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

JOHN DEVEREUX and NORVA LEE DEVEREUX,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent,

and

WILLIAM FRIEBEL, DEBRA FRIEBEL,
and WILLIAM HEMPHILL,
Intervenors-Respondents.

LUBA No. 2011-059

FINAL OPINION
AND ORDER

Appeal from Douglas County.

Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioners.

No appearance by Respondent.

Stephen Mountainspring, Roseburg, filed the response brief and argued on behalf of intervenors-respondents. With him on the brief was Dole, Coalwell, Clark, Mountainspring & Mornarich, P.C.

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

DISMISSED

09/29/2011

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

NATURE OF THE DECISION

Petitioners appeal a county decision granting a temporary use permit for a one-day outdoor music concert to be held on land zoned exclusive farm use (EFU).

MOTION TO INTERVENE

Intervenors-respondents (intervenors) William Friebel, Debra Friebel and William Hemphill, the applicants below, move to intervene on the side of the respondent. There is no opposition to the motion and it is allowed.

MOTION TO ALLOW REPLY BRIEF

Petitioners move the Board to allow them to file a reply brief. There is no opposition to the motion or reply brief, and the motion is granted.

FACTS

The challenged decision approves intervenors' application for a temporary use permit for an "outdoor gathering" under the county Land Use and Development Ordinance (LUDO), allowing intervenors to hold an outdoor music concert on their EFU-zoned property on September 17, 2011. As approved, ticket sales would be limited to 6,500 tickets, gates would open to the public at 2:00 p.m., and the music would last from 4:30 p.m. until 8:00 p.m. Final clean-up must be completed no later than September 19, 2011.

The county planning commission held a hearing and on May 19, 2011, approved the temporary use permit, with a number of conditions of approval. Petitioners appealed to the county board of commissioners, which declined review, adopting the planning commission decision as the county's final decision. This appeal followed.

1 **JURISDICTION**

2 As relevant here, LUBA has exclusive jurisdiction to review appeals of “land use
3 decisions” as defined at ORS 197.015(10).¹ Because the challenged decision applies a land
4 use regulation, it falls within the definition of “land use decision,” absent some statutory
5 exclusion or exclusion based on case law. However, ORS 197.015(10)(d), which was added
6 to the statute in 1999, excludes from the definition of “land use decision” the “authorization
7 of an outdoor mass gathering as defined in ORS 433.735[.]”²

8 Intervenors move to dismiss this appeal, arguing that the challenged decision
9 authorizes an “outdoor mass gathering as defined in ORS 433.735” and thus is excluded from
10 the definition of “land use decision” subject to LUBA’s jurisdiction, pursuant to the
11 exclusion at ORS 197.015(10)(d). Petitioners, on the other hand, argue that the challenged
12 decision does not authorize an “outdoor mass gathering as defined in ORS 433.735” and
13 therefore does not fall within the ORS 197.015(10)(d) exclusion.

14 ORS 433.735 is part of a series, at ORS 433.735 to 433.770, adopted in 1971 and
15 amended several times since to govern the regulation of outdoor mass gatherings. ORS

¹ ORS 197.015(10)(a) defines “land use decision” in relevant part to include:

 “(A) A final decision or determination made by a local government or special district that
 concerns the adoption, amendment or application of:

- “(i) The goals;
- “(ii) A comprehensive plan provision;
- “(iii) A land use regulation; or
- “(iv) A new land use regulation; [or]

 “(C) A decision of a county planning commission made under ORS 433.763[.]”

² ORS 197.015(10)(d) provides that “land use decision”

 “Does not include authorization of an outdoor mass gathering as defined in ORS 433.735, or
 other gathering of fewer than 3,000 persons that is not anticipated to continue for more than
 120 hours in any three-month period[.]”

1 433.735 provides that, “unless defined otherwise by county ordinance,” the term “outdoor
2 mass gathering” means an assembly of (1) more than 3,000 persons, that (2) continues more
3 than 24 hours but less than 120 hours within any three-month period, and (3) is held
4 primarily in open spaces.³ Because the concert in the present case continues for less than 24
5 hours, it does not satisfy the second prong of the ORS 433.735 definition.⁴ However, the
6 county has exercised its authority under ORS 433.735(1) to adopt a different definition of
7 “outdoor mass gathering” and has adopted a more expansive definition into its land use
8 ordinance.

