1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3

4 JOHN WHITE,
5 *Petitioner,*
6
7 vs.
8
9 LANE COUNTY,
10 *Respondent,*
11
12 and
13
14 MARK SHRIVES, MARGARET "PEGGY" SHRIVES
15 and RIVER'S EDGE EVENTS LLC.,
16 *Intervenors-Respondent.*
17
18 LUBA No. 2013-063
19
20 FINAL OPINION
21 AND ORDER
22
23 Appeal from Lane County.
24
25 Sean T. Malone, Eugene, filed the petition for review and argued on behalf of
26 petitioner.
27
28 No appearance by Lane County.
29
30 Bill Kloos, Eugene, filed the response brief and argued on behalf of intervenors-
31 respondents.
32
33 BASSHAM, Board Member.
34
35 HOLSTUN, Board Chair, concurring.
36
37 RYAN, Board Member, concurring.
38
39 REMANDED 12/10/2013
40
41 You are entitled to judicial review of this Order. Judicial review is governed by the
42 provisions of ORS 197.850.

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a county board of commissioners' decision approving a temporary use permit to operate a commercial event venue on property that is zoned for forest use and located within the Willamette River Greenway.

FACTS

The subject property is a 20.83-acre parcel zoned F-2 (Impacted Forestland). The F-2 zone, codified at Lane Code (LC) 16.211, implements Statewide Planning Goal 4 (Forest Lands) and the Goal 4 rule, at OAR chapter 660, division 006. Most of the property is located within the Willamette River Greenway, and is therefore subject to LC 16.254, which requires that any development, intensification or change of use within the Greenway requires a greenway permit. In addition, a portion of the property is subject to a riparian setback from the river governed by LC 16.253, which implements Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces).

The property is developed with a dwelling, a swimming pool, a garage, and a temporary hardship manufactured dwelling. In 2011, intervenors-respondents Shrives constructed a gazebo on a concrete foundation, and poured a concrete slab for a dance floor, on which was erected a 1500-square foot steel-framed tent, in preparation for holding their daughter's wedding. Intervenors also poured concrete walkways connecting these structures, and leading down toward the river. However, intervenors did not obtain Greenway, building or any other permits for the gazebo, tent structure or walkways. Following the wedding, the Shrivers incorporated River's Edge Events, LLC, which began conducting weddings and similar events on the property.

On March 28, 2012, intervenors applied to the county to approve the event business as a "temporary use" under LC 16.255. As explained below, LC 16.255 authorizes "temporary" uses not otherwise allowed in the county's rural zones, subject to certain

1 standards and restrictions. The application became complete on June 20, 2012, when
2 intervenors submitted a traffic study.
3 The application proposes events between May 15 and September 30 each year. The
4 application proposes two types of events: (1) “main” events, which occur Fridays, Saturdays
5 and up to five Sundays per season, and (2) “floating” events, which occur on two days during
6 the week. Main events may start by 10:00 a.m., and last until 10:00 p.m., at which time any
7 music must cease. All guests, caterers, and music providers must be off the property by
8 11:00 p.m., with clean-up and lights out no later than 11:30 p.m. Main events may include
9 up to 250 guests and 100 automobiles arriving or leaving during the peak hour. Floating
10 events are limited to two events per day, twice per week. Afternoon events, limited to 25
11 guests, occur between 11:00 a.m. and 2:30 p.m., while evening events start at 6:00 p.m., with
12 music ending at 10:00 p.m., and clean-up and lights out completed by 11:30 p.m. The
13 maximum potential number of evening events during the four and one-half month annual
14 season is 123 events. Parking will occur on a four-acre cleared area, accessed by a gravel
15 driveway. The application proposes to use the gazebo, the tent structure and surrounding
16 grounds for the events, and also use rooms in the two dwellings for bridal and groom
17 preparation.
18 The county hearings officer conducted a hearing, at which petitioner and other
19 neighbors appeared in opposition. On October 30, 2012, the hearings officer approved the
20 proposed commercial event business under the criteria at LC 16.255(2)(a)(ii), with the
21 exception of the use of the gazebo and tent structure. We set out and discuss LC 16.255(2)
22 later in this opinion. The hearings officer concluded that those structures did not meet the LC
23 16.255(2) criteria for “new” structures. Petitioner appealed the hearings officer’s decision to
24 the county board of commissioners.
25 Under LC 14.515, the appeal of hearings officer’s decision to the commissioners must
26 elect between (1) a request that the commissioners conduct a hearing on the appeal, or (2) a

1 request that the commissioners not conduct a hearing, and deem the hearings officer's
2 decision as the final decision of the county. Different fees and processes apply to Option 1 or
3 2. Petitioner requested Option 2. Notwithstanding that election, the commissioners can
4 choose to hear the appeal. The commissioners' *sua sponte* decision whether to hear the
5 appeal under Option 2 is governed by criteria at LC 14.600, including whether the planning
6 director recommends hearing the appeal, whether the appeal involves issues of countywide
7 significance, or issues that will re-occur with frequency or that require policy guidance. The
8 planning director recommended that the commissioners hear the appeal. The commissioners
9 applied LC 14.600 and elected to hear the appeal.

10 On February 5, 2013, the commissioners held an on-the-record hearing on the appeal
11 and, on February 26, 2013, the commissioners issued an order that rejected petitioner's
12 arguments. However, the commissioners remanded the decision to the hearings officer for a
13 *de novo* hearing limited to taking testimony regarding whether the tent structure and gazebo
14 were new or existing structures as of the date the application was deemed complete, which
15 was not an issue that petitioner had raised. As discussed below, new structures are subject to
16 more stringent standards than existing structures.

17 On April 4, 2013, the hearings officer conducted the *de novo* hearing on remand and,
18 on April 23, 2013, issued his decision concluding that the tent structure and gazebo were
19 "existing" structures within the meaning of LC 16.255(2) on the date the application was
20 complete, and therefore not subject to the standards that apply to new structures.
21 Accordingly, the hearings officer approved use of the structures for the event business.

22 Petitioner appealed the second hearings officer's decision to the commissioners, again
23 electing Option 2. This time the commissioners applied the criteria at LC 16.600 and
24 concluded that no hearing on the appeal was warranted. Accordingly, the commissioners
25 summarily affirmed the hearings officer's decisions as the county's final decisions. This
26 appeal followed.

1 **INTRODUCTION**

2 Petitioner raises three assignments of error. Because issues concerning LC 16.255 are
3 common to all three assignments of error, we first provide an overview of LC 16.255. In
4 addition, intervenors argue that four issues raised under the first and second assignments of
5 error were waived under *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003),
6 because petitioner did not specify those issues in the notice of local appeal to the board of
7 commissioners. At oral argument, petitioner responded that *Miles* is distinguishable, and
8 LUBA's scope of review is not limited to the issues raised in the notice of local appeal. We
9 address the parties' contentions regarding *Miles* waiver before proceeding to the merits.

10 Finally, the three assignments of error raise a number of interpretational issues
11 involving LC 16.253, 16.254, 16.255, and related statutes and statewide planning goals.
12 Before addressing those issues, we discuss LUBA's standard of review applied to the
13 challenged interpretations.

14 **A. LC 16.255**

15 LC 16.255, adopted in 1987, is part of the county's acknowledged land use ordinance.
16 LC 16.255(1) sets out the three purposes of a temporary use permit.[1] Specifically, the
17 purpose of LC 16.255 is to allow "on an interim basis" (1) temporary uses "not otherwise

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[1] LC 16.255(1) provides:

> "Purpose. The purpose of the Temporary Permit procedure is to allow on an interim basis:
>
> "(a) Temporary uses in undeveloped areas of the County not otherwise allowable in the applicable zone.
>
> "(b) Use of existing structures designed and intended for a use not allowable in a zone and not otherwise a nonconforming use, and
>
> "(c) Erection of Temporary structures for activities necessary for the general welfare of an area; provided such uses and activities are consistent with the intent of this chapter.
>
> "No Temporary Permit can be granted which would have the effect of permanently rezoning and granting a special privilege not shared by other property in the same zone."

1 allowable" in the applicable zone, (2) use of existing structures designed and intended for a
2 use not allowable in a zone and not otherwise a conforming use, and (3) new temporary
3 structures if necessary for the general welfare of an area. LC 16.255 also provides that no
4 temporary permit may be granted that has the effect of permanently rezoning property, or
5 granting a special privilege not shared by other property in the zone.

6 LC 16.255(2) describes several types of allowable temporary uses, and sets out
7 approval criteria and limitations.[2] Intervenors initially sought approval under LC

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[2] LC 16.255(2) provides, in relevant part:

"Allowable Temporary Uses, Criteria and Limitations.

"(a) The following are allowable Temporary Uses and may be permitted in any zone, subject to the following criteria and limitations:

"(i) A different use for existing structures or structures and premises in a combination which are occupied or have been occupied by a nonconforming use; provided it is determined by the Hearings Official that the character and nature of the proposed use will be less incompatible to the surrounding vicinity than the existing or previous nonconforming use.

