

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

CHERI AVGERIS,)	
)	
Petitioner,)	
)	
vs.)	
)	LUBA No. 91-208
JACKSON COUNTY,)	
)	
Respondent,)	FINAL OPINION
)	AND ORDER
and)	
)	
YESHE NYINGPO, INC.,)	
)	
Intervenor-Respondent.)	

Appeal from Jackson County.

G. Philip Arnold, Ashland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Drescher & Arnold.

Arminda J. Brown, Medford, filed a response brief and argued on behalf of respondent.

John R. Hassen and Daniel C. Thorndike, Medford, filed a response brief on behalf of intervenor-respondent. With them on the brief was Blackhurst, Hornecker, Hassen & Thorndike. John R. Hassen argued on behalf of intervenor-respondent.

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

REMANDED 04/10/92

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a county decision granting conditional use approval for a church on property zoned for exclusive farm use.

MOTION TO INTERVENE

Yeshe Nyingpo, Inc., the applicant below, moves to intervene in this appeal on the side of respondent. There is no opposition to the motion, and it is allowed.

MOTION TO STRIKE

Petitioner moves to strike portions of intervenor-respondent's brief. The motion is denied.

FACTS

The relevant facts are set out in respondent's brief as follows:

"On February 14, 1991, intervenor, Yeshe Nyingpo, Inc., filed an application for a conditional use permit to establish a church on its property which consists of 67.07 acres * * *. The bulk of the property is zoned Exclusive Farm Use (EFU). A portion of the property, located in the northeast corner and comprising 10 to 15 acres, is zoned Woodland Resource.

"The applicant's property was originally part of what has been called the Ferguson Ranch. The Fergusons owned the property from 1943 until 1959. Later it was part of a much larger ranch called the SS Bar Ranch which consisted of approximately 6,000 acres in both Oregon and California. Portions of the ranch, including the applicant's property, were used for seasonal cattle grazing. Active cattle ranching of the SS Bar Ranch [was] discontinued in the early 1970's when the ranch was sold; and by 1980, the ranch had been divided

into approximately 49 parcels, 41 in Oregon and 8 in California. Applicant's property is a portion of one of the parcels partitioned from the old ranch.

"In 1981, Jackson County approved a major partition which created applicant's parcel (tax lot 100) along with tax lots 400 and 500 and a private access road. Uses of surrounding properties include cattle grazing and limited hay production. Dwellings have been constructed on parcels adjacent to the south and southwest sides of intervenor's property.

"A nonfarm dwelling, a tool shed, a masonry Buddha statue, and a barn are currently located on the property. The nonfarm building has four stories. The first floor is a 1500 square foot private chapel; the second floor, a residential apartment; the third floor, the master bedroom; and the fourth floor, a library.

"Access to intervenor's property is gained via a private road extending eastward from Colestin Road. Colestin Road is an unpaved, narrow, winding country road. It is maintained by Jackson County; however, there are no future plans to widen the road in order for it to accommodate two-way traffic in all places. The Jackson County Public Works Department has done some widening of the road around curves and has taken out brush and trees which reduce sight distance throughout the length of the road. Access is gained from the California side of the valley via Hilt Road. This road is also unpaved and experiences rutting and potholing in between maintenance. However, it is a maintained public road." (Record citations omitted.) Respondent's Brief 3-4.

The county hearings officer approved intervenor's request for conditional use approval to use the existing nonfarm dwelling as a church, and this appeal followed.

FIRST AND FIFTH ASSIGNMENTS OF ERROR

Under the first and fifth assignments of error,

petitioner argues the hearings officer's decision fails to demonstrate compliance with two of the criteria set forth in Jackson County Land Development Ordinance (LDO) 218.060(1), which govern approval of conditional uses in the EFU zone.¹ As relevant in this appeal, LDO 218.060(1) provides as follows:

"A conditional use may be approved by the County only when findings can be made that * * * the proposed use * * *:

"A) Is compatible with farm uses described in Subsection (2) of ORS 215.203^[2] and is consistent with the intent and purposes set forth in ORS 215.243,^[3] as specified in

¹Under the second, third and fourth assignments of error, petitioner argues the county failed to demonstrate compliance with other criteria in LDO 260.040 which apply to approval of conditional uses generally.

²ORS 215.203(2) defines "farm use" broadly, listing a variety of agricultural pursuits, including raising livestock.

³ORS 215.243 is the legislature's expression of agricultural land use policies and provides as follows:

"The Legislative Assembly finds and declares that:

"(1) Open land used for agricultural use is an efficient means of conserving natural resources that constitute an important physical, social, aesthetic and economic asset to all of the people of this state, whether living in rural, urban or metropolitan areas of the state.

