

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 DEPARTMENT OF LAND CONSERVATION)

5 AND DEVELOPMENT,)

6)
7 Petitioner,)

8)
9 vs.)

10 CLACKAMAS COUNTY,)

11)
12 Respondent,)

13)
14 and)

15)
16)
17 FRANK WOOD,)

18)
19 Intervenor-Respondent.)

LUBA No. 97-098

FINAL OPINION
AND ORDER

20
21
22 Appeal from Clackamas County.

23
24 Richard M. Whitman, Assistant Attorney General, Salem,
25 filed the petition for review and argued on behalf of
26 petitioner. With him on the brief were Hardy Myers,
27 Attorney General, David Schuman, Deputy Attorney General,
28 and Virginia L. Linder, Solicitor General.

29
30 No appearance by respondent.

31
32 David J. Hunnicutt, Tigard, filed the response brief
33 and argued on behalf of intervenor-respondent.

34
35 HANNA, Administrative Law Judge; GUSTAFSON, Chief
36 Administrative Law Judge, participated in the decision.

37
38 REVERSED 11/26/97

39
40 You are entitled to judicial review of this Order.
41 Judicial review is governed by the provisions of ORS
42 197.850.

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's approval of the siting
4 of a church and related facilities in the county's exclusive
5 farm use (EFU) zone on high-value farmland.

6 **MOTION TO INTERVENE**

7 Frank Wood (intervenor), the applicant below, moves to
8 intervene in this proceeding on the side of respondent.
9 There is no objection to the motion, and it is allowed.

10 **MOTIONS TO FILE SUPPLEMENTAL BRIEF**

11 After the parties submitted their briefs, the Supreme
12 Court issued its decision in Lane County v. LCDC, 325 Or
13 569, ___ P2d ___, recon den 326 Or ___, ___ P2d ___ (1997)
14 (Lane County).¹ Each party moves to file a supplemental
15 brief to respond to issues addressed in that decision.²
16 There is no opposition to these motions, and they are
17 allowed.

¹The flow of both petitioner's and intervenor's arguments was disrupted by the issuance of Lane County after the briefs were submitted to LUBA. We address the parties' initial arguments only to the extent they do not appear to have been superseded by later arguments in the supplemental briefs.

²After oral argument, petitioner moved to file a memorandum of additional authorities concerning the Oregon Supreme Court's denial of the amici curiae motion for reconsideration of Lane County. This Board officially notices decisions of the Supreme Court. Materials attached to petitioner's motion that contain copies of arguments made by amici to the court are not noticed by this Board. Additionally, we will not accept the copies of arguments made by amici to the court.

1 **FACTS**

2 The facts as described by petitioner are essentially
3 undisputed, and we adopt them as our own:

4 "[Intervenor, the agent acting for the] Good
5 Shepherd [church] applied to the County for a
6 permit to construct a church and school complex
7 approximately 2.6 miles northwest of the City of
8 Sandy. The subject property contains
9 approximately 30.5 acres zoned for exclusive farm
10 use (EFU) and is designated "Agriculture" by the
11 Clackamas County Comprehensive Plan. The property
12 is high-value farmland for the purposes of the
13 County's Zoning and Development Ordinance (ZDO)
14 and OAR 660-33-120 and 130. The land consists of
15 gently rolling hills cultivated in berries.

16 "Good Shepherd proposes to build one of the
17 largest churches in Oregon on the property. The
18 proposed facility consists of a church and school
19 complex, including 210,000 square feet of
20 buildings and 13 acres of paved parking for up to
21 1,500 cars. The proposed facilities will draw
22 3,000 people on an average weekend, with between
23 4,000 and 5,000 possible during peak usage. The
24 proposed physical structures include a three-
25 story, 142,000 square foot main building
26 containing the main sanctuary, as well as several
27 classrooms. Other structures include additional
28 classrooms, a maintenance/machine shop, and a gym
29 totaling 71,000 square feet. Fifty percent of the
30 30.5 acre site will be covered with impervious
31 structures. In addition to the physical
32 structures, Good Shepherd proposes to build two
33 lighted sports fields and a one-half acre lake to
34 supply water for fire suppression.

35 "These facilities will support five church
36 services a week, as well as a day school for an
37 estimated 500 students. Proposed activities
38 include church services, weekly classes for
39 students, assemblies, concerts, and athletic
40 events. The church campus will require a full
41 time staff of 80 persons as well as an additional
42 20 person maintenance staff.

1 "On November 27, 1996, Clackamas County adopted an
2 ordinance implementing LCDC rules concerning lands
3 zoned for EFU. ZDO Section 401. Seven days
4 later, on December 4, 1996, Good Shepherd
5 submitted its application. In a letter dated
6 January 2, 1997, Clackamas County Counsel
7 expressed his opinion that ZDO Section 401, passed
8 just two months prior, was invalid under the
9 Supreme Court's decision in Brentmar v. Jackson
10 County, 321 Or 481, 900 P2d 1030 (1995), which
11 predated the county's ordinance by more than a
12 year.

