**BEFORE THE BOARD OF COMMISSIONERS OF LANE COUNTY, OREGON**

**ORDER NO:** 17-04-04-13

IN THE MATTER OF ELECTING WHETHER OR NOT TO HEAR AN APPEAL OF A HEARINGS OFFICIAL DECISION APPROVING A SPECIAL USE PERMIT FOR AN EXPANSION OF AN EXISTING (K-12) SCHOOL IN THE EXCLUSIVE FARM USE (E-25) ZONE; ASSESSOR'S MAP 18-03-14-00-002500 AND 2501; (File No. 509-PA16-05321/Oak Hill School)

**WHEREAS,** the Lane County Hearings Official has made a determination approving a special use permit to expand an existing school in Department File No. 509-PA16-05321; and

**WHEREAS,** the Lane County Planning Director has received an appeal of the Hearings Official's decision to the Board of County Commissioners pursuant to LC 14.515(3)(f)(ii); and

**WHEREAS,** the Lane County Hearings Official has affirmed his decision on the application after reviewing the appeal in File No. 509-PA16-05321; and

**WHEREAS,** Lane Code 14.600 provides the procedure and criteria that the Board follows in deciding whether or not to conduct an on the record hearing for an appeal of a decision by the Hearings Official; and

**WHEREAS,** the Board of County Commissioners has reviewed this matter at a public meeting of the Board.

**NOW, THEREFORE,** the Board of County Commissioners of Lane County **ORDERS** as follows:

1. The appeal does not comply with the criteria of Lane Code 14.600(3) and arguments on the appeal should therefore not be considered. Findings in support of this decision are attached as Exhibit "A."

2. The Lane County Hearings Official decision dated February 14, 2017, and the letter affirming the decision dated March 1, 2017, attached as Exhibit "B," which found relevant approval criteria are met, are affirmed and adopted by the Board of County Commissioners as the County's final decision. The Board of County Commissioners has reviewed the appeal and the Hearings Official decision and expressly agrees with and adopts the interpretations made by the Hearings Official in the decision.

**ADOPTED** this 4th day of April, 2017

Pat Farr, Chair
Lane County Board of Commissioners

APPROVED AS TO FORM
Date 3-27-17
LANE COUNTY OFFICE OF LEGAL COUNSEL

## ORDER EXHIBIT "A"

## FINDINGS IN SUPPORT OF THE ORDER

1. The property subject to this application, hereinafter referred to as the "subject property," can be identified as tax lots 2500 and 2501, assessor's map 18-03-14 and is zoned (E-25) Exclusive Farm Use. It is 61.86 acres in size and is a private (K-12) school campus. The subject property is located due east of the Lane Community College campus and west of Interstate 5 southbound. The subject property has a physical address of 86397 Eldon Shafer Drive, Eugene OR 97405.

   The Applicant has requested approval of a special use permit to expand Oak Hill School, an existing private school. Oak Hill School is located within three miles of the Springfield Urban Growth Boundary and contains enclosed structures that individually and collectively have a design capacity in excess of 100 people. The request is to construct one new structure and to expand two existing structures totaling 9,500 square feet of floor area. At their nearest points, the proposed structures are at least 52' from adjoining property lines.

   The school provides a unique independent educational resource to the residents of Lane County; including residents from Oakridge, Noti, Monroe and elsewhere within County jurisdictional boundaries. The school was established and has been in continuous operation under the same use and on the same tract since 1994. The property has been in the same ownership since 2001.

2. The subject property is bordered to the north by lands zoned Exclusive Farm Use (E-25), by property to the south zoned Impacted Forest Lands (F-2), by Lane Community College zoned Public Facilities (PF) to the west and Interstate I-5 to the east. The site does not contain any areas designated on the Department of Fish and Wildlife Habitat Maps as Major Big Game.

3. Forty-two percent of the subject property are Agricultural Class IV soils (Dixonville-Philomath-Haxelair complex, 12-35 percent slope) and the remainder are Agricultural Class VI soils. The subject property contains no mapped high value farmland soils.

4. The Oak Hill School was approved in 1994 under the provisions of ORS 215.213(1)(a). It is located within three miles of the Springfield Urban Growth Boundary and contains enclosed structures that individually and collectively have a design capacity in excess of 100 people. ORS 215.213(1)(a) was effectively changed in 2010 through the passage of Chapter 850, Section 14, Oregon Laws 2009, to delete that portion of the provision that allowed schools. Section 14 of that legislation also created ORS 215.135.

