BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LARRY KAPLOWITZ and KARIN MARCUS,
Petitioners,

vs.

LANE COUNTY,
Respondent,

and

CHARLES WIPER III,
Intervenor-Respondent.

LUBA No. 2016-029

CHARLES WIPER III,
Petitioner,

vs.

LANE COUNTY,
Respondent,

and

LARRY KAPLOWITZ and KARIN MARCUS,
Intervenors-Respondents.

LUBA No. 2016-030

FINAL OPINION
AND ORDER

Appeal from Lane County.

William H. Sherlock, Eugene, filed a petition for review on behalf of petitioners Kaplowitz and Marcus in LUBA No. 2016-029 and a response brief on behalf of intervenors Kaplowitz and Marcus in LUBA No. 2016-030. William H. Sherlock argued on behalf of petitioners/intervenors Kaplowitz and Marcus. With him on the brief was Hutchinson Cox.

Aaron J. Noteboom, Eugene, filed a petition for review on behalf of petitioner Wiper in LUBA No. 2016-030 and a response brief on behalf of intervenor Wiper in LUBA No. 2016-029. Aaron J. Noteboom argued on behalf of petitioner/intervenor Wiper. With him on the briefs were Micheal M. Reeder and Arnold, Gallagher, Percell, Roberts & Potter, P.C.

No appearance by Lane County.

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

AFFIRMED (LUBA No. 2016-029) 10/11/2016
REMANDED (LUBA No. 2016-030)

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a county decision that determines that a use that began as an unpermitted commercial event venue in a converted horse barn may continue to operate as an accessory use to an existing dwelling.

INTRODUCTION

The parties in this appeal are petitioners/intervenors Kaplowitz and Marcus and petitioner/intervenor Wiper. For simplicity we refer to petitioners/intervenors Kaplowitz and Marcus collectively as "Kaplowitz," and to petitioner/intervenor Wiper as "Wiper." Kaplowitz is the property owner and was the applicant for land use approval below. Wiper, who is Kaplowitz's neighbor to the north, opposes the application. In LUBA No. 2016-029, Kaplowitz appeals the board of county commissioners' decision to accept and consider Wiper's local appeal of a hearings official's decision approving his application. In LUBA No. 2016-030 Wiper appeals the board of county commissioners' ultimate decision to approve the application on the merits. Kaplowitz and Wiper have intervened on the side of respondent in the other's appeal—Kaplowitz to defend the board of commissioners' decision on the merits, and Wiper to defend the board of commissioners' decision to accept and consider Wiper's local appeal of the hearings official's decision.

FACTS

The subject 9.7-acre property is zoned Impacted Forest Land (F-2), a zone that was adopted to implement Statewide Planning Goal 4 (Forest Lands). The property has access to the nearest public right of way over a shared easement that is improved with a shared driveway. Abutting properties to the north are zoned E-40, an exclusive farm use zone. Abutting properties to the south are zoned F-2. And abutting properties to the east and west are zoned Rural Residential – 5 Acre Minimum (RR-5).

The property is improved with three structures. A 3,600 square foot dwelling was constructed in 1994, pursuant to land use and building permits. A barn that was constructed pursuant to a building permit in 1995 is located approximately 300 feet east of the dwelling. Finally, an approximately 5,000 square foot horse barn/arena is located approximately 285 feet north east of the dwelling. The horse barn/arena was built in 2000 without any land use permit or building permit. As originally constructed, the horse barn/arena had a dirt floor on which horses were ridden.

Kaplowitz purchased the property in 2009. In 2012, Kaplowitz modified 2,800 square feet of the 5,000 square foot horse barn/arena to create what the parties sometimes refer to as a "sanctuary." The sanctuary included "approximately 2800 square feet, and include[d] a yoga/dance/music studio (1000 square feet), a guest room, a recording studio, 2 storage rooms, 2 bathrooms, and a mudroom/entry foyer." Record 421. "* * * The remaining

2,200 square feet of the structure has not been altered and is being used as a woodshop and storage area for tools, equipment, and building materials." *Id*. Kaplowitz used the 2,200 square-foot sanctuary "to conduct a business known as Solsara. Solsara consisted of workshops, residential retreats, etc., that featured instruction in yoga, meditation, kirtan, ecstatic dance, concerts and community gatherings." Record 16 (footnote omitted).

