

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

3  
4                   ALLEN WILLIS, KIM WILLIS, MIKE MOORE,  
5                   RICHARD JOHNSON, JEFFREY WALTER,  
6                   JOHN JOHNSON, CHRIS HERGERT,  
7           EDWARD RASMUSSEN, KIMBERLY RASMUSSEN  
8                   JEFF PLYMATE, JEFFREY CAMERON,  
9                   ALISSA CAMERON and STEVE COPHER,  
10                                   *Petitioners,*

11  
12                                   vs.

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14                   CLACKAMAS COUNTY,  
15                                   *Respondent,*

16  
17                                   and

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19                   TOAL PROPERTIES, LLC,  
20                                   *Intervenor-Respondent.*

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22                                   LUBA No. 2017-021

23  
24                                   FINAL OPINION  
25                                   AND ORDER

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27                   Appeal from Clackamas County.

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29                   Allen Willis, Kim Willis, Mike Moore, Richard Johnson, Jeffrey Walter,  
30                   Chris Hergert, Edward Rasmussen, Kimberly Rasmussen, Jeff Plymate, Jeffrey  
31                   Cameron, Alissa Cameron, and Steve Copher represented themselves. Allen  
32                   Willis, Sandy, filed the petition for review and argued on his own behalf.

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34                   No appearance by Clackamas County.

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36                   Dorothy Cofield, Portland, filed the response brief and argued on behalf  
37                   of intervenor-respondent.

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

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4 AFFIRMED

10/20/2017

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

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**NATURE OF THE DECISION**

Petitioner appeals a decision by the hearings officer approving a conditional use permit for a home occupation to host events in a pole barn.<sup>1</sup>

**FACTS**

Intervenor-respondent Toal Properties, LLC (intervenor) applied for a conditional use permit to construct a pole barn and operate a home occupation events center on 28.37 acres of 34.72 acres of property zoned Rural Residential Farm Forest-5 Acres (RRFF-5). The subject property is bounded by the Sandy River on the north, SE Hull Road on the south, by property zoned RRFF-5 to the east and by property zoned exclusive farm use that contains a dwelling to the west. A public use airport is also located on the property, and includes several airport hangars and a runway.

The subject property is comprised of four lots, which for convenience we refer to by tax lot number. Tax Lot 100 includes a dwelling occupied by Jack and Georgia Hoffman. Adjacent to Tax Lot 100 to the west is Tax Lot 200. Adjacent to Tax Lot 100 to the east is Tax Lot 1400, on which the proposed pole barn and events would be located. No dwelling is located on Tax Lot 1400. Adjacent to Tax Lot 1400 to the east is Tax Lot 1100.

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<sup>1</sup> Petitioner Allen Willis is the only petitioner who filed a petition for review.

1 A hearing on the application was held, and petitioner and others testified  
2 in opposition to the proposal. The hearings officer approved the application,  
3 and this appeal followed.

4 **FIRST ASSIGNMENT OF ERROR<sup>2</sup>**

5 ORS 197.835(9)(a)(C) provides that LUBA shall reverse or remand a  
6 land use decision if LUBA finds that the local government “[m]ade a decision  
7 not supported by substantial evidence in the whole record[.]” In his first  
8 assignment of error, we understand petitioner to argue that the traffic study and  
9 engineer’s testimony submitted by intervenor and its engineer in order to  
10 establish compliance with Clackamas County Zoning and Development  
11 Ordinance (ZDO) 1203.03(C) does not amount to substantial evidence that the  
12 approval criterion is met.<sup>3</sup> In his decision, the hearings officer reviewed the  
13 evidence intervenor provided in the traffic study and testimony from  
14 intervenor’s traffic engineer, and concluded it was sufficient to demonstrate  
15 that the application complies with ZDO 1203.03(C). Record 3-4.

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<sup>2</sup> The petition for review includes a paragraph that partially quotes OAR 660-004-0020(2)(a), which applies when a reasons exception to a statewide planning goal is sought. No reasons exception was sought here, and therefore we do not address petitioner’s quote of OAR 660-004-0020(2)(a).

<sup>3</sup> Although petitioner does not cite it in his petition for review, the decision addresses traffic impacts in the context of ZDO 1203.03(C), which requires intervenor to demonstrate that “the safety of the transportation system is adequate to serve the proposed use.” Record 3-5.

1           Petitioner first points to a statement in the decision that “the county’s  
2 traffic engineer agreed with the applicant’s traffic engineer: ‘SE Oral Hull  
3 Road is a gravel public road that is not maintained by the county’.” Record 3.  
4 Petitioner argues that the statement is inaccurate and that SE Oral Hull Road is  
5 in fact a paved road and is maintained by the county. Record 3. According to  
6 petitioner, the inaccuracy of the statement in the decision demonstrates that the  
7 traffic study and testimony provided by intervenor’s traffic engineer are not  
8 credible evidence.

9           Petitioner also challenges the accuracy of the traffic counts included in  
10 the study and argues that the traffic study is not credible, for two reasons. First,  
11 petitioner argues that the traffic study does not accurately measure traffic  
12 impacts because the counts were taken on two mid-week days, when events are  
13 proposed for weekends. Second, petitioner argues that the traffic counts are not  
14 accurate where the counts were taken during a time when two nearby  
15 businesses that generate traffic on adjacent roadways were closed, one for  
16 hunting season and the second for annual maintenance.