5. The Hearings Official found and the Board agrees that first the limitation of OAR 660–033–0130(2)(c) on the expansion of enclosed existing structures is qualified as being "beyond the requirements" of OAR 660–033–0130. Within these parameters is OAR 660–033–0130(18)(b) and (c), which explicitly allow the expansion of a nonconforming school located within three miles of an urban growth boundary that was made nonconforming by the revision of ORS 215.213(1)(a).[1] Second, any confusion about the intent of OAR 660–033–0130(2) is clarified by ORS 215.135, which allows the alteration and expansion of nonconforming uses formerly allowed under ORS 215.213(1)(a) if the expansion concerns a use established prior to January 1, 2009 and the use is located on a tax lot that was established prior to January 1, 2009. In 2009, LCDC modified OAR 660–033–0130(18) (effective January 1, 2010) to reflect this statutory change. Legislative history supports this conclusion.[2]

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[1] See *LandWatch Lane County v. Lane County*, LUBA No. 2016–038(2016).

[2] Agenda Item 6, November 5-6, 2009 Land Conservation and Development Commission meeting (October 23, 2009), Pg 4.

6. The Hearings Official found and the Board agrees that OAR 660–033–0130(18)(b) and (c) is an exception to the more rigorous standards of OAR 660–033–0130(2) and (5) and is intended to implement ORS 215.135. This exception applies to schools made nonconforming by the amendment to ORS 215.213(1)(a) if the school was created prior to January 1, 2009 and the proposed expansion occurs on a tax lot on which the use was established and that was created prior to January 1, 2009. The proposed use meets these criteria.

7. The Hearings Official found and the Board agrees that the OAR 660–033–0120 table states that churches on non–high value farmland have to comply with Section (2) of OAR 660–033–0130 but do not cite (18)(b–c). Under standard judicial procedure, LandWatch would not have standing to raise this issue as it is not a religious assembly or institution. *Lighthouse Institute for Evangelism v. City of Long Branch*, 510 F3d 253, 270 (3rd Cir 2007), *cert den* 128 S Ct 2503, 171 L Ed 2d 787 (2008). In Oregon, however, you have standing if you appear before the local government decision–maker.[3] Nevertheless, having standing does not guarantee that all issues are ripe for review. In the present case, neither the Applicant nor the Appellant is a religious assembly or institution and therefore the claim that OAR 660–033–0120 violates 42 USC 2000cc–(b)(1) is speculative. Indeed, there is no evidence in the record that there are any religious assemblies in Oregon that are in the same situation as the Applicant. It should also be pointed out that ORS 215.130 allows nonconforming uses located within a farm zone to be expanded[4] and this is an option that might be used to cure any nonconformity with RLUIPA. Even if the Appellant were correct in its assessment that OAR 660–033–0130 (18)(b–c) violates the "equal terms" clause of RLUIPA, the issue is not ripe for consideration in this proceeding.

8. The Hearings Official found and the Board agrees that the applicant school was made a nonconforming use within the EFU zone with the amendment of ORS 215.213(1)(a). ORS 215.235 and OAR 660–033–0130(18)(b–c) explicitly provide an exception to the standards of OAR 660–033–0130(2)(b) if a school was established prior to 2009 and the expansion will occur on a tax lot created prior to 2009 and upon which that use was established. The Oak Hill school meets this exception and therefore does not have to meet the standards set out in OAR 660–033–0130(2)(b).

9. The Hearings Official found and the Board agrees that Oak Hill qualifies under the exception language of ORS 215.235 and OAR 660–033–0130(18)(b–c).

10. The Hearings Official found and the Board agrees that if a school does not qualify under OAR 660–033–0130(18)(c) because it was established after January 1, 2009, it could still apply under ORS 215.130 for an expansion.

    ORS 215.130(9) provides that the alteration of a nonconforming use, through a change in the use or a structure, may not have a greater adverse impact on the neighborhood. Even if this provision were an applicable approval criterion, the Applicant has pointed out that Oak Hill school is bordered by forest property owned by Lane Community College that has not changed during the duration of the school's tenure; Lane Community College itself; uncultivated E–25 zone land; and Interstate–5 and a mixture of residential and commercial properties. Increased traffic is estimated by Lane County Transportation staff to be less than the 50 vehicles per peak hour trip necessary to require a transportation impact study. No evidence has been submitted into the record to refute the Applicant's conclusion that the school has not had an adverse impact on the neighborhood in the past nor will it in the future after the proposed expansion.