On December 27, 2013, the county cited Kaplowitz for operating Solsara without required land use approvals. Record 706. In response to that citation Kaplowitz initially sought approval for Solsara as a home occupation. Record 16. Kaplowitz withdrew that application in December 2014. That application withdrawal led to an additional exchange with the county concerning required building and land use permits and ultimately led Kaplowitz to submit an application "to convert an existing agricultural structure to a residential accessory structure as provided by the Lane Code 16.211(8) siting standards of the Impacted Forest Lands (F-2) Zone." Record 940.

The county planning director approved the application on May 19, 2015. On June 1, 2015, Wiper appealed the planning director's decision to the county land use hearings official. The hearings official's first decision was issued on August 17, 2015, and that decision affirmed the planning director's decision in part and reversed it in part. The hearings official took issue with the planning director's approval of monthly gatherings at the proposed residential accessory structure and whether the proposal complied with the siting requirements of

Lane Code (LC) 16.211(8). Both Kaplowitz and Wiper appealed the hearings official's initial decision. Kaplowitz thereafter offered to limit the scope of social gatherings at the proposed residential accessory use. In a second decision, the hearings official approved the proposal, and on appeal to the board of commissioners, the board of commissioners affirmed the hearings official's decision and specifically adopted the hearings official's interpretations of the LC. These appeals followed.

KAPLOWITZ'S ASSIGNMENT OF ERROR

As noted above, the hearings official affirmed the planning director's decision on January 4, 2016. Wiper filed a local appeal of that decision on January 15, 2016, within the 12-day deadline imposed by LC 14.515.[1] In

[1] LC 14.515 provides, in part:

"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;

"(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 (until acknowledgment of the Lane County Comprehensive Plan, or any applicable portion thereof has been acknowledged to be in compliance with the Statewide Planning Goals by the Land Conservation and Development Commission);

"* * * * *

"(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)[.]"

accordance with LC 14.515(3)(f), Kaplowitz requested that the "Board [of Commissioners] not conduct a hearing on the appeal and deem the Hearings Official decision the final decision of the County." Record 83 (underscoring in original).

It is undisputed that the form the county provides for appellants who request that the Board of Commissioners not hear the appeal and instead deem the hearing official's decision final does not require that the appellant provide the detailed statement required by LC 14.515(3)(d) and Wiper did not provide that detailed statement with his January 15, 2016 appeal. Wiper did provide that detailed statement on January 20, 2016, but did not do so until 16 days after the hearings official's January 4, 2016 decision.

Citing LC 14.520, Kaplowitz argues the planning director should have rejected Wiper's appeal based on that failure and assigns error to the board of commissioners' decision to affirm the planning director's decision to accept Wiper's appeal. LC 14.520 provides:

> "Within two working days of the date that the appeal is received by the Department, the Director shall review the written appeal to determine if it was received within the 12 day appeal period and if it contains the contents required by LC 14.515 above. *If it was not received within the appeal period or does not contain the required contents, within this same two day period, the Director shall reject the appeal and mail to the appellant the appellant's appeal submittal contents and a disclosure in writing identifying the deficiencies of content. The appellant may correct the deficiencies and resubmit the appeal if still within the 12 day appeal period.* Appeals which are not so rejected by the Director shall be assumed to have been accepted." (Italics and underscoring added).

Kaplowitz, relying on the italicized language in LC 14.520, argues that compliance with the detailed statement requirement of 14.515(3)(d) is jurisdictional or mandatory, in the sense that LC 14.520 requires that a noncompliant appeal, which is not corrected within the 12-day appeal period, be dismissed. *Brievogal v. Washington County*, 114 Or App 55, 834 P2d 473 (1992), *Siuslaw Rod and Gun Club v. City of Florence*, 48 Or LUBA 163 (2004); *Tipton v. Coos County*, 29 Or LUBA 474 (1995), *aff'd* 137 Or App 633, 904 P2d 1094 (1995). The board of commissioners rejected the argument:

