BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROBERT HORNING,
Petitioner,

vs.

WASHINGTON COUNTY,
Respondent,

and

RONALD SQUEGLIA,
Intervenor-Respondent/Cross-Petitioner.

LUBA No. 2005-108

FINAL OPINION
AND ORDER

Appeal from Washington County.

William K. Kabeiseman, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Carrie A. Richter and Garvey Shubert Barer.

Chris Gilmore, Assistant County Counsel, Hillsboro, filed a response brief and argued on behalf of respondent.

Ronald Squeglia, North Plains, filed a response brief and a cross-petition for review on his own behalf.

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

REMANDED 02/17/2006

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

Petitioner appeals a hearings officer's decision that approves in part and denies in part a proposal to expand an existing private park to include eight multi-day concert events and an expanded campground on a 158-acre tract zoned Exclusive Forest Conservation (EFC).

FACTS

The subject property is located approximately six miles north of the City of North Plains. Access to the property from the highway requires driving several miles north along NW Pumpkin Ridge Road, a two-lane paved county local road. Immediate access is provided by NW Brunswick Canyon Road, a county road with an 18-foot wide gravel surface. NW Brunswick Canyon Road bisects the subject property and continues north. The main topographic feature of the subject property is Brunswick Creek canyon, which bisects the approximate middle of the property from east to west. The camping and concert facilities described below are generally located in the canyon on both sides of the creek.

The parcels north of the property consist mostly of large industrial timberlands zoned EFC. South and west of the subject property is an area zoned Agriculture-Forest 20-acre minimum (AF-20), which consists of a number of parcels with mixed uses including rural residential, agricultural and timber uses. The area east and southeast of the subject property consists of a number of parcels zoned EFC.

In 1988, the county approved an application for a private park on the subject property, including a fishing pond, picnic areas and unspecified recreational activities. The 1988 decision conditioned approval on a review of conditions at the end of a five-year period to determine whether additional conditions were necessary to lessen the impact of the park on surrounding properties.

In 1993, the county approved an application for two primitive campsites on the property. At some point in the late 1990s, the park began to host outdoor musical events, with associated camping on more than the two authorized sites. In 1999, the county issued a notice of violation for the unauthorized expansion of the concert events and campsites. As an apparent consequence, the applicants applied for, and the county approved, one additional tent camping site, two RV/tent camping sites, and a restroom on a septic system. The 1999 approval limited the park use to tax lots 100 and 200, but did not otherwise address, authorize, or limit musical events. In the period between 2000 to 2005, the musical events grew in size until, in the summer of 2004, the park hosted several multi-day events that attracted over 1,000 people. At some point during this period petitioner constructed a stage, five group shelters, and a shower facility without county approval. In 2004, petitioner and his mother acquired an adjoining parcel, tax lot 400, which includes an existing dwelling.

In January 2005, petitioner requested review of compliance with conditions of approval with respect to the 1988, 1993 and 1999 decisions, and a special use review for the following proposals: (1) expand the private park to include tax lot 400, (2) conduct up to eight multi-day concerts totaling no more than 24 days of activity within a 120-day period from mid-May to mid-September, (3) provide 35 acres for an unspecified number of campsites or camping areas, and 23 acres of associated parking, (4) retroactively approve seven structures, including the stage, group picnic shelters and the shower facility, and (5) dispense with future periodic reviews for compliance with conditions of approval.

One disputed point in this appeal is the number of attendees at the proposed concerts. The application proposed a maximum of 5,500 persons per concert, but petitioner took the position below that only one or two of the concert events would have more than 3000 people per day in attendance, up to a maximum of 5,500 people. According to petitioner, if attendance exceeded 3,000 persons during those one or two events, petitioner would seek an Outdoor Mass Gathering permit from the county Department of Health and Human Services

(HHS), pursuant to ORS 433.750(1). As discussed below, such permits are not subject to county land use regulations and are not land use decisions as that term is defined at ORS 197.015(10).

County staff recommended approval of six of the seven structures, but denial of the concert events and expanded camping. The hearings officer conducted a hearing at which a number of neighbors appeared in opposition. The hearings officer issued a decision that (1) approved the seven proposed structures and the expansion of the park to tax lot 400, but (2) denied the concert events and expanded camping. The hearings officer denied the concert events on several grounds, including that they constituted in effect an "outdoor performing arts center," as defined by the county code, that is not allowed on the subject property. The hearings officer further denied the proposed events and campsites based on concerns regarding noise, wildfire, and protecting riparian habitat on the property. This appeal followed.

MOTION TO STRIKE

Intervenor-respondent moves to strike Appendix C to the petition for review on the grounds that it consists of documents not in the record. There is no response to the motion. We agree with intervenor-respondent that the material in Appendix C is not in the record. We shall not consider Appendix C or references in the petition for review to that material.

CROSS-APPEAL

A. Standing

Petitioner challenges the standing of intervenor-respondent (intervenor) to file a cross-petition for review. While OAR 661-010-0030(7) explicitly authorizes the filing of a cross-petition, petitioner argues, the rule is inconsistent with ORS 197.830(2). That statute provides that:

> "Except as provided in ORS 197.620(1) and (2), a person may petition [LUBA] for review of land use decision or limited land use decision if the person:

> "(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section; and
>
> "(b) Appeared before the local government, special district or state agency orally in writing."

Petitioner concedes that intervenor appeared before the local government, and that intervenor has standing to intervene in this appeal pursuant to ORS 197.830(7). However, petitioner contends that ORS 197.830(2) permits a party to "petition" LUBA for review of a decision only if the person files a notice of intent to appeal that decision. It is inconsistent with ORS 197.830(2), petitioner argues, to allow an intervenor-respondent to file a cross-petition for review under OAR 661-010-0030(7).

Petitioner's argument is plausible, particularly if the text of ORS 197.830(2) is considered in isolation. While the text of ORS 197.830(2) says nothing about what petitions or briefs an *intervenor* may file before LUBA, the negative implication of providing that "a person may petition" LUBA for review of a decision "if the person" files a notice of intent to appeal suggests that other persons before LUBA who are not petitioners may not "petition" LUBA for review of that decision, *i.e.*, they may not seek reversal or remand of the decision. However, for the following reasons we decline to read ORS 197.830(2) as implicitly prohibiting cross-petitions for review.

