BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JORDAN UTSEY and MELANIE TANG,
Petitioners,

and

LEAGUE OF WOMEN VOTERS OF COOS COUNTY,
Intervenor-petitioner,

vs.

COOS COUNTY,
Respondent,

and

ALBERT LILLIE and CINDY LILLIE,
Intervenors-Respondent.

LUBA No. 2000-006

FINAL OPINION
AND ORDER

Appeal from Coos County.

Douglas M. DuPriest, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was Hutchinson, Anderson, Cox, Coons & DuPriest, P.C.

Jerry O. Lesan, Coos Bay, represented intervenor-petitioner.

No appearance by Coos County.

Allen L. Johnson, Eugene, represented intervenors-respondent.

Mark D. Shipman, Salem, filed a brief on behalf of amicus curiae Oregon Farm Bureau. With him on the brief was Saalfeld, Griggs, Gorsuch, Alexander & Emerick, P.C.

John Kevin Shuba, Assistant Attorney General, Salem, filed a state agency brief on behalf of the Department of Land Conservation and Development. With him on the brief were Hardy Myers, Attorney General, and Michael D. Reynolds, Solicitor General.

BASSHAM, Board Chair; BRIGGS, Board Member; HOLSTUN, Board Member,

participated in the decision.

REMANDED 08/18/2000

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal the county's approval of a private park for off-highway vehicles (OHV) on land zoned for exclusive farm use (EFU) and Forest Mixed-Use (F-MU).

MOTION TO INTERVENE

The League of Women Voters of Coos County moves to intervene on the side of petitioners. Albert Lillie and Cindy Lillie, the applicants below, move to intervene on the side of respondent. There is no opposition to either motion, and both are allowed.[1]

FACTS

The subject property is a hilly 531-acre tract zoned EFU and F-MU. The largest EFU portion of the subject property is in the middle of the property; the portion of the property zoned F-MU generally surrounds the EFU portion.

In March 1999, intervenors-respondent (intervenors) filed a conditional use permit application with the county for an "OHV Recreational Trail System Park" on 225 acres of the subject property. OHVs are motorized two, three or four-wheeled vehicles, including all-terrain vehicles, capable of operating on rugged roads and trails. The proposed park would feature four to six miles of trails within the main trail system, with additional trails of unspecified length within the outer perimeter of the property. A separate "motocross" skill training and riding area is proposed on 25 acres in the northwest portion of the property.[2]

The proposed park would operate year-round, with use averaging six to eight vehicles operating per mile of trail or track at any one time. In addition, the application proposes up to 12 undefined "Special Events" per year. Six of these events would be three-day events,

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[1]In a separate order, the Board granted the motion of the Oregon Farm Bureau to appear as amicus curiae. In addition, the Department of Land Conservation and Development (DLCD) submitted a state agency brief pursuant to ORS 197.830(7) and OAR 661-010-0038.

[2]*Webster's Ninth New Collegiate Dictionary*, 775 (1991) defines "motocross" as "a motorcycle race on a tight closed course over natural terrain that includes steep hills, sharp turns, and often mud."

and six would be two days in length. A graveled main parking area and an overflow parking area are proposed to accommodate daily and event parking.

On May 13, 1999, the county planning commission approved the application with conditions. Petitioners, who own a nearby ranch to the north, appealed the planning commission decision to the county board of commissioners (commissioners). The commissioners conducted an evidentiary hearing on August 18, 1999, and closed the record. On August 25, 1999, the commissioners deliberated and voted orally to approve the application with conditions, directing intervenors to prepare proposed findings. The proposed findings were submitted on October 12, 1999. On October 22, 1999, petitioners requested that the commissioners reopen the record to accept additional evidence. On December 22, 1999, the commissioners issued their final decision denying the motion to accept additional evidence, and approving the application with conditions. Among the imposed conditions are a prohibition on permanent structures, a prohibition on trail riding within 100 feet of petitioners' property, and a prohibition on operation of an OHV, alone or in conjunction with others, causing noise levels that exceed Oregon Department of Environmental Quality (DEQ) standards within 1,000 feet of the OHV.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

A. Private Parks on Agricultural and Forest Lands

Petitioners argue that the county erred in determining that the proposed OHV park is a "private park" allowed in the EFU and F-MU zones under Coos County Zoning and Land Development Ordinance (CCZLDO) 4.8.350(D), 4.9.350(L), ORS 215.283(2)(c), OAR 660-033-0120 and 660-006-0025(4)(e).[3] According to petitioners, "private parks" allowed by

[3]CCZLDO 4.8.350(D) and 4.9.350(L) implement the statute and rules cited. Accordingly, our discussion will focus on the statute and rules rather than local provisions. ORS 215.283(2)(c) provides that a county may allow in an EFU zone as a conditional use, subject to ORS 215.296:

statute and rule on agricultural and forest lands do not include such high-intensity recreational uses as the proposed OHV park.

Neither the statute nor the rule defines "park" or "private park." The county's determination that the proposed OHV park is a "private park" for purposes of ORS 215.283(2)(c) and OAR 660-006-0025 relies on our decision in *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993). In *Spiering*, we considered whether a proposal for a 24-acre "paintball" game park in the center of a 108-acre parcel zoned EFU constituted a "park" for purposes of ORS 215.213(2)(e).[4] We described the game of paintball as a version of "capture the flag," with players trying to eliminate opposing players by tagging with a paintball expelled from a special paintgun. There, the proposed park included a parking lot,

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> "*Private parks*, playgrounds, hunting and fishing preserves and campgrounds. Subject to the approval of the county governing body or its designee, a private campground may provide yurts for overnight camping. * * *" (Emphasis added.)

