BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LANDWATCH LANE COUNTY,
Petitioner,

vs.

LANE COUNTY,
Respondent.

LUBA No. 2017-043

FINAL OPINION
AND ORDER

Appeal from Lane County.

Salvatore Catalano, Eugene, filed the petition for review and argued on behalf of petitioner.

H. Andrew Clark, Assistant County Counsel, Eugene, filed the response brief and argued on behalf of respondent.

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

REVERSED 10/16/2017

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 that approves Oak Hill School's request for approval to expand two existing school buildings.

FACTS

Oak Hill School is located on exclusive farm use (EFU)-zoned land and is less than three miles from the City of Eugene and City of Springfield urban growth boundaries (UGBs). Although the 61.86-acre school tract is zoned EFU, it does not contain any high-value farm land. The existing school is designed to serve more than 100 students. The expanded school would be designed to serve even more students. The existing buildings are not separated by at least one-half mile. The central issue in this appeal is whether a Land Conservation and Development Commission (LCDC) administrative rule that limits the design capacity of closed structures and imposes spacing requirements, if the closed structures are within three miles of a UGB (hereafter the three-mile rule), applies to Oak Hill School.[1] Based on a statute and conforming LCDC administrative rules that took effect on January 1, 2010, the county found that the three-mile rule does not apply. The central issue in this appeal is whether that finding is based on a misconstruction of the applicable statutes and administrative rules.

[1] We set out the text of the three-mile rule later in this opinion.

INTRODUCTION

LCDC amendments to the three-mile rule, 2009 legislation affecting schools on EFU-zoned lands, and LCDC rulemaking related to that 2009 legislation overlapped somewhat during 2009 and 2010. Although these legislative and rulemaking efforts concerned similar or overlapping subject matter (concerns about urban intensity uses on rural land) and occurred during roughly the same time period, they were separate proceedings. We first discuss the key events in each of those separate proceedings chronologically before turning to petitioner's assignments of error. Before doing that, however, we briefly describe one aspect of the relationship of the EFU-zoning statutes and the LCDC's administrative rules that govern EFU zoning, which has a bearing in this appeal.

A. The EFU Statutes and LCDC Administrative Rules

The EFU statutes are codified at ORS 215.203 through 215.327. The statutes have been amended many times since they were first enacted in 1963 and are wide-ranging and quite complex. For purposes of this appeal, it is important to understand that one part of the EFU-zoning statutes authorizes two categories of uses, which are set out at ORS 215.213(1) and 215.283(1) (hereafter subsection (1) uses) and ORS 215.213(2) and 215.283(2) (hereafter subsection (2) uses).[2] The Oregon Supreme Court has drawn a distinction

[2] ORS 215.213(1) and (2) apply to what are referred to as marginal land counties; ORS 215.283(1) and (2) apply to all other counties. The subsections

between subsection (1) and subsection (2) uses. The Court described subsection (1) uses as uses that are allowed by right, which may not be subject to additional local criteria. *Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995). But subsection (2) uses may be subject to additional local criteria and are subject to additional statutory criteria as well. In a subsequent decision, the Oregon Supreme Court further clarified that the prohibition against applying additional *local government* criteria to subsection (1) uses did not apply to LCDC. *Lane County v. LCDC*, 325 Or 569, 583, 942 P2d 278 (1997). LCDC is therefore free to enact administrative rules that regulate both subsection (1) and (2) uses more stringently than the EFU statutes, even if the rules "have the effect of prohibiting uses otherwise permissible under the applicable statue." *Id*. The three-mile rule is an example of such a rule, since in its original and current form, it prohibits certain uses that would otherwise be permissible under the EFU-zoning statutes. The interaction between the EFU zoning statute and LCDC's rules governing agricultural land make the already complicated statutes even more complicated.[3]

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of ORS 215.213 and 215.283 authorize similar but not identical lists of uses. Only Lane and Washington Counties took advantage of the marginal lands authorization before it was repealed in 1993.

[3] An additional complicating factor is introduced when counties enact their own EFU zoning ordinances, patterned after the statutes and rules, but frequently deviate from the statutory and rule language. Fortunately, this additional complicating factor is not present in this appeal.