9 LUDO 1.090 defines “outdoor gathering” in relevant part as “[a]n outdoor event or
10 assembly where the anticipated attendance will be more than 1,000 persons or the event is
11 expected to continue for more than three days and which is held outside of a public park
12 primarily in open spaces and not in any permanent structure.”⁵ As defined by county

³ ORS 433.735(1) provides, in relevant part:

“As used in ORS 433.735 to 433.770 and 433.990(7):

“(1) ‘Outdoor mass gathering,’ *unless otherwise defined by county ordinance*, means an actual or reasonably anticipated assembly of more than 3,000 persons which continues or can reasonably be expected to continue for more than 24 consecutive hours but less than 120 hours within any three-month period and which is held primarily in open spaces and not in any permanent structure.” (Emphasis added.)

⁴ Because the challenged decision authorizes an assembly of more than 3,000 persons, there is no dispute that the decision does not fit within the second clause of the exclusion at ORS 197.015(10)(d).

⁵ LUDO 1.090 provides:

“OUTDOOR GATHERING: An outdoor event or assembly where either the anticipated attendance will be more than 1,000 persons or the event is expected to continue for more than three days and which is held outside of a public park primarily in open spaces and not in any permanent structure. Gatherings meeting the definition in the previous sentence are subject to the provisions of Article 41 (Temporary Use Permit) and the requirements of ORS 433.750 to 433.763 that are found to be applicable in the review process. Gatherings meeting the statutory definition of a ‘mass gathering’ shall be subject to the provisions of ORS 433.735 to 433.770. Temporary outdoor gatherings of 1,000 or less people that will not continue for more than three days within any three month period may be exempt from a land use decision process providing they comply with Health and Sanitation requirements, provide for off street parking for all vehicles associated with the gathering, shall not be a traffic hazard, provide for fire protection and suppression by a public entity or on-site equipment, and except for non-

1 ordinance, an outdoor gathering includes an assembly of more than 1,000 persons that
2 continues less than 24 hours. There is no dispute that the concert at issue in this appeal falls
3 within that more inclusive county definition. The immediate question is whether a decision
4 authorizing an outdoor mass gathering under a county definition adopted pursuant to ORS
5 433.735 constitutes the “authorization of an outdoor mass gathering as defined in ORS
6 433.735” for purposes of the ORS 197.015(1)(d) exclusion to the definition of land use
7 decision.

8 To resolve that interpretational issue we apply the methodology described in *State v.*
9 *Gaines*, 346 Or 160, 165-73, 206 P3d 1042 (2009), and *Portland Gen. Elec. Co. v. Bureau of*
10 *Labor & Indus.*, 317 Or 606, 610-11, 859 P2d 1143 (1993), which focus initially on the text
11 and context of the relevant statutes, with due consideration of any relevant legislative history.
12 In our view, the text of ORS 197.015(10)(d) is ambiguous regarding whether decisions
13 authorizing an outdoor mass gathering “as defined in ORS 433.735” includes only those
14 decisions that satisfy the three-prong definition set out in ORS 433.735, or whether it also
15 includes decisions issued under a more expansive county definition in a county ordinance as
16 authorized under ORS 433.735(1). The definition of “outdoor mass gathering” at ORS
17 433.735(1) is also ambiguous on this point. The language “unless otherwise defined by
18 county ordinance” can be read to include within the category of a statutory “outdoor mass
19 gathering” a county ordinance-defined outdoor mass gathering, as intervenors argue.

20 Petitioners respond that there is only one explicit “definition” at ORS 433.735(1), the
21 three-prong statutory definition, and that the language “unless otherwise defined by county
22 ordinance” should not be understood to include county-defined outdoor mass gatherings
23 within the ambit of gatherings “as defined in ORS 433.735.”

profit organizations, shall not contain any commercial aspect including admission to the event.”

1 Although there is some text and context supporting petitioners’ view, we agree with
2 intervenors that considering the statutory scheme as a whole and relevant legislative history
3 that the legislature intended the ORS 197.015(10)(d) exclusion to encompass outdoor mass
4 gatherings authorized under a county definition. In any case, even if the ORS
5 197.015(10)(d) exclusion is not broad enough to encompass county-defined outdoor mass
6 gatherings, the outdoor mass gathering statute specifically provides that exclusive review of
7 county-defined outdoor mass gatherings lies with the circuit court. We first discuss the latter
8 point.

9 **A. ORS 433.750(5)**

10 The outdoor mass gathering statutes, at ORS 433.735 to 433.770, were originally
11 adopted in 1971, before LUBA was created and prior to adoption of a comprehensive state-
12 level land use program. In 1981, the legislature amended the definition of “outdoor mass
13 gathering” at ORS 433.735(1) to include the language “unless otherwise defined by county
14 ordinance[.]” The same legislation adopted ORS 433.767, which provides that “ORS
15 433.735 to 433.770 * * * apply to outdoor mass gatherings defined by county ordinance as
16 well as those defined by ORS 433.735(1).” Because ORS 433.767 refers separately to
17 statutory and county definitions, it lends some contextual support to petitioners’ argument
18 that county-defined outdoor mass gatherings are not “outdoor mass gatherings as defined at
19 ORS 433.735(1),” for purposes of the ORS 197.015(10)(d). However, in our view, the more
20 telling significance of ORS 433.767 is that it explicitly subjects outdoor mass gatherings
21 defined by county ordinance to the same regulations and procedures governing outdoor mass
22 gatherings as defined by ORS 433.735(1).