11. The Hearings Official found and the Board agrees that Lane Code 16.212(4)(b–b) is written in a confusing manner and tends to conjoin sections of OAR 660–033–0130(2) and (18) in a

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[3] ORS 197.830(2)(b).
[4] See OAR 660–033–0130(18)(b).

manner that does not reflect the clear intent of the administrative rule or ORS 215.135. That is, LC 16.212(4)(b–b) lists certain requirements for public or private schools (through grade 12) in EFU–zones that primarily are for residents of the rural area in which the school is located. These requirements include provisions that the school may not be located on high value farmland, that they comply with LC 16.212(10(f) through (g), and that they not have an enclosed structure or structures that have a design capacity greater than 100 people or structures that are not separated by at least one–half mile. The forth requirement, however, replicates OAR 660–033–0130(18) and ORS 215.135 in that it carves out an exception for schools made nonconforming by the amendment of ORS 215.213(1)(a). Unfortunately, the exception is placed in the center of requirements that apply to new schools located on EFU–zoned property and non–conforming schools that have enclosed structures that have not exceeded the design capacity limitations of LC 16.212(4)(b–b)(v). The incongruity is that a school that qualifies under LC 16.212(4)(b–b) was not required to primarily serve rural residents or to meet design standards if it was created prior to 2009.

Rules of statutory construction require, if possible, that statutory provisions should be read together to be consistent. If the requirements of OAR 660–033–0130(2)(c) were absolute, then the provisions of OAR 660–033–0130(18)(b) would be superfluous. [The] explicit intent of ORS 215.135 and OAR 660–033–0130(18) [is] to provide an exception to all schools made nonconforming by the revision of ORS 215.213(1)(a)

12. The Planning Director was correct in granting conditional approval for the expansion of Oak Hill School, authorized by ORS 215.135 and OAR 660–033–0130(18)(b)(B), and consistent with the criteria of OAR 660–033–0130(18)(c) and Lane Code 16.212(4)(b–b)(iv).

13. On April 21, 2016, the applicant submitted a request to expand an existing (K-12) private school in the Exclusive Farm Use (E-25) zone to Lane County Land Management Division. Specifically, the applicant requested to construct one new structure and to expand two existing structures totaling 9,500 square feet of floor area.

14. On May 18, 2016, staff reviewed the application materials and deemed the application incomplete as the submission contained insufficient information for staff to make a determination on the completeness of the application. On June 20, 2016, staff deemed the application complete and subsequently sent referrals requesting comments about the proposal on July 8, 2016.

15. On November 7, 2016, the Planning Director issued a determination that the subject property complied with the applicable standards and criteria for the proposed expansion pursuant to LC 16.212(4) (b-b) and OAR 660-033-0120 and 0130. Notice of the determination was mailed to surrounding property owners. On November 21, 2016, a timely appeal was submitted by LandWatch Lane County and Robert Emmons. Notice of public hearing on the appeal was mailed on December 12, 2016.

16. On January 19, 2017, the Lane County Hearings Official conducted a public hearing. The written record was held open until January 26, 2017, with opportunity for rebuttal on February 2, 2017 and applicant's final written argument by February 9, 2017. On February 14, 2017, the Lane County Hearings Official issued a decision approving the application. Notice of the Hearings Official's decision was mailed to the applicant and all parties of on the same day.

17. On February 27, 2017, the appellant filed a timely appeal and requested that the Board of County Commissioners not conduct a hearing on the appeal and deem the Hearings Officer's decision the final decision of the County, pursuant to LC 14.515(3)(f)(ii).

18. On March 1, 2017, the Hearings Official reviewed the appeal and affirmed his decision without further consideration pursuant to LC 14.535(1).

19. The Appellant requested that portions of the Applicant's second supplemental submission, dated February 2, 2017 and in its Final Argument, dated February 7, 2017, be redacted as not being responsive to the open record directives agreed to by the parties and ordered by the Hearings Official. A description of the open record directive is as follows:

    At the January 19, 2017 appeal hearing on this matter, the record was held open until February 9, 2017. The parties were given until the end of business day on January 26, 2017 to submit new evidence. They then had until the end of business day on February 2, 2017 to review and comment on the other's prior submission. The intent of the directive for this second phase of the open record period was to restrict new evidence and argument to that which was directly responsive to new evidence and argument placed into the record during the prior submission period. Unfortunately, the directive was excessively curt and merely noted that the second phase would be limited to "cross rebuttal." Finally, the Applicant was given until February 9, 2017, for final argument.

    The Applicant cites the Marr decision for the proposition that a party may only respond to arguments and evidence submitted in the first open record period. The text of that decision does not address this issue but in that proceeding the Hearings Official did clarify via email during the open record period that the materials filed during the second open record period must be responsive to the other party's submission during the first open record period. If one party did not make a submission then the other party was prohibited from filing supplemental material during that period. The ruling did not restrict the applicant in that case from making any argument in support of the application or in opposition to the appeal during the final rebuttal period.

    In the present case, the Appellant has objected to the Applicant's submission of argument during the second submission period; arguing that it was not directly responsive to new evidence submitted by the Appellant during the first submission period. I believe that the Appellant is essentially correct in that the intent of the second phase of the open record period was to allow the parties to response to the submissions during the first phase. I am not going to examine the Appellant's suggested redaction in detail because it was mooted by the inclusion of the same materials in the Applicant's final argument.

