

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

3
4 ROBERT SMALLEY and DONNA SMALLEY,
5 *Petitioners,*

6
7 vs.

8
9 BENTON COUNTY,
10 *Respondent.*

11
12 LUBA No. 2014-110

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from Benton County.

18
19 Michael E. Farthing, Eugene, filed the petition for review and argued on
20 behalf of petitioners.

21
22 Vance M. Croney, County Counsel, Corvallis, filed the response brief
23 and argued on behalf of respondent.

24
25 BASSHAM, Board Member; HOLSTUN, Board Member, participated in
26 the decision.

27
28 RYAN, Board Chair, did not participate in the decision.

29
30 AFFIRMED 03/17/2015

31
32 You are entitled to judicial review of this Order. Judicial review is
33 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a board of commissioners’ decision concluding that petitioners’ event facility on land zoned for exclusive farm use (EFU) does not constitute “on-site filming” allowed on EFU land under ORS 215.306.

FACTS

The subject property is a 70-acre, EFU-zoned parcel developed with a single-family dwelling and outbuildings. Most of the parcel is cultivated, except for a wooded creek that runs through the middle of the parcel.

Since 2003, petitioners have operated the “Whisper-n-Oaks Outdoor Wedding and Event Center” on the subject property. The Center’s website describes it as “an outdoor facility available to host your event,” accommodating up to 500 people, with a number of amenities, including a 900-square foot covered area, a dance floor, tables and chairs, large wooden gazebo, two large dressing rooms, table décor, and guest parking. Record 14.¹

¹ The county’s decision further describes the activities that occur during events:

“The use that has been occurring for the past several years on this property has been described by the property owners (for example, on their website) as a ‘wedding and event center.’ The applicant in his submittal refers to it as an ‘on-site filming and event facility.’ Regardless of what the facility is named, the facility has been operated and, with no evidence submitted to the contrary, would continue to operate as follows: a member of the public rents the venue—most typically for a wedding, but potentially for a class reunion, family reunion, party or other event—and invites up to 500 people to attend. In the example of a wedding, any or all of the following activities occur at the facility: wedding ceremony, reception, catered meals, music, dancing. Other (non-

1 On August 1, 2013, prompted by a complaint, the county contacted
2 petitioners to advise them that their wedding and event facility is not an
3 allowed use on EFU lands.

4 On June 20, 2014, after considerable back and forth, petitioners applied
5 to the county requesting a determination that petitioners' facility, which the
6 application describes as a "film and event production facility," qualifies as "on-
7 site filming" and therefore constitutes a permitted use in the EFU zone under
8 ORS 215.306(3)(a). ORS 215.306(3)(a) provides that "[o]n-site filming and
9 activities accessory to on-site filming may be conducted in any area" zoned
10 EFU without prior approval of the county, with some limitations.² Petitioners

wedding) events held at the facility likely include similar activities. Apparently it is typical that portions or all of the event are video recorded to memorialize the event for the participants. This recording is performed by either a professional hired by the party renting the facility, or by one or more non-professionals associated with the event. There is no evidence that video recording has necessarily been an element of all events in the past, nor that it would be in the future.

"The Board notes that the website for 'Whisper-n-Oaks' makes no mention of filming, or any form of video recording, as of November 13, 2013, and July 16, 2014." Record 16 (footnotes omitted).

² ORS 215.306(3) provides:

"(a) On-site filming and activities accessory to on-site filming may be conducted in any area zoned for exclusive farm use without prior approval of local government but subject to ORS 30.930 to 30.947.

"(b) Notwithstanding paragraph (a) of this subsection, on-site filming and activities accessory to on-site filming that exceed 45 days on any site within a one-year period or

1 argued to the county that weddings and other events at their facility qualify as
2 “on-site filming,” because the events are typically videotaped by the
3 participants.

