

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

07/30/18 PM 1:17 LUBA

3
4 SHELLEY WETHERELL,
5 *Petitioner,*

6
7 vs.

8
9 DOUGLAS COUNTY,
10 *Respondent.*

11
12 LUBA No. 2018-033

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from Douglas County.

18
19 Andrew Mulkey, Eugene, filed the petition for review on behalf of
20 petitioner.

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22 No appearance by Douglas County.

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24 RYAN, Board Chair; BASSHAM, Board Member; ZAMUDIO Board
25 Member, participated in the decision.

26
27 REMANDED 07/30/2018

28
29 You are entitled to judicial review of this Order. Judicial review is
30 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a pre-application worksheet approving interior alterations to a portion of an existing 2,076 square foot church to add a bedroom, kitchen and bathroom.

FACTS

The subject church is located on a 1.44-acre parcel zoned Exclusive Farm Use-Cropland (FC-3) and includes a floodplain overlay. Petitioner's property is adjacent to the church parcel. The church is a 2,076 square foot structure, and an agent of the church submitted a request to convert 510 square feet of the church to a bedroom, kitchen and bathroom, which the applicant described in the application as a "parsonage." The term "parsonage" is not defined in the Douglas County Land Use and Development Ordinance or in state law, but as we understand the proposal, the kitchen, bedroom, and bathroom would be used for the residence of the church's parson, pastor, or religious leader, and the kitchen would also be used by churchgoers. The planning department approved the request in a one-page "Planning and Sanitation Pre-Application Worksheet," and petitioner appealed that decision to LUBA.

FIRST ASSIGNMENT OF ERROR

Petitioner's first assignment of error includes four subassignments of error. We address the third subassignment of error.

1 **A. Third Subassignment of Error**

2 The county’s decision identifies no criteria that apply to the proposed
3 use, and the county’s theory for approving the proposed use without providing
4 notice and an opportunity for a hearing is not apparent from the decision. In her
5 third subassignment of error, petitioner argues that the county erred in failing to
6 follow the procedures in ORS 215.416(11) that apply to decisions on an
7 application for a “permit” as defined in ORS 215.402(4), and that failure
8 prejudiced her substantial right to notice of the decision and the opportunity to
9 request an appeal hearing.¹ ORS 197.835(9)(a)(B). According to petitioner, the
10 proposed conversion of a portion of the church to include a bedroom, kitchen
11 and bathroom for use by the church’s pastor qualifies as a proposal for a
12 nonresource dwelling on land zoned exclusive farm use (EFU), and the county
13 failed to determine whether the proposed use meets the criteria for a
14 nonresource dwelling at ORS 215.284 and the county’s implementation of that
15 statute, at LUDO 3.43.100.1. Petitioner argues that because the proposal is for
16 a nonresource dwelling on EFU land, the county was required to process the
17 application according to the procedures for processing a nonfarm dwelling at
18 LUDO 2.060.1.

¹ ORS 215.402(4) defines “permit” in relevant part to mean “discretionary approval of a proposed development of land under ORS 215.010 to 215.311, 215.317, 215.327 and 215.402 to 215.438 and 215.700 to 215.780 or county legislation or regulation adopted pursuant thereto.”

1 We agree with petitioner that the application for the proposed parsonage
2 is an application for a “permit” as defined in ORS 215.402(4) that requires the
3 county to either hold a public hearing on the application (ORS 215.416(3)),
4 or provide notice of the decision and the opportunity to request a *de novo*
5 hearing (ORS 215.416(11)).² That is because the county’s decision does not
6 identify, and we cannot imagine, any theory under which the proposed
7 parsonage could be approved or denied that does not require the application of
8 one or more land use standards that require the exercise of “discretion[]” to
9 approve “a development of land.” ORS 215.402(4); *see* n 1.

10 It is not clear to us that petitioner is correct that the proposed use must be
11 evaluated and approved or denied under the criteria that apply to a nonfarm
12 dwelling at LUDO 3.43.100.1, which implements ORS 215.284. But assuming
13 that is the case, there is no question that those land use standards require the

² ORS 215.416 provides in relevant part:

“(3) Except as provided in subsection (11) of this section, the hearings officer shall hold at least one public hearing on the application.

“ * * * * *

“(11)(a)(A) The hearings officer or such other person as the governing body designates may approve or deny an application for a permit without a hearing if the hearings officer or other designated person gives notice of the decision and provides an opportunity for any person who is adversely affected or aggrieved, or who is entitled to notice under paragraph (c) of this subsection, to file an appeal.”

1 exercise of discretion in approving the development of land. For example,
2 determining whether the dwelling will “force a significant change in or
3 significantly increase the cost of accepted farming or forest practices on nearby
4 land devoted to farm or forest uses,” and whether the dwelling is located on
5 land that is “generally unsuitable for the production of farm crops and livestock
6 or merchantable tree species, considering the terrain, adverse soil or land
7 conditions, drainage and flooding, vegetation, location and size of the tract[]”
8 requires the exercise of discretion. LUDO 3.43.100.1(a) and (b) (footnote
9 omitted).

10 Further, it is possible, even probable, that any application for a proposed
11 residential use associated with a church must be evaluated under the standards
12 at ORS 215.441. ORS 215.441(1) provides that if a church is allowed on real
13 property, the county must allow “the reasonable use of the real property for
14 activities customarily associated with the practices of the religious activity,
15 including[.]” What follows is a non-exclusive list of activities, including “(g) []
16 providing housing or space for housing in a building that is detached from the
17 place of worship,” subject to a number of restrictions. Even if the application
18 proposes an activity that is authorized pursuant to ORS 215.441(1) as “the
19 reasonable use of the real property for activities customarily associated with the
20 practices of the religious activity[.]” determining what the “reasonable use of
21 the real property” is, and what activities are “customarily associated” with the
22 church’s practices is an exercise which clearly requires discretion.

1 Remand is required in order for the county to process the application
2 according LUDO procedures that apply to permits. In doing so, the county
3 must necessarily articulate what land use category the proposed parsonage
4 belongs to under the LUDO and state law, and therefore what standards apply
5 to approve or denial of that use.

6 The third subassignment of error under the first assignment of error is
7 sustained.

8 **B. First, Second, and Fourth Subassignments of Error**

9 In her first subassignment of error, we understand petitioner to argue that
10 if the county approves the application, the “church[]” is no longer a use
11 permitted without restriction in the EFU zone under ORS 215.283(1)(a). In her
12 second subassignment of error, petitioner argues that ORS 215.441(1)(g) does
13 not authorize the proposed residential use of the existing church and that it
14 does not authorize a combined single building that includes a church and
15 residence. In her fourth subassignment of error, petitioner argues as an
16 alternative to her third assignment of error that ORS 215.284 does not
17 enumerate as an allowed use on EFU land a residence for a church’s pastor,
18 which, as noted, the county and the applicant term a “parsonage.”

19 We sustain the third subassignment of error, and remand is required in
20 order for the county to process the application according to the procedures for
21 permits. That process may result in different and additional arguments and
22 evidence regarding the application and the county’s decision. Accordingly, it

1 would be premature for us to address petitioner's remaining subassignments of
2 error. Therefore, we do not reach the first, second, or fourth subassignments of
3 error.

4 The county's decision is remanded.