

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3
4 GEORGE W. FENCE,)
5)
6 Petitioner,) LUBA No. 94-137
7)
8 vs.) FINAL OPINION
9) AND ORDER
10 JACKSON COUNTY,)
11)
12 Respondent.)

15 Appeal from Jackson County.

17 George W. Fence, Ashland, filed the petition for
18 review. Tonia L. Moro, Medford, argued on behalf of
19 petitioner.

21 Georgia L. Daniels, Assistant County Counsel, Medford,
22 filed the response brief and argued on behalf of respondent.

24 KELLINGTON, Referee; HOLSTUN, Chief Referee; SHERTON,
25 Referee, participated in the decision.

27 REMANDED 03/31/95

29 You are entitled to judicial review of this Order.
30 Judicial review is governed by the provisions of ORS
31 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county ordinance regulating "mass
4 gatherings."

5 **ASSIGNMENTS OF ERROR**

6 There is an extensive statutory scheme governing the
7 regulation of outdoor mass gatherings. ORS 433.735 to
8 433.770. The challenged decision amends the Jackson County
9 Land Development Ordinance (LDO) to impose requirements
10 pursuant to ORS 433.735 to 433.770. The primary issue in
11 this appeal is the extent to which the challenged county
12 ordinance is authorized under ORS 433.735 to 433.770.
13 Petitioner also argues the challenged ordinance violates the
14 federal Religious Freedom Restoration Act of 1993.¹

15 To understand this appeal, it is necessary to outline
16 generally ORS 433.735 to 433.770. ORS 433.735(1) defines
17 "outdoor mass gathering" as follows:

18 "[U]nless otherwise defined by county ordinance, *
19 * * an actual or reasonably anticipated assembly
20 of more than 3,000 persons which continues or can
21 reasonably be expected to continue for more than
22 24 consecutive hours but less than 120 hours
23 within any three month period, and which is held
24 primarily in open spaces and not in any permanent
25 structure." (Emphases supplied.)

26 In addition, another provision within the outdoor mass

¹Petitioner also includes various constitutional arguments in his petition for review. However, because we dispose of this appeal on statutory grounds, we need not reach petitioner's constitutional arguments.

1 gathering statute, ORS 433.763, provides specific
2 requirements for large gatherings of people that are not
3 covered by the above quoted ORS 433.735 outdoor mass
4 gathering definition. Specifically, ORS 433.763 regulates
5 gatherings of more than 3,000 people for more than 120 hours
6 within any three month period. ORS 433.763 requires county
7 approval of a permit for gatherings of more than 120 hours
8 duration where the standards of ORS 433.750 and certain
9 zoning standards are met. For ease of reference from this
10 point forward, we refer to the outdoor mass gatherings
11 defined in ORS 433.735(1) as gatherings of less than 120
12 hours duration, and to the gatherings regulated by
13 ORS 433.763 as gatherings of more than 120 hours in
14 duration.²

15 Under ORS 433.750, gatherings of less than 120 hours
16 duration are subject only to specific health and safety
17 regulations adopted by the Oregon State Health Division and
18 are not subject to additional, more restrictive local
19 regulations.³ This principle was established in 1000
20 Friends of Oregon v. Wasco County, 6 Or LUBA 117 (1982),
21 aff'd 62 Or App 663 (1982) (Wasco County). While we
22 recognize Wasco County was decided under the outdoor mass

²Similarly, we use the same terms when referring to the two kinds of gatherings regulated by the challenged ordinance.

³In addition, as explained in more detail below, ORS 433.755(1) authorizes a county governing body to require that the organizers of such a gathering obtain an insurance policy of up to one million dollars.

1 gathering statute as it existed prior to 1985 amendments, we
2 do not believe the 1985 amendments to ORS 433.735 to 433.770
3 affect the regulations to which gatherings of less than 120
4 hours duration are subject under ORS 433.750. Then, as now,
5 ORS 433.750 required the issuance of an outdoor mass
6 gathering permit, if the proposed gathering meets the
7 statutory requirements for an outdoor mass gathering. In
8 other words, ORS 433.750 completely occupies the field of
9 regulation of outdoor mass gatherings of less than 120 hours
10 duration. There is no room for more restrictive local
11 regulation of those gatherings. See Bear Creek Valley
12 Sanitary v. City of Medford, 130 Or App 24, 27, 880 P2d 486,
13 rev den 320 Or 493 (1994). Therefore, the only aspects of
14 mass gatherings of less than 120 hours duration that a
15 county may regulate, are those aspects that ORS 433.735 and
16 433.750 expressly allow, and those that are not inconsistent
17 with the provisions of the mass gathering statute. In this
18 regard only, ORS 433.735(1) authorizes more restrictive
19 local regulation of gatherings of less than 120 hours
20 duration. Specifically, ORS 433.735(1) authorizes a county
21 to adopt a more expansive definition of gatherings of less
22 than 120 hours duration. With this background, we analyze
23 petitioner's arguments concerning the challenged ordinance.