> "On January 15, 2016, [Wiper], filed a timely appeal of the Hearings Official's reconsidered decision pursuant to Lane Code 14.5I5(3)(f)(ii), again requesting that the Board not conduct a hearing on the appeal and deem the Hearings Official decision the final decision of the County. On January 22, 2016, the Hearings Official reviewed the appeal and affirmed his reconsidered decision of [January 4, 2016]. On January 22, 2016, [Kaplowitz] submitted a motion and request to dismiss [Wiper's] January 15, 2016 appeal * * *. The Planning Director accepted the appeal, and did not reject the appeal pursuant to Lane Code 14.520. The Board finds that Lane Code 14.520 gives the Director discretion in accepting or rejecting appeals. The Board elects not to dismiss the appeal as requested by the applicant." Record 6.

The italicized and underlined parts of LC 14.520 are inconsistent. The italicized text appears to impose a mandatory requirement and to require that the planning director examine an appeal and reject the appeal if it is not timely filed. In addition, the planning director is directed by LC 14.520 to identify any content deficiencies in the appeal, advise the appellant of such deficiencies and reject the appeal if those content deficiencies are not corrected within the 12-day appeal deadline. On the other hand, the underlined text provides that

the appeal is "assumed to have been accepted" if the planning director fails to identify any content deficiencies. The board of commissioners implicitly resolved that conflicting language in LC 14.520 to give the planning director the discretion to identify content deficiencies in a local appeal and dismiss the appeal if those content deficiencies are not timely corrected, or to overlook content deficiencies and accept the local appeal.

The board of county commissioners' interpretation of LC 14.520 is entitled to deferential review under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 258, 243 P3d 776 (2010). The board of commissioners' resolution of the conflicting requirements of LC 14.515 is plausible and is not reversible under ORS 197.829(1) and *Siporen*.

WIPER'S FIRST ASSIGNMENT OF ERROR

ORS 215.760(1) authorizes "agricultural building[s]" that are "customarily provided in conjunction with farm use or forest use" in forest zones, but ORS 215.760(2) prohibits conversion of such agricultural buildings "to another use."[2] ORS 215.760(1) cross-references and adopts the definition

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[2] ORS 215.760 provides:

> "(1) An agricultural building, as defined in ORS 455.315, customarily provided in conjunction with farm use or forest use is an authorized use on land zoned for forest use or for mixed farm and forest use.
>
> "(2) A person may not convert an agricultural building authorized by this section to another use."

of "agricultural building" that appears at ORS 455.315. ORS 455.315 separately defines "agricultural building" and "equine facility."[3]

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[3] ORS 455.315 is quite lengthy, and we only set out below enough of the statute to demonstrate that the statute does separately define "agricultural building" and "equine facility."

> "(1) The provisions of this chapter do not authorize the application of a state structural specialty code to any agricultural building, agricultural grading or equine facility.
>
> "(2) As used in this section:
>
> "(a) 'Agricultural building' means a structure located on a farm or forest operation and used for:
>
> "(A) Storage, maintenance or repair of farm or forestry machinery and equipment;
>
> "(B) The raising, harvesting and selling of crops or forest products;
>
> "(C) The feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees;
>
> "(D) Dairying and the sale of dairy products; or
>
> "(E) Any other agricultural, forestry or horticultural use or animal husbandry, or any combination thereof, including the preparation and storage of the produce raised on the farm for human use and animal use, the preparation and storage of forest products and the disposal, by marketing or otherwise, of farm produce or forest products.
>
> "* * * * * *

The county's F-2 zone includes language that is nearly identical to ORS 215.760, including the prohibition against converting "an agricultural building authorized by this section to another use." LC 16.211(2)(n). And the cross-referenced ORS 455.315 definition of "agricultural building," which separately defines "agricultural building" and "equine facility," is codified at LC 16.090, the definition section of the Lane County Land Use and Development Code. Although the words "Agricultural Building" are inserted at the beginning of that two-part LC 16.090 definition, the LC 16.090 definition and ORS 455.315 definitions are essentially identical.[4]

Wiper concedes that the ORS 455.315 definition of "agricultural building" does not include separately defined "equine facilit[ies]." *See* n 3; Wiper Petition for Review 14. However Wiper argues the county is generally free to adopt forest zone regulations that are more restrictive than the statutes and administrative rules they implement. *Miller v. Multnomah County*, 153 Or

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> "(d) 'Equine facility' means a building located on a farm and used by the farm owner or the public for:
>
> "(A) Stabling or training equines; or
>
> "(B) Riding lessons and training clinics.
>
> "* * * * *
>
> "* * * * *"

[4] The county appears to have incorporated the language of ORS 455.315 without some of the amendments that were adopted by the same legislation that enacted ORS 215.760. Those differences are not material in this appeal.