OAR 660-033-0120 allows "private parks, playgrounds, hunting and fishing preserves and campgrounds" to be sited on non-high-value farmland subject to criteria at OAR 660-033-0130(5) implementing ORS 215.296. OAR 660-006-0025(4) describes uses allowed on forest lands subject to criteria at OAR 660-006-0025(5) that parallel ORS 215.296. OAR 660-006-0025(4)(e) allows the following on forest lands:

> "Private parks and campgrounds. Campgrounds in private parks shall only be those allowed by this subsection. Except on a lot or parcel contiguous to a lake or reservoir, campgrounds shall not be allowed within three miles of an urban growth boundary unless an exception is approved pursuant to ORS 197.732 and OAR Chapter 660, Division 4. A campground is an area devoted to overnight temporary use for vacation, recreational or emergency purposes, but not for residential purposes and is established on a site or is contiguous to lands with a park or other outdoor natural amenity that is accessible for recreational use by the occupants of the campground. A campground shall be designed and integrated into the rural agricultural and forest environment in a manner that protects the natural amenities of the site and provides buffers of existing native trees and vegetation or other natural features between campsites. Campsites may be occupied by a tent, travel trailer or recreational vehicle. Separate sewer, water or electric service hook-ups shall not be provided to individual camp sites. Campgrounds authorized by this rule shall not include intensively developed recreational uses such as swimming pools, tennis courts, retail stores or gas stations. Overnight temporary use in the same campground by a camper or camper's vehicle shall not exceed a total of 30 days during any consecutive 6 month period."

[4]ORS 215.213(2)(e) (1991) allowed in an EFU-zone in marginal lands counties:

> "Community centers owned and operated by a governmental agency or a nonprofit community organization, hunting and fishing preserves, *parks*, playgrounds and campgrounds." (Emphasis added.)

trails and some small structures used as part of the game. To resolve the petitioners' arguments that the proposed use was too intense to constitute a "park" under ORS 215.213(2)(e), we relied upon the following definition from *Webster's Third New International Dictionary*, 1642 (unabridged ed 1981):

> "**park*** * * a tract of land maintained by a city or town as a place of beauty or of public recreation * * * a large area often of forested land reserved from settlement and maintained in its natural state for public use (as by campers or hunters) or as a wildlife refuge * * * a large enclosed area used for sports; *esp*: ball park."

Based on the foregoing definition, we concluded that "park" included a tract of land set aside for public recreational use, and that nothing in ORS 215.213 excluded from that definition privately owned public recreational facilities such as the proposed game park. 25 Or LUBA at 704-705. We then commented that nothing in ORS 215.213(2) inherently limits the intensity of the uses allowed thereunder, noting that ORS 215.213(2) allows several uses such as schools, churches, golf courses, living history museums, etc., that may involve gatherings of people as large as or exceeding that of the game park proposed. *Id.* at 705.[5]

In the present case, the county found that the proposed OHV park is similar in intensity to the paintball game park at issue in *Spiering*. The county discussed and distinguished other cases in which LUBA or the Land Conservation and Development Commission (LCDC) has determined that certain intensive recreational uses are not permitted on forest lands under Goal 4 or the rules implementing Goal 4, principally *Tice v. Josephine County*, 21 Or LUBA 371 (1991).[6] In *Tice*, LUBA addressed whether a

[5]While that comment is accurate as far as it goes, as we discuss below all uses allowed under ORS 215.213(2) and 215.283(2) are subject to criteria at ORS 215.296(1), which tend to limit the intensity of nonfarm uses.

[6]In addition to *Tice*, the county's decision discusses *Cotter v. Clackamas County*, 36 Or LUBA 172, 177 (1999) (full-service recreational vehicle parks are not "campgrounds" allowed as "recreational opportunities appropriate in a forest environment" for purposes of the Goal 4 rule); *Donnelly v. Curry County*, 33 Or LUBA 624, 626 (1997) (same); and *Teamsters v. Hood River Cty.*, 2 LCDC 83 (1979) (tennis courts, swimming pool, skiing rope tow are not "outdoor recreational activities" allowed under Goal 4 on forest lands).

motorcycle race track on 77 acres of forest lands was a permitted "outdoor recreational activity" allowed under Goal 4.[7] The proposed race track included concession stands and ticket booths. After summarizing the relevant authority, we stated:

> "These cases recognize that there is a limit to the types of outdoor recreation activities allowable as an 'outdoor recreational activity' as that phrase is used in Goal 4. The limitation on 'outdoor recreational activities' under Goal 4 stems from the very purpose that lands designated as forest lands are designed to serve. Proposed recreational uses which dominate and change the character of the forest environment are not considered 'outdoor recreational activities' even though such proposed uses do provide, in a broad sense, 'outdoor recreation.'" 21 Or LUBA at 379.