First, although the parties do not cite the case, we rejected an identical argument in *Reusser v. Washington County*, 24 Or LUBA 652, 654 (1993), based in part on the context of ORS 197.830(2). That context includes ORS 197.830(13)(a), which authorizes LUBA to adopt rules establishing deadlines for petitions and briefs, and ORS 197.805, which states the legislative policy that "time is of the essence in reaching final decisions in matters involving land use" and that those decisions be made "consistently with sound principles governing judicial review." We held in *Reusser* that allowing cross-petitions furthers the legislative policies set out in ORS 197.805 because it reduces the necessity for filing multiple appeals.

We also relied on *State ex rel Dodd v. Joseph*, 313 Or 333, 833 P2d 1273 (1992), in which the Oregon Supreme Court affirmed the Court of Appeals' authority to adopt rules that allow for cross-petitions in appeals of a LUBA decision to the Court under ORS 197.850.[1] The court's rules provided then, and continue to provide, that once a LUBA decision is appealed to the court, any other party may file a cross-petition for review challenging the LUBA decision, without requiring that the cross-petitioner also file a petition for judicial review (the equivalent to the notice of intent to appeal before LUBA). Oregon Rule of Appellate Procedure 4.68.

There is a clear similarity between the statutory scheme for invoking the Court of Appeals' review under ORS 197.850(1) and (3), the grant of authority for the Court to adopt rules governing petitions and briefs under ORS 197.850(6), and the analogous statutes at ORS 197.830(2) and 197.830(13)(a). If it is consistent with legislative intent for the Court's rules to allow cross-petitions on review of a LUBA decision, it is difficult to see how a

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[1] ORS 197.850 provides, in relevant part:

> "(1) Any party to a proceeding before [LUBA] under ORS 197.830 to 197.845 may seek judicial review of a final order issued in those proceedings.
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> "* * * * *
>
> "(3)(a) Jurisdiction for judicial review of proceedings under ORS 197.830 to 197.845 is conferred upon the Court of Appeals. Proceedings for judicial review shall be instituted by filing a petition in the Court of Appeals. The petition shall be filed within 21 days following the date the board delivered or mailed the order upon which the petition is based.
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> "(b) Filing of the petition, as set forth in paragraph (a) of this subsection, and service of a petition on all persons identified in the petition as adverse parties of record in the board proceeding is jurisdictional and may not be waived or extended.
>
> "* * * * *
>
> "(6) Petitions and briefs shall be filed within time periods and in a manner established by the Court of Appeals by rule."

different conclusion could be reached with respect to LUBA's rules. For these reasons, we disagree with petitioner that OAR 661-010-0030(7) is inconsistent with ORS 197.830(2).[2]

B. OAR 661-010-0030(7)

OAR 661-010-0030(7) requires that a cross-petition for review must comply with requirements governing the petition for review. The county argues that the cross-petition omits or inadequately addresses the requirements for a petition for review at OAR 661-010-0030(4) with respect to (1) the statement of standing, (2) the statement of the nature of the land use decision and the relief sought, (3) the summary of the material facts, and (4) the statement of the Board's jurisdiction.

The cross-petition for review includes a statement of standing alleging that cross-petitioner appeared below and a section describing the nature of the decision. While both statements are cursory, the county does not seriously dispute that cross-petitioner appeared below as alleged and that cross-petitioner has standing, and it is doubtful that the county is confused over the nature of the decision. The cross-petition requests reversal of the hearings officer's decision. Cross Petition 6. We do not see that the cross-petition is defective in these regards.

The cross-petition does not include a summary of the material facts or a section establishing the Board's jurisdiction, as OAR 661-010-0030(4)(b)(C) and (c) require. The county argues that omission of the summary of material facts prejudices the county's

[2] In addition, we note that if petitioner's argument is carried to its logical conclusion then persons who intervene on the side of *petitioner* could not file a petition for review, as provided by OAR 661-010-0050(3)(a), because they have not filed a notice of intent to appeal. If an intervenor-petitioner cannot file a brief on the merits then intervening on the side of petitioner would be a useless exercise, which seems inconsistent with ORS 197.830(7). That statute allows "any person" who meets specified standing and other requirements to intervene in an appeal to LUBA, with the clear implication being that intervenors may then participate as parties, including filing briefs on the merits of the appeal. Nothing in the pertinent statutes suggests that ORS 197.830(2) and 197.830(7) should be read together in a manner that effectively precludes intervenors-petitioner from filing briefs on the merits and allows only intervenors-respondent to participate. For that matter, we note that petitioner's reading of ORS 197.830(2) would appear to preclude a state agency from filing a brief under ORS 197.830(8) if that brief sought reversal or remand of the challenged decision.

substantial rights, but it is not clear why. The two assignments of error in the cross-petition primarily allege errors of law. Further, we see no reason for a full summary of material facts in a cross-petition for review, where as here the petition for review includes a summary that appears more than adequate to give the Board and the parties a sufficient understanding of the relevant facts underpinning both petitions. While the cross-petition is deficient in this regard, we do not see that that defect prejudices the parties' ability to respond to or the Board's ability to understand the cross-petition.

The cross-petition does not include a statement of jurisdiction. However, again, there is no dispute that the Board has jurisdiction over the challenged decision, a point that is adequately addressed in the petition for review. We do not see that failure to include a statement of jurisdiction is a basis to reject the cross-petition in this case.

The cross-petition is allowed.

FIRST ASSIGNMENT OF ERROR

As a condition of approval, the hearings officer required that petitioner provide "evidence the fencing (approved pursuant to below) has been implemented." Record 16. Petitioner argues that that condition refers to a staff proposal to fence the perimeter of the proposed camping area if the proposed concerts and associated camping are approved. Because the hearings officer denied the concerts and expanded campground, petitioner argues, any condition for fencing the site is erroneous and should be stricken.

The county agrees that the condition was mistakenly included in the conditions of approval. According to the county, the condition is a nullity, because it operates only in reference to another condition "approved pursuant to below" that was in fact never imposed. The inclusion of the condition requiring fencing is thus harmless error, the county contends, and not a basis to reverse or remand the challenged decision.

Intervenor-respondent (intervenor) does not agree that the fencing condition was intended to apply only if the hearings officer approved the proposed concerts and expanded

campground. According to intervenor, the fencing condition is in part intended to address trespassing problems that have arisen from other activities at the park, including smaller concerts not associated with the eight large (>1000 persons) concerts proposed in the application.