App 30, 38-39, 956 P2d 209 (1998). Wiper contends the county did so by incorporating the ORS 455.315 definitions of agricultural building and equine facility into the definition section of the Lane County Land Use and Development Code and inserting the word "agricultural building" at the beginning of those definitions. Wiper argues the horse barn/arena qualifies as an "agricultural building," within the meaning of the LC's broader definition of that term at LC 16.090. Therefore, Wiper argues, the conversion of a portion of that structure to a residential accessory structure is prohibited by LC 16.211(2)(n).

Wiper's legal theory under the first assignment of error has several fatal flaws. First, ORS 215.760 and LC 16.211(2)(n) only authorize "agricultural building[s]." Wiper concedes that the ORS 455.315 definition of "agricultural building" does not include an "equine facility." If LC 16.090 defines "agricultural building" more broadly than ORS 455.315, to include an "equine facility," the LC would be regulating equine facilities more *permissively* than ORS 215.760 and ORS 455.315 by permitting them in the F-2 zone, not more *restrictively*.

Second, Wiper reads far too much into the fact that the statutory language from ORS 455.315 is codified in the definition section of the LC with the word "Agricultural Building" inserted at the beginning of the definitions of "agricultural building" and "equine facility." The fact that the county codified the statute in that way, rather than inserting the more accurate phrase

"Agricultural Building/Equine Facility" to describe the separate statutory definitions of "agricultural building" and "equine facility" that the county incorporated into LC 16.090 falls far short of demonstrating a legislative intent to make equine facilities a type of agricultural building.

Finally, the parties do not question whether ORS 215.760 and LC 16.211(2)(n) were in effect and therefore at least potentially a source of legal authorization and limitation for the disputed horse barn/arena at the time it was constructed. But the appellate courts are not limited by the arguments of the parties when the courts must determine the meaning of a statute. *Gunderson, LLC v City of Portland*, 352 Or 648, 662, 290 P3d 803 (2012) citing *Stull v. Hoke*, 326 Or 72, 77, 948 P2d 722 (1997) ("In construing a statute, this court is responsible for identifying the correct interpretation, whether or not asserted by the parties."). When called on to determine the meaning or applicability of a statute, LUBA is similarly not limited by the parties' arguments.

The ORS 215.760 authority for counties to authorize agricultural buildings in forest zones was first enacted in 2013 and did not become effective until January 1, 2014. Or Laws 2013, ch 73. LC 16.211(2)(n) would have been enacted at a later date, after the statute took effect on January 1, 2014. The horse barn/arena was constructed in 2000. Whatever statutory authority or LC authority that may have existed in the year 2000 when the horse barn/arena was constructed, it was not ORS 215.760 or LC 16.211(2)(n). Therefore the ORS 215.760(1) authority for agricultural buildings in forest zones and the

ORS 215.760 (2) and LC 16.211(2)(n) prohibition against "convert[ing] an agricultural building *authorized by this section* to another use," could not apply to the horse barn/arena, even if the horse barn/arena could be viewed as an "agricultural building."

To resolve Wiper's first assignment of error we are not required to determine whether the disputed horse barn/arena was allowed by statute, administrative rule or under the LC in the year 2000 when it was constructed. We are only required to determine whether ORS 215.760(2) and LC 16.211(2)(n) prohibit conversion of that horse barn/arena to another use. For the reasons explained above, we conclude that it does not.

Wiper's first assignment of error is denied.