We then concluded that a motorcycle race track is not an "outdoor recreational activity" allowed on forest lands under Goal 4. *Id.*

In the present case, the county distinguishes *Tice* because that case involved a race track, with massed vehicles racing in direct competition to each other, as well as approval of structures such as concession stands and ticket booths. In contrast, the county found, the proposed OHV park is primarily an off-road trail system, dispersed in time and space over a large tract of land, and does not include any permanent structures. The county finds that the proposed motocross area will not feature high-intensity head-to-head competition racing, although it states that the permit allows competitive events on the motocross track in which points are scored for skills in navigation, riding, timing and accuracy in passing checkpoints. The county ultimately concludes that the proposed OHV park is a low-intensity recreational use and therefore allowed as a "private park" under its code, the statute and administrative rules.

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[7]As we noted in *Tice*, prior to February 5, 1990, Goal 4 identified "outdoor recreational activities" as a forest use. Effective February 5, 1990, Goal 4 was amended in relevant part to specify that "recreational opportunities appropriate in a forest environment" are forest uses. *See also* OAR 660-006-0025(1)(b) (identifying "recreational opportunities appropriate in a forest environment" as one of five general types of forest uses allowed on forest lands). We noted in *Tice* that the 1990 amendments, while not applicable in that case, strongly supported an interpretation that only recreational uses with a relatively low impact are allowed on forest lands. 21 Or LUBA at 378 n 7.

Petitioners, echoed by DLCD and amicus, argue that *Tice* and similar cases provide the controlling example and principle in this case, and that *Spiering* is either distinguishable or incorrect insofar as it suggests that "parks" allowed under the statute and rules in resource zones include every conceivable recreational use or are not subject to any limitations on intensity. For the following reasons, we agree with petitioners, DLCD and amicus that the county misconstrued the applicable law.

The reasoning and analytical approaches of *Spiering* and the line of cases represented by *Tice* appear, at first glance, to be at odds with each other. The proposed uses in *Spiering* and *Tice* were privately owned and operated public recreational facilities on resource land, and would be most accurately characterized under current nomenclature as "private parks" under ORS 215.283(2)(c) and OAR 660-006-0025(4)(e), respectively. Unless context or evidence of legislative intent to the contrary indicates otherwise, identical terms such as "private park" in ORS 215.283(2)(c) and OAR 660-006-0025(4)(e) should have the same meaning. However, the difference between the two line of cases is that, as we recognized in *Tice*, Goal 4 and OAR 660-006-0025(1)(b) expressly require that recreational activities on forest lands be "appropriate in a forest environment." *See* n 7. Thus, as the line of cases represented by *Tice* demonstrates, not all recreational activities that might otherwise fall within the scope of "park" or "private park" are appropriate on forest lands. In contrast, as *Spiering* recognizes, no such express qualification appears to exist in the statutes or rules governing nonfarm uses on agricultural land. We understand petitioners, DLCD and amicus to argue, however, that such a qualification should be inferred, at least with respect to recreational uses allowed in "private parks" under ORS 215.283(2)(c). DLCD argues that the county's interpretation of "private parks"

> "permits a number of varied activities to be considered recreational without reference to the overriding policy to preserve farm land for farming. This is contrary to the well-developed concept that state and local provisions permitting non-farm uses in EFU zones should be construed to maximize agricultural uses and minimize non-agricultural uses. *Von Lubken v. Hood*

River County, 118 Or App 246, 846 P2d 1178 (1993). It is also contrary to the doctrine that the non-agricultural uses that the provisions allow should be construed as ones that are related to and promote the agricultural use of the farm land. When no such direct supportive relationship can be discerned between agriculture and a use permitted by the statute, the use should be understood as being as non-disruptive [of] farm use as the language defining it allows. *McCaw Communications[, Inc.] v. Marion County*, 96 Or App 552, 773 P2d 779 (1989).

"The definition of park and recreation must be considered in the context of Goal 3. The law, properly interpreted, requires counties to first consider whether the proposed use is eligible to be considered a 'park' under [ORS] 215.283(2) before balancing the intensity against surrounding uses. * * * Therefore, 'park' should be defined to include only those uses with low impact on the subject property and that are of low intensity – uses that won't dominate or change the forest or farming environment on the subject property. (*E.g.* uses that do not involve motor vehicles or the erection of physical structures.)" State Agency Brief 5 (footnotes omitted).

In addition, petitioners and DLCD point out that OAR 660-034-0035 and 660-034-0040 regulate the types of activities that can occur on state and local "public parks" allowed under OAR 660-033-0130 and OAR 660-006-0025(4)(f) on agricultural and forest lands.[8] In relevant part, OAR 660-034-0035(2) and 660-034-0040(4) provide that among the uses a local government may allow in a state or local park on agricultural or forest land without an exception to Statewide Planning Goals 3 or 4 are "recreational trails," including "walking, hiking, biking, horse, or motorized off-road vehicle trails; [and] trail staging areas."[9]

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[8]OAR 660-033-0130(31) and 660-006-0025(4)(f) allow on agricultural and forest land, respectively, "[p]ublic parks including only those uses specified under OAR 660-034-0035."

