BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOSH WARBURTON, DENISE WARBURTON,
LARRY J. BROWN, GUY HIGGINSON,
PHIL KESSINGER and LORD MAITREYA,
Petitioners,

vs.

HARNEY COUNTY,
Respondent,

and

STEENS MOUNTAIN PACKERS, INC.,
Intervenor-Respondent.

LUBA No. 2000-096

OREGON NATURAL DESERT ASSOCIATION,
Petitioner,

vs.

HARNEY COUNTY,
Respondent,

and

STEENS MOUNTAIN PACKERS, INC.,
Intervenor-Respondent.

LUBA No. 2000-100

FINAL OPINION
AND ORDER

Appeal from Harney County.

Corinne C. Sherton, Salem, filed the petition for review and argued on behalf of petitioners in LUBA No. 2000-096. With her on the brief was Johnson & Sherton, P.C.

Paul D. Dewey, Bend, filed the petition for review and argued on behalf of petitioner in LUBA No. 2000-100.

No appearance by Harney County.

William C. Cox and Gary P. Shepherd, Portland, filed the response brief. William C. Cox argued on behalf of intervenor-respondent.

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

REVERSED 02/02/2001

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

Petitioners appeal county approval of a private career school to train hunting and horsepacking guides on a parcel zoned for exclusive farm use (EFU).

MOTION TO INTERVENE

Steens Mountain Packers, Inc. (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

FACTS

The subject property is a 160-acre parcel located on the flanks of Steens Mountain, 15 miles from the community of Frenchglen. Intervenor's owners purchased the subject property in 1986 and shortly thereafter obtained a conditional use permit from the county to operate an outfitting business on the property. The outfitting business provides hunting guides and horsepacking trips into the Steens Mountain area. The conditional use permit allows the placement of certain portable structures to accommodate the needs of the business.

In 1997, intervenor's owners applied to the county to take an exception to Statewide Planning Goal 3 (Agricultural Lands) and rezone 12 acres of the property to a limited use commercial zone, in order to develop a permanent lodge, restaurant and cabins in conjunction with their existing outfitting business. The county orally denied that application, and the application was withdrawn before the county issued its final written decision. *See Witzel v. Harney County*, 34 Or LUBA 433 (1998) (dismissing appeal of that decision).

In 1999, the subject property was transferred to intervenor, which sought and obtained a one-year renewable license from the Oregon Department of Education (ODOE) to operate a career school. The license permits intervenor to train students in three programs: Big Game Hunting Guide, Extended Day Horsepack Guide, and Trail Ride Guide. As part of the school's approved curriculum, students obtain vocational training through the outfitting and horsepacking business operated by intervenor.

On January 12, 2000, intervenor filed an application for site plan approval with the county. The application proposes a main school facility that includes a 14-room dormitory and staff quarters, a 30-seat cafeteria, two assembly/classroom areas, two private classrooms, two libraries, and administrative space. In addition, the application proposes 19 single-occupancy cabins for use by seasonal staff and students, and two permanent staff dwellings.

After soliciting comments from interested persons, the county planning director issued a decision denying intervenor's application, on the grounds that intervenor's career school was not among the uses allowed by statute in EFU zones. Intervenor appealed to the county court. The county court conducted a hearing on April 26, 2000, and on June 7, 2000, issued a written decision approving the application, in which the court concluded that intervenor's career school was a "private school" allowed under ORS 215.283(1)(a). On June 21, 2000, the county court issued a corrected decision that amended minor details in its earlier decision. This appeal followed.

FIRST ASSIGNMENTS OF ERROR (LUBA NOS. 2000-096 AND 2000-100)

The principal issue under these assignments of error is whether the county erred in concluding that intervenor's career school is a "private school" within the meaning of ORS 215.283(1)(a).[1] The county court interpreted ORS 215.283(1)(a) to include career schools, based on the language of that statute, the definition of "career school" and "school" at ORS 345.010(4), the title of ORS chapter 345, and legislative history from a 1983 amendment to ORS 215.283(1)(a).