13 "On February 5, 1997 an initial public hearing was
14 held and the Record was left open for comment
15 through February 19th. On February 26, 1997, a
16 brief hearing was held to reopen the record
17 through March 5th. On March 12, 1997, another
18 public hearing was held. On April 28, 1997, the
19 hearing officer issued his final order and
20 findings in which he approved Good Shepherd's
21 request premised on his determination that ZDO
22 Section 401 was invalid under Brentmar.^[3] The
23 hearing officer's decision represents the County's
24 final land use decision in this matter " Petition
25 for Review 2-3 (Record citations omitted).

26 The hearings officer also determined that OAR chapter
27 660, division 33 rules did not apply to the challenged
28 decision because the county had implemented those rules
29 through ZDO 401. This appeal followed.

30 **ASSIGNMENT OF ERROR**

31 Petitioner challenges the county's determination that
32 neither OAR chapter 660, division 33 nor ZDO 401 applies to

³In Brentmar, the local government denied the siting of an agricultural school on EFU land, following its own legislatively adopted criteria which 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 the challenged decision. It also challenges the county's
2 failure to establish compliance with Statewide Planning
3 Goals 3 and 14. We consider first the applicability of OAR
4 chapter 660, division 33.

5 Following 1993 amendments to statutes regulating uses
6 on farmland, the Land Conservation and Development
7 Commission (LCDC) adopted OAR chapter 660, division 33
8 regulating those uses. The county amended ZDO 401 on
9 November 27, 1996 to incorporate the provisions of OAR
10 chapter 660, division 33. As relevant here, the county
11 adopted ZDO 401.04(C)(44) and (45) to implement OAR 660-33-
12 120 and 660-33-130 (the rules). OAR 660-33-120 includes a
13 table that lists uses authorized on agricultural land as
14 well as those uses that are not permitted on high-value
15 farmland. These prohibitions on high-value farmland
16 include: "Public or private schools, including all buildings
17 essential to the operation of a school * * *" and
18 "[c]hurches and cemeteries in conjunction with churches."⁴

19 The relevant provisions of ZDO 401, specifically ZDO
20 401.04(C)(44) and (45), were in effect on the December 6,
21 1996 application date. The hearings officer reasoned that
22 because ZDO 401.04(C)(44) and (45) implemented OAR 660-33-
23 120 and 660-33-130, the rules were therefore inapplicable to

⁴ZDO 401.04(C)(44) and (45) duplicate the relevant portions of OAR 660-33-120, stating: "44. Public or private schools, including all buildings essential to the operation of a school. * * *" and "45. Churches and cemeteries in conjunction with churches."

1 the challenged decision.⁵

2 However, while the ZDO amendments were effective, they
3 had not yet been acknowledged when the application was
4 filed. Under ORS 197.646(3), the relevant goals and rules
5 remain directly applicable to local decisions until the
6 county provisions are acknowledged. Gisler v. Deschutes
7 County, 149 Or App 528, 533, ___ P2d ___ (1997). Thus, in
8 these circumstances, we agree with petitioner that OAR
9 chapter 660, division 33 was applicable to the challenged
10 decision because the county regulations were not yet
11 acknowledged under ORS 197.625 at the time of the
12 application.

13 Intervenor then stated:

14 "[Intervenor] concedes that the subject
15 application was submitted after the adoption by
16 Clackamas County of the new ZDO provisions, but
17 prior to the 21 day acknowledgment period required
18 by ORS 197.625(1). Therefore, [intervenor]
19 concedes that the Hearings Officer's rationale for
20 refusing to apply OAR 660-33-120 and 660-33-130
21 [that the ordinance had been acknowledged] is
22 incorrect." Intervenor's Brief 3.

23 Nonetheless, intervenor continues to argue that OAR
24 660-33-120 and 660-33-130 do not apply to the challenged
25 decision.

26 Initially, intervenor argued that based on the Court of

⁵It is not necessary for us to address the hearings officer's conclusion that once a local government adopts an ordinance that implements a rule, the rule is no longer directly applicable to the local government's decisions.

1 Appeals' decision in Lane County v. LCDC, 138 Or App 635,
2 910 P2d 414, on recon 140 Or App 368, 914 P2d 1114 (1996),
3 OAR 660-33-120 and 660-33-130 were not applicable to its
4 proposal.⁶ In Lane County, the county challenged the
5 validity of rules adopted by LCDC restricting uses otherwise
6 allowed by ORS 215.213 on high-value farmland in the two
7 marginal lands counties.⁷ The Court of Appeals determined
8 that LCDC exceeded its authority when it limited uses
9 allowed on high-value farmland that are allowed under ORS
10 215.213. Intervenor argued that even though Clackamas
11 County is not a marginal lands county, the reasoning of the
12 Court of Appeals was equally applicable to nonmarginal lands
13 counties. Thus, according to intervenor, OAR 660-33-120 and
14 660-33-130 were inapplicable to the subject application.

