BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CENTRAL OREGON LANDWATCH,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

JOHN SHEPHERD and STEPHANIE SHEPHERD,
Intervenors-Respondents.

LUBA No. 2015-034

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Paul D. Dewey, Bend, filed the petition for review and argued on behalf of petitioner.

No appearance by Deschutes County.

David J. Hunnicutt, Tigard, filed the response brief and argued on behalf of intervenors-respondents. With him on the brief was Oregonians in Action Legal Center.

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

REVERSED 08/17/2015

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a county decision approving a wedding event facility as a private park on land zoned for exclusive farm use (EFU).

MOTION TO INTERVENE

John Shepherd and Stephanie Shepherd (intervenors), the applicants below, move to intervene on the side of respondent. No party opposes the motion and it is granted.

FACTS

The subject property is a 1.6-acre portion of a 216-acre parcel zoned EFU, within a Wildlife Area (WA) sub-zone. The 1.6-acre portion is located at the highest elevation of the parcel, and is developed with a single family dwelling, a gazebo, a circular driveway and a large grassy area. The remainder of the parent parcel is unirrigated land used formerly for cattle grazing, but currently not in agricultural use. The dwelling was approved in 2001 as a dwelling in conjunction with farm use, pursuant to a farm management plan that proposed a commercial farm operation consisting of grazing cattle and raising hogs. However, the farm management plan was not implemented.

In 2011, intervenors began using the dwelling and property to conduct commercial wedding events, which led to a code enforcement complaint. Intervenors submitted an incomplete application seeking permission to conduct commercial wedding events on the property, but the application expired. In 2013, intervenors submitted the present application, seeking to establish a "private park" on the 1.6-acre portion of the property, in order to conduct weddings, receptions, reunions and similar events.

County staff approved the proposal, described as follows:

"The applicant is proposing to establish a private park on the subject property. The purpose of the private park would be to host wedding[s], wedding receptions, family reunions, fundraisers and charity balls. The applicant describes the following activities that will occur during events:

"Wedding Ceremony (which typically lasts only 15-20 minutes)
"Outdoor eating with family and friends
"Public speaking using a sound system
"Listening to amplified music
"Singing, including karaoke
"Dancing in the pavilion (gazebo)
"Lawn games, such as volleyball and badminton in the volleyball court, croquet on the lawn, catch, bocce ball, corn hole and ring toss.

"The events would be conducted on an approximately 1.6-acre lawn area that is a 350-foot by 250[-foot] oval which includes some juniper trees. Parking is provided on a contiguous 1-acre parking area, which is accessed from the driveway that connects to Holmes Road. Event participants would have limited access to the existing dwelling and full access to a gazebo on the property. The wedding party (including bridesmaids, groomsmen and immediate family) will have access to the main floor of the home and two upstairs rooms. Weddings will not be conducted inside the dwelling. Temporary tents and the gazebo will be used in the event of inclement weather.

"Restrooms will be provided through portable restrooms and guest access will be provided to an existing downstairs restroom in the dwelling. Food is either prepared off-site or cooked on-site by licensed caterers using their own equipment. The existing kitchen in the dwelling will be used for food assembly only.

"The private park would be open to event participants one weekend day per week beginning in late May of each year and ending in early October, not to exceed 18 days per calendar year. Each reception would last no more than 8 hours and conclude by 10 p.m. A limit of no more than 250 guests per event would be enforced by the applicant.

> "The applicant has proposed that guests will be allowed to tent camp or stay in recreational vehicles following events as a precaution against unsafe driving. The applicant states that this use does not constitute a commercial campground." Record 372-73.

The county board of commissioners initiated direct review of the staff decision. The commissioners approved the application, adopting the staff decision and findings and additional findings and conditions. This appeal followed.

FIRST ASSIGNMENT OF ERROR

ORS 215.283(2)(c) allows in an EFU zone "[p]rivate parks, playgrounds, hunting and fishing preserves and campgrounds," subject to county approval and conditions.[1] Deschutes County Code (DCC) 18.16.031(E) implements the statute, using identical language. OAR chapter 660, division 033, the administrative rule that governs agricultural land, includes additional restrictions and requirements for private parks, playgrounds, hunting and fishing preserves and campgrounds.

Under the first assignment of error, petitioner advances two challenges to the county's conclusion that the proposed use qualifies as a "private park" authorized under ORS 215.283(2)(c). We address each in turn.

---

[1] ORS 215.283(2) provides in relevant part that a county may approve in the EFU zone:

> "(c) Private parks, playgrounds, hunting and fishing preserves and campgrounds. Subject to the approval of the county governing body or its designee, a private campground may provide yurts for overnight camping. * * *
>
> "(d) Parks and playgrounds. A public park may be established consistent with the provisions of ORS 195.120."