    The Appellant, however, also objects to the inclusion of the same arguments in the Applicant's final argument, essentially arguing that it has a right to respond them as if they were new evidence. The Applicant is correct in its understanding that ORS 197.763(6)(e) only prohibits new evidence during final written argument but places no limitation on the nature of argument. The arguments presented by the Applicant in its final argument was directly responsive to issues raised by the Appellant and did not rely upon any evidence that was not already in the record. I fail to see how the Appellant was substantially prejudiced by argument that addressed its allegations of error. The motion to redact the Applicant's final argument and exclude it from the record is denied."

20. In order for the Board to hear arguments on the appeal, Lane Code 14.600(3) requires one or more of the following criteria to be found by the Board to apply to the appeal:
    - *The issue is of Countywide significance.*
    - *The issue will reoccur with frequency and there is a need for policy guidance.*
    - *The issue involves a unique environmental resource.*
    - *The Planning Director or Hearings Official recommends review.*

21. The Board finds that the issues involved in this appeal are not of Countywide significance. The issues in this appeal are focused on a distinctly narrow scope; very few schools operate outside the urban growth boundaries of cities in Lane County and even fewer are within three miles of a particular city's urban growth boundary. The Hearings Official's decision represents a reasonable interpretation of Lane Code 16.212(4)(b-b) and the guiding Oregon

Administrative Rule and Statute. The Planning Director does not find that the implications of this decision are of such import that they would demonstrate Countywide significance.

22. The Board finds that the issues involved in this appeal will not reoccur with frequency and that there is not a need for further policy guidance. As mentioned above, the issues in this appeal are narrow in in scope and applicability. Requests for Special Use Permits to expand schools are relatively uncommon land use applications. The majority of schools in Lane County's jurisdictional boundaries are typically located within unincorporated cities such as Pleasant Hill, Elmira and Marcola. These communities do not have urban growth boundaries associated with them and therefore are not subject to the same standards and review criteria presented in this case.

    The Hearings Official's decision represents a reasonable interpretation of Lane Code 16.212(4)(b-b) and the guiding Oregon Administrative Rule and Statute.

    In the event that a comparable proposal and fact pattern comes before the Land Management Division, the Hearings Official's decision provides sufficient guidance. Therefore, the Planning Director finds that there is not a need for further policy guidance.

23. The Board finds that the issues raised in this appeal do not relate to, or involve, a unique environmental resource. The property does not contain any unique or notable environmental resources, nor does it contain any regulated water bodies, rivers, creeks, or wetlands. Soils present on the property are not highly productive agricultural soils.

24. The Planning Director does not recommend review of the appeal on the record for the reasons cited above.

25. To meet the requirements of Lane Code 14.600(2)(b), the Board is required to adopt a written decision and order electing to have a hearing on the record for the appeal or declining to further review the appeal.

26. The Board has reviewed this matter at its meeting on January 31, 2017, and finds that the appeal does not comply with the criteria of Lane Code Chapter 14.600(3), declines further review, and elects not to hold an on the record hearing for the appeal.

27. The Board affirms and adopts the Lane County Hearings Official decision dated February 14, 2017, and the letter affirming the decision dated March 1, 2017, as the County's final decision in this matter, and expressly agrees with and adopts the interpretations made by the Hearings Official in the decision.

EXHIBIT B

LCOG
Working Together
FOR OUR COMMUNITY

March 1, 2017

Ms. Lydia McKinney, Manager
Land Management Division
3050 N. Delta Highway
Eugene, OR 97408

Re: *Appeal of Hearings Official decision affirming the Planning Director's approval of the Oak Hill request (PA 16–05321) for a special use permit for the expansion of an existing school on tax lots 2500 and 2501, assessor's map 18–03–14.*

Dear Ms. McKinney:

On February 14, 2017, I affirmed the Planning Director's approval of the Oak Hill request (PA 16–05321) for a special use permit for the expansion of an existing school on tax lots 2500 and 2501, assessor's map 18–03–14. On February 27, 2017 LandWatch Lane County appealed my decision. Upon a review of this appeal, I find that the allegations of error have been adequately addressed in that decision and that a reconsideration is not warranted.

Accordingly, on the authority of Lane Code 14.535(1), I shall affirm my February 14, 2017 decision without further consideration. Please advise interested parties of this decision.

Sincerely,

Gary L. Darnielle
Lane County Hearings Official

cc: Erik Forsell (file)

LCOG
WorkingTogether
FOR OUR COMMUNITY

February 14, 2017

Ms. Lydia McKinney, Division Manager
Land Management Division
3050 N. Delta Highway
Eugene, OR 97408

*Re: Appeal of a Planning Director approval of a request (PA 16–05321) to expand an existing school in an EFU District.*

Dear Ms. McKinney:

Please find the Lane County Hearings Official's decision affirming the Planning Director's approval of the Oak Hill (Bob Sarkisian) request (PA 16–05321) to expand an existing school in an EFU District.