"(2) The preservation of a maximum amount of the limited supply of agricultural land is necessary to the conservation of the state's economic resources and the preservation of such land in large blocks is necessary in maintaining the agricultural economy of the state and for the assurance of adequate, healthful and nutritious food for the people of this state and nation.

Section 218.020; and,

" * * * * *

"D) Is situated upon land generally unsuitable for the production of farm crops and livestock, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location, and size of tract, unless findings conclusively demonstrate that:

"(i) The proposed use will result in a more efficient and effective use of the parcel in view of its value as a natural resource; and

"(ii) No feasible alternative sites in the area exist which shall have less impact on agricultural land."
LDO 218.060(1)."

While counties may not adopt EFU zones that are less protective of agricultural lands than required by statute, they are free to regulate agricultural lands more stringently. See Kola Tepee, Inc. v. Marion County, 99 Or App 481, 782 P2d 955 (1989), rev den 309 Or 441 (1990). In a prior decision, we noted that the standards set out in

"(3) Expansion of urban development into rural areas is a matter of public concern because of the unnecessary increases in costs of community services, conflicts between farm and urban activities and the loss of open space and natural beauty around urban centers occurring as the result of such expansion.

"(4) Exclusive farm use zoning as provided by law, substantially limits alternatives to the use of rural land and, with the importance of rural lands to the public, justifies incentives and privileges offered to encourage owners of rural lands to hold such lands in exclusive farm use zones."

LDO 218.060(1), quoted in part above, are nearly identical to the statutory EFU zone standards that counties are required to apply in approving nonfarm dwellings in EFU zones. See ORS 215.213(3); 215.283(3). Jackson County has elected to apply these stringent standards to all conditional uses in its EFU zone and, therefore, regulates nonfarm uses (other than nonfarm dwellings) more stringently than the EFU zoning statute requires for such uses. See Clark v. Jackson County, 19 Or LUBA 220, 227, rev'd on other grounds 103 Or App 377, review allowed 310 Or 791 (1990).⁴

A. Compatibility with Farm Uses and Agricultural Land Use Policies

The hearings officer found that under the EFU zoning statutory provisions, churches may be allowed as outright permitted uses. The hearings officer therefore reasoned that a church necessarily is consistent with farm uses as described at ORS 215.203(2) and with the Agricultural Land Use Policies set forth at ORS 215.243. Petitioner challenges these conclusions in her first assignment of error.

The legislature apparently has determined, as a matter

⁴Where a local government adopts language from the exclusive farm use zoning statute as part of its zoning ordinance, this Board has previously determined that such zoning ordinance provisions should be construed consistently with the corresponding statutory language. McCaw Communications, Inc. v. Marion County, 17 Or LUBA 206, 220 (1988), rev'd on other grounds 96 Or App 552 (1989); but see Clark v. Jackson County, 103 Or App 377, 380, 797 P2d 1061, rev allowed 310 Or 791 (1990).

of state policy, that churches may be allowed in EFU zones without making the case-by-case compatibility and consistency findings required by LDO 218.060(1)(A). Although the legislature's failure to impose a requirement for such findings may be sufficient to establish that churches are not viewed by the legislature as inherently incompatible with farm uses or inherently inconsistent with the state Agricultural Land Use Policies quoted above at n 3, we do not believe that legislative choice necessarily constitutes a legislative determination that in all cases the location of a church in an EFU zone is compatible with farm uses and consistent with the Agricultural Land Use Policies. For example, a particular church clearly could have far more of an impact on farm uses than a particular non farm dwelling and could raise issues concerning the Agricultural Land Use Policies that would not be raised by a nonfarm dwelling, for which such findings are required by ORS 215.283(3). In our view, the legislature has simply determined the state should not require by statute that churches be subjected to the stringent siting standards that are required for nonfarm dwellings. There could be a number of policy reasons underlying that decision which have nothing to do with the compatibility of churches with farm uses or with whether locating churches in EFU zones is consistent with the state's Agricultural Land Use Policies.

LDO 218.060(1)(A) requires that the county adopt

findings demonstrating the proposed church is compatible with farm uses described in ORS 215.203(2) and consistent with the state Agricultural Land Use Policies. The county may not fail to satisfy that requirement, simply because the requirement is imposed by the county itself rather than imposed by statute.

