BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RICHARD GREEN and EMILY GREEN,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent,

and

CHUCK HESTER and SANDY HESTER,
Intervenors-Respondents.

LUBA No. 2010-106

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 Douglas County.

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

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

HOLSTUN, Board Chair concurring.

REMANDED 04/04/2011

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

In 2003, intervenors were granted conditional use approval to host "weddings and receptions, reunions, and anniversaries" on their property on weekends as a home occupation. In the 2010 decision that is the subject of this appeal, the county approves an amendment to that 2003 conditional use approval to authorize the home occupation to host additional events and to hold those additional events on weekdays.

MOTION TO INTERVENE

Chuck Hester and Sandy Hester, the applicants below, move intervene on the side of respondent in this appeal. There is no opposition to the motion, and it is allowed.

FACTS

A. The Site

Intervenors' property includes approximately six acres and is located in the county Exclusive Farm Use – Cropland (FC) zone, which qualifies as a statutory exclusive farm use (EFU) zone. Tyee Road provides access to the property and runs east/west along intervenors' northern property line. The Umpqua River runs along intervenors southern property line. Petitioners Green own the adjoining property to the east. The Treadways own the adjoining property to the west. Record 27, 249.

The record includes a site plan. Record 249. According to that site plan, intervenors' home is located in the northeastern corner of the property, along with a shed, green house and a building that is identified as a "bridal cottage." Directly behind the house is a large open grassy area that is identified as a "ceremony area" that runs from intervenors' house along the property line shared with petitioners Green to the Umpqua River. Along the property's Umpqua River frontage there is a Gazebo, located approximately 127 feet west of petitioners' property. Eighty-two feet further west is a 40-foot by 100-foot "pavilion (reception area)." Immediately north of the pavilion is a 12-foot by 22-foot "catering

building." Immediately west of the pavilion is a "play area." A large grass parking area is located in the northwest quadrant of the property, along the south side of Tyee Road and the Treadways' property to the west. That parking area is connected to the pavilion by a gravel road that runs north/south, parallel to the Treadways' property to the west.

B. The 2003 Conditional Use Permit

There is no entirely satisfactory way to describe intervenors' home occupation. For lack of a better alternative, we will refer to it as an "event-site." The 2003 conditional use permit (CUP) limited the authorized home occupation as follows:

> "The Home Occupation shall be limited to conducting weddings and receptions, reunions, and anniversaries, and shall conform to the definition and standards for Home Occupations, as specified in Section 1.090 of the Douglas County Land Use and Development Ordinance." Record 1005.

The authorized events were limited to "one event per weekend (Saturday or Sunday)" and the 2003 CUP required that events "conclude no later than 9:00 p.m." Record 1006. In support of their request for conditional use approval in 2003, intervenors submitted a "Noise Impact Report." The 2003 CUP included a condition of approval that required "verification from a licensed acoustical engineer that the required sound system(s) and improvements have been installed in accordance with the recommendations outlined in the submitted Noise Impact Report." *Id*. Finally, the 2003 CUP included a condition of approval that required intervenors to construct a six foot tall sound fence along a portion of the shared property line with petitioners Green.

C. The 2010 Amendment

The 2010 CUP Amendment that is challenged in this appeal continues authorization for the events authorized by the 2003 CUP, and the limitations that were imposed on those events by the 2003 CUP, but also adds to the list of permissible events on the site. The additional events are: (1) "bridal showers," (2) "luncheons," (3) "teas," (4) "business meetings," (5) "birthday parties," and (6) "memorial services." Whereas the 2003 CUP only

authorized one event per week on Saturday or Sunday, the 2010 Amendment authorized the events on the expanded list of authorized events to be held on one weekday and on one weekend day each week. The 2010 Amendment also includes a condition that "[t]he total of all Home Occupation events conducted during any given week (i.e., not to exceed three (3) events), shall be limited to a maximum of 300 people * * *." Record 5.

D. The Events

The operational details of the authorized events are not very clear from the record. But for purposes of this appeal there does not appear to be any dispute that intervenors' participation in the events is largely limited to providing their property with its supporting facilities. The actual production of the events (conducting ceremonies, preparation of food and drinks, playing recorded music and other entertainment and parking management) is provided by caterers and other contractors, not by intervenors or employees of intervenors. There also does not appear to be any dispute that at least some of the events will be held in significant part outdoors, weather permitting, in the grassy area behind the house along the river, next to the gazebo and pavilion. For example the record includes photographs showing a large number of folding chairs set up in the grassy area, presumably for a wedding. Record 799, 800, 811, 812.

REPLY BRIEF

As we explain next in this opinion, the parties' legal arguments concerning whether petitioners may be precluded from bringing this appeal or be precluded from raising certain issues evolved slowly over the course of the briefing in this appeal. So that we may have the benefit of the parties' complete briefing regarding waiver and issue and claim preclusion, we allow petitioners' reply brief, which responds to waiver and issue and claim preclusion arguments in intervenors' response brief. Although somewhat unusual, we also allow intervenors' reply brief, which responds to petitioners' reply brief.

WAIVER/ISSUE PRECLUSION/CLAIM PRECLUSION

Home occupations are authorized and limited by statute. ORS 215.448. The county has adopted nearly identical standards for home occupation. Douglas County Land Use and Development Ordinance (LUDO) 1.090. Intervenors argue that many of the issues that petitioners raise in this appeal concerning whether the 2010 proposal complies with these statutory and LUDO requirements were raised in the 2003 CUP proceeding, or could have been raised in those 2003 proceedings, and therefore petitioners are barred from raising those issues in this 2010 appeal.

A. Waiver

In the decision that is before us in this appeal, the county repeatedly takes the position that petitioners are precluded from raising certain issues under the law of the case or waiver principle articulated in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992). Record 13. In particular, the county took the position that under *Beck* petitioners have waived their arguments that the home occupation authorized by the 2003 CUP or the expanded home occupation authorized by the 2010 CUP Amendment comply with statutory requirements that a home occupation (1) may employ "no more than five full time or part-time employees," (2) must be operated substantially in a residence or other building, and (3) "shall not unreasonably interfere with other uses permitted in the zone where the property is located."

In their petition for review, petitioners briefly respond as follows:

> "The county invokes an 'issue preclusion' theory citing *Beck v. City of Tillamook* * * *; a 'collateral attack' theory might be a better label, since the 2003 decision was in a completely different proceeding." Petition for Review 11.[1]

[1] Petitioner makes that point a second time on page 32 of the petition for review.

We agree with petitioners. Under *Beck*, a party at LUBA fails to preserve an issue for review if, in a prior stage of a *single proceeding*, that issue is decided adversely to the party or that issue could have been raised and was not raised. 313 Or at 154. We do not agree with the county that most of the issues that petitioners seek to raise in this appeal are issues that could have been raised in the 2003 CUP proceeding. But even more fundamentally, for purposes of analyzing alleged failures to preserve issues under *Beck*, the 2010 CUP Amendment is a different proceeding; it is not a continuation of the 2003 CUP proceeding. Petitioners waived no issues under *Beck*.

