

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

3
4 LEE KLEIN, KATHY KLEIN,
5 DENNIS KLOEHN, LUANN KLOEHN, and
6 LANDWATCH LANE COUNTY,
7 *Petitioners,*

8
9 vs.

10
11 LANE COUNTY,
12 *Respondent,*

13
14 and

15
16 OREGON COUNTRY FAIR,
17 *Intervenor-Respondent.*

18
19 LUBA No. 2019-030

20
21 FINAL OPINION
22 AND ORDER

23
24 Appeal from Lane County.

25
26 Sean T. Malone, Eugene, filed the petition for review and reply brief and
27 argued on behalf of petitioners.

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29 No appearance by Lane County.

30
31 Bill Kloos, Eugene, filed the response brief and argued on behalf of
32 intervenor-respondent. With him on the brief was the Law Office of Bill Kloos,
33 PC.

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35 RUDD, Board Member; RYAN, Board Chair, participated in the decision.

36
37 ZAMUDIO, Board Member, did not participate in the decision.
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AFFIRMED

09/06/2019

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

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NATURE OF THE DECISION

Petitioners challenge a board of county commissioners’ approval of a special use permit authorizing park and campground uses on property zoned Rural Residential (RR) and Impacted Forest (F-2).

FACTS

Intervenor-respondent Oregon Country Fair (OCF), a nonprofit organization, owns extensive property in Lane County. “The [OCF] ownership extends for a distance of 2.4 miles bordered by Territorial Highway, Highway 126, and Suttle Road. It includes over one mile of frontage along the Long Tom River.” Record 17. “The City of Veneta is located southeast, and the Rural Community of Elmira is located northeast of OCF ownership.” *Id.* The OCF ownership is 443.14 acres. Record 1245. The portion of the OCF property that is at issue in this decision (the property) is approximately 271 acres in size and zoned RR and F-2. The property is surrounded by land “zoned Exclusive Farm Use zone (E-40) to the east and west, Rural Residential (RR-5) to the north, and Impacted Forest Lands (F-2) zone to the south.”¹ Record 10.

¹ The subject property includes the following tax lots: 1400, 1801, 2900, 3200, 3203, 3300, 3401, 3402, 3403, 100, 102 and 103. Record 16. “Portions of OCF land east of the Long Tom River and lands zoned Exclusive Farm Use on the western end of the ownership are excluded from this proposal.” Record 17.

1 In April 2015, OCF submitted an application for a special use permit for
2 park and campground uses. Record 11. The appealed decision describes the
3 proposed uses by activities and area as generally set forth below.

4 Area 1 is zoned RR and contains a meadow. Record 17. The proposed
5 special use includes up to six small social gatherings of up to 500 people between
6 April and October. *Id.*

7 Area 2 is zoned RR and the proposed special use will include day camps,
8 retreats and environmental education programming for a maximum of 100
9 persons. Record 18. The proposed special use also includes a weeklong overnight
10 camp called the Culture Jam, serving youth. *Id.*

11 Area 3 is zoned F-2. Record 19. It is proposed for use mid-July through
12 October with up to 1,000 people four times a year and up to 500 people four times
13 a year for a total of 8 events a year.

14 “The activities would typically last one day and include the Elmira
15 County Fair Classic High School Track Meet and the Beaver Open
16 Foot Bagging event, a Hacky Sack tournament. The activities would
17 not include the use of any structures. Camping for activities would
18 involving less than 500 persons would be provided in the field at the
19 south end of Bus Road.” *Id.*

20 Area 4 is zoned primarily F-2 with a small area zoned RR. It is proposed
21 for year-round use for nature associated activities including “environmental
22 studies, wildlife observation, wildflower walks, and habitat restoration” by up to
23 50 people. Record 19-20.

1 After submitting its application in 2015, OCF submitted multiple timeline
2 extensions and the planning director issued a tentative approval in May 2016.
3 Record 11. Multiple appeals were filed and OCF “submitted a full timeline
4 waiver” in June 2016. *Id.* The hearings officer conducted a hearing in September
5 2016. A year later, in September 2017, the hearings officer issued a decision
6 affirming the special use permit with modifications. Record 12. Petitioners
7 appealed the hearing officer’s decision, and the hearings officer issued notice of
8 intent to reconsider the decision. *Id.* The reconsidered decision was issued in
9 September 2018. Petitioners appealed the reconsidered decision to the board of
10 county commissioners and requested that it not conduct a hearing but rather deem
11 the hearings officer’s decision the final decision. In February 2019, the board of
12 county commissioners expressly agreed with and adopted the hearings officer’s
13 interpretations and application of the code. Record 9, 13. This appeal followed.

