

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 OLAFUR BRENTMAR,)
5)
6 Petitioner,)
7)
8 vs.)
9) LUBA No. 93-208
10 JACKSON COUNTY,)
11)
12 Respondent,)
13)
14 and)
15)
16 NEIL E. WARREN,)
17)
18 Intervenor-Respondent.)

19
20
21 On remand from the Court of Appeals.

22
23 Tonia L. Moro, Medford, represented petitioner.

24
25 Arminda J. Brown, County Counsel, Medford, represented
26 respondent.

27
28 Neil E. Warren, Jacksonville, represented himself.

29
30 LIVINGSTON, Chief Referee; GUSTAFSON, Referee; HANNA,
31 Referee, participated in the decision.

32
33 REMANDED 12/12/95

34
35 You are entitled to judicial review of this Order.
36 Judicial review is governed by the provisions of ORS
37 197.850.

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county hearings officer's 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
8 exclusive farm use zone.

9 **BACKGROUND**

10 The facts are fully set forth in our decision in
11 Brentmar v. Jackson County, 27 Or LUBA 453, 454-56 (1994)
12 (Brentmar I). Very briefly stated, petitioner proposes to
13 develop a school of sorts "for education, research, and
14 development of economically viable commercial activities in
15 conjunction with farm use." Id. at 455. The school would
16 be located on land zoned for exclusive farm use (EFU).

17 Our decision to remand in Brentmar I rested on several
18 Court of Appeals decisions stating that although a county
19 may not regulate nonfarm uses in its EFU zones less
20 stringently than required by ORS chapter 215, it may
21 regulate such nonfarm uses more stringently. The Court of
22 Appeals affirmed Brentmar I. Brentmar v. Jackson County,
23 130 Or App 438, 882 P2d 1117 (1994). The Supreme Court
24 reversed. Brentmar v. Jackson County, 321 Or 481, ___ P2d
25 ___ (1995) (Brentmar II).

26 The Supreme Court concluded:

1 "[U]nder ORS 215.213(1) and 215.283(1), a county
2 may not enact or apply legislative criteria of its
3 own that supplement those found in ORS 215.213(1)
4 and 215.283(1). Under ORS 215.213(2) and
5 215.283(2), however, a county may enact and apply
6 legislative criteria of its own that supplement
7 those found in ORS 215.213(2) and 215.283(2).

8 "LUBA erred when it held that ORS 215.213(1) and
9 215.283(1) do not require a county to permit the
10 uses delineated therein. LUBA did not err,
11 however, when it stated that the uses allowed by
12 ORS 215.213(2) and 215.283(2) may be subject to
13 more stringent local criteria than those set forth
14 in those statutory provisions. LUBA did not
15 distinguish between subsection (1) and subsection
16 (2) uses. It is not clear, from the record,
17 whether all or part of PGI's application was
18 rejected improperly, because PGI's proposed
19 subsection (1) uses violated the county's LDO.
20 Accordingly, this case must be remanded to LUBA
21 for reconsideration." (Footnote omitted.)
22 Brentmar II at 496-97.¹

23 **DISCUSSION**

24 We did not distinguish between subsection (1) and
25 subsection (2) uses because the county hearings officer
26 evaluated the proposal as a whole under the conditional use
27 criteria set forth in Jackson County Land Development
28 Ordinance (LDO) Chapters 218 and 260. However, we have
29 already decided that

30 "petitioner's multifaceted proposal is not merely
31 a 'private school' and 'buildings essential to the
32 operations of a school.' The proposal includes
33 'commercial activities * * * in conjunction with

¹Neither Brentmar I nor Brentmar II distinguishes between ORS 215.213 and ORS 215.283. However, because Jackson County did not adopt marginal lands provisions, ORS 215.213 does not apply.

1 farm use' and 'small scale energy producing
2 facilities,' neither of which are uses allowed
3 under ORS 215.213(1) and 215.283(1)." Brentmar I
4 at 458.

5 While some components of petitioner's proposed
6 development, including the school and all buildings
7 essential to it, are uses allowed outright under ORS
8 215.283(1), the county may apply its conditional use
9 criteria in deciding whether to approve the balance of the
10 proposal. First, however, the county must separate those
11 components of petitioner's proposal that are allowed
12 outright under ORS 215.283(1) from those that are not.²

13 The county's decision is remanded.

²Doing so will require a reevaluation of evidence already in the record and perhaps a reopening of the record to allow additional evidence.