4 ORS 215.306(3)(a) and (b) distinguish between two types of “on-site
5 filming”: (1) filming that lasts less than 45 days and requires no county land
6 use approval, and (2) filming that exceeds 45 days and requires county land use
7 approval, subject to standards at ORS 215.296. *See* n 2. ORS 215.306(4)
8 describes what is and is not included in the scope of “on-site filming and
9 activities accessory to on-site filming.”³ Among the qualifying activities is the

involve erection of sets that would remain in place for longer than 45 days may be conducted only upon approval of the governing body or its designee in any area zoned for exclusive farm use subject to ORS 215.296. In addition to other activities described in subsection (4) of this section, these activities may include office administrative functions such as payroll and scheduling, and the use of campers, truck trailers or similar temporary facilities. Temporary facilities may be used as temporary housing for security personnel.”

³ ORS 215.306(4) provides:

“For purposes of this section, ‘on-site filming and activities accessory to on-site filming’:

“(a) Includes:

“(A) Filming and site preparation, construction of sets, staging, makeup and support services customarily provided for on-site filming.

“(B) Production of advertisements, documentaries, feature film, television services and other film productions that rely on the rural qualities of an exclusive farm use zone in more than an incidental way.

1 production of “documentaries” that rely on the rural qualities of an exclusive
2 farm use zone in more than an incidental way. *See* n 3. As discussed below,
3 petitioners argued to the county that videotaping a wedding or similar event on
4 the property constitutes the “production” of a “documentary” within the
5 meaning of ORS 215.306(4)(a)(B).

6 ORS 215.306(1) provides that the limitations on uses of EFU-zoned land
7 set out in several ORS chapter 215 sections, and any limitations adopted by the
8 Land Conservation and Development Commission (LCDC) pursuant to ORS
9 197.040, do not apply to “on-site filming” activities authorized by ORS
10 215.306.⁴ Finally, ORS 215.306(5) provides that any county permit approvals
11 that may be necessary for activities allowed under ORS 215.306(3)(a) are not
12 land use decisions.⁵

“(b) Does not include:

“(A) Facilities for marketing, editing and other such activities that are allowed only as a home occupation;
or

“(B) Construction of new structures that requires a building permit.”

⁴ ORS 215.306(1) provides:

“The limitations on uses made of land in exclusive farm use zones described in ORS 215.213, 215.283, 215.284 and 215.700 to 215.780 and limitations imposed by or adopted pursuant to ORS 197.040 do not apply to activities described in this section.”

⁵ ORS 215.306(5) provides:

“A decision of local government issuing any permits necessary for activities under subsection (3)(a) of this section is not a land use decision.”

1 In the present case, the county planning official issued a decision on
2 petitioners' request for an interpretation, concluding that petitioner's facility
3 does not qualify as "on-site filming and activities accessory to on-site filming."
4 Petitioners appealed that decision to the county planning commission, which
5 conducted a hearing and issued a decision reaching the same conclusion.
6 Petitioners appealed the planning commission decision to the county board of
7 commissioners, who conducted a hearing and, on December 2, 2014, issued its
8 decision upholding the planning official's interpretation.

9 This appeal followed.

10 **FIRST ASSIGNMENT OF ERROR**

11 In three sub-assignments of error, petitioners challenge the county's
12 conclusion that their event facility does not qualify as "on-site filming and
13 activities accessory to on-site filming" that ORS 215.306 allows as a permitted
14 use in the EFU zone under ORS 215.306(3)(a).

15 Reduced to essentials, petitioners' position to the county below and to
16 LUBA on appeal is that the scope of "on-site filming," as that term is used in
17 ORS 215.306(3)(a), includes the videotaping of weddings and similar events
18 that occur at petitioners' event facility. According to petitioners, the event
19 facility is a permitted use in the EFU zone, because the digital video-recordings
20 of events held on the property constitute the "filming" and "production" of
21 "documentaries" as those terms as used in ORS 215.306, and because the
22 events rely "on the rural qualities of an exclusive farm use zone in more than an
23 incidental way." *See* n 3. For the following reasons, we agree with the county
24 that petitioners' position is inconsistent with the text, context and legislative
25 history of ORS 215.306.