"(ii) Use of existing structures and premises which are designed and intended for a use which is not allowable in the applicable zone and new structures and premises and use thereof necessary for the physical and economic welfare of an area; provided it is determined by the Hearings Official that the location, size, design and operating characteristics of the proposed use and new structure, if applicable:

"(aa) Will be compatible with and will not adversely affect the livability or appropriate development of abutting properties and the surrounding vicinity; and

"(bb) Will not be adversely affected by the development of abutting properties and the surrounding vicinity.

"(iii) Open land uses which do not involve structures with a combined value in excess of $1,000; provided it is determined by the Hearings Official that the location, size, design and operating characteristics of the proposed use [comply with criteria not relevant here.]

"(b) In applying the criteria for allowable temporary uses provided in LC 16.255(2)(a)(i) and(ii) above, consideration may be given to harmony in scale, bulk, coverage and density; to the availability of public facilities and utilities; to the harmful effect, if any, upon desirable neighborhood character; to the generation of traffic and the capacity of surrounding streets and roads; and to any other relevant impact of the use.

1 16.255(2)(a)(iii), allowing temporary uses that "do not involve structures with a combined
2 value in excess of $1,000[.]" However, the hearings officer determined that LC
3 16.255(2)(a)(iii) is not available, since the proposed use involves several structures, including
4 the dwellings, with values considerably in excess of $1,000. The hearings officer evaluated
5 the application under LC 16.255(2)(a)(ii), which in relevant part provides for the use of
6 "existing structures and premises which are designed and intended for a use which is not
7 allowable in the applicable zone." The second prong of LC 16.255(2)(a)(ii) authorizes "new
8 structures and premises" necessary for the physical and economic welfare of an area. As
9 noted, the hearings officer's initial decision approved the event business, but denied the use
10 of the gazebo and tent structure as new structures, after concluding that they are not necessary
11 for the physical and economic welfare of the area. On remand, the hearings officer concluded
12 that the gazebo and tent structure were existing uses, and not subject to that standard.

13 **B. *Miles* Exhaustion/Waiver**

14 ORS 197.825(2)(a) limits LUBA's jurisdiction "to those cases in which the petitioner
15 has exhausted all remedies available by right before petitioning the board for review[.]" In
16 *Miles*, the Court of Appeals held that ORS 197.825(2)(a) also limits LUBA's review to those
17 issues that are raised on local appeal. Further, the Court concluded that when the local appeal
18 ordinance requires an appealing party to specify the issues for appeal, and the local ordinance

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"(c) No structural alterations may be made to a nonconforming structure to be utilized by a temporary use which would materially prolong the economic life of the structure.

"(d) Where new structures and use thereof and new open land uses are permitted, the premises shall be required to be restored to the prior state within three months of the termination of the permit. A performance bond shall be required, if determined necessary by the Hearings Official, at the time of approval in sufficient amount to cover the estimated cost such restoration.

"(e) Temporary Permits for any one permit shall be approved for a maximum of five years."

1 expressly or impliedly limits the appeal body to the issues so specified, the appeal body's
2 review is generally limited to the specified issues. 190 Or App at 509-10.

3 In the present case, intervenors argue that four issues raised in the first and second
4 assignments of error were not specified in petitioner's notice of local appeal, and thus are
5 waived under *Miles*. At oral argument, petitioner responded that *Miles* waiver does not apply
6 to limit the issues to those stated in the notice of appeal, because the county's local appeal
7 regulations do not require an appellant to specify issues on appeal when exercising Option 2
8 under LC 14.515.

9 As noted above, Option 2 allows an appellant to request that the board of
10 commissioners not hear the appeal, but rather deem the hearings officer's decision the
11 county's final decision, and allow direct appeal to LUBA. LC 14.515(3) requires that all
12 appeals shall be completed on the form provided by the county.[3] Petitioner submitted the

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[3] LC 14.515 provides, in relevant part:

"**Appeal Content Requirements**.

"All appeals shall:

"(1) Be submitted in writing to, and received, by the Department within the 12 day appeal period;

"(2) Be accompanied by the necessary fee to help defray the costs of processing the appeal; and

"(3) Be completed on the form provided by the Department, or one substantially similar thereto, and shall contain the following information:

"* * * * *

"(d) An explanation with detailed support specifying one or more of the following as assignments of error or reasons for reconsideration;

"(i) The Approval Authority exceeded his or her jurisdiction;

"(ii) The Approval Authority failed to follow the procedure applicable to the matter;

"(iii) The Approval Authority rendered a decision that is unconstitutional;

1 appeal on a three-page form provided by the county. Record 558-560. The form has two
2 sections, one for Option 1 appeals and another for Option 2 appeals. Each section lists the
3 "required" submittals. The Option 1 section requires submittal of a letter that addresses the
4 reasons why the hearings officer's decision was in error and identifies reasons for the appeal.
5 The Option 2 section does not require submittal of a letter identifying errors or the reason for
6 the appeal. Petitioner selected Option 2, but nonetheless attached a three-page letter that
7 describes six issues on appeal. Record 561-63. The letter takes the position in exercising
8 Option 2 that petitioner is not required to specify any issues on appeal, but petitioner does so
9 in the event it is necessary to preserve issues before LUBA. Record 561. One issue raised in
10 the letter is whether the hearings officer erred in approving the application after removing the
11 gazebo and tent structure from the proposal, instead of denying the application as proposed.
12 As noted, the commissioners elected to hear the appeal pursuant to the criteria at LC
13 16.600, and scheduled an on-the-record hearing. Pursuant to LC 14.515, both petitioner and
14 intervenor filed pre-hearing memoranda, as permitted by the county's procedures at LC

"(iv) The Approval Authority misinterpreted the Lane Code or Manual, State Law (statutory or case law) or other applicable criteria;

"(v) The Approval Authority rendered a decision that violates a Statewide Planning Goal * * *[.]

"* * * * *

"(e) The position of the appellant indicating the issue raised in an appeal to the Board was raised before the close of the record at or following the final evidentiary hearing and whether the appellant wishes the application to be approved, denied or conditionally approved; [and]

"(f) An election between the following two options:

"(i) Request that the Board conduct a hearing on the appeal, or

"(ii) Request that the Board not conduct a hearing on the appeal and deem the Hearings Official decision the final decision of the County. An appellant's election under this section shall constitute exhaustion of administrative remedies for purposes of further appeal of the County's final decision. The fee under this option shall not exceed the amount specified in ORS 215.416(11)(b)[.]"

1 14.400(7). In addition, on the day of the February 6, 2013 hearing, intervenors submitted a
2 two-page memorandum that challenged the condition of approval in the hearings officer's
3 decision that excluded the gazebo and tent structure from the approved use, a memorandum
4 also permitted under LC 14.400(7). Record 332-33. Intervenors' challenge to that condition
5 of approval ultimately led to the commissioners' remand for proceedings on the issue of
6 whether the gazebo and tent structure were new or existing structures.

7 We agree with petitioner that as the county has implemented and applied the local
8 appeal requirements in LC 14.515, appeal to the board of commissioners under Option 2 is
9 not limited the issues specified in the appeal document. As petitioner notes, LC 14.515(3)
10 requires the appeal to be completed on the form provided by the county, and that form
11 expressly requires specification of issues for Option 1 appeals, but not for Option 2 appeals.
12 Moreover, the board of commissioners clearly do not understand LC 14.515 to limit issues to
13 those specified in the notice of appeal for Option 2 appeals, because it considered—and
14 remanded the decision based on—a new issue that was submitted for the first time at the
15 hearing, by a party who was not even the appellant.

16 Accordingly, we disagree with intervenors that *Miles* operates to limit the issues
17 within LUBA's scope of review to those issues identified in the notice of appeal. In our
18 view, under these circumstances ORS 197.825(2)(a) and *Miles* are satisfied as long as the
19 issue is raised during the proceedings before the commissioners in a manner and time that is
20 consistent with the county's procedures. As noted, the board of commissioners allowed and
21 considered issues that both parties raised in multiple written pleadings, before, during and
22 after the hearing. Issues raised in such pleadings, or raised during the hearing, are not
23 excluded from LUBA's scope of review under *Miles*.