[9]OAR 660-034-0040(4) allows in local parks the uses listed at OAR 660-034-0035(2)(a) through (g). OAR 660-034-0035(2) governs uses allowed in state parks, and provides:

> "A local government is not required to adopt an exception to Statewide Planning Goals 3 or 4 for the following uses on agricultural or forest land within a state park provided the uses, alone or in combination, meet all statewide goals and are authorized in a state park master plan adopted by OPRD, including state park master plans adopted by OPRD prior to the effective date of this division:
>
> "(a) Campground areas: recreational vehicle sites; tent sites; camper cabins; yurts; teepees; covered wagons; group shelters; campfire program areas; camp stores;

Thus, petitioners and DLCD argue, motorized off-road vehicle trails and trail staging areas are allowed on agricultural and forest lands without a Goal 2 exception only in public parks pursuant to OAR 660-034-0035(2)(c) and 660-034-0040(4). By implication, petitioners and DLCD argue, such uses are *not* allowed on agricultural and forest lands without a Goal 2 exception under other circumstances, for example in private parks. Further, we understand petitioners and DLCD to argue, OAR 660-034-0035(2) does not allow at all for motocross race tracks such as the county approved in the present case. The rule thus is

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> "(b) Day use areas: picnic shelters, barbecue areas, swimming areas (not swimming pools), open play fields, play structures;
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> "(c) Recreational trails: walking, hiking, biking, horse, *or motorized off-road vehicle trails*; trail staging areas;
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> "(d) Boating and fishing facilities: launch ramps and landings, docks, moorage facilities, small boat storage, boating fuel stations, fish cleaning stations, boat sewage pumpout stations;
>
> "(e) Amenities related to park use intended only for park visitors and employees: laundry facilities; recreation shops; snack shops not exceeding 1500 square feet of floor area;
>
> "(f) Support facilities serving only the park lands wherein the facility is located: water supply facilities, sewage collection and treatment facilities, storm water management facilities, electrical and communication facilities, restrooms and showers, recycling and trash collection facilities, registration buildings, roads and bridges, parking areas and walkways;
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> "(g) Park Maintenance and Management Facilities located within a park: maintenance shops and yards, fuel stations for park vehicles, storage for park equipment and supplies, administrative offices, staff lodging;
>
> "(h) Natural and cultural resource interpretative, educational and informational facilities in state parks: interpretative centers, information/orientation centers, self-supporting interpretative and informational kiosks, natural history or cultural resource museums, natural history or cultural educational facilities, reconstructed historic structures for cultural resource interpretation, retail stores not exceeding 1500 square feet for sale of books and other materials that support park resource interpretation and education;
>
> "(i) Visitor lodging and retreat facilities in state parks: historic lodges, houses or inns and the following associated uses in a state park retreat area only:
>
> "(A) Meeting halls not exceeding 2000 square feet of floor area;
>
> "(B) Dining halls (not restaurants)." (Emphasis added.)

consistent with *Tice*, petitioners and DLCD argue, in prohibiting such uses as permissible recreational activities on resource land.

OAR 660-034-0035(2) reflects LCDC's legislative determination of activities that are appropriate for a public park on agricultural and forest lands. We decline to read into the rule any implication that the listed uses are allowed only in public parks. By its terms the rule applies to public state and local parks, and any inference that uses listed in the rule cannot be located without a Goal 2 exception other than in public parks is eliminated by the fact that among those listed uses are such facilities as campgrounds and hiking trails. Campgrounds are expressly permitted in private parks, OAR 660-006-0025(4)(e); further, it is difficult to imagine what low-intensity uses could be allowed in private parks if uses such as hiking trails are prohibited.

LCDC might have intended the listed activities at OAR 660-034-0035(2) to reflect a general expression of the type of recreational activities appropriate on agricultural or forest lands, without regard to whether they are located in public parks. However, if that was LCDC's intent, it is not evident in any administrative rule drawn to our attention. OAR 660-033-0130(31) and 660-006-0025(4)(f) expressly limit uses in *public* parks to those listed at OAR 660-034-0035. The corresponding rules at OAR 660-033-0120 and 660-006-0025(4)(e) regarding *private* parks contain no such express limitation or reference to OAR 660-034-0035. While we are aware of no reason why the scope of activities allowed in private parks should be different than those allowed in public parks, nothing in LCDC's rules purports to apply the limitations applicable to public parks to private parks.

The more difficult issue is whether, as petitioners, DLCD and amicus argue, some limit on the types of activities allowed by statute and rule in "private parks" on agricultural lands should be inferred from Goal 3 and statutory policies directed at the preservation of agricultural land. As the parties recognize, ORS 215.296 provides some limits to the intensity of activities allowed as nonfarm uses on agricultural lands. Such activities, even if

otherwise permissible, cannot force a significant change in accepted farm or forest practices, or significantly increase the cost of such practices, on surrounding lands devoted to farm or forest use. Nonetheless, petitioners, DLCD and amicus argue, recreational activities such as OHV parks and motocross race tracks are so inconsistent with the preservation of agricultural land that the scope of "private parks" allowed under ORS 215.283(2)(c) should not be construed to include those activities. *See McCaw Communications, Inc.*, 96 Or App at 555 (state and local provisions defining nonfarm uses that are permitted in EFU zones must be construed, to the extent possible, as being consistent with the overriding policy of preventing agricultural land from being diverted to nonagricultural uses). In support of that view, petitioners point out that both ORS 215.283(2)(c) and OAR 660-033-0130(19) substantially limit the intensity of "campgrounds" allowed on agricultural lands. Petitioners argue that campgrounds and other recreational uses allowed in private parks are similar and, while the limitations on campgrounds do not apply to private parks, petitioners contend that those limitations evince the legislature's and LCDC's general intent that recreational uses in private parks on resource lands be limited in intensity, including private parks on agricultural land. DLCD urges us to overrule or limit *Spiering*, to the extent it suggests that private parks on agricultural land have no such inherent limitation.

