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BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CORPORATION OF THE PRESIDING )  
BISHOP OF THE CHURCH OF JESUS )  
CHRIST OF LATTER-DAY SAINTS, A )  
UTAH CORPORATION SOLE, )  
Petitioner, )  
vs. )  
KLAMATH COUNTY, )  
Respondent, )  
and )  
BRUCE RITTER, PAUL RITTER, CAROL )  
RITTER, and DEPARTMENT OF LAND )  
CONSERVATION AND DEVELOPMENT )  
Intervenors-Respondent.)

LUBA No. 97-210  
FINAL OPINION  
AND ORDER

Appeal from Klamath County.

James H. Bean, Portland and William M. Ganong, Klamath Falls, filed the petition for review and argued on behalf of petitioner. With them on the brief was Lindsay, Hart, Neil & Weigler.

No appearance by respondent Klamath County.

Michael P. Rudd, Klamath Falls, filed a response brief on behalf of intervenors-respondent Ritter, Ritter, and Ritter.

Celeste J. Doyle, Assistant Attorney General, Salem, filed the petition for review and argued on behalf of intervenor-respondent Department of Land Conservation and Development. With her on the brief were Hardy Myers, Attorney General, David Schuman, Deputy Attorney General, and Michael Reynolds, Solicitor General.

HANNA, Administrative Law Judge; GUSTAFSON, Chief Administrative Law Judge, participated in the decision.

REMANDED 02/05/98

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

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's denial of an application  
4 to site a church meeting house (church) on land zoned  
5 exclusive farm use - crop grazing (EFU-CG).

6 **MOTION TO INTERVENE**

7 Bruce, Paul and Carol Ritter (intervenors Ritter), the  
8 appellants below, move to intervene in this proceeding on the  
9 side of respondent. The Department of Land Conservation and  
10 Development (intervenor DLCD), moves to intervene in this  
11 proceeding on the side of respondent.<sup>1</sup> There is no objection  
12 to the motions, and they are allowed.

13 **FACTS**

14 Petitioner applied to the county to build a church on a  
15 14.7-acre parcel in an exclusive farm use zone in central  
16 Klamath County. The parcel is more than three miles from the  
17 nearest urban growth boundary.

18 On May 6, 1997, the planning department approved  
19 petitioner's site plan. Intervenors Ritter appealed that  
20 approval to the board of county commissioners (commissioners),  
21 which reversed the planning department's approval, thereby  
22 denying the site plan approval. The basis for the challenged  
23 decision is that petitioner proposes to site a church on high-  
24 value farmland in contravention of OAR 660-33-120 and 660-33-

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<sup>1</sup>We refer to "intervenor" when collectively describing both intervenors Ritter and intervenor DLCD.

1 130.

2 This appeal followed.

3 **FIRST ASSIGNMENT OF ERROR**

4 Petitioner argues that the commissioners improperly  
5 applied state law when they concluded: (1) that OAR 660-33-  
6 120 and 660-33-130 preclude siting a church on high-value  
7 farmland; and (2) that petitioner's only avenue for approval  
8 of the site plan was to take an exception to Statewide  
9 Planning Goals 3 (Agriculture) and 14 (Urbanization). We  
10 understand petitioner to argue that a church is a permitted  
11 use under ORS 215.283(1), that it is not subject to further  
12 local government or agency regulation, and that, therefore, an  
13 exception to goals 3 and 14 is not necessary.

14 Intervenor DLCD responds that petitioner reads Brentmar  
15 v. Jackson County, 321 Or 481, 900 P2d 1030 (1995) too broadly  
16 when it concludes that LCDC does not have authority to  
17 restrict uses otherwise allowed under ORS 215.283(1).<sup>2</sup>  
18 Intervenor DLCD explains that in Lane County v. LCDC, 325 Or  
19 569, \_\_\_ P2d \_\_\_ (1997), the court explained that its holding  
20 in Brentmar does not preclude the Land Conservation and  
21 Development Commission (LCDC) from adopting rules regulating

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<sup>2</sup>In Brentmar, the local government denied the siting of an agricultural school on EFU land, following its own legislatively adopted criteria that supplemented the statutory language in ORS 215.283(1). The court stated that "under ORS 215.213(1) and 215.283(1), a county may not enact or apply legislative criteria of its own that supplement those found in ORS 215.213(1) and 215.283(1)." Brentmar v. Jackson County, 321 at 496.

1 uses allowed under ORS 215.283(1).<sup>3</sup>

2 In DLCD v. Clackamas County, \_\_\_ Or LUBA \_\_\_ (LUBA No.  
3 97-098, November 26, 1997), we applied the reasoning in  
4 Brentmar and Lane County to an appeal of a decision allowing a  
5 church to be sited on high-value farmland. We concluded that:

6 "Under OAR 660-33-120 and 660-33-130, churches are  
7 not allowed to be established and thus are  
8 prohibited on high value farmland as a matter of  
9 law." Id. at 8-9.

