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

RED GRAPES, LLC,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent.

LUBA No. 2022-069

REBECCA PUSKAS
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent.

LUBA No. 2022-070

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Steve C. Morasch filed a petition for review and reply brief and argued on behalf of petitioner Red Grapes, LLC. Also on the brief was Landerholm, P.S.

Rebecca Puskas filed a petition for review and reply brief and argued on behalf of themselves.

Nathan K. Boderman, Assistant County Counsel, filed a response brief and argued on behalf of respondent. Also on the brief was Stephen L. Madkour.

ZAMUDIO, Board Member; RYAN, Board Chair, participated in the

decision.

RUDD, Board Member, did not participate in the decision.

REVERSED 11/18/2022

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

Opinion by Zamudio.

NATURE OF THE DECISION

Petitioners appeal a hearings officer's decision approving a chiropractic and massage therapy clinic as a home occupation.

BACKGROUND

This is the second time that this land use dispute has been before LUBA. *See Red Grapes, LCC v. Clackamas County*, ___ Or LUBA ___ (LUBA Nos 2021-103/106, Mar 30, 2022) (*Red Grapes I*).

The subject property is a 5.71-acre parcel zoned Rural Residential Farm Forest 5-acres (RRFF-5) that is located outside of the West Linn Urban Growth Boundary and within the Metro Urban Growth Boundary. The property is improved with a single-family dwelling (the dwelling) and a sheep barn. The dwelling is located on top of a hill, with a long driveway connecting to Wisteria Road. A dilapidated structure is also located on the property 900 feet downhill from the dwelling, closer to Wisteria Road. The dilapidated structure is the original residence for the property. The dwelling is on a separate building site on the same parcel.

The applicant, Wihksne, who is not a party in this appeal, owns the subject property and resides in the dwelling. Wihksne intends to demolish the dilapidated structure and construct a new chiropractic clinic building (clinic building) in its place. The dwelling is not visible from the proposed clinic building site. Wihksne applied to the county for land use approval for a home occupation. Specifically,

Wihksne sought approval of a 1,200 to 1,500 square foot clinic building in which to operate their chiropractic practice and offer massage therapy and possibly small group yoga classes. The clinic would employ three to four people, including Wihksne as a chiropractor, one to two massage therapists, and a receptionist.

The proposed clinic building would be rectangular with a reception area, a restroom, a storage room, two chiropractic rooms, one massage room, one massage/yoga room, and storage and maintenance areas. The proposed clinic building would share exterior design characteristics with the dwelling with a "modern farmhouse exterior with white board and batten siding, a red door, black shingled roof and either black framed windows or white framed windows with black trim." Record 56. The proposed clinic building would be served by an existing driveway directly off Wisteria Road. The existing driveway formerly served the dilapidated structure and does not serve the dwelling. A separate septic system and drain field may be necessary to avoid pumping waste uphill to the existing septic system serving the dwelling. The clinic building is also likely to be served by separate utility connections.

Clackamas County Zoning and Development Ordinance (ZDO) allows a Level Three Major Home Occupation in the RRFF-5 zone, subject to several standards and restrictions. ZDO 822.04. 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." ZDO

202 defines "accessory building or use" as "[a] subordinate building or use, the function of which is clearly incidental to that of the main building or use on the same lot."

In *Red Grapes I*, we agreed with petitioners that the hearings officer adopted inadequate findings explaining why the proposed clinic building is "subordinate" and "clearly incidental" to the dwelling, and hence qualifies as an "accessory building" as defined in ZDO 202. ___ Or LUBA at ___ (slip op at 8). We also agreed with petitioners that hearings officer did not adequately explain why the clinic building is one that is "normally associated with primary uses allowed in the" RRFF-5 zone. *Id.*; ZDO 202.