We decline to read into ORS 215.283(2)(c) and OAR 660-033-0120 any inherent limitation on the types of recreational activities allowed on agricultural lands as private parks under those provisions. Unlike Goal 4 and the Goal 4 rule, the EFU statute and the Goal 3 rule contain no express language that can be read to restrict the types of recreational activities allowed on agricultural land. In the absence of such language, we do not believe it appropriate to rely on general statutory and rule-based policies as a basis to import such restrictions. Nor is the principle of interpretation described in *McCaw Communications, Inc.* particularly helpful. Interpretation of ORS 215.283(2)(c) does not require us to choose among one of several textually plausible meanings, as was the case in *McCaw*

Communications, Inc. In other words, the text of ORS 215.283(2)(c) contains no suggestion that "park" means something different than the plain, ordinary sense of that term. As we stated in *Spiering*, the plain meaning of "park" includes land set aside for public recreational activities. Petitioners do not dispute that riding OHVs on trails or on a motocross track falls within that broad definition.

The foregoing has the result that activities permissible in private parks on agricultural land may not be permissible on private parks on forest lands. However, that difference reflects the text of the relevant statutes and rules: as noted above, Goal 4 and the Goal 4 rule expressly limit recreational activities on forest lands to those appropriate for the forest environment, while the EFU statues, Goal 3 and the Goal 3 rule contain no corresponding limitation.

We further recognize the difficulty in applying the foregoing to the present case, because the subject property is comprised of both agricultural and forest land, and the applicants propose placing OHV trails and the motocross race track on both types of land. However, as a consequence of our analysis, to the extent those recreational activities occur on agricultural land, they are permissible under ORS 215.283(2)(c), subject only to the criteria at ORS 215.296. To the extent those activities occur on forest land, they are permissible only if, in addition, they are "appropriate in a forest environment." Accordingly, the following analysis of the parties' arguments regarding the intensity of the proposed OHV trails and motocross race track applies only to the portion of those facilities on forest lands.

B. Private Parks Appropriate in a Forest Environment

1. Motocross Race Track

Petitioners, DLCD and amicus argue that the proposed motocross race track is substantially similar to the motorcycle race track we found in *Tice* to be inconsistent with Goal 4. The county's findings in the present case attempt to distinguish the motocross race track from the race track at issue in *Tice*, on the grounds that (1) the applicants will not allow

head-to-head competition or the racing of massed vehicles, only less intensive types of competition; and (2) no permanent structures are allowed. Petitioners, DLCD and amicus argue that those differences are minor and that the supposedly less intensive types of racing proposed on the motocross race track are no more appropriate in a forest environment than those proposed in *Tice*. In addition, petitioners, DLCD and amicus point out that the county failed to impose any conditions prohibiting head-to-head competition or the racing of massed vehicles, or to impose any limits at all on competition or the number of competitors, or how the motocross race track is used. With respect to the prohibition on permanent structures, the parties point out that the county's decision defines a "permanent structure" to mean "a roofed and walled structure built for or capable of permanent use." Record 24. As discussed in the fourth assignment of error, petitioners, DLCD and amicus contend that the decision allows roofed structures such as pavilions, or roofless structures such as bleachers, grandstands, concession stands, etc., the same types of structures proposed as part of the race track at issue in *Tice*.

We agree with petitioners, DLCD and amicus that the proposed motocross race track on forest land is substantially similar to that proposed in *Tice*, and is also inappropriate in a forest environment. Even if the decision had imposed conditions that prohibited head-to-head racing or other intensive types of competition, or conditions that effectively prohibited structures such as those proposed in *Tice*, we agree with the parties that a motocross race track and any accessory structures are not appropriate on forest lands, and therefore would require an exception to Goal 4. Consistent with this view is the public park rule at OAR 660-034-0035(2), which, as described above, authorizes off-road vehicle trails, but does not list OHV race tracks of any kind as uses permitted in public parks without an exception to applicable statewide planning goals. While that rule does not directly govern the present situation, it is consistent with *Tice* and, in our view, is an appropriate contextual guide for purposes of determining whether motocross race tracks are permitted in "private parks"

under the Goal 4 rule.

2. OHV Trails

With respect to the proposed OHV trails on forest lands, OAR 660-034-0035(2) also provides relevant guidance, in expressly allowing off-road vehicle trails in public parks. Further, the challenged decision cites to testimony from a former county forester to the effect that OHV roads and trails similar to those proposed are part of the forest environment on public forested lands. We conclude that the proposed OHV trails, which the county describes as "a low-intensity, single-file OHV trail system," dispersed over more than 200 acres of a 531-acre site, "with dispersed riders passing at intervals," (Record 15), is a recreational activity appropriate in a forest environment and thus allowed on forest lands in private parks under the Goal 4 rule.

C. Conclusion

Based on the foregoing, we conclude that the county erred in allowing a motocross race track on forest lands zoned F-MU on the subject property. The county did not err in allowing the separate OHV trail system on land zoned EFU or F-MU.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the county erred in concluding that the proposed OHV park would not cause a significant change in or significantly increase costs of farm or forest practices on surrounding lands, contrary to ORS 215.296(1) and OAR 660-006-0025(5).[10]

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[10]ORS 215.296(1) provides:

> "A use allowed under ORS 215.213 (2) or 215.283 (2) may be approved only where the local governing body or its designee finds that the use will not:
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> "(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or
>
> "(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use."