Although we reject the hearings officer's determination that LDO 218.060(1)(A) does not apply to the decision challenged in this appeal, the hearings officer also adopted the following finding:

"The applicant also submitted proposed findings of fact and conclusions regarding compatibility with farm use as defined in ORS 215.203(2) and ORS 215.243. Applicant's proposed findings are adopted by the Hearings Officer and are incorporated by reference herein as if fully set forth." (Record citation omitted.)⁵ Record 12.

The applicant's proposed findings, adopted by reference in the above quoted finding, in addition to advancing the arguments we have already rejected above concerning LDO 218.060(1)(A), find that the proposed church is compatible with farm uses (Record 535-36) and that the proposal is consistent with the Agricultural Land Use Policies (Record 534). Petitioner does not challenge the adequacy of these findings of compliance with LDO 218.060(1)(A) or their

⁵The record pages cited by the hearings officer are to the pages of the record before the hearings officer. Those pages do not correspond to the page numbers in the record submitted to the Board by respondent. The applicant's proposed findings appear at Record 531 through 544.

evidentiary support. Because the hearings officer's alternative findings of compliance with LDO 218.060(1)(A) are not challenged, his erroneous finding that LDO 218.060(1)(A) does not apply to the proposed use provides no basis for reversal or remand.

The first assignment of error is denied.

B. The Generally Unsuitable Standard

The generally unsuitable standard of LDO 218.060(1)(D) is quoted in full, supra. Petitioner, relying largely on historical use of the property for grazing and documents included in a prior conditional use permit application concerning the subject property, which was denied by the county in 1990, argues the subject property is suitable for livestock grazing.

The hearings officer concluded the subject property is generally unsuitable for production of farm crops and livestock as follows:

"The Hearings Officer concludes that [the subject property] is not capable of supporting a 'cognizable' level of farming activity and is therefore generally unsuitable for the production of farm crops [or] livestock. In reaching this conclusion the Hearings Officer has relied upon the evidence offered by applicant's soils expert and by Messrs. Schwindt, Fugas, Weiss and Closer that the property, even with an intense application of labor, would not generate a positive cash flow if planted in crops. If used for grazing, the Hearings Officer finds that the animal unit months which the property can support are insignificant and that cattle grazing would further compact the soils, reduce ground cover, and contribute to erosion. The Hearings Officer

has considered the evidence regarding past agricultural use of the property which is clearly relevant. * * * However, the Hearings Officer concludes that evidence of historical usage dating from the 1940's and '50s, when the subject property was part of a larger ranching operation, is not particularly probative on the issue of the property's current suitability for the production of farm crops and livestock. Much more telling is the evidence of recent efforts to make an agricultural use of the land."⁶ Record 17-18.

The subject property includes clayey soils, and much of the property has steep slopes. As the hearings officer explained in the above quoted findings, there is evidence in the record that recent attempts to cultivate agricultural crops on nearby properties have met with limited success. However, as the hearings officer also acknowledged, documents submitted in support of a prior conditional use permit request for the subject property explained that the subject property had recently been used in conjunction with two adjoining tax lots for cattle grazing. While these three tax lots were managed together for livestock grazing, ponds had been installed and dry pasture was planted. Record 425. The document goes on to describe cattle grazing activity on numerous nearby parcels. Record 425-28. Additionally, there was testimony presented in the

⁶Although the hearings officer found the proposal complies with LDO 218.060(1)(D) based on his findings that the property is generally unsuitable for production of farm crops and livestock, the hearings officer also found that the applicant failed to demonstrate compliance with the alternative standards set out in LDO 218.060(1)(D)(i) and (ii), quoted in full in the text, supra.

proceedings below that the property has been and could be used for seasonal grazing of livestock.

It may be that the hearings officer is correct that utilization of the subject property for the production of certain farm crops would be sufficiently problematic, due to a variety of factors, that the subject property is not suitable for such agricultural uses. However, we do not agree the record supports the hearings officer's conclusion that the subject property is generally unsuitable for livestock grazing. The property historically has been put to such use. The record also shows the property has not been used for that purpose in recent years and that the property is not particularly valuable for such use by itself, due to its size and soil limitations. However, there is substantial evidence in the record that the property could be used for limited livestock grazing, particularly if used in conjunction with adjoining or nearby parcels currently in such use. See Rutherford v. Armstrong, 31 Or App 1319, 572 P2d 1331 (1977), rev den 281 Or 431 (1978). We reach this result at least partially on the basis of testimony by the applicant's own expert who, while noting the limitations of the property for agricultural uses, nevertheless testified as follows:

"It is possible that this land was part of a much larger ranch in the past, one which included adjacent properties which do have productive meadow areas and better forage. Under those circumstances, this land could be used as

supplemental forage in conjunction with more productive areas." Record 15.