24 **C. Standard of Review**

25 Petitioner's three assignments of error present several interpretative issues.
26 Generally, LUBA's review of a governing body's interpretations of local code provisions is

1 governed by ORS 197.829(1)(a)-(d).[4] LUBA must affirm a governing body's local code
2 interpretation, unless the interpretation is inconsistent with the express language, purpose or
3 underlying policy, or the interpretation is contrary to a statute, land use goal, or rule that the
4 local provision implements. Where the local provision at issue does not implement any
5 statute, land use goal or rule, LUBA must apply a deferential standard of review to the
6 governing body's local code interpretation, and affirm the interpretation if it is "plausible"
7 given the text and context. *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776
8 (2010). However, where the local provision implements a statute, land use goal or rule,
9 LUBA applies no deference to the governing body's interpretation of the local provision.
10 *Doob v. Josephine County*, 31 Or LUBA 275, 281-82 (1996). Finally, if there is no
11 interpretation or the interpretation is inadequate for review, ORS 197.829(2) provides that
12 LUBA may interpret the local provision in the first instance.
13 Another important facet in the present case is that the temporary use permit
14 provisions at LC 16.255 were acknowledged in 1987 to comply with the statewide planning
15 goals and administrative rules, including Goals 4, 5 and 15. Therefore, any decisions made

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[4] ORS 197.829 provides:

> "(1) [LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
>
> > "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
> >
> > "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
> >
> > "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
> >
> > "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.
>
> "(2) If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct."

1 pursuant to LC 16.255 are not subject to direct application of Goals 4, 5 and 15. ORS
2 197.175(2)(d); *Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 46, 911 P2d
3 350 (1996). Consequently, if the plain text of LC 16.255 authorizes uses that are inconsistent
4 with uses allowed under Goals 4, 5 and 15, the acknowledged status of LC 16.255 means that
5 any inconsistency with the goals is not a basis to reverse or remand a decision applying LC
6 16.255. *Central Oregon Landwatch v. Deschutes County*, 52 Or LUBA 582, 597 (2006).
7 However, there are several caveats to the foregoing principle. The first is that if the
8 terms of a local code provision implementing a goal are ambiguous, and that ambiguity can
9 be interpreted consistently with the applicable goals and rules, ORS 197.829(1)(d) dictates
10 that the county cannot instead choose an interpretation that is contrary to the applicable goals
11 and rules. *Id.* at 599-600.
12 Further, in our view, the obligation to interpret an ambiguous code provision in a
13 manner not contrary to the applicable goals and rules operates not only where the local code
14 provision is expressly intended to directly implement a goal or administrative rule, but also in
15 circumstances, like the present one, where the local code provision is a general provision
16 applicable to all zones and not intended to implement any particular goal or rule. In such
17 circumstances, we believe that ORS 197.829(1)(d) supplies the appropriate standard of
18 review.
19 A second important caveat is that acknowledgment is limited to compliance with
20 statewide planning goals and administrative rules; it does not shield local ordinances from the
21 obligation to comply with applicable statutes. *See Kenagy v. Benton County*, 115 Or App
22 131, 134-36, 838 P2d 1076 (1992) (even after acknowledgment, where an acknowledged
23 comprehensive plan or land use regulation is inconsistent with a statutory obligation, the
24 statutory obligation must be observed). For example, the county cannot adopt legislation that
25 allows uses on lands zoned for exclusive farm use or other rural areas that are not allowed

under ORS chapter 215. *Gruener v. Lane County*, 21 Or LUBA 329, *aff'd* 109 Or App 160, 818 P2d 959 (1991).

Finally, a third important caveat is that acknowledgment is limited to compliance with the statewide planning goals and administrative rules in effect when the local ordinance was acknowledged. Pursuant to ORS 197.646(3), subsequent goal or rule amendments apply directly until a local government amends its land use code to implement post-acknowledgment goal or rule amendments.[5]

In sum, if the text of LC 16.255 unambiguously authorizes uses that are prohibited by the applicable goals or rules in effect when LC 16.255 was acknowledged, then inconsistency with those goals or rules is not a basis for reversal or remand. However, if the text of LC 16.255 is ambiguous, and that ambiguity can be interpreted in a manner that is not contrary to the applicable goals or rules, then the county cannot choose an interpretation that is contrary to the goals or rules.

With that introduction, we turn to the assignments of error.

FIRST ASSIGNMENT OF ERROR

Petitioners present four sub-assignments of error under the first assignment of error, each of which challenges the county's conclusion that the proposed use can be approved

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[5] ORS 197.646 provides, as relevant:

> "(1) A local government shall amend its acknowledged comprehensive plan or acknowledged regional framework plan and land use regulations implementing either plan by a self-initiated post-acknowledgment process under ORS 197.610 to 197.625 to comply with a new requirement in land use statutes, statewide land use planning goals or rules implementing the statutes or the goals.
>
> "* * * * *
>
> "(3) When a local government does not adopt amendments to an acknowledged comprehensive plan, an acknowledged regional framework plan or land use regulations implementing either plan, as required by subsection (1) of this section, the new requirements apply directly to the local government's land use decisions. * * *"

1 under LC 16.255. We first address the second sub-assignment of error, because it appears to
2 be dispositive.

3 **A. Second Sub-Assignment of Error: LC 16.255 must be interpreted**
4 **consistently with the Goal 4 Rule**

5 The hearings officer concluded that LC 16.255 unambiguously authorizes uses on the
6 subject property that are not authorized under the Goal 4 rule, but that the inconsistency
7 between LC 16.255 and the Goal 4 rule is "shielded by the acknowledgment of compliance of
8 the Lane Code and Rural Comprehensive Plan." Record 572.[6] The commissioners also
9 relied upon the acknowledged status of LC 16.255 to reject petitioner's arguments on appeal
10 that LC 16.255 requires interpretation and must be interpreted consistently with the Goal 4
11 rule.

12 On appeal, petitioner argues that the temporary use regulations must be interpreted if
13 possible in such as way to be consistent with Goal 4 and the Goal 4 rule. According to
14 petitioner:

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[6] The hearings officer's findings state:

> "Landwatch Lane County has cited the *Central Oregon Landwatch v. Deschutes County* case for the proposition that the temporary use permit application must be denied as being inconsistent with Oregon Administrative Rule Chapter 660, Division 6. I agree that this case is instructive in the determination of this issue. In *Central Oregon Landwatch*, LUBA distinguished between situations where the substance of an acknowledged provision is being challenged as being contrary to a goal or administrative rule and where an acknowledged provision may be subject to an interpretation that is inconsistent with a goal or administrative rule. In the former situation, LUBA suggests that *Opus Development Corp. v. City of Eugene*, 141 Or App 249, 255-56 (1996), is controlling and has opined that the acknowledged status of a code provision cannot be retroactively challenged. In the latter situation, *Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 46, *rev den* 323 Or 136 (1996) is controlling and prohibits a vague, acknowledged code provision from being interpreted in a manner that is inconsistent with a goal or administrative rule.
>
> "It is clear that the proposed use is not a use that is authorized by OAR 660-006-0025 to be sited in a forest zone, either outright or conditionally. It is also clear that Lane Code 16.255 allows temporary uses in any zone. There is no ambiguity about this situation and there is a clear disconnect between Lane Code 16.255 and the administrative rule. For this reason, I believe that *Opus Development Corp.* is controlling in the present case. Thus, whatever inconsistency exists between the code and the administrative rule is shielded by the acknowledgment of compliance of the Lane Code and Rural Comprehensive Plan." Record 572 (footnote omitted).

1 “An interpretation that would be consistent with Goal 4 and the Goal 4 rule
2 would be to determine that the proposal is for a home occupation, not a
3 temporary use. State statute provides that local governments may allow for
4 home occupations and the parking of vehicles in any zone. ORS 215.448. The
5 legislature has set forth minimum requirements that a local government must
6 apply to home occupations that it allows on forestland. *See* ORS 215.448(1).
7 Those statutory provisions include limiting the number of employees, ORS
8 215.448(1)(b), and a requirement that all activities shall be conducted
9 substantially in the dwelling or other buildings. ORS 215.448(1)(c). Here, the
10 proposed use is more of a permanent home occupation than a temporary use
11 because it is a commercial use that is being conducted on land where a
12 residence already exists. Whether the Applicant would satisfy the criteria of a
13 home occupation is not at issue, but what appears unmistakable is that the
14 alleged ‘temporary’ use here is actually an indefinite, unpermitted commercial
15 use in a forest zone. Because the proposed use should have been addressed as
16 a home occupation, the statutory limitations contained in ORS 215.448 would
17 apply to it. Therefore, the county erred in failing to require the proposed use
18 satisfy those statutory limitations.” Petition for Review 22.

19 Intervenors respond that the issue of whether the proposed use should not be approved
20 as a temporary use because it is properly characterized as a home occupation is waived under
21 *Miles* because that issue was not specified in the notice of appeal. However, as explained
22 above, *Miles* waiver does not limit the issues on appeal to the issues raised in the notice of
23 appeal.

