

BEFORE THE LAND USE BOARD OF APPEALS

JUN 20 2 35 PM '89

OF THE STATE OF OREGON

1
2
3 KOLA TEPEE, INC., an Oregon)
corporation, A.J. UPDEGRAVE,)
and BENJAMIN FORTNER,)

) LUBA No. 89-021

4)
5 Petitioners,)

) FINAL OPINION
) AND ORDER

6 vs.)

7 MARION COUNTY,)

8 Respondent.)

9 Appeal from Marion County.

10 M. Chapin Milbank, Salem, filed the petition for review and
argued on behalf of petitioners.

11 Robert C. Cannon, Jane Ellen Stonecipher, and Daryl S.
12 Garrettson, Salem, filed the response brief and Jane Ellen
Stonecipher argued on behalf of respondent.

13 HOLSTUN, Chief Referee; SHERTON, Referee; KELLINGTON,
14 Referee; participated in the decision.

15 AFFIRMED 06/28/89

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

1 Opinion by Holstun.

2 NATURE OF THE DECISION

3 Petitioners appeal Marion County's denial of a request for
4 conditional use approval of a church and church related
5 facilities on a 331 acre ownership in the county's Exclusive
6 Farm Use (EFU) zone.

7 FACTS

8 On May 18, 1988, petitioners applied for conditional use
9 approval for church related activities on property designated
10 Primary Agriculture in the Marion County Comprehensive Plan and
11 zoned EFU. The nature of the proposal changed during the
12 county proceedings. The hearing officer's findings of fact,
13 which were adopted by the board of county commissioners,
14 explain the nature of the proposal as follows:

15 " * * * The subject property contains the owner's
16 dwelling and several farm accessory structures. Uses
17 to the north consist of acreage homesites, farm
18 operations, and woodlots on land zoned AR (Acreage
19 Residential). To the west on land zoned AR and EFU,
20 commercial farm uses dominate the land use pattern.
21 To the south and east, commercial farm operations
22 dominate.

23 " * * * * *

24 "The use as proposed and outlined is for a church
25 conference center replacing the current conference
26 center in Gladstone, Oregon and including a church and
parochial schools serving the South Salem area.
Attendance would vary throughout the year from 15 to
4,000 in residence on the eastern 80 acres of the
subject property. The conference grounds would serve
the church membership for the State of Oregon.

" * * * * *

" * * * The subject property would continue as the

1 homesite of the current residents, and would have
2 dwellings for resident staff estimated at 15-25 adult
3 persons or an approximate equivalent of 7-12 family
4 units, a weekly church population of 300-400, a school
5 population unknown, and a yearly conference population
6 estimated at 4,000. In addition, 27 buildings are
7 proposed with car parking, RV parking and restrooms as
8 needed. * * *.

9 " * * * * * ." Record 12-14.

10 ASSIGNMENT OF ERROR

11 "The hearings officer erred in concluding that a
12 church or church related education facility was only a
13 conditional use and not an outright permitted use."

14 In this opinion we assume, as the hearings officer and
15 board of commissioners apparently did, that the proposal was
16 for a church or a school, or both.¹

17 Petitioners argue the county improperly construes
18 ORS 215.213 to permit the county to subject churches in its EFU
19 zone to conditional use standards. Petitioners contend that
20 under a correct interpretation of ORS 215.213(1) and (2)
21 churches and schools must be allowed outright and may not be
22 subjected to the county's conditional use standards.²

23 Marion County Zoning Ordinance (MCZO), chapter 136 "EFU
24 Zone" provides as relevant:

25 "136.020 USES. Within an EFU zone no building,
26 structure or premise shall be used, arranged or
designed to be used, erected, structurally altered or
enlarged except for one or more of the following uses:

"[The list of uses allowed outright does not include
churches or schools.]"

"136.030 CONDITIONAL USES. The following uses may be
permitted in an EFU zone subject to obtaining a
conditional use permit and satisfying the applicable
criteria in Section 136.040.

1 "* * * * *

2 "(o) Churches, public and private schools, meeting the
3 criteria in 136.040(d) and (c) or (e);

4 "* * * * *."

5 Petitioners argue the county's zoning ordinance is not
6 consistent with the following provisions in ORS chapter 215:

7 "215.203(1) Zoning ordinances may be adopted to zone
8 designated areas of land within the county as
9 exclusive farm use zones. Land within such zones
10 shall be used exclusively for farm use except as
11 otherwise provided in ORS 215.213 or 215.283. * * *."