A. A Private Park Need not Exclude the Public

First, petitioner argues that a defining characteristic of a "private park," as opposed to a public park or a simple "park," is that a private park is for private use only, and is not open to the general public. Because the proposed event venue in the present case caters to the public, petitioner argues that for that reason alone the proposed use does not qualify as a "private park." Petitioner urges that LUBA should distinguish or overrule prior LUBA case law, discussed further below, to the extent those cases suggest that recreational use of private land that is open to the public qualifies as a "private park" authorized under ORS 215.283(2)(c).

To support that proposition, petitioner cites *Steel v. City of Portland*, 23 Or 176, 184-85, 31 P 479 (1892), in which the Oregon Supreme Court considered whether labeling a four-block area on a recorded plat as a "park," followed by sale of surrounding residential lots and city management of the four-block area as a public park, had the effect of dedicating the four-block area to the city as a public park. The Court answered the question in the affirmative. Petitioner cites to a discussion in *Steel* of Blackstone's Commentaries, to the effect that, depending on context, one possible meaning of "park" is an enclosure of private land open only to the owner or surrounding property owners, and not open to the general public, for example a "park" around a large manor. Petitioner argues that the Oregon legislature, in providing for a "private park" in the EFU zone, intended that specialized meaning, to allow only parks for private use that exclude the general public. We understand petitioner to argue that only a "public park" authorized under ORS 215.283(2)(d) can admit the general public.

The text and context of ORS 215.283(2)(c) do not suggest any such intent. We first note that the adjective "private" modifies not only "parks," but also the subsequent nouns "playgrounds, hunting and fishing preserves and campgrounds." Even if the term "private park," standing alone, could have the limited and rather obsolete meaning described in *Steel*, it seems unlikely that the legislature intended that limited meaning when it applied the same adjective "private" also to "playgrounds, hunting and fishing preserves and campgrounds."

Further, the context of ORS 215.283(2)(c) demonstrates that the adjective "private" is intended to distinguish privately-owned and managed recreational lands from publicly-owned and managed recreational lands. As noted, ORS 215.283(2)(d) provides for "parks and playgrounds," with the further proviso that "[a] public park may be established consistent with the provisions of ORS 195.120." *See* n 1. ORS 195.120 is concerned with state and local parks, *i.e.* publicly owned and managed parks. ORS 195.120(2) directs the Land Conservation and Development Commission (LCDC) to adopt administrative rules providing for allowed uses in state and local parks, and LCDC has done so, in OAR chapter 660, division 034. *See also* OAR 660-033-0130(31) (providing for "public parks" on EFU land that may include only the uses specified in OAR chapter 660, division 034). LCDC has adopted somewhat different rules that apply to privately owned and operated parks, campgrounds, etc. *See* OAR 660-033-0130(19). None of these statutes or administrative rules distinguishes between recreational lands based on whether the lands are, or are not, open to the public. Based on the text and context of the relevant statutes and rules, we reject petitioner's argument that a "private

park" authorized under ORS 215.283(2)(c) is limited to parks that exclude the general public.

B. An Event Venue is not a Recreational Use

The staff decision that is incorporated as the county's findings reviewed several county, LUBA and Court of Appeals' decisions regarding what activities qualify a proposed use of land as a "park" or "private park." Neither term is defined in ORS chapter 215 or OAR chapter 660. In an early case, *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993), LUBA reviewed several dictionary definitions of "park" and concluded that as used in the relevant provision of ORS chapter 215, the term is intended to mean a tract of land set aside for public recreational use. LUBA held that the proposed use in that case, a paintball park, was a recreational use, and thus the proposed use of land qualified as a "park." *Id.* at 704-05. *See also Utsey v. Coos County*, 38 Or LUBA 516, *rev dismissed* 176 Or App 524, 32 P3d 933 (2001), *rev dismissed* 335 Or 217, 65 P3d 1109 (2003) (a proposed off-road motorcycle riding facility is a recreational use that qualifies as a park on EFU-zoned land).

Applying *Spiering,* the staff decision answered the question of whether the proposed use fits within the use category of a "private park" by analyzing whether and to what extent the proposed activities constitute "recreation" or the recreational use of land. Intervenors argued to the county that all the proposed activities, including weddings and other events, constitute "recreation." The county rejected that argument, concluding that a wedding itself is not recreational activity. However, the county concluded that other activities on the property, specifically (1) outdoor eating, (2) public speaking, (3) listening to music, (4) singing, (5) dancing, (6) and lawn games, constitute recreation or recreational activities. The county concluded that these recreational activities,

viewed in isolation, are sufficient to qualify the proposed use as a "park." The county then considered whether use of the property to conduct wedding ceremonies and other non-recreational activities disqualifies the proposed use as a "park." According to the county, a recreational park can host non-recreational activities such as wedding ceremonies and similar activities as long as such events are "incidental and subordinate to the recreational activities," which the county characterized as "minor and secondary activities relative to the recreational activities." Record 382.

