



1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county hearings officer decision  
4 denying an application for conditional use approval for "an  
5 agricultural/horticultural school, small scale energy  
6 producing facilities, and commercial activities in  
7 conjunction with farm use on 155 acres of land in an EFU  
8 [(exclusive farm use)] zone." Record 7.

9 **FACTS**

10 Petitioner is the president and co-founder of the Peace  
11 Garden Institute (PGI), the applicant below. As described  
12 in PGI's modified application, the activities to be included  
13 in the proposal at issue in this appeal are as follows:

14 "[PGI] is an agricultural and horticultural  
15 organization whose primary purpose is to establish  
16 a school for education, research, and development  
17 of economically viable commercial activities in  
18 conjunction with farm use, including:

19 "• vocational and educational training in  
20 horticulture, and related value-enhanced  
21 agricultural product processing, to  
22 strengthen the rural economic base.  
23 Initially we will be licensed as a vocational  
24 school, and in time hope to become an  
25 accredited research facility granting post-  
26 secondary degrees. In addition to offering  
27 classes in all areas of plant production  
28 (nursery, composting, equipment maintenance &  
29 repair, cultivation, processing,  
30 reforestation, etc.), we will provide basic  
31 classes in English, math, and writing. These  
32 educational programs will serve approximately  
33 50 to 100 students during the week, of which  
34 up to 12 may be in residence[;]

1           "• conferences, seminars, lectures and  
2           symposiums in conjunction with horticultural  
3           education for the advancement of related  
4           environmental and economic issues, perhaps  
5           with an attendance of 300 people held one  
6           weekend each month[;]

7           "• processing of agricultural products grown on  
8           the land, including the right for sales and  
9           services of these products on the land[;]

10          "• agriculturally related projects to fund  
11          education and research, such as building,  
12          using, and marketing garden- and farm-  
13          oriented tools and materials. As a part of  
14          the vocational training, staff and students  
15          create such products as compost, solar  
16          dryers, greenhouses, and alternative energy  
17          and septic systems, to help finance further  
18          education and research projects." Record  
19          313.

20          PGI proposes to site the facilities that will be  
21          required for the above described activities on the portions  
22          of the subject property where soils of lesser value for farm  
23          uses are located. A number of existing and new buildings  
24          and structures will be used. A complex of approximately  
25          20,000 square feet is proposed, which will house "an office,  
26          a botanical library, computer laboratory, classrooms, and  
27          dormitory." Record 314. A roadside stand is proposed for  
28          marketing produce grown on the property and on other farms.  
29          A 2,000 square foot "Garden Tasting Facility and 'Tea Room'"  
30          is proposed "to process and prepare products that are grown  
31          on the land, and to serve these products to the general  
32          public, as a part of [PGI's] educational outreach program \*  
33          \* \*." Id. A 4,000 square foot "Food and Medicinal Plant

1 Processing Facility" is proposed. Id. Multiple uses will  
2 be made of the three existing residential structures on the  
3 property and other farm buildings. For example, a barn may  
4 be used for school purposes "such as a gymnasium, a meeting  
5 hall, or farm shops \* \* \*." Id. One of the houses will be  
6 converted "to serve as a visitor center \* \* \*." Id.

7 **MOTION TO STRIKE**

8 Petitioner moves to strike two cross assignments of  
9 error included in intervenor-respondent's brief. A  
10 respondent or intervenor-respondent wishing to challenge  
11 particular aspects of a land use decision on appeal to LUBA  
12 may do so in either of the following ways:

13 1. By filing a separate appeal or intervening as  
14 a petitioner and filing a timely petition for  
15 review; or

16 2. By filing a timely cross-petition for review.

17 Intervenor-respondent did not pursue either of these courses  
18 and, instead, attempts to assert cross assignments of error  
19 in his intervenor-respondent's brief. He may not do so.  
20 McKay Creek Valley Assoc. v. Washington County, 25 Or LUBA  
21 238, 243, rev'd on other grounds 122 Or App 159 (1993);  
22 Miller v. Washington County, 25 Or LUBA 169 (1993). The  
23 motion to strike intervenor-respondent's cross assignments  
24 of error is allowed.

