BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CHRISTIAN LIFE CENTER,	)	
	)	
Petitioner,	)	
	)	LUBA No. 98-142
vs.	)	
	)	FINAL OPINION
WASHINGTON COUNTY,	)	AND ORDER
	)	
Respondent.	)	

Appeal from Washington County.

William C. Cox, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief were B. Rupert Koblegarde and Timothy P. Landis, Portland, and William B. Ball and Richard E. Connell, Camp Hill, Pennsylvania.

Alan R. Rappleyea, Hillsboro, filed the response brief and argued on behalf of respondent.

BASSHAM, Board Member; BRIGGS, Board Member; HOLSTUN, Board Chair, participated in the decision.

AFFIRMED 05/13/99

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a county hearings officer's decision denying a Special Use Permit and Preliminary Development Review approval for a private school on land zoned Agricultural Forest (AF-10).

FACTS

Petitioner owns approximately 13 acres of land located just outside the Metro Urban Growth Boundary (UGB) on land zoned AF-10. The purpose of the AF-10 zone is to retain the area's rural character and conserve natural resources while providing for rural residential use.

In 1993, the county approved a two-phase proposal for a 38,000-square foot church and related educational and recreational facilities, including offices, kitchen, Sunday school classrooms, gymnasium, cafeteria, and support space. In May 1996, petitioner sought approval to operate a private school on the subject property, to be located in the existing facility in conjunction with a third phase of development to provide additional classrooms for the proposed school.

A school is an allowed use within the AF-10 zone as long as it meets the terms of other applicable code provisions, including Washington County Code (CDC) 430-121.[1] The proposed private school would operate on approximately the same calendar and hourly schedule as most public schools, and would have similar extracurricular events outside of regular school hours. The proposed school would offer certified school courses substantially

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[1]CDC 430-121, entitled Schools, Including Nursery (Private and Public), defines a school as:

"A place for systematic instruction in any branch or branches of knowledge including any of the following: nursery, kindergarten, primary, intermediate and high school or combination thereof, which may be a public school or a private school offering instruction substantially similar to public schools. School does not include trade and commercial schools or day care facilities."

similar to public school curricula, but within a religious setting featuring daily classroom prayer, Bible-based curricula, weekly chapel services, and activities and programs expressing a Christian ministry. The proposed kindergarten through grade 12 (K-12) school would begin the first year offering grades K-7 with approximately 23-30 students. The school would add an additional grade each year until the school is K-12 with 200 students and 20 teachers and support staff. A county hearings officer denied petitioner's 1996 application for the private school and related development, because it was not scaled to serve the rural population as required by CDC 430-121.3.[2]

In June 1998, petitioner again sought approval to operate a private school on the subject property. For this application, petitioner submitted evidence that nine percent of the county's population resides in rural areas, and that approximately nine percent of the students attending the proposed school would reside in rural areas, while the remainder came from urban areas within the UGB. The hearings officer denied the second application in August 1998, because the proposed school was not scaled to serve the rural population as required by CDC 430-121.3.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the county failed to adopt adequate findings supported by substantial evidence addressing petitioner's claim that the proposed school is an integral part of its church and thus an outright permitted use not subject to CDC 430-121.3.

Petitioner explains that a church in the AF-10 zone is not subject to a requirement similar to CDC 430-121.3 that it be scaled to a rural population. According to petitioner, the undisputed testimony before the hearings officer is that the proposed school is an extension

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[2]CDC 430-121.3 provides that:

"Schools outside an urban growth boundary shall be scaled to serve the rural population."

of the church's ministry. Petitioner argues that the county erred in failing to address that evidence, which would have lead the county "to conclude that the reference to the 'scaled' terminology was not relevant to the application." Petition for Review 10.

In the challenged decision, the hearings officer summarized the testimony regarding the relationship between the church and the proposed school and then found, in relevant part, that:

> "[t]he issue before the Hearings Officer is not the value of a church related school. The issue is not whether the approval criteria are required by state law, or should have been included in the Washington County Community Development Code. The issue is whether the Applicant's proposed school, at the proposed location, meets the requirements of the Washington County Community Development Code and other approval criteria. The Staff contends that since the proposed school is located outside of the Urban Growth Boundary, the Applicant must demonstrate compliance with CDC 430-121.3 * * *[.]" Record 7-8.