24 On the merits, the Goal 4 rule, at OAR 660-006-0025(4)(s), authorizes on forest lands
25 “[h]ome occupations as defined in ORS 215.448[.]” ORS 215.448 in turn authorizes
26 establishment of a “home occupation” and associated parking “in any zone.” However, a
27 home occupation established in an exclusive farm use zone or forest zone is subject to several
28 restrictions.[7]

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[7] ORS 215.448 provides:

“(1) The governing body of a county or its designate may allow, subject to the approval of the governing body or its designate, the establishment of a home occupation and the parking of vehicles in any zone. However, in an exclusive farm use zone, forest zone or a mixed farm and forest zone that allows residential uses, the following standards apply to the home occupation:

1 The county's F-2 zone, at LC 16.211(3)(n), implements OAR 660-006-0025(4)(f) by
2 providing for home occupations on forest lands, subject to criteria that implement ORS
3 215.448, plus some additional criteria.[8] As LC 16.255(1) indicates, the temporary use

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"(a) It shall be operated by a resident or employee of a resident of the property on which the business is located;

"(b) It shall employ on the site no more than five full-time or part-time persons;

"(c) It shall be operated substantially in:

"(A) The dwelling; or

"(B) Other buildings normally associated with uses permitted in the zone in which the property is located; and

"(d) It shall not unreasonably interfere with other uses permitted in the zone in which the property is located.

"(2) The governing body of the county or its designate may establish additional reasonable conditions of approval for the establishment of a home occupation under subsection (1) of this section.

"(3) Nothing in this section authorizes the governing body or its designate to permit construction of any structure that would not otherwise be allowed in the zone in which the home occupation is to be established.

"(4) The existence of home occupations shall not be used as justification for a zone change."

[8] LC 16.211(3)(n) authorizes in the F-2 zone:

"Home occupations that comply with these requirements:

"(i) Shall be operated by a resident of the property on which the business is located;

"(ii) Shall employ on the site no more than five full-time or part-time persons;

"(iii) Shall be operated substantially in the dwelling, or other existing buildings normally associated with uses permitted by LC 16.211(2) above;

"(iv) No structure shall be constructed for the home occupation that would not otherwise be allowed by LC 16.211(2) above;

"(v) Shall not unreasonably interfere with uses permitted by the zoning of nearby lands or with uses allowed by LC 16.211(2) above;

"(vi) Shall comply with sanitation and building code requirements;

1 provisions are intended to authorize only uses that are "not otherwise allowable in the
2 applicable zone," and the use of existing structures that are "designed and intended for a use
3 not allowable in a zone and not otherwise a nonconforming use" LC 16.255(1)(a) and (b). If
4 the F-2 zone already allows the proposed use, then a temporary use permit is not authorized
5 under LC 16.255. That understanding of LC 16.255 and LC 16.211 is not only consistent
6 with the text and purpose of both provisions, but also consistent with Goal 4, the Goal 4 rule
7 and ORS 215.448. So the question becomes whether the proposed use is properly
8 characterized as a "home occupation" for purposes of LC 16.211, the Goal 4 rule and ORS
9 215.448.

10 The statute, rule and code do not define a "home occupation," but in its broadest
11 terms it is clearly some kind of business or commercial use that is associated with a "home"
12 or dwelling. In zones that are not resource zones, ORS 215.448 authorizes counties to
13 approve home occupations and associated parking subject only to whatever local criteria the
14 county chooses to adopt. In exclusive farm use and forest zones, however, the statute
15 imposes additional restrictions, and allows counties to approve only home occupations that
16 meet those additional restrictions.

"(vii) Shall not be used as a justification for a zone change;

"(viii) Shall comply with any additional conditions of approval established by the Approval Authority; and

"(ix) Approved applications for home occupations shall be valid until December 31 of the year following the year that the application was initially approved or until December 31 of the year for which an extension of the approval was granted by the Director as provided in LC 16.212(3)(n)(ix) below. Prior to December 31 of the year that the approval expires, the property owner or applicant who received initial approval, or a renewal pursuant to LC 16.212(3)(n)(ix), shall provide the Director with written request for renewal of the home occupation and written information sufficient to allow the Director to determine if the Conditions of Approval and other approval criteria have been satisfied. The Director shall review this information for each approved home occupation to determine if it continues to comply with the conditions of approval. Home occupations which continue to comply with the conditions of approval shall receive a two-year extension of approval to December 31 of the following year, and such extension shall be put in writing by the Director and mailed to the owner of the property upon which the home occupation is located. * * *"

The proposed event operation certainly appears to constitute as a "home occupation" in that it is a business or commercial use associated with a home. An event business of the type proposed in this case can, potentially, be approved as a home occupation under ORS 215.448, if it meets the restrictions imposed by the statute and local implementations of the statute. *See Green v. Douglas County*, 245 Or App 430, 263 P3d 355 (2011) (concerning approval of an event business as a home occupation under ORS 215.448). It is unknown in the present case whether intervenor's event business would meet those restrictions, because the county did not consider that question. However, both the statute and LC 16.211(3)(n) authorize the county to impose reasonable conditions of approval to ensure that a proposed home occupation complies with applicable statutory and local restrictions, and there is no obvious reason why an event business such as that proposed in the present case could not be approved as a home occupation, subject to appropriate conditions. Further, even if a proposed home occupation does not meet the additional restrictions that apply in resource zones, or the applicant refuses to accept conditions necessary to ensure compliance with those restrictions, that does not mean that the proposed use is not properly characterized as a home occupation for purposes of ORS 215.448.

Intervenors argue that the use proposed is not for a "home occupation." However, intervenors do not explain why the proposed use is not properly categorized as a home occupation. That the application sought approval under LC 16.255 does not bind the county to apply those standards, if the proposed use is properly evaluated under other standards. Intervenors may mean that the proposed use is "temporary" in nature, while a home occupation is presumably "non-temporary" in nature. However, that distinction is not particularly meaningful under LC 16.255 and LC 16.211. A temporary use permit is valid for five years, and apparently may be reapplied for, *ad infinitum.* Under LC 16.211(3)(n)(ix), a permit for a home occupation is valid for two years, and can be extended or renewed every two years. Further, that distinction is not particularly meaningful as applied to the proposed

1 event business. Intervenors are not proposing a one-time or limited duration use that is easily
2 characterized as "temporary," but instead they propose an on-going business that has already
3 operated continuously for over a year and is intended to operate another five years, if not
4 more.

5 More importantly, LC 16.255 by its terms applies only to uses that are "not
6 allowable" in the applicable zone. A threshold question under LC 16.255 that must be
7 addressed in every case is whether the proposed use is or is not "allowable" in the applicable
8 zone. If it is among the types of uses permitted or conditionally permitted in the applicable
9 zone, then the county cannot issue a temporary use permit for that use. That understanding of
10 LC 16.255 is entirely consistent with its plain text and purpose. To the extent there is any
11 ambiguity in the code on this point, the county must interpret its code in a manner that is not
12 contrary to the statute and administrative rule. If the proposed use is properly characterized
13 as a home occupation for purposes of LC 16.211, ORS 215.448 and OAR 660-006-
14 0025(4)(s), then the county cannot interpret its code to recharacterize the use as something
15 else.

16 Accordingly, we agree with petitioner that the county erred in not considering whether
17 the proposed use is properly characterized "as a "home occupation" for purposes of LC
18 16.211(3)(n) and ORS 215.448. If it is, then the county cannot apply the temporary use
19 standards at LC 16.255. Remand is necessary to make that determination.

20 **B. Remaining Sub-Assignments of Error**

21 The premise for the remaining sub-assignments of error is that LC 16.255 applies and
22 governs approval of the proposed use. Remand under the second sub-assignment of error
23 above may moot or make it unnecessary to resolve the remaining sub-assignments of error.
24 However, ORS 197.835(11)(a) requires us to decide all issues presented when remanding a
25 decision. In addition, we reached the merits of the second sub-assignment of error based on
26 our conclusion, explained above, that the issue was not waived under *Miles*. In the event the

1 latter conclusion is overturned on appeal, we deem it appropriate to address petitioner's
2 remaining challenges under LC 16.255. Accordingly, in resolving the remaining assignments
3 and sub-assignments of error we assume that LC 16.255 applies and governs approval of the
4 proposed use.

5 **1. First and Fourth Sub-Assignments: The Proposed Use is not**
6 **"Temporary."**

7 Petitioner argued below that the proposed use is not a "temporary" use, noting that the
8 proposed use would operate for up to 125 events per year, for five years, with the potential
9 for unlimited five-year re-applications. According to petitioner, a further indication that the
10 proposed use is not "temporary" is the fact that it is supported by recently built structures
11 constructed on permanent concrete foundations. Petitioner argues that LC 16.255(1)(c)
12 authorizes only new structures that are "temporary," and LC 16.255(2)d) requires removal of
13 all new structures within three months of termination of the permit. Because the county
14 concluded that the gazebo and tent structure qualify as "existing" structures for purposes of
15 LC 16.255(2)(a)(ii), LC 16.255(2)(d) will not apply to require their removal when and if the
16 permit is ever terminated. According to petitioner, structures constructed on permanent
17 concrete slabs that are used for five years, with no requirement to remove such structures, and
18 with their use potentially renewed every five years is not properly viewed as "temporary"
19 structures under any possible meaning of that term. Under these circumstances, petitioner
20 argues, the county must make a threshold determination that the proposed use is in fact a
21 "temporary" rather than a permanent or semi-permanent use, and if necessary impose
22 conditions authorized by LC 16.255(3) to ensure that the proposed use is temporary.