1 The meaning and scope of the terms of ORS 215.306 is a matter of
2 statutory interpretation, determined by examination of the text, context, and
3 available legislative history. *See PGE v. Bureau of Labor and Industries*, 317
4 Or 606, 610-612, 859 P2d 1143 (1993), *as modified by State v. Gaines*, 346 Or
5 160, 172, 206 P3d 1042 (2009) (to determine legislative intent, a court first
6 examines a statute’s text and context, and may consider legislative history to
7 the extent it deems appropriate. If the legislature’s intent is still unclear, the
8 court may resort to general maxims of statutory construction).

9 The statute does not define the key terms “filming,” “production” and
10 “documentary.” In the county’s decision, the county initially noted that ORS
11 215.306 was adopted in 1995, at a time when digital recording devices did not
12 exist, and the term “filming” was typically understood, based on then-current
13 dictionary definitions, to mean the act of making a motion picture or similar
14 connected narrative, using the medium of celluloid film. The county’s decision
15 acknowledges that technology changes, and that the term “filming” today could
16 be understood to encompass use of modern digital cameras to perform the
17 equivalent function to “filming” as that term was understood in 1995. Record
18 17. However, the county noted that “filming” as used in ORS 215.306 requires
19 “production,” which the county understood to suggest an “involved and
20 substantial undertaking, not the mere recording of an event through
21 commonplace technology.” *Id.* The county ultimately concluded that

22 “the video recording the applicant describes is not ‘filming’ as
23 authorized by ORS 215.306. The use the applicant is proposing is
24 more appropriately termed ‘events and the recording of those
25 events.’ That is a different use from production of a film.” *Id.*

1 Secondly, the county concluded that as used in ORS 215.306, “filming”
2 and “production” of a film must be the primary use proposed, not an incidental
3 part of a different primary use. According to the county,

4 “A wedding (or similar event) is not ‘filming.’ Neither is a
5 wedding ‘accessory to filming.’ In fact, the reverse is true: the
6 recording of a wedding is accessory to the wedding. The purpose
7 of the event is to hold the event, not to create a film. Because the
8 events are neither filming nor accessory to filming, neither the
9 events nor the facility for such events is authorized by this statute.

10 “To expand on the Board’s reasoning, the recording of events is
11 incidental to the primary purpose of the facility, which is to host
12 events. Even if the video recording were allowed outright or
13 unregulated, the event facility needs to be authorized on its own
14 merits. A use is not suddenly allowable on EFU land simply by
15 virtue of being recorded on a digital device. By the applicant’s
16 logic, a hunting preserve, a golf course, a mass gathering, or any
17 number of other uses that are either limited or prohibited on EFU
18 land would become permissible without review, provided the
19 activities were video recorded. Filming could be as minimal as
20 one of the participants recording video on a smart-phone. This is
21 inconsistent with the concept of ‘filming’ laid out in the statute in
22 1995, and is inconsistent with the policy of protecting the
23 agricultural land base as laid out in statute and statewide planning
24 goals. The letter from the Department of Land Conservation and
25 Development, in the record, amplifies on these points.” Record
26 17-18.

27 Petitioners challenge the foregoing findings, arguing first that restricting
28 the scope of “filming” and “production” of films to exclude videotaping of
29 weddings and other events reads limitations into the statute that the legislature
30 omitted. According to petitioners, videotaping a wedding or similar event
31 constitutes the production of a “documentary” of a real-life event for posterity,
32 and therefore falls within the description of “on-site filming” at ORS
33 215.306(4)(a). Petitioners contend that the county improperly attempts to

1 separate the event being filmed, a wedding for example, from the filming itself.
2 Petitioners argue that nothing in the statute requires that the event being filmed
3 must be a use independently authorized in the EFU zone, or that the filming
4 itself must be the primary use of EFU land. On that point, petitioners argue
5 that a wedding or similar event and the filming of that event constitute a single
6 unified use: the production of a documentary about the event. And production
7 of such a documentary meets the only express limitation set out in the statute,
8 petitioners argue, because such a documentary relies “on the rural qualities of
9 an exclusive farm use zone in more than an incidental way.”

