

LAND USE
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS DEC 15 10 14 AM '88

OF THE STATE OF OREGON

HIGHWAY 213 COALITION, JACK and)
RUTH BARBER, DON and MARILYN)
BOSCH, JAMES and PHYLLIS GLYNN,)
GENE and NORMA J. HOLLIDAY,)
PAT and LINDA MURPHY, FRANCIS)
and NINA RYEL, RONALD and GLENDA)
SAUNDERS, ANNE K. SCHNEIDER,)
MARLIN and JOYCE TERRY, BRUCE)
and BEVERLY WESTERFIELD,)

Petitioners,)

and)

JERRY J. VANDEBERGHE and)
CAROL K. VANDEBERGHE,)

Intervenors-Petitioner,)

vs.)

CLACKAMAS COUNTY,)

Respondent,)

and)

TOKYO COLLEGE OF COMMERCE,)

Intervenor-Respondent.)

LUBA No. 88-060

FINAL OPINION
AND ORDER

Appeal from respondent Clackamas County.

Mark J. Greenfield, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Mitchell, Lang and Smith.

No appearance by respondent Clackamas County.

Jon S. Henricksen, Gladstone, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Henricksen, Grafe and Stocklin-Enright.

HOLSTUN, Chief Referee; SHERTON, Referee; participated in the decision.

REMANDED

12/15/88

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

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1 Opinion by Holstun.

2 NATURE OF THE DECISION

3 Petitioners appeal the county's approval of a conditional
4 use permit for a private college for up to 40 students in the
5 county's Rural Residential Farm/Forest, five acre minimum lot
6 size (RRFF-5) zone.

7 MOTIONS TO INTERVENE

8 Tokyo College of Commerce moves to intervene on the side of
9 respondent in this proceeding. Jerry J. Vandenberghe and Carol
10 K. Vandenberghe move to intervene on the side of petitioners.
11 There is no opposition to the motions and they are allowed.

12 FACTS

13 Intervenor-respondent Tokyo College of Commerce requested a
14 conditional use permit to allow existing structures on a 17
15 acre site in the county's RRFF-5 zone to be used as a private
16 college. The proposed use would be an extension campus of the
17 Tokyo College of Commerce, but would not be a school accredited
18 by the State of Oregon.

19 Courses offered by the Tokyo College of Commerce in Japan
20 include "computer programming, computer-aided accounting,
21 business management, fashion apparel management, finance,
22 secretarial skills, public relations and bookkeeping." Record
23 5, 37. Some classes would be offered on the 17 acre site,
24 although the application does not identify the courses to be
25 offered. Students would also take classes at Clackamas
26 Community College and in addition would spend "a lot of time"

1 on cultural tours in the State of Oregon. Record 5.
2 Approximately 200 to 300 students would participate in the
3 program annually. Each group of up to 40 students would be in
4 residence on the site for 6 weeks.

5 FIRST ASSIGNMENT OF ERROR

6 "The proposed use is not a "school" of any kind and is
7 not a use permitted in the RRF zone. In approving
8 the use respondent exceeded its jurisdiction,
9 improperly construed the applicable law and made a
10 decision not supported by substantial evidence in the
11 whole record."

12 Public and private schools are allowed in the RRF-5 zone
13 as conditional uses under Clackamas County Zoning and
14 Development Ordinance (ZDO) Section 309.05(A)(2). However,
15 petitioners argue the proposal is not a school.

16 Petitioners say the proposed use is more like a boarding
17 house. Petitioners argue there is no evidence in the record of
18 what the curriculum will be or how the school will operate.
19 Petitioners argue it is irrelevant what the Tokyo College of
20 Commerce does in Tokyo; the applicant must explain what it
21 proposes to do in Clackamas County, and it has not done so.
22 Petitioners contend that without additional evidence that the
23 proposed use is the type of activity that qualifies as a
24 school, the applicant has failed to carry its burden.
25 Petitioners say they specifically challenged, during hearings
26 below, the adequacy of the evidence to show this proposal is
for a school or college. Petitioners say the unsubstantiated
representations of the applicant's lawyer that classes will be

1 held on the site are not sufficient to establish that the use
2 proposed is in fact a school.