23 Relatedly, petitioner argues that the county's findings fail to address issues raised
24 below that approving a renewable five-year "temporary" use permit for the proposed
25 commercial event operation would, under the present circumstances, violate the LC
26 16.255(1) prohibition on temporary permits that have the effect of permanently rezoning
27 property, or that grant a special privilege not shared by other property in the same zone.

The commissioners did not directly address petitioner's arguments, but concluded simply that the "five year limit imposed on a Temporary Use Permit issued per LC 16.255 constitutes the temporary nature of such permits." Record 241. Intervenors argue that the plain language of LC 16.255 authorizes "temporary" uses that may last for the entire five year period of the temporary use permit, and that the commissioners correctly interpreted LC 16.255 to the effect that as a matter of law the five-year limit constitutes the temporary nature of the use.

The county's code does not define the terms "temporary" or "temporary use." LC 16.090 provides that "[w]here terms are not defined, they shall have their ordinary accepted meanings within the context with which they are used. Webster's Third New International Dictionary of the English Language, Unabridged, Copyright 1981, Principal Copyright 1961, shall be considered as providing ordinary accepted meanings." Webster's defines the adjective "temporary" in relevant part as meaning "lasting for a time only **:** existing or continuing for a limited time **:** IMPERMANENT, TRANSITORY[.]" LC 16.255(1), the purpose statement for temporary use permits, describes the purpose of that chapter to allow uses on an "interim basis." Webster's defines "interim" as "a time intervening **:** MEANTIME, INTERVAL[.]" Thus, as used in the context of LC 16.255, "temporary" appears to mean something that exists only for a limited, transitory interval.

LC 16.255(2)(e), the code section cited by the county, sets out the maximum term of a temporary use *permit*, but does not expressly or clearly provide that a use that extends for the maximum possible term of the permit necessarily qualifies as a "temporary" use. LC 16.255(3) sets out the conditions the county may impose on a temporary use, including (1) a time period within which the proposed use shall be developed, and (2) a limit on total duration of use. *See* n 2. Consequently, the fact that LC 16.255(2)(e) provides that a temporary use permit may be approved for a maximum of five years does not mean that any and all uses that are intended to last the entire term of the permit are necessarily "temporary"

1 or will necessarily operate on "an interim basis." Based on the circumstances, the county
2 could exercise its discretion under LC 16.255(3) to limit the duration or other characteristics
3 of the proposed use to ensure that it is in fact a "temporary" use. The county might choose to
4 do so, for example, to address concerns that approving a particular proposed use might
5 violate the prohibition at LC 16.255(1) on temporary permits that have the effect of
6 permanently rezoning property, or that grant a special privilege not shared by other property
7 in the same zone. Thus, to the extent the commissioners interpreted LC 16.255 to provide
8 that any use that is proposed to last for five years is necessarily, in all circumstances, a
9 "temporary" use, the commissioners' interpretation is inconsistent with the express language
10 and purpose of LC 16.255. ORS 197.829(1)(a) and (b).
11 With respect to the LC 16.255(1) prohibition on temporary use permits that have the
12 effect on rezoning property or granting special privileges, intervenors respond that the LC
13 16.255(1) prohibition is part of the purpose statement for LC 16.255, and therefore does not
14 constitute applicable approval criteria. According to intervenors, LC 16.255(2) sets out the
15 only applicable "criteria and limitations." However, the LC 16.255(1) prohibition on
16 temporary use permits that have the effect of rezoning property or granting special privileges
17 is phrased in express mandatory terms. Even if that express prohibition is not an "approval
18 criterion" set out in LC 16.255(2), that does not mean that the approval criteria at LC
19 16.255(2) can be applied or interpreted inconsistently with that prohibition. Further, we see
20 no reason that the county could not consider the prohibition, or other language in the purpose
21 statement, as context for determining whether limiting conditions are necessary under LC
22 16.255(3).
23 Accordingly, we agree with petitioner that if LC 16.255 is applicable, remand is
24 necessary for the county to make a threshold determination whether the use proposed and
25 approved is "temporary," whether and how the prohibitions in LC 16.255(1) apply, and

1 whether limiting conditions are necessary under LC 16.255(3) to ensure that the use will in
2 fact be temporary, *i.e.* exist only for a limited, transitory interval.

3 **2. Third Sub-Assignment: OAR 660-006-0025(5) Applies Directly**
4 **Pursuant to ORS 197.646(3)**

5 As noted earlier, ORS 197.646(1) requires that the county adopt plan and code
6 amendments to implement new or amended statutes, goals and administrative rules. If the
7 county fails to adopt implementing amendments, then pursuant to ORS 197.646(3) the new
8 or amended statutes, goals and administrative rules apply directly to the county's land use
9 decisions. *See* n 5.[9]

10 LC 16.255 was adopted and acknowledged in 1987. In 1990, LCDC adopted
11 amendments to the Goal 4 rule, at OAR 660-006-0025, which set out the uses allowed on
12 forest lands, including, as noted, home occupations. As noted, the county subsequently
13 implemented OAR 660-006-0025 in adopting the F-2 zone, at LC 16.211. The LC 16.211
14 provisions appear to faithfully reflect the requirements of OAR 660-006-0025, including the
15 standards at OAR 660-006-0025(5)(a) and (b) that apply to conditionally allowed uses on
16 forest lands. OAR 660-006-0025(5)(a) and (b) require findings that the proposed use does
17 not force a significant change in or increase the costs of accepted farming or forest practices,
18 or significantly increase fire hazard or fire suppression costs. The corresponding code
19 provisions are found at LC 16.211(3).

20 Petitioner repeats his argument that if the county treats the proposed use as a "home
21 occupation" conditionally allowed in the F-2 zone under LC 16.211(2)(n), subject to the
22 standards at LC 16.211(3), then consistency with the Goal 4 rule is assured. In that
23 circumstance, ORS 197.646 could play no possible role, as OAR 660-006-0025 is fully
24 implemented by LC 16.211. However, petitioner goes on to argue that if the proposed use is

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[9] Intervenors argue initially that any issue under OAR 197.646 is waived under *Miles* because the issue was not specified in petitioner's notice of appeal. However, as explained above, under the present circumstances *Miles* does not limit LUBA's review to the issues raised in the notice of appeal.

not treated as a home occupation, and the temporary use provisions at LC 16.255 apply, then pursuant to ORS 197.646(3) the county must apply OAR 660-006-0025 directly, including the significant change/increase standards at OAR 660-006-0025(5)(a) and (b).

The latter argument is difficult to understand. ORS 197.646(3) applies when a local government fails to implement a new or amended statute, goal or rule, as required by ORS 197.646(1). The county long ago implemented OAR 660-006-0025 by, among other things, adopting the substance of the rule into LC 16.211. Reading between the lines, petitioner appears to argue that the county failed to *fully* implement OAR 660-006-0025, because it did not at the same time amend its code to expressly provide that, notwithstanding LC 16.255, the only uses allowed in the F-2 zone are those specified in LC 16.211.

If that is petitioner's argument, we agree with intervenors that it does not establish a basis for reversal or remand. Petitioner is probably correct that when the county implemented OAR 660-006-0025 by adopting LC 16.211, the county should have also made sure that no other code chapters authorized uses in the F-2 zone in a manner contrary to OAR 660-006-0025. For whatever reason, the county did not. That failure on the county's part could have been raised as an issue in periodic review or a LUBA appeal, but was not. The post-acknowledgment ordinance that implemented OAR 660-006-0025 and adopted LC 16.211 is, itself, now acknowledged to comply with the Goal 4 rule. Even assuming that that ordinance should have gone further to implement the Goal 4 rule, it is not the case that the county failed to adopt implementing amendments, as required by ORS 197.646(1). Notably, the same OAR 660-006-0025 requirements that petitioner argues should be applied directly pursuant to ORS 197.646(3) are already present in LC 16.211. Accordingly, petitioner has not established that ORS 197.646(3) require the county to directly apply OAR 660-006-0025.

The first assignment of error is sustained, in part.

1 **SECOND ASSIGNMENT OF ERROR**

2 In the second assignment of error, petitioner challenges the county's conclusion that
3 the gazebo and tent structure are "existing" structures for purposes of LC 16.255(2), because
4 those structures were in existence on June 20, 2013, the date that intervenor submitted the
5 traffic study and the application became complete.[10] Under LC 16.255(2)(a)(ii), a temporary
6 use involving a new structure must demonstrate that the structure, premises and use thereof
7 are "necessary for the physical and economic welfare of an area." No such demonstration is
8 required for temporary uses involving existing structures. Further, new structures, but not
9 existing structures, must be removed three months after expiration of the temporary use
10 permit. LC 16.255(2)(d).

11 Under our resolution of the second-sub-assignment to the first assignment of error, it
12 may be unnecessary to reach the second assignment of error, which assumes that LC 16.255
13 applies. Nonetheless, in the event our resolution of the second sub-assignment to the first
14 assignment of error is incorrect, we proceed to resolve the second assignment of error.

