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

1000 FRIENDS OF OREGON,
Petitioner,

and

ROBERT POWELL, JAMES STERLIN,
and LINDA LACEY,
Intervenors-Petitioners,

vs.

CLACKAMAS COUNTY,
Respondent,

and

MARK HERKAMP,
Intervenor-Respondent.

LUBA No. 2020-051

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Andrew Mulkey, Portland, filed a petition for review and argued on behalf of petitioner.

Mike J. Sargetakis, Portland, filed a petition for review and argued on behalf of intervenors-petitioners. With him on the brief was Oxbow Law Group.

Nathan K. Boderman, Assistant County Counsel, and Chris Killmer, Certified Law Student, Oregon City, filed a response brief and argued on behalf of respondent. With them on the brief was Stephen L. Madkour, County Counsel.

Tyler D. Smith, Canby, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Tyler Smith & Associates, PC.

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

REMANDED 10/30/2020

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

Opinion by Rudd.

NATURE OF THE DECISION

Petitioner appeals a county hearings officer decision approving a conditional use permit (CUP) to host events as a home occupation on land zoned exclusive farm use (EFU).

FACTS

The subject property is approximately 12.5 acres in size and zoned EFU. Located south of Oregon City and west of Highway 213, the subject property is

> "in an area of EFU-zoned properties with predominantly agricultural uses and scattered rural homesites. The property is rectangular shaped with a creek and large pond on the northern portion. There is an existing residence close to Highway 213. There are two existing barns, an upper barn in the southwest corner and a lower barn in the northeast corner[.]" Record 3.

The subject property is adjacent to Mueller Road, an approximately one-mile, dead-end road. Intervenor-respondent (applicant) applied to the county for a CUP authorizing the hosting of events on the subject property as a home occupation. Proposed development plans include renovating the two existing barns to accommodate event use, including the addition of a banquet area, dance floor, and catering preparation kitchen with a sink and service entrance. Plans also include constructing a new building containing restrooms, a new parking lot, and new septic and well water systems. Event attendees would access the property via Mueller Road from Highway 213.

On February 20, 2020, the hearings officer held a public hearing on the application, where opponents expressed concerns related to event traffic:

> "This road that measures only 17' to 18' in most places, is less than a mile in length, is not lit or maintained and the only way in and out for residents and emergency vehicles. It simply cannot accommodate 100 cars, 70 cars or even 50 cars in a short time span.
>
> "* * * * *
>
> "The average wait to get onto the highway is 1-2 minutes and can be as much as five. With dozens of cars coming and going, I can't imagine how long it will take to get out of our own driveway." Record 191, 284.

Following the public hearing, the hearings officer issued an order leaving the record open for the submission of additional evidence and testimony, including to allow the Oregon Department of Transportation (ODOT) to respond to the applicant's traffic impact analysis (TIA). Record 45. On April 20, 2020, the hearings officer issued his decision, in which he explained:

> "ODOT responded that it would approve the proposed development with two conditions of approval—that the applicant submit a traffic control plan (TCP) and widen Highway 213 to include a left turn lane onto Mueller Road. The construction of a left turn lane onto Mueller Road would be prohibitively expensive, so the applicant's traffic engineer worked with ODOT to find an acceptable alternative." Record 5.

The applicant's traffic engineer and ODOT concluded that a condition of approval restricting event size, coupled with a requirement that applicant coordinate TCPs with ODOT, would keep traffic and safety at acceptable levels.

Record 5-6. The hearings officer approved the application subject to conditions of approval. This appeal followed.

MOTION TO STRIKE

The county's response brief states, "Respondent hereby incorporates and adopts as its own the response filed by Intervenor-Respondent Mark Herkamp ('Applicant')." Respondent's Response Brief 1. At oral argument, petitioner moved to strike the incorporation by reference as improperly allowing the county to exceed the word limit on response briefs set forth in OAR 661-010-0030(2)(b) and -0035(2). OAR 661-010-0065(1) requires that motions be in writing. Accordingly, the Board instructed petitioner to file his motion to strike in writing within three days of oral argument. Petitioner timely filed a written motion to strike. The county did not respond to the motion.