B. LCDC's Three-Mile Rule and *Young v. Jackson County*

LCDC first enacted its three-mile rule in 1992. At the time of LUBA's decision in *Young v. Jackson County*, 58 Or LUBA 64, 70 (2008), *aff'd* 227 Or App 290, 205 P3d 890 (2009), it prohibited churches and schools within three miles of a UGB, with an exception for existing structures.[4] As LUBA explained in *Young* the only uses that the three-mile rule applied to at that time were churches and schools, both of which were subsection (1) uses.

Young concerned an application to operate a church within three miles of a UGB. When the county denied the application based on the three-mile rule, the applicant appealed to LUBA and argued that application of the three-mile rule to churches, while a number of other secular assemblies were not subject to the three-mile rule, meant the three-mile rule applied to churches "on less that equal terms with a nonreligious assembly or institution," in violation of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). 58 Or LUBA at 67. LUBA agreed with the applicant. *Id*. at 80. LUBA's agreement with the applicant on that point either meant a three-mile rule that applied only to churches and schools could not be applied to churches at all, or that the

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[4] In 2008, OAR 660-033-0130(2) provided:

> "The use shall not be approved within three miles of an urban growth boundary unless an exception is approved pursuant to ORS 197.732 and OAR chapter 660, division 4. Existing facilities wholly within a farm use zone may be maintained, enhanced or expanded on the same tract, subject to other requirements of law."

three-mile rule could only be applied to churches if it "furthers a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest," which the county had not demonstrated. *Id*.

LUBA's decision in *Young* was issued on December 23, 2008. The Court of Appeals affirmed LUBA's decision, without opinion, on March 25, 2009.

C. HB 3099

The next relevant event occurred on July 28, 2009. During the 2009 regular legislative session, the legislature enacted HB 3099 (Oregon Laws 2009, chapter 850). The purpose of HB 3099 was to reduce the number of uses allowed on EFU-zoned lands and to impose restrictions on some of those uses. As relevant in this appeal, HB 3099 did three things. First, it amended the EFU-zoning statutes to change schools from a subsection (1) use to a subsection (2) use.[5] Second, it amended the statutes to require that schools on EFU-zoned land must be "primarily for residents of the rural area in which the school is located." That change is codified at ORS 215.213(2)(y). And finally, to address concerns about the effect these statutory changes might have on existing schools, some of which might become nonconforming uses if they were not "primarily for residents of the rural area in which the school is

[5] The primary legal effects of the change from subsection (1) use to subsection (2) use was to subject schools to the approval criteria at ORS 215.296 and to potentially subject schools to additional county standards or criteria.

located," or did not comply with subsequently enacted local criteria, HB 3099 adopted language that is now codified at ORS 215.135, which sets out special standards for expansion of schools that existed on January 1, 2010, the date HB 3099 became effective. Those special standards were expressly "in addition to" any statutory rights those existing schools might have to expand as nonconforming uses under ORS 215.130.[6]

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[6] The text of ORS 215.135 is set out below:

> "(1) In addition to and not in lieu of the authority in ORS 215.130 to continue, alter, restore or replace a use that has been disallowed by the enactment or amendment of a zoning ordinance or regulation, a use formerly allowed pursuant to ORS 215.213(1)(a) or 215.283(1)(a), as in effect before January 1, 2010, may be expanded subject to:
>
> "(a) The requirements of subsection (2) of this section; and
>
> "(b) Conditional approval of the county in the manner provided in ORS 215.296.
>
> "(2) A nonconforming use described in subsection (1) of this section may be expanded under this section if:
>
> "(a) The use was established on or before January 1, 2009; and
>
> "(b) The expansion occurs on:
>
> "(A) The tax lot on which the use was established on or before January 1, 2009; or
>
> "(B) A tax lot that is contiguous to the tax lot described in subparagraph (A) of this

D. Three-Mile Rule Work Group

In the fall of 2009, LCDC created a work group, composed of an LCDC commissioner, the Department of Land Conservation and Development (DLCD) Director and a number of stakeholders to develop rule amendments for the three-mile rule to correct the RLUIPA violation that LUBA identified in *Young*. That task force ultimately developed proposed rule amendments that were presented to LCDC at a June 2010 hearing. We discuss those rules below.

