BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, Petitioner, vs. JACKSON COUNTY, Respondent, and ROGUE VALLEY MANOR, NAUMES, INC. and EVELYNE NYE, Intervenors-Respondent.	LUBA No. 96-117
JACKSON COUNTY CITIZENS' LEAGUE and CHRIS N. SKREPETOS, Petitioners, vs. JACKSON COUNTY, Respondent, and ROGUE VALLEY MANOR, NAUMES, INC. and EVELYNE NYE, Intervenors-Respondent.	LUBA No. 96-123

FINAL OPINION AND ORDER

Appeal from Jackson County.

Celeste J. Doyle, Assistant Attorney General, Salem, filed a petition for review and argued on behalf of DLCD.

With her on the brief was Theodore R. Kulongoski, Attorney General, Thomas A. Balmer, Deputy Attorney General, and Virginia L. Linder, Solicitor General.

F. Blair Batson, Portland, filed a petition for review and argued on behalf of petitioners Jackson County Citizens' League and Skrepetos.

No appearance by respondent.

Gregory S. Hathaway, Portland, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief was Timothy R. Volpert, Christopher C. Brand, and Davis Wright Tremaine.

HANNA, Chief Referee, participated in the decision.

REVERSED 06/25/97

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

Opinion by Hanna.

NATURE OF THE DECISION

Petitioners appeal the county's approval of a permit to expand an existing golf course on urban land onto rural exclusive farm use land.[1]

MOTION TO INTERVENE

Rogue Valley Manor, Naumes, Inc. and Evelyne Nye (intervenors), the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The City of Medford approved a nine-hole golf course on 80 acres in 1994 as part of the expansion of a planned unit development within the city. In 1995, intervenors applied to the county for a permit to add 251 acres to the golf course.[2] The proposed expansion includes 85 acres for nine additional holes, 35 acres for a golf learning center and 92 acres for buffers in and around the developed golf course and learning facility. An additional 39 acres is devoted to miscellaneous uses related to the golf course. Six of the nine new holes will be outside of the Urban Growth Boundary

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[1]We refer to petitioner Jackson County Citizens' League and petitioner Skrepetos as JCCL, and petitioner Department of Land Conservation and Development as DLCD. We refer to JCCL and DLCD together as petitioners.

[2]Actual acreage numbers are not critical to the resolution of this appeal and, in some instances, have been rounded to the nearest whole number.

(UGB) and three of the nine new holes will be developed within the urban area.

The area of the proposed expansion includes four tax lots (tax lots 100, 101, 200 and 800). Tax lot 100 consists of 176.2 acres zoned EFU and is a producing pear orchard. It qualifies as high-value farmland subject to special protection under OAR chapter 660, division 33. Tax lot 101 is a 1.14 acre lot within tax lot 100. It is zoned Farm-5 and is developed with a residence. Tax lot 200 consists of 47.82 acres zoned EFU and is used for grazing and pasture land. Tax lot 800 consists of 25.93 acres zoned EFU and is used for grazing. Tax lots 100, 101 and 800 lie outside the Medford UGB. The existing golf course and proposed expansion are joined only by a short common boundary.[3]

The conditional use application was filed December 29, 1995 with the county.[4] The county held a public hearing on April 26, 1996. The hearing was continued to May 13, 1996, and the public record was left open until May 20, 1996. The county conditionally approved the application on June 13, 1996. This appeal followed.

THIRD ASSIGNMENT OF ERROR (JCCL)
FIRST ASSIGNMENT OF ERROR (DLCD)

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[3]The property can be visualized as a "figure 8," with the existing golf course in one loop and the proposed addition in the other loop.

[4]Chapter 218 of the Jackson County Land Development Ordinance (LDO) has been renumbered since the application was submitted. All references are to the numbers in effect on the application date.