B. Issue and Claim Preclusion

Issue preclusion bars relitigation of an issue in subsequent proceedings when the issue has been determined by a valid and final determination in a prior proceeding. *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 103, 862 P2d 1293 (1993). Claim preclusion bars relitigation of claims that were previously decided or could have been decided in a prior proceeding. *Drews v. EBI Companies*, 310 Or 134, 140-41, 795 P2d 531 (1990).

1. Issue Preclusion

Turning first to issue preclusion, when an issue has been decided in a prior proceeding, the prior decision on that issue may preclude relitigation of the issue in a subsequent proceeding if five requirements are met: (1) the issue in the two proceedings is identical; (2) the issue was actually litigated and was essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded had a full and fair opportunity to be heard on that issue; (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding; and (5) the prior proceeding was the type of proceeding to which preclusive effect will be given. *Nelson v. Emerald People's Utility Dist.*, 318 Or at 104.

Intervenors contend that petitioners raise several issues in this appeal that were decided adversely to petitioners in 2003 and for that reason may not be raised in this appeal.

We understand intervenors to contend that petitioners are barred by issue preclusion from raising the following issues: (1) whether the pavilion and gazebo are "buildings" and whether the proposed event-site home occupation is "operated substantially in * * * buildings," as required by ORS 215.448(1)(c) (First Assignment of Error); (2) whether the proposed event-site home occupation employs more that five persons, in violation of ORS 215.448(1)(b) (Second Assignment of Error); and (3) whether the proposed event-site home occupation will produce noise that violates LUDO compatibility and ORS 215.448(1)(d) interference standards (Third Assignment of Error) It is not clear that issue preclusion applies generally in land use appeals. In at least two decisions, based on the fifth *Nelson* factor, LUBA has concluded that it does not. *Lawrence v. Clackamas County*, 40 Or LUBA 507, 519-20 (2001), *aff'd* 180 Or App 495, 43 P3d 1192 (2002); *Nelson v. Clackamas County*, 19 Or LUBA 131 (1990). However, as we noted in *Kingsley v. City of Portland*, 55 Or LUBA 256, 262-63 (2007), the Court of Appeals in *Lawrence* affirmed our decision in that appeal on narrower grounds, and reserved its opinion on whether under the fifth *Nelson* factor the issue preclusion doctrine categorically could never apply to land use proceedings. *Lawrence v. Clackamas County*, 180 Or App 495, 504, 43 P3d 1192 (2002). For purposes of this opinion we will assume without deciding that the fifth *Nelson* factor is present. However, as explained below, two other *Nelson* factors are missing and the issues petitioners raise in this appeal are not barred by issue preclusion.

a. The Second Nelson Factor

The second *Nelson* factor requires that "[t]he issue was actually litigated and was essential to a final decision on the merits in the prior proceeding." *Nelson*, 318 Or at 104. A copy of the 2003 CUP decision appears at Record 1008-11. Nowhere in that 2003 decision does the county actually address any of the issues that petitioners raise under ORS 215.448(1)(b), (c) and (d). Like ORS 215.448(1)(b), (c) and (d), LUDO 1.090 requires that a home occupation: (1) "be operated substantially in * * * [t]he dwelling * * *or * * *

buildings," (2) "employ on the site no more than five * * * persons, and (3) "not unreasonably interfere with other uses permitted in the zone." The 2003 CUP did not address whether the event-site home occupation proposed in 2003 complied with any of these requirements.[2] Instead, the 2003 CUP simply imposed a condition of approval that "[t]he home occupation shall be limited to conducting weddings and receptions, reunions and anniversaries, and shall conform to the definition and standards for Home Occupations, as specified in Section 1.090 of the Douglas County Land Use and Development Ordinance (LUDO)." Record 1010. Therefore the issues that intervenors argue are precluded in this appeal were not "actually litigated," as required by the second *Nelson* factor. Instead, the county substituted a condition of approval rather that require that that issue be litigated in 2003. The second *Nelson* factor is therefore missing and none of the issues that petitioners seek to raise in this appeal are barred by issue preclusion.

b. The First Nelson Factor

The first *Nelson* factor requires that "[t]he issue in the two proceedings is identical." With one exception, the issues that petitioners raise in this appeal are not the same issues that were raised or could have been raised in 2003, and for that reason the first *Nelson* factor is missing with regard to those issues.[3] Therefore, in addition to the second *Nelson* factor, the first *Nelson* factor is missing with regard to those issues as well. Those issues in the 2003 CUP were whether the 2003 CUP application for an event-site for "weddings and receptions, reunions and anniversaries" complied with statutory and LUDO requirements for home occupations. The issues that petitioners raise in this appeal are whether the proposal for a

[2] Neither did the 2003 CUP address whether the event-site home occupation proposed in 2003 complied with the LUDO 3.39.050 requirement that "[t]he proposed use is or may be made compatible with existing adjacent permitted uses[.]"

[3] As far as we can tell, the gazebo and pavilion have not changed between 2003 and 2010. Therefore, if their status as "buildings" as ORS 215.448(1)(c) and LUDO 1.090 use that word had been litigated in 2003, that issue likely would be barred by issue preclusion.

home occupation that is authorized to host bridal showers, luncheons, teas, business meetings, birthday parties, and memorial services complies with statutory and LUDO requirements for home occupations. The issues presented in 2003 and the issues presented in 2010 are not the same, and because they are not the same the issues presented in this appeal are not barred by issue preclusion. LUBA has encountered an incredible variety of home occupation proposals: auto repair business,[4] automobile repossession business,[5] bed and breakfast,[6] beauty/barber shop,[7] boat repair and storage business,[8] chiropractic clinic,[9] construction contracting business,[10] day care/group home,[11] emergency and fire vehicle brokerage,[12] excavation business,[13] fishing retreat,[14] florist,[15] log home kit manufacturing business,[16] mail order business,[17] paving business,[18] pilates studio,[19] video business.[20] If

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[4] *Greer v. Josephine County*, 37 Or LUBA 261 (1999); *Gibbons v. Clackamas County*, 35 Or LUBA 210 (1998); *Wuester v. Clackamas County*, 27 Or LUBA 314 (1994); *Roozenboom v. Clackamas County*, 24 Or LUBA 433 (1993).

[5] *Stevenson v. Douglas County*, 23 Or LUBA 227 (1992).

[6] *Cookman v. Marion County*, 44 Or LUBA 630 (2003); *Hatfield v. City of Portland*, 37 Or LUBA 664 (2000).

[7] *Constantino v. City of Hine*s, 15 Or LUBA 193 (1986).

[8] *Clemens v. Lane County*, 4 Or LUBA 63 (1981).

[9] *Casey v. Dayton*, 5 Or LUBA 96 (1982).

[10] *Henkel v. Clackamas County*, 56 Or LUBA 495 (2008); *Watts v. Clackamas County*, 51 Or LUBA 166 (2006).