15 As noted, the hearings officer's initial decision treated the gazebo and tent structure as
16 "new" structures for purposes of LC 16.255(2)(a)(ii), and imposed a condition requiring that
17 the structures not be used as part of the temporary use. Intervenors challenged the condition.
18 The commissioners remanded the decision to the hearings officer to determine "whether the
19 tent structure and gazebo were new or existing structures under LC 16.255(2)(a)(ii) *as of the*
20 *date the application was deemed complete*." Record 239 (Emphasis added.) The hearings

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[10] Intervenors argue, initially, that this issue was waived under *Miles* because it was not specified in petitioner's initial appeal to the board of commissioners. However, that issue could not have been challenged in the initial appeal. The hearings officer's initial decision treated the structures as new structures, which apparently was not a point in dispute during the initial proceedings. *See* Record 623 (intervenors' characterization of the two structures as new structures). To the extent it was an issue, petitioner prevailed on that issue, and we do not understand *Miles* to require them to challenge the hearings officer's decision on that point in their initial notice of appeal. Petitioner's first opportunity to challenge that point was on remand to the hearings officer, and in the appeal of the remand decision to the commissioners, and petitioner did so. Record 56-57. The issue is not waived under *Miles*.

1 officer determined on remand that the tent structure and gazebo had been constructed on the
2 property in 2011, well before the application became complete on June 20, 2013, and thus the
3 structures were in "existence" within the meaning of LC 16.255(2) as interpreted by the
4 commissioners. On appeal of that decision, the commissioners reaffirmed their interpretation
5 of LC 16.255(2)(a)(ii), to the effect that a structure is existing if it is "in existence as of the
6 date the land use application is deemed complete." Record 4.

7 **A. Procedural Error**

8 Petitioner first argues that the county committed procedural error by failing to provide
9 petitioner with an opportunity to weigh in on the commissioners' interpretation that
10 "existence" of structures is determined "as of the date that the land use application is deemed
11 complete." According to petitioner, that interpretation appeared for the first time in the
12 commissioners' initial decision remanding to the hearings officer, and there was no
13 opportunity for any party to address the interpretation.

14 Under limited circumstances, a local government may be required to provide parties
15 an opportunity to address an interpretation adopted in the final decision, if (1) the
16 interpretation significantly changes an existing interpretation or, for other reasons, is beyond
17 the range of interpretations that the parties could reasonably have anticipated at time of their
18 evidentiary presentations, and (2) the petitioner demonstrates that he can produce specific
19 evidence that differs in substance from the evidence previously produced, and that is directly
20 responsive to the unanticipated interpretation. *Gutoski v. Lane County*, 155 Or App 369,
21 373-74, 963 P2d 145 (1998).

22 In the present case, the commissioners' interpretation was arguably not within the
23 range of anticipated interpretations, given that the issue of whether the gazebo and tent
24 structure were new or existing structures was not part of petitioners' appeal, and was raised
25 for the first time by non-appellants at the on-the-record hearing. However, the
26 commissioners recognized that taking additional evidence under the new interpretation was

necessary, and remanded to the hearings officer to provide that evidentiary hearing. Petitioner participated in the evidentiary hearing, and had a full opportunity to present responsive evidence. Neither *Gutoski* nor any other case cited to us requires that petitioner be provided an opportunity to challenge the initial interpretation itself during the proceedings below.

B. Existing structure designed and intended for a use which is not allowable in the applicable zone.

On the merits, petitioner contends that the commissioners' interpretation—that a structure is "existing" as long as it was constructed before the date the application became complete—is inadequate for review, because it provides no rationale whatsoever for choosing the date the application became complete to determine whether the structure is "new" or "existing" for purposes of LC 16.255(2)(a)(ii). Petitioner notes that the hearings officer found that determining whether a structure is "new" or "existing" using the date that application became complete would "undermine any meaningful distinction between the terms 'new' and 'existing.'" Record 22. The hearings officer commented:

> "Under ORS 215.427, local governments have 30 days in which to judge whether an application is complete. If an application is deemed incomplete, the applicant is given another 180 days in which to cure its incompleteness. An application can theoretically be deemed complete almost seven months after it is submitted. Thus, under the remand language, an applicant can turn in an application for a temporary use permit on January 1, 2013, have the application deemed incomplete on January 31, and then have until July 30 to build a structure that would qualify as 'existing' for the purposes of the temporary use permit. I do not believe that is the intent of the code. Nevertheless, under the remand interpretation, the two structures must be deemed 'existing' for the purposes of this application as they were physically in existence on the subject property by July 21, 2011, eleven months prior to the application being deemed complete (June 20, 2012)." Record 22.

Similarly, petitioner argues that the commissioners' interpretation is inconsistent with the text and intent of LC 16.255(2)(a)(ii), because it allows an applicant to illegally construct structures for uses that are not permitted in the underlying zone, with the intent of qualifying them as "existing" structures for a temporary use, under the more lenient standards that apply

to existing structures. According to petitioner, that is what happened in the present case: intervenors built without county approval two structures designed and intended for a commercial use that is not permitted in the F-2 zone, and now seeks to qualify them as "existing" structures for purposes of LC 16.255(2)(a)(ii).

Intervenors respond that the commissioners' interpretation is explicit and adequate for review, and there is no need for additional findings explaining the basis or rationale for choosing the date the application becomes complete as the date that determines whether a structure for a temporary use is "new" or "existing." Further, intervenors argue that it is irrelevant that the hearings officer disagreed with the commissioners' interpretation; it is the latter's interpretation that LUBA must review. On the merits, intervenors argue that it is significant that petitioner offers no alternative interpretation as a counterpoint to the commissioners' interpretation. If for example petitioner is taking the position that "existing structures" means structures that existed on the date the application is filed, intervenors argue that such an interpretation would not assist petitioner in this appeal, because the gazebo and tent structure were constructed in 2011, prior to the date the application was filed.

Petitioner and the hearings officer are correct that the commissioners' interpretation would appear to allow an applicant to construct a building for a use that is not allowed in the underlying zone, at any time prior to the date the temporary use application becomes complete, and thereby gain the status of an "existing" structure for purposes of LC 16.255(2)(a)(ii). That interpretation makes it absurdly easy for an applicant to avoid the "necessary for the physical and economic welfare of an area" standard that applies to new structures under LC 16.255(2)(a)(ii), and which would have prohibited use of the gazebo and tent structure as part of the event business in the present case. Instead, under the commissioners' interpretation, the applicant simply needs to construct a structure for a use that is not allowed in the applicable zone, sometime before the temporary use application is complete. Under the county's apparent understanding of LC 16.255(2)(a)(ii), the legal status

of the structure proposed for a temporary use is not a matter for consideration; the structure simply needs to physically "exist" as of the date the application is complete.

The commissioners' apparent understanding of LC 16.255(2)(a)(ii) would likely be affirmable on appeal if it were only a question of what constitutes a "new" versus an "existing" structure. However, the phrase "existing structure" is qualified by LC 16.255(2)(a)(ii), to include only structures are "designed and intended for a use which is not allowable in the applicable zone." In our view, that language is the key to determining whether a structure may be treated as an existing structure for purposes of LC 16.255(2)(a)(ii). However, the county's decision does not address that key language.

The phrase "designed and intended for a use which is not allowable in the applicable zone" is ambiguous. Specifically, it is not clear whether it is limited to (1) a structure that was lawfully constructed prior to the application of zoning that prohibits the use the structure is designed and intended for, or whether it more broadly includes (2) a structure illegally constructed *after* the application of zoning that prohibits the use the structure is designed and intended for. The county's findings do not address that ambiguity. To the extent the commissioners intended the broader interpretation, that broader interpretation appears to bring LC 16.255(2)(a)(ii) into conflict with several LC provisions, if not several statutes.