24 **A. LDO 620.02(a)**

25 In LDO 620.02(a), the county accepts the invitation in
26 ORS 433.735(1) to define mass gatherings of less than 120

1 hours duration differently than ORS 433.735(1).

2 LDO 620.02(a) provides the following definition:

3 "Temporary outdoor mass gathering" means an
4 assembly of 500 or more persons per day for 24
5 hours or more but for less than 120 hours which
6 occurs in part outdoors or in temporary structures
7 within any six-month period. Included within the
8 120 hours is any time necessary to set up the
9 event or to clean up afterwards."

10 Petitioner argues the county may not define mass
11 gatherings subject to ORS 433.750 to include gatherings of
12 500 or more people for 24 hours or more. Specifically,
13 petitioner contends the county may not adopt a definition of
14 "mass gathering" that includes less than 3,000 people.
15 Petitioner is incorrect. As stated above, ORS 433.735(1)
16 expressly authorizes counties to adopt a more inclusive
17 county definition of outdoor mass gatherings.

18 Petitioner also argues that it is inconsistent with
19 ORS 433.735(1) for the county to include the time necessary
20 to set up, take down and clean up after a gathering in the
21 calculation for determining whether a particular mass
22 gathering is of less than 120 hours duration. Petitioner is
23 incorrect. ORS 433.735(1) specifically authorizes a county
24 to define what constitutes an outdoor mass gathering under
25 ORS 433.735(1). The county is within its ORS 433.735 grant
26 of authority in establishing when the time period used in
27 that calculation begins.

28 This subassignment of error is denied.

1 **B. LDO 620.04(a), (c)(2), (e) and (f)**

2 LDO 620.04(a) requires mass gatherings of less than
3 120 hours duration to comply with applicable zoning
4 regulations. LDO 620.04(c)(2) requires an applicant to
5 establish that a proposed mass gathering of less than 120
6 hours duration is a use permitted in the applicable zoning
7 district. Petitioner contends these requirements are
8 inconsistent with ORS 433.750(1). We agree. ORS 433.750(1)
9 leaves no room for the county to subject mass gatherings of
10 less than 120 hours duration to zoning regulations.

11 In addition, LDO 620.04(c)(2) requires the applicant to
12 provide a legal description of the property subject to any
13 proposed mass gathering of less than 120 hours duration. We
14 do not believe this ordinance requirement is inconsistent
15 with any provision of ORS 433.735 to 433.770.

16 Finally LDO 620.04(e) and (f) require referral of an
17 application for an outdoor mass gathering of less than 120
18 hours duration to the county planning director and building
19 official, as well as other county officials, and urges those
20 officials to submit comments to the county administrator.
21 We see nothing inconsistent between this requirement and
22 ORS 433.735 to 433.770.

23 This subassignment of error is sustained, in part.

24 **C. LDO 620.04(b)**

25 LDO 620.04(b) authorizes the county to charge a fee of
26 up to \$5,000 for * * * county services provided to the

1 gathering * * *." ORS 433.750(6) provides:

2 "A county governing body may charge permit
3 applicants a fee reasonably calculated to
4 reimburse the county for its reasonably necessary
5 costs in receiving, processing and reviewing
6 applications for permits to hold outdoor mass
7 gatherings."⁴

8 Petitioner argues ORS 433.750(6) does not authorize a
9 county to seek reimbursement for anything other than
10 "reasonably necessary costs in receiving, processing and
11 reviewing applications for permits to hold outdoor mass
12 gatherings" and, therefore, the county may not charge for
13 other services such as law enforcement. Petitioner is
14 correct.

15 In addition, petitioner argues the challenged ordinance
16 requires payment of an outdoor mass gathering permit fee in
17 all cases, and does not provide for a fee waiver as required
18 by ORS 433.750(6), which provides in relevant part:

19 " * * * However, [an outdoor mass gathering
20 permit] fee * * * shall not exceed \$5,000 and
21 shall not be charged when the governing body
22 finds, by a preponderance of the evidence
23 presented to the governing body, that the
24 applicant is unable to reimburse the governing
25 body."

26 ORS 433.750(6) clearly requires a county to waive
27 payment of an outdoor mass gathering permit fee if it finds
28 that the applicant is unable to reimburse the governing

⁴This provision also appears to apply to applications for gatherings of more than 120 hours duration, through ORS 433.763(1)(b).