Petitioners argue that the county's findings of compliance with ORS 215.296(1) and OAR 660-006-0025(5) are inadequate and not supported by substantial evidence. Petitioners identify several types of potential impacts from the proposed OHV park: (1) noise impacts on petitioners' farm practices; (2) impacts on forest practices; and (3) impacts on the domestic water supply of a neighboring resource-zoned parcel. Finally, petitioners argue that the conditions the county imposed are inadequate to prevent significant impacts on resource practices on surrounding lands.

A. Noise Impacts on Farm Practices

Petitioners explain that they operate a nearby 600-acre ranch north of the subject property, the primary focus of which is a Limousin cattle breeding operation. Ancillary farm activities include the adoption and training of wild mustangs. The county's decision finds that petitioners' ranch raises champion cattle and does research of various kinds relating to the breeding and raising of fine Limousin cattle. Petitioners testified below that their herd of 300 cattle are full-blood, purebred Limousin cattle that are "top of the line genetically," with individual animals valued at up to $10,000 apiece. Petitioners testified that a safe and calm environment is important to successful breeding and calving of these valuable cattle, which is in turn important to the success of the ranch. With respect to impacts from the proposed OHV park, petitioners testified:

> "There is significant data from the Dunes Park personnel and from neighboring ranchers * * * and our own observations, that there will be an element of the riding group making use of the trails who will constitute a very real trespassing problem.
>
> "* * * The threat of trespass therefore would, out of necessity, need to be met with both passive and active solutions. First, we would need at minimum an eight foot cyclone fence placed between the properties and a firebreak would need to be constructed * * * Second, we would need to patrol our side to assure the safety of our cattle. Both of these would be expensive.

OAR 660-006-0025(5) sets forth the same criteria for uses allowed under OAR 660-006-0025(4), including private parks on forest lands.

> "Since we have a calm herd of cattle, many of which are halter broken—we will need to move them away from the noise and traffic to other land holdings, particularly during the summer months. This will cause over grazing on those pastures and reduce our ability to raise sufficient grass hay to carry our herd through the winter as we do now. We follow a very careful rotational grazing pattern that provides our cattle good summer pastures and supplemental fall grazing forage, but which also allows us to harvest hay from nearly every pasture. We could be forced with the necessity of purchasing an additional $6,000 - $9,000 worth of hay every year. Up to 150 tons at $60.00 per ton.
>
> "We follow as carefully as possible recommended ethical and gentle stockmanship and we know that such practices are effective. * * * From a purely economical perspective, good stockmanship pays. There are numerous studies where the difference in replacing an average stockperson with a good one increased net returns by 10 to 20%. * * *
>
> "The effect of the proposed OHV trail park upon our good stockmanship is a concern and the noise and traffic of this OHV trail park could cost us a 10-20 percent return. I would view a potential loss of $15,000 to $20,000 a year as *significant*.
>
> "[The applicants contend] that noise will not be a problem. If we can hear one or two machines on calm days (and we have in the past), what will 25 to 45 OHVs be like? A roar is what it will resemble. * * *" Record II 21-22 (emphasis in original).

With respect to petitioners' wild mustang adoption and training operation, petitioners cite to testimony by the trainer that wild mustangs spook easily, and that existing OHV noise from the subject property has already caused the trainer to discontinue use of a training trail during times that OHVs are being used. Record II 15. The trainer testified that the mustangs are kept approximately one-half mile from the subject property. *Id.*

Petitioners emphasize with respect to both types of identified impacts that the county failed to determine or limit the activities or numbers of participants during what would presumably be the times of most intense usage of the proposed OHV park: the 12 annual "Special Events" approved. Petitioners argue that without such determination or limits, the county has no basis to conclude that the cumulative noise impacts of what could be hundreds of OHVs operating at the same time will not significantly change or increase the cost of farming practices on petitioners' ranch.

In relevant part, the county found with respect to noise impacts:

> "* * * We find that noise generated by the proposed use will not be such as to force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use. The trail system will be isolated by topography within a bowl created by an 800-foot-high tree-covered ridge and by distance, as shown on the aerial photos and maps. Rec. 336-345.
>
> "By the terms of this Order, all vehicles will be required to have mufflers in good working order[.] The applicant has proposed that no vehicle using the facilities will be allowed to exceed noise levels of 99 decibels measured 20 inches from the muffler at 45 degrees as required by DEQ regulations. By comparison, a chainsaw operates at about 110 decibels and a rotary lawn mower operates at about 95 decibels. Rec. 183. Measurements will be taken of each vehicle before it is allowed to operate. * * *
>
> "[T]he trail system we are approving is located consistent with the advice of the AMA's [(American Motorcycle Association's)] trail design guide. All trails in the proposed system will be separated from area homes both by ridges and topography, as recommended by the guide. In addition to topography, physical distance is very effective at reducing sound impacts, and here the large size of the [subject property] is valuable in dispersing the use internally and in separating the trail system as a whole from the Wheeler and Utsey/Tang pastures.
>
> "Our conditions require that noise levels not exceed 99 decibels 20 inches from each vehicle's tailpipe, using standard [DEQ] measurement procedures * * *. With this limit in place, noise may be expected to attenuate to 75 decibels at 24 feet and to 51 decibels at 364 feet, which is less than a quarter mile away. The record shows that areas used by livestock on adjoining lands are about 1/2 mile, or more than 2,500 feet, away. Rec. 218 and scaled aerials and maps at Rec. 336-345. This is well within the quiet-area standard set by DEQ regulations. * * *
>
> "These conditions on noise level are imposed to address concerns raised by Mr. Utsey about stress to his livestock. These restrictions are consistent with those imposed on 'noise sensitive properties' and in quiet areas, as these are identified by DEQ regulations." Record 19-20 (footnotes omitted).