Petitioner and the county are probably correct that the fencing condition was intended to apply only if the proposed concerts and expanded campground were approved. However, that is not entirely clear to us. We cannot say that inclusion of the condition is a nullity or harmless error that we can overlook. Accordingly, remand is necessary for the hearings officer to either withdraw the condition or explain what criterion it relates to and what purpose it serves.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

The hearings officer's determined that the proposed music venue constitutes an "outdoor performing arts center" as described in Community Development Code (CDC) 430-88.[3] There is no dispute that the EFC zone does not permit "outdoor performing arts centers." Even if it did, the CDC limits such centers to locations within one-quarter mile of a highway interchange, and the subject property is more than one-quarter mile from the nearest highway interchange. Accordingly, the hearings officer denied the proposed concerts.

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[3] CDC 430-88 describes an "Outdoor Performing Arts Center" as follows:

> "An Outdoor Performing Arts Center is a land use consisting of an amphitheater with either fixed, permanent or temporary seating or a combination thereof used on a seasonal basis for musical performance theater or similar productions."

As the parties and hearings officer noted, the CDC definition section does not provide a separate definition of "Outdoor Performing Arts Center." However, it is reasonably clear that the description of "Outdoor Performing Arts Center" at CDC 430-88 functions as a definition and has definitional significance, *i.e.*, it describes the scope of the use category "Outdoor Performing Arts Center."

The hearings officer conducted an extensive analysis of the CDC, beginning with a determination that music concerts are recreational uses that are permitted within a "park" that is allowed in the EFC zone. Petitioner does not challenge that determination. However, the hearings officer further concluded that the proposed musical venue is also an "outdoor performing arts center," and thus is *concurrently* subject to the requirements of CDC 430-88. Specifically, the hearings officer found that the open, sloping area before the proposed stage constitutes a natural "amphitheater" within the meaning of CDC 430-88, and that the act of patrons sitting on the ground, on blankets, or on folding chairs constitutes "temporary seating" as that term is used in the code.[4]

Petitioner argues that "temporary seating" clearly refers to some kind of physical seating or structure, and cannot reasonably be interpreted to include an undeveloped, gently-sloping open area. Even if "temporary seating" could potentially include folding chairs, petitioner argues, CDC 430-88 describes an amphitheater that comes "*with* * * * temporary seating." (Emphasis added.) According to petitioner, the private park will provide no physical seats of any kind at concert events, and patrons will not be required or even

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[4] The hearings officer's findings state, in relevant part:

> "(1) The CDC does not define the word 'seating,' and that word is capable of more than one meaning. The hearings officer finds that there is nothing in the context of the term that requires chairs, benches or other accessories per se.
>
> "(2) The applicants intend to have people sit within the gently sloping open space in front of the stage when watching a concert. The site contains seating, albeit on the ground or on folding chairs, blankets or the like that the patrons bring, as is evidenced in the record on the numerous photos of the area in front of the stage. Therefore, the hearings officer disagrees with the applicants, and concludes that the site does contain temporary seating during concert events." Record 37 (footnote omitted).

In the omitted footnote to the above text, the hearings officer stated:

> "An expansive reading of the term is also supported by the first two definitions for the term 'seat' in WEBSTERS NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE (1966) as follows: '1. the manner of sitting, as on a horseback. 2. the place or space where a person sits. . .' Neither requires a chair." Record 37, n 19.

encouraged to sit. Patrons will be "free to stand, sit, squat, dance or use the space in front of the stage in whatever method they choose." Petition for Review 15.

The county responds that the hearings officer's interpretation of "temporary seating" is reasonable and correct. The county cites, as did the hearings officer, to dictionary definitions indicating that the term "seat" is not limited to physical objects or structures, but can include a place where people sit or that is available for sitting. The county argues further that a broad interpretation of "temporary seating" is necessary to prevent park owners from circumventing the requirements for an "outdoor performing arts center."

We agree with petitioner that the hearings officer misconstrued CDC 430-88. There seems little doubt that the phrase "fixed [or] permanent * * * seating" refers to physical objects or structures, such as chairs or benches, that provide people with a place to sit. The third category of "temporary" seating adds a temporal element, but we see nothing to suggest that "temporary" seating differs from "fixed [or] permanent" seating by including bare ground.[5] An undeveloped open area on which people may or may not sit or spread blankets does not constitute "temporary seating" as that term is used in CDC 430-88. While folding chairs could certainly qualify as "temporary seating," we agree with petitioner that the amphitheater must in some way come "with" or provide the seating. *See also* CDC 430-88.1(C) (limiting outdoor performing arts centers to 5000 permanent seats, although "[a]dditional, non-permanent seating may be provided"). That some patrons may voluntarily bring folding chairs to an outdoor musical event does not transform that venue into an "amphitheater with * * * seating," as the code describes that use.

[5] Indeed, if the ground itself could provide the "seating," then one would think that that seating would be "fixed" or "permanent" rather than "temporary." The distinctions between "fixed," "permanent" and "temporary" are clearly based on the nature of the seat, not the actions or endurance of the sitter. However, it seems highly unlikely that the board of commissioners intended "fixed [or] permanent * * * seating" to include bare ground.

The terms "seat" and "seating" have a number of dictionary definitions, and it is certainly appropriate (even necessary) to refer to those definitions, in interpreting ambiguous code language. However, given the descriptive and all-inclusive nature of modern reference dictionaries, some caution is warranted. The fact that one of several definitions of "seat" refers to the "place where a person sits" or words to that effect does little to tell us what the county governing body meant to include within the scope of "fixed, permanent or temporary seating." As noted, the best indication of that intent is the text and context of CDC 430-88 itself, which describes "outdoor performing arts center" in a way that appears to limit it to amphitheaters that provide physical seats or structures on which people are intended to sit during a performance.

The county is undoubtedly correct that a broad understanding of "outdoor performance arts center" would frustrate those who wish to avoid its regulations. The hearings officer may be correct that the board of commissioners would wish the regulatory scope of "outdoor performance arts center" to include the proposed musical events, given the similar potential adverse impacts of such events. However, the fact is that the board of commissioners drafted CDC 430-88 in such a way that it does not appear to include the proposed use. If the board of commissioners wishes to regulate as "outdoor performance art centers" other uses besides those that involve "amphitheaters with fixed, permanent or temporary seating," then it must amend the code to so reflect.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

CDC 342 allows parks and campgrounds in the EFC zone under the standards of CDC 342-3.3 and 342-4.2, both of which require findings that the proposed use will not (1) force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands, or (2) significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression

personnel. In addition, CDC 428-4.1(A)(2) requires a finding that the siting of structures in the EFC zone "ensures that forest operations and accepted farming practices will not be curtailed or impeded." *See* n 9. Petitioner refers to these standards collectively as "significant impact" tests that are derived from or inspired by ORS 215.296(1).