The hearings officer then addressed whether the proposed school complied with CDC 430-121.3 and concluded that petitioner had not demonstrated compliance with that provision:

> "The Hearings Officer has previously rejected Applicant's novel interpretation of CDC 430-121.3 in [the denial of petitioner's 1996 application for a school]. The Hearings Officer has interpreted CDC 430-121.3 as requiring a showing that the school is intended to serve the rural population. 'Scaled to serve the rural population,' in the Hearings Officer's judgment, simply means a size needed to serve the rural population. Applicant's evidence suggests that there would be 18 students from the rural population. According to Applicant's evidence, over 90% of the students would be from the urban area. The Applicant is proposing a school for 200 students with 20 teachers. There is no evidence to suggest [that] the school sized to serve 200 students with 20 teachers is of a size scaled to serve the rural population of 18 students. The Hearings Officer finds that the Applicant has not met its burden of proof to establish compliance with CDC 430-121.3." Record 8-9.

The county responds that petitioner applied for a school and not a church and thus it did not err in evaluating petitioner's application under criteria applicable to a school. Further, the county argues that even if the evidence suggests that the proposed use is an extension of a church, the proposed use also meets the definition of "school" at CDC 430-121 and thus must comply with the criteria applicable to a school. See Damascus Comm.

Church v. Clackamas Co., 45 Or App 1065, 1071, 610 P2d 273, rev den 289 Or 588 (1980), appeal dismissed 450 US 902, 101 S Ct 1336, 67 L Ed 2d 326 (1981) (county land use ordinance that regulates churches and schools differently manifests the county's legislative decision to make the granting of and criteria for conditional use permits for churches and for parochial schools different and independent). Accordingly, the county argues, it was not required to adopt findings addressing testimony that the proposed school is an extension of petitioner's ministry. Finally, the county contends, even if such findings were required, the above-quoted findings are sufficient to address that testimony.

LUBA has suggested that findings of noncompliance with applicable criteria need not be as exhaustive or detailed as findings necessary to show compliance with applicable criteria. Salem-Keizer School Dist. 24-J v. City of Salem, 27 Or LUBA 351, 371 (1994). However, findings of noncompliance must explain the local government's conclusion that applicable criteria are not met, and must suffice to inform the applicant either what steps are necessary to obtain approval or that it is unlikely that the application will be approved. Id.

In the present case, we agree with the county that, to the extent findings are required, the above-quoted findings of noncompliance are adequate to explain the county's conclusion that the proposed use is a school that must comply with CDC 430-121.3. The findings are also adequate to explain why the proposed use does not comply with that criterion. The hearings officer addressed the testimony submitted by petitioner and others, and rejected the argument implicit in that testimony that the proposed school was not subject to CDC 430-121.3 because it is an extension of the church's ministry. The hearings officer then explained and interpreted the requirements of CDC 430-121.3, addressed the evidence petitioner submitted, and explained why that evidence did not establish compliance with that criterion. Such findings are adequate to meet the county's obligations under ORS 215.416(9) and Salem-Keizer School Dist. 24-J.

It is not entirely clear whether petitioner raises an evidentiary challenge to the hearings officer's findings regarding CDC 430-121.3. Where the petitioner challenges a county's denial of land use approval on evidentiary grounds, it is not sufficient for the petitioner to demonstrate that substantial evidence in the record would also support a finding of compliance with applicable criteria. In bringing an evidentiary challenge to a county's denial, the petitioner must show that the evidence in the record demonstrates that the proposed use complies with applicable criteria as a matter of law. Jurgenson v. Union County Court, 42 Or App 505, 510, 600 P2d 1241 (1979); Horizon Construction, Inc. v. City of Newberg, 28 Or LUBA 632, 641-42 (1995). That is, petitioner must establish that the evidence is such that a reasonable trier of fact could only conclude that the proposal complies with applicable criteria. Horizon Construction, 28 Or LUBA at 641.