WIPER'S SECOND ASSIGNMENT OF ERROR

LC 16.211(2)(o) allows "[u]ses and development accessory to existing uses and development" if specified siting standards are satisfied. LC 16.090 defines "accessory" as "[i]ncidental, appropriate and subordinate to the main use of a tract or structure." The LC does not further define those terms and dictionary definitions of the words "incidental," "appropriate,' and "subordinate" are not particularly helpful in this context.[5] The question for the

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[5] *Webster's Third New Int'l Dictionary* (unabridged ed 2002) sets out definitions of "incidental" (1142); "appropriate" (106) and "subordinate" (2277). Those definitions are set out in part below"

> "**incidental** * * * **1:** something that is incidental : a subordinate or incidental item * * *."

county was whether the proposed sanctuary use, as proposed, is properly viewed as "accessory" to the main use of the property, the 3,600 square foot residential use, because it is "incidental," "appropriate" and "subordinate" to the main residential use. That is obviously a subjective question, and the board of commissioners is entitled to deferential review of its understanding of the subjective standard that in inherent in that inquiry, under ORS 197.829(1) and *Siporen*.

Wiper relies heavily on LUBA's decision in *McCormick v. City of Baker*, 46 Or LUBA 50 (2007), where LUBA reversed a city council decision that interpreted the city's zoning ordinance to allow four grass tennis courts, support structures and ancillary parking as an accessory to a residential use in a city residential zone. The zoning ordinance in McCormick also required that an accessory use be "incidental" and "subordinate" to the residential use. 46 Or LUBA at 56.

The 1,988 square-foot house in McCormick had an attached garage. The approved accessory use included two sets of dual tennis courts (a total of four courts) with bleachers and a "cabana-like clubhouse" between them surrounded by a ten-foot high wall/screen. The clubhouse had showers and a restroom. Parts of the property had been leveled for car and recreational vehicle parking

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"**appropriate** * * * **1:** specially suitable **:** FIT PROPER * * *."

"**subordinate 1:** placed in a lower order, class or rank **:** holding a lower or inferior position * * *."

and tent camping. The property hosted five tennis tournaments between June and early September with 18 to 48 entrants and 22 to 27 tournament days. The tennis courts included lighting to allow nighttime tennis matches. The property owners did not charge a fee to use the courts. 46 Or LUBA at 51-53.

LUBA concluded in *McCormick* that the city council exceeded its discretion under ORS 197.829(1).

> "There is no dispute that the tennis facility far exceeds the physical scope, scale and intensity of both the dwelling and the recreational needs of the dwelling's residents. There also seems no dispute that most of the structural and operational aspects of the tennis facility (the extra courts, bleachers, clubhouse, parking, RV camping, public tournaments and unrestricted public access) go far beyond the recreational needs of the residents and were designed and built to accommodate large, intensive public tennis events. The city's decision does not explain why, under its basic approach of comparing the nature and scale of the tennis facility and dwelling, it is permissible to rely on two factors to the exclusion of other, highly relevant considerations.
>
> "The question under ORS 197.829(1) is whether the city's interpretation of its code is consistent with the express language of the code, read in context. *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003). The BCZO does not define 'incidental' or 'subordinate,' and the challenged decision does not provide an express interpretation of those terms. Land use codes often define 'accessory' uses with similar terms. There is no reason to believe that the city code gives those terms something other than their ordinary meaning. Yet, by focusing exclusively on the seasonal and noncommercial nature of the tennis facility, the challenged decision allows a use that in almost all other parameters dwarfs residential use of the property. We do not think the terms 'accessory,' 'incidental and subordinate' are quite that elastic.
>
> 'Consideration of context supports our view that the city's interpretation exceeds the discretion allowed the city under ORS

> 197.829(1). As noted, the R-MD zone allows as a conditional use a 'service club, lodge or other quasi-public use.' If there is a meaningful difference between the disputed tennis facility and a 'quasi-public use,' we do not know what it could be. The fact that the proposed facility appears to fall squarely within a category of non-residential uses conditionally allowed in the R-MD zone is a strong contextual indication that the disputed facility cannot be reasonably viewed as an 'accessory' use to a residential use." 46 Or LUBA at 58-59 (footnotes omitted).

Wiper argues the sanctuary use the county has approved as an accessory use here will provide parking for more cars, could result in 65 annual events, generate more vehicle trips and permit more annual visitors as compared to the putative accessory use in *McCormick*.