The existing golf course is located on urban non-agricultural land. Petitioners contend that the proposed expansion of the golf course onto high value farmland (HVF) is prohibited. Petitioner DLCD argues:

> "Central to this case are the table of uses incorporated into OAR 660-33-120 and the language of OAR 660-33-130(18), which combine to prohibit new golf courses from being sited on HVF unless an exception to Goal 3 is taken, but authorize the expansion of existing golf courses onto HVF. Intervenors contend that the plain language of the rule allows expansion of existing uses on HVF.
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> "* * * The question raised under this assignment of error is whether the rule permits a county to authorize an existing golf course inside a UGB to expand onto HVF in an adjacent agricultural zone. DLCD asserts that the answer is 'no.'
>
> "[T]he agency interprets the rule that says that '[a]n existing golf course may be expanded' on HVF to relate to golf courses that exist in an agricultural zone." Petition for Review 3-4.

In making this argument, DLCD relies on two letters from its staff to the county that set forth DLCD's position. The first letter, dated February 29, 1996 and addressed to the county planner, states, in relevant part:

> "Jackson County cannot approve a conditional use permit for this application for two primary reasons: First, on high-value farmland, new golf courses are not permitted without an exception to statewide goal 3 under OAR 660-33-120 and -130(18). The applicant has not requested a plan amendment and exception to statewide goal 3. Because the proposed site is high-value farmland, the county cannot approve a conditional use permit for this application. Second, also on high-value farmland, an 'existing' golf course may only be 'expanded.' In this case, there is no 'existing'

> golf course on high-value farmland. The existing Quail Point Golf Course is inside the Medford UGB and cannot be expanded by a conditional use permit onto high-value farmland outside the UGB under goal 3 and OAR 660-33-090, -120 and -130(18)." Record 137-38.

DLCD staff submitted a second letter, dated April 25, 1996, to the county hearings officer, responding to arguments raised by intervenor:

> "[T]he applicant asserts that our rule does not require that the 'existing' facility to be expanded onto high-value farmland must also be on high-value farmland. The applicant misunderstands our point. The issue is not whether the existing golf course has to be on high-value farmland in order to be expanded, but, rather, whether OAR 660-33-120 and -130(18) apply only when the existing use is within the same farm zone as the proposed expansion site. It is the department's position that the expansion provision under 660-33-130(18) applies to existing uses on lands within a farm zone. The plain meaning and most logical reading of the rule is that the use to be expanded must also be within the same zone as the expansion site. To allow otherwise will defeat the purpose of the rule's limitations to protect high-value farmland.
>
> "The intent of the expansion provision was to protect high-value farmland by limiting this land intensive use to the expansion of those already existing in farm zones and prohibiting any new ones on high-value farmland." Record 94.

In response to DLCD's argument, intervenors contend that the rule does not say what petitioners claim and, "if it does say that, it is directly contrary to ORS 215.283(2)(e) and therefore is invalid." Intervenors' Brief 14. Intervenors also argue that the opinion of a DLCD staff

person concerning the meaning of a Land Conservation and Development (LCDC) rule is not entitled to deference, and additionally, that the opinion lacks merit.

A. Agency Interpretations

Intervenors argue that the staff person who wrote the letters at issue did not have authority to represent that LCDC interprets the rule in the manner advanced by the staff. With respect to staff interpretation of agency rules, DLCD argues:

> "[T]he letter does embody the agency's interpretation and that * * * interpretation is entitled to deference. Intervenor-respondents' arguments [to the county hearings officer] on this point were filed on the day the local record was closed, and DLCD had no opportunity to enter documents into the record to establish the authority of the individual to represent the agency's position. Consequently, we rely on the authority of the Director under ORS 197.090 to represent the department, the commission and the state 'with respect to land conservation and development within the state,' and seek this Board's review of land use decisions, limited land use decisions and expedited land [divisions]. ORS 197.090(1)(d) and (2). These authorities necessarily imply interpretive and policy-making authority. We also note that the letter at issue was copied to the Director (rec 96). From these points, the Board may infer that the Director agrees with the challenged interpretation and authorized the signatory to present it as an official DLCD position." Petition for Review 4-5 n2.

