BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SHELLEY WETHERELL and FRIENDS
OF DOUGLAS COUNTY,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent.

LUBA No. 2012-051

FINAL OPINION
AND ORDER

Appeal from Douglas County.

Anne C. Davies, Eugene, filed a petition for review.

Paul E. Meyer, County Counsel, Roseburg, represented respondent.

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

TRANSFERRED 03/27/2013

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a county decision that approves a temporary use permit for a music festival.

INTRODUCTION

As approved, the music festival was limited to not more than 3,000 attendees and was to be held on July 20, 2012. The music festival was held on July 20, 2012, approximately eight months ago. The property where the music festival was held is zoned Exclusive Farm Use – Grazing (FG), which is a statutory Exclusive Farm Use (EFU) zone. ORS 215.203 *et seq*. Petitioners filed this appeal on July 27, 2012, seven days after the music festival was over. The county transmitted the record on August 21, 2012, and petitioners filed their petition for review on September 11, 2012. On September 26, 2012, the county moved to dismiss this appeal, arguing that the appeal is moot. In a November 8, 2012 Order, LUBA denied the motion to dismiss, relying on the exception to the mootness doctrine for cases that are "capable of repetition yet evading review."[1] On November 16, 2012, the county moved for voluntary remand. Petitioners opposed the motion, and the motion remains pending.

In considering the motion for voluntary remand, LUBA discovered a jurisdictional question. That jurisdictional question is based on ORS 197.015(10)(d), which sets out an exception to LUBA's jurisdiction for decisions that authorize gatherings of fewer than 3,000 people that continue for fewer than 120 hours. We set out and discuss ORS 197.015(10)(d) later in this opinion. In a December 18, 2012 Order, LUBA asked the parties for further briefing on that jurisdictional question. We turn now to that jurisdictional question and conclude that we do not have jurisdiction in this matter. We first discuss two closely related

[1] As we explained in our November 8, 2012 Order, the Oregon Supreme Court has decided that the generally recognized "capable of repetition yet evading review" exception to the mootness doctrine does not apply to Oregon judicial branch courts. *Yancy v. Shatzer*, 337 Or 345, 363, 97 P3d 1161 (2004). However, LUBA is an executive branch agency and continues to apply that exception.

statutes, the Outdoor Mass Gathering statutes and the 2011 legislative amendments to the EFU statute authorizing "agri-tourism," before turning to the county's decision and relevant statutes governing LUBA's jurisdiction.

DECISION

A. The Outdoor Mass Gathering Statutes ORS 433.735 to 433.770.

"Outdoor Mass Gatherings" is a defined term. ORS 433.735(1).[2] As we explained in *Landsem Farms v. Marion County*, 44 Or LUBA 611, 615 (2003):

> "a gathering is an 'outdoor mass gathering' if it falls within four parameters: (1) number of participants (more than 3,000 people); (2) duration (more than 24 hours but less than 120 hours); (3) frequency (not more than one gathering each three months); and (4) location (in open spaces and without permanent structures)."

"Outdoor mass gatherings" are regulated by ORS 433.750 through 433.760 and are not subject to local land use regulations. *Landsem Farms*, 44 Or LUBA at 621-22. A music festival was approved on the subject property in 2011, under a prior version of the Douglas County Land Use and Development Ordinance (LUDO). As we explain later in this opinion LUBA does not have jurisdiction to review decisions that authorize "outdoor mass gatherings." LUBA dismissed an appeal of the 2011 music festival approval, concluding that the music festival fell within the statutory definition of "outdoor mass gathering." *Devereux v. Douglas County*, 64 Or LUBA 191 (2011).[3]

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[2] ORS 433.735(1) provides:

> "'Outdoor mass gathering,' unless otherwise defined by county ordinance, means an actual or reasonably anticipated assembly of more than 3,000 persons which continues or can reasonably be expected to continue for more than 24 consecutive hours but less than 120 hours within any three-month period and which is held primarily in open spaces and not in any permanent structure."