[11] *Slavich v. Columbia County*, 16 Or LUBA 704 (1988).

[12] *Sheldon Fire & Rescue, Inc. v. Washington County*, 34 Or LUBA 474 (1998).

[13] *Munn v. Clackamas County*, 37 Or LUBA 621 (2000).

[14] *Tarbell v. Jefferson County*, 21 Or LUBA 294 (1991).

[15] *Latta v. City of Joseph*, 39 Or LUBA 318 (2001)

[16] *Ott v. Lake County*, 54 Or LUBA 502 (2007).

intervenors were proposing to amend the 2003 CUP to authorize the addition of one of those activities, for example an auto repair business, intervenors certainly would not contend that issues petitioners might raise concerning whether the newly proposed auto repair business component of the home occupation complies with statutory requirements for home occupations are barred by issue preclusion. While the issues presented in this appeal of intervenors' proposal to expand the types of events and the timing of those events at intervenors' previously approved event-site home occupation may be more similar to the 2003 CUP issues than they would be if intervenors were proposing to amend the CUP to add an auto repair business, they are not the same issues.

2. Claim Preclusion

Intervenors' claim preclusion argument is half-hearted and undeveloped. We do not see how the county's final decision on the 2003 CUP could possibly bar petitioners' present appeal of the 2010 amendment to that CUP. We therefore do not consider intervenors' claim preclusion argument further.

FOURTH ASSIGNMENT OF ERROR

An issue that arises throughout the petition for review, and is squarely presented in the fourth assignment of error, is whether the county was obligated in its 2010 decision to determine whether the event-site home occupation that it authorized in 2003 is operating within statutory limits on home occupations and conditions of approval that were imposed in the 2003 CUP, or whether the county need only consider whether the expansion of the event-

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[17] *Smith v. Clackamas County*, 25 Or LUBA 568 (1993).

[18] *Holsheimer v. Clackamas County*, 28 Or LUBA 279 (1994).

[19] *Stewart v. Coos County*, 45 Or LUBA 525 (2003).

[20] *Hightower v. Curry County*, 15 Or LUBA 159 (1986).

site home occupation that is authorized by the 2010 amendment to the 2003 CUP complies with LUDO standards governing home occupations in EFU zones.

In arguing that the county is obligated to determine whether the existing event-site home occupation is being operated in compliance with LUDO standards governing home occupations and the 2003 CUP, before the county may approve the disputed 2010 CUP Amendment, petitioners rely on LUDO 1.040.2, which provides:

> "A development shall be approved by the Director or other Approving Authority according to the provisions of this ordinance. The Director shall not approve a development or use of land that has been previously divided or otherwise developed in violation of this ordinance, regardless of whether the applicant created the violation, unless the violation can be rectified as part of a development proposal."

As petitioners correctly note, the LUDO defines the word "developed" broadly so that if activities on intervenors' property are inconsistent with the LUDO or the 2003 CUP, then intervenors' property has been "developed in violation of this ordinance," as LUDO 1.040.2 uses those words.

Petitioners contend that once they *alleged* violations of state law and the 2003 CUP during the county proceedings on the 2010 CUP amendment, LUDO 1.040.2 places a burden on intervenors to establish that the existing event-site home occupation complies with the cited state law and 2003 CUP condition or to demonstrate that any noncompliance will be rectified by the Amended CUP.

Although the county's response to this argument in its decision is terse, it is clear that the county does not agree with petitioners that the mere *allegation* of a violation, or even the presentation of evidence of violations in the 2010 proceedings, is sufficient to trigger application of LUDO 1.040.2:

> "This is not a proceeding to determine whether the current operation complies with the 10 approval conditions. That would be the proper subject of an enforcement action." Record 11-12.

As intervenors point out, LUDO 3.52.110 prohibits violations of the LUDO and conditions of permit approval.[21] LUDO 3.52.110 makes violations of the LUDO a nuisance, which may be "enjoined abated or removed." LUDO 3.52.125 provides that the circuit court "has jurisdiction over any and all violations of this ordinance." LUDO 3.52.150 authorizes the planning director or the director's designee to issue notices of violation. LUDO 3.52.425 provides that "[v]iolation proceedings shall follow the process set forth in ORS 153.005 to 153.145," which set out procedures for adjudicating alleged violations in circuit court. We understand the county to take the position that mere allegations of violations of the LUDO or presentation of evidence concerning possible violations during the 2010 CUP proceedings are insufficient to implicate LUDO 1.040.2 and petitioners' allegations of violations and the evidence petitioners submitted does not have the legal effect of obligating intervenors to establish that the existing event-site home occupation is being operated in compliance with state statures and 2003 CUP conditions of approval.

LUDO 1.040.2 is only implicated if intervenors' property has been "developed in violation of" the LUDO. While petitioners filed complaints about intervenors' event-site home occupation after the application for the CUP amendments was filed, no formal enforcement action has been initiated in circuit court against intervenors by either the county or petitioners. We understand the planning commission to have interpreted LUDO 1.040.2 to require more than petitioners' allegations and presentation of evidence that intervenors current event-site home occupation may violate the LUDO or the 2003 CUP. We understand the planning commission to have implicitly interpreted LUDO 1.040.2 to require a completed

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[21] LUDO 3.52.100 provides:

> "No person shall construct, erect, locate, maintain, repair, alter, enlarge, use or change the use or uses of any structure or property, or shall allow such, or shall transfer any property, in violation of this ordinance. A violation of a condition imposed as a consequence of an approval of a conditional use, or other condition imposed by the Approving Authority, shall be a violation of this ordinance."

enforcement action that concludes that intervenors event-site home occupation is in violation of the LUDO or 2003 CUP. While the planning commission's interpretation is not entitled to any deference under ORS 197.829(1), we cannot say that interpretation is erroneous. ORS 197.835(9)(a)(D).[22]

FIRST ASSIGNMENT OF ERROR

ORS 215.448 authorizes counties to approve home occupations. ORS 215.448(1) is the relevant part of the statute for purposes of this appeal and is set out below:

> "The governing body of a county or its designate may allow, subject to the approval of the governing body or its designate, the establishment of a home occupation *and the parking of vehicles* in any zone. However, in an exclusive farm use zone, forest zone or a mixed farm and forest zone that allows residential uses, the following standards apply to the home occupation:
>
> "(a) It shall be operated by a resident or employee of a resident of the property on which the business is located;
>
> "(b) It shall employ on the site no more than five full-time or part-time persons;
>
> "(c) It shall be operated *substantially in*:
>
> (A) The dwelling; or
>
> (B) *Other buildings* normally associated with uses permitted in the zone in which the property is located; and
>
> "(d) It shall not unreasonably interfere with other uses permitted in the zone in which the property is located." (Emphases added).[23]

In their first assignment of error, petitioners allege the existing event-site home occupation and the authorized expanded event-site home occupation violate the ORS 215.448(1)(c) requirement that a home occupation be "operated substantially in * * * [t]he

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[22] Under ORS 197.835(9)(a)(D), LUBA may reverse or remand a planning commission decision if the planning commission "[i]mproperly construed the applicable law."