To the extent petitioner presents an evidentiary challenge to the county's findings under this assignment of error, we conclude that petitioner has not demonstrated as a matter of law either that the proposed school is not subject to the requirements of CDC 430-121.3, or that the proposed school complies with those requirements. Damascus Comm. Church, 45 Or App at 1071; Horizon Construction, 28 Or LUBA at 641.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the CDC 430-121.3 requirement that schools be "scaled to serve the rural population" is so vague and subjective that its application in this case is a violation of the right to due process protected by the United States Constitution.[3]

Petitioner's vagueness argument is somewhat difficult to follow. Petitioner relies on several United States Supreme Court decisions addressing the constitutionality of penal

[3]Petitioner's second assignment of error also makes a reference to its "Oregon and U.S. constitutionally protected right to equal protection." Petition for Review 15. However, petitioner does not develop any argument under the equal protection elements of either constitution. Therefore, we will not address that issue. Deschutes Development v. Deschutes Cty., 5 LUBA 218, 220 (1982).

statutes without explaining why those decisions are relevant. As the county points out, zoning ordinances are not subject to the exacting scrutiny given penal laws under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Towry v. City of Lincoln City, 26 Or LUBA 554, 558 n 4 (citing Papachristou v. City of Jacksonville, 405 US 156, 162, 31 L Ed 2d 110, 92 S Ct 839 (1972)). Challenges to land use regulations on grounds of impermissible vagueness are more immediately framed as challenges under Article 1, section 20 of the Oregon Constitution (equal privileges and immunities) and ORS 215.416(8) (requiring that decisions on land use permits be based on "standards and criteria"). Anderson v. Peden, 284 Or 313, 326-27, 587 P2d 59 (1978); Lee v. City of Portland, 57 Or App 798, 802, 646 P2d 662 (1982). The appropriate standard under Anderson and Lee is whether reasonable applicants can understand what they must do to establish compliance with an applicable standard. See Larsson v. City of Lake Oswego, 26 Or LUBA 515, 522, aff'd 127 Or App 647, 874 P2d 99, rev den 320 Or 110 (1994); Marineau v. City of Bandon, 15 Or LUBA 375, 378 (1987). Petitioner has not established that the federal due process requirement imposes a more rigorous standard in addressing vagueness challenges to land use regulations than that described in Anderson and Lee. Thus, we will address petitioner's argument under that standard.

In the present case, we understand petitioner to argue that CDC 430-121.3 is impermissibly vague because a reasonable person cannot understand what evidence it must submit in order to show that a proposed school is "scaled to serve the rural population." Petitioner explains that it interpreted CDC 430-121.3 as allowing a school of any size where the percentage of rural students in the school approximates the percentage of rural population in the county compared to its total population. Accordingly, petitioner submitted evidence that approximately nine percent of its students, or 18 students, will come from rural areas, the same percentage of rural residents in the county compared to its total population. The hearings officer rejected that interpretation, but, according to petitioner, did not announce

how CDC 430-121.3 should be interpreted in a manner that apprises petitioner what evidence it must submit in order to demonstrate compliance with the standard.

The county responds that CDC 430-121.3, particularly as interpreted by the hearings officer, suffices to inform petitioner what evidence it must submit to demonstrate compliance with that provision. The hearings officer interpreted CDC 430-121.3 to mean that the size of a school must be appropriate to serve the rural population. Record 9.[4] The county argues that a reasonable applicant can understand from the text of CDC 430-121.3, particularly as interpreted by the hearings officer, that it must show the proposed school is no larger than needed to serve the rural population. The county contends that petitioner understands, or should understand, what CDC 430-121.3 requires; but petitioner prefers a different interpretation of CDC 430-121.3 and petitioner chose to present evidence directed at its interpretation of that provision rather than what the standard itself requires. According to the county, the hearings officer properly rejected petitioner's interpretation, and properly denied the application, because petitioner's own evidence demonstrated that a 200-student school is not scaled to serve the needs of the rural population. Record 9.

We agree with the county that the standard in CDC 430-121.3 is not impermissibly vague. The requirement in CDC 430-121.3 that a school outside an urban growth boundary

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[4]The hearings officer also adopted findings at pages 14 to 17 (Record 59-62) of the June 18, 1998 staff report in support of his conclusion that petitioner had not established compliance with CDC 430-121.3. Record 10. The staff findings discuss another application involving a private school subject to CDC 430-121.3, where the hearings officer denied a proposed school with a student population that was 60 percent rural because it was not "scaled to serve the rural population." Record 59-60. In that case, staff had argued that an appropriate rural enrollment was 75 percent. Based on that case, the staff report states that "the County has consistently informed potential applicants for a private school that the term 'scaled to serve the rural population' means a school's enrollment should be between 60 and 75 percent rural residents." Record 61. Apparently, the staff interprets CDC 430-121.3 as being directed at the composition of the student body rather than the size of the student body, and hence the size of the school.