Sincerely,

Gary L. Darnielle
Lane County Hearings Official

cc: Erik Forsell (file)

## LANE COUNTY HEARINGS OFFICIAL

## APPEAL OF PLANNING DIRECTOR APPROVAL OF THE EXPANSION OF AN EXISTING SCHOOL IN AN EXCLUSIVE FARM USE ZONE

### Application Summary

Bob Sarkisian of Oak Hill School, Inc., 86397 Eldon Schafer Drive, Eugene, OR 97405. This appeal concerns the Planning Director's approval to construct one new structure and to expand two existing structures, totaling 9,500 square feet of floor area, for an existing school in the Exclusive Farm Use Zone, pursuant to Lane Code 16.212(4)(b-b) and OAR 660-033-0120 and 0130.

The application was submitted to the Lane County Land Management Division on April 12, 2016. It was deemed incomplete on May 18, 2016. Additional materials were submitted by the Applicant on June 23, 2016 and the application was determined to be complete on June 30, 2016. On November 17, 2016 the Director approved the application and a timely appeal was filed on November 21, 2016 by LandWatch Lane County.

### Parties of Record

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|---|---|---|
| Bob Sarkisian | Liam Sherlock | LandWatch Lane County |
| Salvatore Catalano | Sean Malone | Cynthia Morris |
| Jesse Elliott | | |

### Application History

Hearing Date: January 19, 2017
(Record Held Open Until February 8, 2017)

Decision Date: February 14, 2017

### Appeal Deadline

An appeal must be filed within 12 days of the issuance of a final order on this rezoning request, using the form provided by the Lane County Land Management Division. The appeal will be considered by the Lane County Board of Commissioners.

### Statement of Criteria

LC 16.212(4)(b–b)
Lane Code 16.212(10)(a)–(d) & (f)–(h)
ORS 215.135
OAR 660–033–0120 & 0130

## Findings of Fact

1. The property subject to this application, hereinafter referred to as the "subject property," can be identified as tax lots 2500 and 25013, assessor's map 18–03–14 and is zoned E–25 Exclusive Farm Use. It is 61.86 acres in size and is a private (K–12) school campus. The subject property is located due east of the Lane Community College campus and west of Interstate 5 southbound. The subject property has a physical address of 86397 Eldon Shafer Drive, Eugene OR 97405.

   The Applicant has requested approval of a special use permit to expand Oak Hill School, an existing private school. Oak Hill School is located within three miles of the Springfield Urban Growth Boundary and contains enclosed structures that individually and collectively have a design capacity in excess of 100 people. The request is to construct one new structure and to expand two existing structures totaling 9,500 square feet of floor area. At their nearest points, the proposed structures are at least 52' from adjoining property lines.

   The school provides a unique independent resource to the residents of Lane County; including residents from Oakridge, Noti, Monroe and elsewhere within County jurisdictional boundaries. The school was established and has been in continuous operation under the same use and on the same tract since 1994. The property has been in the same ownership since 2001.

2. The subject property is bordered to the north by lands zoned Exclusive Farm Use (E–25), by property to the south zoned Impacted Forest Lands (F–2), by Lane Community College zoned Public Facilities (PF) to the west and Interstate I–5 to the east. The site does not contain any areas designated on the Department of Fish and Wildlife Habitat Maps as Major Big Game.

3. Forty–two percent of the subject property are Agricultural Class IV soils (Dixonville-Philomath–Haxelair complex, 12–35 percent slope) and the remainder are Agricultural Class VI soils. The subject property contains no mapped high value farmland soils.

## Decision

THE PLANNING DIRECTOR'S APPROVAL OF THE SARKISIAN REQUEST (PA 16–05321) FOR THE EXPANSION OF AN EXISTING SCHOOL IN AN EXCLUSIVE FARM USE ZONE IS AFFIRMED.

## Motions to Redact/Strike

The Appellant has requested that portions of the Applicant's second supplemental submission, dated February 2, 2017 and in its Final Argument, dated February 7, 2017, be redacted as not being responsive to the open record directives agreed to by the parties

and ordered by the Hearings Official. A description of the open record directive is as follows:

At the January 19, 2017 appeal hearing on this matter, the record was held open until February 9, 2017. The parties were given until the end of business day on January 26, 2017 to submit new evidence. They then had until the end of business day on February 2, 2017 to review and comment on the other's prior submission. The intent of the directive for this second phase of the open record period was to restrict new evidence and argument to that which was directly responsive to new evidence and argument placed into the record during the prior submission period. Unfortunately, the directive was excessively curt and merely noted that the second phase would be limited to "cross rebuttal." Finally, the Applicant was given until February 9, 2017 for final argument.