LC 16.255(1)(b) states in relevant part that the purpose of the temporary use provisions is to allow the "[u]se of existing structures designed and intended for a use not allowable in a zone and not otherwise a nonconforming use[.]" *See* n 1. LC 16.255(2)(a)(i) sets out the standards for allowing "different use" of an existing structure that is currently or has been occupied by a nonconforming use. *See* n 2. Essentially, LC 16.255(2)(a)(i) allows temporary use of an existing structure as a type of change or alteration to a lawful nonconforming use. The county's nonconforming use regulations, at LC 16.251, otherwise

1 govern establishment, verification, change and alteration of nonconforming uses, consistent

2 with ORS 215.130.[11]

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[11] LC 16.251 provides, in relevant part:

> "Except as is hereinafter provided in this Chapter, the lawful use of a building or structure or of any land or premises lawfully existing at the time of the effective date of this Chapter or at the time of a change in the official zoning maps may be continued although such use does not conform with the provisions of this Chapter.
>
> "(1) Verification of Nonconforming Use. * * * When evaluating a request for verification, the following criteria shall apply:
>
> "(a) To be valid, a nonconforming use must have been lawfully established prior to the enactment of an ordinance restricting or prohibiting the use.
>
> "(b) The use must have been in actual existence prior to the enactment of an ordinance restricting or prohibiting the use or have proceeded so far toward completion that a right to complete and maintain the use is deemed to have vested in the landowner.
>
> "(c) The nonuse of a nonconforming use of a structure or property for a period in excess of one year will prohibit the resumption of the nonconforming use. The burden of proof for the verification of a nonconforming use is upon the applicant.
>
> "(2) Change in Nonconforming Use. A nonconforming use may be changed only insofar as it applies to the zone in which it is located. Once changed to a conforming use, no building or land shall be permitted to revert to a nonconforming use.
>
> "(3) Increase of Nonconforming Use. A nonconforming use shall not be increased * * *.
>
> "* * * * *
>
> "(5) Discontinuance of Nonconforming Use. When a non-conforming use of a structure or property is discontinued for a period in excess of one year, the structure or property shall not thereafter be used, except in conformance with the zone in which it is located.
>
> "(6) Unlawful Use of a Nonconforming Use. No unlawful use of property existing at the time of passage of this Chapter shall be deemed a nonconforming use.
>
> "* * * * *
>
> "(11) Alterations of a Nonconforming Use. Alterations of a nonconforming use may be permitted to continue the use in a reasonable manner subject to Hearings Official approval pursuant to LC 14.300 and consistent with the intent of ORS 215.130(9), and shall be evaluated pursuant to criteria expressed in LC 16.251(12) below. Alteration of any such use shall be permitted when necessary to comply with any lawful requirement for alteration in the use.

1 LC 16.255(2)(a)(ii) in turn governs circumstances involving existing structures that
2 are "not otherwise a nonconforming use." An existing structure may be authorized for a
3 temporary use *only* if it is "designed and intended for a use which is not allowable in the
4 applicable zone." By negative implication, LC 16.255(2)(a)(ii) does not authorize temporary
5 uses in existing structures that are designed and intended for a use which *is* allowable in the
6 applicable zone. In fact, nothing in LC 16.255 expressly authorizes temporary uses in
7 existing structures that are designed and intended for uses allowed in the zone. That in turn
8 indicates that the category of "existing structures" is not as unbounded as the county's
9 interpretation would suggest, limited only by the requirement that the structure be in physical
10 existence prior to the date the application is complete.

11 However, it is still unclear what sub-types of existing structures properly belong in the
12 category of structures "designed and intended for a use not allowed in the applicable zone."
13 That category presumably includes a structure lawfully built prior to application of zoning
14 that prohibited the structure's designed and intended use, but which otherwise does not
15 qualify as part of a lawful nonconforming use, for example because the use was ended prior
16 to contrary zoning and never became established as a nonconforming use under LC 16.251
17 and the statute it implements, ORS 215.130. But it is less clear that LC 16.255(2)(a)(ii) is
18 also intended to authorize temporary use of structures that were constructed illegally in

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"(12) Criteria for Decision. When evaluating a proposal for increase, restoration, alteration or repair, the following criteria shall apply:

"(a) The change in the use will be of no greater adverse impact to the neighborhood.

"(b) The change in a structure or physical improvements will cause no greater adverse impact to the neighborhood.

"(c) Other provisions of this Chapter, such as property development standards, are met."

1 violation of the currently applicable zone, because they were designed and intended for a
2 currently prohibited use.

3 The latter, broader interpretation appears to conflict with code provisions that require
4 that development comply with applicable land use regulations, and prohibit construction or
5 uses contrary to zoning requirements. For example, LC 16.005 provides that a development
6 may be used only for a lawful use, defined as a use that is not prohibited by law or that
7 qualifies as a nonconforming use.[12] Similarly, LC 16.006 prohibits any person from engaging
8 in development that does not comply with the county's land use regulations.[13] LC 16.262(6)
9 provides that any use established in violation of zoning requirements is unlawful and declared
10 a nuisance.[14] These provisions presumably implement ORS 215.190, which prohibits any
11 person from constructing or maintaining any structure or use in violation of a county's land
12 use ordinance. While LC 16.255 expressly authorizes temporary *uses* that are not allowed in
13 the applicable zone, it does not authorize, at least expressly, use of illegally built structures.

14 To sum, the county's interpretation—that a structure is "existing" for purposes of LC
15 16.255(2)(a)(ii) if it is physically existing on the date the application is complete—is

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[12] LC 16.005(1) provides:

> "A Development May Be Used Only For a Lawful Use. A lawful use is a use that is not prohibited by law or which is nonconforming pursuant to LC 16.251 below of this chapter."

[13] LC 16.006 provides:

> "**Compliance Required**.
>
> "(1) No person shall engage in, or cause to occur, a development which does not comply with the Lane County Land Use and Development Chapter.
>
> "(2) A development shall be approved by the Director, or other Approving Authority, according to the provisions of this chapter."

[14] LC 16.262(6) provides:

> "Any use which is established, operated, erected, moved, altered, enlarged, painted or maintained contrary to the zoning requirements shall be, and is hereby declared to be, unlawful and a public nuisance and may be abated as such."

inadequate for review because it does not address and give meaning to the key limitation that the structure must be "designed and intended for a use not allowable in the applicable zone." To the extent the county interpreted LC 16.255(2)(a)(ii) to authorize use of structures built in violation of the law, that interpretation is not compelled by the language of LC 16.255, brings LC 16.255 into conflict with other code provisions discussed above, and is contrary to ORS 215.190, if not ORS 215.130.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

As noted, the entire property on which the event business is conducted is within the Willamette River Greenway. The county has implemented Statewide Planning Goal 15 (Willamette River Greenway) by adopting LC 16.254. LC 16.254 requires in relevant part that a permit is required for any change of use, intensification of an existing use or development within the Greenway boundary, subject to standards at LC 16.254(4). The main dwelling on the property was approved pursuant to a Greenway permit. "Change of use" is defined as "[m]aking a different use of the land or water than that which existed on December 5, 1975." LC 16.254(2)(f). "Intensification" is defined as "[a]ny additions which increase or expand the area or amount of an existing use or the level of activity." LC 16.254(2)(g).

In addition, the county's Greenway regulations impose a setback from the ordinary high water line from the river, and only water-dependent or water-related uses are allowed within that setback. The county has also implemented Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) by adopting LC 16.253, which is a set of regulations governing removal, maintenance and restoration of vegetation within a 100 foot riparian setback. Both the Greenway setback and the riparian setback apply to portions of the subject property adjacent to the river. The gazebo and the tent structure are located within the Greenway boundary, but not within the Greenway setback or the riparian setback.

1 However, the proposed event business will use a mowed area and concrete walkway that
2 slopes down to the river and that may be within the Greenway and riparian setbacks.
3 The hearings officer concluded that the proposed use constitutes an intensification of
4 a use within the Greenway. Record 32. However, the hearings officer ultimately concluded
5 that, as a matter of law, a temporary use is "exempt" from the requirement to obtain a
6 Greenway permit and from the regulations governing riparian areas, because
7 acknowledgment of the temporary use permit provisions at LC 16.255 "shields this
8 temporary use from the requirements imposed" by the statewide planning goals and all other
9 provisions of Lane Code, including LC 16.253 and LC 16.254. Record 31-32.
10 On appeal to the Board of Commissioners, petitioner argued that the proposed use is a
11 change of use or intensification that requires a Greenway permit, and is also subject to the
12 riparian standards at LC 16.253. Petitioner argued that the county cannot approve the
13 temporary use unless the county either addresses the Greenway permit and riparian standards,
14 or conditions temporary use approval on obtaining a Greenway permit and approval under the
15 riparian standards. Record 554-55. As a basis for arguing that the county must require a
16 Greenway permit and apply the riparian standards in the course of approving the temporary
17 use permit, petitioner argued that LC 16.255(2)(b) requires that the county consider "any
18 other relevant impact of the use." Petitioner contended that the requirements of LC 16.253
19 and 16.254 must be considered because they concern "other relevant impact[s] of the use."
20 The commissioners rejected the latter argument, concluding that the temporary use
21 permit provisions at LC 16.255 do not "contain a nexus to the Riparian ordinance, LC
22 16.253, or the Greenway ordinance, LC 16.254, and therefore compliance with those
23 ordinances is not required in evaluating a Temporary Use Permit." Record 241. However,
24 the commissioners did not address petitioner's contention that the Greenway permit and
25 riparian standards apply to the proposed use, and thus the county must at least condition
26 temporary use approval on obtaining the required Greenway permit and riparian approvals.

On appeal to LUBA, petitioner argues that the county's findings regarding the applicability of the Greenway and riparian standards are inadequate. Petitioner devotes most of his argument to a challenge to the commissioners' finding that there is no "nexus" between temporary use permits and the Greenway and riparian regulations, and that compliance with those regulations is not required in approving a temporary use permit. Petitioner contends that the commissioners failed to address his argument under that LC 16.255(2)(b) that compliance with those regulations must be addressed because they concern "other relevant impacts of the use."