We will ignore a brief's incorporation of assignments of error in another brief where that incorporation causes the brief to exceed the length allowed by our rules. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 360, 391 (2013) (so stating in the context of a petition for review). The motion to strike is granted. We will not consider applicant's response brief as part of the county's response.[1]

[1] We do consider applicant's response brief on its own, so it is unclear what petitioner gains from the motion to strike.

PETITIONER'S ASSIGNMENT OF ERROR

Petitioner argues that the hearings officer's decision miscontrues ORS 215.488 and is not supported by substantial evidence in the record.

A. Introduction

ORS 215.448 provides:

> "(1) 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.
>
> "(2) The governing body of the county or its designate may establish additional reasonable conditions of approval for the establishment of a home occupation under subsection (1) of this section.

"(3) Nothing in this section authorizes the governing body or its designate to permit construction of any structure that would not otherwise be allowed in the zone in which the home occupation is to be established.

"(4) The existence of home occupations shall not be used as justification for a zone change."

Implementing ORS 215.448, Clackamas County Zoning and Development Ordinance (ZDO) Table 401 provides that home occupations to host events are conditionally allowed in the EFU zone, subject to ZDO 806. ZDO 806.02 provides, in part:

"Home occupations to host events shall comply with the following standards:

"A. Operator: The operator shall reside full-time in a lawfully established dwelling unit on the tract on which the home occupation is located.

"B. Employees: The home occupation shall have no more than five employees.

"C. Type of Buildings: Notwithstanding the definition of home occupation in Section 202, *Definitions*, in the AG/F, EFU, and TBR Districts, the home occupation shall be operated substantially in the operator's dwelling or other buildings normally associated with uses permitted in the applicable zoning district.

"* * * * *

"E. Impacts on Dwellings: In the AG/F, EFU, and TBR Districts, the evaluation of compliance with Subsection 1203.03(D) shall include consideration of impacts on dwellings even though dwellings are not primary uses in these zoning districts.

"* * * * *

"H. Guests: The maximum number of guests for any single event is 300. However, to the extent necessary to comply with Subsection 1203.03, a lower limit may be imposed based on site capacity constraints."[2] (Underline and italics in original.)

B. First Subassignment of Error

Petitioner argues that "[t]he county lacks substantial evidence in the record that the applicant, another resident of the property, or one of their employees will 'operate' the 'home occupation.'" Petitioner's Petition for Review 7.

1. Preservation of Error

Applicant maintains that "[a]n argument that Applicant was not the operator of the home occupation was not preserved below." Intervenor-Responent's Response Brief 2. Petitioner responds that it did raise the issue below, citing its statement that "[s]imply making space available for others to rent does not establish that the applicant actually 'operates' the business in the sense implied by the home occupation statute." Petitioner's Petition for Review 4 (citing Record 213). We agree with petitioner that the issue was raised below. The decision recognizes that "1000 Friends argue that the applicant 'has not

[2] ORS 215.448 does not define the term "home occupation." ZDO 202 defines "home occupation" as "[a]n occupation or business activity that results in a product or service and is conducted in whole or in part, in a dwelling unit, an accessory building normally associated with primary uses allowed in the subject zoning district, or both."

established that his business serves as his occupation' or that he would 'operate' the business." Record 13. This issue was preserved.

2. ORS 215.448(1)(a)

ORS 215.448(1)(a) requires that the operator of the home occupation reside on the premises. Applicant described his plan as being to retire and run the business with "no full time employees. During events, it is anticipated that a small number of planners, caterers and servers will be brought in by the individual parties as necessary." Record 353. Petitioner argues that:

> "Because the applicants will not operate the events that they want to allow others to host on their property, they fail to meet the statutory approval criteria for a home occupation on EFU land. ORS 215.448(1)(a). The hearings official lacks support of substantial evidence in the record to demonstrate that the applicant will 'operate' the home occupation as required by statute." Petitioner's Petition for Review 6.