The Applicant cites the *Marr* decision[1] for the proposition that a party may only respond to arguments and evidence submitted in the first open record period. The text of that decision does not address this issue but in that proceeding the Hearings Official did clarify via email during the open record period that the materials filed during the second open record period must be responsive to the other party's submission during the first open record period. If one party did not make a submission then the other party was prohibited from filing supplemental material during that period. The ruling did not restrict the applicant in that case from making any argument in support of the application or in opposition to the appeal during the final rebuttal period.

In the present case, the Appellant has objected to the Applicant's submission of argument during the second submission period; arguing that it was not directly responsive to new evidence submitted by the Appellant during the first submission period. I believe that the Appellant is essentially correct in that the intent of the second phase of the open record period was to allow the parties to response to the submissions during the first phase. I am not going to examine the Appellant's suggested redaction in detail because it was mooted by the inclusion of the same materials in the Applicant's final argument.

The Appellant, however, also objects to the inclusion of the same arguments in the Applicant's final argument, essentially arguing that it has a right to respond them as if they were new evidence. The Applicant is correct in its understanding that ORS 197.763(6)(e) only prohibits new evidence during final written argument but places no limitation on the nature of argument. The arguments presented by the Applicant in its final argument was directly responsive to issues raised by the Appellant and did not rely upon any evidence that was not already in the record. I fail to see how the Appellant was substantially prejudiced by argument that addressed its allegations of error. *The motion to redact the Applicant's final argument and exclude it from the record is denied.*

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[1] *Application of Jeannie Marr*, Lane County Hearings Official decision in PA 16–05388 (August 11, 2016)

**Justification for the Decision (Conclusion)**

The Oak Hill School was approved in 1994 under the provisions of ORS 215.213(1)(a). It is located within three miles of the Springfield Urban Growth Boundary and contains enclosed structures that individually and collectively have a design capacity in excess of 100 people. ORS 215.213(1)(a) was effectively changed in 2010 through the passage of Chapter 850, Section 14, Oregon Laws 2009, to delete that portion of the provision that allowed schools. Section 14 of that legislation also created ORS 215.135.

***Allegation of Error #1***

The Appellant argues that OAR 660–033–0130(2)(c) prohibits the proposed expansion because it is already in excess of what is allowed by OAR 660–033–0130(2)(a) & (b). OAR 660–033–0130(2)(c) states:

> *"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."*

I believe this argument fails for two reasons. First, the limitation of OAR 660–033–0130(2)(c) on the expansion of enclosed existing structures is qualified as being "beyond the requirements" of OAR 660–033–0130. Within these parameters is OAR 660–033–0130(18)(b) and (c), which explicitly allow the expansion of a nonconforming school located within three miles of an urban growth boundary that was made nonconforming by the revision of ORS 215.213(1)(a).[2] Second, any confusion about the intent of OAR 660–033–0130(2) is clarified by ORS 215.135, which allows the alteration and expansion of nonconforming uses formerly allowed under ORS 215.213(1)(a) if the expansion concerns a use established prior to January 1, 2009 and the use is located on a tax lot that was established prior to January 1, 2009. In 2009, LCDC modified OAR 660–033–0130(18) (effective January 1, 2010) to reflect this statutory change. Legislative history supports this conclusion.[3] *This allegation of error is dismissed.*

***Allegation of Error #2***

The Appellant argues that the Planning Director only addressed the standards contained in OAR 660–033–0130(18)(b) and (c) and disregarded the standards contained in OAR 660–033–0130(2) that pertain to design capacity and half–mile separation. The Appellant notes that the Table incorporated into OAR 660–033–0130 has not changed since 2009 and requires that schools be evaluated pursuant

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[2] See *LandWatch Lane County v. Lane County*, LUBA No. 2016–038(2016).

[3] Agenda Item 6, November 5-6, 2009 Land Conservation and Development Commission meeting (October 23, 2009), Pg 4.

to all the minimum standards set out in OAR 660–033–0130(2), OAR 660–033–0130(5), and OAR 660–033–0130(18)(b–c).