3 Whether the proposed use is correctly viewed as a school is
4 a relevant issue. The county's decision is based on its
5 assumption that a "private school" is proposed and, as such,
6 the proposed use is an allowable conditional use in the RRF-5
7 zone. Because the petitioners disputed this fundamental
8 assumption in the hearings below, the county was obliged to
9 address the issue in its findings. Norvell v. Portland Metro
10 Area LGBC, 43 Or App 849, 853, 604 P2d 896 (1979); City of Wood
11 Village v. Portland Metro Area LGBC, 48 Or App 79, 87, 616 P2d
12 528 (1980); Grovers Beaver Electric Plumbing v. Klamath Falls,
13 12 Or LUBA 61, 66 (1984).

14 The county's only finding addressing this issue is as
15 follows:

16 "The proposed use as described in the application is a
17 private school, listed as a conditional use by
18 subsection 309.05A2. The request thereby satisfies
1203.01A, as the use is listed as a conditional use in
the underlying RRF-5 district."

19 This finding is simply a conclusion, and does not explain why
20 the county believed the proposed use to be a school.

21 Under ORS 197.835(10)(b), we may affirm the county's
22 decision notwithstanding its failure to adopt findings
23 explaining why it believed the proposed use as a school, if the
24 parties identify evidence in the record which clearly supports
25 the county's conclusion that the proposed use is a school. See
Bright v. City of Yachats, ___ Or LUBA ___ (LUBA No. 87-048,

1 October 13, 1987), slip op 12. Therefore, we will consider
2 whether the evidence in the record cited by the parties
3 "clearly supports the county's decision."

4 Although the zoning ordinance does not define "school,"¹
5 it does define "commercial school" and "private school."²
6 The dictionary definition of the word "school,"³ and the
7 meaning apparently expressed in the Clackamas County Zoning
8 Ordinance, at a minimum, require that a school include
9 teachers, students and a class curriculum where an orderly
10 exchange of ideas and knowledge or formal instruction occurs.

11 Our review of the evidence cited in the record shows no
12 detailed explanation of precisely what the applicant proposes.
13 The record does contain the application (Record 140); a letter
14 from the applicant's lawyer to county planning staff (Record
15 142) and testimony by the applicant's lawyer. (Record 33-46).
16 The lawyer testified that most of the classes will be taken on
17 site and there will be an unspecified number of teachers and
18 support staff. The record shows the existing structure is an
19 enormous mansion with sufficient floor space to serve as a
20 school.

21 Based on this evidence, all we can determine is that there
22 will be groups of up to 40 students attending 6 week sessions.
23 There will be an unspecified number of teachers, and an
24 unspecified number of classes of unspecified content may be
25 provided. Although we reject petitioners' suggestion that a
26 final detailed course curriculum must be submitted as part of

1 the conditional use permit application, we also reject the
2 applicant's suggestion that a determination of the number, type
3 and nature of the classes to be offered can be completely
4 deferred to some later date, after the conditional use permit
5 is issued.

6 If the applicant seeks approval of a conditional use permit
7 for a school, there must be more of a showing than is presented
8 in this record that the activity proposed is properly viewed as
9 a school. Specifically, the applicant must show, and the
10 county find, that the instructional curriculum to be offered on
11 site is such that the use is more than a dormitory for students
12 who will attend classes as Clackamas Community College and more
13 than a home base for cultural tours of the county and state by
14 visiting students.

15 The first assignment of error is sustained.

16 SECOND ASSIGNMENT OF ERROR

17 "If the proposed use is a 'school', then it is not a
18 'private school' but a 'commercial school' which is
19 not authorized in the RRF-5 zone. The County
improperly construed the applicable law and exceeded
its jurisdiction by approving this application."

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21 Petitioners say that if the proposed use is a school, it is
22 a business or technical college and therefore a "commercial
23 school" which is not allowed in the RRF-5 zone. As noted
24 earlier, the zoning ordinance defines "commercial school" as
25 follows:

26 "A building where instruction is given to pupils in
arts, crafts, or trades, and operated as a commercial

1 enterprise as distinguished from schools endowed
and/or supported by taxation." ZDO Section 202-15.