Pursuant to DLCD v. Lincoln County, 144 Or App 9, 14 n4, ___ P2d ___ (1996), "we accord no 'formal' deference to the interpretation [of the rule] that DLCD advocates."

Recognizing that we owe no "formal" deference to agency interpretations, the threshold question for LUBA is what degree of authority must we give such interpretations.

To aid our consideration of DLCD's interpretation of its rule, DLCD cites ORS 197.075, under which "[t]he department shall consist of the Land Conservation and Development Commission, the director and their subordinate officers and employees," and that under ORS 197.090(2), the director of DLCD is specifically authorized to initiate and participate in litigation. Additionally, ORS 197.090(2) instructs that, after commencing litigation, "[t]he director shall report to the commission on each case in which the department participates and on the positions taken by the director in each case." Read together, these statutes indicate that although LCDC is the policy making body for DLCD and LCDC adopts the rules that carry out those policies, LCDC is also an integral part of DLCD. The statutes also anticipate department advocacy and rule interpretations, and require that the director keep LCDC abreast of those activities.

Case law also aids us in determining what authority to give agency interpretations. In Hensley v. Granning and Treece Loans, Inc., 378 F. Supp 841 (1974), the court explained with reference to a Federal Reserve Board advisory letter:

> "Advisory letters represent only the informed view of a particular official, Ratner v. Chem Bank N.

> Y. Trust Co., 329 F Supp. 270 (S.D.N.Y. 1971), which the Court is not bound to follow. Nonetheless, in 'interpreting [an] administrative regulation whose meaning is in doubt, we must necessarily look to the construction given the regulation by the agency responsible for its promulgation.' Bone v. Hibernia Bank, 493 F.2d 135 (9th Cir. 1974). Agency rulings, interpretations and opinions '. . . do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' Skidmore v. Swift and Co., 323 U.S. 134, 140, 65 S.Ct. 161, 164 89 L.Ed. 124 (1944)."

We do not formally defer to agency interpretations. Nonetheless, when considering DLCD staff letters, we respect the experience and informed judgment of the agency and its staff and may properly look to agency interpretations for guidance in interpreting the meaning of LCDC rules.[5] Cf. Springfield Education Assn. v. School Dist., 290 Or 217, 621 P2d 547 (1980) (judicial deference to agency expertise is not automatic or unreasoning).

B. Interpretation of OAR 660-33-120 and 660-33-130

OAR 660-33-120 and 660-33-130 exemplify policies enunciated in case law. Thus, case law can provide general guidance regarding the use that may be made of agricultural land.

"[S]tate and local provisions * * * must be

[5]The April 25, 1996 letter does not retreat from the position expressed in the February 29, 1996 letter that was copied to the director. In the April 25, 1996 letter, the director had an opportunity to correct any interpretation with which he did not agree. The April 25, 1996 letter does not indicate that the director made any change to the interpretation expressed in the February 29, 1996 letter.

> construed, to the extent possible, as being consistent with the overriding policy of preventing 'agricultural land from being diverted to non-agricultural use.' Hopper v. Clackamas County, 87 Or App 167, 172, 741 P2d 921 (1987), rev den 304 Or 680 (1988). Therefore, when possible, the non-agricultural uses which the provisions allow should be construed as ones that are 'related to and [promote] the agricultural use of farm land.' Hopper v. Clackamas County, supra, 87 Or App at 172. When no such direct supportive relationship can be discerned between agriculture and a use permitted by the provisions, the use should be understood as being as nondisruptive of farm use as the language defining it allows." McCaw Communications, Inc. v. Marion County, 96 Or App 552, 555, 773 P2d 779 (1989).

Furthermore, we are aided in our review of how the courts regard the scope of uses on agricultural lands by the court's discussion in Lindquist v. Clackamas County, 146 Or App 7, 13-14, ___ P2d ___ (1997). There the court reaffirmed that siting nonfarm dwellings on agricultural land continues to be stringently regulated. It rejected a party's suggestion that

> "Brentmar effects a generalized shift in the law, under which all proposed nonfarm uses in EFU zones are to be viewed more favorably, and are to be less subject to local regulation than was the case before the Supreme Court decided Brentmar. However, Brentmar has no such generalized effect." Id. (Emphasis in original)

The issue before us involves the interpretation of OAR 660-33-120 and 660-33-130(18). We use the same analytical framework to interpret an agency rule as we would a statute. Cf. Mental Health Division v. Lake County, 17 Or LUBA 1165 (1989) (Rules of statutory construction apply to

interpretation of local ordinances).