The relevant terms of ORS 215.283(1)(a) are not defined anywhere in ORS chapter 215. No reported cases address the scope and meaning of "public or private schools" as used

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[1]ORS 215.213(1) provides in relevant part:

"The following uses may be established in any area zoned for exclusive farm use:

"a. Public or private schools, including all buildings essential to the operation of a school."

in that statute. That issue is primarily one of statutory interpretation, and LUBA owes no deference to the county's interpretation of ORS 215.283(1)(a). *Davenport v. City of Tigard*, 121 Or App 135, 140, 854 P2d 483 (1993). In interpreting a statute, the guiding principle is to discern the intent of the legislature. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993). The starting point of analysis is the statute's text and context. *Id.* at 610-11. If the text and context can reasonably bear more than one construction, examination of legislative history is appropriate. *Id.* at 611-12. If legislative intent is unclear after consideration of text, context and legislative history, resort to general maxims of statutory construction is permissible. *Id.* at 612.

The parties parse the text of ORS 215.283(1)(a) in slightly different ways. Petitioners view the statute as providing for either "public schools" or "private schools."[2] Intervenor views those terms as providing simply for "schools," with the clarification that such schools can be private as well as public. Petitioners and intervenor then cite to definitions of "private school" and "school" at ORS 345.505(2) and 345.010(4), respectively, to support their different readings.[3] Intervenor argues that the definition of "school" at ORS 345.010(4)

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[2]Petitioners in LUBA Nos. 2000-096 and 2000-100 advance overlapping arguments under their respective first assignments of error. We address them together as "petitioners" unless more specific reference is required.

[3]ORS 345.010 provides in relevant part:

> "As used in ORS 345.010 to 345.450 [governing career schools] and 345.992 to 345.997 [providing for penalties for violation of ORS chapter 345]:
>
> "* * * * *
>
> "(4) 'Career school' or 'school' means any private proprietary professional, technical, home study, correspondence, business or other school instruction, organization or person that offers any instruction or training for the purpose or purported purpose of instructing, training or preparing persons for any profession."

ORS 345.505 provides in relevant part:

> "As used in ORS 345.505 to 345.575 [governing private elementary and secondary schools] unless the context requires otherwise:
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> "* * * * *

includes career schools such as that proposed here, and that that statutory definition is consistent with the dictionary meaning of the term "school," which includes as one of its sub-senses establishments for teaching particular skills.[4] In contrast, petitioners argue that the pertinent definition is that of "private school" at ORS 345.505(2), which includes only private elementary or secondary schools and does not include career schools. Petitioners argue that the definition at ORS 345.505(2) is consistent with the dictionary meanings of "public school" and "private school," which seem to refer to elementary and secondary schools.[5]

We agree with the parties that the provisions of ORS chapter 345 are relevant context for ORS 215.283(1)(a), although none of the definitions in that chapter apply directly to the terms of ORS 215.283(1)(a). The definition of "school" at ORS 345.010(4) applies in relevant part only to the provisions of ORS 345.010 to 345.450, which govern career schools, while the definition of "private school" at ORS 345.505(2) applies only to ORS 345.505 to

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> "(2) 'Private school' means a private elementary or secondary school operated by a person or by a private agency except as provided in ORS 339.030(1)(c) or (d), offering education in prekindergarten, kindergarten, or grades 1 through 12 or any part thereof."

[4] *Webster's Third New Int'l Dictionary*, 2031 (unabridged ed 1981), defines "school" in relevant part to include:

> "[A]n organized source of education or training: as (1) **:** an institution for the teaching of children **:** an elementary or secondary school (2) **:** an institution for specialized higher education usu. within a university <the [school] of medicine at the state university> (3) **:** COLLEGE, UNIVERSITY <the excellent east coast [schools]> (4) **:** an establishment for teaching a particular skill or group of skills <a [school] of design> <a fencing [school]> <a beauticians' [school]> [.]"