Petitioner submitted an impact assessment to demonstrate that the proposed concert events and associated camping comply with the significant impact standards. With respect to the risk of fire, petitioner submitted an operating plan for large events that includes a page describing various proposed fire prevention and fire-suppression procedures, including a prohibition on open fires. Petitioner also submitted a letter from the local fire district. The fire district letter opines that, provided the prohibition on open fires is maintained, there would be no significantly increased fire hazard or fire suppression cost. Record 372.

The hearings officer found that the impact assessment was inadequate in several respects, and failed to demonstrate compliance with those standards.[6] The hearings officer

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[6] The hearings officer's findings state, in relevant part:

> "The hearings officer finds that the applicants' impact assessment failed to substantiate the boundaries of the impact areas, failed to make realistic assumptions about potential crowd size and the nature and density of camping, failed to make an adequate inventory of farm and forest uses and practices, failed to realistically assess noise impacts based on substantial evidence, failed to assess the impact of campfires that the applicants apparently plan to allow at all but 'larger' events unless restricted by the State Forester and failed to support many conclusions with substantial evidence. Instead the assessment relies on speculation, the lack of evidence of harm (which the hearings officer understands from case law is not the same as substantial evidence supporting an affirmative finding) and on testimony exclusively from witnesses who support the proposed uses and without addressing substantial evidence to the contrary." Record 40-41.

In a footnote appended to the above text, the hearings officer stated:

> "For instance, there is no substantial evidence in the record about ambient noise levels or the impact of increased noise on animals nor that noise levels will not increase suddenly. Comparing concert noise to noise of log trucks is not germane, because log trucks and other farm and forest practices are permitted outright and [are] not subject to noise regulations. The argument that fire hazards will be addressed by effective management and guidance to patrons is conclusory. The assessment fails to give weight to impacts of the use on aerial spraying or on farm and forest traffic conflicts with events. In short the assessment is a transparent partisan justification of the use rather than an objective assessment of impacts. * * *" Record 41 n 21.

particularly emphasized the risk of wildfire, and found that the proposal to allow thousands of campers to pitch tents throughout forested areas of the site was "a disaster just waiting to happen." Record 41.[7] Accordingly, the hearings officer concluded that petitioner failed to demonstrate compliance with CDC 342-3.3, 342-4.2 and 428-4.1.

Petitioner disputes the hearings officer's finding that the impact assessment was inadequate and the conclusion that petitioner failed to demonstrate compliance with the significant impact standard. With respect to the risk of wildfire, petitioner argues that the fire district letter is substantial evidence that the proposed concerts and camping will not significantly increase fire hazard or fire suppression costs, and that there is no other substantial evidence to the contrary.

Because we agree with the county that the hearings officer's findings with respect to the risk of wildfire are supported by substantial evidence, we decline to address petitioner's challenges to the hearings officer's other bases for denial under CDC 342-3.3, 342-4.2 and 428-4.1.

The fire district opinion that large event camping would not significantly increase fire hazards etc. was premised on the park's ability to prohibit "burning of any type." Record 372. The critical conclusion is that, "*provided the prohibition is maintained on open*

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[7] The hearings officer's findings state with respect to the risk of wildfire:

> "The hearings officer finds that fire is a particularly serious concern, because of the potential significance to surrounding forests if a wildfire occurs. The proposal to allow campers to pitch tents throughout the forested areas of the site is a disaster just waiting to happen * * *. That a fire has not happened yet is not substantial evidence that it is not reasonably likely to occur. The representations in the Operating Plan that the applicants will prevent smoking and fires are simply not persuasive in light of the large crowds involved, the relatively large area where camping is proposed (35 acres), the limited ability of staff to control crowds once dispersed in the campground areas, and the obscuring nature of tents and the forest itself. Particularly where camping is proposed in forested areas well within the 1000-foot buffer proposed for the campsites approved in 1993 and 1999 (i.e. within 50 feet of the site perimeter), it poses a heightened risk and warrants more substantiation than provided. The assessment did not address the issue except in a conclusory and limited manner. The fire district's testimony is not persuasive that it can respond quickly enough to provide emergency services when needed, particularly when the district is not staffed 24 hours a day. There is no substantial evidence about fire district response times." Record 41.

burning, there is not a significantly increased fire hazard[.]" *Id.* (emphasis added). The hearings officer concluded essentially that petitioner's proposals to prevent wildfires by prohibiting campfires and other open fires were simply unrealistic, given the large crowds dispersed over a large forested area, and the limited ability of staff to control those crowds once dispersed. Record 41. The fire district expressed no opinion on that point, but simply offered a contingent opinion based on the assumption that petitioner could in fact maintain the prohibition on "burning of any type."

In addition, the hearings officer found unpersuasive the fire district's testimony that it could respond adequately to fire emergencies during large multi-day events, noting that the fire district offices are not staffed 24 hours per day. The county cites us to evidence that the fire district facilities are staffed only 12 hours per day, and those facilities are located seven miles from the subject property, which is accessed by a single long winding road. Petitioner does not challenge these findings.

Further, the county notes that the hearings officer adopted staff findings raising concerns regarding use of the proposed campsites for events or group camps other than those associated with the proposed eight concerts.[8] The staff findings note that petitioner scheduled 11 group camping events on non-concert weekends during summer 2005 that

[8] The county cites to the following staff finding in the June 8, 2005 addendum to the staff report:

> "As detailed above, Staff continues to have concerns regarding fire hazards on the site. The applicant has provided an operations plan that addresses the larger events (1,000 to 5,000 people), however the applicant has not indicated what measures, if any, are taken for smaller group camping events. As noted later in this report, if approval of the Group Camping includes the days not associated with the concerts, then there are 10 to 15 weekends during the summer season that group camping could occur. According to the information in the Casefile, the applicant has listed 11 group camping events scheduled this summer with up to 200 people at an event. The applicant has articulated measures taken during the large events (no campfires, smoking areas, and fire protection personnel) however no mention is made of the rest of the year. Staff notes that the applicant provided a copy of a letter from the Fire District Inspector that indicates approval of the fire protection aspects of the applicant's operations plan, however it does not address the other non-concert times of the year. * * * Staff continues to conclude that the applicant has not carried the burden of proof necessary for approval of the expansion of the campground for group camping outside the concert weekends." Record 184.

involved hundreds of participants. According to staff, the operating plan and its prohibition on open fires governs only the proposed eight concert events, and does not apply to other large events at the park. The fire district reviewed only the operating plan and did not address other large camping events at the park, where fires are apparently allowed. Staff cited to testimony that campfires commonly occur at such camping events, and found no indication that the fire prevention techniques described in the operating plan (burning prohibitions, designated smoking areas, security patrols, etc.) would be in effect for such events.