> "In interpreting a statute, our task is to discern the intent of the legislature. ORS 174.020; PGE v. Bureau of Labor and Industries, 317 Or. 606, 610, 859 P.2d 1143 (1993). At the first level of analysis, we examine the text and context of the statute. If the legislature's intent is clear from those inquiries, further inquiry is unnecessary. Id. at 610-11, 859 P.2d 1143. If not, we turn next to legislative history. Id. at 611-12, 859 P.2d 1143." Brentmar v. Jackson County, 321 Or 481, 900 P2d 1030 (1995).

Our first task is to discern the intent of the enacting body, LCDC, by examining the text and context of the rule.[6]

OAR 660-33-120 states:

> "The specific development and uses listed in Table 1 are permitted in the areas that qualify for the designation pursuant to this division. All uses are subject to the general provisions, special conditions, additional restrictions and exceptions set forth in this division. The abbreviations used within the schedule shall have the following meanings:
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> "* * * * *
>
> "(3) * [asterisk denoting]- Use not permitted.
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> "* * * * *"

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[6]To some extent our analysis is "hampered by the fact that the manner in which the rules are published defies easy designation. OAR 660-33-120, for instance, is not framed as a simple rule with subsections that may be cited individually. It consists of a chart, describing what uses are permitted and under what conditions." Lane County v. LCDC, 140 Or App 368, 371 ___ P2d ___ (1996), petition for rev. filed. Additionally, there are no documents in OAR Chapter 660, Division 33 entitled "schedule" or "chart." We understand the use of "table," "schedule" and "chart" in OAR 660-33-120 and 660-33-130 to refer to that document attached to OAR Chapter 660, Division 33 entitled "Table 1."

On Table, 1 golf courses on high-value farmland are designated with an asterisk, indicating that they are a use that is not permitted.

OAR 660-33-130 states in relevant part:

> "The following standards apply to uses listed in OAR 660-33-120 where the corresponding section number is shown on the chart for a specific use under consideration. Where no numerical reference is indicated on the chart, this division does not specify any minimum review or approval criteria. Counties may include procedures and conditions in addition to those listed in the chart as authorized by law:
>
> > "(18) Existing facilities may be maintained, enhanced or expanded, subject to other requirements of law. An existing golf course may be expanded consistent with the requirements of sections (5) and (20) of this rule, but shall not be expanded to contain more than 36 total holes."[7]

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[7]The two subsections to which OAR 660-33-130(18) refers, state:

> "(5) Approval requires review by the governing body or its designate under ORS 215.296. Uses may be approved only where such uses:
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> > "(a) Will not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; and
> >
> > "(b) Will not significantly increase the cost of accepted farm or forest practices on lands devoted to farm or forest use."

and

> "(20) 'Golf Course" means an area of land with highly maintained natural turf laid out for the game of golf with a series of 9 or more holes, each including a tee, a fairway, a putting green, and often one or more natural or artificial hazards. A 'golf course' for purposes of ORS 215.213(2)(f), 215.283(2)(e) and this division means

As petitioner DLCD aptly explains:

> "The rules [at issue] establish uses that are permissible on agricultural lands consistent with Goal 3 and the state's statutory polices to protect agricultural land for agricultural uses. The rules also establish limitations on where and under what conditions certain uses may be authorized on agricultural lands under Goal 3. The rules by their terms and in context regulate uses on agricultural lands." DLCD's Petition for Review 3.