[5] *Webster*'s provides the following apposite definitions of "public school" and "private school," at 1836 and 1805, respectively:

> "[A] tax-supported school controlled by a local governmental authority; *specif* **:** an elementary or secondary school in the U.S. providing free education for the children of residents of a specific area[.]"

> "[A] school that is established, conducted, and primarily supported by a nongovernmental agency—compare PUBLIC SCHOOL[.]"

345.575, which govern private elementary and secondary schools.[6] Nonetheless, it is apparent that the legislature knows how to distinguish between different types of schools.[7] The definition of "school" at ORS 345.010(4) is so worded that it excludes private elementary and secondary schools, while the definition of "private school" at ORS 345.505(2) is so worded that it excludes career schools. To the extent these definitions have contextual significance to ORS 215.283(1)(a), they point to quite different meanings in the terms of that statute.

Although the parties do not discuss them, other statutory provisions also appear to be relevant context. A phrase almost identical to the pertinent language from ORS 215.283(1)(a) appears at ORS 326.575(1) (transfer of records when a student seeks initial enrollment in a "public or private school"), in a context that clearly refers to elementary and secondary education schools. As discussed in n 7, references in ORS chapters governing education to "public school" or "private school" consistently refer to institutions for elementary and secondary education. With few exceptions, most references in such chapters to "school" are also to institutions for elementary and secondary education.

More immediate context to ORS 215.283(1)(a) is provided by the other provisions of ORS chapter 215. All parties emphasize that uses allowed by ORS 215.283(1) in EFU zones

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[6]The general title of ORS chapter 345 is "Private Schools." Petitioners in LUBA No. 2000-096 argue, and we agree, that the title of ORS chapter 345 is of no significance for purposes of statutory construction, because the titles of ORS chapters are adopted by the codifier of the Oregon Revised Statutes, not the legislature.

[7]In addition to the distinctions drawn in ORS chapter 345, other ORS chapters govern different types of educational institutions such as public elementary and secondary schools and post-secondary colleges and universities. For example, ORS chapters 326 through 339 generally govern public elementary and secondary schools. ORS chapters 341 and 348 through 353 govern post-secondary education. The chapters governing post-secondary educational institutions do not refer to those institutions as "schools," while the chapters governing elementary and secondary educational institutions consistently refer to them as "schools." *Compare* ORS 326.011; 326.603(7)(a); 339.030; 339.315(1) and 339.865(4) with ORS 341.005 *et seq.* (community colleges); ORS 351.001 *et seq.* (institutions of higher education). One possible exception to this pattern appears at ORS 351.065(3), where there are references to post-secondary "institutions, schools or departments." However, the reference appears to be to distinct faculties within a post-secondary institution, such as a law school.

are permitted uses, and a county may not apply to uses allowed by ORS 215.283(1) legislative criteria of its own to supplement those found in the statute. *Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995). However, the parties draw different conclusions from that principle. Intervenor argues that adopting petitioners' view of the phrase "public or private schools" would exclude community colleges, universities and career schools and thus be inconsistent with the court's reasoning in *Brentmar*. According to intervenor, uses listed in ORS 215.283(1) must be interpreted to afford the broadest possible scope in order to effect the legislative intent that such uses be allowed as permitted uses, not uses subject to county limitation.

In contrast, petitioners argue that *Brentmar* merely establishes that uses listed in ORS 215.283(1) are not subject to local supplemental criteria, and that the reasoning in *Brentmar* has no applicability to the question of whether a proposed use falls within the scope of a use listed in ORS 215.283(1). According to petitioners, the correct way to approach that question recognizes that nonfarm uses allowed under ORS 215.283(1) and (2) are *exceptions* to the agricultural purpose of the EFU zone. ORS 215.203(1) ("Land within [EFU] zones shall be used exclusively for farm use except as otherwise provided in ORS 215.213, 215.283 or 215.284."). Petitioners contend that, where a nonfarm use allowed in EFU zones under ORS chapter 215 is capable of more than one reasonable interpretation, the narrower interpretation or the interpretation more consistent with the primary purpose of the EFU zone should prevail. *See Craven v. Jackson County*, 308 Or 281, 288, 779 P2d 1011 (1989) (interpreting the scope of "commercial activities that are in conjunction with farm use" under ORS 215.283(2)(a) to exclude commercial activities tangentially related to farm use that would subvert the goal of preserving land in productive agriculture); *McCaw Communications, Inc. v. Marion County*, 96 Or App 552, 555, 773 P2d 779 (1989) (interpreting the scope of "utility facilities necessary for public service" under ORS 215.213(1)(d) to include only circumstances where it is necessary to site the facility in

