

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 DAVID TENNANT,
5 *Petitioner,*

6
7 vs.
8

9 POLK COUNTY,
10 *Respondent,*

11 and
12

13
14 BRETT ADAMS, DONAVAN RESS,
15 BRAD DOUGLAS and LINDA DOUGLAS,
16 *Intervenor-Respondents.*

17
18 LUBA No. 2007-209
19

20 FINAL OPINION
21 AND ORDER
22

23 Appeal from Polk County.
24

25 David Tennant, Dallas, filed the petition for review and argued on his own behalf.
26

27 No appearance by Polk County.
28

29 Brett Adams, Donavan Ress, Brad Douglas and Linda Douglas, Dallas, represented
30 themselves.
31

32 HOLSTUN, Board Chair; BASSHAM, Board Member; RYAN, Board Member,
33 participated in the decision.
34

35 REMANDED

04/09/2008
36

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

NATURE OF THE DECISION

Petitioner appeals a county decision granting conditional use approval to establish a private park to be used for paintball events.

FACTS

The subject property is a 45.53-acre parcel split-zoned Acreage Rural Five Acre and Farm Forest (FF). The property is located almost one mile from the City of Dallas urban growth boundary (UGB) in unincorporated Polk County. The applicant proposes to establish a private park on 17 acres of the FF-zoned portion of the parcel to conduct paintball activities. The 24-acre adjacent parcel to the east is owned by petitioner, and that adjoining parcel is partially developed as a vineyard. The county planning department approved the application, and petitioner appealed that decision to the board of county commissioners (BCC). The BCC denied the appeal and granted conditional use approval with conditions. This appeal followed.

MOTION TO DISMISS

At oral argument, the petitioner filed what he titled a motion to dismiss. Petitioner argues that because neither the county nor intervenors filed a response brief, the appeal should “be dismissed, or at a minimum, the county decision be reversed.” Motion to Dismiss

1. While petitioner styles his motion as a motion to dismiss, we understand petitioner to seek a summary ruling in his favor. When no response brief is filed, LUBA will still address a petitioner’s assignments of error on the merits, and summary reversal or remand is not appropriate. *Roth v. Jackson County*, 40 Or LUBA 531 (2001).

Petitioner’s motion is denied.

FIRST ASSIGNMENT OF ERROR

Polk County Zoning Ordinance (PCZO) 177.040 lists conditional uses in forest zones. Under PCZO 177.040(G), conditional uses include:

1 “Private Parks and campgrounds. Except on a lot or parcel contiguous to a
2 lake or reservoir, private campgrounds shall not be allowed within three (3)
3 miles of an urban growth boundary unless an exception to Statewide Planning
4 Goal 4 is approved * * *. For purpose of this title, a campground is an area
5 devoted to overnight temporary use for vacation, recreational or emergency
6 purposes, but not for residential purposes and is established on a site that is
7 contiguous to lands with a park or other outdoor natural amenity that is
8 accessible for recreational use by the occupants of the campground. * * *”

9 PCZO 177.040(G) parallels and presumably was adopted by the county to implement
10 OAR 660-006-0025(4)(e)(A), which provides that private parks are allowed as uses on forest
11 lands subject to further review.¹ The county approved the conditional use application as a
12 “private park.” Uses allowed conditionally pursuant to PCZO 177.040 must satisfy the
13 general review standards of PCZO 177.050, which provide in pertinent part:

14 “The Planning Director or Hearings Officer shall determine that a use
15 authorized by Section 177.035(B) and Section 170.040 meet the following
16 requirements:

17 “(A) The proposed use will not force a significant change in, or
18 significantly increase the cost of, accepted farming or forest practices
19 on agriculture or forest lands;

¹ OAR 660-006-0025(4)(e)(A) provides:

“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 004. 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.”

1 “(B) The proposed use will not significantly increase fire hazard or
2 significantly increase fire suppression costs or significantly increase
3 risks to fire suppression personnel[.]”

4 PCZO 177.050 parallels and presumably was adopted by the county to implement
5 OAR 660-006-0025(5), which provides the further review for uses authorized under OAR
6 660-006-0025(4).² PCZO 177.050(A) is also the standard used in ORS 215.296(1) for
7 evaluating nonfarm uses in exclusive farm use zones.³

8 Petitioner argues that the county did not demonstrate that the proposed conditional
9 use complies with PCZO 177.050(A) regarding effects upon farming practices. Petitioner
10 argues that intervenors’ plan to eradicate large areas of blackberry bushes and poison oak by

² OAR 660-006-0025(5) provides:

“A use authorized by section (4) of this rule may be allowed provided the following requirements or their equivalent are met. These requirements are designed to make the use compatible with forest operations and agriculture and to conserve values found on forest lands:

- “(a) The proposed use will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands;
- “(b) The proposed use will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel; and
- “(c) A written statement recorded with the deed or written contract with the county or its equivalent is obtained from the land owner which recognizes the rights of adjacent and nearby land owners to conduct forest operations consistent with the Forest Practices Act and Rules for uses authorized in subsections (4)(e), (m), (s), (t) and (w) of this rule.”