OAR 660–033–0130(18)(b) and (c) is an exception to the more rigorous standards of OAR 660–033–0130(2) and (5) and is intended to implement ORS 215.135. This exception applies to schools made nonconforming by the amendment to ORS 215.213(1)(a) if the school was created prior to January 1, 2009 and the proposed expansion occurs on a tax lot on which the use was established and that was created prior to January 1, 2009. The proposed use meets these criteria. *This allegation of error is dismissed.*

***Allegation of Error #3(a)***

The Appellant argues that allowing the non-conforming school to expand is a violation of the "equal terms" provision of 42 USC 2000cc–(b)(1), that provides:

"*No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.*"

Oregon Administrative Rule 660–033–0130(2)(a) generally provides that enclosed structures with a design capacity greater than 100 people or a group of structures with a total design capacity of greater than 100 people, shall not be approved in connection with the use within three miles of an urban growth boundary without an exception to the Statewide Planning Goals.

The Appellant is arguing that Section (18)(b–c) of OAR 660–033–0130 violates the "equal terms" clause of RLUIPA because it allows nonconforming schools to expand beyond the design capacity but there is no concomitant exception for existing nonconforming churches. The OAR 660–033–0120 table states that churches on non–high value farmland have to comply with Section (2) of OAR 660–033–0130 but do not cite (18)(b–c). Under standard judicial procedure, LandWatch would not have standing to raise this issue as it is not a religious assembly or institution. *Lighthouse Institute for Evangelism v. City of Long Branch*, 510 F3d 253, 270 (3rd Cir 2007), *cert den* 128 S Ct 2503, 171 L Ed 2d 787 (2008). In Oregon, however, you have standing if you appear before the local government decision–maker.[4] Nevertheless, having standing does not guarantee that all issues are ripe for review. In the present case, neither the Applicant nor the Appellant is a religious assembly or institution and therefore the claim that OAR 660–033–0120 violates 42 USC 2000cc–(b)(1) is speculative. Indeed, there is no evidence in the record that there are any religious assemblies in Oregon that are in the same situation as the Applicant. It should also be pointed out that ORS 215.130 allows nonconforming uses located within a farm zone to be expanded[5] and this is an option that might be used to cure any nonconformity with RLUIPA. Even if the Appellant were correct in its

[4] ORS 197.830(2)(b).
[5] See OAR 660–033–0130(18)(b).

assessment that OAR 660–033–0130 (18)(b–c) violates the "equal terms" clause of RLUIPA, the issue is not ripe for consideration in this proceeding. *This allegation of error is dismissed.*

***Allegation of Error #3(b)***

The Applicant argues that the application does not comply with OAR 660–033–0130(2)(b) in that the proposed construction of one new structure and expansion of two existing structures are not separated by at least one–half mile.

This argument is addressed in the response to Allegation of Error #1. The applicant school was made a nonconforming use within the EFU zone with the amendment of ORS 215.213(1)(a). ORS 215.235 and OAR 660–033–0130(18)(b–c) explicitly provide an exception to the standards of OAR 660–033–0130(2)(b) if a school was established prior to 2009 and the expansion will occur on a tax lot created prior to 2009 and upon which that use was established. The Oak Hill school meets this exception and therefore does not have to meet the standards set out in OAR 660–033–0130(2)(b). *This allegation of error is dismissed.*

***Allegation of Error #3(c)***

The Appellant argues that the application does not comply with OAR 660–033–0130(2)(a) and (c) in that the proposed construction of one new structure and expansion of two existing structures, in concert with the existing structures, represent a group of structures with a total design capacity in excess of 100 people within three miles of an urban growth boundary. The Appellant notes that the existing structures have a collective square area of 36,400 square feet and that the proposed expansion would add an additional area of almost 10,000 square feet. The Appellant next concludes that any reasonable person would conclude that the group of school structures, before and after the expansion, exceed the 100 person design capacity standard of OAR 660–033–0130(2)(a). I agree. However, for the same reasons as in Allegations of Error #1 and #3(b), this argument must fail as Oak Hill qualifies under the exception language of ORS 215.235 and OAR 660–033–0130(18)(b–c). *This allegation of error is dismissed.*

***Allegation of Error #4***

The Appellant alleges that the Planning Director disregarded the applicable requirements of LC 16.212(4)(b–b)(v)(aa) and (bb). These requirements, which mirror those of OAR 660–033–0130(2)(a) through (c), provide:

*(v) 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 uses described in LC 16.212(4)(b-b) above within three miles of an urban growth boundary, unless an exception is approved pursuant to ORS 197.732 and OAR chapter 660, division 4, or unless the*

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

*(aa) Any enclosed structures or group of enclosed structures described in LC 16.212(4)(b-b)(v) above 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.*

*(bb) 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 LC 16.212(4)(b-b)(v) above.*

However, LC 16.212(4)(b–b)(iv), in a manner similar to ORS 215.235 and OAR 660–033–0130(18)(b–c), provide:

*"(iv) 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 public or private school formerly allowed pursuant to LC 16.212(4)(b-b), as in effect before January 1, 2010, the effective date of 2009 Oregon Laws, Chapter 850, Section 14, may be expanded subject to:*