the EFU zone in order to provide the public service). Consequently, petitioners argue, the phrase "public or private schools" should not be interpreted to include "career schools." Petitioners argue that the potential scope of "career schools" is unbounded, and because ORS 215.283(1)(a) includes all buildings essential to the operation of a school, intervenor's view of ORS 215.283(1)(a) could allow virtually any kind of use in the EFU zone.[8] Petitioners contend that the text and context of ORS 215.283(1)(a) indicate that the phrase "public or private schools" should be construed to include only public and private elementary and secondary schools.

Although the issue is not without doubt, we believe that the text and context of ORS 215.283(1)(a) indicate that the legislature intended that provision to allow only public and private elementary and secondary schools. Intervenor's argument to the contrary is not assisted by the definition at ORS 345.010(4), which excludes private elementary and secondary schools. We do not believe that the legislature intended ORS 215.283(1)(a) to exclude such schools. Intervenor's strongest argument is the above-quoted dictionary definition of "school," which is broad enough to include a "career school." That argument depends on reading ORS 215.283(1)(a) as intended to provide for "schools" in all possible senses, with the clarification that such schools can be either publicly or privately operated. However, since all schools are either public or private, intervenor's reading relegates the terms "public or private" to a minor, if not superfluous, role. Given the legislature's clear distinctions in ORS chapters governing education between different types of educational institutions, it seems more consistent with those references to understand ORS 215.283(1)(a) as referring to public and private schools, as those terms are generally used and understood in other statutory provisions. As noted above, the statutory provisions governing post-

[8]As examples, petitioners argue that, under intervenor's interpretation of ORS 215.283(1)(a), if an applicant conducts a "career school" to train metal fabricators or the manufacturers of computer chips, the county could be required to allow a metal fabrication plant or computer chip plant in its EFU zone as an essential building to that school.

secondary education such as community colleges and universities refer to those institutions as something other than "schools," while references to public and private schools in other statutory provisions invariably refer to elementary and secondary schools. It would be inconsistent with that scheme of reference to understand ORS 215.283(1)(a) as providing for public and private community colleges and universities, merely because colleges and universities are one of the senses of the dictionary definition of "school."[9] Similarly, except as specifically provided for in ORS 345.010 to 345.450, the statutes refer to career schools such as that proposed here as "career schools." It is inconsistent with the statutory scheme of reference to understand ORS 215.283(1)(a) to provide for "career schools," merely because such schools fall within one of the dictionary senses of "school."

With respect to *Brentmar*, we agree with petitioners that that case does not stand for the proposition that uses listed in ORS 215.283(1) must be read as broadly as possible. *Brentmar* says nothing regarding how to choose between plausible interpretations of specific nonfarm uses allowed in that statute.[10] The better approach, exemplified in *Craven* and *McCaw Communications, Inc.*, is to view such nonfarm uses as exceptions to the primary farm uses of the EFU zone and, where an interpretative choice is necessary, interpret the statute not to include uses that would subvert the goal of preserving land in productive agriculture. Here, intervenor's proffered interpretation of ORS 215.283(1)(a) to include not only career schools but also public and private community colleges and universities would

[9]The statutory provisions governing post-secondary education in Oregon seem to apply only to public institutions; as far as we can tell, the pertinent statutes do not appear to govern *private* institutions for post-secondary education, such as private colleges and universities.