[23] LUDO 1.090 includes an almost identically worded definition of "home occupation." In this opinion we refer to the statute.

dwelling * * *or [o]ther buildings normally associated with uses permitted in the zone[.]" Based on our disposition of the fourth assignment of error, we will not consider whether the *existing* event-site home occupation that was authorized by the 2003 CUP violates ORS 215.448(1)(c) or whether it has done so in the past. However, we will consider petitioners' ORS 215.448(1)(c) arguments concerning the events authorized by the 2010 CUP Amendment.

Most of the parties' arguments under the first assignment of error address the meaning of the word "substantially" in ORS 215.448(1)(c). However, petitioners also contend that activities conducted under the gazebo and the pavilion do not qualify as activities "in" a "building," as ORS 215.448(1)(c) uses those words.[24] The county's application of the "substantially" test hung almost entirely on the county's conclusion that activities conducted under the gazebo and pavilion qualify as activities "in" buildings. The substantially test requires the county to determine, essentially, which portion of the entire home occupation operation (with the exception of parking, as discussed below) occur out-of-doors and which portion occurs "in" the dwelling or qualified buildings. It is either one or the other. If activities conducted under the gazebo and pavilion are not activities "in" buildings for purposes of ORS 215.448(1)(c), if they are essentially out-of-doors activities, then there can be no possible dispute that the activities authorized under the 2010 CUP Amendment fail the substantially test, no matter how the term is construed. We therefore turn first to that question.

[24] Petitioners do not contend that the gazebo and pavilion are not "normally associated with uses permitted in the zone" within the meaning of ORS 215.448(1)(c). It is arguable that that phrase does not include structures that are purpose-built, or even extensively modified, to support a home occupation. *See Slavich v. Columbia County*, 16 Or LUBA 704, 708 (1988) (ORS 215.448 (1)(c) prohibits remodeling a barn into a day-care facility to include a kitchen, sleeping areas, etc., because such extensive alterations means that the structure is no longer a building normally associated with uses permitted in the zone). However, because petitioners do not raise that issue in this appeal and we do not consider it further.

A. Operated "In" Buildings

Petitioners argue:

> "[T]he open-air gazebo and open-air pavilion are not 'buildings' within the meaning of the statute and code. They have no sides. They do not enclose anything. * * *. The statute intends that home occupations be in buildings in order to limit the externalities. The statute says the use must be 'in' a building, not simply under the cover of a building. When the 'operated substantially in' test is applied, the county may not count open-air structures. This is both the plain language reading of 'in' and the common sense reading." Petition for Review 16.

Under LUDO 1.090 the terms "building" and "structure" are "synonymous." The term "structure" is defined as follows:

> "That which is built or constructed; an edifice or building of any kind or any piece of work artificially built up or composed of parts joined together in some manner and which requires location on the ground or which is attached to something having a location on the ground. * * *" LUDO 1.090.

As far as the LUDO definition of the terms "building" and "structure" is concerned, walls are not essential, and open-sided structures such as the gazebo and pavilion, or even structures such as an open, roofless deck or platform, technically qualify as "buildings." But the term "building" in ORS 215.448(1)(c) is a statutory term and it does not necessarily have the same meaning as the county's definition of that term. The term "building" is not defined in ORS 215.448.

Webster's Third New Int'l Dictionary 292 (unabridged ed 1981) defines "building" in relevant part as:

> "a constructed edifice designed to stand more or less permanently, covering a space of land, usu[ally] covered by a roof and more or less completely enclosed by walls, and serving as a dwelling, storehouse, factory, shelter for animals, or other useful structures—distinguished from structures not designed for occupancy (as fences or monuments) * * *."

It is not clear if the modifier "usually" modifies only the phrase "covered by a roof" or if it also modifies the following phrase, "and more or less completely enclosed by walls." If it modifies only the former phrase, then a building must be "more or less completely enclosed

by walls." If it modifies both phrases, then the phrase as a whole indicates that buildings are usually roofed and usually completely enclosed, but not necessarily. However, viewed in the particular context the term "building" appears in under ORS 215.448(1), we think the legislature intended that buildings in which the home occupancy occurs must be an enclosed structure of some type.

The operative word, in our view, is the requirement that the home occupation be operated substantially "in" a dwelling or building. The common sense understanding of being "in" a dwelling or building implies enclosure within or inside a dwelling or building. As an overworked preposition, "in" has many meanings, but when the object of the proposition is words like "dwelling" and "building" the most pertinent dictionary definition suggests that "in" means location in a "materially bounded object." *See* n 29. The statute in essence requires the county to distinguish meaningfully between activities that are out-of-doors, not in any building, and those that are "in" a dwelling or building. Activities are either inside or outside. We do not think there is any meaningful difference between activities conducted on an open-sided structure like a deck, or under a roofed open-sided structure like a canopy, gazebo or pavilion, and the same activity conducted on the open lawn, for purposes of ORS 215.448(1). A useful analogy may be to a proposed home occupation that will be conducted entirely on a covered but otherwise open-sided porch attached to a dwelling. The dwelling itself certainly qualifies as a potential enclosed space for the home occupation, but it cannot be meaningfully said that the activities conducted entirely on the porch are "in" the dwelling. Such activities would clearly be "outside" the dwelling, notwithstanding that they are conducted under a roofed structure.

Petitioners argue, and we agree, that one of the reasons why the legislature presumably required that the home occupation be substantially "in" a dwelling or building is that the legislature intended thereby to reduce the externalities of the home occupation. Home occupations are non-resource commercial uses in a resource zone that does not

generally allow such commercial uses, which are allowed only subject to several significant restrictions. As discussed below, the number of workers or employees that are part of the home occupation operation is sharply limited, presumably to keep the home occupation small in size and in part to reduce externalities. ORS 215.448(1)(d) requires a finding that the home occupation "shall not unreasonably interfere with other uses permitted in the zone in which the property is located," apparently intended to reduce adverse impacts or externalities on permitted uses on nearby properties in the resource zone. As far as reducing externalities go, we see little difference between an activity conducted under an open-sided gazebo or pavilion and the same activity conducted on the open lawn.

In sum, considered in context, we conclude that in requiring that the home occupation operation be conducted substantially "in" a dwelling or building, the legislature had in mind and intended that qualifying structures be enclosed, in order to reduce the size, impacts and externalities of home occupations. Activities conducted in open-sided structures are, for purposes of the substantiality test, conducted out-of-doors or outside, not "in" a dwelling or building, and therefore must be included on the out-of-doors side of the ledger.