Petitioner apparently agrees that the ban on open fires applies only to the proposed large concert events, which he defines as gatherings of over 1,000 people. According to petitioner, during smaller gatherings of less than 1,000 people the park allows open fires except during periods when the state forester prohibits them. Petition for Review 28. However, we understand petitioner to argue that such gatherings of less than 1,000 people are not part of the present application, and thus not properly considered in the hearings officer's decision.

We agree with the county that the hearings officer's findings with respect to fire hazards are supported by substantial evidence. The hearings officer was not obligated to accept the assumption underlying the fire district's contingent testimony. The evidence petitioner submitted with respect to the effectiveness of banning burning of any kind during large events was extremely limited and conclusory. As the hearings officer noted, that a fire has not happened yet is not substantial evidence that a fire is not reasonably likely to occur. The hearings officer's concern with the fire risk presented by up to 5,500 people camping during the dry summer months, in a narrow forested canyon accessed by a single road and seven miles from the nearest emergency responder, is more than a legitimate concern. We cannot say under these circumstances that the hearings officer erred in concluding that

petitioner failed to substantiate its claims that the proposed measures to prevent wildfires will be effective.

In addition, we agree with the county that it properly considered camping events involving fewer than 1,000 people under the significant impact standards. The private park has only five approved camp sites under the 1993 and 1999 decisions. Without county approval, petitioner expanded camping areas on the subject property well beyond those approved, to accommodate thousands of people. While the application did not explicitly seek approval for large camping events of fewer than 1,000 people, the application did seek review of conditions imposed in the previous decisions. The hearings officer found petitioner in violation of those conditions. The hearings officer's decision denies the expanded campground, and limits use of the park to the uses and development approved in the 1988, 1993, and 1999 decisions, or as allowed by the hearings officer's decision. Record 50. The conditions of approval order petitioner to cease "all concert and group camping on the site[.]" Record 16. It seems reasonably clear that denial of the expanded campground is not limited to camping associated with the eight proposed concerts. Although the hearings officer's findings are not entirely clear on this point, the staff findings incorporated by the hearings officer suggest that one reason for denying the expanded campground beyond its use in association with the eight proposed concerts, is concern over the risk of wildfires from smaller concert events not governed by petitioner's fire prevention plan or addressed by the fire district. Petitioner does not challenge those incorporated findings, or offer any reason to dismiss that staff concern.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

CDC 428 provides siting and fire safety standards for dwellings and structures on forest lands.[9] The hearings officer concluded that tents are "temporary structures" subject to the CDC 428 siting and fire safety standards, including standards requiring fire breaks. The hearings officer stated:

> "The hearings officer finds that tents are temporary accessory structures for purposes of CDC 428. Parking consumes all but a few acres of the unforested area of the site. That forces camping into the forest. Because the expanded camp areas are spread over 35 forested areas and extend to within 35 feet of the perimeter of the site, the hearings officer concludes that such expansion does not have the least impact on adjoining forest land, does not minimize the amount of forest land devoted to structures, does not minimize the risks associated with wildfire and does not maintain fire breaks of any size, much less fire breaks consistent with the Department of Forestry standards or alternatives approved by the Department of Forestry or Fire Marshall. By placing tents as close as 35 feet to the perimeter of the site, the applicants effectively force neighbors to provide fire breaks offsite to protect forest resources there." Record 44-45 (footnote omitted).

Petitioner challenges the hearings officer's conclusion that tents are "structures" for purposes of CDC 428. According to petitioner, the definition of "structure" at CDC 106-205

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[9] CDC 428-4.1 provides:

> "A. Dwellings and structures shall be sited on the parcel so that:
>
> > "(1) They have the least impact on nearby or adjoining forest or agricultural lands;
> >
> > "(2) The siting ensures that forest operations and accepted farming practices will not be curtailed or impeded;
> >
> > "(3) The siting ensures that adverse impact on forest operations and accepted farming practices on the tract will be minimized;
> >
> > "(4) The amount of forest lands used to site access roads, service corridors, the dwelling and structures is minimized; and
> >
> > "(5) The risks associated with wildfire are minimized.
>
> "B. Siting considerations satisfying Section 428-4.1 may include setbacks from adjoining properties, clustering near or among existing structures, siting close to existing roads and siting on that portion of the parcel least suited for growing trees."

on which the hearings officer relied clearly refers to permanent, not temporary, structures.[10] Further, if anything in CDC 428 applies to tents or campgrounds, petitioners argue, it is not 428-4.1 but rather CDC 428-2 and 428-3. Petitioner notes that CDC 430-25.2(C) sets forth criteria for "campgrounds" allowed in the EFC zone, and expressly requires that campgrounds shall meet the standards of CDC 428-2 and 428-3, without mention of 428-4. Petitioner argues that the hearings officer failed to address whether the proposed expanded camping complies with CDC 428-2 and 428-3, and therefore remand is necessary to address those standards.

The definition of "structure" at CDC 106-205 is quite broad, and is not expressly limited to permanent structures. Further, the fact that CDC 430-25.2 requires that campgrounds comply with CDC 428-2 and 428-3 tends to support the hearings officer's conclusion. CDC 428-2 and 428-3 provide siting standards for "dwellings and structures" that are reviewed through a Type I procedure. Even if a tent is not a structure, as petitioner claims, it seems that the CDC treats campsites as structures or at least uses that are subject to the standards for structures.[11]

Petitioner appears to be correct that CDC 428-2 and 428-3 provide the relevant criteria for a "campground," at least initially. As we understand the code, CDC 428-4 is invoked only for those dwellings or structures that "do not comply with the standards in Section 428-3," in which case the county applies the standards in CDC 428-4 through a Type II procedure. CDC 428-4. The county argues that no issue was raised below with respect to

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[10] CDC 106-205 states defines "structure" as follows:

> "Anything which is built, erected or constructed and located on or under the ground, or attached to something fixed to the ground. Structures include, but are not limited to, buildings, towers, walls (includes retaining walls), fences more than six feet in height, billboards, and utilities. Structures do not include paved areas."