[10]The parties do not discuss the facts in *Brentmar* to any extent, but we note that the use at issue in that case was a multifaceted proposal for a horticultural school, along with various commercial and energy production activities. *See Brentmar v. Jackson County*, 27 Or LUBA 453, 455-56 (1994) (describing proposal). Arguably, the horticultural school proposed in that case could be described as a "vocational school" under the then-current statutory nomenclature, or a "career school" under the current nomenclature. However, no issue was raised on that point, or whether the proposed school constituted a "public or private school" within the meaning of ORS 215.283(1)(a). Neither LUBA's opinion nor the subsequent Court of Appeals or Supreme Court decisions address or resolve that issue. Under these circumstances, we do not read *Brentmar* as implicitly resolving the issue before us.

open the EFU zone to a large, if not unlimited, array of institutional uses exceeding in potential the impacts of the hypothetical commercial uses that the court in *Craven* felt to be subversive to the EFU zone. The only interpretation short of that result is the one advanced by petitioners. As explained above, petitioners' interpretation is, unlike that proffered by intervenor, consistent with the relevant statutory context. Based on the foregoing, we conclude that the text and context of ORS 215.283(1)(a) indicate a legislative intent to provide only for public and private elementary and secondary schools under that provision.

To the extent it is necessary or appropriate to consider legislative history, the history to which we are directed is consistent with the foregoing. ORS 215.283(1)(a) was first adopted in 1963, as ORS 215.213(1). No pertinent legislative history is available from that 1963 session. However, at that time, as in the current statutes, the relevant statutes governing education referred to public and private schools in a context that clearly denoted elementary and secondary education. Further, the relevant statutes treated such schools as distinct from other types of educational institutions. *See, e.g.*, ORS 342.625 (1963) (requiring teachers in "any public, private or parochial school, or any academy, college, university or other institution of learning" to take an oath of allegiance). ORS chapter 345 then governed only what were termed "vocational schools."[11] ORS 345.010(5) (1963) (defining "vocational school"). What are today defined as "private schools" under ORS 345.505(2) were apparently governed by the same ORS chapters governing public schools.

In 1983, ORS 215.283(1)(a) was amended to add the terms "including all buildings essential to the operation of a school."[12] The apparent purpose of that amendment was to

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[11]In 1995 the legislature adopted amendments to ORS chapter 345 that substituted the term "career school" for "vocational school."

[12]It is highly questionable whether the opinions of legislators and witnesses in 1983 are probative of the 1963 legislature's intent in adopting the terms "public or private schools." *See DeFazio v. WPPSS*, 296 Or 550, 561, 679 P2d 1316 (1984) (legislators' views of existing law may shed light on new enactment, but are of no

clarify that "public or private schools" could build essential buildings in EFU zones. The history to which we are cited suggests that the 1983 legislators thought they were addressing a perceived problem involving rural boarding schools, which have needs for dormitories and staff housing that other schools do not. There is no indication that the 1983 legislature thought that "public or private schools" included institutions for adult career education or colleges and universities.

The first assignments of error in LUBA Nos. 2000-096 and 2000-100 are sustained.

REMAINING ASSIGNMENTS OF ERROR

Because the county's decision approves a use that is prohibited by statute, the decision "violates a provision of applicable law and is prohibited as a matter of law," and accordingly must be reversed. OAR 661-010-0071(1). There is no point in addressing petitioners' remaining assignments of error, which challenge the decision on alternate grounds.

The county's decision is reversed.

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weight in interpreting a law enacted by their predecessors); *Sensible Transportation v. Washington County*, 28 Or LUBA 375, 377 (1994) (post-enactment expressions of intent are not competent legislative history). The 1983 amendment did not alter the relevant terms of ORS 215.283(1)(a). Nonetheless, both parties cite us to portions of the 1983 legislative history, and we consider it because it is consistent with the foregoing textual analysis of ORS 215.283(1)(a). *See State v. Sumerlin*, 139 Or App 579, 587 n 7, 913 P2d 340 (1996) (examination of text and context ended the inquiry, but the court nonetheless noted that legislative history also supported the text and context interpretation).