³ 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:

- “(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.”

1 spraying them with herbicides will result in the herbicides drifting onto his grapevines and
2 destroying his vineyard. In *Utsey v. Coos County*, 38 Or LUBA 516, 535 (2000), *rev*
3 *dismissed* 176 Or App 524, 32 Pd 933 (2001), *rev dismissed* 335 Or 217 (2003), we
4 explained that because a neighboring owner of resource land alleged that the proposed use in
5 that case (also a private park) would force a significant change in farm or forest practices or
6 significantly increase the costs of those farm or forest practices, the county was required to
7 find that the proposed use would not cause those impacts. We further explained that the
8 county’s findings were inadequate because the county did not address the alleged impacts or
9 explain why the alleged impacts will not occur. *Id.*

10 In the present case, the county’s findings identified the properties to the north, south,
11 and west of the subject property and found that the proposed conditional use would not force
12 a significant change in farm or forest practices or cause a significant increase in cost of those
13 practices on those properties. For reasons that are not clear to us, the county simply failed to
14 even mention petitioner’s property to the immediate east, let alone address the adverse
15 impacts alleged by petitioner. In the absence of any findings whatsoever addressing
16 petitioner’s arguments or any assistance from the county or intervenors on appeal, we sustain
17 petitioner’s first assignment of error.

18 It may be that clearing blackberry and poison oak from the subject property
19 (something the owner of the subject property presumably could do whether or not the
20 property is put to use as a paintball park) is not properly viewed as part of the proposed use.
21 It may also be that poison oak and blackberry vines can be removed without using the
22 herbicides that petitioner fears will damage his vineyard. Those are considerations the
23 county may address on remand. On remand, to demonstrate that the proposal complies with
24 PCZO 177.050(A), the county must adopt findings that demonstrate that the proposed use
25 “will not force a significant change in, or significantly increase the cost of, accepted farming
26 * * * practices” on petitioner’s adjoining vineyard.

1 The first assignment of error is sustained.

2 **SECOND ASSIGNMENT OF ERROR**

3 Petitioner argues that the county did not demonstrate that the proposed conditional
4 use complies with PCZO 177.050(B) regarding increased fire hazards, fire suppression costs,
5 or risks to fire suppression personnel. Petitioner raised the issue that smoking by paintball
6 participants, abundance of dry brush, lack of adequate emergency access, and an absence of
7 restrictions placed on internal roads on the subject property will all lead to increased risks of
8 fire, increased fire suppression costs, and greater danger to fire suppression personnel.
9 Although the county required any structures to be built to fire siting standards and imposed a
10 condition of approval regarding fire safety in the parking and loading areas, the county did
11 not address petitioner’s arguments. The county’s failure to respond to petitioner’s concerns
12 that allowing paintball participants to smoke cigarettes while engaged in paintball activities
13 during times when there is abundant dry fuel present is a particularly serious omission on the
14 county’s part. There may be ways to address and adequately minimize petitioner’s concerns,
15 but if so the county needs to explain what those minimization or mitigation measures are and
16 take appropriate steps to ensure that they are carried out.

17 In the absence of any findings whatsoever addressing petitioner’s arguments
18 regarding fire hazards that may be associated with the proposed use or any assistance from
19 the county or intervenors on appeal, we agree with petitioner that the county failed to
20 demonstrate that the proposal complies with PCZO 177.050(B).

21 The second assignment of error is sustained.

22 **THIRD ASSIGNMENT OF ERROR**

23 Petitioner’s third assignment of error states that the county “erred by allowing a
24 private park in a Forest Zone with no conditions to intensity, structures, and proximity to
25 urban growth boundaries, public safety, and setbacks thus requiring an exception to Goal 4.”
26 Petition for Review 12. We understand petitioner to argue that the proposed private park, as

1 approved by the county, does not comply with Goal 4 (Forest Lands), thereby requiring an
2 exception to Goal 4.