[11] It is perhaps worth noting here that ORS 433.735(4), which is part of the statutory scheme governing outdoor mass gatherings, defines "temporary structure" to include tents.

compliance with CDC 428-2 and 428-3. In any case, the county argues, petitioner does not allege that the proposed campground complies with the firebreak requirements of CDC 428-3.4(D), and it does not appear it does. Therefore, the county argues, the county did not err in proceeding to evaluate the campground under CDC 428-4.

The hearings officer found that the proposed campground did not comply with the density and other requirements for a campground allowed in the EFC zone under CDC 430-25.2. Petitioner challenges that finding under the sixth assignment of error. However, the hearings officer also adopted a staff report finding stating that the application does not satisfy CDC 428-3. Record 607. While that finding is cursory, petitioner neither challenges it nor alleges that the application satisfies the requirements of CDC 428-3, including the firebreaks required by CDC 428-3.4(D). Accordingly, we see no point in remanding to the county to adopt further findings addressing CDC 428-3 or to explain why it evaluated the campground under CDC 428-4. Petitioner's arguments under this assignment of error do not provide a basis for reversal or remand.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Brunswick Canyon Creek is designated as Water Areas and Wetlands/Fish & Wildlife Habitat in the county's Rural/Natural Resources Plan. In addition, the entire subject parcel is designated Wildlife Habitat in the plan. CDC 422-3.6 requires a finding that the proposed use "will not seriously interfere with the preservation of fish and wildlife areas and habitat identified" in the county natural resources plan.

Petitioner proposed siting large camping and parking areas within 25 to 50 feet of the creek. To demonstrate compliance with CDC 422, petitioner submitted a natural resource assessment prepared by a consultant. The assessment describes several habitat areas, including sensitive forest habitat, riparian habitat, and stream/water areas, and less sensitive or disturbed riparian areas, parkland and open areas. With respect to CDC 422-3.6, the

assessment concludes that the proposed campground complies with that provision because "[t]he proposed uses stay well clear of the more sensitive habitats on the site (Forest Habitat, Riparian Habitat, and Stream/Water Areas) * * *." Record 363.[12]

The hearings officer rejected the above-quoted conclusion, finding that it was irreconcilable with petitioner's proposal to locate hundreds of campsites through 35 acres of forest habitat, and within 25 to 50 feet of Brunswick Canyon Creek.[13] The hearings officer ultimately concluded that petitioner failed to meet his burden of proof with respect to CDC 422-3.6.

Petitioner argues that the hearings officer's finding quoted at n 13 is inadequate because it fails to explain why the proposed campsites will "seriously interfere" with riparian habitat or forest habitat. According to petitioner, the hearings officer offered no interpretation of the "seriously interfere" standard that could be used to evaluate the natural resource assessment, which constitutes the only evidence on the issue. Further, petitioner

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[12] The natural resource assessment states, in relevant part:

> "As noted previously, this proposal takes a conservation approach to planning uses within the site. The proposed uses stay well clear of the more sensitive habitats on the site (Forest Habitat, Riparian Habitat, and Stream/Water Areas) and will have negligible and only temporary impacts to wildlife within the lower quality habitat (Open Areas and Parkland).
>
> "The preceding analysis of habitat areas * * * demonstrates that the proposal will not 'seriously interfere' with the preservation of fish and wildlife areas, and associated habitat. * * *" Record 363.

[13] The hearings officer's decision states, in relevant part:

> "* * * [T]he hearings officer is not bound to accept the conclusions of [the natural resource] assessment. The criteria for development in CDC 422-1 list what is required in a master plan and site analysis. Although the assessment appears on its face to address those requirements, the hearings officer finds that the conclusions of the natural resource assessment are not supported by substantial evidence in the record. For instance the conclusion in the assessment that the proposed uses will stay well clear of riparian and forest habitat is contrary to applicants' proposal to spread 350 campsites through 35 acres of timber and within 25 to 50 feet of a substantial portion of Brunswick Canyon Creek on the site. Therefore, the hearings officer finds that the applicants failed to meet the burden of proof that the proposed concerts and expanded camping will not seriously interfere with the preservation of habitat identified in the Rural/Natural Resource Plan." Record 42.

argues that the hearings officer may have misunderstood the assessment. Citing to maps in the record, petitioner argues that it is clear that camping and parking are proposed mostly within low quality "parkland" and "open areas," not in sensitive riparian or forest habitats. Petitioner contends that any activity close to riparian areas would occur near the disturbed, low quality riparian areas, which are apparently near the pond, not the sensitive riparian areas along the creek.

Based on the maps cited to us, it appears that most of the proposed camping will occur in areas designated "parkland" and most or all of the proposed parking will occur in areas designated "open areas." *See* Supplemental Record 61 and 66. Petitioner may be correct that the hearings officer confused forested "parkland" with "forest habitat." On the other hand, contrary to petitioner's argument it is clear that many acres of proposed campsites and parking areas are located essentially adjacent to the creek area that is marked as "riparian habitat," not limited to the areas around the pond designated as "disturbed riparian area." *Id.* The hearings officer rejected the consultant's testimony that the "seriously interfere" standard was met, in part because that testimony was based on the assertion that the "proposed uses stay well clear" of the more sensitive riparian habitats. We understand the hearings officer to conclude that locating hundreds of campers and vehicles within 25 to 50 feet of sensitive riparian habitat is not "well clear" of that habitat and thus fails to demonstrate that the proposed uses will not "seriously interfere" with that habitat. That conclusion is reasonable and supported by substantial evidence.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

CDC 430-25.2 requires that campsites within a campground allowed in the EFC zone have a minimum area of 1,500 square feet, and limits density to a maximum 10 campsites per acre, with a total maximum campground size of 35 acres. Initially, petitioner proposed large areas of "group camping" without any identified "campsites." In response to concerns raised

at the hearing, petitioner proposed to limit campsite size and density to comply with CDC 430-25. However, the hearings officer found in relevant part that petitioner failed to demonstrate that compliance with CDC 430-25.2 was feasible, given that no individual campsites are identified, and the difficulty of policing the size and density limitations over a forested 35-acre area for thousands of campers entering the site at the start of concert weekends.[14]