The above testimony is consistent with the information submitted in support of the prior conditional use permit application and included in the record of this proceeding and is consistent with the historical use of the property. It is not clear whether the level of grazing the subject property would support by itself would justify a finding that the property is generally unsuitable for grazing. However, in any event, the county may not focus on the subject property and fail to consider the subject property's suitability for grazing in conjunction with adjoining and nearby properties. Rutherford v. Armstrong, supra; Stefan v. Yamhill County, 18 Or LUBA 820, 827-29 (1990). It is clear from the record that the property is sufficiently usable for such purposes in conjunction with adjoining and nearby properties that it does not satisfy the generally unsuitable standard.

The fifth assignment of error is sustained.

SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR

Under the second, third and fourth assignments of error, petitioner argues the county failed to demonstrate compliance with criteria in LDO 260.040 which apply to approval of conditional uses generally. As relevant in this appeal, LDO 260.040 provides as follows:

"In order to grant a conditional use permit, the County must make the following findings:

- "1) That the permit would be in conformance with the Jackson County Comprehensive Plan for the area, the standards of the district of the Zoning Ordinance in which the proposed development would occur, and the Comprehensive Plan for the county as a whole.
- "2) That the location, size, design, and operating characteristics of the proposed use will have minimal adverse impact on the liveability, value, or appropriate development of abutting properties and the surrounding area.

"* * * * *

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

A. Compliance with Comprehensive Plan

LDO 260.040(1) requires that the challenged conditional use be consistent with applicable provisions of the Jackson County Comprehensive Plan. In petitioner's second assignment of error, she alleges the county erred by failing to adopt findings demonstrating compliance with three plan policies.

Petitioner first cites Transportation Element Policy 4 and Natural Hazard Element Policy 1. Assuming without deciding that the cited plan policies are applicable approval standards, the hearings officer did adopt findings addressing the road adequacy and wildfire danger issues

petitioner argues the county was required to address under these plan policies. Specifically, the hearings officer adopted findings addressing road adequacy and wildfire issues in addressing the requirement of LDO 260.040(2), quoted in full supra, that "the * * * proposed use will have minimal adverse impact on the liveability, value, or appropriate development of abutting properties and the surrounding area." Assuming the road and wildfire issues are adequately addressed by the county's findings of compliance with LDO 260.040(2), discussed infra, the county did not commit error by failing to address the cited transportation and natural hazards policies directly. We consider petitioner's challenge to those findings, infra.

The third plan policy cited by petitioner under this assignment of error is Agricultural Lands Policy 3, which provides as follows:

"The county recognizes that the priority use of farm land shall be for farm uses. At all times in which non-agricultural uses, or divisions, are proposed on farm land the applicant shall be required to provide substantial and compelling findings which document that the nonfarm proposal will result in a more efficient and effective use of the land in view of its value as a natural resource and no feasible alternative site in the area exists which has less impact on agricultural land." (Emphasis added.)

Although the county did not adopt findings specifically addressing Agricultural Lands Policy 3, respondent contends the county did not err in failing to do so. Respondent points out that the operative language in the policy is

implemented by LDO 218.060(1)(D), which is quoted in full and discussed supra. According to the county, the identical findings required by Agricultural Lands Policy 3 are required by subsection (i) and (ii) of LDO 218.060(1)(D). However, respondent argues, LDO 218.060(1)(D) also provides that the findings required by Agricultural Lands Policy 3 and subsection (i) and (ii) of LDO 218.060(1)(D) are not required where the county determines that the relevant property is generally unsuitable for production of farm crops and livestock.⁷

We understand respondent to argue that because LDO 218.060(1)(D) incorporates and refines Agricultural Lands Policy 3, that plan policy is fully implemented by LDO 218.060(1)(D) and Agricultural Lands Policy 3 need not be applied directly as an approval criterion. We agree with respondent.⁸

The second assignment of error is denied.⁹

⁷Respondent explains that Agricultural Lands Policy 3 only applies to "farm land." Respondent argues that land found to be "generally unsuitable for the production of farm crops and livestock" under LDO 218.060(1)(D) is not "farm land" as that term is used in Agricultural Lands Policy 3. We accept respondent's explanation of the meaning of "farm land" as used in Agricultural Lands Policy 3.

⁸In Weist v. Jackson County, 18 Or LUBA 627 (1990), we concluded that Agricultural Lands Policy 3 was an approval standard directly applicable to conditional use permit decisions in the county's Exclusive Farm Use zone. However, no argument was presented in that case that LDO 218.060(1)(D) fully implements that policy, and we did not consider the question.