17           Intervenor responds, and we agree, that a reasonable person could rely  
18 on the traffic study to conclude that ZDO 1203.03(C) was met. *Dodd v. Hood*  
19 *River County*, 317 Or 172, 179, 855 P2d 608 (1993) (substantial evidence is  
20 evidence a reasonable person would rely on in making a decision). In his  
21 decision, the hearings officer addressed the same arguments that petitioner now  
22 makes in his petition for review, citing testimony from the applicant’s traffic

1 engineer responding to criticisms of the traffic study. Absent a developed  
2 challenge to the findings and testimony on this point, petitioner has failed to  
3 establish that the hearings officer’s decision is not supported by substantial  
4 evidence in the whole record.

5 The first assignment of error is denied.

6 **SECOND ASSIGNMENT OF ERROR**

7 In his second assignment of error, we understand petitioner to argue that  
8 the hearings officer’s decision improperly construes ORS 215.448(1)(d), and is  
9 not supported by substantial evidence in the whole record.<sup>4</sup> ORS  
10 197.835(9)(a)(C) and (D). Petitioner argues that the home occupation will  
11 interfere with use of the public airport located on the subject property by  
12 hanger tenants and the aviation community at large.

13 ORS 215.448(1)(a)-(d) provide standards that apply to a proposed home  
14 occupation in “an exclusive farm use zone, forest zone or a mixed farm and  
15 forest zone that allows residential uses[.]” ORS 215.448(1)(d) provides that the  
16 home occupation “shall not unreasonably interfere with other uses permitted in  
17 the zone in which the property is located.” The subject property is located in a  
18 rural residential zone, and that is not one of the zones to which the standards in  
19 ORS 215.448(1)(a)-(d) apply. Accordingly, to the extent petitioner argues that  
20 ORS 215.448(1)(d) applies to the proposed home occupation, petitioner’s

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<sup>4</sup> Although petitioner cites ORS 215.448(1)(c), it is reasonably clear from his argument that he intended to cite ORS 215.448(1)(d). Petition for Review 5.

1 argument in the second assignment of error provides no basis for reversal or  
2 remand of the decision.<sup>5</sup>

3 The second assignment of error is denied.

#### 4 **THIRD ASSIGNMENT OF ERROR**

5 In his third assignment of error, we understand petitioner to argue that  
6 the hearings officer improperly construed ZDO 806.03 when he approved the  
7 conditional use permit. As relevant here, ZDO 806.03 provides:

8 “A home occupation to host events shall comply with the  
9 following standards:

10 “A. The home occupation shall be sited on a lot of record that  
11 contains a lawfully established dwelling.

12 “B. The operator of the home occupation shall be a resident of  
13 the property on which the home occupation is located.

14 “C. The home occupation shall have no more than five full-time  
15 or part-time employees on the site.”

16 In his third assignment of error, we understand petitioner to argue that the  
17 hearings officer improperly construed ZDO 806.03(A) and (B) by approving  
18 the home occupation and pole barn to be located on Tax Lot 1400, which does  
19 not contain a dwelling, and where the operators of the home occupation live on

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<sup>5</sup> ZDO 713.04(N) provides that certain uses are permitted outright in the county’s Public Use Airport and Safety Overlay Zone, and that “[u]ses not identified in Subsection 713.04, but permitted in the underlying zoning district may be permitted if they do not conflict with permitted uses in Subsection 713.04, safety, or the continued operation and vitality of the airport.” The hearings officer adopted findings that address ZDO 713.04(N), and petitioner does not acknowledge or address those findings, or cite ZDO 713.04(N).

1 Tax Lots 100 and 200. Intervenor responds that petitioner failed to raise the  
2 issue raised in his third assignment of error before the close of the initial  
3 evidentiary hearing, and he therefore is precluded from raising the issue for the  
4 first time at LUBA. ORS 197.763; ORS 197.835(3).<sup>6</sup>

5 Petitioner has not responded to intervenor’s argument that the issue  
6 raised in the third assignment of error is waived or otherwise established that  
7 the issue was not required to be raised in order to raise it at LUBA. We agree  
8 with intervenor that the issue raised in the third assignment of error was not  
9 raised below, and thus is waived on appeal.<sup>7</sup> *See Boldt v. Clackamas County,*

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<sup>6</sup> ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

ORS 197.835(3) provides:

“Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.”

<sup>7</sup> The staff report to the hearings officer took the position that ZDO 806.03 was met because the application included both Tax Lots 1400 and 100, and Jack and Georgia Hoffman live on Tax Lot 100 while the events are proposed on Tax Lot 1400. Record 75. The hearings officer adopted the findings in the staff report. Record 2.



1 107 Or App 619, 623, 813 P2d 1078 (1991) (issues presented during the  
2 proceedings below must give the county “fair notice” that it needs to address an  
3 issue).

4 The third assignment of error is denied.

5 The county’s decision is affirmed.