3 As discussed earlier, PCZO 177.040(G), which appears to implement OAR 660-006-
4 0025(4)(e)(A), which in turn implements Goal 4, allows “private parks” as conditional uses
5 in forest zones. The terms “private park” and “park” are not defined by the statute, the rules,
6 or the PCZO. The county’s finding that the proposed paintball operation is a private park
7 states:

8 “The [PCZO] does not have a definition for ‘park’ or ‘private park.’
9 According to Webster’s Seventh Edition a park is a ‘tract of land often
10 including lawns, woodland, and pasture attached to a country house and used
11 as a game preserve and for recreation.’ The applicant stated that games
12 played with paintball guns or ‘markers’ would only take place on that portion
13 of the subject property designated as a private park. Staff finds that games
14 normally associated with paintball include elimination, capture the flag and
15 center flag. The applicant stated that the type of games played at the private
16 park would be ‘woods ball.’ The objective would be to move around to sneak
17 up on the opponent. *The proposed use is for recreational purposes.*” Record
18 116-17 (emphasis added).

19 The threshold question is whether the proposed paintball operation constitutes a
20 “private park” for the purposes of Goal 4.⁴ The county did not directly address that question,
21 or apply the correct test. Because the question of whether the proposed use is a private park
22 under Goal 4 is a question of state law, we will address the issue.

23 Although the statutes and rules do not define “private park,” there are cases which
24 have addressed what activities are permissible in a “private park,” without an exception to
25 Goal 3 (Agricultural Lands) or Goal 4. In *Tice v. Josephine County*, 21 Or LUBA 371
26 (1991), we addressed whether a proposed motorcycle race track on forest land was an

⁴ A local government’s interpretation of its own land use regulations is not entitled to deference when the land use regulation implements a state statute or rule. ORS 197.829(1)(d).

1 “outdoor recreational activity” that is permitted in a forest zone without a Goal 4 exception.⁵
2 In determining that the proposed motorcycle race track was not authorized under Goal 4, we
3 held that:

4 “[T]here is a limit to the types of outdoor recreation activities allowable as an
5 ‘outdoor recreational activity’ as that phrase is used in Goal 4. The limitation
6 on ‘outdoor recreational activities’ under Goal 4 stems from the very purpose
7 that lands designated as forest lands are designed to serve. Proposed
8 recreational uses which dominate and change the character of the forest
9 environment are not considered ‘outdoor recreational activities’ even though
10 such proposed uses do provide, in a broad sense, ‘outdoor recreation.’” *Id.* at
11 379.

12 In *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993), we addressed whether a
13 paintball operation very similar to the proposed use in this appeal constituted a “park,” within
14 the meaning of ORS 215.213(2)(e), which authorizes parks on EFU-zoned farmland. In
15 addition to citing the Webster’s definition of park as the county did in the present appeal, we
16 also cited various other definitions of “park” all indicating that a public recreational use of
17 property qualified as a park. We stated:

18 “All of the above quoted definitions of park recognize a tract of land set aside
19 for public recreational use as a ‘park.’ Neither these definitions, nor any other
20 provision in ORS 215.213, excludes the concept of a privately owned and
21 managed recreational ‘park.’ The proposed paintball game park satisfies this
22 definition. Further, we see nothing in ORS 215.213 that inherently limits the
23 intensity of the uses allowed thereunder.” *Id.* At 704-05.

24 In *Utsey*, the subject property was split zoned for both farm use and forest use, so
25 both Goal 3 and Goal 4 were applicable to the proposed use. The proposed use in *Utsey*
26 included both a motorcycle track and off-road vehicle trails. We addressed the apparent
27 contradiction between *Tice*, which appears to require not only a recreational activity but also
28 that the use be in accord with the character of forest uses, and *Spiering*, which appears only

⁵ The version of Goal 4 in effect at the time allowed “outdoor recreational activities” as permitted forest uses.

1 to require that a use be of a public recreational nature to constitute a park. We explained that
2 the difference was because Goal 3 does not contain any explicit restrictions on the intensity
3 of uses allowed in parks, while Goal 4 requires that “recreational uses” must be “appropriate
4 in a forest environment.”⁶ Thus, under *Utsey*, a proposed use might be permitted as a private
5 park on farmland and not be permitted as a park on forestland.⁷ In sum, it is clear that as
6 least as far as forestlands are concerned, in order to constitute a private park a proposed use
7 must not only be a public recreational use as the county concluded here, but also “appropriate
8 in a forest environment,” a consideration the county did not address.⁸

9 Although the county did not address whether the proposed use is appropriate in a
10 forest environment, because the facts are not in dispute and the question is a matter of state
11 law, we will address the issue in the first instance. The reasons cited by petitioner for
12 whether the proposed use is inappropriate in a forest environment are: (1) noise; (2) fencing;
13 (3) buildings; and (4) proximity to a UGB.

14 **A. Noise**

15 Petitioner argues that the paintball operation will be very noisy and will disturb
16 petitioner’s peaceful enjoyment of his land.