⁹Notwithstanding our agreement that Agricultural Lands Policy 3 does not apply directly to the challenged decision, we already concluded, in

B. Impact on Liveability

As noted in our discussion of the previous assignment of error, LDO 260.040(2) requires that the county find that "the * * * proposed use will have minimal adverse impact on the liveability, value, or appropriate development of abutting properties and the surrounding area." The hearings officer identified traffic, dust and wildfire hazard as aspects of liveability to be addressed under this standard. Under the third assignment of error, petitioner argues the hearings officer failed to demonstrate compliance with LDO 260.040(2).

1. Traffic and Dust

The hearings officer found that the roads providing access to the subject property are narrow, substandard rural roads, which are dusty in dry weather and muddy when wet. However, the hearings officer also found, based on the expected number of vehicle trips the proposed use would generate per day, that the additional traffic would have an insignificant additional impact on those roads and would not result in an unreasonable increase in dust. In addition, the hearings officer relied on evidence submitted by the Oregon and California county agencies responsible for maintenance of the affected roads that the additional

sustaining the fifth assignment of error above, the county erroneously determined that the subject property is generally unsuitable for the production of farm crops and livestock. Therefore, while the county did not commit error in failing to apply Agricultural Lands Policy 3, the county did err in concluding that LDO 218.060(1)(D) is satisfied.

traffic could be accommodated without adverse effects.

We conclude the hearings officer's findings that the traffic and dust impacts of the proposal would have no more than a minimal impact on liveability are adequate and supported by substantial evidence in the record.

2. Wildfire Hazard

After noting the possibility of increased wildfire hazards, the hearings officer adopted the following finding:

"The Hearings Officer finds, as a matter of fact, that increasing the number of people in the valley will result in an increased risk of fire." Record 22.

Unlike the findings adopted addressing traffic impacts and dust, the hearings officer never explicitly found that the risk of increased fire hazard would result in no more than a minimal adverse impact on liveability, value, or appropriate development of abutting properties and the surrounding area. For that reason, the findings are inadequate to demonstrate compliance with LDO 260.040(2) with regard to potential adverse impacts from wildfire hazards.

The third assignment of error is sustained in part.

C. Provides for Needs of Rural Residents or Requires a Rural Setting

Under the fourth assignment of error, petitioner argues the hearings officer erroneously found the proposal satisfies the LDO 260.040(4) requirement, quoted in full supra, that "the nature of the use requires a rural setting

* * * even though the use may not provide primarily for the needs of rural residents."¹⁰

Petitioner contends the applicant may not satisfy LDO 260.040(4) by making allegedly self serving claims about its need for an isolated location. Further, petitioner contends the record shows the applicant in fact conducts services in urban areas.

The record includes evidence of a 2,500 year tradition of siting Buddhist temples in isolated areas, including the following testimony:

"His Holiness, the Dalai Lama of Tibet sent [The Venerable Gyatrul] Rinpoche to the United States in 1972. And in 1976 he was appointed the Spiritual Representative of of the Yeshe Nyingpo churches in California. After several years in California, we began searching for a place where Rinpoche could practice mediation and solitude and teach disciples in a surrounding that's necessary for the intermediate and advanced techniques of our practice. Buddhism is one of the oldest world religions. It dates back some 2,500 years and has 9 vehicles of practice which have various distinctions to the manner in which the practice is carried out. All 9 of these vehicles were propagated in their entirety in Tibet.

"The vehicles of Buddhism that we practice are often referred to as Tibetan Buddhism, because there are the teachings, transmissions and

¹⁰LDO 260.040(4) may also be satisfied if the proposed use will primarily serve the needs of rural residents. Petitioner challenges the hearings officer's finding that the proposal will primarily serve such needs. Because we sustain the hearings officer's decision that the nature of the proposed use requires a rural setting, we do not consider the hearings officer's findings that the proposed use will primarily serve the needs of rural residents.

practices that flourished in Tibet. * * * Our lineage of Buddhism is well-known as the practice lineage and in order to be carried out, one must be able to practice in a quiet, isolated mountainous region that possesses auspicious signs. [H]is holiness Rinpoche found that the [subject property] was perfect for our needs as the signs were present in the four directions and I believe there has been a paper submitted as to exactly what those signs are so I won't go into the details at this time unless you would like me to. * * * * *" Record 66-67.

Although some of intervenor's services apparently have been and will continue to be held in Ashland, the hearings officer's findings that important aspects of intervenor's lineage of Buddhism require a rural setting are adequate and supported by substantial evidence in the record.

The fourth assignment of error is denied.

The county's decision is remanded.