The hearings official first concluded that the size of the approximately 5,000 square foot horse barn/arena, as compared to the 3,600 square foot residence is not determinative, relying on LUBA's decision in *Fleming v. Coos County*, 34 Or LUBA 328 (1998). We agree with the hearings official that the larger size of the horse barn/arena is not determinative of whether the proposed sanctuary is properly viewed as an accessory use. It is not unusual in rural areas to have large outbuildings that are put to uses that are accessory to a residential use.

The disputed use of the sanctuary included commercial activities in the past. Those commercial activities have been relocated to an off-site location. Record 421. The challenged decision imposes a condition that precludes future

commercial use of the sanctuary.[6] The decision includes the following discussion of the proposed accessory use:

> "[T]he Applicants have clarified how they intend to use the accessory structure. The structure will be used on a daily basis by the Applicants and their housemates for personal use such as yoga, dance, meditation and hobbies. Small groups of friends and family (5 to 15 individuals) will use the structure for dancing, music, yoga or meditation practice once a week, on the average. The Applicants intend to hold parties of 40 or more people once a month or so. There will be an occasional accommodation of overnight guests.
>
> "* * * * *
>
> "Based upon the Applicants' statements, it appears that the business aspects of their activities, such as workshops and such, have been transferred to Spencer Creek Grange. The use of the accessory structure on a daily basis by the Applicants and housemates is, by definition, a reasonable and normal residential use, the scope of which is determined by the number of residents in the primary residence. The weekly meeting of a small group of friends also does not appear to exceed normal residential use as measured against households that host weekly bridge parties, poker games or book clubs. * * *" Record 22-23.

The hearings official initially was concerned about the proposed large monthly parties. The hearings official ultimately concluded that "parties of between 40 and 80 persons three to four times a year and an occasional

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[6] The decision imposes the following condition:

> "The use of the accessory residential structure shall be confined to family and friends of family, and family guests for all events and shall not be offered to the general public nor used for commercial purposes." Record 10.

wedding or bar mitzvah celebration/reception once a year" would not exceed what might be expected with an accessory use in the circumstances presented in this case." Record 12.

There are some similarities between the intensity of the proposed accessory use in this case and the putative accessory use in *McCormick*. We note that our decision in *McCormick* was decided before the Supreme Court's 2010 decision in *Siporen*. And in *McCormick* we cited and relied on *Church v. Grant County*, a decision that seemed to signal a change in the Court of Appeals' characterization of extreme level of deference that was suggested in some Court of Appeals' decisions following the Supreme Court's 1992 decision in *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). *Church*, 187 Or App at 524. However, following *Siporen*, the standard of review required under ORS 197.829(1) is unquestionably highly deferential. In any event, and without regard to any nuanced differences in the level of deference required under *Church* and *Siporen*, the focus has always been on the text and context of the standard in question. As we have already noted, the meanings of the operative terms in this case, "accessory," "incidental," "appropriate," and "subordinate" are subjective. The hearings official concluded that the more limited use of the sanctuary now proposed by the occupants of the residence on the property and their friends and invitees, with the commercial aspects of the prior use now relocated off-site, is properly viewed as incidental, appropriate and subordinate and therefore accessory to

that residential use. The board of county commissioners adopted that interpretation as its own. We cannot say the board of commissioners' conclusion that the proposed use of the sanctuary qualifies as an accessory use is inconsistent with the commonly understood meaning of the terms the Lane Land Use and Development Code uses to define "accessory use."

Wiper's second assignment of error is denied.

WIPER'S THIRD ASSIGNMENT OF ERROR

As noted in our discussion of the previous assignment of error, in his initial decision the hearings official was concerned that monthly parties with 40 or more attendees might exceed what could be considered subordinate to the residential use of the property. Record 24. In his reconsidered decision the hearings official understood Kaplowitz to propose "parties of between 40 and 80 persons three to four times a year." Record 12. Wiper argues the hearings official failed to explain why that reduction in frequency is sufficient to ensure the sanctuary is accessory to the main residential use of the property.