25 Petitioner also identifies assertions of fact in the  
26 intervenor-respondent's brief which are not supported by the  
27 record. We disregard those assertions of fact. Hammack &

1 Associates, Inc. v. Washington County, 16 Or LUBA 75, 78,  
2 aff'd 89 Or App 40 (1987).

3 **FIRST ASSIGNMENT OF ERROR**

4 The county's EFU zone allows "public or private  
5 schools," "commercial activities that are in conjunction  
6 with farm use" and certain "small scale energy producing  
7 facilities" as conditional uses. Jackson County Land  
8 Development Ordinance (LDO) 218.040(1), (9) and (11). Among  
9 the standards that must be satisfied to approve a  
10 conditional use, are those set out at LDO 260.040.  
11 Petitioner argues the LDO is inconsistent with statutory EFU  
12 zoning provisions which allow public and private schools on  
13 EFU zoned land without requiring them to be subject to  
14 approval standards such as those set out at LDO 260.040.

15 The EFU zoning statutes include a list of "uses [that]  
16 may be established in any area zoned for exclusive farm  
17 use[.]" ORS 215.213(1); 215.283(1).<sup>1</sup> Such uses include  
18 "[p]ublic or private schools, including all buildings  
19 essential to the operations of a school." ORS  
20 215.213(1)(a); 215.283(1)(a). The EFU zoning statutes also  
21 list other "uses [that] may be established \* \* \* in any area

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<sup>1</sup>Prior to 1993 statutory amendments that are not applicable here, counties that adopted marginal lands provisions were required to apply ORS 215.213(1) to (3) to EFU zoned lands. ORS 215.288(2) (1991). Counties that did not adopt marginal lands provisions could apply either ORS 215.213(1) to (3) or 215.283 to EFU zoned lands. ORS 215.288(1) (1991). For purposes of our discussion of these assignments of error, the relevant statutory language and statutory structure of ORS 215.213 and 215.283 are identical.

1 zoned for exclusive farm use subject to ORS 215.296."<sup>2</sup> ORS  
2 215.213(2); 215.283(2).

3 Petitioner contends the statutory scheme established by  
4 ORS 215.213(1) and (2) and 215.283(1) and (2) requires that  
5 the uses allowed by ORS 215.213(1) and 215.283(1) be allowed  
6 outright. While uses allowed by ORS 215.213(2) and  
7 215.283(2) are subject to additional approval standards and  
8 presumably may be subject to some additional local approval  
9 standards, petitioner contends the county may not make uses  
10 allowed by ORS 215.213(1) and 215.283(1) conditional uses or  
11 require that approval of such uses include demonstration of  
12 compliance with county conditional use approval standards.

13 There are two problems with petitioner's argument.  
14 First, petitioner's multifaceted proposal is not merely a  
15 "private school" and "buildings essential to the operations  
16 of a school." The proposal includes "commercial activities  
17 \* \* \* in conjunction with farm use" and "small scale energy  
18 producing facilities," neither of which are uses allowed

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<sup>2</sup>ORS 215.296(1) provides as follows:

"A use allowed under ORS 215.213(2) or 215.283(2) may be approved only where the local governing body or its designee finds that the use will not:

"(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or

"(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use."

1 under ORS 215.213(1) and 215.283(1). That problem aside,  
2 this Board and the Oregon Court of Appeals have not  
3 construed the above statutes as limiting the county's  
4 authority to regulate uses in its EFU zones in the way  
5 petitioner argues. The Oregon Court of Appeals has stated  
6 in several cases that although a county may not regulate  
7 nonfarm uses in its EFU zones less stringently than required  
8 by ORS chapter 215, it may regulate such nonfarm uses more  
9 stringently. Kenagy v. Benton County, 112 Or App 17, 20 n  
10 2, 826 P2d 1047 (1992); Von Lubken v. Hood River County, 104  
11 Or App 683, 687, 803 P2d 750 (1990), on reconsideration 106  
12 Or App 226, rev den 311 Or 349 (1991); Kola Tepee, Inc. v  
13 Marion County, 99 Or App 481, 782 P2d 955 (1989), rev den  
14 309 Or 441 (1990). Therefore, while nothing in ORS  
15 215.213(1) and (2) and 215.283(1) and (2) prevents the  
16 county from adopting an EFU zone that allows uses identified  
17 in ORS 215.213(1) or 215.283(1) as outright permitted uses,  
18 those statutes do not require that it do so.