10 That conclusion applies equally to the proposed church  
11 use in this case. We agree with the county that OAR 660-33-  
12 120 and 660-33-130 preclude siting of a church on high-value  
13 farmland. As the county suggests and intervenor DLCD argues,  
14 the only procedure available to site a church on high-value  
15 farmland would be for petitioner to apply for an exception  
16 under Goal 2 to the goals applicable to this proposal.

17 The first assignment of error is denied.

18 **SECOND ASSIGNMENT OF ERROR**

19 Petitioner contends that the commissioners' conclusion  
20 that the subject property is composed of high-value farmland  
21 is not supported by substantial evidence in the whole record.

22 Land is high-value farmland if it meets one of two tests:  
23 (1) under OAR 660-33-020(8)(a) if it is classified prime,

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<sup>3</sup>In Lane County, the county challenged the validity of rules adopted by LCDC restricting uses otherwise allowed by ORS 215.213 on high-value farmland in the two marginal lands counties. The Supreme Court validated the applicability of OAR 660-33-120 and 660-33-130 in the two marginal lands counties. The court's analysis in Lane County as to marginal lands counties validates the high-value farmland rules as they apply to all counties.

1 unique, Class I or II; or (2) under OAR 660-33-020(8)(b), if a  
2 photograph made under specified circumstances shows specific  
3 crops. The challenged decision states:

4 "[U]nder DLCD regulations, the property in question  
5 is high value farmland. The soil is Class III, 19A-  
6 type soil which is prime when irrigated.<sup>[4]</sup> The  
7 property is irrigated pursuant to the Water Right  
8 Certificate submitted and has been used to grow  
9 perennial crops (strawberries). Any new church  
10 construction would require [an] exception be taken  
11 to the Statewide Planning Goals both 3 and 14."  
12 Record 5.

13 Intervenor argue that the subject property meets the  
14 definition of high-value farm land under OAR 660-33-020(8)(a)  
15 because it is classified as IIIw and has rights to water for  
16 irrigation. Intervenor contend that this combination  
17 qualifies it for a prime classification. Intervenor do not  
18 provide any evidence or documentation to support this  
19 conclusion. Nor do intervenors point to a place in the record  
20 containing any evidence that this combination renders the  
21 soils "prime" as prime is described by the NRCS. Rather, they  
22 explain that it is generally understood among soil scientists  
23 and rural lands planners that this combination results in a  
24 prime classification.

25 As a review body, we are authorized to reverse or remand

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<sup>4</sup>The Agricultural Capability Classification System, prepared by the Natural Resources Conservation Service (NRCS) of the United States Department of Agriculture, establishes soil classifications. Soils may be ranked I through VIII, with I being the best soil. Those rankings may also include letter qualifications indicating other factors such as "w" for wet or "e" for erosion. Additionally there are broad classifications such as prime, unique and other important farmland in which the ranked soils may fall.

1 the challenged decision if it is "not supported by substantial  
2 evidence in the whole record." ORS 197.835(7)(a)(C). The  
3 evidence in the record shows that the subject property is  
4 composed of Fordney loamy fine sand soil, classified as IIIw  
5 and has rights to water for irrigation. Although soil  
6 scientists and rural lands planners may agree that this  
7 combination results in a prime classification, the county must  
8 have evidence in the record of this ultimate conclusion before  
9 it can make such a finding. Because we have not been cited to  
10 evidence in the record to support the county's conclusion that  
11 the soils on the subject property are prime, the county's  
12 finding lacks evidentiary support.

13 The second assignment of error is sustained.

14 **THIRD ASSIGNMENT OF ERROR**

15 Petitioner contends that the commissioners improperly  
16 applied Land Development Code (LDC) Article 41 when it  
17 determined that a Type II procedure was required rather than a  
18 Type I procedure, as determined by the planner.<sup>5</sup> Petitioner  
19 explains that the county invokes a Type II procedure only when  
20 a decision involves interpretation or the exercise of factual,

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<sup>5</sup>LDC 41.030 establishes the types of procedures to used for site plan review:

- "A. Site Plan Review for all actions involving the application of clear and objective standards or review criteria shall be conducted according to the Type I Administrative Review Procedure.
- "B. Site Plan Review for all land use decisions involving interpretation or the exercise of factual, policy or legal judgment shall be conducted according to the Type II Administrative Review Procedure."