We agree. From the text and context of OAR chapter 660, division 33, it is clear that the rules at issue regulate uses on agricultural lands. It is a logical reading of the rule to conclude that the "existing facilities" referred to in an agricultural lands rule must "exist" on agricultural lands. The informed opinion of DLCD staff draws that same conclusion. We conclude that OAR 660-33-120 and 660-33-130(18) apply only when the existing golf course is within the same zone as the proposed expansion site, and that the rule does not allow the

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> a 9 or 18 hole regulation golf course or a combination 9 and 18 hole regulation golf course consistent with the following:
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> "(a) A regulation 18 hole golf course is generally characterized by a site of about 120 to 150 acres of land. * * *;
>
> "(b) [Describes the size and scope of a regulation 9 hole golf course];
>
> "(c) [Describes non-regulation golf courses];
>
> "(d) [Describes limitations counties may place on accessory uses provided as part of a golf course]."

proposed expansion of a golf course from an urban zone onto agricultural (high-value EFU) land.

C. Relationship of Rules to ORS 215.284(2)(e)

Intervenor argues that, as we interpret OAR 660-33-120 and 660-33-130 here, those rules contradict ORS 215.283(2)(e) and therefore are invalid. In Marquam Farms Corp. v. Multnomah County, 147 Or App 368, ___ P2d ___ (1997) the court discussed a proposal similar to the case before us. In Marquam Farms, petitioner also argued that OAR 660-33-120 and 660-33-130 violated a paragraph of ORS 215.283(2). That proposal involved a kennel existing on high-value farmland. In validating the high-value farmland rules, the court stated:

> "Petitioners do not appear to dispute that, by their terms, OAR 660-33-120 and OAR 660-33-130 make it impermissible to establish new kennel uses on high-value farmland and allow counties to issue kennel-related permits only in connection with existing facilities. They contend, however, that the rules are contrary to ORS 215.283(2)(m), which allows counties to permit dog kennels in EFU zones, without specifying whether they are new uses or continuations, enlargements or changes of existing ones. Petitioners therefore reason that the rules are invalid and cannot be given effect here. They rely on Lane County v. LCDC, 138 Or App 635, 910 P2d 414, on recon 140 Or App 368, 914 P2d 1114, rev allowed 324 Or 305 (1996), where we invalidated parts of OAR 660-33-120 and 660-33-130 as conflicting with ORS 215.213.
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> "* * * * *
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> "* * * We emphasized in particular in Lane County, id., that ORS 215.304(3), one of the 1993 statutes, precludes the implementation or

enforcement of or the giving of legal effect to

> '[a]ny portion of a rule inconsistent with the provisions of ORS 197.247 (1991 edition), 215.213, 215.214 (1991 Edition), 215.288 (1991 Edition), 215.317, 215.327 and 215.337 (1991 Edition) or 215.705 to 215.780 * * *.' (Emphasis supplied.)

> "That critical point in our analysis in Lane County also constitutes the critical difference between Lane County and this case: ORS 215.304 expressly prohibits the implementation of LCDC high-value farmland rules insofar as they conflict with the general EFU use provisions of ORS 215.213, but it contains no prohibition against the implementation of the rules insofar as they affect the operation of ORS 215.283 or the uses generally allowed by that statute.
>
> "* * * * *
>
> "We hold that the limitations that OAR 660-33-120 and OAR 660-33-130 place on uses on high-value farmland are within LCDC's authority under ORS 215.304, and are not subject to and therefore cannot violate ORS 215.283(2). It follows that LUBA did not err in remanding the county's approval of the 'initial' conditional use permit, which purports to allow a new use that the rules prohibit." (Footnote omitted, emphasis in original). Id. at 375-78.

For the reasons explained and quoted above in Marquam Farms, we conclude that ORS 215.283(2)(m) does not contradict OAR 660-33-120 and OAR 660-33-130, and that those rules are not invalid.

This assignment of error is sustained.

REMAINING ASSIGNMENTS OF ERROR

Petitioners JCCL make six additional assignment of error and petitioner DLCD makes one additional assignment of

error. Because we reverse the county's decision on one assignment of error, no purpose would be served by our addressing the remaining assignments of error for which petitioners seek relief.

The county's decision is reversed.