1 body. The reimbursement to the local governing body
2 referred to by ORS 433.750(6) is the fee which reimburses
3 the local government for the costs of processing the
4 application. Therefore, petitioner is correct that the
5 challenged ordinance erroneously fails to provide for an
6 outdoor mass gathering permit fee waiver, in the
7 circumstances described in ORS 433.750(6).

8 This subassignment of error is sustained.

9 **D. LDO 620.04(c)**

10 LDO 620.04(c) requires an applicant to apply for an
11 outdoor mass gathering permit at least 60 days before the
12 proposed gathering is to occur. Petitioner argues this
13 requirement violates ORS 433.735. However, we see nothing
14 in ORS 433.735 or any other provision of the outdoor mass
15 gathering statute that prohibits a county from imposing such
16 a time limitation.

17 This subassignment of error is denied.

18 **E. LDO 620.05(a)(5)**

19 LDO 620.05(a)(5) authorizes the county to require the
20 applicant for a permit for a mass gathering of less than 120
21 hours duration to obtain and show, in all cases, proof of
22 insurance in the amount of one million dollars. Petitioner
23 contends LDO 620.05(a)(5) is inconsistent with
24 ORS 433.755(1).

25 Petitioner is correct. ORS 433.755(1) provides a
26 limited grant of authority to a county to require insurance:

1 " * * * If the county governing body determines
2 upon examination of the permit application that
3 the outdoor mass gathering creates a potential for
4 injury to persons or property, the county
5 governing body may require organizers to obtain an
6 insurance policy in an amount commensurate with
7 the risk, but not exceeding \$1 million. * * *"

8 Therefore, the county may not require an applicant for an
9 outdoor mass gathering, subject to the challenged ordinance,
10 to obtain in all cases one million dollars of insurance.
11 Rather, ORS 433.755(1) requires an individualized
12 determination concerning the insurance risks posed by the
13 particular gathering, with one million dollars being the
14 maximum amount of insurance that a county may require.

15 This subassignment of error is sustained.

16 **F. LDO 620.05(b)**

17 LDO 620.05(b) authorizes the county sheriff to order
18 the crowd at an outdoor mass gathering of less than 120
19 hours duration to disperse, essentially if the permit holder
20 engages in unlawful activity or cannot prevent the crowd
21 from doing so.

22 There is nothing in ORS 433.735 to 433.770 which
23 prevents a county sheriff from maintaining order at an
24 outdoor mass gathering consistent with the sheriff's
25 statutory authority to protect public safety and statutory
26 obligations concerning the observation of unlawful conduct.
27 However, ORS 433.770(1) makes it clear that with regard to
28 specific violations of the mass gathering statute or its
29 implementing local regulations, the only remedy is

1 injunctive relief authorized by a court. In the absence of
2 a court order authorizing dispersal, there is no independent
3 authority in ORS 433.770(1) for a county sheriff to order
4 dispersal of a covered gathering because the sheriff
5 believes a violation of the mass gathering statute or
6 implementing ordinance has occurred. Therefore, we believe
7 that LDO 620.05(b), which purports to authorize the county
8 sheriff to order dispersal of an outdoor mass gathering if
9 he believes such gathering is not in "compliance with all
10 applicable state and local laws," is overly broad.

11 This subassignment of error is sustained, in part.

12 **G. LDO 620.06**

13 **1. Consistency with ORS 433.735 to 433.770**

14 LDO 620.06 provides that outdoor mass gatherings of
15 more than 120 hours duration are subject to conditional use
16 permit standards of the applicable zoning district.
17 Petitioner argues this requirement subjects these gatherings
18 to a host of extremely burdensome local requirements, and is
19 not authorized by ORS 433.763.⁵

⁵For example, LDO 260.040 contains conditional use permit standards which require, in part:

- "(1) That the permit would be in conformance with the Jackson County Comprehensive Plan for the same area, the standards of the district of the zoning ordinance in which the proposed development would occur, and the comprehensive plan for the County as a whole.
- "(2) That the location, size, design, and operating characteristics of the proposed use will have minimal

1 ORS 433.763(1) provides as follows:

2 "[A gathering of more than 120 hours duration]
3 shall be allowed by a county planning commission
4 if all of the following occur:

5 "(a) The organizer makes application for a permit
6 to the county planning commission.

7 "(b) The applicant demonstrates to the county
8 planning commission that the applicant has
9 complied or can comply with the requirements
10 for an outdoor mass gathering permit set out
11 in ORS 433.750.