Under the foregoing interpretation of ORS 215.448(1)(c), there is no possible dispute that the activities authorized by the 2010 CUP Amendment are not conducted substantially "in" a dwelling or building, no matter how liberally "substantially" is interpreted. For that reason, we could sustain this assignment of error and not address the parties' dispute over the meaning of "substantially." However, for the reasons set out in the concurrence, it is a reasonably close question whether activities under an open-sided gazebo or pavilion are "in" a building within the meaning of ORS 215.448(1)(c), and we deem it appropriate to address the parties' dispute regarding the meaning of "substantially" and how the substantiality test is applied. Therefore, for the remainder of this assignment of error we will assume, contrary to the above, that the open-sided gazebo and pavilion are qualifying "buildings" and that activities conducted under their roofs are "in" a building for purposes of ORS 215.448(1)(c).

For the reasons set out below, however, even with that assumption, we agree with petitioners that the county erred in concluding that the activities authorized by the 2010 CUP Amendment will be conducted "substantially" in a dwelling or building.

B. Operated "Substantially" in Buildings Normally Associated with Uses in the FC Zone

The parties' main disagreement is over the meaning of the word "substantially" in ORS 215.448(1)(c). Petitioner relies in large part on LUBA's decision in *Ott v. Lake County*, 54 Or LUBA 502 (2007). The "home occupation" in Ott was a log home kit construction business. The administrative and sales functions of that business were to be carried out in a single family dwelling on the property. But the balance of the business, a log storage yard and a fabricating facility, were conducted on 3 to 4 acres of the property and did not comply with the ORS 215.448(1)(c) requirement to be located within a dwelling or other building associated with uses permitted in the zone. The county found that the "majority" of the operation would be conducted within the dwelling, and therefore the operation considered as a whole met the substantiality test and qualified as a "home occupation." LUBA disagreed, concluding:

> "[T]he county erred in focusing on the administrative and sales functions of the business that would be conducted inside the dwelling, and essentially disregarding the manufacturing operation occurring on 3 to 4 acres of the property. The manufacturing site where the homes would be constructed, dismantled and then removed by truck is a significant part of the business activity that must be considered in determining whether the proposal can be approved as a home occupation. The construction and dismantling of the dwellings and the constant transport of the materials for the log home kits to and from the property is a significant part of the proposal. Those activities are not conducted in the dwelling or any structure normally associated with uses in an EFU zone. * * *" 54 Or LUBA at 506.

Based on *Ott*, petitioners argue that if the substantiality test is not met if a "significant part of the proposal" is conducted outdoors and not within a dwelling or other buildings. According to petitioners, there is no dispute that, even if the gazebo and pavilion qualify as "buildings," a "significant part of the proposal," indeed probably by far the largest part of the proposal as

measured by square footage used during events, is conducted on the large areas of open lawns between and around the gazebo and pavilion.

The county adopted the following findings concerning this issue:

> "* * * 'Substantially' means 'considerably;' it does not mean 'entirely.' While the existing use has outdoor components, the essentials of the main reception area and the preparation areas are uses conducted within the structures. The venue and use could not exist without these structures. On rainy days, the covered areas are essential to all functions. On sunny days, the covered areas offer relief from the summer heat and are again the most popular locations. Weddings are conducted within the gazebo, although some parties chose the open air. The buildings are essential because of the need to have guaranteed interior space if it rains. Since weddings are planned long in advance, involving long distance travel for some participants, venue is difficult to change. The great time duration of the event is the preparation, which occurs within the bridal cottage and other buildings, and the reception itself, which is focused in the pavilion and the catering building. * * *
>
> "The purpose of the use is to allow social gatherings which occur in substantial part in the four structures. The existing and proposed use take place over a continuity of socializing venues within the structures and among the outdoor amenities." Record 13-14.

Intervenors rely on *Ind. Refrigeration v. Tax Com.*, 242 Or 217, 408 P2d 937 (1965), a tax case that turned on whether "plaintiff was 'primarily engaged in manufacturing, processing or assembling materials into finished products for purposes of sale * * *" and therefore entitled to offset personal property tax against the corporate excise tax. 242 Or at 218. In that case, the Supreme Court determined that "'primarily' means 'chiefly' or 'principally' but that it does not necessarily mean 'over 50 percent.'" 242 Or at 220. In rejecting an argument that "primarily" means the same thing as "substantially," the Supreme Court explained:

> "To construe 'primarily' as meaning 'substantially' does not appeal to us as being a very practical solution to the problem. What is substantial: 25 per cent, 10 per cent, 2 per cent? If such a construction were given, it would create more problems than it solved. * * *. *Id.*

The Supreme Court went on to cite cases that have determined "the meaning of 'primarily' not to be 'principally' or 'chiefly' but to be of more consequence than 'substantially[.]" 247 or at 221. Based on *Ind. Refrigeration*, intervenors argue:

> "[*Ind.*] *Refrigeration* states that 'substantially' does not have a certain meaning; that it means a whole range of possibilities, none of which necessarily amount to more than 50%. 'Substantially' is less than 'primarily,' which may be less than 50%. The legislature did not give clear guidance, and with ORS 174.010 in mind, that vagueness was deliberate on the part of the legislature, presumably because of the range of uses that might be considered and because of the desire to allow local government some leeway in decision making." Intervenors-respondents' Brief 6.

We doubt a 1965 tax case in which meaning of the term "substantially" was not even the central question on appeal provides much help in understanding what the legislature meant by inserting the word "substantially" into ORS 215.448(1)(c) in 1995. That said we agree with intervenors that the meaning of "substantially" in ORS 215.448(1)(c) is ambiguous, although we see nothing in the legislative history of those 1995 amendments to suggest the legislature was being intentionally vague in choosing to insert that word in ORS 215.448(1)(c). Rather than infer an intended meaning from *Ind. Refrigeration* we believe it is appropriate to examine the legislative history of the 1995 amendments to gain some appreciation of the problem or problems that the 1995 amendments were intended to address to see if that might shed some light on what the legislature meant in using the word "substantially."

Based on our review of the legislative history of the 1995 amendments, we agree with the county that "substantially" does not mean "entirely." If the county is saying that as long as a significant portion of the home occupation is carried out inside a dwelling or building, the home occupation complies with ORS 215.448(1)(c), we think the legislative history supports that interpretation.

When ORS 215.448 was first enacted in 1983, it authorized the establishment of a "home occupation" in any zone and provided that a home occupation had to be "operated in

* * * [t]he dwelling * * * or [o]ther buildings." As relevant here, when ORS 215.448 was first enacted in 1983, it did not expressly authorize "parking of vehicles" in connection with a home occupation and the command that a home occupation be "operated in * * * [t]he dwelling * * * or [o]ther buildings" was not qualified by the word substantially. The 1995 amendments added those provisions, which are italicized in the current version of ORS 215.448(1) that was quoted above at the beginning of our discussion of the first assignment of error.