10 Petitioners’ extremely broad reading of ORS 215.306 is not consistent
11 with the statutory text, read as a whole, and what we understand to be the
12 legislative intent of the statute. ORS 215.306(3) authorizes in an EFU zone
13 “on-site filming and activities accessory to on-site filming[.]” The inclusion of
14 activities “accessory to on-site filming” makes it clear that “on-site filming”
15 itself must be the primary use. Filming that is incidental to a primary use of the
16 property cannot legitimize that primary use, if it is otherwise not allowed in the
17 EFU zone, and such incidental filming cannot bring that primary use within the
18 scope of “on-site filming.”⁶

⁶ A hypothetical may serve to illustrate the distinction. In the first instance, imagine that a film company wishes to make a film of William Shakespeare’s *As You Like It*, and to use the woods on petitioners’ farm to film scenes in the Forest of Arden. There is no possible dispute that such filming would constitute “on-site filming.” In the second instance, imagine that a Shakespearean play company wishes to perform *As You Like It* on the same location, with a public audience, as part of a Shakespeare in the Park series. That an audience member videotapes the play performance on a smart-phone does not render the use of EFU land “on-site filming.” Even if the play company videotapes the performance for archival or study purposes, such

1 With respect to petitioners’ event facility, hosting the weddings and
2 other events at the facility is the main, indeed the only, purpose of the facility;
3 the videotaping of those events, if videotaping happens to occur, is at most an
4 incidental part of the events. As the findings note, the description of the
5 facility on petitioners’ website does not mention filming or videotaping events.
6 Further, as the county notes, petitioner Donna Smalley testified that “most
7 customers do film but it isn’t required.” Record 130. An event that may or
8 may not involve videotaping, depending on the whims of the event participants,
9 does not constitute “on-site filming,” because any videotaping that occurs is
10 not the *primary* use of EFU land, but at best only an incidental part of the
11 event. Even if the facts were that petitioners’ facility *required* the videotaping
12 of weddings and other events, we agree with the county that such events would
13 still not qualify as “on-site filming,” because it is the events themselves, not the
14 recording of them, which would be the principal use of EFU land.

15 The foregoing view is consistent with other terms in the statute. ORS
16 215.306(4)(B) provides for the “production” of films that “rely on the rural
17 qualities of an exclusive farm use zone in more than an incidental way.”
18 Notably, it is the *production* of the *film* itself that must rely on the rural
19 qualities of the EFU zone in an essential way; that petitioners’ customers are
20 attracted to the rural qualities of the property as a beautiful site to conduct their
21 wedding or event is not the question. There must be some non-incidental
22 reason why the film itself must be produced on EFU-zoned land.

videotaping would not render the activity “on-site filming.” That is because in that circumstance the “play’s the thing,” *i.e.* the primary use, not the videotape recording of the play, which is merely incidental.

1 In addition, the list of activities at ORS 215.306(4)(b) that constitute
2 “on-site filming,” *i.e.*, the production of “advertisements, documentaries,
3 feature film, television services and other film productions,” suggest that
4 “filming” refers to production of films and television for broadcast or
5 distribution to the public in some manner, not private home videos that simply
6 memorialize personal events of interest only to the participants. Given that
7 context for the term “documentary,” we disagree with petitioners that
8 videotaping a wedding or similar private event constitutes the production of a
9 “documentary” within the meaning of ORS 215.306(4)(a).