E. LCDC's HB 3099 Administrative Rule Amendments

Following adoption of HB 3099, LCDC considered amendments to OAR chapter 660, division 33 to make those rules consistent with the HB 3099 statutory amendments. Those rule amendments were adopted in November 2009, effective January 1, 2010. Those rules incorporated the statutory changes into LCDC's chapter 660, division 33 rules.

OAR 660-033-0130 sets out a long list of special standards that apply to EFU-zoned uses. The OAR "Chapter 660, Division 033, rule 0120, Table" (hereafter Rule 0120 Table) sets out uses authorized on EFU-zoned land and uses a number of letters, symbols and numbers to indicate whether the use is allowed (A), allowed but requires review (R), is not allowed (*) or is subject to one or more of the numbered criteria in OAR 660-033-0130.

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paragraph and that was owned by the applicant on January 1, 2009."

The HB 3099 administrative rule amendment amended OAR 660-033-0130(18).[7] Prior to the HB 3099 rule amendments, OAR 660-033-0130(18) applied to a number of uses, including schools on "high-value farm land."[8] The HB 3099 rule amendments amended OAR 660-033-0130(18) to incorporate the statutory language at ORS 215.135 as OAR 660-033-0130(18)(b)-(c). The rule amendment is set out in the margin and is substantially identical to ORS 215.135, *see* n 6.[9] To complete the

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[7] Prior to its amendment following HB 3099, OAR 660-033-0130(18) provided in relevant part:

> "Existing facilities wholly within a farm use zone may be maintained, enhanced or expanded on the same tract, subject to other requirements of law."

As we explain later in this opinion, DLCD understands the "subject to other requirements of law" to be a reference to the ORS 215.130 standards governing alteration of nonconforming uses.

[8] "High-value farm land" is defined at OAR 660-033-0020(8), which identifies certain land in tracts composed of certain soil types as high value farm land.

[9] The new OAR 660-033-0130(18) language is in boldface. We have omitted irrelevant rule language regarding golf courses.

> "(18)(a) Existing facilities wholly within a farm use zone may be maintained, enhanced or expanded on the same tract, subject to other requirements of law. * * *
>
> **"(b) In addition to and not in lieu of the authority in ORS 215.130 to continue, alter, restore or replace a use that has been disallowed by the enactment or amendment of a zoning ordinance or regulation, schools as formerly**

incorporation of the HB 3099 statutory changes into OAR chapter 660, division 33, the HB 3099 rule amendments also revised the relevant part of the Rule 0120 Table to read as follows, with new language in underlined boldface and deleted language in strike-through:[10]

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allowed pursuant to ORS 215.213(1)(a) or 215.283(1)(a), as in effect before January 1, 2010, the effective date of 2009 Oregon Laws, chapter 850, section 14, may be expanded subject to:

"(A) The requirements of subsection (c) of this section; and

"(B) Conditional approval of the county in the manner provided in ORS 215.296.

"(c) A nonconforming use described in subsection (b) of this section may be expanded under this section if:

"(A) The use was established on or before January 1, 2009; and

"(B) The expansion occurs on:

"(i) The tax lot on which the use was established on or before January 1, 2009; or

"(ii) A tax lot that is contiguous to the tax lot described in subparagraph (i) of this paragraph and that was owned by the applicant on January 1, 2009."

[10] For clarity, the table format in this opinion is different from the format of LCDC's Rule 0120 Table.

HV Farm	All Other	
*18**(a)** or **(b-c)**	R2,**5**, **18(b-c)**	~~Public or private schools, including all buildings essential to the operation of a school~~. **Public or private schools for kindergarten through grade 12, including all buildings essential to the operation of a school, primarily for residents of the rural area in which the school is located**.

Prior to and after the HB 3099 amendments the * meant that new schools were not allowed on high-value farm land, but number 18 meant existing schools on high-value farm land could expand, but only pursuant to OAR 660-033-0180(18) as an expansion of a non-conforming use under ORS 215.130. Prior to the HB 3099 amendments, on non-high-value farm land, the R2 meant schools were allowed, subject to review and subject to the three-mile rule at OAR 660-033-0130(2).