Legislative history of the 1995 amendments to ORS 215.448 show that the amendments were directed primarily at *Holsheimer v. Columbia County*, 133 Or App 126, 890 P2d 447 (1995). In that case, the county had approved, as a home occupation, the portion of a paving business "composed of the routine administration and bookkeeping functions of the business and storage of the equipment and vehicles and some of the materials used in the paving business." 133 Or App at 128. The Court of Appeals concluded that storage and parking aspects of the paving business violated ORS 215.448(1)(c).

> "Although petitioners contend that the pertinent on-site activities are limited to mere storage of equipment and paving materials, that 'storage' necessarily entails the constant movement of vehicles and equipment to and from [the paving business's] premises and off-site job locations. Indeed, such transport activities are inherently more intensive that the purported storage activity on the home-site itself. Moreover, the activities will not be limited to the structure where the storage itself is to take place. * * *" 133 Or App at 130.

The primary proponent for the 1995 amendments to ORS 215.448 was the attorney that argued on behalf of the paving company in *Holsheimer*. In a letter to the House Subcommittee on Energy and Environment, the attorney explained that the amendments were to allow home occupations to be approved even though that home occupation might be conducted in part outside of dwellings and qualifying structures and involve parking of vehicles on the site of the home occupation. The express reference to parking in the current version of ORS 215.448(1) solved the *Holsheimer* on-site equipment parking problem. The central concern in *Holsheimer* was not whether the paving business was being conducted

substantially within the dwelling or other structures on the property. The concern was with the Court of Appeals' and LUBA's focus on the travel to and from the site and the outdoor parking of equipment. The case that provided the primary motivation for the 1995 amendments was an outdoor parking case; it was not really a case that presented the question of whether the home occupation was being operated substantially in a dwelling or qualifying structure. It was the express authorization for parking in the 1995 amendments that solved the identified problem in *Holsheimer*, not the addition of the word "substantially."

However, in addition to citing the *Holsheimer* decision, the attorney supporting the 1995 amendments referred to three other LUBA decisions to illustrate the problems that the 1995 amendments were being proposed to address. *Weuster v. Clackamas County*, 25 Or LUBA 425 (1993); *Stevenson v. Douglas County*, 23 Or LUBA 227 (1992); and *Slavich v. Columbia County*, 16 Or LUBA 704 (1988).

In *Weuster* the home occupation was an automobile repair business that carried out the actual auto repairs inside a shop building but parked trailers and autos that were awaiting repair outside buildings. LUBA held this outside parking of trailer and cars violated ORS 215.448(1). In *Stevenson*, the home occupation was an automobile repossession business in which repossessed cars were parked outdoors temporarily after they were repossessed. LUBA held that that outside parking violated a local standard that paralleled ORS 215.448, even though a majority of the business occurred indoors. Finally, *Slavich* concerned a proposal to convert a "pole building with metal siding" for use as a "day care center/group home." 16 Or LUBA 705. The proposed use would take place inside the remodeled pole building, except for play periods for the children in a "small fenced-in play area." *Id.* at 709, n 1. LUBA held that because the proposed use was not to be carried out entirely within the remodeled building, it did not qualify as a home occupation under ORS 215.448(1)(c). *Id*. at 706.

We believe it is appropriate to assume that the legislature believed the home occupations in *Holsheimer*, *Weuster*, *Stevenson*, and *Slavich* would all have passed muster under the amended version of ORS 215.448(1)(c). The paving business in *Holsheimer* consisted of parking of equipment, which is specifically allowed under the 1995 amendments and the storage of some materials. The other onsite business activities (administrative and bookkeeping functions) were entirely within the dwelling. Similarly the automobile repair home occupation in *Weuster* and the automobile repossession home occupation in *Stevenson* consisted of parked vehicles awaiting repair (*Weuster*) or return to the creditor (*Stevenson*), which under the 1995 amendments is specifically allowed, and the actual repair of those vehicles or business functions of the repossession business, which was done entirely within buildings. *Slavich* is the case that likely sheds the most light on what the legislature had in mind when it used the word "substantially" in ORS 215.448(1)(c). The day-care facility at issue in *Slavich* took place entirely within a converted pole building with metal siding, except for outdoor play periods in a small, fenced-in play area.

With that background we turn to the meaning of "substantially." *Webster's Third New Int'l Dictionary* 2280 (unabridged ed 1981), rather tautologically defines the adverb "substantially" to mean "in a substantial manner: so as to be substantial." The entry for the related term "substantial" has several definitions. The only definition having any bearing on relative size, scope or proportion is the fourth:

> **4 a :** being that specified to a large degree or in the main < a ~ victory> <a ~ lie> **b :** of or relating to the main part of something **syn** see MASSIVE." *Id.*

Based on the above definition and the facts in *Slavich*, we think the legislature most likely intended "substantially" to mean that the home occupation must be conducted in the dwelling or buildings "to a large degree," "in the main," or as the "main part," compared to the portion that is conducted outside the dwelling or buildings. In other words, as expressed in adverbial form, the home occupation must be "largely" or "mainly" conducted in the dwelling or building. That is consistent with our conclusion in *Ott*, where the portion of the operation

conducted in the dwelling was much less extensive than the portion conducted outdoors, and we concluded the proposed operation did not constitute a "home occupation." The above interpretation is also consistent with the apparent legislative intent to limit the size and scope of home occupations to reduce externalities, as discussed above, because if the "main part" of the home occupation must be indoors, limited to the size of the existing dwelling or existing resource buildings, then that will inherently limit the size and scope of the outdoor portion. The county's and intervenor's interpretation, under which the most extensive or "main part" of the home occupation could occur out-of-doors, but the operation as a whole could still comply with ORS 215.448(1), as long as some ill-defined but not-insignificant portion of the operation occurred indoors, is inconsistent with the above definitions and the apparent legislative intent. We therefore reject the county's and intervenor's interpretation.

Under the above interpretation (or even under the county's limited view of what "substantially" means, and even assuming that activities taking place under the gazebo and pavilion are activities "in" buildings for purposes of ORS 215.448(1), and thus excluded from the out-of-doors side of the ledger), we agree with petitioners that the record and decision does not demonstrate that the 2010 CUP Amendment authorizes activities that will occur "substantially" in the dwelling or buildings normally associated with uses permitted in the resource zone.

Turning specifically to the events authorized by the 2010 CUP Amendment, the large parking area would have been a serious problem under the pre-1995 version of ORS 215.448(1)(c), but with the 1995 amendments such parking is expressly allowed and is not considered as part of the "substantially" analysis. Based on the record in this appeal, little is known regarding how the events authorized by the 2010 CUP will be carried out and the 2010 CUP Amendment imposes no limits on where events may occur on the site and does not require that any part of an event be held inside the buildings on the property. During nice weather, for example, there is simply no reason to believe that the birthday parties,

memorials or luncheons authorized by the 2010 CUP Amendments will be conducted "substantially" in the pavilion or any other building on the property, even under the county's limited view of the term "substantially." Stated differently, there is every reason to believe that during good weather such events will be conducted almost entirely outside buildings, with at most only food and drink preparation occurring in buildings. If that occurs, and there is nothing in the 2010 CUP Amendment to prevent it from occurring, those birthday parties, memorials or luncheons will not be "operated substantially in * * * [t]he dwelling * * *or * * * [o]ther buildings * * *" as required by ORS 215.448(1)(c), under any definition of that term.