1 policy or legal judgment. We understand petitioner to argue  
2 that by invoking the Type II procedure, the county was adding  
3 additional requirements that are not allowed under Brentmar,  
4 to determine if the use is allowed under ORS 215.283(1).  
5 Intervenor DLCD responds that "[p]etitioner confuses  
6 appropriate and required process with impermissible  
7 substantive standards." Intervenor DLCD's Brief 11 (emphasis  
8 in original). We agree. While Brentmar circumscribes a local  
9 government's authority under ORS 215.283(1) with respect to  
10 substantive standards, it does not prescribe the process that  
11 a county may use when considering whether a proposed use is  
12 permitted under ORS 215.283(1).

13 The third assignment of error is denied.

14 **FOURTH ASSIGNMENT OF ERROR**

15 Petitioner contends that the county impermissibly  
16 reversed the county planner's approval of the application  
17 because the county planner used a Type I process instead of a  
18 Type II process. Petitioner alleges that reversal on this  
19 basis is a denial of due process of law, and thus, is  
20 unconstitutional.

21 First, we do not see that the commissioners' decision  
22 reversed the county planner's approval of the application on  
23 the basis that the county planner used a Type I process  
24 instead of a Type II process. In any case, petitioner has not  
25 made a legal argument to establish any the constitutional  
26 violation sufficient for our review. Joyce v. Multnomah

1 County, 23 Or LUBA 116, 118, aff'd 114 Or App 244 (1992);  
2 Torgeson v. City of Canby, 19 Or LUBA 511, 519 (1990); Van  
3 Sant v. Yamhill County, 17 Or LUBA 563, 566 (1989).

4 The fourth assignment of error is denied.

5 **FIFTH ASSIGNMENT OF ERROR**

6 Petitioner challenges LCDC's constitutional authority to  
7 prohibit the location of churches on high-value farmland,  
8 stating:

9 "The Board of Commissioners' decision  
10 unconstitutionally denies Petitioner the right to  
11 use its property for protected religious purposes.

12 "\* \* \* \* \*

13 "LCDC has specifically listed the types of uses that  
14 are approved or may be approved on agricultural  
15 lands in table I of OAR 660-033-0120. This table  
16 lists several uses, including 'Destination resorts',  
17 'a winery', and 'a single-family dwelling.'  
18 Churches are not listed on this table.

19 "Interpreting LCDC rules to prohibit construction of  
20 churches would mean that a government body has  
21 enacted a regulation that on its face discriminates  
22 against churches. Although non-farm uses that are  
23 similar in size to a church are listed on Table I,  
24 churches are conspicuously absent. Thus, if Table I  
25 and OAR 660-033-0120 are interpreted to prohibit  
26 churches, then the Table is discriminatory on its  
27 face, which stands as proof of the government's  
28 intent to discriminate." Petition for Review 14.

29 Intervenor DLCD refutes petitioner's claim of  
30 constitutional protection from this zoning rule, stating:

31 "Petitioner apparently asserts that LCDC's rules at  
32 OAR 660-33-120, governing construction of church  
33 structures on high value farm land, violate rights  
34 secured to petitioner by the 'free exercise' clause  
35 of the First Amendment. Petitioner is incorrect for  
36 several reasons.

37 "As a threshold matter, petitioner has not

1 demonstrated that LCDC's division 33 rules infringe  
2 upon a religious practice or activity that may be  
3 protected by the First Amendment. The free exercise  
4 clause of the First Amendment protects 'the right to  
5 believe and profess whatever religious doctrine one  
6 desires.' Employment Div., Department of Human  
7 Resources of Oregon v. Smith, 494 US 872, 877, 110  
8 Sct 1595, 1599, 108 LEd 2d 876 (1990). \* \* \*

9 "Petitioner apparently assumes, without citation to  
10 any supporting legal authority, that among the  
11 rights recognized by the free exercise clause is a  
12 right to construct church buildings wherever a  
13 religious organization may choose. In fact, the  
14 free exercise clause is not implicated merely  
15 because zoning laws or land use regulations restrict  
16 or prohibit construction of a church in a particular  
17 location. See e.g. Lakewood, Ohio Cong. Jehovah's  
18 Witnesses, Inc. v. City of Lakewood, Ohio, 699 F 2d  
19 303 (6th Cir) cert den 464 US 815 (1983).

20 \* \* \* \* \*

21 "'A church has no constitutional right to be free  
22 from reasonable zoning regulations nor does a church  
23 have a constitutional right to build its house of  
24 worship where it pleases.' Messiah Baptist Church  
25 v. Cty. of Jefferson, Colo., 859 F2d at 826, citing  
26 Lemon v. Kurtzman, 403 US 602, 91 Sct 2105, 29 LEd  
27 2d 745 (1971). Intervenor DLCD's Brief 12-14.

28 To the extent petitioner has made an adequately developed  
29 constitutional challenge, we agree that petitioner has not  
30 shown that OAR 660-33-120 or 660-33-130 violates a provision  
31 of the United States Constitution or the Oregon Constitution.

32 The fifth assignment of error is denied.

33 The county's decision is remanded.