After the HB 3099 amendments, schools on non-high-value farm land remain subject to review, and remain subject to the OAR 660-033-0130(2) three-mile rule, but the Rule 0120 Table indicates existing schools may be expanded under OAR 660-033-0180(18)(b)-(c), which again are the special criteria adopted by HB 3099 and codified at ORS 215.135.

Before turning to the rule amendments LCDC adopted to respond to LUBA's *Young* decision, we note and emphasize that the HB 3099

administrative rule amendments did not change the three-mile rule at OAR 660-033-0130(2), which remained worded as it was worded when LUBA issued its decision in *Young*, and remained applicable to schools on non-high-value farmland. The three-mile rule did not apply to schools on high-value farm land, presumably because new schools are prohibited on all high-value farm land, regardless of proximity to UGBs, subject only to the exception for expansion of existing schools as non-conforming uses.

F. LCDC's Three-Mile Rule Amendments

The proposed rules that were distributed to the LCDC commissioners in 2009/2010 changed the former OAR 660-033-0130(2) three-mile rule prohibition into a design capacity limitation and minimum spacing requirement.[11]

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[11] The 2009/2010 proposed OAR 660-033-0130(2) amendments are set out below, with the new language in boldface and underlined and the deleted language in strike-through:

> "~~(2) The use shall not be approved within three miles of an urban growth boundary unless an exception is approved pursuant to ORS 197.732 and OAR chapter 660, division 4. Existing facilities wholly within a farm use zone may be maintained, enhanced or expanded on the same tract, subject to other requirements of law~~.
>
> **"(2)(a) No enclosed structure with a design capacity greater than 100 people, or group of structures with a total design capacity of greater than 100 people, shall be approved in connection with the use within three miles of an urban growth boundary, unless an exception is approved pursuant to ORS 197.732 and OAR chapter**

The audio recording of the June 2, 2009 meeting that considered the three-mile rule amendments discloses that LCDC Commissioners and DLCD staff were well aware of HB 3099, and the corresponding January 1, 2010 administrative rule amendments at OAR 660-033-0130(18), and were concerned about the interaction of those rules and the three-mile rule amendments. Much of that discussion, some of which is set out below, is difficult to follow. Some of it discloses that DLCD staff considered the language of old OAR 660-033-0180(18)—which was carried over to OAR 660-033-0180(18)(a) and applies to schools and churches on high-value farm land—simply provides that existing schools and churches on high-value farm land can be expanded if they can demonstrate the expansion complies with the ORS 215.130 standards for altering a nonconforming use. Much of the discussion centers around this "nonconforming use" exception for churches and schools on high-value farm land. But the discussion also addresses existing structures that are not on high-value farm land, which are subject to the three-mile rule. The proposed three-mile rule amendments that were distributed to

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660, division 4, or unless the structure is described in a master plan adopted under the provisions of OAR chapter 660, division 34.

"(b) Any enclosed structures or group of enclosed structures described in subsection (a) within a tract must be separated by at least one-half mile. For purposes of this section, 'tract' means a tract as defined by ORS 215.010(2) that is in existence as of June 17, 2010."

the LCDC commissioners before the June 2, 2010 meeting did not include OAR 660-033-0130(2) subsection (c). *See* n 11. That subsection (c) language, which was discussed and ultimately adopted at the June 2, 2010 hearing is as follows: "Existing facilities wholly within a farm use zone may be maintained, enhanced or expanded on the same tract, subject to other requirements of law, but enclosed existing structures within a farm use zone within three miles of an urban growth boundary may not be expanded beyond the requirements of this rule." The discussion set out below shows the reference to "the requirements of this rule" in subsection (c) is a reference to the OAR 660-033-0130(2)(a) 100-person design capacity restriction and the OAR 660-033-0130(2)(a) half mile spacing requirement, within 3 miles of a UGB. The references to "2(c)" or "(c)" in the discussion below are references to the language that ultimately became OAR 660-033-0130(2)(c):

> "[Commissioner] So read the read the proposed 2(c) again. We're looking at 18(a).
>
> "[DLCD Director] Sure.
>
> "[DLCD Staff] (c) existing facilities wholly within a farm use zone may be maintained, enhanced or expanded on the same tract subject to other requirements of law comma but enclosed existing structures within a farm use zone within three miles of an urban growth boundary may not be expanded beyond the requirements of this rule.
>
> "[Commissioner] So was 2(c) discussed by the work group? It was circulated but not discussed?
>
> "[DLCD Staff] 2(c) the recommendation from the work group came out with and I must say in the last work group Richard

expressed some uncomfortableness with (c) he as he's expressed today.[12] (c) came out as part of the recommendation there was committee member Laurie Craghead which is another local rep local government representative by the way suggested well why don't we keep this 2(c) but cross reference to 215.130 so I'll just say as I wrote it up as the staffer (c) was part of the committee's sub group work group's recommendation but there was still some moving ambiguity is the best I can put it.