10 Petitioners’ textual and contextual arguments to the contrary are not
11 persuasive. Petitioners cite to ORS 215.306(1), which provides that the
12 limitations on uses allowed in the EFU zone set out in several statutes do not
13 apply to activities described under ORS 215.306. *See* n 4. We understand
14 petitioners to argue that ORS 215.306(1) is evidence that the legislature
15 intended “on-site filming” to have a broad scope, restricted only by the
16 limitations in ORS 215.306 itself. However, ORS 215.306(1) simply clarifies
17 that the standards or restrictions that apply to other non-farm uses authorized
18 by other statutory provisions and implementing rules do not apply to “on-site
19 filming” as that use is described and limited in ORS 215.306(4). ORS
20 215.306(1) provides no particular insight into the scope of what constitutes
21 “on-site filming.” That question is answered most directly by ORS 215.306(4).
22 As explained above, the text and context of ORS 215.306(4) do not support
23 petitioners’ expansive interpretation of the scope of “on-site filming.”

24 Although the parties do not cite to any legislative history of ORS
25 215.306, the legislative history available to us also provides no support for
26 petitioners’ interpretation. ORS 215.306 was adopted in 1995 as SB 1049, and

1 was proposed and drafted by Deschutes County, following that county's
2 experience with a film company that wanted to film a television series on an
3 EFU-zoned parcel that included a scenic log cabin. *See* testimony of George
4 Read, Deschutes County Community Director, before the Senate Water and
5 Land Use Committee, April 13, 1995. The county sought to clarify the status
6 of permitted filmmaking activities on farm land, which it characterized as
7 "temporal" and "limited to those filming activities that require the often scenic,
8 rural setting afforded by the EFU zones." *Id.* at 2. As far as we can tell,
9 nothing in the available legislative history suggests that the proponents of the
10 bill or the legislature contemplated that SB 1049 would authorize wedding
11 event facilities or any similar uses, in the guise of "on-site filming."

12 In sum, the text, context and legislative history of ORS 215.306 do not
13 support petitioners' expansive interpretation of that statute, and petitioners
14 accordingly have not demonstrated that the county erred in concluding that
15 petitioners' event facility does not fall within the scope of "on-site filming"
16 authorized under ORS 215.306.

17 The first assignment of error is denied.

18 **SECOND ASSIGNMENT OF ERROR**

19 Under the second assignment of error, petitioners contend that the
20 county, in rejecting petitioners' argument that their event facility qualified as a
21 permitted use under ORS 215.306(3)(a), violated Benton County Code (BCC
22 53.110, which provides in relevant part that "the County may not impose
23 additional criteria or condition of approval upon a permitted use."⁷ Petitioners

⁷ BCC 53.110 provides:

1 argue that by interpreting the scope of “on-site filming” to exclude petitioners’
2 event facility, the county effectively imposed “additional criteria or conditions
3 of approval upon a permitted use.”

4 However, we have affirmed the county’s conclusion that petitioners’
5 event facility does not qualify as a “permitted use” allowed under ORS
6 215.306(3)(a), so BCC 53.110 has no possible applicability in the present case.
7 In addition, the county’s decision simply interprets ORS 215.306 to answer the
8 question posed by petitioners’ request for an interpretation regarding the scope
9 of “on-site filming.” We do not understand how such an interpretation, even if
10 incorrect, could possibly impose “additional criteria or conditions of approval
11 upon a permitted use” within the meaning of BCC 53.110.

12 The second assignment of error is denied.

13 **THIRD ASSIGNMENT OF ERROR**

14 The final two paragraphs of the county’s decision appear to suggest that
15 petitioners’ event facility should not be viewed as a permitted use allowed
16 without review under ORS 215.306(3)(a), but rather as a conditional use
17 subject to county review and approval.⁸ The first paragraph discusses the

“In general, permitted uses are allowed to be established in a zone without review. Some permitted uses are regulated by a review process, but approval such uses is based upon clear and objective standards. Unless specifically authorized by this code, the County may not impose additional criteria or conditions of approval upon a permitted use.”