Turning to that question, the county concluded that wedding ceremonies and similar ceremonies and events are "incidental and subordinate" because they "last for just a fraction of the time in which the event is held." Record 383. Citing an earlier hearings officer decision, the county compared a wedding ceremony or similar ceremony to an awards ceremony that follows a sporting event, described as a "minor offshoot" of such sporting events. *Id.* We understand the county to ultimately conclude that the primary use of the property is recreational activity, and the proposed event venue as a whole can be approved as a "private park," notwithstanding non-recreational aspects such as wedding ceremonies, because such non-recreational aspects of the event venue are merely "incidental" to the primary recreational activities.

Petitioner challenges that conclusion, and we agree with petitioner that the county's decision misconstrues the applicable law. We owe no deference to the county board of commissioners' interpretation of the statute and administrative rule. *Kenagy v. Benton County*, 115 Or App 131, 134, 838 P2d 1076 (1992).

Stated simply, the county's analysis represents the tail wagging the dog. As we understand the proposed use, the public is not coming to intervenor's

property to engage in recreational activities on intervenors' lawn. The public is coming to the property (and paying for the right) to conduct some focal event (a wedding, wedding reception, family reunion, fundraiser, charitable ball, etc.,) that is the entire reason for being on the property in the first place. The only basis the county cites for concluding that a wedding or other event is "incidental" to the above-listed activities (eating, dancing, lawn games, etc.) is the temporal brevity of ceremonial aspects of the focal event compared to the amount of time spent celebrating the focal event through eating, dancing, etc. However, comparing the amount of time spent on the ceremonial aspects of the focal event versus the amount of time spent on alleged "recreational" activities does not accurately reflect the relationship between the focal event and those activities. Clearly, it is the focal event that is the primary use, and any associated activities (eating, dancing, lawn games, etc.) are, at best, incidental to the focal event. No party argues on appeal that the focal events (weddings, wedding receptions, family reunions, fundraisers, charitable balls, etc.) themselves constitute "recreation" or "recreational activities," and they do not. Thus, even if some of the incidental activities associated with the focal event (eating, dancing, etc.) could be described as "recreational activities," such incidental activities cannot convert the proposed primary event venue use into a recreational use that is essential to constitute a "private park" for purposes of ORS 215.283(2)(c).

The foregoing is consistent with our approach in resolving a similar issue regarding whether a proposed wedding event venue fit within the use category of "on-site filming," which like private parks is a category of non-farm use allowed in the EFU zone, pursuant to ORS 215.306. *Smalley v. Benton County*, __ Or LUBA __ (LUBA No. 2014-110, March 17, 2015). In

Smalley, the applicant attempted to argue that a wedding event venue constitutes "on-site filming," or the recording of "documentary," because the wedding event is often recorded or video-taped by the participants. The county rejected that argument, and LUBA affirmed the county's decision. We concluded that the proposed primary use of the property was the wedding event itself, and that any filming or recording of that event that would occur is, at best, incidental to the primary wedding event. Slip op at 10.

Similarly, in the present case, as proposed the primary use is an event venue to conduct various events (weddings, receptions, reunions, fundraisers, charitable balls, etc.), and any "recreational" activities associated with such events (eating, dancing, singing, lawn games) that may or may not occur are, at best, incidental to the event. In both *Smalley* and the present case, the applicant is attempting to use incidental elements of a proposed primary use to fit within a use category that does not encompass the proposed primary use.

A different way to articulate the distinction we made in *Smalley* and make here in the present case is to apply a "causation" test. Would the elements that arguably fit within the use category (filming in *Smalley*, "recreational activities" in the present case) occur on the property without the wedding or other event? The answer in both cases is clearly no. The filming in *Smalley*, if it occurs, would occur only if there is a wedding on the property. In the present case, any recreational activities on the property will occur only if there is an event (wedding, reception, reunion, fundraiser, charitable ball, etc.) that is the reason the event participants are allowed on the property. But for the event, the public would not engage in any recreational activities on intervenors' property. The event is therefore the primary use, and any incidental recreational activities that may or may not occur in association with the event do not qualify

the proposed event venue as a private park allowed on EFU land under ORS 215.283(2)(c).

The first assignment of error is sustained, in part.

SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR

Under these assignments of error, petitioner advances additional challenges to the county's decision to approve the event venue as a private park. However, we concluded under the first assignment of error that the county erred in approving the proposed use as a "private park" allowed in the EFU zone under ORS 215.283(2)(c). The proposed use cannot be approved as a private park. Because the decision "violates a provision of applicable law and is prohibited as a matter of law," the decision must be reversed. OAR 661-010-0073(1)(c). Accordingly, there is no point in addressing petitioner's additional challenges to the county's decision.

The county's decision is reversed.