[3] Although it has no bearing on this appeal, a second category of gathering, which we referred to as "extended mass gatherings" in *Landsem Farms*, is expressly recognized by ORS 433.763. With the exception of one of the four parameters noted above, "extended mass gatherings" are identical to "outdoor mass gatherings." The exception is their duration; "extended mass gatherings" are expected to last more than 120 hours. ORS 433.763(1). Unlike "outdoor mass gatherings," "extended mass gatherings" are subject to local land use regulation and are subject to LUBA review. *Landsem Farms*, 44 Or LUBA 622.

B. Agri-Tourism

ORS 215.203 authorizes counties to adopt EFU zones where, with certain exceptions, land is to be used exclusively for farm use. The non-farm use exceptions are numerous and far-ranging. Subsection (1) of ORS 215.283 lists 23 non-farm uses that may be allowed in EFU zones. The Oregon Supreme Court has determined that the subsection (1) uses are uses that a county must allow, subject only to state standards. *Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995). Subsection (2) of ORS 215.283 lists 27 nonfarm uses that are permissible in EFU zones. But unlike subsection (1) uses, subsection (2) uses are subject to any adopted county land use standards. Subsection (3) of ORS 215.283(3) allows certain highway improvements that are not authorized under subsections (1) and (2), provided the statutory standards set out in subsection (3) are met. Suffice it to say, subsections (1) through (3) authorize a large number and variety of nonfarm uses. In 2011 the legislature added to those authorized nonfarm uses, by enacting what is now codified at ORS 215.283(4).

Subsection 4 of ORS 215.283 authorizes four kinds of "agri-tourism and other commercial events or activities * * *."[4] Rather than repeat the cumbersome phrase "agri-tourism and other commercial events or activities," as the statute does, in this opinion we generally shorten the reference to "agri-tourism."[5] ORS 215.283(4) provides no definition of "agri-tourism." Instead, the statute sets out four different sets of standards for "agri-tourism" and allows agri-tourism events if they comply with any applicable county standards and also

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[4] ORS 215.283(4) provides in part:

> "The following agri-tourism and other commercial events or activities that are related to and supportive of agriculture may be established in any area zoned for exclusive farm use[.]"

[5] The statutory EFU zone contains parallel provisions that apply separately to "counties that have adopted marginal lands provisions" (ORS 215.213), and to nonmarginal lands counties (ORS 215.283). Because Douglas County is a nonmarginal lands county, ORS 215.283 applies and we do not address ORS 215.213, even though ORS 215.213 also includes provisions for agri-tourism that apply to marginal lands counties.

comply with specified restrictions that are set out in the statute. The first kind of agri-tourism is a single agri-tourism event on a tract of land per year, which is authorized by ORS 215.283(4)(a).[6] The second kind of agri-tourism is an expedited, single agri-tourism event on a tract of land per year, which is authorized by ORS 215.283(4)(b).[7] The third kind of agri-tourism consists of up to six agri-tourism events on a tract of land per year, which are authorized by ORS 215.283(4)(c).[8] The fourth kind of agri-tourism is agri-tourism events

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[6] An ORS 215.283(4)(a) single agri-tourism event must satisfy the following statutory standards:

(1) Be incidental and subordinate to existing farm use on the property.

(2) Last no longer than 72 hours.

(3) Limit attendance to no more than 500 people.

(4) Limit parking to 250 vehicles.

(5) Comply with ORS 215.296.

(6) Occur outdoors or in temporary or existing structures.

(7) Comply with operational, access and traffic conditions.

[7] ORS 215.283(4)(b) authorizes a county to issue a license for an expedited, single agri-tourism event if it will:

(1) Be incidental and subordinate to existing farm use on the property.

(2) Begin after 6 a.m. and end before 10 p.m.

(3) Be limited to 100 attendees and 50 vehicles.

(4) Not include amplified music before 8 a.m. or after 8 p.m.

(5) Not require construction of a new permanent structure.

(6) Be located on a tract of at least 10 acres.

(7) Comply with health, fire and safety requirements.

[8] The six agri-tourism events authorized by ORS 215.283(4)(c) must satisfy the following statutory limits:

(1) Be incidental and subordinate to existing farm use on the property.