We review the hearings officer's construction of the law to determine whether it is correct. *Tylka v. Clackamas County*, 34 Or LUBA 14, *aff'd*, 153 Or App 414, 960 P2d 397, *rev den*, 327 Or 620 (1998). In addition, the hearings officer's decision must be supported by substantial evidence, that is, evidence a reasonable person would rely upon to make a decision. *Younger v. City of Portland*, 305 Or 346, 752 P2d 262 (1988). We agree with applicant that the hearings officer's decision correctly construes the law, and is supported by substantial evidence.

ZDO 806.01(c) defines an operator as "[t]he person who conducts the home occupation, has majority ownership interest in the home occupation, and is

responsible for strategic decisions and day-to-day operations of the home occupation." The hearings officer found:

> "1000 Friends neither acknowledge nor address the ZDO, and I fail to see how it is even remotely possible that the applicant would not be the person who has a majority interest in the home occupation and would be responsible for strategic decisions and day to day operations. The mere fact that the applicant would make the space available for others to rent would hardly change this fact—despite 1000 Friends' protestations to the contrary. 1000 Friends' argument is without merit." Record 14.

The application narrative states, "The property owner will typically be on-site during events to assist with general coordination, parking and other activities and may utilize 3-4 assistants as required." Record 353. A condition of approval requires that the applicant or his designee monitor noise at all events. Record 20. The decision explains:

> "The applicant is a Gladstone police officer who is trained in applying noise ordinances and operating a noise meter, so he would be more able than the average home occupation to host events operator to adhere to the noise requirements. The applicant has offered to personally monitor noise levels at all events." Record 8.

With regard to signage, applicant points to a provision in the record requiring that signs be removed no more than 24 hours after an event.[3] Record 18. The decision

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[3] Although applicant points to evidence that other home occupations allowing the hosting of events have been approved by the county, those approvals do not explain why this application meets the relevant standards. Moreover, the hearings officer did not rely on those approvals, but rather relied on fact that the applicant is, as the owner of the property, the majority owner of the home occupation and necessarily responsible for day to day decisions.

notes that "[t]he number of events and guests has changed during the process of the application, but the applicant now proposes no more than 44 events per year with varying numbers of guests allowed depending on the day of the event." Record 3. As approved,

> "[d]uring the months of November through March, no more than five events shall be allowed per week. During the months of April through October, no more than seven events shall be allowed per week. No more than a total of 44 events shall be allowed per year." Record 19.

Pursuant to the decision, "[i]t shall be the responsibility of the property owner(s) to comply with [the decision] and the limitation of approval described [t]herein." Record 17. Thus, the applicant is responsible for operational matters such as maintaining the event calendar and monitoring noise and sign removal. This is evidence upon which a reasonable person would rely to conclude that the applicant will operate the home occupation.

Petitioner cites *Green v. Douglas County*, 63 Or LUBA 200 *(Green I)*, *rev'd and rem'd*, 245 Or App 430, 263 P3d 355 (2011) (*Green II*). In *Green I*, we observed in *dicta* that there may be instances where an applicant for a home occupation permit authorizing the hosting of events will not meet the requirement that they be the "operator." We stated:

> "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)." *Green I*, 63 Or LUBA at 224.

This observation does not, however, establish that an applicant whose business plan includes the use of contractors retained by the customer can never be the operator of a home occupation to host events. The hearings officer did not misconstrue the term "operated" in ORS 215.448(1)(a) or "operator" in ZDO 806.01(C).

Petitioner's first subassignment of error is denied.

C. Second Subassignment of Error

Petitioner's second subassignment of error is that there is not substantial evidence in the record that the home occupation will employ no more than five full-time or part-time persons as required by ORS 215.448(1)(b). Petitioner invites us to consider the complex planning and implementation that a 300-guest wedding may entail and argues that it is not possible to successfully staff such an event with no more than five full-time or part-time persons. We reject the invitation and agree with applicant that substantial evidence supports the hearings officer's determination that this criterion is met.