To summarize our resolution of this portion of the first assignment of error, the home occupation events authorized by the 2010 CUP Amendments must be "operated substantially in * * * [t]he dwelling * * *or * * * [o]ther buildings * * *" as required by ORS 215.448(1)(c). To satisfy that statutory requirement, the events must be carried out in "large part," "in the main," or as the "main part" in the dwelling or buildings, compared to the portion that is conducted outside the dwelling or buildings. It is possible that the events authorized by the 2010 CUP could meet that standard, assuming the gazebo and pavilion qualify as buildings for purposes of ORS 215.445(1)(c), but only if conditioned to limit the extent of uses that occur outside qualifying buildings. The 2010 CUP decision does not include any such conditions and, as it stands, the authorized events could be carried out almost entirely outside buildings in the grassy area that is set aside for such events. For that reason alone the 2010 CUP Amendment authorizes a home occupation that does not comply with ORS 215.448(1)(c).

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

In their second assignment of error, petitioners allege the existing event-site home occupation and the authorized expanded event-site home occupation violate the ORS

215.448(1)(b) requirement that a home occupation in an EFU zones "shall employ on the site no more than five full-time or part-time persons."

As we have already explained, whether the event-site home occupation authorized by the 2003 CUP complies with ORS 215.448 is not before us in this appeal. But the issue of whether the event-site home occupation authorized by the 2010 CUP Amendment complies with ORS 215.448(1)(b) is before us. The parties in this appeal seem to agree that the 2010 CUP Amendment authorizes events at the site and authorizes persons who lease the site for events to engage contractors and others to put on the events authorized by the 2010 CUP Amendment. We therefore assume that it does. The parties also seem to agree that the 2010 CUP allows use of more than five persons to carry out events on the site. We therefore assume that it does.

Petitioners argued below that the event-site home occupation authorized by the 2010 CUP Amendment violates ORS 215.448(1)(b). Petitioners argued:

> "The home occupation employs, either directly or indirectly, more than five persons. Mr. and Mrs. Hester are employees. Other people working on site include, but are not limited to: caterer(s), parking attendant(s), DJ(s), bartender(s), cake decorator(s), wedding planner(s), stylist(s), waitperson(s), chauffeur(s), florists, photographer(s) and ministers." Record 1079.

The county found that the persons petitioners reference above are not intervenors' employees and therefore authorized events do not violate ORS 215.448(1)(b), even if persons other than intervenors contract with more than five persons to put on events at intervenors' property.[25] Petitioners argue that anyone working on intervenors' property should be considered part of the home occupation operation of intervenors, for purposes of applying the ORS 215.448(1)(b) five-person cap.

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[25] The relevant finding is set out below:

> "Green asserts that the use employs more than 5 employees. Green fails to differentiate employees of the operator (Hester) with invited guests who perhaps are the agents of the persons letting the facility. Merely 'working' on the site does not make a person an employee of the business. * * *" Record 498.

Although ORS 215.448(1) was previously quoted, we set it out again here to facilitate our resolution of this assignment of error.

> "The governing body of a county or its designate may allow, subject to the approval of the governing body or its designate, the establishment of a home occupation and the parking of vehicles in any zone. However, in an exclusive farm use zone, forest zone or a mixed farm and forest zone that allows residential uses, the following standards apply to the home occupation:
>
> "(a) It shall be operated by a resident or employee of a resident of the property on which the business is located;
>
> "(b) It shall employ on the site no more than five full-time or part-time persons[.]"

The "It" referred to in ORS 215.448(1)(a) and (b) is intervenors' home occupation. Under ORS 215.448(1)(a) the home occupation must be operated by "a resident or employee of a resident." Intervenors are the residents and as far as we are informed they have not operated and will not operate the event-site home occupation, and intervenors have no employees and do not intend to hire employees to produce events on the site. Assuming as we do that the 2010 CUP permits intervenors' home occupation to operate in that manner, it would appear to violate the ORS 215.448(1)(a) requirement that intervenors event-site home occupation must be operated by intervenors and their employees. However, petitioners do not assign error under ORS 215.448(1)(a). We therefore do not consider that question and turn to the five "person" limit in ORS 215.448(1)(b).

Under ORS 215.448(1)(b) intervenors' event site home occupation may "employ on the site no more than five * * * persons. It is undisputed that in carrying out the events authorized by the 2010 CUP the services of more than five persons may be required and under the 2010 CUP those services will be provided on the site. The county's sole answer to whether employing more than five persons to produce those events violates ORS 215.448(1)(b) is that the persons so employed are "agents of the persons letting the facility" rather than intervenors' employees.

We agree with petitioners that as ORS 215.448(1)(b) is worded, its five person limit is not so easily avoided. The "it" in ORS 215.448(1)(b) is intervenors' event-site home occupation. Under ORS 215.448(1)(b), that event-site home occupation may not "employ" more than "five * * * persons."[26] Intervenors event-site home occupation "employs" the persons who are required to produce events on the site, within the meaning of ORS 215.448(1)(b), whether they are intervenors' employees or independent contractors or whether they are the employees or independent contractors of the attendees of the events. In either case the event-site home occupation employs those persons to produce the event.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

ORS 215.448(1)(d) requires that a home occupation "shall not unreasonably interfere with other uses permitted in the zone in which the property is located." LUDO 3.39.050.1, one of two LUDO conditional use standards, requires that "[t]he proposed use is or may be made compatible with existing adjacent permitted uses and other uses permitted in the underlying zone." Petitioners contend the county's findings regarding noise impacts on nearby properties are inadequate and are not supported by substantial evidence. The county's findings are set out in part below:

> "Neighbors expressed concern that the increased scope of use will lead to increased noise. The applicants provided evidence indicating that the amount of noise generated by the current use is not reasonably objectionable to neighbors for example in Green's position. There are sound barriers in place. There is about 300 feet of distance to the Green residence, which includes a gulch and thick vegetation that mutes sound. The sound system has been professionally designed to minimize neighborhood disturbance. The

[26] The word "employ" is defined as follows:

> "**1a** : to make use of * * * **b :** to use or occupy (as time) advantageously * * * **c :** to use or engage the services of * * * ; also : to provide with a job that pays wages or a salary or with a means of earning a living * * * **d :** to devote to or direct toward a particular activity or person * * * e : OCCUPY * * *." *Webster's Third New Int'l Dictionary* 743 (unabridged ed 1981).

testimony of the acoustics expert, which we find credible, is that the Umpqua River makes more noise at the property line than the sound system.

"As reported at the July 15th hearing, the sound system was checked by Steve Curwick. The sound system is designed to prevent amplification beyond the pre-set parameters, regardless of the input signal source (e.g., CD's computers, radio). The amplification and processing side of the system is part of the subject property operation.