12 "215.213(1) The following uses may be established in
13 any area zoned for exclusive farm use:

14 "(a) Public or private schools, including all
15 buildings essential to the operation of a
16 school.

17 "(b) Churches.

18 "* * * * *

19 "215.213(2) The following uses may be established in
20 any area zoned for exclusive farm use if the use meets
21 reasonable standards adopted by the governing body.

22 "[The list of uses that follows does not include
23 churches or schools.]" (Emphasis added.)

24 We understand petitioners to argue that the above-quoted
25 provisions of ORS chapter 215 require the county to allow
26 churches and schools outright in its EFU zone. According to
 petitioners, the structure and language of ORS 215.213(1) and
 (2) clearly shows a legislative division of uses allowed in the
 EFU zone into (1) those uses permitted outright and (2) those
 uses that may be subjected to reasonable approval standards.
 Petitioners contend that this statutory structure is

1 meaningless if the county may nevertheless subject to
2 conditional use standards the uses that the legislature
3 indicated are to be allowed outright. In short, petitioners
4 contend the county improperly treats churches and schools as
5 though they were listed in ORS 215.213(2) rather than in ORS
6 215.213(1).

7 In addition to petitioners' contention that the county's
8 EFU zone contravenes the language and structure of ORS 215.213,
9 petitioners provide legislative history which they contend
10 shows a legislative intent to make churches and schools
11 outright permitted uses in EFU zones.

12 Respondent offers several theories for why petitioners'
13 assignment of error should be denied. We address respondent's
14 theories separately below.

15 A. Applicability of ORS 215.213

16 Respondent argues, and petitioners do not dispute, that the
17 MCZO was acknowledged in 1982. The statutory language in ORS
18 215.213(1) and (2), cited by petitioners, was first adopted in
19 1983 as part of revisions to the EFU zone statutes to allow
20 counties to designate marginal lands³ and apply the more
21 permissive land use regulations prescribed in ORS 215.317 and
22 215.327 to such marginal lands. ORS 197.247; 215.288.

23 Counties electing to designate marginal lands are required
24 to apply ORS 215.213(1) to (3) to lands zoned EFU.
25 ORS 215.213, as it existed in 1983 prior to the above-mentioned
26 revisions, was recodified without change at ORS 215.283.

1 Counties which do not elect to designate marginal lands, such
2 as Marion County, may apply either ORS 215.213(1) to (3) or ORS
3 215.283. Respondent argues that when its plan and land use
4 regulation were adopted and acknowledged what is now ORS
5 215.213(1) and (2) did not exist; and, therefore, petitioners'
6 claim that the county's EFU zone violates those sections must
7 be rejected.

8 Although respondent is correct that the language now
9 codified at ORS 215.213(1) and (2) did not exist when the MCZO
10 was adopted and acknowledged, the provisions now codified at
11 ORS 215.283(1) and (2), which the county did apply, are
12 substantially identical.⁴ ORS 215.283(2) does lack the
13 explicit reference contained in ORS 215.213(2) to "reasonable
14 standards adopted by the governing body." However, we do not
15 believe this difference in the statutory language is sufficient
16 to reject petitioners' assignment of error solely on the basis
17 that petitioners' arguments incorrectly assume ORS 215.213(1)
18 and (2) apply, rather than ORS 215.283(1) and (2).

19 B. ORS 215.213 and 215.283 Only Establish Minimum
20 Requirements For EFU Zones

21 The central question in this appeal is whether
22 ORS chapter 215 is properly read to require that a county's EFU
23 zone must allow those uses identified in ORS 215.213(1) as uses
24 permitted outright. If the answer to that question is yes, we
25 believe the parallel provision in ORS 215.283(1) applicable to
26 counties electing not to designate marginal lands also imposes

1 such a requirement.

2 If ORS 215.213(1) and (2) are viewed in isolation, they
3 appear to create a list of outright permitted uses and a list
4 of uses that are to be subject to additional approval
5 standards. There are, however, several problems with
6 petitioners' contention that ORS 215.213(1) requires that
7 counties allow churches and schools in their EFU zones as uses
8 permitted outright.

9 First, there is no statutory requirement that counties
10 adopt EFU zones at all.⁵ ORS 215.203(1) provides as follows:

11 "Zoning ordinances may be adopted to zone designated
12 areas of land within the county as exclusive farm use
13 zones. Lands within such zones shall be used
14 exclusively for farm use except as otherwise provided
15 in ORS 215.213 or 215.283. * * *." (Emphasis added.)