Although "employee" is not defined in ORS 215.448, it is defined in ZDO 806.01(A) to include "[a]ny on-site person, whether they work full-time or part-time in the home occupation, including, but not limited to, the operator, partners,

assistants, and any other persons participating in the operation of the home occupation" and, in the EFU zone, to include "persons employed by contract to provide services for a single event, such as caterers, photographers, and florists."[4] Applicant argues that the existence of similar home occupations in the county is evidence that such event facilities are able to meet this criteria. However, as we explained above, the existence of other approvals is not relevant

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[4] In *Green I*, the county concluded that the statutory bar on employing more than five persons to host events did not restrict the number of contractors used to staff those events. We disagreed and explained:

> "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.' 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." *Green I*, 63 Or LUBA at 224-25 (footnote omitted).

to whether substantial evidence supports the finding that the standard is met by applicant's application. *See* ___ Or LUBA at ___ n 3 (slip op at 11 n 3).

During the review process, applicant explained:

> "Just some of the combinations of 5 persons that can make the applicant[']s events work are as follows: For weddings, the five-employee limit can be achieved by scheduling of activities. All food preparation will be done off site, with minimal final prep done on-site. The casual atmosphere of the venue will lend itself to buffet style services, which will eliminate the need for most servers. There are a variety of ways a wedding might be conducted including the following: 1- operator, 3- planner/servers, 1- photographer, 1- DJ; or 1- operator, 2- planner/servers, 2- musicians; or 1- operator, 1-planner, 3- servers. Planning and arrangements will be made in advance to control and limit the event to match the capability of any 5 persons that have to work on the event." Record 41.

The hearings officer found that, based on applicant's representations, it is feasible to staff events with no more than five persons at one time. Record 12. Petitioner argues that there is not substantial evidence that a 300-person event can be held with only five employees on site at one time, but the application does not provide an absolute right to 300-person events. If petitioner is ultimately correct and it is impossible to host a 300-person wedding with only five workers on site, then the size of the event will have to decrease in order to comply with the condition of approval requiring that the home occupation "have no more than five full-time or part-time employees on the site." Record 19. However, that does not mean that the decision is not supported by substantial evidence.

Petitioner's second subassignment of error is denied.

D. Third Subassignment of Error

In its third subassignment of error, petitioner argues:

> "[T]he legislature did not intend to allow applicants to expand the scope of their home occupation by juggling the number of employees on site at any one time. * * * Petitioner respectfully disagrees with LUBA's prior interpretation of ORS 215.448(1)(b).
>
> "LUBA was wrong to conclude that the statute allows an applicant to 'count the number of persons who are employed on site at any given time' rather than the total number of people employed to carry out the use." Petitioner's Petition for Review 12 (quoting *Green v. Douglas County*, 67 Or LUBA 234, 245-46 (2013) (*Green III*)).

In *Green III*, we held,

> "Petitioners contend ORS 215.448(1)(b) limits the number of persons who are employed on the site, whether they are employed on the site 'full-time or part-time.' Under petitioners' interpretation of ORS 215.448(1)(b) a person who is employed on the site for one hour would count as one of the five persons ORS 215.448(1)(b) permits the home occupation to employ on the site, and any part-time person who was employed on site for one hour that day after the first person left would count as another of the five persons ORS 215.488(1)(b) permits. Petitioners offer a colorful 'five orange jump suit' description of the county's interpretation and a 'take a check' description for the county's and their interpretations.
>
> "Both petitioners' interpretation and the planning commission's interpretation is possible, because ORS 215.448(1)(b) does not specify the period of time that the five person limit is to be applied. And therefore both petitioners' and the county's interpretation can be criticized as adding to the statute the underlined language below:
>
> > "'It shall employ on the site no more than five full-time or part-time persons <u>each day</u>.' Petitioners' Interpretation.

> "'It shall employ on the site no more than five full-time or part-time persons at any one time.' The Planning Commission's Interpretation.
>
> "We doubt the legislature envisioned home occupations like the one at issue in this appeal. We also doubt the legislature considered the possibility that home occupations would employ potentially large numbers of persons who would shuttle onto and off of the site. The legislature likely intended the five person limit to apply at any given point in time (the planning commission's position) or per day (petitioners' position), as opposed to per week, per month or per year. But the statute is simply silent about the period of time that the five person limit is applied to. Although it is a reasonably close call, we conclude the planning commission's interpretation is at least as consistent with the language of ORS 215.488(1)(b) as petitioners'. Under the planning commission's interpretation all that is required is to count the number of persons who are employed on the site at any given time. In our view, that interpretation requires less embellishment of the statute than petitioners' interpretation." *Green III*, 67 Or LUBA at 244-46.