Petitioner challenges the finding that compliance with the CDC 430-25.2 size and density standards are not feasible. According to petitioner, there is sufficient land in the 35 acre portion of the property to locate 350 dispersed campsites on 35 acres, with at least 1,500 square feet per campsite. Petitioners contend that with 75-90 staff working at any given

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[14] The hearings officer findings state, in relevant part:

> "a. The hearings officer finds that the proposed campground expansion does not comply with CDC 430-25.2, based on the findings at pp. 36-50 of the Staff Report, pp. 9-10 of the June 8 Addendum to the Staff Report and the following.
>
> "b. Although, after the hearing, the applicants proposed to limit campsite density consistent with CDC 430-25.2.A and B, the hearings officer finds that the applicants failed to sustain the burden of proof that such compliance is feasible. With hundreds if not thousands of campsites spread throughout 35 acres, none of which are identified in advance and most of which are established within a rolling, densely forested topography within a 158-acre site in a relatively short time after gates open to thousands of patrons, when numerous other management duties are likely to occupy the applicants' staff, most of whom are volunteers without evidence of training or expertise in such matters, the applicants' proposal simply is not credible to the hearings officer. Of course the applicants can measure the distance between campsites; it is possible. But it is not reasonable to expect that the applicants will be able to do so in fact given the foregoing and the evidence in the record that the applicants have not done so at major concert events and even relatively small gatherings in the past." Record 45 (footnote omitted).

In the omitted footnote, the hearings officer states:

> "For what it is worth, the hearing officer finds that there is no such use as 'group camping.' The special use potentially permitted in the EFC zone is a 'campground.' See CDC 430-25.2. Based on the evidence in the record, there is nothing about the proposed manner of camping that distinguishes the proposed expansion of the campground on the site from other campgrounds. Each patron can bring his or her own tent and install it separately from others. In fact, given the standards in CDC 430-25.2A and C, each tent must be situated apart from each other tent if permitted." Record 45 n 26.

time, it is certainly feasible for staff to enforce the size and density standards. Although such standards have not been enforced at previous concerts or at smaller events, where petitioner did not attempt to apply those standards, petitioner argues that there is no evidence that such standards cannot be enforced at the proposed large events.

As the hearings officer notes, CDC 430-25.2 allows a campground that consists of individual "campsites" subject to specified size and density standards. The CDC does not allow "group camping" as a use category. Like the hearings officer, we do not see how the size and density standards can be met or meaningfully enforced unless specific "campsites" are delineated. Petitioner did not propose to identify specific campsites or explain how the size and density standards could be enforced absent specific campsite locations that are identified and delineated before campers arrive. Although it is not clear, petitioner apparently proposes that such standards will be enforced in an ad hoc manner, with event staff going through the camping area with measuring tapes and calculators and determining which groups of tents constitute "campsites" and then trying to enforce the size and density per acre standards.

Further, we note that the hearings officer apparently understood the 1,500-square foot spacing standard to apply per tent, that is one tent per campsite or at least per 1,500 square feet. Record 45 n 26, quoted at n 14. As intervenor-respondent points out, that understanding has some support in CDC 430-25.2.B, which states in the singular that a "campsite may be occupied by a tent, travel trailer or a recreational vehicle." Although petitioner does not specifically challenge the hearings officer's apparent understanding, we understand petitioner to take the contrary position that CDC 430-25 allows an unlimited number of tents per "campsite." We tend to agree with the hearings officer that "campsite" implies a discrete unit that is not intended to be occupied by a multitude of tents or trailers, etc. The wording of CDC 430-25.2.B aside, the minimum size and density standards can have meaning only if there is some limit to the number of tents or occupants per "campsite."

However, because it is not clear that the issue was decided below or is challenged before us, we need not and do not address that issue.

Petitioner also challenges the bases for denial identified in the two staff reports adopted by the hearings officer. According to petitioner, the initial staff report found that the proposed campground violated the 1,500-square foot minimum size standard and the 10 campsites per acre density standard. After petitioner proposed to allow only 350 campsites, the supplemental staff report expressed disbelief that petitioner could pack up to 5,500 people into only 350 "campsites," and recommended that the hearings officer require petitioner to submit a detailed site plan showing compliance with the size and density standards. Petitioner argues that staff misunderstood the proposal in various ways, for example by assuming that all attendees would necessarily camp. We are not persuaded that staff misunderstood the proposal or that any misunderstanding undermines the staff conclusion that petitioner had failed to demonstrate that it can comply with the size and density standards.

The sixth assignment of error is denied.

FIRST ASSIGNMENT OF ERROR (CROSS-PETITION)

Before the hearings officer the parties disputed whether and to what extent the proposed concert events are subject to CDC land use regulations. The hearings officer concluded that the concert events were subject to county regulation, although the hearings officer noted that state law governing "outdoor mass gatherings" under ORS 433.735 through 433.770 pre-empts or supersedes CDC requirements, and potentially could allow up to two gatherings within a three month period, and up to four gatherings within a four-month summer season.[15]

[15] The hearings officer's findings state, in relevant part:

> "The parties dispute whether and, if so, to what extent the proposed uses are subject to county land use regulations. Clearly the CDC says they are, even if it takes five or six pages of

Cross-petitioner challenges the foregoing, arguing that the hearings officer misconstrued ORS 433.735 through 433.770 and ORS 197.015(10)(d) to conclude that the applicant has the right to one outdoor mass gathering *and* one small gathering during a three-month period. According to cross-petitioner, the statutes are correctly interpreted to allow *either* one outdoor mass gathering (>3000 persons) *or* one small gathering (<3000 persons) within a three-month period, not both.

The county and petitioner respond that the hearings officer merely assumed, without deciding, that the relevant statutes potentially allowed petitioner to conduct both an outdoor mass gathering and a small gathering within a three-month period. Any such gatherings were not part of the application before the hearings officer, the county argues, and the hearings officer did not authorize or decide anything about such gatherings. In the alternative, the

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discussion to figure it out. But state law pre-empts or supersedes the CDC where the legislature evidences an intent to do so expressly or by implication. As county staff and counsel and applicants' counsel discuss, the legislature, in its infinite wisdom, adopted ORS 433.735 through 433.770 and ORS 197.105(10)(d), which the Court of Appeals construed to supersede conflicting local land use laws as follows:

> "Outdoor mass gatherings (1) 3000 or more people, (2) lasting between 24 and 120 hours, (3) occurring no more frequently than once very three months, (4) held in open spaces are not subject to county land use regulations.
>
> "Small gatherings (1) attracting fewer than 3000 persons (2) lasting fewer than 120 hours, (3) occurring no more frequently than once very three months are not subject to county land use regulations. (*Landsem* [*Farms, LP v. Marion County*, 190 Or App 120, 78 P3d 103 (2003)] citing with approval LUBA's understanding of ORS 197.015(10)(d).