We agree with petitioners that the county's findings with respect to noise impacts are inadequate. The county does not address the evidence petitioners submitted regarding potential noise impacts of the proposed OHV park on their farm practices, or explain why the proposed OHV park, as conditioned, will not cause those impacts. The county's findings provide no basis to conclude that noise from the OHV park, even limited by the conditions

imposed, will not have the consequences petitioners identify. The county does not explain why a condition of compliance with DEQ standards is adequate to ensure that those consequences will not occur. Further, although the county imposed a condition designed to prevent any OHV, alone or in conjunction with others, from exceeding DEQ ambient noise limits within 1,000 feet of that OHV, the county's findings suggest no way to achieve compliance with that condition other than requiring that individual OHVs should not exceed 99 decibels. However, that individual OHVs will not exceed 99 decibels does not address the cumulative noise impacts of a number of OHVs operating simultaneously. Because the county made no findings regarding such cumulative impacts, the county is in no position to conclude that the impacts and cost increases identified by petitioners will not occur.

This subassignment of error is sustained.

B. Impacts on Forest Practices

The county's decision concludes that no participants in the proceedings expressed concern that the proposed use would significantly alter forest practices in the area. Record 17. Petitioners dispute this finding, pointing to concerns raised below that the development and maintenance of trails on the subject property would be detrimental to forest practices on the subject property, by converting forest lands to non-forest use.

ORS 215.296(1) requires analysis of impacts to accepted farm and forest practices on "*surrounding* lands devoted to farm or forest use." (Emphasis added.) It is not clear that ORS 215.296(1) requires consideration of impacts on farm or forest practices on the property that is being proposed for a use allowed under ORS 215.283(2). Even if such impacts must be considered, petitioners do not identify any forest *practices* impacted by the proposed OHV park.

This subassignment of error is denied.

C. Impacts on Water Supply

Petitioners argue that the county's decision fails to address evidence that the proposed OHV park will detrimentally affect the domestic water supply of the neighboring Nobbs ranch. Petitioners explain that the main access road on the subject property is carved into a steep hillside above a drainage basin that supplies domestic water for the Nobbs property, through a series of ponds.

The Nobbs submitted a report by OHP, LLC, an aquatic resource inventory, analysis, consulting and restoration firm. The report describes historical slope failures related to the access road, and concludes that the increase in traffic associated with the proposed OHV park "will most likely have an impact on drainage patterns that could adversely effect slope stability. This site exhibits a high probability of continued slope failure and subsequent potential degradation to the Nobbs family's water supply." Record II 86. The Nobbs expressed concerns that slope failure attributable to increased traffic on the access road could require them to replace or repair their primary water source. Further, the Nobbs testified that even without slope failure, water contamination from dust and petroleum by-products could impose significant increased costs from testing and purification of the existing water supply. Petitioners argue that the county erred in failing to address the foregoing evidence.

Although the challenged decision addresses other watershed impact issues, it does not appear to address the issues raised by the Nobbs regarding impacts to their water supply, and whether such impacts significantly change or increase the costs of farm or forest practices on their property. Where specific issues are raised concerning compliance with an approval criterion, the findings supporting the decision must respond to those issues. *Rouse v. Tillamook County*, 34 Or LUBA 530, 536 (1998).

This subassignment of error is sustained.

D. Conditions of Approval

Petitioners argue that several conditions of approval necessary to comply with ORS 215.296(1) are inadequate to prevent significant changes or significant cost increases to accepted farming practices on surrounding lands.

Petitioners argue, first, that preventing trespassing by OHV riders is essential to comply with ORS 215.296(1), but the only condition imposed to prevent trespassing is a requirement that intervenors supply each rider with a map of the approved trails, that intervenors post "No Trespassing" signs on unauthorized trails, and that intervenors require each rider to sign a statement agreeing to comply with the park's rules. Petitioners argue that these conditions are inadequate to prevent trespassing over a 531-acre parcel, and that a physical barrier, such as a fence, is necessary to prevent trespassing. Similarly, petitioners argue that the condition prohibiting riders from venturing within 100 feet of petitioners' property line is unenforceable and inadequate to prevent trespassing. Finally, petitioners argue that a condition B-12, which requires that trails be kept 100 feet from the ridgeline, is contradicted by the county's approval of certain trails that travel along or near ridgelines.

With respect to the provisions directed at preventing trespassing, the county found that the subject property is fenced along its entire perimeter, except for a small segment along the southwest property line, where a steep ridge and dense vegetation prevent passage. Petitioners do not explain why the existing fence, in addition to the other measures imposed by the county, is inadequate to prevent trespassing.

With respect to the prohibition on ridgeline trails, the county approved the trails depicted on a topographical map, attached to the decision as "Exhibit B." As petitioners point out, the map appears to depict several segments of approved trails and roads that run along or near ridgelines. Record 30. We agree with petitioners that the condition B-12 is in apparent conflict with the approval of trails on or near ridgelines. Remand is necessary for the county to explain or resolve the apparent inconsistency. *See Doob v. Josephine County*,

27 Or LUBA 293, 301 (1994) (where the county adopts conflicting findings that are not reconciled in the challenged decision, the conflict may sufficiently undermine the sufficiency of the findings to render them inadequate).