12 "(c) The county planning commission shall make
13 findings that:

14 "(A) Any permits required by the applicable
15 land use regulations have been granted;
16 and

17 "(B) the proposed gathering:

18 "(i) Is compatible with existing land
19 uses; and

20 "(ii) Does not materially alter the
21 stability of the overall land use
22 pattern of the area." (Emphasis
23 supplied.)

adverse impact on the livability, value, or appropriate development of abutting properties and the surrounding area.

"(3) The permit will be in compliance with other required findings, if any, which may be listed in the zone in which the use is proposed to be located.

"(4) The proposed use will either provide primarily for the needs of rural residents and therefore requires a rural setting in order to function properly or the nature of the use requires a rural setting, such as an aggregate operation, even though the use may not provide primarily for the needs of rural residents. * * *

1 The emphasized portion of ORS 433.763(1)(c) makes it
2 clear that the county may subject outdoor mass gatherings of
3 more than 120 hours duration to land use regulations. There
4 is nothing apparent from the face or context of ORS 433.763,
5 or any other provision of the outdoor mass gathering
6 statute, which prohibits a county from subjecting such
7 gatherings of more than 120 hours duration to conditional
8 use permit land use regulations. Therefore, LDO 620.06 is
9 not inconsistent with ORS 433.735 to 433.770.

10 This subassignment of error is denied.

11 **2. Federal Religious Freedom Restoration Act**

12 Petitioner argues the challenged ordinance violates the
13 Federal Religious Freedom Restoration Act of 1993.⁶ As far

⁶In his petition for review, petitioner states the following bases for his concerns:

"My attention was drawn to the proposed county ordinance some time in April 1994. I was serving as the Director of [the] Executive Council and Peace Chief of the American Indian Cultural Center located in Talent Oregon. Our organization has been sponsoring and supporting activities of Native Peoples for its eight year history. We * * * provided support for Sun Dances held in our regions for years and saw the proposed ordinance as a threat to this and other Native American activities.

"Sun Dance: * * * Generally, the [Sun] Dance is the culmination of the past year's preparation, the dancer[s] enduring hardships and strengthening themselves for the physical ordeal to come. Sun Dance camps exist in areas approved by the Sun Dance leader, although usually in remote places. The preparation of the annual Sun Dance, the dance itself and the time within which all have dispersed is often a month or more. * * *

"PowWows: Pow wows are considerably less religious in nature, however, traditional events such as pow wows provide a more

1 as we can tell, this federal statute prohibits a state from
2 "substantially burdening" a person's exercise of religious
3 freedom unless such burden is imposed to serve a compelling
4 state interest and is the least restrictive means to further
5 that interest.⁷ Our review of this portion of petitioner's
6 brief is troublesome because the conditional use permit
7 standards to which an outdoor mass gathering of more than
8 120 hours duration is subject are uncertain. Specifically,
9 it is difficult at best to determine which regulations in
10 the county comprehensive plan apply and how those
11 regulations are satisfied. Further, it is also difficult,
12 if not impossible, to determine what additional standards
13 referred to in LDO 260.040(3) apply to outdoor mass
14 gatherings of more than 120 hours duration when such

secular background. Pow wows too, follow rituals with opening and closing prayer. Many dances are seen as and experienced as prayers by dancers, drummers and singers * * *.

"Other occasions in which Native gatherings may be impacted might include Naming ceremonies, weddings, Give-aways, Homecomings, etc.

"* * * I raised objection to the proposed ordinance as it appeared to threaten the community's (* * * Jackson County Native American Population's 1990 census being 1800+) ability to exercise our religious beliefs together, as well as jeopardizing the future of pow wows and other traditional gatherings. * * * " Petition for Review 2-3.

⁷We do not understand the county to contend the Federal Religious Freedom Restoration Act of 1993 does not apply or that petitioner does not have religious interests at stake. The county argues the challenged ordinance is consistent with the Federal Religious Freedom Restoration Act of 1993 and whether the challenged ordinance impermissibly infringes upon a particular outdoor mass gathering requires an individualized determination, after a person applies for a permit for an outdoor mass gathering of more than 120 hours duration.

1 gatherings are not listed as a permitted or conditional use
2 in any zoning district.⁸ Therefore, we cannot determine
3 whether the challenged ordinance employs the least
4 restrictive means to achieve a compelling state interest.

5 This subassignment of error is sustained.

6 The assignments of error are sustained, in part.

7 The county's decision is remanded.

8

⁸The county asserts that it subjects churches to zoning regulations and that churches are authorized as either permitted or conditional uses in county Exclusive Farm Use, Forest Resource and Farm Residential zoning districts. The county also asserts campgrounds are authorized in forest zones, and an outdoor mass gathering more than 120 hours in duration might qualify as a church or a campground use. The county also invites petitioner to seek an exception to applicable statewide planning goals for seasonal Native American activities.