*(aa) LC 16.212(10(f) through (g) below;*
*(bb) The public or private school was established on or before January 1, 2009; and*
*(cc) The expansion occurs on:*
*(i–i) The tax lot on which the public or private school was established on or before January 1, 2009; or*
*(ii–ii) The tax lot that is contiguous to the tax lot described in LC 16.212(4)(b–b)(iv)(cc)(i–i) above and that was owned by the applicant on January 1, 2009."*

This allegation of error is dismissed for the same reason that the Allegations of Error #1 and #3(b) were dismissed. *This allegation of error is dismissed.*

***Allegation of Error #5***

The Applicant alleges that the Planning Director misconstrued applicable law and made inadequate findings in regard to the applicable requirements of OAR 660–033–0130(18)(b). In specific, the Appellant points to OAR 660–033–0130(18)(b) that states:

> *"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, ..."*

The Appellant is apparently reading this provision to require that ORS 215.130 to be applicable, in addition to OAR 660–033–0130(18)(b)(A) and (c), to the expansion of Oak Hill school. I read the cited section as merely pointing out a separate route that may be taken to expand a school, not additional criteria that must be applied. Thus, if a school does not qualify under OAR 660–033–0130(18)(c) because it was established after January 1, 2009, it could still apply under ORS 215.130 for an expansion.

ORS 215.130(9) provides that the alteration of a nonconforming use, through a change in the use or a structure, may not have a greater adverse impact on the neighborhood. Even if this provision were an applicable approval criterion, the Applicant has pointed out that Oak Hill school is bordered by forest property owned by Lane Community College that has not changed during the duration of the school's tenure; Lane Community College itself; uncultivated E–25 zone land; and Interstate–5 and a mixture of residential and commercial properties. Increased traffic is estimated by Lane County Transportation staff to be less than the 50 vehicles per peak hour trip necessary to require a transportation impact study. No evidence has been submitted into the record to refute the Applicant's conclusion that the school has not had an adverse impact on the neighborhood in the past nor will it in the future after the proposed expansion.

*This allegation of error is dismissed.*

***Allegation of Error #6***

The Appellant argues that the application does not contain sufficient data to sustain a finding[6] that the application conforms with the requirement of Lane Code 16.212(4)(b–b)(i) that the school is primarily for residents of the rural area in which the school is located. The Appellant is correct as the record contains no statistical data that would support a conclusion that the school is "primarily for residents of the rural area in which the school is located."

Lane Code 16.212(4)(b–b) is written in a confusing manner and tends to conjoin sections of OAR 660–033–0130(2) and (18) in a manner that does not reflect the clear intent of the administrative rule or ORS 215.135. That is, LC 16.212(4)(b–b) lists certain requirements for public or private schools (through grade 12) in EFU–zones that primarily are for residents of the rural area in which the school is located. These requirements include provisions that the school may not be located on high value farmland, that they comply with LC 16.212(10(f) through (g), and that they not have an enclosed structure or structures that have a design capacity greater than 100 people or structures that are not separated by at least one–half mile. The forth requirement, however, replicates OAR 660–033–0130(18) and ORS 215.135 in that it carves out an exception for schools made nonconforming by the amendment of ORS 215.213(1)(a). Unfortunately, the exception is placed in the center of requirements that apply to new

[6] Finding #1, November 7, 2016 Staff Report.

schools located on EFU–zoned property and non–conforming schools that have enclosed structures that have not exceeded the design capacity limitations of LC 16.212(4)(b–b)(v). The incongruity is that a school that qualifies under LC 16.212(4)(b–b) was not required to primarily serve rural residents or to meet design standards if it was created prior to 2009.

Thus, the Appellant's statutory construction would limit the applicability of LC 16.212(4)(b–b)(iv) to schools established prior to 2009 that primarily served rural residents and either were not located within 3 miles of an urban growth boundary or met the design capacity standards of Lane Code 16212(4)(b–b)(v). Rules of statutory construction require, if possible, that statutory provisions should be read together to be consistent. If the requirements of OAR 660–033–0130(2)(c) were absolute, then the provisions of OAR 660–033–0130(18)(b) would be superfluous.

The Appellant's interpretation frustrates the clear and explicit intent of ORS 215.135 and OAR 660–033–0130(18) to provide an exception to all schools made nonconforming by the revision of ORS 215.213(1)(a). *This allegation of error is dismissed.*

**Conclusion**

The Planning Director was correct in granting conditional approval for the expansion of Oak Hill School, authorized by ORS 215.135 and OAR 660–033–0130(18)(b)(B), and consistent with the criteria of OAR 660–033–0130(18)(c) and Lane Code 16.212(4)(b–b)(iv).

**Respectfully Submitted,**

**Gary Darnielle**
**Lane County Hearings Official**