14 **STANDARD OF REVIEW**

15 The board of county commissioners expressly adopted the hearings
16 officer’s decision. Record 9, 13. We review the boards’ interpretation of its own
17 land use regulations under ORS 197.829(1) and are required to affirm it so long
18 as that interpretation is not inconsistent with the express language of the
19 regulation or its underlying purposes and policies and not contrary to state law.
20 *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010).

21 We will review findings to determine if they “(1) identify the relevant
22 approval standards, (2) set out the facts which are believed and relied upon, and

1 (3) explain how those facts lead to the decision on compliance with the approval
2 standards.” *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992).

3 **FIRST ASSIGNMENT OF ERROR**

4 Petitioners allege that the county misconstrued Lane County Code (LC)
5 16.251(12).² Petition for Review 18. “OCF hosts [its] annual three-day art, crafts,
6 education, and entertainment [festival] on the subject property. The OCF has held
7 the [festival] on the site every year since 1971.” Record 53. Petitioners argue that
8 because the festival is a verified nonconforming use and overlaps in time and
9 space with uses authorized by the special use permit, nonconforming use criteria
10 apply to the application. Petition for Review 23. We agree, however, with OCF
11 that the board of county commissioners correctly concluded that the LC’s
12 nonconforming use provisions do not apply to the special use permit application.

² Portions of the Lane County Code (LC) have been amended since the date of the application. We refer to the code language provided by the parties, unless otherwise noted.

LC 16.251(12)(a) provides:

“When evaluating a proposal for increase, restoration, alteration or repair [of a nonconforming use], the following criteria shall apply:

“(a) The change in use will be of no greater adverse impacts to the neighborhood.” Petition for Review 20.

1 OCF has operated its festival on a portion of its 400 plus acres every year
2 since 1971. Record 16. Although the festival was inconsistent with land use
3 regulations adopted by the county in 1984, it has continued as a nonconforming
4 use. Record 33.

5 The festival was initially verified as a nonconforming use in 1985 and
6 verified again in 1998. Record 33. As the hearings officer observed, the initial
7 1985 verification “said nothing about setup, takedown, and volunteer camping.
8 To be charitable, it can be said that the verification was vague and lacked
9 important specifics regarding the scope and intensity of the [festival].” *Id.* The
10 1998 verification also failed to address festival setup or deconstruction or the
11 intensity of the festival use at the time it became nonconforming. *Id.* In the early
12 seventies, however, 1,000 people assisted with running the festival and camped
13 as part of that effort. Record 33-34. In 2016, 24,000 people helped put the festival
14 on and camped as part of that volunteer effort. Record 34. In addition:

15 “[a] large volunteer effort is needed to establish and prepare the
16 grounds of the [festival] for the occurrence of the event. This
17 traditionally begins in the 1st week of June with establishment of
18 Main Camp to coordinate the activities of the volunteers on site.
19 Prior to the 4th of July, approximately 25-300 persons stay on the
20 site each weekend; less than 100 persons stay on site during the
21 weekdays. After the 4th of July the numbers are increasing until the
22 opening day of the event to the public that is held the weekend after
23 the 4th of July. After the [festival], a relatively small number of
24 volunteers (less than 100) are on the site for 8 days to deconstruct
25 the [festival] facilities. Booth occupants depart from the site
26 immediately after the public event and are allowed until the end of
27 August to return to deconstruct their particular booth as necessary.”

1 Record 16.

2 The number of public attendees is currently about 52,000 over the course of the
3 festival weekend. *Id.*

4 In addition to the festival and its related support activity, OCF has
5 conducted other, non-festival related uses and activities on land it owns. By
6 authorizing park and campground use on OCF property, the challenged decision
7 provides land use approval for these other, non-festival related uses and activities.