This subassignment of error is sustained, in part.

The second assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

Petitioners contend that the county committed procedural error that prejudiced petitioners, in denying petitioners' motion to reopen the record.

The county closed the record on August 18, 1999, but did not issue its final written decision until December 22, 1999. Petitioners explain that on September 26, 1999, intervenors invited the public to an OHV riding and fundraising event on the subject property, in which 300 people participated. On October 22, 1999, petitioners requested that the county re-open the record to consider evidence regarding that event, which petitioners argued was relevant evidence of the probable character and impacts of the 12 "Special Events" approved by the county. The county denied that request, stating that "[a]ny activities subsequent to the closing of the record on August 18, 1999, are not relevant to the application and appeal and will not be considered." Record 9.

Petitioners argue that the county erred in finding that the evidence was irrelevant, and that the county cannot refuse to accept evidence relevant to an approval criterion. *Friends of Linn County v. Linn County*, 37 Or LUBA 280, 285 (1999); *Silani v. Klamath County*, 22 Or LUBA 734, 740 (1992). However, in both *Friends of Linn County* and *Silani* the local government rejected evidence offered during the period in which the record was held open to receive such evidence. Petitioners do not cite to any authority, and we are aware of none, that compels the county to re-open the record to accept new evidence after the record is closed, no matter how relevant that evidence is.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners argue that the county erred in determining that the proposed OHV park is a "low-intensity" recreational use, as defined by CCZLDO 2.1.200.[11]

The county found that the proposed OHV park was a low-intensity recreational use as defined by CCZLDO 2.1.200, as part of its reasoning why the proposed park was a "private park" for purposes of ORS 215.283(2)(c), OAR 660-006-0025(4)(e) and corresponding local provisions:

> "The use proposed by the applicants takes the subject property as it is, using the existing private dirt and gravel roads as the main element in the trail system. The trail system will involve only minimal toilet facilities and other nonstructural improvements, such as trails and paths. No permanent structures will be constructed. The activity will be dispersed both in time and space over a long trail system on a large tract of land. The recreational activities and facilities make use of the site as a recreational park while it continues to serve its primary purpose as land on which the existing commercial farm and forest practices will continue without significant changes or increases in costs. This is a low-intensity use." Record 15.

Petitioners contend that the county's conclusion rests primarily on its view that no "permanent structures" will be constructed. Petitioners explain that the county defines a "structure" for purposes of this decision as "a roofed and walled structure built for or capable of permanent use." Record 24. However, petitioners argue, that *ad hoc* definition is

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[11]CCZLDO 2.1.200 defines "Recreation – Low Intensity" as follows:

> "A limited experience voluntarily engaged in largely during leisure (discretionary time) from which the individual derives satisfaction. Low intensity recreation facilities may include boat ramps, minimal toilet facilities, interpretative shelters and other non-structural improvements such as trails, paths, and other activities not requiring permanent structural facilities."

In contrast, CCZLDO 2.1.200 defines "Recreation – High Intensity" as

> "Any experience voluntarily engaged in largely during leisure (discretionary time) from which the individual derived satisfaction. High intensity recreation facilities may include the same types of facilities as low intensity recreation facilities, but are generally more intense in nature and may include large improved parking lots, highly developed picnic or camping areas, skeet ranges or trap ranges, commercial hunting or fishing preserves, and other recreationally dependent structures. High-intensity facilities can include small docks that provide temporary, day-use only, transient boat tie-ups when in conjunction with approved boat ramps."

considerably narrower than the definition of "structure" at CCZLDO 2.1.200. Further, petitioners and DLCD argue, it is worded in the conjunctive in a manner that would allow structures such as bleachers, grandstands, starting gates, carports, pavilions, etc., *i.e.*, structures with either a wall and no roof or a roof and no walls. Petitioners submit that the activities and structures allowed by the decision are inconsistent with "Recreation—Low Intensity" as defined by CCZLDO 2.1.200, and that the county erred in determining otherwise.

It is not clear what role the county's determination that the proposed OHV park is a "low-intensity" recreational use plays in the decision. We are not advised of any provision of the county's code that limits a private park on agricultural or forest lands to "low-intensity" recreational uses as opposed to "high-intensity" recreational uses.[12] As we understand the county's decision, its finding that the proposed OHV park is a "low-intensity" recreational use as defined by county code is used to bolster its conclusion that the proposed park is similar to the use approved in *Spiering* and unlike the uses found to be too intense to be allowed on forest lands in *Tice*, *Teamsters*, *Donnelly* and similar cases. Our analysis of the relevant statutes and administrative rules under the first assignment of error resolves that issue, without regard to the definition at CCZLDO 2.1.200. Because that definition plays no role in the terms of any approval criteria identified to us, any error committed by the county in applying that definition is harmless error. *See DLCD v. Josephine County*, 28 Or LUBA 459, 461 (1994) (adoption of an inaccurate local code definition of the term "taking" provides no basis for reversal or remand, where the term "taking" is not used elsewhere in the code).

The fourth assignment of error is denied.

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[12]As far as we can tell, the only role the definitions of recreational uses play under the county's legislation is with respect to certain site-specific coastal and aquatic zones, at CCZLDO 4.5.100 to 4.5.832. The subject property is not, apparently, within any of those zones.

The county's decision is remanded.