"[Commissioner] So any thought that this sub group that the work group ought to have a chance to discuss 2(c) further or at all or.

"[DLCD Staff] Well I think that you know I guess I'm speaking out of school here because I wasn't on the work group but I think it's clearly the intent of the work group that you limit the size of these places of assembly because that was the basis on which the new facilities could be established and so it seems contrary to allow existing facilities to expand beyond that.

"So to me it's clear that was [the working group's] intent was to limit the ability of existing facilities to grow to an urban scale rather than a rural scale.

"[Commissioner] Subject to the non-conforming use stuff in 215.130 which you described earlier.

"[Director] No.

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[12] We understand the referenced uncomfortableness to be with the language "[e]xisting facilities wholly within a farm use zone may be maintained, enhanced or expanded on the same tract, subject to other requirements of law[.]" which appeared in the original version of the OAR 660-033-0130(2) three-mile rule, the original OAR 660-033-0180(18) and the HB 3099 amendments codified at OAR 660-033-0180(18)(a), and ultimately was included in OAR 660-033-0130(2)(c). As we have noted, the director and staff apparently understand that language to be reference to ORS 215.130 which governs alterations of nonconforming uses, and consider the references to be unnecessary and duplicative.

"No they intended I think Hanley is correct *they intended to put a hard cap on existing uses* [emphasis added].

"[Commissioner] Right.

"[Director] On existing uses.

"They tried to quantify urban vs. rural.

"[Commissioner] So 2(c) doesn't do what you want?

"[Commissioner] No, I think 2(c) accomplishes that the problem is that [it] is more restrictive than 18(a) which is what is authorized on high-value land.

"[DLCD Staff] And simply that they're different.

"[Director] So my recommendation is I think the non-conforming as I've said before I think the non-conforming use provisions in division 33 need attention and harmonization. This is not the rule making to do that in. I would recommend that you go forward and adopt the rules that are proposed today frankly with the 2(c) provision in it, but with direction to staff to as part of housekeeping rule making on division 33 to address, readdress the non-conforming issues generally in division 33 including this one in particular.

"[Commissioner] So let me 18 or rather 2(c) would say the same as 18(a) and including this phrase 'subject to other requirements of law.'

"[Director] No.

"[Commissioner] 2(c) does not have a subject to other requirements of law?

"[Director] Yes it does.

"It does *but it also says in addition to that you also can't go over 100* [emphasis added].

"[Commissioner] Right.

"Right and where Richard says that there's similarity is then you go to 215.130 and it says you can't have additional impacts as a result of the expansion *where 2(c) says there's a hard and fast number 100 you can't go above 100* [emphasis added] for the place of assembly and so we've quantified what that we believe that impact to neighboring properties we expect the impact to be and there is the risk until we revise high-value or no until we revise non-conforming uses there's a risk that you could have a facility that was larger on high-value than you could have on other.

"[Director] Although you I would note that it would be high-value farmland beyond.

"[DLCD Staff] Beyond.

"Beyond three miles.

"[Commissioner] Okay.

"Great.

"I think we can get out of this.

"I think we have to adopt the (c) language the 2(c) language that Michael read to us and recognize that there's a disharmony between a the high-value farmland other EFU land and that that needs to be resolved—should be resolved in a later rule making.

"[Director] So just on that last point remember that these uses are not allowed at all on high-value farmland regardless of how far they are from the UGB.

"[Commissioner] New uses.

"[Director] New uses.

"[DLCD Staff] New uses.

"[Commissioner] Yeah the only thing we're talking about in high-values is.

"Existing.

"Is the opportunity to expand existing.

"[Director] Right.