8 In their first assignment of error, we understand petitioners to argue that
9 the county determined that approval of the application might alter the
10 nonconforming use but approved the application anyway without applying the
11 nonconforming use provisions of the LC. Petition for Review 20-21. Contrary to
12 petitioners' argument, however, the county did not throw up its virtual hands and
13 approve an alteration of the nonconforming use without applying relevant
14 criteria.³ Rather, the county limited the approval of the proposed special uses to
15 clarify that festival-related use was not allowed by the approval. The county
16 explained that it was "clear that the special use permit does not address or
17 authorize the pre- and post- [festival] activities." Record 48.

18 We agree with OCF that the county properly construed the LC in not
19 applying criteria related to the modification of a nonconforming use. The special
20 use approval does not authorize uses associated with the festival, expressly

³ A verification of a nonconforming use is required prior to requesting approval to change a nonconforming use. LC 16.251(1).

1 explaining it does not approve camping in conjunction with the festival setup and
2 festival deconstruction. Record 27-28. As approved, the special use permits do
3 not authorize festival-related uses. In addition, we agree with OCF that the
4 county’s findings are adequate to explain that it approved the application without
5 addressing nonconforming use verification or alteration criteria because those
6 criteria do not apply.

7 The special uses have been occurring without permission and the special
8 use application is an effort to legalize the special uses. Petitioners argue that:

9 “The problem here is that one cannot tell whether the proposed use
10 expands or alters the nonconforming use because, as the Hearings
11 Official notes, the 1985 * * * and 1998 * * * verification of the
12 annual event as a nonconforming use is vague, lacking any
13 specificity regarding the scope and duration of the annual event,
14 except to say that it is a *three-day* annual event (which is, in reality,
15 more akin to a three-month event).” Petition for Review 21
16 (emphasis in original).

17 Petitioners maintain that the county:

18 “erred not only in failing to restrict the [special use permit] events
19 from overlapping with the annual event and allowing attendees at
20 those events to attend the core, three-day annual event, but also in
21 failing to require a verification of the nonconforming use in order to
22 determine whether LC 16.251(12) is implicated and whether it has
23 been violated through the [special use permit] request.” Petition for
24 Review 23.

25 As the hearings officer noted, petitioners identify no law preventing the county
26 from issuing permits that have the effect of legalizing the special uses that have
27 been occurring independent of the festival uses. Record 32. Petitioners speculate

1 that the nonconforming use could increase in intensity or be altered by potential
2 attendance at the festival by persons attending events authorized by the special
3 use permit. Petition for Review 22. Petitioners argue that the decision should have
4 included a condition prohibiting cross-attendance at events. Petition for Review
5 23. However, we agree with OCF that petitioners' challenges are really to the
6 existing non-conforming uses, and that the appropriate mechanism for evaluating
7 the scope of the nonconforming use and any alteration to it is, an application
8 seeking such a determination or, if appropriate, an enforcement action.

9 The first assignment of error is denied.

10 **SECOND ASSIGNMENT OF ERROR**

11 LC 16.290(4)(p) allows “[p]arks, playgrounds, [and] community centers”
12 in the RR zone. Petition for Review 27. Petitioners allege that the county
13 misconstrued LC 16.290(4)(p) in authorizing (a) year-round use of Area 2 for
14 park uses, and (b) the use of Area 1, which includes the area which is designated
15 as the main stage during the festival, “for small social gatherings of its members
16 and guests of up to 500 persons in size for picnics, weddings, and memorials
17 during the months of April through October weather permitting.”⁴ Record 17-19.

⁴ The county’s decision authorized for Area 2 “day camps, retreats, and environmental education programs for a maximum of 100 persons. This proposed use would include the weeklong Culture Jam youth camp in the summer ***. Park use of the property during the Culture Jam consists of nature walks, archaeology walks, group bike rides, touch football and hackysack.” Record 18.

1 Petitioners argue that the proposed intensity and frequency of these uses is too
2 intense to qualify as a park in the RR zone. Petition for Review 32.

3 The LC does not include a definition of park, and the county relied upon
4 the dictionary definition of “park” as:

5 “a tract of land maintained by a city or town as a place of beauty or
6 of public recreation * * * a large area often of forested land reserved
7 from settlement and maintained in its natural state for public use (as
8 by campers or hunters) or as a wildlife refuge * * * a large enclosed
9 area used for sports; *esp*: ball park.” Record 35.