"a. Evidently these statutes allow the applicants to conduct up to one outdoor mass gathering [in excess of 3,000 persons] and one small gathering [less than 3,000 persons] in a given three-month period even if not permitted by the county land use regulations. * * *

"b. Assuming for the sake of argument that the applicants can conduct two outdoor mass gatherings and two small gatherings during a four-month concert season, that does not affect the county's authority over all other events at the site. Just because the applicant may be able to conduct four events pursuant to the statutory exception, that does not justify allowing additional events over which the county does have jurisdiction where those events are not permitted by the applicable list of permitted uses in the zone and/or are not consistent with approval standards." Record 37-38 (footnote omitted).

county and petitioner argue, the hearings officer correctly understood the statutes to allow both an outdoor mass gathering and a small gathering within the same three-month period.

We agree with the county and petitioner that the hearings officer merely assumed, without deciding, that petitioner could conduct both types of gatherings in one three-month period. A proposal for outdoor gatherings under the statute was not part of the application, and any opinion the hearings officer offered on the permissibility or frequency of such gatherings was merely *dicta*. Because that issue was not properly before the hearings officer, the county is not bound by the hearings officer's views, and those views set no precedent that could bind any party. The issue of whether the statute allows one or two types of gatherings within the same three-month period must await another case, and almost certainly a different forum.

The first assignment of error (cross-petition) is denied.

SECOND ASSIGNMENT OF ERROR (CROSS-PETITION)

Cross-petitioner challenges inclusion of tax lot 400 into the private park, on three grounds. First, cross-petitioner argues that only parcels held in common ownership can be part of a private park, and that tax lot 400 is owned by petitioner and his mother, while the remaining tax lots within the park are owned solely by petitioner's mother. Second, cross-petitioner argues that the applicant withdrew the request to include tax lot 400 by failing to include it in a supplemental submission found at Record 289-91, and the hearings officer failed to address that issue. Finally, cross-petitioner argues that tax lot 400 includes an existing residence, and that the CDC does not allow dwellings in private parks.

The county argues that no issue was raised below regarding common ownership or whether the supplemental information at Record 289-91 was intended to withdraw the inclusion of tax lot 400 within the private park. Therefore, the county argues, such issues is waived, pursuant to ORS 197.763(1) and 197.835(3). In any case, the county argues, cross-petitioner has not established that lack of common ownership is a basis to deny the request to

include tax lot 400 in the park, or that petitioner intended to withdraw the request to include tax lot 400.

Cross-petitioner does not cite us to any place in the record where the first two issues were raised below. Accordingly, those issues are waived. Even if those issues were not waived, we agree with the county that cross-petitioner has not established that lack of common ownership is a basis to deny the request to include tax lot 400 in the park, or that petitioner withdrew the request to include tax lot 400.

With respect to the dwelling on tax lot 400, petitioner argues that that dwelling predates use of the property for the park and thus may continue as a nonconforming use. According to petitioner, the fact that tax lot 400 is now part of a private park does not mean that its pre-existing use as a dwelling cannot continue as a nonconforming use. The county responds that the CDC allows caretaker dwellings in public parks, and that such dwellings are implicitly allowed in private parks as well.

No party argues that this issue was not raised below, so we assume it was. The hearings officer apparently did not address the issue. Petitioner's response, that continued residential use of the dwelling is a nonconforming use, and the county's response, that it is permitted as a caretaker's residence, are somewhat at odds. Nothing cited to us in the record indicates that petitioner intends to use the dwelling as a caretaker's residence. Nor is it clear to us that caretaker dwellings are allowed in both private and public parks. Nonetheless, we agree with petitioner and the county that cross-petitioner has not established a basis for remand under this assignment of error. The EFC zone allows one "detached dwelling unit" as a permitted use, and presumably the existing dwelling was originally authorized under that provision. CDC 342-3.1(D). Nothing cited to us in the CDC prohibits more than one lawful use on the same parcel. That is, the CDC does not limit use of EFC-zoned parcels to only one of the uses listed at CDC 342-3.1 and 342-3.2. As far as cross-petitioner has established,

there is nothing unlawful with the fact that tax lot 400 includes two otherwise lawful uses, a dwelling authorized under CDC 342-3.1(D) and a private park, or part of a private park.

The second assignment of error (cross-petition) is denied.

CONCLUSION

In the typical case involving a denial of an application for land use approval, if the local government successfully defends one basis for denial, LUBA will affirm the decision and not reach or resolve assignments of error challenging other bases for denial. This case is not typical. It involves a decision that approves in part and denies in part multiple expansions of an existing use, under circumstances in which it is reasonably clear the parties do not have a shared understanding of what is and what is not allowed by the decision and under the applicable law. Accordingly, we chose to review all assignments of error, in hopes of bringing as much resolution as possible to the issues between the parties.

We sustained the first assignment of error relating to a condition of approval, which requires remand. We denied the third, fourth, fifth and sixth assignments of error, which relate primarily to the proposed expanded campground. While the eight concert uses and expanded campground uses are obviously linked, denial of the expanded campground does not necessarily mean that the concerts must be denied. Petitioner could theoretically offer concerts without camping. Accordingly, we addressed the second assignment of error, and sustained that assignment, ultimately overturning the hearings officer's denial of the concerts on the grounds that they constitute an "outdoor performing arts center."

However, remand is not independently required under our resolution of the second assignment of error, because, as the county points out, the hearings officer denied a requested variance to the noise standards at CDC 423-6 for the proposed concerts, and petitioner failed to assign error to that denial. Record 43. It is clear that denial of the noise variance was an independent basis to deny the proposed concerts, and petitioner's failure to assign error to that basis for denial means that we must affirm denial of the concerts, notwithstanding any

errors with respect to other bases for denial. Thus, when the dust settles, the hearings officer's denial of the concerts and expanded campground stands, and remand is warranted only to address the issue identified in the first assignment of error.

The county's decision is remanded.