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3 Petitioners argue that the county zoning ordinance
4 distinguishes between "public and private schools" and
5 "commercial schools." There is no definition of "public
6 schools," but "private schools" are defined as follows:

7 "Includes private kindergartens, nurseries, play
8 schools and church-related schools." ZDO Section
202-15.

9 Public schools and private schools are allowed as a conditional
10 use in the RRFF-5 zone but, according to petitioners,
11 commercial schools are not.

12 Although the record is not entirely clear on the point, the
13 proposed use apparently will be operated as a commercial
14 enterprise. The proposal therefore satisfies that part of the
15 "commercial school" definition quoted above requiring that it
16 be "operated as a commercial enterprise as distinguished from
17 schools endowed and/or supported by taxation." However,
18 consistent with our resolution of the first assignment of error
19 we cannot, on the current record, determine whether instruction
20 will be "given to pupils in arts, crafts, or trades * * * ."
21 We therefore are unable to conclude whether the proposal is a
22 "commercial school" as defined in ZDO Section 202-15.

23 When, and if, the nature of the proposal is more fully
24 known, it may be that the county or this Board can determine
25 whether it falls within the definition of commercial school.
26 However, we are unable to determine at this point that such is

1 the case as a matter of law.

2 The second assignment of error is denied.⁴

3 THIRD ASSIGNMENT OF ERROR

4 "The County improperly construed the applicable law,
5 violated its Rural Lands policies in its comprehensive
6 plan, violated statewide Goals 2 and 14 and
7 OAR 660-04-018(2) and exceeded its jurisdiction by
8 approving an urban use in a rural area. Absent a new
exception, urban uses are not permitted within the
RRFF-5 zone. No exception was noticed, taken or
approved in this proceeding."

9 Petitioners argue that under 1000 Friends of Oregon v. LCDC
10 (Curry County), 301 Or 447, 724 P2d 268 (1986), and decisions
11 by this Board, e.g., Hammack and Associates v. Washington
12 County, ___ Or LUBA ___ (LUBA No. 87-037, September 11, 1987),
13 aff'd, 89 Or App 40 (1987); Schaffer v. Jackson County, ___ Or
14 LUBA ___ (LUBA No. 88-029, August 11, 1988.), location of an
15 urban use outside an acknowledged urban growth boundary
16 requires that the urban growth boundary be amended to include
17 the land or an exception to Goal 14 (Urbanization) be taken to
18 allow the urban use outside the urban growth boundary.

19 Petitioners point out the proposed use would be located outside
20 the acknowledged urban growth boundary, and the county did not
21 amend the urban growth boundary as part of its decision.

22 Petitioners also argue the exception to Goals 3 (Agricultural
23 Lands) and 4 (Forest Lands) previously taken by the county for
24 the subject property allows only rural uses, and the county
25 took no new exception to allow urban uses.

26 Petitioners finally point out the proposed school serves

1 students from Japan, not local residents. We understand
2 petitioners to argue that the fact the students will come from
3 outside the local area is a sufficient reason by itself to
4 conclude the proposal is for an urban use in contravention of
5 Goal 14 and county plan policies adopted to implement Goal 14.

6 Because the county's land use decision challenged in this
7 proceeding is not "an amendment to an acknowledged
8 comprehensive plan or land use regulation or a new land use
9 regulation" we have no authority to reverse or remand the
10 county's land use decision for failure to comply with the
11 goals. ORS 197.835(3) and (4). Byrd v. Stringer, 295 Or 311,
12 316-317, 666 P2d 1332 (1983). Furthermore, OAR 660-04-18(2),
13 which petitioners claim is violated by the county's decision,
14 only applies when a local government adopts or amends plan or
15 zone designations for goal exception areas and, therefore, does
16 not apply to the appealed decision.