10 In determining that park uses allowed by LC 16.290(4)(p) were not limited to
11 those deemed strictly recreational, the county explained that:

12 “The National Recreation and Park Association, in its publication
13 ‘Why Parks and Recreation are Essential Public Services,’ notes that
14 parks and recreational programs generate *‘significant revenues to*
15 *local and regional economies from sports tournaments and special*
16 *events such as arts, music and holiday festivals.’* Individuals
17 familiar with Eugene’s Alton Baker Park, for instance, know that
18 this facility hosts such activities as music concerts, commercial
19 ventures (Art In the Vineyard Festival), and a wide variety of other
20 activities that are not strictly recreational. By the same token,
21 weddings, reunions and similar events are allowed in Lane County
22 parks. For instance, the Mount Pisgah Arboretum is available for
23 wedding ceremonies and other gatherings. * * * This information
24 only reinforces the conclusion that park usage can become more
25 intense if the park is not located on land zoned for resource use.”
26 Record 36. (Emphasis in original.)

27 We agree with OCF that the county’s interpretation of the LC is not inconsistent
28 with the express language of LC 16.290(4)(p) or the plain meaning of the word
29 “park” that the county relied on. Even if a different interpretation might be better,

1 the county’s interpretation of LC to authorize the proposed uses as park uses
2 based on the types of park uses recognized nationally and found in a City of
3 Eugene park and in other county parks, is plausible and entitled to deference.
4 *Siporen*, 349 Or at 259.

5 The county considered our decisions addressing the intensity of park use
6 allowed on forest land in *Utsey v. Coos County*, 38 Or LUBA 516 (2000), *rev*
7 *dismissed*, 176 Or App 524, 32 P3d 933 (2001), *rev dismissed*, 335 Or 217
8 (2003), and on exclusive farm use land in *Spierling v. Yamhill County*, 25 Or
9 LUBA 695 (1993). The county concluded that a less restrictive view of the
10 permissible scope of park use on RR-zoned land was appropriate and that *Utsey*
11 and *Spierling* did not constrain the county’s decision. The county’s findings
12 explained that “[i]n the present case, the proposed parks are in areas zoned for
13 rural residential use, which implies fewer restrictions than might be found in
14 parks located on EFU or forest lands.” Record 35.

15 We also understand petitioners to argue that the board of county
16 commissioners’ interpretation of “parks” as used in LC 16.290(4) is inconsistent
17 with the purpose of the RR zone set forth in LC 16.290(1)(b). Petition for Review
18 31. The purpose of the RR zone is to “promote a compatible and safe rural
19 residential living environment by limiting allowed uses and development to
20 primary and accessory rural residential uses and to other rural uses compatible
21 with rural residential uses and the uses of nearby lands.” LC 16.290(1)(b);
22 Petition for Review 31. However, petitioners do not explain how the county’s

1 interpretation of the word “park,” a discretionary use as provided in LC 16.290,
2 is inconsistent with the purpose of the RR zone.

3 Lastly, petitioners argue that OCF may violate the conditions of approval.
4 The small social gatherings are limited to members and guests. Record 17.
5 Petitioners state that given that

6 “membership has risen dramatically, there is no limitation on how
7 many [OCF] members there will be in the future. There is no cap,
8 and if there are 20,000-24,000 [OCF] members, then it remains to
9 be seen how an event will be limited to 50, 500, 1,000 and so on.”
10 Petition for Review 33.

11 Petitioners argue that it is unclear how OCF members will be identified but
12 acknowledge that registering for OCF membership requires submitting a signed
13 membership application and that the decision places caps on attendance at
14 approved events. *Id.* The decision limits attendance at certain events or programs
15 to a maximum of 500 persons six times a year in Area 1, a maximum of 100
16 persons for up to 25 events per year in Area 2, a maximum of 1,000 persons four
17 times a year and a maximum of 500 persons four times a year in Area 3 and a
18 maximum of 50 persons a day in Area 4. Record 11. Petitioners’ concern that
19 OCF will violate its conditions of approval is not a basis for remand.

20 This assignment of error is denied.

21 **THIRD ASSIGNMENT OF ERROR**

22 LC 16.290(4)(k) allows “campgrounds” in the RR zone. Response Brief
23 28. OCF proposes to use Area 2 year-round for a variety of day camps, retreats,

1 environmental education programs, and the week-long Culture Jam youth
2 overnight camp. Record 18. Petitioners argue in their third assignment of error
3 that the county misconstrued applicable law by instead permitting a “youth
4 camp” in the RR zone, which is not specifically allowed in RR zone but is
5 allowed in the F-2 zone. Petition for Review 34.