(2) Last no longer than 72 hours.

that do not comply with ORS 215.283(4)(a) through (c). These other agri-tourism events are authorized by ORS 215.283(4)(d).[9] We have set out the requirements for the four kinds of agri-tourism in some detail in the footnotes to demonstrate that the nature of the four types of authorized agri-tourism is defined by the statutory limits that must be met for each of the four categories of agri-tourism. And those statutory limits are a mixture of approval standards and performance standards.

The 2011 legislation authorizing agri-tourism events also addressed LUBA's jurisdiction to review decisions that authorize agri-tourism events. ORS 197.015(10)(d) and 215.283(6)(c). We discuss ORS 197.015(10)(d) and 215.283(6)(c) in more detail later in this opinion.

C. The County's Decision

As already noted, the subject property is located in the county's FG zone. The county's FG zone, like the EFU zoning statute, authorizes agri-tourism events. LUDO 3.3.075(17). But the applicant did not seek approval of an agri-tourism event and the county did not approve the music festival as an agri-tourism event or any other use that is allowed in

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(3) New permanent structures are not allowed.

(4) Comply with ORS 215.296.

(5) May not "materially alter the stability of the land use pattern in the area.

(6) Comply with locational, access, parking, traffic, sanitation and solid waste conditions.

[9] The other agri-tourism events authorized by ORS 215.283(4)(d) must satisfy the following statutory standards:

(1) Be incidental to existing commercial farm use and necessary to support commercial farm uses and enterprises in the area.

(2) Comply with requirements (3) through (6) of the requirements for single agri-tourism events. *See* n 6.

(3) Be on a parcel that complies with the acknowledged minimum lot size.

(4) Not exceed 18 events per calendar year.

the county's FG zone or the statutory EFU zone. Neither did the county approve the music festival as an "outdoor mass gathering," as it had in 2011. Instead, the county granted a temporary use permit for the music festival as an "outdoor event," pursuant to recent amendments to the LUDO. LUDO Article 41 authorizes Temporary Use Permits. The county apparently interprets LUDO Article 41 to authorize approval of temporary uses in all county zoning districts, including the FG zone. Among the temporary uses for which LUDO 3.41.100 authorizes the county to issue temporary use permits are "outdoor events."[10] As defined by LUDO 1.090, an "outdoor event" includes events with between 1,000 and 3,000 attendees, and "outdoor events" "are not 'outdoor mass gatherings' as defined by ORS 433.735 and are not Agri-tourism events as provided for by ORS 215.283(4)."[11]

D. ORS 197.015(10)(d)

With the above background, we now turn to the relevant jurisdictional statutes. As relevant here, LUBA has exclusive jurisdiction to review "land use decisions." ORS 197.825(1).[12] In this case, if the challenged temporary use permit is not a "land use

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[10] LUDO 3.41.100 provides:

> "Temporary structures, activities or uses may be authorized, subject to notice pursuant to LUDO Section 2.060.1, as necessary to provide for housing of personnel, storage and use of supplies and equipment, or to provide for temporary sales offices for uses permitted in the zoning district. Other uses may include temporary signs, *outdoor events*, short term uses, roadside stands, or other uses not specified in this ordinance and not so recurrent as to require a specific or general regulation to control them." (Emphasis added.)

[11] LUDO 1.090 includes the following definition:

> "OUTDOOR EVENT: An assembly that is held outside of a public park primarily in open spaces and not in any permanent structure, where either: the anticipated attendance will be more than 1,000 but not more than 3,000 persons, or; the event is expected to continue for more than three days within any three month period. Temporary Events of less than 1,000 persons that will not continue for more than three days within any three month period are subject to LUDO Section 3.41.050. *Outdoor Events and Temporary Events are not 'outdoor mass gatherings' as defined by ORS 433.735 and are not Agri-tourism events as provided for by ORS 215.283(4).* (Emphasis added.)