16 Thus, ORS 215.203(1) enables, but does not require, counties to
17 adopt EFU zones. If a county is not statutorily required to
18 adopt an EFU zone, it could not violate ORS 215.213(1) by
19 failing to provide for churches and schools as outright uses in
20 its EFU zone.

21 Aside from the lack of a statutory requirement to adopt an
22 EFU zone, ORS 215.203 explicitly states that land within EFU
23 zones "shall be used exclusively for farm use except as
24 otherwise provided in ORS 215.213 or 215.283." ORS 215.213(1)
25 and (2) and 215.283(1) and (2) each explicitly state "the
26 following uses may be established * * *." (Emphasis added.)

If the operative language in ORS 215.213(1) and (2) and
215.283(1) and (2) instead stated "the following uses shall be

1 allowed (outright or with conditions) in an EFU zone," it might
2 be possible to argue the legislature intended ORS 215.213(1) to
3 be incorporated intact into county EFU zones when counties
4 elect to adopt such zones. However, we conclude the
5 legislature's use of the terms "may" and "shall" in ORS chapter
6 215 demonstrate the legislature did not intend to require that
7 counties adopt EFU zones that incorporate, word for word, ORS
8 215.213(1) and (2).

9 The legislature used the non mandatory verb "may" in
10 ORS 215.203 when enabling counties to adopt EFU zones. The
11 legislature used the mandatory verb "shall" in ORS 215.203 when
12 it required that lands in EFU zones be used for farm use the
13 exception of certain nonfarm uses. In ORS 215.213(1) and (2)
14 and 215.283(1) and (2), which identify the permissible nonfarm
15 uses, the legislature again used the non mandatory verb "may."
16 We find nothing in the text of ORS 215.213(1) or the context in
17 which that section appears, that would support our interpreting
18 "the following uses may be established" to mean "the following
19 uses shall be allowed." As the Court of Appeals explained:

20 "In interpreting legislative acts, the Supreme Court
21 has said that the same word used in different parts of
22 a statute is presumed to be used in the same sense
23 throughout, absent an indication of contrary intent.
24 School District No. 17 of Sherman County v. Powell,
25 203 Or 168, 279 P2d 492 (1955); Holman Transfer Co. v.
26 City of Portland, 196 Or 551, 249 P2d 175 (1952).
Conversely, when one word ('shall') is used
consistently within a paragraph to direct mandatory
behavior, we believe the deliberate choice of another
word ('may') in a similar context indicates a
deliberate difference in meaning * * *." Portland
Assn of Teachers v. School District No. 1, 51 Or App

1 321, 326, 625 P2d 1336 (1981). See also, 2A Sutherland
2 Statutory Construction, Sec. 57.11 (4th Ed., 1984).

3 We also note that the county relied in large part on 45 Op
4 Att'y Gen 77 (1981) where the Attorney General concluded that
5 ORS 215.213 establishes minimum rather than absolute standards
6 for an EFU zone. In that opinion, the Attorney General noted
7 that in instances where the legislature intended to inhibit the
8 planning and zoning authority granted in ORS chapter 215 to
9 regulate farm uses, it explicitly said so. 45 Op Att'y Gen
10 at 82.⁶ The Attorney General also noted that for property
11 tax assessment purposes under ORS 308.370(1), (2) and (3) and
12 ORS 308.372 through 308.395, ORS 215.213 is "clearly intended
13 to establish minimum standards." 45 Op Att'y Gen at 83.

14 Petitioners rely heavily on legislative history surrounding
15 the adoption of the 1983 marginal lands legislation. Oregon
16 Laws 1983, chapter 826. The legislative history petitioners
17 cite concerns an amendment to add churches and schools as a use
18 allowed outright under ORS 215.213(1) whereas an earlier
19 version of the bill had deleted those uses from ORS 215.213(1).