23 Since it was originally adopted in 1971, the mass gathering statutes have subjected
24 outdoor mass gatherings as defined in ORS 433.735 to a *sui generis* procedure and a very
25 limited set of criteria codified at ORS 433.750, under which the county “shall” permit an
26 outdoor mass gathering if the applicant demonstrates compliance with health and safety rules

1 adopted by the Oregon Health Authority. Significantly, ORS 433.750 has provided since
2 1971 that any decision of the county on an application for an “outdoor mass gathering” may
3 be appealed to the circuit court. ORS 433.750(5).⁶ In *1000 Friends of Oregon v. Wasco*
4 *County*, 6 Or LUBA 117 (1982), *aff’d* 62 Or App 663, 662 P2d 813 (1983), we cited ORS
5 433.750(5) (then codified at ORS 433.750(3)) in partial support of our conclusion that a
6 decision authorizing an outdoor mass gathering under ORS 433.735 to 433.770 is not a land
7 use decision subject to LUBA’s jurisdiction. We explained that the statutory scheme
8 “provides an express and exclusive remedy of appeal to the circuit court,” and accordingly
9 dismissed the appeal. *Id.* at 122.

10 The decision at issue in *1000 Friends of Oregon* did not involve authorization under a
11 more expansive county definition of outdoor mass gathering. However, pursuant to ORS
12 433.767, county-defined outdoor mass gatherings are subject to the same ORS 433.750
13 procedures and standards as statutorily-defined outdoor mass gatherings. That means that
14 county-defined outdoor mass gatherings are necessarily subject to ORS 433.750(5), which as
15 we noted in *1000 Friends of Oregon* “provides an express and exclusive remedy of appeal to
16 the circuit court[.]” In short, even if the ORS 433.735(1) definition does not implicitly
17 incorporate county-defined outdoor mass gatherings into the statutory definition for purposes
18 of ORS 197.015(10)(d), ORS 433.750(5) makes it clear that the circuit court, and not LUBA,
19 has exclusive jurisdiction to review an appeal of a decision authorizing an “outdoor mass
20 gathering” under a county ordinance definition of that term.

⁶ ORS 433.750(5) currently provides:

“Any decision of a county governing body on an application for a permit to hold an outdoor mass gathering may be appealed to a circuit court for the county as provided in ORS 34.020 to 34.100.”

1 **B. ORS 197.015(10)(d)**

2 That view of ORS 433.750(5) and 433.767 is entirely consistent with subsequent
3 amendments to ORS 197.015(10) and the outdoor mass gathering statute. In 1985, the
4 legislature amended the outdoor mass gathering statutes to create a separate category of
5 “extended” mass gatherings that continue in excess of 120 hours. Under ORS 433.763(1),
6 such “extended” mass gatherings are explicitly subject to land use regulations, and reviewed
7 under local procedures that apply to review of land use permits. ORS 433.763(3).⁷ In 1999,
8 the legislature adopted Senate Bill 99, which introduced the ORS 197.015(10)(d) exclusion
9 that is at issue in this appeal. Or Laws 1999 ch 866. Tellingly, Senate Bill 99 also adopted
10 ORS 197.015(10)(a)(C), which clarifies that a decision under ORS 433.763 on an “extended”

⁷ ORS 433.763, entitled “Compliance with land use regulations required,” provides in relevant part:

“(1) Any gathering of more than 3,000 persons which continues or can reasonably be expected to continue for more than 120 hours within any three-month period and any part of which is held in open spaces shall be allowed by a county planning commission if all of the following occur:

“(a) The organizer makes application for a permit to the county planning commission.

“(b) The applicant demonstrates to the county planning commission that the applicant has complied or can comply with the requirements for an outdoor mass gathering permit set out in ORS 433.750.

“(c) The county planning commission shall make findings that:

“(A) Any permits required by the applicable land use regulations have been granted; and

“(B) The proposed gathering:

“(i) Is compatible with existing land uses; and

“(ii) Does not materially alter the stability of the overall land use pattern of the area.

“* * * * *

“(3) A decision granting or denying a permit under this section may be appealed to the county governing body as provided in ORS 215.402 to 215.438.”

