

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

3
4 KENNETH A. THOMAS,
5 *Petitioner,*

6
7 vs.

8
9 WASCO COUNTY,
10 *Respondent,*

11
12 and

13
14 MOONSHINE EVENTS LLC
15 and WOLF RUN RANCH LLC,
16 *Intervenors-Respondent.*

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18 LUBA No. 2013-044

19
20 FINAL OPINION
21 AND ORDER

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23 Appeal from Wasco County.

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25 Peter Livingston, Portland, represented petitioner.

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27 Eric J. Nisley, County Counsel, The Dalles, represented respondent.

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29 Elaine R. Albrich, Portland, represented intervenors-respondents.

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

33
34 DISMISSED

07/25/2013

35
36 You are entitled to judicial review of this Order. Judicial review is governed by the
37 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals Order No. 13-103, approving an outdoor mass gathering to be held July 25-28, 2013.

MOTION TO INTERVENE

Moonshine Events LLC and Wolf Run Ranch LLC move to intervene on the side of the respondent. There is no opposition to the motions and they are allowed.

FACTS

On March 11, 2013, Moonshine Events LLC (Moonshine) filed an application with the Wasco County Planning Department, seeking authorization to conduct an outdoor art and music festival from July 25 to 28, 2013, to be held on property owned by Wolf Run Ranch LLC (Wolf Run). After publishing notice, the board of county commissioners held a public hearing on May 1, 2013, which was continued to May 8, 2013, when the board voted 3-0 to adopt Order No. 13-103, authorizing a mass gathering permit under ORS 433.735 to 433.770 for the festival, subject to 11 conditions of approval. Petitioner appeals Order No. 13-103.

MOTION TO DISMISS

The county, Moonshine and Wolf Run (collectively respondents) move to dismiss this appeal for lack of jurisdiction, arguing that the decision is not a “land use decision” or “limited land use decision” subject to LUBA’s jurisdiction. Respondents argue that the challenged decision authorized an outdoor mass gathering (OMG) permit under ORS 433.735 to 433.770 and therefore jurisdiction is vested exclusively with the Wasco County Circuit Court.¹

¹ Respondents also request the Board to take official notice of a document entitled “Notification of Non-Violation” that was issued by the Code Compliance Office for Wasco County on May 23, 2013, in response to petitioner’s complaint to initiate a land use enforcement proceeding. Petitioner opposes the request. Because the request has a bearing on the jurisdictional question, LUBA could consider the document for the limited purpose of resolving the jurisdictional issue, even if it is not subject to official notice or a motion to take

1 LUBA has exclusive jurisdiction to review appeals of “land use decision[s]” as
2 defined in ORS 197.015(10).² Because the challenged decision applies a land use regulation,
3 it falls within the statutory definition of “land use decision,” absent some statutory exclusion
4 or exclusion based on case law. However, ORS 197.015(10)(d), which was added to the
5 statute in 1999, excludes from the definition of “land use decision” the “authorization of an
6 outdoor mass gathering as defined in ORS 433.735[.]”³

7 Petitioner does not dispute that the approval of the OMG application is not subject to
8 LUBA’s jurisdiction. However, petitioner claims that when the county approved the OMG
9 permit, it simultaneously made a separate land use decision to approve permanent alterations
10 on the property where the OMG is to be sited, specifically an access road and parking lot.⁴
11 Petitioner claims these permanent physical alterations are expressly prohibited under ORS
12 433.745(2). To approve the permanent physical alterations, petitioner argues that county staff

evidence under OAR 661-010-0045. *Murray v. Multnomah County*, 56 Or LUBA 370, 373 (2008). However, consideration of the document is not necessary to resolve the jurisdictional question, and the request is denied.

² ORS 197.015(10)(a)(A) defines “land use decision” in relevant part to include:

“A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

- “(i) The goals;
- “(ii) A comprehensive plan provision;
- “(iii) A land use regulation; or
- “(iv) A new land use regulation[.]”

³ ORS 197.015(10)(d) provides that a “land use decision”:

“Does not include * * * 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[.]”

⁴ We note that the county’s decision approves the proposed access road and parking areas pursuant to OAR 333-039-0055, which is a state administrative rule governing approval of outdoor mass gatherings. In relevant part, OAR 333-039-0055 requires the applicant to provide internal access via roads of all-weather construction, graded to allow emergency vehicle access. OAR 333-039-0055(6) requires the applicant to provide suitable parking.

1 had to consult and apply the county's land use regulations and interpret a 2005 land use
2 decision approving a replacement dwelling on the property. We understand petitioner to
3 argue that the portions of Order No. 13-103 that approve the access road and parking lot are
4 subject to LUBA's review, even if other portions of Order No. 13-103 are subject only to
5 review in circuit court.⁵

6 However, the county made only a single decision, Order No. 13-103, which approves
7 the OMG, including the access road and parking areas. Even if the county applied land use
8 regulations in reaching its decision, the application of such regulations was part of the OMG
9 approval and is not a separate land use decision appealable to LUBA. Even if petitioner is
10 correct that Order No. 13-103 erroneously approved permanent physical alterations to the
11 land in violation of ORS 433.745(2), that argument must be made to the circuit court. LUBA
12 does not have jurisdiction over this appeal.

13 Petitioner has not filed a motion to transfer this appeal to circuit court in the event
14 LUBA concludes that the challenged decision is not a land use decision. OAR 661-010-
15 0075(11). Therefore, this appeal is dismissed.⁶

⁵ The parties advise us that petitioner filed a writ in Wasco County Circuit Court seeking review of Order No. 13-103, and the proceedings on that writ are pending.

⁶ On July 16, 2013, petitioner filed a motion to extend the deadline for filing the petition for review in this appeal. On July 25, 2013, intervenor filed a second motion to dismiss this appeal, for failure to timely file the petition for review, pursuant to OAR 661-010-0030(1). Because we conclude that we lack subject matter jurisdiction over this appeal, we deny as moot petitioner's motion to extend the deadline to file the petition for review and intervenor's second motion to dismiss based on failure to file the petition for review.