20 As respondent points out, petitioners' reliance on that
21 legislative history is misplaced. First, the legislative
22 history concerns amendments to ORS 215.213, not to ORS 215.283,
23 which applied when the MCZO was adopted and acknowledged.
24 Second, the operative language in ORS 215.213(1) and
25 ORS 215.283(1) was first adopted in 1963. Even if statements
26 made 20 years later concerning the legal effect of those

1 sections can be read to express petitioners' view of those
2 sections, those statements are of no value in determining the
3 original legislative intent. DeFazio v. WPPSS, 296 Or 550,
4 561, 679 P2d 1316 (1984); Fred Meyer v. Bureau of Labor, 39 Or
5 App 253, 262, 592 P2d 564, rev den 287 Or 129 (1979); Barbee v.
6 Josephine County, ___ Or LUBA ___ (LUBA No. 88-004, May 13,
7 1988). Finally, at best, the legislative history petitioners
8 cite is unclear about whether ORS 215.213(1) merely enables
9 counties to adopt EFU zones allowing the identified uses
10 outright, or requires that their EFU zones allow the identified
11 uses. Although petitioners cite comments by members of a
12 senate committee and persons testifying before the committee
13 that suggest the speakers view ORS 215.213(1) to require that
14 the listed uses be allowed outright, petitioners also cite the
15 following portion of a committee staff report that preceded the
16 amendment to include churches and schools on the list of uses
17 specified in ORS 215.213(1):

18 "Section 5 amends ORS 215.213 which describes the uses
19 allowed outright in an exclusive farm use zone and
those allowed only under a conditional use permit.
* * *

20 "[T]he committee added language ensuring that boarding
21 schools could be constructed unconditionally as
22 well." (Emphasis added.) Petition for Review 5-6.

23 Even if the 1983 legislative history petitioners cite could
24 be used to determine the intended legal effect of statutory
25 language adopted first in 1963, we do not read that legislative
26 history to show an intent that counties be required to allow

1 churches and schools outright in the EFU zone, only that they
2 may adopt EFU zones that do so. See Washington County Farm
3 Brueau v. Washington County, ___ Or LUBA ___, LUBA
4 No. 88-104/105, June 21, 1989), slip op 20-21; McCaw
5 Communications v. Marion County, ___ Or LUBA ___ (LUBA No.
6 88-068), slip op 27-28, n 10, rev'd on other grounds 96 Or App
7 552 (1989).

8 Because we reject petitioners' argument that ORS 215.213(1)
9 requires Marion County allow churches and schools outright in
10 its EFU zone, petitioners' assignment of error is denied.

11 C. Collateral Challenge to Marion County's Acknowledgment

12 Respondent also argues petitioners in this appeal are
13 collaterally attacking the 1982 acknowledgment of the MCZO.
14 Citing Byrd v. Stringer, 295 Or 311, 666 P2d 1332 (1983),
15 respondent contends such a collateral attack must be rejected.

16 Respondent's collateral attack theory is based on its
17 argument that, from the time EFU enabling legislation was
18 adopted in 1963 until present, the statutory provisions now
19 codified at ORS 215.203 through 215.337 are enabling and
20 voluntary, not mandatory. Respondent acknowledges that the
21 voluntary nature of the EFU zoning changed following adoption
22 of SB 100 creating the statewide land use planning program.
23 Specifically, ORS 197.175(2) requires counties to adopt a
24 comprehensive plan and land use regulations that comply with
25 the statewide planning goals adopted by the Land Conservation
26 and Development Commission pursuant to ORS 197.225 and

1 197.230. Goal 3 (Agricultural Land) requires that agricultural
2 lands be "protected by adopting exclusive farm use zones
3 pursuant to ORS chapter 215." We understand respondent to
4 argue that Goal 3 is the only legal standard requiring that the
5 county adopt an EFU zone in compliance with ORS chapter 215.
6 Therefore, even if the county's EFU zone does conflict with ORS
7 215.213(1) or 215.283(1), such a conflict is a goal compliance
8 issue which may not be raised in this appeal of a conditional
9 use permit decision approval.

10 We agree with the county; and, therefore, we would reject
11 petitioners' assignment of error even if we agreed with
12 petitioners that MCZO Sections 136.020 and 136.030 are
13 inconsistent with ORS 215.213(1) and (2) and 215.283(1) and (2).

14 With exceptions not relevant in this proceeding, it is
15 clear that after acknowledgment the land use standards
16 contained in the acknowledged comprehensive plan and land use
17 regulations apply to a county's land use decisions, rather than
18 the statewide planning goals.⁷ ORS 197.835(3); Byrd v.
19 Stringer, supra; Cale v. Deschutes County, 5 Or LUBA 156
20 (1982); Friends of Benton County v. Benton County, 10 Or LUBA
21 281 (1984); Goracke v. Benton County, 12 Or LUBA 128 (1984).