1 mass gathering permit application *is* a land use decision subject to LUBA’s review. *See* n 1.
2 The legislature was apparently concerned that Senate Bill 99 clarify the regulatory and
3 jurisdictional landscape for different types of outdoor mass gatherings. If the legislature
4 intended decisions authorizing outdoor mass gatherings under a county definition to be a
5 land use decision, like extended outdoor mass gatherings, it presumably would have adopted
6 an express provision to that effect similar to ORS 197.015(10)(a)(C). That the legislature did
7 not might be viewed as an oversight, but a review of legislative history instead indicates that
8 the legislature understood and intended that county-defined gatherings be treated as a sub-
9 species of “outdoor mass gatherings as defined at ORS 433.735,” subject to the same
10 regulatory and jurisdictional consequences.

11 The legislative history to Senate Bill 99 suggests that the main purpose of the bill was
12 to clarify that county-defined outdoor mass gatherings, like statute-defined outdoor mass
13 gatherings, are not land use decisions and not subject to county land use regulations. *See*
14 testimony of Ron Eber, Department of Land Conservation and Development, Senate Rules
15 and Elections Committee, July 17, 1999, (explaining that counties have the authority to
16 expand the definition of outdoor mass gathering to include gatherings with less than 3,000
17 participants, and the purpose of SB 99 is to clarify that permits for such gatherings are not
18 subject to land use regulations and are not land use decisions). Further, Eber testified that
19 SB 99 would “make it clear that * * * short duration, temporary kind of activities[] are not
20 subject to the zoning regulations.” *See Landsem Farms, LP v. Marion County*, 190 Or App
21 120, 128, 78 P3d 103 (2003) (quoting testimony). In addition, the main proponent of SB 99
22 testified that the bill was intended to codify existing case law, to the effect that, with the
23 exception of “extended” outdoor mass gatherings, no other outdoor mass gatherings are
24 regulated or treated as land use decisions. Testimony of David Hunnicutt, Oregonians in
25 Action, House Rules, Elections, and Public Affairs Committee, July 1, 1999. Hunnicutt’s and
26 Eber’s testimony both suggest that the legislature intended to draw the

1 regulatory/jurisdictional line between “extended” outdoor mass gatherings that last more than
2 120 hours, and all other types of outdoor mass gatherings that last less than 120 hours.

3 Further, Hunnicutt represented that Senate Bill 99 specifically codified *Fence v.*
4 *Jackson County*, 29 Or LUBA 147, 149-150, *rev’d & rem’d in part, aff’d in part*, 135 Or
5 App 574, 900 P2d 524 (1995). *Fence* involved an appeal of a legislative decision adopting a
6 county ordinance that among other things promulgated a more expansive definition of
7 outdoor mass gathering, as authorized under ORS 433.735(1), to include gatherings of less
8 than 3,000 persons. In relevant part, LUBA rejected the petitioner’s argument that the
9 county lacked the authority to define outdoor mass gatherings more expansively than the
10 three-prong definition. We concluded that “ORS 433.735(1) specifically authorizes a county
11 to define what constitutes an outdoor mass gathering under ORS 433.735(1).” 29 Or LUBA
12 at 151. The Court of Appeals remanded our decision on other grounds, but did not disturb
13 that conclusion. *Fence* can be read for the proposition that an outdoor mass gathering under
14 a county definition authorized under ORS 433.735(1) *is* an outdoor mass gathering under the
15 ORS 433.735(1) definition, and was apparently cited to the legislature for that proposition.

16 In sum, the text, context and available legislative history of ORS 197.015(10)(d)
17 suggests that the legislature intended the phrase “outdoor mass gathering as defined in ORS
18 433.735(1)” to encompass outdoor mass gatherings defined by county ordinance, as
19 authorized under ORS 433.735(1). Even if that were not the case, however, as explained
20 above, ORS 433.750(5) independently mandates that jurisdiction to review appeals of a
21 decision authorizing an outdoor mass gathering, whether under a county definition or the
22 statutory definition, lies with the circuit court, not LUBA. Accordingly, this appeal must be
23 dismissed.⁸

⁸ Petitioners have not filed a motion to transfer this appeal to circuit court under OAR 661-010-0075(11). At oral argument petitioners indicated that they have filed a writ of review in circuit court challenging the same decision that is before us, which proceeding is suspended pending the outcome of the appeal to LUBA.

1 This appeal is dismissed.⁹

⁹ Intervenors also move to dismiss this appeal on the grounds that the concert authorized by the decision took place on September 17, 2011, and thus this appeal became moot after that date. Petitioners respond that the challenged permit can be renewed under the county code and its own terms to authorize similar future events, and thus petitioners' challenge to the permit is not moot. Because we decide that we have no jurisdiction over this appeal in any event, we do not reach the mootness issue.