"[DLCD Staff] Yeah.

"[Commissioner] But that's not limited to three miles.

"[Director] And that should be addressed in a general if you want to get into a policy making non-conforming uses you should do policy making.

"[Commissioner] Yep.

"[Director] But do it in a separate.

"[Commissioner] Well and give notice.

"[Director] Yep.

"[Commissioner] So I'm uncomfortable about doing this without the work group and so again your thoughts about that.

"It seems like its significant.

"[DLCD Staff] Well one I think that the work group worked to the end of its workable life on one hand. Two if you adopt 2(c) I think you'll be in harmony with what they recommended if you don't do that I suppose it's an open question so if you go in that direction I'm pretty comfortable that's what they intended." LCDC June 2, 2010 hearing, 68:49 – 75:53.

LCDC then proceeded to adopt the three-mile rule amendments, including OAR 660-033-0130(2)(c).

The above discussion is at times difficult to follow. It is clear LCDC was concerned with the potentially different treatment under the proposed rules for existing structures on high-value farm land and existing structures on non-

high-value farm land. But it is equally clear from the above that LCDC made a decision to wait until a future date to address that different treatment of existing structures on high-value farmland.[13] But that discussion about high-value farm land structures and the, at times, confusing discussion about the relationship of OAR 660-033-0130(2) and (18) with the nonconforming use statute aside, one thing is clear from the above. With regard to structures that existed prior to adoption of the three-mile rule on non-high-value farmland, like Oak Hill School, the subject matter of this dispute, OAR 660-033-0130(2)(c) provides that such schools may be "maintained, enhanced or expanded on the same tract subject to other requirements of law, *but enclosed existing structures within a farm use zone within three miles of an urban growth boundary may not be expanded beyond the requirements of this rule*." (Emphasis added.) The "requirements of this rule" is a reference to the OAR 660-033-0130(2)(a) requirement that the design capacity of enclosed structures be no "greater than 100 people," and the OAR 660-033-0130(2)(b) "no less than one-half mile" spacing requirement.

Turning to the special ORS 215.135 provisions for expansion of schools that existed on January 1, 2010, those provisions were adopted to address legislative concerns about the new HB 3099 requirement that schools on EFU-

[13] LCDC apparently eliminated that different treatment at a later date by amending the Rule 0120 Table to make existing schools on high-value farm land subject to the three-mile rule.

zoned land must be "primarily for residents of the rural area in which the school is located" and perhaps concerns about new local criteria that might be adopted and applied to such existing schools. We have reviewed the hearing testimony on HB 3099 and there is no suggestion that HB 3099 was concerned with LCDC's three-mile rule, which as we have noted applied to schools in its original form at the time HB 3099 took effect and was within LCDC's authority, under the Oregon Supreme Court's *Lane County* decision, to regulate uses allowed in EFU zones more stringently than the legislature. As far as any statutory and local criteria are concerned, such existing schools may expand under the standards set out at ORS 215.130 for nonconforming uses or under the special provisions set out at ORS 215.135 and OAR 660-033-0130(18)(b)-(c). But ORS 215.135 and OAR 660-033-0130(18)(b)-(c) were not adopted to excuse existing schools from complying with LCDC's three-mile rule. The text of OAR 660-033-0130(2)(c), emphasized above, that subjects schools on non-high-value farmland to the three-mile rule is not really ambiguous. To the extent the text of OAR 660-033-0130(2)(c) is ambiguous, due to the admittedly confusing context it appears in, the legislative history confirms that LCDC intended the OAR 660-033-0130(2)(a) 100-person design limit and the OAR 660-033-0130(2)(b) "no less than one-half mile" spacing requirement to apply to expansion of such existing structures.[14] So while an existing school on farm

[14] As noted above, the DLCD Director described what became OAR 660-

land within three miles of a UGB may expand under the standards set out at ORS 215.130, that expansion may not exceed the OAR 660-033-0130(2)(a) 100 person design limit or the OAR 660-033-0130(2)(b) "no less than one-half mile" spacing requirement.

With that lengthy introduction, we turn to petitioner's assignments of error.