17 “Can you imagine 8 a.m. every weekend to have upwards of 60 or 70 grown
18 men, or more, running around in camouflage gear, shouting and yelling and

⁶ Among the uses allowed by Goal 4 on forest land are:

“* * * recreational opportunities appropriate in a forest environment[.]”

⁷ Our decision in *Utsey* was appealed to the Court of Appeals and that appeal was dismissed on the grounds that the petitioners did not have standing before the Court of Appeals. While the majority opinion did not reach the merits, two dissenting members of the Court did and disagreed with our conclusion that parks on farmland do not face any additional restrictions other than being a public recreational use. *Utsey v. Coos County*, 176 Or App 524, 572-74, 32 P3d 933 (2001) (Diets, dissenting), *rev dismissed* 335 Or 217 (2003).

⁸ While the county did address whether the proposed use was in harmony with the purpose and intent of the zoning district as one of the conditional use criteria, the county merely concluded that because the proposed use was a public recreational activity that it was in accord with the zoning district. As explained earlier, this is not the proper inquiry under Goal 4.

1 firing weapons at each other, playing War. * * * When these men are ‘shot’
2 they must lay there and yell for a medic * * * these guys are in ‘War’ mode,
3 they are ALL yelling and screaming while running around shooting each
4 other.” Petition for Review 15-16.

5 While the proposed use certainly may produce noise, petitioner does not explain why
6 this is inappropriate for a forest environment. While it may be unpleasant for petitioner
7 himself, and might be inappropriate for some other zoning districts like single family
8 residential zoning districts, that does not mean it is inappropriate for a forest zone. Petitioner
9 does not identify any adverse effects the proposed use would have on forest uses. Typical
10 forest uses, such as logging, frequently are not quiet uses. In *Utsey*, we found that proposed
11 off-road vehicle trails were appropriate for a forest environment so long as races were not
12 being conducted. We see little difference between riding off-road vehicles on trails in the
13 woods and contestants shooting paintball guns from the trails in the woods. Noise in itself is
14 not inappropriate for a forest environment.

15 **B. Fencing**

16 Petitioner argues that a lack of required screening, netting, or setbacks may result in
17 stray paintballs landing on petitioner’s property. Again, while this could be annoying to
18 petitioner, and certainly could be (and was) considered under the conditional use approval
19 criteria, we do not see how occasional stray paintballs are inappropriate for a forest zone.
20 The county found that the paintballs that will be used are biodegradable and will not cause
21 any adverse effects on trees or other forest uses. The alleged lack of adequate netting or
22 screening does not render the use inappropriate for a forest environment.

23 **C. Buildings**

24 Petitioner argues that the county imposed no restrictions on any structures that could
25 be built. According to petitioner, intervenors can build any structure they want and structures
26 on forestlands are inappropriate. While some type of structures might be inappropriate for a
27 forest zone, petitioner does not allege that any actual structures have been proposed or

1 approved. The incorporated findings state that building permits will be required for any
2 permanent structures to be built, such as booths or grandstands. If a proposed structure is
3 inappropriate for a forest zone then the proposed building permit could be challenged.
4 Because the challenged decision does not approve any structures that are inappropriate for a
5 forest zone, this argument does not provide a basis for reversal or remand.

6 **D. Proximity to UGB**

7 As quoted earlier, PCZO 177.040(G) allows private parks but not campgrounds
8 within three miles of a UGB. Petitioner argues that because the subject property is within
9 one mile of the City of Dallas UGB, the proposed use is not appropriate for a forest zone.
10 Although petitioner recognizes that the proposed paintball operation is not a campground, he
11 still argues that the three mile limitation should apply. The language regarding three mile
12 limits for campgrounds in PCZO 177.040(G) is taken directly from OAR 660-006-
13 0025(4)(e)(A). *See* n 1. The limitation on campgrounds clearly does not apply to private
14 parks. This argument does not provide a basis for reversal or remand.

15 **E. Conclusion**

16 For the forgoing reasons, we conclude that the proposed paintball operation is
17 “appropriate in a forest environment” and therefore may be permitted in a forest zone if the
18 relevant approval standards are met. An exception to Goal 4 is not required.

19 The third assignment of error is denied.

20 **FOURTH ASSIGNMENT OF ERROR**

21 Petitioner argues that the county “erred by not making any inquiries or findings about
22 a threatened specie of lynx.” Petition for Review 18. According to petitioner, a neighbor
23 saw a Canadian Lynx on a property adjoining the subject property, and Canadian Lynx are a
24 threatened species. Petitioner, however, does not explain what approval criterion is
25 implicated by the alleged siting of a Canadian Lynx or why the county was otherwise

1 required to consider this issue. Petitioner's argument is not sufficiently developed to provide
2 a basis for reversal or remand.

3 The fourth assignment of error is denied.

4 The county's decision is remanded.