It is not clear whether, in the present case, the hearings officer adopted the staff discussion at Record 59-62 in order to adopt the staff interpretation of CDC 430-121.3 implicit in that discussion. We need not resolve here whether the hearings officer intended to adopt the staff interpretation, but we note that the staff interpretation is different than the hearings officer's interpretation of CDC 430-121.3 stated in the challenged decision at Record 9.

be "scaled to serve the rural population" is a reasonably clear standard. The permissible size of the school is a function of the size of its anticipated rural student population.[5] Accordingly, a reasonable applicant should know that it must submit evidence demonstrating that its proposed school is scaled, i.e. the appropriate size needed, to serve the rural population. In individual cases it may be difficult to determine which segment of the "rural population" a proposed school would serve. Nevertheless, however that determination is made, it is clear that under CDC 430-121.3 the size of the proposed school must be scaled to serve that population.[6] Because that requirement is expressed in CDC 430-121.3 with sufficient clarity to allow a reasonable applicant to discern what it must do to establish compliance with that standard, CDC 430-121.3 is not impermissibly vague.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the county's decision violates the Free Exercise and Establishment Clauses of the Oregon and United States Constitutions because it restricts the activity of petitioner's ministry to a particular geographic area.

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[5]We do not understand the hearings officer's interpretation as imposing an inflexible relationship between the size of the rural population to be served and the size of the school. Circumstances may exist that would justify some flexibility in the size of the proposed school in order to "serve the rural population." We need not and cannot describe what those circumstances might be, but we write to emphasize that we do not understand the hearings officer's interpretation as foreclosing that possibility. Whatever those circumstances might be, and however flexibly CDC 430-121.3 might be applied under those circumstances, we agree with the hearings officer's ultimate conclusion in the present case that the proposed 200-student school is not "scaled to serve" a rural population that, the evidence suggests, is no greater than 18 students.

[6]Determining the size of the student population and hence the size of the proposed school would seem to be relatively straightforward where a school draws its student population from within a certain geographic district. Where, as here, the proposed school does not serve a particular district, but instead proposes to draw its students from an undefined geographic area presumably shared by other schools, that determination is more difficult but not impossible. In the present case, petitioner submitted evidence that the rural population served by the proposed school was approximately 18 students, based on a survey of its membership. Presumably, petitioner could have conducted surveys or other inquiries not limited to its membership, and produced a different number.

B. Free Exercise of Religion

Petitioner contends that the hearings officer's interpretation of CDC 430-121.3, as limiting the size of a proposed school outside an urban growth boundary to the size needed to serve the rural population, infringes on petitioner's exercise of religion in two ways. First, it bars the church from conducting part of its religious ministry.[7] Second, it denies participation in part of that ministry to urban adherents of the church.

1. Government Barring the Conduct of a Ministry

Petitioner argues that the hearings officer's decision effectively bars the church from operating a school, which petitioner contends is part of its ministry, unless it limits that school and hence its ministry to rural children. Petitioner argues that this consequence directly violates the Free Exercise Clause, because it prohibits conduct undertaken for religious reasons, essentially forcing the church to abandon its ministry to children. Such consequences, petitioner contends, invoke the strictest scrutiny. Under strict scrutiny, petitioner argues, the county's application of CDC 430-121.3 must fail unless the county can demonstrate that a compelling interest justifies the county's action, and that its action is the least restrictive means for achieving the county's goal. Sherbert v. Verner, 374 US 398, 83 S Ct 1790, 10 L Ed 2d 965 (1963); Wisconsin v. Yoder, 406 US 205, 92 S Ct 1526, 32 L Ed 2d 15 (1972). Under this framework, petitioner argues that the county's application of CDC 430-121.3 must fail, because there is no compelling interest justifying restrictions on the size of schools in rural areas. Even if there were such a compelling interest, petitioner argues, the county has not shown that its action is the least restrictive means for achieving that interest.