19 The first assignment of error is denied.

20 **SECOND ASSIGNMENT OF ERROR**

21 Under LDO 260.040, the county may not grant a  
22 conditional use permit unless it makes the following  
23 findings:

24 "1) That the permit would be in conformance with  
25 the Jackson County Comprehensive Plan for the  
26 area, the standards of the district of the  
27 Zoning Ordinance in which the proposed

1 development would occur and the Comprehensive  
2 Plan for the county as a whole.

3 "2) That the location, size, design, and  
4 operating characteristics of the proposed use  
5 will have minimal adverse impact on the  
6 livability, value, or appropriate development  
7 of abutting properties and the surrounding  
8 area.

9 "3) The permit will be in compliance with other  
10 required findings, if any, which may be  
11 listed in the zone in which the use is  
12 proposed to be located.

13 "4) The proposed use will either provide  
14 primarily for the needs of rural residents  
15 and therefore requires a rural setting in  
16 order to function properly or the nature of  
17 the use requires a rural setting, such as an  
18 aggregate operation, even though the use may  
19 not provide primarily for the needs of rural  
20 residents.

21 " \* \* \* \* \*"<sup>3</sup>

22 In addressing LDO 260.040(2), the challenged decision  
23 first identifies thirteen separate impacts affecting the  
24 livability of adjoining properties. The county's findings  
25 describe the proposed activities on the subject property and  
26 note testimony presented by opponents concerning impacts on  
27 the adjoining road system.

28 In a June 11, 1993 staff report, planning staff stated  
29 the proposed use "would likely have a major impact on

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<sup>3</sup>The omitted part of LDO 260.040 allows finding (4) to be waived in certain circumstances.

1 Hamilton Road and on Applegate Road."<sup>4</sup> Record 162.  
2 Planning staff recommended that the applicant be required to  
3 "furnish a traffic generation study from an Oregon  
4 Registered Traffic Engineer and \* \* \* implement [any]  
5 recommendation[s] of the study as approved by Public Works."  
6 Id.

7 The Public Works Department later met with the  
8 applicant. In a July 6, 1993 memorandum, the Public Works  
9 Department indicates that a member of its staff "inspected  
10 Hamilton Road and its intersections with Highway 238 and  
11 Upper Applegate Road, the proposed driveway, and the gravel  
12 access road from Upper Applegate Road." Record 78. The  
13 July 6, 1993 memorandum provides traffic counts for Hamilton  
14 Road and Upper Applegate Road and identifies a total of 11  
15 accidents that occurred on Hamilton Road and its  
16 intersections with Upper Applegate Road and Highway 238  
17 between 1978 and 1991. The memorandum goes on to describe  
18 Hamilton Road as

19 " \* \* \* a low volume, rural two-lane county road,  
20 connecting Highway 238 with Upper Applegate Road.  
21 Both the intersections at Highway 238 and Upper  
22 Applegate Road are nontraditional intersections  
23 which limit road capacity." Record 79.

24 The memorandum ultimately recommends that the traffic study  
25 could be deferred, provided:

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<sup>4</sup>The documents in the record refer to both "Applegate Road" and "Upper Applegate Road." As far as we can tell, those references are to the same road.

1 "1. The applicant's Oregon Registered Traffic  
2 Engineer shall complete a traffic study when  
3 traffic volumes to the Peace Garden Institute  
4 exceed 300 vehicles per day, or when accident  
5 data supports the need.

6 "2. [The applicant shall sign] a deferred  
7 improvement agreement with Jackson County for  
8 completion of a traffic study and any  
9 necessary improvements recommended in the  
10 study. The traffic study shall be completed  
11 by the applicant when directed in writing  
12 from Jackson County Public Works and Parks.

13 "3. The applicant shall encourage the general  
14 public to take access from Hamilton Road.  
15 Access to Upper Applegate Road via the gravel  
16 driveway shall be limited to the outdoor  
17 concerts and local traffic only. The gravel  
18 driveway shall not be used by the general  
19 public for access to the Peace Garden  
20 Institute." Record 79-80.