[12] ORS 197.825(1) provides:

decision," the venue to challenge that decision is circuit court rather than LUBA. There is no dispute that the challenged decision falls within the ORS 197.015(10)(a) definition of "land use decision."[13] But as ORS 197.015(10) is structured, subsection (a) of ORS 197.015(10) broadly defines the term "land use decision," and subsections (b) through (d) of ORS 197.015(10) then set out a number of exceptions for decisions that would otherwise qualify or potentially qualify as land use decisions under subsection (a). The central dispute is whether the challenged decision is excluded from the ORS 197.015(10)(a) definition of land use decision by ORS 197.015(10)(d). ORS 197.015(10)(d) provides that the ORS 197.015(10)(a) definition of "land use decision:"

> "Does not include, *except as provided in * * * 215.283 (6)(c)*, authorization of an outdoor mass gathering as defined in ORS 433.735, or other gathering of fewer than 3,000 persons that is not anticipated to continue for more than 120 hours in any three-month period[.]" (Emphasis added.)

The italicized language in ORS 197.015(10)(d) was added to the statute by the same 2011 legislation that adopted the ORS 215.283(4) authorization for agri-tourism events. Or Laws 2011, ch 567, sec 7. Turning first to the part of ORS 197.015(10)(d) that existed before the 2011 amendments, it exempts two kinds of authorizations from the ORS 197.015(10)(a) definition of land use decision: (1) "outdoor mass gathering[s] as defined in ORS 433.735" and (2) "other gathering[s] of fewer than 3,000 persons that [are] not anticipated to continue for more than 120 hours in any three-month period[.]" As shorthand, we refer to the second kind of gathering as an "other gathering."

> " Except as provided in ORS 197.320 and subsections (2) and (3) of this section, the Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district or a state agency in the manner provided in ORS 197.830 to 197.845."

[13] Under ORS 197.015(10)(a), a final local government decision that concerns the application of a land use regulation is a land use decision. There is no dispute that in approving the challenged temporary use permit the county applied the LUDO, which qualifies as a "land use regulation" as ORS 197.015(11) defines that term.

The challenged decision approved the music festival as an "outdoor event," as LUDO 1.090 defines that term. *See* n 11. The county did not consider or apply the "outdoor mass gathering" statute and the music festival was not approved as a statutory "outdoor mass gathering" Because the festival had fewer than 3,000 attendees and lasted less than 24 hours, it would not have qualified as an "outdoor mass gathering," as ORS 433.735(1) defines that term. *See* n 2. But we can think of no reason why an outdoor music festival with hundreds or thousands of attendees would not qualify as a "gathering," and petitioners do not argue otherwise.[14] The one-day music festival, which was limited to fewer than 3000 attendees, therefore falls within the exclusion provided by the final part of ORS 197.015(10)(d) for a "gathering of fewer than 3,000 persons that is not anticipated to continue for more than 120 hours in any three-month period[.]" The only remaining question is whether the language in ORS 197.015(10)(d) that was added in 2011 is an applicable exception to the exception that is provided by the rest of ORS 197.015(10)(d).

The language that was added to ORS 197.015(10)(d) in 2011 has the legal effect of creating an exception to the exception provided by ORS 197.015(10)(d). The 2011 amendment presumably was added because some or all of the agri-tourism events authorized by ORS 215.283(4) likely would fall within one of the two exceptions provided by ORS 197.015(10)(d), and therefore authorizations of those agri-tourism events would not be land use decisions and would not be reviewable by LUBA. The 2011 amendment to ORS 197.015(10)(d) presumably was adopted to clarify that decisions approving agri-tourism events are reviewable by LUBA as land use decisions. To do that, the legislature added the italicized text to ORS 197.015(10)(d) and adopted what is now codified at ORS 215.283(6)(c). ORS 215.283(6)(c) provides:

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[14] *Webster's Third New International Dictionary* (Unabridged 1981) 940 defines "gather," in part, as "**1 a** to bring together into a crowd, group, body or mass[.]"