FIRST ASSIGNMENT OF ERROR

In its first subassignment of error, petitioner challenges the county's finding that OAR 660-033-0130(18)(b)-(c) makes it unnecessary to apply the three-mile rule in approving the requested expansion. In its second subassignment of error, petitioner argues that because it is undisputed that the existing school has a design capacity in excess of 100 persons and it is undisputed that the buildings are much closer than the minimum one-half mile spacing requirement in the three-mile rule, the appealed decision violates the three-mile rule. And in its third subassignment of error, petitioner largely restates its first subassignment of error.

033-0130(2)(c) as a "hard cap on" on expanding existing structures on non-high-value farmland, and while OAR 660-033-0130(2)(c) authorizes those schools to expand if they comply with nonconforming use standards, "it also says in addition to that you also can't go over 100[.]" And an LCDC commissioner explains that while OAR 660-033-0130(2)(c) authorizes expansion of existing structures on non-high-value farmland within three miles of a UGB if the ORS 215.130 nonconforming use standards are satisfied, "2(c) says there's a hard and fast number 100 you can't go above 100 for the place of assembly[.]"

We note that the county argues, correctly, that in another appeal brought by the same petitioner in this appeal, which concerned a different school located within three miles of a UGB, LUBA noted the existence of the HB 3099 legislation and related rules, noted that the statue and rules had been cited to the hearings officer, and then noted the statute and rules had not been addressed in the hearings officer's decision. *Landwatch v. Lane County*, 74 Or LUBA 299, 310-11 (2016). After that we suggested that ORS 215.135 and OAR 660-033-0130(18) likely would apply, in the event that the county evaluated on remand whether the school expansion could be approved as a nonconforming use. *Id*. However, the issue of whether HB 3099 and OAR 660-033-0130(18) allow an applicant to avoid the OAR 660-033-0130(2) requirement for schools on non-high-value farmland to comply with the three-mile rule was not before LUBA in that appeal, making any suggestion that the statute and related rules might do so dicta. And more importantly, in that case we did not consider the legislative history of the 2010 three-mile rule amendments, which resolve any ambiguity in OAR 660-033-0130(2)(c). That legislative history makes it clear that LCDC adopted OAR 660-033-0130(2)(c) specifically to make it clear that its three-mile rule applies to schools on non-high-value farm land within three miles of a UGB. The rule language is relatively clear, and the legislative history permits no other conclusion.

We conclude the county erroneously concluded that ORS 215.135 and OAR 660-033-0130(18)(b) and (c) make it unnecessary for Oak Hill School to

comply with the three-mile rule. And it is undisputed that (1) Oak Hill School already has a design capacity in excess of 100 students and (2) that the existing buildings are not spaced "at least one-half mile" apart. Therefore, the undisputed facts show the approved expansion violates OAR 660-033-130(2). Because the approved expansion "violates a provision of applicable law and is prohibited as a matter of law," the county's decision must be reversed. OAR 661-010-0071(1)(c). Our disposition of the first assignment of error makes it unnecessary for us to address the second assignment of error. However, in the interests of a complete adjudication in the event of appeal we briefly address the second assignments of error.

SECOND ASSIGNMENT OF ERROR

As we have already explained, HB 3099 changed schools from a subsection (1) use to a subsection (2) use and added the requirement that such a school be "primarily for residents of the rural area in which the school is located." ORS 215.213(2)(y).[15] Petitioner contends the county erred by relying on the special expansion provisions at ORS 215.135 and 660-033-0130(18)(b)-(c) to conclude the applicant need not demonstrate that the Oak Hill School is "primarily for residents of the rural area in which the school is located."

[15] The statute is reflected in the Lane Code (LC). LC 16.212(4)(b-b).

As we have already explained the special provision for expanding existing schools set out at ORS 215.135 and 660-033-0130(18)(b)-(c) was specifically adopted to allow existing schools to utilize that procedure to expand, notwithstanding that they may not comply with the HB 3099 requirement that schools must be "primarily for residents of the rural area in which the school is located."

The first subassignment of error is denied.

Petitioner cites several LC sections that repeat the statutory requirements we have already discussed and argues the county misconstrued and violated those LC provisions for the same reason the county misconstrued and violated the statutes.

This subassignment of error is duplicative of the first assignment of error, and we do not consider it further.

The second assignment of error is denied.

The county's decision is reversed.