21 The county hearings officer ultimately concluded the  
22 applicant failed to demonstrate the traffic that will be  
23 associated with the proposal "will have minimal adverse  
24 impact on the livability, value, or appropriate development  
25 of abutting properties and the surrounding area:"

26 "\* \* \* The final recommendation from the county  
27 public works department suggests that a detailed  
28 traffic study can be deferred until traffic  
29 produced by the subject uses exceed 300 vehicles  
30 per day, and that access to the property must be  
31 restricted to Hamilton Road. While Exhibit 126  
32 establishes existing traffic levels on nearby  
33 public roads, nowhere in the record is there any  
34 evidence to quantify the capacity of Hamilton  
35 Road, or other roads serving the property. There  
36 is also no conclusion from any party, qualified or  
37 otherwise, that the existing road network is  
38 capable of accommodating the additional levels of  
39 traffic without producing greater than minimal  
40 impacts. On this record, the Hearings Officer can

1 not find, as required, that the addition of 300  
2 vehicles on a roadway having current traffic  
3 volumes of 472 to 664, will be an impact that is  
4 no greater than minimal as it affects the  
5 livability of abutting properties and those in the  
6 surrounding area.

7 "There is also inadequate evidence upon which the  
8 Hearings Officer can conclude that weekend traffic  
9 impacts will be no greater than minimal given the  
10 testimony of opponents regarding severe traffic  
11 congestion produced by the nearby Applegate  
12 Christian Fellowship during certain weekend  
13 periods, and applicant's intention to conduct  
14 weekend seminars which may occur during the same  
15 peak periods.

16 "On this record the Hearings Officer ultimately  
17 concludes that he can not find that the traffic  
18 impacts produced by the proposed use will be no  
19 greater than minimal." (Emphases added.) Record  
20 18.

21 **A. Adequacy of the Findings**

22 Petitioner contends the above findings are inadequate  
23 to explain why the hearings officer concluded the applicant  
24 failed to carry its burden.

25 We do not agree. The findings explain that the lack of  
26 evidence concerning the capacity of Hamilton Road and other  
27 roads serving the property leave the hearings officer unable  
28 to conclude, based on existing traffic level data, that the  
29 traffic impacts of the proposed use will be only minimal.  
30 The findings also explain, based on evidence submitted by  
31 the opponents, that weekend events may cause severe traffic  
32 congestion. The hearings officer's findings are sufficient  
33 to explain why he concluded the applicant failed to carry

1 its burden concerning LDO 260.040(2), with regard to traffic  
2 impacts.

3 **B. Adequacy of the Evidence**

4 Petitioner first complains that the hearings officer  
5 "completely rejected the expert opinion of the County's  
6 Public Works Department agent, who concluded that Hamilton  
7 Road and its intersection with Highway 238 and Upper  
8 Applegate Road are capable of accommodating an additional  
9 300 vehicles per day with minimal impact not requiring an  
10 immediate traffic study, or perhaps any traffic study at  
11 all." Petition for Review 15.

12 At no point does the Public Works Department  
13 representative specifically address the "minimal adverse  
14 impact" standard. To the contrary, the stated purpose of  
15 the site inspection that led to the above described  
16 memorandum was "to determine whether or not the existing  
17 facilities are adequate to handle this additional traffic."  
18 Record 78. In the July 6, 1993 memorandum, the Public Works  
19 Department simply concludes that a traffic study can be  
20 deferred if certain precautions are taken. That conclusion  
21 is not the same as the ultimate conclusion the hearings  
22 officer is required to reach under LDO 260.040(2), i.e. that  
23 the proposal will have only minimal adverse traffic impacts.  
24 The Public Works Department memorandum might well constitute  
25 substantial evidence in support of such a conclusion by the

1 hearings officer, but it neither constitutes nor compels the  
2 required ultimate legal conclusion.