Intervenors respond that petitioner's main theory—that the county is *required* to process Greenway and riparian permits at the same time as it processes a temporary use permit application—is contrary to ORS 215.416(2), which requires counties to establish a consolidated procedure by which an applicant may apply at one time for all permits needed for a development project. By implication, intervenors argue, the applicant is *not* required to consolidate applications needed for development, but may pursue them serially.

We agree with petitioner that the county's findings are inadequate. The county's decision retroactively approves a commercial event operation within the Greenway boundary, and non-structural elements of that operation may occur within the Greenway setback or the riparian area. Petitioner argued on appeal below that that operation cannot lawfully proceed without obtaining Greenway and possibly riparian permits, and requested that the county either apply the Greenway and riparian standards in this proceeding, or condition approval on obtaining the required Greenway and riparian permits in a future proceeding. The commissioners' findings clearly reject petitioner's argument that compliance with the Greenway and riparian provisions must be established in approving the temporary use permit, but do not address petitioner's arguments under LC 16.255(2)(b), or petitioner's alternative contention that conditions should be imposed to require that intervenors obtain required Greenway and riparian approvals.

It may be the case that nothing in the county's code, including LC 16.255(2)(b), compels the county to approve in a single proceeding all applications needed for the proposed use. But that does not mean that such necessary approvals may be completely ignored in approving a temporary use permit under LC 16.255, particularly to retroactively approve an on-going use. LC 16.255(2)(b) could be understood to require that a decision approving a temporary use permit consider whether other land use approvals may be necessary before development or operation of the temporary use, and impose conditions necessary to ensure that any required approvals are obtained prior to development or use. Even if LC 16.255(2)(b) does not carry that obligation, other general code provisions arguably do. *See* LC 16.006(1) and (2) (requiring compliance with the county code, prohibiting non-compliant development, and requiring county approval of development) (quoted at n 13).

The only potential explanation in the county's findings for the position that no conditions are required with respect to obtaining Greenway or riparian provisions is the hearings officer's conclusion that acknowledgment of LC 16.255 means that a temporary use is "exempt" from county code permit requirements that implement the statewide planning goals. However, as explained under the first assignment of error, that conclusion is simply incorrect. LC 16.255 authorizes only uses not otherwise allowable in the applicable zone, *i.e.* uses that are *prohibited* in the applicable zone. With limited exceptions, the Greenway and riparian provisions do not *prohibit* uses within the Greenway boundary or riparian setback; they simply require that the applicant obtain a permit or approval under the Greenway and riparian standards. Nothing in LC 16.255 expressly purports to waive the obligation to obtain all permits otherwise required by county code. To the extent LC 16.255 can be interpreted to that effect, any such interpretation would be inconsistent with the Goal 5 and Goal 15

1 requirements that LC 16.253 and LC 16.254 implement.[15] As explained in the introduction,
2 ambiguities in LC 16.255 cannot be interpreted in a manner that causes conflict with the
3 goals, if the ambiguity can be interpreted consistently with the goals.

4 Accordingly, we agree with petitioner that the county erred at least in not imposing
5 conditions of approval requiring that intervenors obtain a Greenway permit and riparian
6 permit, if applicable.

7 The third assignment of error is sustained.

8 The county's decision is remanded.

9 Holstun, Board Chair, concurring.

10 With one caveat, I do not agree with the majority that the county's decision should be
11 remanded for the county to consider whether the proposed event venue could be approved as
12 proposed, or modified to become, a home occupation. LC 16.255(1) allows the county to
13 approve temporary uses if they are "not otherwise allowable in the applicable zone." Event
14 venues are not allowable in the F-2 zone. So with one caveat, the disputed event venue is
15 potentially a candidate for approval as a temporary use under LC 16.255(1). If the disputed
16 event venue, as proposed, could be approved as a home occupation, then I agree with the
17 majority that it could not be approved as a temporary use under LC 16.255(1). But there is
18 simply no reason on this record to believe that the proposed event venue, as proposed, could
19 be approved as a home occupation. Certainly there is nothing in the application that would
20 suggest intervenors intend to operate the proposal in a way that would comply with ORS
21 215.448.

22 The home occupations authorized by ORS 215.448 are not really uses. Rather ORS
23 215.448 authorizes approval of *any* use, so long as that use (1) is "operated by a resident or

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[15] Any such interpretation would also be inconsistent with LC 16.254(8), which provides that in case of any conflict between the Greenway provisions and any other code provision, the more restrictive provisions apply. The Greenway provisions are clearly more restrictive than the temporary use provisions.

employee of a resident of the property on which the business is located," (2) employs "no more than five full-time or part-time persons," (3) is "operated substantially in" "[a] dwelling; or [o]ther buildings normally associated with uses permitted in the zone in which the property is located," and (4) will not "unreasonably interfere with other uses permitted in the zone in which the property is located." ORS 215.448 imposes no limits on the kinds of uses that may be approved in resource zones beyond these four limitations. *Green v. Douglas County*, 63 Or LUBA 200, 208-09, *rev'd and remanded* 245 Or App 430, 263 P3d 355 (2011). I suspect that intervenors might be able to modify their proposal so that it qualifies as a home occupation. But of course that is the case with almost any use. Under the majority's reading of LC 16.255(1), it seems unlikely that any use could be approved as a temporary use, since almost any use could be modified to comply with ORS 215.448. The intervenors did not seek approval as a home occupation, and I believe it is a misconstruction of LC 16.255 to remand the county's decision to determine if intervenor's proposal could be modified to seek approval for a home occupation that the applicant did not seek approval for.

Under the majority's reading of LC 16.255(1), an applicant for approval as a temporary use must demonstrate that its proposal could not be modified to qualify as a home occupation before it could seek approval as a temporary use. In other words the applicant must show that it is not possible to operate its proposed business in a way that it does not want to operate that business, before it can seek temporary use approval to operate its proposed use in the way that it wants to operate the business. I disagree with that reading of LC 16.255(1).

Although I disagree with the majority's reading of LC 16.255(1), I could not agree more with the majority that this intensive seasonal use in a forest zone, which could in theory operate forever as a temporary use, is not a "temporary use" under any plausible understanding of that term. The county's interpretation to the contrary is simply and completely implausible.

1 Ryan, Board Member, concurring.

2 I concur in the reasoning and result, but write separately because I respectfully 3 disagree with the majority's conclusion that the Goal 4 rule requirements in OAR 660-006- 4 0025(4) do not apply directly to the county's decision to approve a temporary use in a forest 5 zone, by virtue of ORS 197.646(3) According to the majority, because the county previously 6 amended the county's F-2 zone provisions at LC 16.211 after OAR 660-006-0025(4) was 7 adopted, as required by ORS 197.646(1), the Goal 4 rule does not apply to the county's 8 decision to issue a temporary use permit pursuant to LC 16.255. ORS 197.646, enacted in 9 1991, provides in relevant part:

10 "(1) A local government shall amend its acknowledged comprehensive plan 11 or acknowledged regional framework plan and land use regulations 12 implementing either plan by a self-initiated post-acknowledgment 13 process under ORS 197.610 to 197.625 to comply with a new 14 requirement in land use statutes, statewide land use planning goals or 15 rules implementing the statutes or the goals.

16 "* * * * *

17 "(3) When a local government does not adopt amendments to an 18 acknowledged comprehensive plan, an acknowledged regional 19 framework plan or land use regulations implementing either plan, as 20 required by subsection (1) of this section, the new requirements apply 21 directly to the local government's land use decisions. * * *"

22 After LCDC adopted OAR 660-006-0025 in 1990, the county subsequently amended its 23 previously existing F-2 zone provisions at LC 16.211 to comply with the rule. ORS 24 197.625(1) provides in relevant part that "[the] local decision adopting a change to * * * a 25 land use regulation is deemed to be acknowledged" when no appeal of the decision is filed 26 within the appeal period set out in ORS 197.830(9).[16] Under ORS 197.625(1), then, the 27 "local decision" that adopted text amendments to the F-2 zone is what is deemed to comply

[16] ORS 197.015(1) defines "acknowledgement" in relevant part to mean "a commission order that certifies that a * * * plan or regulation amendment complies with the goals * * *." The phrase "deemed acknowledged" is not defined in the statutes or rules.

1 with the goals. But the county is not relying in the challenged decision on the provisions of
2 its F-2 zone that are deemed to comply with the Goal 4 rule. The county is relying on LC
3 16.255, a provision that was adopted before the 1990 amendments to Goal 4 and that has not
4 been amended to comply with the Goal 4 rule, although it appears to allow uses in forest
5 zones that are prohibited by the Goal 4 rule. Accordingly, I believe that under ORS
6 197.646(3), until the county amends LC 16.255 to comply with the Goal 4 rule, the rule
7 applies directly to the county's land use decisions made pursuant to LC 16.255 and I would
8 sustain petitioner's sub-assignment of error that makes that argument.