Our reasoning remains the same. The five-employee limit restricts the home occupation to five employees on site at one time.

Petitioner's third subassignment of error is denied.

E. Fourth Subassignment of Error

Petitioner's fourth subassignment of error is that the extent of renovations and construction associated with the home occupation violates ORS 215.448(1)(c)'s requirement that, in an EFU zone,

> "[The home occupation] 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[.]"

Petitioner also argues that the home occupation violates ORS 215.448(3)'s provision that:

> "Nothing in this section authorizes the governing body or its designate to permit construction of any structure that would not otherwise be allowed in the zone in which the home occupation is to be established."

For the reasons set forth below, we sustain this subassignment of error.

The property includes two barns. Applicant explains that the lower barn has deteriorated aluminum siding and "is simply framed-in on top of dirt that is sloped at essentially the natural slope; the walls do not extend all the way to the ground." Intervenor-Respondent's Response Brief 14 (citing Record 143). The decision authorizes renovation of the lower barn to include a new entry vestibule, new emergency exit doors, and six large new garage-style doors along the building's sides. New siding and weatherization and soundproofing improvements will be installed. A floor for dancing, a catering preparation area without cooking equipment, and a service entrance will be added, as will a paved parking lot, a new patio, and bicycle parking.

The proposed renovations to the smaller upper barn include the creation of a meeting space and "Brides and Grooms rooms" to support the use of the lower barn. Record 349. Two ADA bathrooms and a patio are proposed to be added to the upper barn.

The conditions of approval include:

"All construction activities, and all changes of use (occupancy type),

> shall comply with applicable Oregon Specialty Codes and local ordinances. All such codes and ordinances apply to such activities, even when permits and inspections are not required." Record 20.

Petitioner argues that this condition of approval necessarily means that the barns will change from a storage use to an assembly use under the Oregon Specialty Codes. Petitioner's Petition for Review 16-17. Petitioner maintains that commercial dance and banquet halls are not allowed uses in the EFU zone, that the renovated barns are not "normally associated" with uses permitted in the EFU zone, and that the renovations mean that the barns will no longer be agricultural buildings customarily provided in conjunction with farm use.

The hearings officer concluded:

> "According to 1000 Friends the two exi[s]ting barns would somehow no longer be barns if they were used to host events but rather would be transformed into dancing halls or event centers. Barns are undoubtedly 'buildings normally associated with uses permitted in the [EFU] zoning district.' Just because the barns may be used for hosting events does not mean they would not still be barns. While the applicant proposes to improve the barns by adding a hard floor[] (rather than dirt) and sound/water proofing that would hardly change their identification as barns." Record 12.

We agree with petitioner that the question presented in this assignment of error is similar to that presented in *Slavich v. Columbia County*, 16 Or LUBA 704, 709 n 3 (1988), wherein we explained that ORS 215.448 "prohibits remodeling to such an extent that the building could not be newly constructed in the zoning district." ORS 215.448(3) provides that nothing in ORS 215.448 authorizes the county to permit construction of a "structure that would not

otherwise be allowed in the zone in which the home occupation is to be established." *Slavich* involved an appeal of a CUP for a home occupation day care/group home in the Single-Family Residential (R-10) zone. The subject property was a 2.25-acre site containing the applicants' dwelling, daughter-in-law-occupied mobile home, and a pole building that the county described as a barn or shed. The pole building was proposed to be remodeled to accommodate the day care center/group home,

> "including removal of the hay loft and horse stalls, paving of the dirt floor, and construction of an office, bathroom, kitchen, baby room and sleep room. On the exterior of the building, existing chicken coops will be removed, the entrance improved, cedar siding added, and an attached, fenced-in play area constructed." 16 Or LUBA at 705 (citation omitted).

