence in the Record or, as in the case of the testimony of Dr. Paul Connett, are generic comments not clearly applicable to the proposed use at its proposed location.

The Board further concludes that there are additional reasons why the proposed use is not the type of use that was intended to be covered by KCLDC 92.009. Based upon the second sentence of KCLDC 92.009, the Board concludes that this use type is intended to cover public or quasi-public uses that both possess special siting requirements and are imbued with such substantial public interest that normal limitations on land use can be superseded. After reviewing the Record, the Board finds that the proposed use exhibits no special siting requirements and that the applicant has not requested and requires no relaxation of normal land use limitations. In this regard, the Board distinguishes the proposed use from sanitary landfills, which require special site characteristics and preparation.

The Board is not persuaded that the proposed use should be classified under the Extensive Impact Services and Utilities use type by the fact that uses with some characteristics of the proposed use are classified within this use type in some zones. The Board concludes with respect to "solid waste disposal sites" mentioned under this use type in certain zones, that such classification is only found and is only appropriate in agriculture and forest zones which are more vulnerable to impact than other

urban zones such. The Board concludes that a classification within the Extensive Impact Services and Utilities use type is not appropriate in the Heavy Industrial zone involved here. In addition, the Board concludes that the fact that a related use is classified under KCLDC 92.009 is not conclusive as to the proposed use, particularly where many related uses are classified in the Code under different use types (e.g., airports (KCLDC 92.009 and KCLDC 93.028), sports facilities (KCLDC 92.009 and KCLDC 93.025)).

In summary, the Board concludes that the proposed use should not be classified under the Extensive Impact Services and Utilities use type because it is not the kind of use intended to be covered by that use type and because its functional, product and compatibility characteristics are not very similar and in some respects are inconsistent with those of that use type.

11. The Board concludes, based upon the use type descriptions in the Code, that the Funeral and Interment Services: Cremating (KCLDC 93.015 A) and the Scrap Operations (KCLDC 93.024) use types have the following functional, product and compatibility characteristics:

FUNERAL AND INTERMENT SERVICES: CREMATING

Functional Characteristics: Care, preparation, disposition, purification, reduction by fire.

Product Characteristics: Ash.

Compatibility Characteristics: None specified.

SCRAP OPERATIONS

Functional Characteristics: Storing, dismantling, processing.

Product Characteristics: Used or waste materials intended for reuse in their original form.

Compatibility Characteristics: None specified.

With regard to the Funeral and Interment Services use type, the Board concludes, based on a comparison of the Board's Finding of Fact No. 7 and the Funeral and Interment Services characteristics above, that the proposed use is similar in function to cremating in that both involve the preparation, disposition, purification and reduction by fire. The Board concludes the proposed use and the use type are similar in product in that both involve at least parts of the human body (although the proposed use also involves other types of biomedical waste), and have a final product, ash, that is disposed of and not reused. The Board concludes that the proposed use and the use type are similar in compatibility in that both involve incineration and the resultant discharge of emissions containing ash.

With regard to the Scrap Operations use type, the Board concludes, also based upon a comparison of the Board's Find of Fact No. 7 and the Scrap Operation characteristics above, that the proposed use and the use type are similar in function in that both involve storage, dismantling or other processing. The Board concludes that the proposed use and the use type are similar in product in that both involve used or waste materials, but that type differ in product in that the products of the proposed use are not intended for reuse in their original form. The Board concludes

that the proposed use and the use type are different in compatibility since scrap operations are unlikely to have emissions.

In summary, the Board concludes that both the Funeral and Interment Services use type and the Scrap Operations use type have characteristics which are in some ways similar to and in some ways different from the proposed use.

12. The Board concludes, based upon the use type description in the Code, that the General Industrial use type (KCLDC 94.003) has the following functional, product and compatibility characteristics:

Functional Characteristics: Manufacturing, compounding, processing, assembling, packaging, treating, fabricating.

Product Characteristics: Materials, property.

Compatibility Characteristics: None specified, but the Board takes official notice that common industrial uses such as mills, factories, etc. often have emissions of ash and chemicals.

In comparing the functional, product and compatibility characteristics of the proposed use and the General Industrial use type, the Board concludes, based upon the Board's Finding of Fact No. 7 and the above characteristics, that the proposed use closely fits the description of the General Industrial use type. The Board concludes that the proposed use and the use type have common functional characteristics of processing, treating and packaging, and that transporting and storing are also common attributes of industrial uses. The Board concludes that the proposed use and the

use type have common product characteristics in that materials and property referred to in the use type are broad categories which include the waste and used materials associated with the proposed use. The Board further concludes that the proposed use and the use type have common compatibility characteristics relating to ash emissions. In summary, the Board concludes that the characteristics of the proposed use are the same or similar to and, in no way inconsistent with, the characteristics of the use type.

13. KCLDC 90.005 requires the classification of the proposed use under the use type with the functional, product and compatibility characteristics most like the propose use. Based upon the above, the Board concludes that while several use types have characteristics similar to the proposed use, the General Industrial use type has characteristics most like the proposed use. This conclusion is based upon the Board's conclusion that the proposed use and the General Industrial use type share common functional, product and compatibility characteristics and have no characteristics that are inconsistent. Since none of the other use types exhibits this overlap and consistency of characteristics, the Board concludes that the General Industrial use type is the proper use type in which to classify the proposed use.

ORDER

Based upon the Findings of Fact and Conclusions of Law as set forth herein, the Board of County Commissioners orders that the decision of the Hearings Officer is hereby modified as set forth in

this Order. The proposed use is classified as "General Industrial" as set out in LDC 94.003.

Dated this 26th day of February, 1990.

BOARD OF COUNTY COMMISSIONERS

Harry J. Fredricks
Harry Fredricks, Chairman

Roger Hamilton, Commissioner

Ted Lindow, Commissioner

APPROVED AS TO FORM:

Michael L. Spencer
County Counsel

STATE OF OREGON: COUNTY OF KLAMATH: ss.

Filed for record at request of Klamath County the 28th day
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Evelyn Biehn County Clerk
By Pauline Mullenbarger

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