22 We recognize that in Greenwood v. Polk County, 11 Or LUBA
23 230 (1984), we noted that acknowledgment does not foreclose the
24 possibility that a land use decision could be remanded because
25 it conflicts with a statutory standard. However, there is no
26 conflict with a statutory requirement present in this appeal.

1 The legal requirement for the county to adopt an EFU zone
2 consistent with ORS chapter 215 is contained in Goal 3, not in
3 ORS chapter 215. Therefore, although the type of land use
4 regulation Goal 3 requires the county to adopt is described in
5 statute, the requirement that EFU zoning be adopted is a goal
6 requirement, not a requirement imposed by statute.

7 The challenge petitioners assert in this appeal is,
8 effectively, a challenge to acknowledgment of the Marion County
9 Zoning Ordinance (i.e., a challenge that the MCZO does not
10 comply with Goal 3's requirement that agricultural land be
11 placed in EFU zones consistent with ORS chapter 215).

12 Accordingly, even if we agreed with petitioners that
13 MCZO Sections 136.020 and 136.030 are inconsistent with
14 ORS 215.213(1) and (2) and 215.283(1) and (2), we have no
15 authority in this challenge to a denial of a conditional use
16 permit subject to an acknowledged land use regulation to
17 reverse or remand the county's decision on that basis.

18 The assignment of error is denied.

19 The county's decision is affirmed.

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FOOTNOTES

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3 1

4 In its brief, respondent argues the petitioners failed to
5 show the proposal is for a church. We tend to agree with
6 respondent that in some respects the proposal is not neatly
7 pigeonholed as either a church or a school. However, the
8 county apparently treated the application as a church or
school, or both, applied the standards it believe applied to
churches and schools, and denied the application based on those
standards. As the county did not base its decision on the
alternative ground that the proposal is not a church or school,
we do not decide that question.

9 2

10 Petitioners suggest that the county's conditional use
11 standards are impossible for a church to meet. Marion County
Zoning Ordinance (MCZO) Section 136.040(d) provides:

12 "(d) The following criteria apply to [EFU zone
conditional] uses * * *.

13 "(1) The use is compatible with farm or forest
14 uses and is consistent with ORS 215.243; and

15 "(2) It does not interfere seriously with farming
16 or forest practices on adjacent lands; and

17 "(3) It does not materially alter the stability
18 of the overall land use pattern of the area;
and

19 "(4) Adequate fire protection and other rural
services are available; and

20 "(5) [It] will not have a significant adverse
21 impact on timber production, grazing land,
22 watersheds, fish and wildlife habitat, soil
and slope stability, air and water quality
and outdoor recreation activities; and

23 "(6) The proposed use complies with the purpose
24 and intent of the agricultural policies in
the Marion County Comprehensive Plan."

25 Petitioners do not challenge the adequacy of the county's
26 findings that the conditional use standards are not met by the
proposal or the evidentiary support for those findings.

1 Rather, petitioners argue the conditional use standards should
2 not have been applied at all.

3

Marginal lands are less productive agricultural and forest
4 lands meeting the standards set forth in ORS 197.247.

5
4

6 ORS 215.283 provides in pertinent part:

7 "(1) Subject to ORS 215.288 the following uses may be
8 established in any area zoned for exclusive farm
9 use;

10 "(a) Public or private schools, including all
11 buildings essential to the operation of a
12 school.

13 "(b) Churches.

14 "* * * * *

15 "(2) Subject to ORS 215.288, the following nonfarm
16 uses may be established, subject to the approval
17 of the governing body or its designate in any
18 area zoned for exclusive farm use:

19 "* * * * *."

20
5

21 As noted infra, Statewide Planning Goal 3 (Agricultural
22 Lands) does require that agricultural lands be placed in EFU
23 zones.

24
6

25 ORS 215.253(1) provides, in part:

26 "No state agency, city, county or political
subdivision of this state may exercise any of its
powers to enact local laws or ordinances or impose
restrictions or regulations affecting any farm use
land situated within an exclusive farm use zone
established under ORS 215.203 * * * in a manner that
would unreasonably restrict or regulate farm
structures or that would unreasonably restrict or
regulate accepted farming practices * * *."

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Thus, unlike the statutory provisions allowing nonfarm uses in EFU zones, the legislature not only made it clear in ORS 215.203(1) that counties shall allow farm uses in EFU zones, it also expressly limited counties' authority to impose additional restrictions on farm uses.

7

Amendments to an acknowledged comprehensive plan or land use regulation must comply with the goals. ORS 197.835(4) and (5).