The petitioner argued that the county erred in granting the CUP for the home occupation because the permit allowed the applicant to remodel and make substantial changes to the characteristics of the existing pole building. The petitioner acknowledged that the existing pole building was a type of building typically found in the R-10 zone, but argued that "the extensive remodeling proposed by the applicants [would] change the building to one *not* typically found in the R-10 zone." *Id.* at 707. We agreed that the proposed renovations

> "would radically change [the pole building's] nature, to the point that its interior would retain none of its present characteristics as a barn or shed. As remodeled, the structure would no longer constitute a building normally accessory to the uses permitted in the R-10 zone. We conclude allowing such extensive alterations to the existing structure is prohibited by ORS 215.448(1)(c)(B) and (3)."

Id. at 708.

Applicant argues that *Slavich* is distinguishable because, in applicant's view, the proposed barn modifications do not change the nature of the existing structures. Intervenor-Respondent's Response Brief 15-16 (quoting Record 303-04). However, we agree that the changes to the lower barn with a dance floor, sound proofing, and an area described in the application narrative as catering preparation area (without cooking equipment) is an extensive renovation that changes the character of the building and is therefore not allowed by ORS 215.448(3). Record 349. The upper barn renovations add restrooms and "Brides and Grooms rooms"; the floor plan does not show the existing barn horse stalls or other barn features and we assume they are proposed to be eliminated. Record 349, 399; Intervenor-Respondent's Response Brief 14. We agree with petitioner that the upper barn renovations also violate ORS 215.448(3).

Petitioner also argues that the hearings officer improperly excluded the new restroom building from his review of the barn renovations, instead finding that the restrooms are uses and structures customarily accessory and incidental to the existing dwelling. The hearings officer explained:

> "I tend to agree with the applicant that the proposed restrooms are 'uses and structures customarily accessory and incidental to a dwelling' so they would be 'other buildings which are normally associated with uses permitted' in the EFU zone." Record 12.

We agree with petitioner that the hearings officer erred in approving the restroom building. Although restrooms are a common component of modern *dwellings*, the

new restroom building and its associated septic field are needed to provide ADA compliant restrooms and septic systems to accommodate up to 300 people at a time for a non-residential and non-agricultural use. There is no evidence to support a conclusion that the restroom building is accessory to the existing dwelling. Moreover, there is no evidence in the record that a free standing restroom with the septic system capacity to serve 300 people per event is a structure or use customarily associated with a dwelling on EFU land.

The hearings officer also found, "Even if [the restrooms are not uses or structures customarily accessory and incidental to a dwelling], ZDO 806.02(C) only requires that the home occupation be *substantially* operated in the dwelling or other buildings associated with uses permitted in the underlying zone." Record 12-13. Under the hearings officer's approach, the restroom building is allowed as long as the home occupation will not be operated substantially in the restroom building. We agree with petitioner that the substantially operated criterion does not negate ORS 215.448(3)'s additional restriction that:

> "Nothing in this section authorizes the governing body or its designate to permit construction of any structure that would not otherwise be allowed in the zone in which the home occupation is to be established."

The restroom building is not accessory to the dwelling or a structure that applicant has shown would otherwise be allowed in the zone.

Petitioner's fourth subassignment of error is sustained.

Petitioner's assignment of error is sustained, in part.

INTERVENORS-PETITIONERS' ASSIGNMENT OF ERROR

ZDO 1203.03 sets forth the general approval criteria applicable to CUPs. Under ZDO 1203.03(C), the "safety of the transportation system [must be] adequate to serve the proposed use." Intervenors-petitioners' (intervenors') assignment of error is that the hearings officer's finding of compliance with ZDO 1203.3(C) is not supported by substantial evidence.

A. First Subassignment of Error

The first page of the TIA submitted by applicant and relied upon by the hearings officer states:

> "Based on information from the applicant and Clackamas County staff, the venue would accommodate typical event sizes of approximately 120 people, with an average of approximately 3 people per vehicle. Maximum event size would consist of approximately 200 people, again with an average of 3 people per vehicle." Record 97.