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[7]Petitioner's argument under this assignment of error appears to be directed at the staff interpretation of CDC 430-121.3, which limits the size of the student population in a proposed school by requiring that a majority of the student population reside in rural areas. As we noted earlier, it is not clear that the hearings officer adopted the staff interpretation. In any case, petitioner's challenge under the Free Exercise and Establishment Clauses is the same whether it is directed at the hearings officer's interpretation or the staff interpretation. Both interpretations have the effect of denying the proposed 200-student school because it is larger than allowed under CDC 430-121.3, albeit for different reasons, and that consequence is the focus of petitioner's arguments under this assignment of error.

Petitioner recognizes that if CDC 430-121.3 is a religiously neutral law of general applicability, then it is not subject to the strict scrutiny standard described in Sherbert and Yoder. Damascus Comm. Church, 45 Or App at 1072-73; Christian Retreat Center v. Comm. for Wash. Co., 28 Or App 673, 680-81, 560 P2d 1100 (1977). However, petitioner contends that the instant case implicates other constitutional rights, and thus falls within a "hybrid" category of cases requiring strict scrutiny. See Employment Division v. Smith, 494 US 872, 881-882, 110 S Ct 1595, 108 L Ed2d 876 (1990) (noting that the Supreme Court has never held that the First Amendment prohibits application of neutral, generally applicable laws to religiously motivated action, except where that application involves not only the Free Exercise Clause, but other constitutional protections such as freedom of speech or the rights of parents to direct the education of their children). Petitioner argues that the present case involves not only the free exercise clause, but also freedom of speech and the rights of parents to direct the education of their children, and is thus a "hybrid" case subject to strict scrutiny.

The difficulty with petitioner's argument is that, even assuming the proposed school is an integral part of its ministry, petitioner fails to explain why the relationship between the school and the church is such that the school must be located on the same rural premises as the church in order for church members to exercise any First Amendment rights in the school or the right of parents to direct the education of their children. Petitioner's church is located across the street from the urban growth boundary. Any school the church proposed to locate across the street or elsewhere within the urban growth boundary would not have to comply with CDC 430-121.3. Absent some showing why the church and school must exist together on the same property or on rural lands in order to exercise the constitutional rights of its members, we have no basis to conclude that the county's application of CDC 430-121.3 in the present case implicates the Free Exercise Clause or other constitutional provisions in a manner that subjects the county's action to a strict scrutiny analysis.

In short, the present case is not one where the county's action is prohibited because it infringes directly on religious belief. Christian Retreat Center, 28 Or App at 681. Rather, the present case involves the permissible imposition on religious practices of reasonable limitations designed to protect the public health or welfare. Id. In this context, the county argues, and we agree, that the appropriate framework to address petitioner's free exercise claims is stated in Christian Gospel Church v. San Franscisco, 896 F.2d 1221 (9th Cir) cert den 498 US 999, 111 S Ct 559, 112 L.Ed2d 565 (1990). In that case, the appellants applied for a permit to establish a church in a residential zone, under provisions that allow churches in such zones only as conditional uses. The city denied the conditional use permit because it violated provisions prohibiting uses with noise, traffic and parking problems that would adversely affect the character of the neighborhood. The applicant appealed, arguing that the city's denial violated the Free Exercise Clause. The Ninth Circuit held that the appropriate test for analyzing a free exercise challenge to zoning laws involves analysis and balancing of three factors:

> "1. The magnitude of the statute's impact on the exercise of religious belief;
>
> "2. The existence of a compelling state interest justifying the imposed burden upon the exercise of the religious belief; and
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> "3. The extent to which recognition of an exemption from the state would impede the objectives sought to be advanced by the state." 896 F2d at 1224.

Applying that analysis, the Ninth Circuit found minimal burden on religious practices, in part because the applicant made no showing that it needed to establish a church in the particular building or neighborhood it had selected. 896 F2d at 1224. The court found the city's interest in maintaining the integrity of its zoning system to be strong, and in balancing the burden imposed against the city's interest, found that the minimal burden on religious practice in that case did not warrant an exemption from the city's zoning scheme. Id. at 1224-25.