6 LC 16.290(4)(k) provides that a “campground” is:

7 “[A]n area designed for *short-term* recreational purposes and where
8 facilities, except commercial activities such as grocery stores and
9 laundromats, are provided to accommodate that use. Space for tents,
10 campers, recreational vehicles and motor homes are allowed and
11 permanent open-air shelters (Adirondacks) may be provided on the
12 site by the owner of the development.” (Emphasis added.) Response
13 Brief 29.

14 The county determined that the Culture Jam youth camp was consistent with the
15 county’s definition of campground, a permitted use in the RR zone. Record 36.

16 LC 16.211(3)(f-f) defines “youth camp” as:

17 “[A] facility either owned or leased, and operated by a state or local
18 government, or a nonprofit corporation as defined under ORS
19 65.001, to provide an outdoor recreational and educational
20 experience primarily for the benefit of persons 21 years of age and
21 younger. Youth camps do not include any manner of juvenile
22 detention center or juvenile detention facility. Changes to or
23 expansions of youth camps established prior to June 14, 2000, shall
24 be subject to the provisions of ORS 215.130.”⁵

⁵ LC 16.211(3)(f-f) and (11) set forth extensive regulations governing youth camps in the F-2 zone. LC 16.211(3)(f-f) contains the definition of “youth camp” and incorporates LC 16.211(11). LC 16.211(11) provides extensive restrictions on youth camps, including:

1 The county determined that:

“(g) A youth camp shall be located on a lawful parcel that is:

“(i) * * * A youth camp shall be located on a parcel containing at least 40 acres;

“(ii) Suitable to provide a protective buffer to separate the visual and audible aspects of youth camp activities from other nearby and adjacent lands. The buffers shall consist of forest vegetation, topographic or other natural features as well as structural setbacks from adjacent public and private lands, roads, and riparian areas. The structural setback from roads and adjacent public and private property shall be 250 feet unless the governing body, or its designate sets a different setback based upon the following criteria that may be applied on a case-by-case basis:

“(aa) The proposed setback will prevent conflicts with commercial resource management practices;

“(bb) The proposed setback will prevent a significant increase in safety hazards associated with vehicular traffic; and

“(cc) The proposed setback will provide an appropriate buffer from visual and audible aspects of youth camp activities from other nearby and adjacent resource lands.

“(iii) Suitable to provide for the establishment of sewage disposal facilities without requiring a sewer system as defined in OAR 660-011-0060(1)(f). Prior to granting final approval, the Approval Authority shall verify that a proposed youth camp will not result in the need for a sewer system.”

1 “[T]here is a difference between a ‘youth camp,’ as used generically,
2 and the specific term ‘youth camp’ as utilized by LC 16.211(3)(f-f).
3 A ‘youth camp’ as defined by the Code must be a permanent use and
4 must be located on a parcel of 40 acres in size or greater. * * * Area
5 2 is only 12.8 acres in size and the Culture Jam camp occurs for a
6 very limited duration on an annual basis. The youth camps proposed
7 by the [OFC] are encompassed by the campground use that is
8 allowed by the LC 16.290(4)(k).” Record 36.

9 Youth camps are heavily regulated in forest zones, as set forth in OAR
10 660-006-0031 and LC 16.211 (Impacted Forest F-2 zone). The county held that
11 “youth camp” as defined in the LC must be a permanent use, and the proposed
12 Cultural Jam use to serve youth was of limited duration and thus appropriately
13 treated as a campground in the RR zone. Record 36. Petitioners do not identify
14 any provision of statute or administrative rule that the county’s interpretation of
15 the LC is inconsistent with. ORS 197.829(1)(d). Petitioners also do not establish
16 that the county’s interpretation of the proposed use as a campground is
17 inconsistent with the express language of LC or the underlying purpose of the RR
18 zone. ORS 197.829(1)(a) and (b). Accordingly, we are required to affirm the
19 county’s interpretation of the word “campground” in LC 16.290(4)(k) as
20 encompassing the proposed limited duration overnight camp.

21 This assignment of error is denied.

22 The county’s decision is affirmed.