The hearings official perhaps could have been clearer. But it is sufficiently clear that he viewed the initially proposed monthly frequency as creating doubt in his mind whether that frequency of large parties could be property viewed as incidental and subordinate to the main residential use. Apparently limiting such parties to three to four times a year eliminated those doubts. Given the subjective nature of the permissible scope of an accessory use under the LC, we cannot say that more adequate findings are necessary to

explain the hearings officer's ultimate conclusion that hosting parties three to four times per year can be viewed as accessory to the residential use.

Wiper's third assignment of error is denied.

WIPER'S FOURTH ASSIGNMENT OF ERROR

Under this assignment of error, Wiper argues:

> "[T]he County determined that an accessory use was permitted if it was 'residential in nature' and did not 'cause[] significant harm to adjacent and nearby uses.' The County then concluded that the proposed use would not create such impacts and therefore 'could be considered a residential use of the structure.' That is not the criterion of approval. The actual criterion is found in 16.2[1]1(2)(o) and requires that the use be 'accessory' to the main use. The County erred when it misconstrued the test for determining when a use is 'accessory.'" Wiper Petition for Review 25.

The county's findings concerning whether the proposed use of the sanctuary can be considered a residential use and the potential impacts the sanctuary use might have on surrounding properties appear to have been adopted in response to Wiper's claim that the proposed use would not be subordinate to the existing residential use. We do not understand the county to have misunderstood that the controlling standard in this matter is whether the proposed use of the sanctuary is properly viewed as "accessory" to the main residential use of the property and that the Lane County Land Use and Development Code defines an "accessory" use as one that is "[i]ncidental, appropriate and subordinate to the main use of a tract or structure." That the county employed surrogate inquiries to make that subjective determination is

not error, so long as the county did not misunderstand the ultimate legal standard. We see no reason to believe the county failed to understand the applicable ultimate legal standard.

Wiper's fourth assignment of error is denied.

WIPER'S FIFTH ASSIGNMENT OF ERROR

To respond to the hearings official's initial concerns that monthly parties of over 40 people might cause the proposed sanctuary use to exceed the intensity and nature of use that is appropriately viewed as "accessory," Kaplowitz offered to limit those larger parties to three or four per year. Record 90; 116. As we have already explained, the hearings official apparently intended to take Kaplowitz up on that offer. Yet the hearings official's final decision, which the board of commissioners adopted as their own, does not impose a condition of approval to that effect. Wiper argues it was error for the county to rely on Kaplowitz's offer to limit the larger parties to three or four per year, without imposing a condition of approval to ensure that the larger parties are so limited.

Kaplowitz responds that the hearings officer's imposition of the condition prohibiting commercial use of the sanctuary and limiting its use to "family and friends of family, and family guests for all events," *see* n 6, is sufficient to ensure the use of the sanctuary will be sufficiently limited to ensure that it is accessory to the main residential use of the property.

We do not agree. The hearings official and board of commissioners found: "In summary, the Applicants have shown by a preponderance of the evidence that their proposed use of the horse barn/arena, including the three to four gatherings of 40 to 80 persons, can be considered a residential use of the structure." Record 12. A condition of approval to ensure that the use of the sanctuary is so limited might not be necessary if that limitation is clearly part of the proposal. *Culligan v. Washington County*, 57 Or LUBA 395, 401 (2008). However that is not the case here. The precise nature of the proposed use of the sanctuary evolved considerably as the proposal was under review by the county. The hearings official relied on that limitation on large parties to conclude the proposal qualifies as an accessory use, and he should have imposed a condition of approval to require that limitation.

Moreover, given the history of this dispute and evolution of the proposal over time, the county might want to consider more clearly stating the precise nature and extent of the authorized accessory use, and imposing additional conditions of approval if they seem appropriate to reduce the chance of misunderstandings as the accessory use goes forward in the future.

The fifth assignment of error is sustained. On remand the county must impose a condition of approval to limit large parties at the sanctuary to three to four per year. On remand the county may consider more precisely setting out the nature and extent of the proposal and impose any conditions of approval it

may determine are needed to avoid misunderstandings concerning the nature and extent of the approved proposal.

Because we reject Kaplowitz's only assignment of error, the county's decision is affirmed in LUBA No. 2016-029. Because we sustain Wiper's fifth assignment of error, the county's decision is remanded in LUBA No. 2016-030.