15 However, after the briefs were filed in this appeal,
16 the Supreme Court reversed the Court of Appeals' decision,

⁶Intervenor also argues that "[p]etitioner did not argue [below] that the rules remained valid because the subject application was submitted prior to the end of the 21 day acknowledgment period * * *." Petition for Review 3. Intervenor thus argues that petitioners waived the issue of validity of the rules and cannot raise it here. We reject this argument. Petitioner clearly raised below the applicability of the rules at issue to the challenged decision. Petitioner has met the requirements of ORS 197.835(3). Boldt v. Clackamas County, 107 Or App 619, 813 P2d 1078 (1991).

⁷ORS 215.213 applies to counties that adopted marginal lands provisions under ORS 197.247 (1991 Edition). Only Lane and Washington counties exercised this option. ORS 215.283 applies to all other counties. Prior to the enactment of HB 3661, the significant difference between ORS 215.213 and 215.283 had not been in the litany of general uses in subsections (1) and (2) of those provisions, but in the special provisions allowing nonfarm dwellings in ORS 215.213.

1 thereby validating the applicability of OAR 660-33-120 and
2 660-33-130 in the two marginal lands counties. Nonetheless,
3 intervenor continues to argue that the rules are not
4 applicable to the challenged decision. Intervenor explains
5 generally:

6 "Although Lane County addresses the validity of
7 LCDC's high value farmland rules only in the
8 context of ORS 215.213, [intervenor] concedes that
9 the opinion is likely applicable to uses allowed
10 in the non-marginal lands counties pursuant to ORS
11 215.283, including the proposed uses at issue in
12 this matter. [Intervenor] submits this memorandum
13 for the sole purpose of addressing the rationale
14 used by the Oregon Supreme Court in Lane County to
15 uphold LCDC's high value farmland rules."⁸
16 Intervenor's Supplemental Brief 1.

17 Notwithstanding the specific application of the court's
18 holding to only two counties, its reasoning is general in
19 nature and also validates the rules as they apply to all
20 counties. Several statements by the court are illustrative
21 of the broad scope of the decision:

22 "[I]n the absence of any evidence of a contrary
23 legislative intent, LCDC has the authority
24 pursuant to ORS chapter 197 to adopt goals and
25 rules to provide special protection for high value
26 farmland within the broader range of farmlands
27 zoned EFU." Lane County v. LCDC, 325 Or at 581.

28 In discussing the list in ORS 215.213 of allowed uses
29 in EFU zones in Lane and Washington Counties, the court

⁸Despite the implication that intervenor is asking LUBA to reconsider the Oregon Supreme Court's Lane County decision, intervenor explained at oral argument that he is merely preparing to take his arguments to that court.

1 described the subordinate role of the counties generally to
2 the statewide land use planning goals and the concomitant
3 limitation on LCDC's authority, stating:

4 "[W]e conclude that a county's power to designate
5 EFU land and its authority to allow non-farm uses
6 on EFU land pursuant to ORS 215.213 are
7 subordinate to the statewide land uses planning
8 goals, including Goal 3, as amended, which
9 recognizes the need to protect high value
10 farmland.

11 "Under those circumstance, LCDC's challenged
12 regulations are consistent with ORS 215.213 so
13 long as they are not less restrictive than those
14 statutes -- that is, if they do not allow more
15 uses than the statutes." Lane County v. LCDC, 325
16 Or at 583.

17 The court's reasoning with respect to the validity of
18 LCDC's rules to marginal lands counties in juxtaposition
19 with ORS 215.213 is directly applicable to the validity of
20 LCDC's rules in juxtaposition with ORS 215.283, which sets
21 forth the statutory list of allowed uses in EFU zones in all
22 other counties. The uses allowed under OAR 660-33-120 and
23 660-33-130 are not less restrictive than those listed under
24 ORS 215.283. Thus, those rules are valid and are applicable
25 to the challenged decision.

26 Under OAR 660-33-120 and 660-33-130, churches are not
27 allowed to be established and thus are prohibited on high-
28 value farmland as a matter of law. Accordingly, the
29 proposal before us to establish a church on high-value
30 farmland is prohibited as a matter of law.

31 It is not necessary for us to reach petitioner's

1 argument that the county was required to apply ZDO 401. As
2 a matter of law, OAR 660-33-120 and 660-33-130 preclude the
3 proposed use. For the same reason, it is not necessary for
4 us to reach petitioner's argument that the county was
5 required to apply Goals 3 and 14.

6 The assignment of error is sustained.

7 The county's decision is reversed.⁹

⁹OAR 661-10-071(1) requires this Board to reverse rather than remand a decision when "[t]he decision violates a provision of applicable law and is prohibited as a matter of law."