> "The authorizations provided by subsection (4) of this section are in addition to other authorizations that may be provided by law, except that *'outdoor mass gathering' and 'other gathering,' as those terms are used in ORS 197.015 (10)(d), do not include agri-tourism or other commercial events and activities.*"

With one exception that has no bearing in this appeal, the italicized language of ORS 215.283(6)(c) and the 2011 amendment to ORS 197.015(10)(d) make it reasonably clear that agri-tourism events authorizations under ORS 215.283(4) are land use decisions and therefore reviewable by LUBA, because ORS 215.283(6)(c) and the 2011 amendment to ORS 197.015(10)(d) narrow the ORS 197.015(10)(d) exception to exclude authorizations of agri-tourism events.[15]

E. Jurisdiction

The jurisdictional question and the merits of the appeal are intertwined and we briefly describe the parties' positions on the merits before resolving the jurisdictional question.

Petitioners argue the county is subject to the statutory EFU zone and may not approve uses in an EFU zone that are not authorized by either the county's FG zone or the statutory EFU zone. *Kenagy v. Benton County*, 112 Or App 17, 20 n2, 826 P2d 1047 (1992); *Bechtold v. Jackson County*, 42 Or LUBA 204, 211 (2002). The statutory EFU zone does not list mass gatherings of any kind among the uses allowed in the zone. According to petitioners, the only potentially applicable EFU zone use category is "[c]ommercial activities that are in conjunction with farm use." ORS 215.283(2)(a). Petitioners contend, however, that the disputed music festival could not be approved under ORS 215.283(2)(a) as a commercial activity in conjunction with farm use, because the music festival is unrelated to the farm use

[15] The exception is the expedited agri-tourism events authorized by ORS 215.283(4)(b). As we explained earlier, ORS 215.283(4)(b) authorizes licenses for expedited, single-event agri-tourism events. *See* n 7. ORS 215.283(4)(b) provides, in part, that "[a] decision concerning an expedited, single event license is not a land use decision, as defined in ORS 197.015." That language of ORS 215.283(4)(d) arguably has the rather complicated legal effect of creating an exception to an exception to an exception, *i.e.*, it creates an exception to the ORS 215.283(6)(c) exception to the ORS 197.015(10)(d) exception for "outdoor mass gathering[s] as defined in ORS 433.735, or other gathering[s] of fewer than 3,000 persons that [are] not anticipated to continue for more than 120 hours in any three-month period[.]"

of the property.[16] With the addition of ORS 215.283(4) in 2011, agri-tourism events are authorized in EFU zones. We understand petitioners to contend the disputed festival similarly could not be approved as an agri-tourism event.[17] In summary, petitioners contend neither the statutory EFU zone nor any other state statute authorizes a music festival like the one the county approved here on EFU-zoned land. Petitioners contend the county's interpretation of ORS 215.283(6)(c) to permit the county to approve "outdoor events" in its EFU zone , which we describe next, is erroneous.

Simply stated, the county relies on the first part of ORS 215.283(6)(c), which was quoted earlier and provides "[t]he authorizations provided by subsection (4) of [ORS 215.283(4)] are in addition to other authorizations that may be provided by law * * *." As we have explained, the disputed music festival falls within the LUDO 1.090 definition of "outdoor event," and was approved under LUDO 3.41.100, which the county apparently interprets to authorize temporary use permits for "outdoor events" in all county zones. The county found that LUDO 1.090 and 3.41.100 together constitute "other authorizations that may be provided by law," within the meaning of ORS 215.283(6)(c). Record 5.

Petitioners contend "other authorizations that may be provided by law" refers to other *statutory* authorizations and that ORS 215.283(6)(c) does not give counties license to adopt land use regulations to authorize whatever uses they wish in county EFU zones. If we were

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[16] In *Craven v. Jackson County*, 308 Or 281, 298, 779 P2d 1011 (1989), the Supreme Court held:

> "We believe that to be 'in conjunction with farm use,' the commercial activity must enhance the farming enterprises of the local agricultural community to which the EFU land hosting that commercial activity relates. The agricultural and commercial activities must occur together in the local community to satisfy the statute."