In the present case, the burden of applying CDC 430-121.3 on petitioner's religious practice is slight. Even assuming that the proposed school is so integral to petitioner's ministry as to constitute a "religious practice" under this test, there is no indication in this record that exercise of any religious practice requires that the proposed school be located on the subject property. Like the city's denial at issue in Christian Gospel Church, the county's action in the instant case has only the minimal burden of requiring petitioner to either to develop a smaller school than desired on the subject property, or to locate the school on property within the urban growth boundary.

With respect to the second prong, we agree with the county that it has a strong interest in maintaining the integrity of its zoning scheme and protecting residents of the AF-10 zone from intensive uses such as large urban-sized schools. As the Oregon Court of Appeals noted in Damascus Comm. Church, a full-time school is a more intensive use than a church, and can be subjected to reasonable restraints without transgressing the First Amendment. 45 Or App at 1073. Further, we agree with the county that it has a compelling interest, expressed in Statewide Planning Goal 14 and similar provisions, in requiring that rural schools be sized to serve the rural population, in order to help maintain the boundaries between rural and urban uses required by Oregon's land use system.[8]

[8]The county's interests under Goal 14 are among the factors that distinguish the present case from Cam v. Marion County, 987 F Supp 854 (1997), on which petitioner places particular reliance. In Cam, the applicant proposed converting an existing barn on high-value soils to a church. The county denied the application, relying in part on a state administrative rule that prohibits the establishment of new churches on high-value agricultural soil. The District Court found that administrative rule unconstitutional as applied in that case, because the state interest was limited to protecting high-value soils from new non-farm development, and, in the District Court's opinion, there was no impact on high-value soils or farm use in general from converting an existing building to a non-farm use. The court concluded that the state's application of the regulation to the disputed barn was not rationally related to the legitimate interests for which the regulation is intended to promote, that is, the preservation of farm land. In the present case, we have no trouble in concluding that the county has a legitimate interest in protecting a rural zone from the impacts of a school apparently ten times larger in size than needed to serve the rural population.

In balancing the slight burden imposed by application of CDC 430-121.3 and the county's strong interest in applying that provision, we conclude that the present case does not warrant an exception from the county's requirements.

This sub-subassignment of error is denied.

2. Participation in Petitioner's Ministry

Petitioner also argues that petitioner's members have a right to direct the education of their children, and that the county's denial infringes that right because it prohibits those members from sending their children to the proposed school.

Petitioner's argument fails for the same reasons described above: the county's decision does not prohibit petitioner from conducting a parochial church; it merely requires petitioner either to develop a smaller school than it apparently desires or to locate the school within the urban growth boundary. Absent a showing that the relationship between the church and the school is such that it is necessary to locate the proposed school on the subject property with the church, we have no basis to conclude that the county's decision denies petitioner's members from participation in its ministry.

This sub-subassignment of error is denied.

This subassignment of error is denied.

B. Claims under the Oregon Constitution

Petitioner argues that the county's action also infringes on its rights under Article I, sections 2 and 3 of the Oregon Constitution. However, petitioner makes no particular argument under the Oregon Constitution, other than noting that the cited state provisions may provide even broader protection than provided by the federal constitution. Meltebeke v. Bureau of Labor and Industries, 322 Or 132, 146, 903 P2d 351 (1995). Petitioner does not explain in what way it believes the state provisions provide broader protection to exercise of religion than the federal constitution. Without a sufficiently developed legal argument, petitioner's argument under this subassignment provides no basis for reversal or remand.

This subassignment of error is denied.

C. Establishment Clause

Petitioner contends that the county's application of CDC 430.121.3 in this case fosters an excessive entanglement with religion that violates the Establishment Clause of the First Amendment to the United States Constitution.