3 Petitioner assumes a heavy burden in challenging the  
4 hearings officer's finding that the applicant failed to  
5 carry its burden under LDO 260.040(2) with regard to traffic  
6 impacts. Jurgenson v. Union County Court, 42 Or App 505,  
7 510, 600 P2d 1241 (1979) (denial of land use approval is  
8 supported by substantial evidence unless proponent sustains  
9 his burden of proof as a matter of law); Consolidated Rocks  
10 Products, 17 Or LUBA 609, 619 (1989). In order to challenge  
11 that finding on evidentiary grounds, petitioner must show  
12 that the evidence in the record is such that a reasonable  
13 decision maker could only conclude that the applicant  
14 carried that burden. Jurgenson v. Union County Court,  
15 supra; Morely v. Marion County, 16 Or LUBA 385, 393 (1987);  
16 McCoy v. Marion County, 16 Or LUBA 284, 291 (1987).

17 Even if we discount the largely undocumented and  
18 somewhat anecdotal testimony of opponents, we nevertheless  
19 conclude the traffic counts, the accident history and the  
20 conditional recommendation of the Public Works Department  
21 that the traffic study could be deferred hardly amount to  
22 the kind of evidence that would require the hearings officer  
23 to conclude, as a matter of law, that the applicant carried  
24 its burden under LDO 260.040(2) with regard to traffic  
25 impacts. We conclude the hearings officer's finding is  
26 supported by substantial evidence.

1           The hearings officer also found that groundwater  
2 impacts of the proposal and impacts on the value of  
3 adjoining properties would violate LDO 260.040(2). The  
4 hearings officer further found the applicant failed to  
5 demonstrate that the proposal provides primarily for the  
6 needs of rural residents or requires a rural setting, as  
7 required by LDO 260.040(4). Because only one sustainable  
8 basis for the hearings officer's decision to deny the  
9 conditional use permit application is required, we do not  
10 consider those other impacts or petitioner's challenges to  
11 those portions of the hearings officer's decision. McCoy v.  
12 Marion County, supra, 16 Or LUBA at 286; Portland City  
13 Temple v. Clackamas County, 11 Or LUBA 70, 78 (1984).

14           The second assignment of error is denied.

15       **THIRD ASSIGNMENT OF ERROR**

16           The arguments presented by petitioner under this  
17 assignment of error challenge other reasons given by the  
18 hearings officer for denying the proposal. Because our  
19 resolution of the second assignment of error requires that  
20 we affirm the county's decision, regardless of whether we  
21 agree with part or all of the arguments presented by  
22 petitioner under this assignment of error, we do not  
23 consider those arguments.

24       **FOURTH ASSIGNMENT OF ERROR**

25           Petitioner notes that in Valley View Nursery v. Jackson  
26 County, 15 Or LUBA 591, 598 (1987), we observed that

1 LDO 260.040(2) is a very subjective standard, and that the  
2 county has considerable discretion in determining whether  
3 the standard is met in any particular circumstance.  
4 Petitioner contends the standard is too subjective and gives  
5 the county too much discretion. Petitioner argues the  
6 county should have more precisely defined, in advance of its  
7 decision in this matter, what constitutes "minimal adverse  
8 impact." Because the county did not do so, petitioner  
9 contends the applicant is unfairly left to guess what the  
10 standard requires.

11 In the land use arena, subjective standards are the  
12 rule rather than the exception. We conclude above that the  
13 county adequately explained why it believes the applicant  
14 failed to carry its burden under LDO 260.040(2) with regard  
15 to traffic impacts. We reject petitioner's contention that  
16 the standard is impermissibly vague. See Oswego Properties,  
17 Inc. v. City of Lake Oswego, 108 Or App 113, 119, 814 P2d  
18 539 (1991); Lee v. City of Portland, 57 Or App 798, 802, 646  
19 P2d 662 (1982).

20 The fourth assignment of error is denied.

21 **FIFTH ASSIGNMENT OF ERROR**

22 Petitioner's final argument is that because the  
23 applicant demonstrated compliance with all criteria  
24 applicable to approval of conditional uses, the hearings  
25 officer exceeded his discretion in denying the application.

1           For the reasons explained above with regard to  
2 LDO 260.040(2), we disagree with the predicate to  
3 petitioner's argument under this assignment of error.

4           The fifth assignment of error is denied.

5           The county's decision is affirmed.