Intervenors' first subassignment of error is that the hearings officer's decision that the safety criterion was met is not supported by substantial evidence because the hearings officer "fail[ed] to connect the restricted number of *attendees* per event to the unrestricted number of *vehicles* per event." Intervenors-Petitioners' Petition for Review 5. Intervenors contend:

> "ODOT recommended Intervenor-Respondent construct a two-stage left-turn lane in the impact area. Intervenor-Respondent found the idea of mitigating his proposed impacts by paying for reasonable improvements to Highway 213 unworkable, and instead attempted to develop an alternate solution: placing a capacity limit on the commercial event venue. This capacity-limit condition varies from

> 105 to 200 attendees with various time of day limitations. What this Condition does not do, is connect the number of people at a given event to the number of vehicles on Mueller Road in any meaningful way." Intervenors-Petitioners' Petition for Review 6-7 (citations omitted).

The county responds, initially, that intervenor failed to raise this issue prior to the close of the hearing, as required by ORS 197.763(1).[5] Intervenors respond that they did not have an obligation to predict the content of the findings and therefore did not have to "strictly preserve" this error. Intervenors-Petitioners' Reply Brief 2. Instead, intervenors argue that their subassignment of error that "the findings fail to explain how the attendance cap demonstrates compliance with the traffic safety conditions of approval" is adequately preserved because intervenors raised concerns about traffic safety impacts. Intervenors-Petitioners' Reply Brief 3. However, we do not understand intervenors' argument in their petition for review to challenge the adequacy of the hearings officer's findings, but rather to argue that the hearings officer's decision is not supported by substantial evidence in the record. Intervenors-Petitioners' Petition for Review 5.

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[5] 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, add the parties an adequate opportunity to respond to each issue."

The purpose of preservation is to avoid unfair surprise. Raising an issue with sufficient specificity requires that the "governing body, planning commission, hearings body or hearings officer, and the parties are afforded an adequate opportunity to respond to each issue." ORS 197.763(1); *see also Lett v. Yamhill County*, 32 Or LUBA 98, 107 (1996) (where "[i]t was perfectly evident at the hearing that the county would consider only the area included in a circle with a one-half mile radius," and petitioner did not object to that limitation below, petitioner failed to give fair notice of his objection). Because intervenors never challenged the guests-per-vehicle assumption in the TIA, neither the hearings officer nor the other participants were provided an opportunity to respond to the challenge intervenors now bring. Similarly, the use of the one-vehicle-per-three-attendees assumption was clear below, intervenors did not object, and they therefore failed to preserve the error. *Lowery v. City of Portland*, 68 Or LUBA 339, 353 (2013) (because petitioner failed to raise below that traffic report in record did not include technical support, "any issue concerning the missing technical information is waived and cannot be raised for the first time at LUBA"). We agree with the county that intervenors did not preserve this subassignment of error.

However, even if the issue were raised, we agree with applicant that the decision is supported by substantial evidence in the record. The hearing officer concluded:

"I agree with ODOT and the applicant's traffic engineer that in order

> to ensure that the safety of the transportation system is adequate for the proposed use that the number of guests must be limited to 200 or less Monday through Saturday (and 300 on Sunday). I also agree with the time restrictions quoted earlier.* * * With the proposed restrictions on number of guests and event times along with conditions of approval requiring TCP coordinated with ODOT, I agree that the safety of the transportation system would be adequate for the proposed use." Record at 6 (footnotes omitted).

The hearings officer relied on applicant's TIA. Record 5-6. In the TIA, applicant's traffic engineer explained that

> "traffic operations and safety differ significantly based on the time of day and day of week. As such, both the need for specific TCP measures and the need for road widening to accommodate a two-stage left turn refuge depend on the size and time of permitted events." Record 29.

The traffic engineer reported that, based on its discussions with ODOT staff, it was confident that limiting event size and working with ODOT to develop TCPs would enable the project to move forward without the need to widen Highway 213. The hearings officer determined that traffic and safety levels would be acceptable if the number of guests were restricted by day and time of event, and if TCPs were approved by ODOT. Record 6. This is evidence upon which a reasonable person would rely and, therefore, substantial evidence.

Intervenors' first subassignment of error is denied.