17 With regard to petitioners' remaining arguments, we cannot
18 decide the questions of compliance with plan policies presented
19 in this assignment of error based on the findings and record in
20 this case. We have already decided under the first assignment
21 of error that the county's decision must be remanded for a
22 clear explanation by the applicant and determination by the
23 county of the nature of the use proposed. To decide, as
24 petitioners request, whether the proposed use would be an urban
25 use proscribed under the cited plan requirements would
26 necessarily require us to engage in speculation concerning

1 exactly what the applicant proposes.⁵

2 Also, the county has not appeared in this proceeding, so we
3 do not have the benefit of its view of the plan policies
4 petitioners cite as applicable. The county presumably will
5 have an opportunity on remand to explain whether it believes
6 those policies to be applicable and, if so, whether they are
7 violated by the proposal.

8 In these circumstances, we believe it is appropriate to
9 remand the decision to the county to determine in the first
10 instance whether the plan policies cited by petitioners, that
11 were presumably adopted to implement Goal 14, are applicable
12 to, or are violated by, the proposed use. See Sunnyside
13 Neighborhood v. Clackamas Co. Comm., 280 Or 3, 20-23, 569 P2d
14 1063 (1977); Jackson-Josephine Forest Farm Assn. v. Josephine
15 County, 12 Or LUBA 40, 42 (1984); Dupont v. Jefferson County, 1
16 Or LUBA 136, 138 (1980).

17 The third assignment of error is sustained in part.

18 The county's decision is remanded.

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1 FOOTNOTES

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4 Under ZDO309.05.A.2, "public and private schools" are
5 specified as conditional uses in the RRF-5 zone. Therefore,
6 the applicants must show their proposal constitutes either a
7 "public school" or a "private school." In either case, the
proposal must constitute a school. We note that the definition
of "private school," see n 2, simply distinguishes private
schools from other types of schools and does not actually
provide a definition of "school."

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10 The zoning ordinance defines commercial school as follows:

11 "A building where instruction is given to pupils in
12 arts, crafts or trades, and operated as a commercial
13 enterprise as distinguished from schools endowed
14 and/or supported by taxation." ZDO Section 202-15.

15 The zoning ordinance defines private school as follows:

16 "Includes private kindgartens, nurseries, play schools
17 and church related schools." ZDO Section 202-15.

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20 "school * * * 1a(1): an organized body of scholars
21 and teachers associated for pursuit and dissemination
22 of knowledge * * * 2a: an organized source of
23 education or training * * * b: a place where
24 instruction is given: (1) a place where lectures are
25 held * * *." Websters Third New International
26 Dictionary.

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21 We note that, even if the proposed use were determined to
22 be a "commercial school," it is not clear that such a
23 determination would require denial of the subject application.
24 Petitioners' argument under the second assignment of error
25 assumes that "commercial schools" are not allowed in the RRF-5
26 zone as a permitted or conditional use. It is true, as
petitioners note, that commercial schools are not explicitly
listed as a permitted or a conditional use in the RRF-5 zone
and that commercial schools are explicitly permitted in other
zones. See ZDO Section 502.03(A)(7). However, we are not
certain that "commercial schools" and "public and private

1 schools" necessarily are mutually exclusive categories of
2 schools. In other words, we are not certain that a particular
3 school could not fall within both categories. In view of our
4 decision that on the basis of the present record the proposed
5 use cannot be determined to be a commercial school, it is
6 unnecessary for us to decide this question.

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6 We also have some difficulty in the circumstances presented
7 by this case in assessing several of petitioners' arguments.
8 Specifically, we have difficulty assigning dispositive
9 significance to the source of the students. Presumably,
10 students in rural schools benefit from attending classes with
11 students from other counties, states or nations. We are not
12 prepared to say all schools that attract students from beyond
13 the immediate area must be considered urban schools. In
14 addition, although all of the students who will attend the
15 school proposed in this case are from another nation, we can
16 also envision circumstances where the goals or educational
17 curriculum of a school might require a rural location. For
18 such schools the source of the student body might be
19 irrelevant. Considering the number of students proposed and
20 the fact all students are to be accommodated within existing
21 structures and with existing facilities, we have difficulty
22 concluding the proposed school is "urban" as a matter of law.
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