⁸ The county’s findings state, in relevant part:

“* * * The introduction into farmland of commercial activities unrelated to agriculture creates a variety of likely conflicts. The wedding season and the farming season overlap. The commercial

1 potential for conflicts with farm uses created by the overlap between the
2 wedding season and the farming season, and argue that such conflicts
3 demonstrate that the event facility should not be allowed without county
4 review. The second paragraph argues that the event facility’s operations as a
5 whole, including marketing, scheduling and other administrative functions,
6 exceed 45 days and for that reason alone cannot qualify as a permitted use
7 under ORS 215.306(3)(a). We understand the county to have concluded that, to
8 the extent petitioners’ event facility or some portions of it *could* qualify as “on-
9 site filming,” the event facility as a whole could only be approved as a
10 conditional use, pursuant to ORS 215.306(3)(b), because the operations of that
11 facility exceed 45 days and could create conflicts that should be reviewed to
12 protect farm uses.

host of an event has a financial interest in ensuring that typical elements related to farming do not occur in a way that affects the event—for example: noise, dust, odors, spraying, irrigation, moving farm machinery on roadways. The primary purpose of the EFU zone is to preserve lands for agricultural production. Allowing events to occur in farmland without oversight would likely lead to increased conflicts and would be inconsistent with the purpose of the EFU zone. The complaint that prompted Benton County to investigate Whisper-n-Oaks facility identified such conflicts as a reason for the complaint.

The Board also notes that ORS 215.306(3)(b) and (4) appear to distinguish between on-site filming and accessory activities that do not exceed 45 days. In the case of an event facility, facilities involved in the marketing, scheduling and other administrative functions are part of the operation. Pursuant to the statute, these are allowed only through review pursuant to ORS 215.296 (which in Benton County entails review as a Conditional Use).” Record 18.

1 Under the third sub-assignment of error to the first assignment of error,
2 and under this third assignment of error, petitioners challenge the findings
3 quoted at note 8. Petitioners dispute that the events held at the facility have or
4 are likely to cause conflicts with agricultural operations. Other than the
5 complaint filed with the county that led to the county’s enforcement action,
6 petitioners argue that there is no evidence of conflicts with farm uses created
7 during the 12 years the event facility has operated. To the extent there are
8 conflicts, petitioners argue, the legislature has chosen to allow on-site filming
9 that does not exceed 45 days as a permitted use without county review or any
10 evaluation for conflicts.

11 With respect to the 45-day period, petitioners argue that the county erred
12 in suggesting that petitioners’ facility operates beyond the 45-day maximum
13 allowed for a permitted use, but notes that the “issue was never explored in
14 detail because of the County’s position that the film production event facility
15 was not allowed in the EFU zone.” Petition for Review 20. Petitioners state
16 that they “would welcome a remand on this issue in order to work with the
17 County about each years’ time period for conducting the ‘on-site filming’ use.”
18 *Id.*

19 As noted above, ORS 215.306(3)(a) and (b) distinguish between “on-site
20 filming” that lasts 45 days or less and that does not require county review, and
21 “on-site filming” that exceeds 45 days in duration and that does require county
22 review. We understand the county to have rejected petitioners’ premise that the
23 use under consideration consists only of the individual events themselves,
24 which last only one day, and that determining the status of petitioners’ event
25 facility requires evaluation of the event facility viewed as a whole.

1 It is reasonably clear from the limitations in ORS 215.306(3) and (4) that
2 the legislature contemplated that “on-site filming” would constitute a use of
3 temporal or non-permanent duration. In contrast, petitioners operate an
4 apparently permanent commercial enterprise to host weddings and other events.
5 While the individual events may last only one day, the enterprise as a whole,
6 including all events, marketing, scheduling, *etc.*, operates over a time span that
7 is significantly greater than 45 days and appears to be an on-going enterprise
8 that so far has lasted 12 years, with no end in sight. In our view, the
9 continuous and apparently permanent nature of petitioners’ event facility
10 demonstrate even more clearly that the event facility does not fall within the
11 scope of “on-site filming” as that term is used in ORS 215.306.

12 Given that conclusion, petitioners’ challenges to the county’s findings
13 quoted at note 8 do not provide a basis for reversal or remand.

14 The third assignment of error is denied.

15 The county’s decision is affirmed.