B. Second Subassignment of Error

As discussed above, ZDO 1203.03(C) requires that the application demonstrate that "the safety of the transportation system is adequate to serve the proposed use." Intervenors' second subassignment of error is that the hearings

officer erred by failing to address safety concerns related to ZDO 1203.3(C) by allowing a 14-fold increase in traffic on Mueller Road. Intervenors-Petitioners' Petition for Review 10. Intervenor argues that the hearings officer's findings ignore testimony that it is already difficult to access Highway 213 from Mueller Road.

The hearings officer recognized:

> "Opponents argue that Highway 213 is a busy highway and it is already difficult, and often delayed, to turn onto Highway 213 from Mueller Road. According to opponents, the proposed additional traffic would make the Highway 213 and Mueller Road intersection unsafe." Record 5.

The hearings officer found:

> "The applicant's traffic engineer prepared the TIA and submitted it to ODOT. ODOT responded that it would approve the proposed development with two conditions of approval—that the applicant submit a [TCP] and widen Highway 213 to include a left turn lan[e] onto Mueller Road. The construction of a left turn lane onto Mueller Road would be prohibitively expensive, so the applicant's traffic engineer worked with ODOT to find an acceptable alternative. The applicant's traffic engineer worked with ODOT and determined that the following conditions of approval would keep traffic and safety levels acceptable at the Mueller Road and Highway 213 intersection if guests were limited to 200 people per event:
>
> "1) Mid-Week Days—Events with more than 120 attendees should not end prior to 6:00 PM.
>
> "2) Fridays—Events with more than 105 attendees should not end prior to 6:00 PM.
>
> "3) Saturdays—Events with more than 180 attendees should not end prior to 5:00 PM.

"4) Sundays—No restrictions on event sizes or times." Record 5.

The additional conditions of approval are:

> "1) The applicant shall submit a [TCP] to manage and mitigate impacts to OR 213 during events. The TCP shall be implemented during each scheduled event. The TCP shall be reviewed and approved by ODOT. A Permit from ODOT District 2B will be required for implementation. The analysis must be conducted by a Professional Engineer registered in the State of Oregon.
>
> "2) The applicant shall provide annual reports to ODOT for review to evaluate traffic performance and safety which may be used to modify TCP requirements." Record 6-7.

The hearings officer relied on the TIA and ODOT's agreement with the proposal. The hearings officer acknowledged opponents' safety concerns and concluded that applicant's TIA and ODOT's agreement resolved the safety concerns.

Intervenors' second subassignment of error is denied.

DISPOSITION

Petitioner seeks "reversal or remand." Petitioner's Petition for Review 2. As we explained in *Richmond Neighbors v. City of Portland*,

> "OAR 661-010-0071 provides that LUBA shall reverse a decision when '[t]he decision violates a provision of applicable law and is prohibited as a matter of law,' while LUBA shall remand a decision when '[t]he decision improperly construes the applicable law, but is not prohibited as a matter of law.' According to petitioners, whether reversal or remand is appropriate depends on whether it is the decision or the proposed development that must be corrected. If the identified errors can be corrected by adopting new findings or accepting new evidence, petitioners argue, then remand is

appropriate. If the identified errors require a new or amended development application, then reversal is appropriate.

> "As noted, respondents do not address whether remand or reversal is the appropriate remedy, if the first assignment of error is sustained. It might be possible that compliance with the [relevant] requirement could be demonstrated on remand, without significant changes to the proposed development. However, as far as we can tell, it is more likely that compliance with the * * * requirement will require, at a minimum, more than insignificant changes to the existing application, if not a new application. Absent some assistance from respondents on this point, we agree with petitioners that reversal is the appropriate disposition." 67 Or LUBA 115, 129 (2013) (citing *Angius v. Washington County*, 35 Or LUBA 462, 465-66 (1999); *Seitz v. City of Ashland*, 24 Or LUBA 311, 314 (1992)).

Petitioner, intervenors, applicant, and the county do not address whether remand or reversal is appropriate if we sustain an assignment of error in this case. We conclude that, because it may be possible for the county to approve the home occupation without the extensive renovations and construction elements for the barns and additional restroom building, remand is the appropriate remedy.

The county's decision is remanded.