"Curwick's report shows that the sound system adds less than 5 dB A to ambient noise levels, and is well within acceptable community guidelines. Curwick is a certified audio and electronic technician; these are professional journeymen credentials. Curwick has worked in consultation with Arthur Noxon, the acoustical engineer who consulted on the project. The installed sound system complies with the engineer's recommendations. The performance data provided by Curwick prove that the system does not unduly disturb the neighbors, and is harmonious with surrounding uses. There is no evidence the events generate substantial additional noise from the participants, and given the wedding and other polite social events that are sought, it is unlikely such events will generate substantial objectionable noise in view of the limitations of the permit conditions.

"The applicants utilize a speaker system recommended by the acoustic engineer Noxon. They also use an approved amplifier and computer controlled audio mixer with automatic gain control. The automatic gain control maintains a constant audio output SPL [sound pressure level] regardless of input volume. This ensures that the SPL will not exceed the acoustic parameters set by Noxon.

"The original CUP has four conditions of approval in place to mitigate noise. Conditions 6-9. There have been no complaints submitted to the Planning Department enforcement program against the Home Occupation regarding noise from the time it began operation under the current CUP until the Major Amendment was requested." Record 19-20.

Petitioners complain that the county does not specifically cite or set out the text of the ORS 215.448(1)(d) interference criterion or the LUDO 3.39.050.1 compatibility criterion. But there does not appear to be any question that the county considered whether the home occupation creates noise that unreasonably interferes with nearby residences which are the most affected uses and whether the home occupation is compatible with those residences. The failure to identify or set out the operative language of ORS 215.448(1)(d) and LUDO 3.39.050.1 is at most harmless error.

Petitioners testified below that the noise mitigation measures are not working and that their properties are unreasonably impacted by noise. Reasonable persons can certainly disagree about whether noise mitigation impacts are sufficient to render the noise that is generated by intervenors' event-site home occupation compatible with adjoining residences or whether that noise results in unreasonable interference with their residences. However, the county's findings are adequate to explain why the county believes the noise impacts do not violate ORS 215.448(1)(d) or LUDO 3.39.050.1, and the evidentiary record supports those findings.

The third assignment of error is denied.

The county's decision is remanded.

Holstun, Board Chair, concurring.

I agree with the majority that the 2010 CUP authorizes an expanded event-site home occupation that, as authorized, could be operated "substantially" outside the "dwelling" and any "buildings" on the property and employ more than "five * * * persons" and, therefore, the 2010 CUP authorizes a home occupation that is inconsistent with ORS 215.448. However, I do not agree with the majority that the gazebo and pavilion are not "buildings," as that word is used in ORS 215.448(1)(c).

ORS 215.448(1) only applies to home occupations in an "exclusive farm use zone, forest zone or a mixed farm and forest zone." ORS 215.448(1)(c) requires that home occupations in such zones must be "operated substantially in" "[t]he dwelling * * *or * * * buildings normally associated with uses permitted in the zone in which the property is located." The majority focuses on the words "in" and "buildings," and speculates that one of the reasons the legislature adopted ORS 215.448(1)(c) is to "reduce the externalities of home occupation."

I see no basis for speculating that ORS 215.448(1)(c) was adopted to address legislative concerns about "externalities of home occupations," or relying in large part on

such speculation to conclude the legislature intended that ORS 215.448(1)(c) buildings must be fully enclosed by walls. The previous sections of ORS 215.448(1) limit employees and the very next section of ORS 215.448(1) after ORS 215.448(1)(c) directly requires that a home occupation "shall not unreasonably interfere with other uses permitted in the zone in which the property is located." ORS 215.448(1)(d). ORS 215.448(1)(d) might have the effect of indirectly necessitating that a noisy home occupation be located in a building with four walls, to reduce off-site noise impacts. But that has no bearing on whether the gazebo and pavilion fail to qualify as "buildings," simply because they are not fully enclosed by walls. If we are going to speculate about what the legislature intended when it required that a home occupation be operated in a "dwelling" or "buildings normally associated with uses permitted in the zone," I think it is probably much more likely that the legislature adopted ORS 215.448(1)(c) to ensure that buildings other than those "normally associated with uses permitted in the zone," would not be constructed to house home occupations.[27]

The main problem with the majority's conclusion that the "buildings" referenced in ORS 215.448(1)(c) must be surrounded by walls is that there is absolutely no textual support for reading in that requirement, and there is context that I think suggests the legislature did not intend that the buildings referenced in ORS 215.448(1)(c) must always have walls. I think the dictionary definition quoted by the majority only says buildings *usually* have walls. The 2010 Oregon Structural Code defines "building" broadly to include: "[a]ny building used or intended for supporting or sheltering any use or occupancy." 2010 Oregon Structural Code Section 202. Under the Oregon Structural Code, a building need not have walls.[28] The dictionary definition of the word "in" does not support the majority's inference that to be

[27] As initially adopted in 1983, ORS 215.448(1)(c) did not include the "substantially" test and simply required that a home occupation be operated in a dwelling or "buildings normally associated with uses permitted in the zone in which the property is located."

[28] That definition is likely broader than the legislature intended, if it would permit locating a home occupation in or on an uncovered deck.

"in" a building that building must have walls.[29] I have no trouble saying a person is "in" the pavilion and gazebo, after one passes the vertical supports of those buildings and steps onto the floor and under the roof.

Rather than speculate that ORS 215.448(1)(c) must have been adopted to address concerns about noise or other externalities, I believe it is more appropriate to view that legislative word choice in context. Again, ORS 215.448(1)(c) requires that a home occupation be operated in a "dwelling" or in "buildings normally associated with uses permitted in the zone." Intervenors' property is zoned FC. The FC zone is a statutory EFU zone and permits, among other things, "farm uses" and "buildings and accessory uses customarily provided in conjunction with farm use." LUDO 3.4.050(1) and (3). Structurally, the pavilion closely resembles a pole barn. Pole barns and other farm buildings are frequently open sided. I think the legislature was well aware that agricultural buildings commonly are not fully enclosed by walls. If the legislature wanted home occupations to be limited to agricultural buildings that are fully enclosed by walls it would have said so. I see no basis for writing in a requirement that the "buildings" referenced in ORS 215.448(1)(c) must be fully enclosed by walls. Doing so, I believe, runs afoul of ORS 174.010 by inserting a limitation that is not fairly inferred from the text and, I believe, is inconsistent with the context.[30]

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[29] As relevant, *Webster's Third New Int'l Dictionary* 1139 (unabridged ed 1981) defines "in" as follows:

> "**1 a** (1) – used as a function word to indicate location or position in space or in some materially bounded object <put the key [in] the lock> <travel [in] Italy> <play [in] the street> <wounded [in] the leg> <read [in] bed> <look up a quotation [in] a book> * * *."

[30] ORS 174.010 provides:

> "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, *not to insert what has been omitted*, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all." (Emphasis added.)