The parties appear to agree that whether an enactment violate the Establishment Clause depends on analysis of three factors: (1) does the enactment have a secular purpose; (2) is its principal or primary effect one that neither advances nor inhibits religion; and (3) does it foster an excessive government entanglement with religion. Eugene Sand & Gravel, Inc. v. City of Eugene, 276 Or 1007, 1012-13, 558 P2d 338 (1976), cert den Lowe v. Eugene Sand & Gravel, Inc., 434 US 876, 98 S Ct 226, 54 L Ed 2d 155 (1977). CDC 430-121.3 clearly has a secular purpose. Petitioner does not argue that the primary effect of CDC 430-121.3 is to advance or inhibit religion. Rather, petitioner argues that:

> "[T]he state seeks to thrust itself into the decision as to how a religious ministry shall be constituted. * * * It is not the business of government to weigh * * * whether this ministry's students shall be of a certain number, or whether they shall be enrolled in this ministry or rejected due to their residence within or without a land use district. * * * Here the state attempts to apply a secular measure, in the form of a population 'scale,' in order to make its decision as to whether a religious ministry's population shall be adequate to serve the whole religiously diverse population. The application here of CDC 430-121.3 is of a kind which 'enmeshes churches in the processes of government.' Larkin v. Grendels' Den Inc., 459 US 116, 127[, 103 S Ct 505, 74 L Ed 2d 297] (1982)." Petition for Review 24-25 (emphasis in original).

Petitioner's argument is premised on its unexplained view that the county's application of CDC 430-121.3 in the present case results in the county prescribing the composition of the student population at the proposed school. Petitioner may be relying on the staff interpretation of CDC 430-121.3, which, as noted above, focuses on the percentage of students from rural or urban residences. We explained above that it is not clear that the hearings officer adopted the staff interpretation. Even if he did, that interpretation must be

reconciled with the express interpretation the hearings officer made in the decision itself, which focuses solely on the size of the school. Under the hearings officer's express interpretation, the urban/rural composition of the anticipated student population is irrelevant, except insofar as it helps determine whether the proposed school is scaled to serve the rural population. The only effect of the hearings officer's interpretation and application of CDC 430-121.3 in the present case is that the church must either reduce the size of its proposed school so that it is scaled to serve the rural population, or the church must locate its proposed school inside the urban growth boundary. Neither result involves the county in determining the actual composition of the student population at the proposed school, or otherwise results in excessive government entanglement in religion.

This subassignment of error is denied.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner argues that the county's application of CDC 430-121.3 in the present case violated petitioner's rights of free speech protected under the First and Fourteenth Amendments to the United States Constitution. Petitioner explains that "[a]pplication of CDC 430-121.3 will have the effect of blocking the education of children contemplated by the Church." Petition for Review 26.

What is missing from petitioner's argument is an explanation how application of a content-neutral zoning ordinance such as CDC 430-121.3 infringes on free speech. Petitioner cites a number of federal Supreme Court cases dealing with education, Fourteenth Amendment liberty interests and First Amendment issues, without attempting to relate either the holdings or facts of those cases to the present circumstance.[9] As far as we can tell, the

[9]Petitioner cites Meyer v. Nebraska, 262 US 290, 397, 43 S Ct 625, 67 L Ed 1042 (1923), which involved a law prohibiting teaching in any language other English, implicating the Fourteenth Amendment liberty right to acquire "useful information"; Tinker v. Des Moines School District, 393 US 503, 89 S Ct 733, 21 L Ed 2d 731 (1969), which involved a prohibition on black armbands used to protest the Vietnam War; Keyishian v. Board

thrust of petitioner's argument is as follows: (1) education is a form of expression; (2) prohibiting education prohibits expression and thus violates the First Amendment; (3) the county's action prohibits education; therefore, the county's action violates the First Amendment.

Among the difficulties with this argument is that, as we determined earlier, nothing in the county's application of CDC 430-121.3 results in the prohibition of education. CDC 430-121.3 does not regulate the content of education or expression; it simply requires that schools outside the urban growth boundary be scaled to serve the rural population. As noted above, the effect of CDC 430-121.3 in the present case is that petitioner must either operate a smaller school than desired, or operate its school within the urban growth boundary. Neither result is a prohibition on education, or expression.

The fourth assignment of error is denied.

The county's decision is affirmed.

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of Regents, 385 US 589, 87 S Ct 675, 17 L Ed 2d 629 (1982), which involved a prohibition on teachers passing out literature advocating overthrow of the government; Board of Education v. Pico, 457 US 853, 102 S Ct 2799, 73 L Ed 2d 435 (1982), which involved removal of books from the school library that the school board deemed offensive; and Pierce v. Society of Sisters, 268 US 510, 45 S Ct 571, 69 L Ed 1070 (1925), which involved an Oregon statute requiring all children to attend public school.