[17] Petitioners appear to go further and suggest that following the 2011 legislation, the music festival could not be approved as an outdoor mass gathering, extended mass gathering or other gathering. Petition for Review 11. We need not and do not reach that issue. We note however that the Land Conservation and Development Commission apparently does not share petitioners' view about the permissibility of outdoor mass gatherings, other gatherings and extended mass gatherings in EFU zones. In its Goal 3 (Agricultural Lands) administrative rule, outdoor mass gatherings and other gatherings are listed as "allowed" uses, and extended mass gatherings are listed as a use that is "allowed, after required review" in EFU zones. OAR 660-033-0130(33) and (34); Table 1.

to reach the merits, petitioners' argument on this point seems very strong, and the county's position seems very dubious. But because the jurisdictional question must be answered first, we return to that question.

The county did not approve the music festival as an outdoor mass gathering under ORS 433.735 to 433.770. But if it had, it is clear under ORS 197.015(10)(d) that LUBA would not have jurisdiction to review such a decision. *Devereaux v. Douglas County*, 64 Or LUBA at 199. The county also did not approve the disputed music festival as an agri-tourism event. If it had approved the disputed music festival as an agri-tourism event under ORS 215.283(4)(a), (c) or (d), it is reasonably clear under ORS 197.015(10)(a) and 215.283(6)(c) that LUBA would have jurisdiction to review such a decision.[18] However, the county instead expressly approved the temporary use permit for the music festival as an "outdoor event," under LUDO 1.090 and 3.41.100. Because the approved event clearly falls within the ORS 197.015(10)(d) exception for "gathering[s] of fewer than 3,000 persons that [are] not anticipated to continue for more than 120 hours in any three-month period," the challenged decision is not a land use decision that is subject to LUBA review. Our jurisdictional conclusion is not altered by petitioners' contentions that the ORS 215.283(2)(a) authorization of "[c]ommercial activities that are in conjunction with farm use" and the ORS 215.283(4) authorization for agri-tourism are the *only* available legal theories under which it would be possible to approve a music festival in the FG zone. Petitioners may or may not be right about that. *See* n 17. As we have already observed, petitioners are likely correct that the county misreads ORS 215.283(6)(c) to grant the county unilateral authority to adopt county land use regulations that supplement the uses that are allowed in the county's EFU zones. But because the ORS 197.015(10)(d) exception for "gathering[s] of fewer than 3,000 persons

[18] As noted earlier, the circuit court apparently would retain jurisdiction to review authorization of an expedited single event agri-tourism event under ORS 215.283(4)(b).

that [are] not anticipated to continue for more than 120 hours in any three-month period" applies here, the circuit court rather than LUBA has jurisdiction to decide that legal question.

F. Motion for Voluntary Remand, Motion to Reconsider, Motion to Transfer

As we noted earlier, the county filed a motion requesting voluntary remand of the temporary use permit. Because we conclude we do not have jurisdiction to review the temporary use permit, the county's motion for voluntary remand is denied.

The county filed a motion requesting that we reconsider our November 8, 2012 Order in which we denied the county's motion to dismiss this appeal as moot. As noted earlier, our November 8, 2012 Order relied on the "capable of repetition yet evading review" exception to the mootness doctrine in denying the county's motion to dismiss this appeal as moot. Because we conclude in this final opinion that we lack jurisdiction, we decline to reconsider our November 8, 2012 Order. If the county believes petitioners' challenge to the temporary use permit should be dismissed as moot, it may make that argument to the circuit court following transfer.

Petitioners filed a conditional motion to transfer this appeal to circuit court, in the event LUBA determines it lacks jurisdiction over the appeal. OAR 661-010-0075(11)(b). Because we conclude that we do not have jurisdiction, we grant that motion, and this appeal is transferred to Douglas County Circuit Court. OAR 661-010-0075(11)(c).[19]

[19] OAR 661-010-0075(11)(c) provides:

> "If the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015(10) or (12), the Board shall dismiss the appeal unless a motion to transfer to circuit court is filed as provided in subsection (11)(b) of this rule, in which case the Board shall transfer the appeal to the circuit court of the county in which the appealed decision was made."