Wihksne initiated county proceedings on remand. The hearings officer reopened the record and Wihksne and interested parties submitted additional materials into the record. In their final decision, the hearings officer explained that the contested issues on remand included:

> "a. Whether the proposed building is the type of building normally associated with primary uses allowed in the RRFF-5 zone;
>
> "b. Whether the proposed building can reasonably function as an accessory building to the dwelling if the home occupation use ceases or is never established; and
>
> "c. Whether the proposed building is 'subordinate' and 'clearly incidental' to the existing primary residential use of the property, considering, among other factors, the locational relationship between the proposed building and the dwelling." Record 15.

The hearings officer approved the application with conditions. This appeal followed.

SECOND ASSIGNMENTS OF ERROR[1]

Petitioners argue that the hearings officer's decision on remand violates applicable law because it approves a new building that is not "subordinate" and "clearly incidental" to the dwelling.

On remand, the hearings officer found:

> "I note in revisiting this topic that it is not easy to separate the accessory use from the discussion of the accessory building. Further, I note that the terms *subordinate* and *clearly incidental* are not clear, even though in the context of land-use laws these terms seem to have a well-established history. Treatises and legal dictionaries use the terms 'incidental' and 'subordinate' to define the concept of 'accessory' use in zoning laws. *Black's Law Dictionary* (9th ed 2009) defines 'incidental use' as '[l]and use that is dependent on or affiliated with the land's primary use' and defines 'accessory use' as '[a] use that is dependent on or pertains to a main use.' Further, the *subordinate building or use must be clearly incidental to that of the main building or use on the same lot.*" Record 23 (emphases in original).

The hearings officer reasoned that the home occupation criteria in ZDO 822.04 ensure that the home occupation use is subordinate and incidental to the primary residential use of the property. For example, ZDO 822.04(A) requires that a home occupation business operator must reside full-time on the property.

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[1] Petitioners filed separate briefs. Their assignments of error present essentially the same legal questions and we analyze and resolve them together.

The hearings officer reasoned that requirement necessarily means that the applicant's use of the clinic building is "clearly incidental" to the residential use of the dwelling, because the home occupation clinic use is not a full-time occupation or use. Record 24-25. The hearings officer also reasoned that, because ZDO 822.04 imposes limitations on the home occupation use that are *not* applicable to the primary residential use of the property, such as restrictions on any noise after 6:00 p.m., the home occupation use is subordinate and incidental. Record 23-25; *see* ZDO 822.04(C)(1). In other words, the clinic building is subordinate to the dwelling because Wihksne's use of the clinic building is subject to more restrictions than Wihksne's use of the dwelling.

In *Red Grapes I*, we acknowledged that some of the factors that the county relied on to support the conclusion that the clinic building is an accessory building overlap with the requirements for a level three major home occupation, including that the home occupation operator must be a full-time resident of a dwelling unit on the tract on which the home occupation is located, and the home occupation use must be conducted primarily in an accessory building. As explained below, duration and frequency of use is a relevant factor, however it is not the only factor. Petitioners argue, and we agree, that the fact that ZDO 822.04 standards impose limitations on home occupation operations that do not also apply to the residential use of the dwelling does little to inform the analysis of whether the clinic building is subordinate to the dwelling.

In *Red Grapes I*, the county identified physical and functional characteristics that that we agreed may be relevant considerations in determining whether the proposed clinic building qualifies as an "accessory building" to the dwelling. Those characteristics include the location of the clinic building, the relative size of the clinic building as compared to the dwelling, relative duration and frequency of occupation and use of the clinic building as compared to the dwelling, and associated improvements. *Red Grapes I*, ___ Or LUBA at ___ (slip op at 15-16). The hearings officer made findings on those characteristics on remand, which petitioners challenge on appeal.

Before proceeding to those challenges, we observe that whether a building is "subordinate" and "clearly incidental" to another building involves interpretation of those terms and application to specific facts on a case-by-case basis. Petitioners challenge the hearings officer's interpretation of "subordinate" and "clearly incidental" as applied to the facts of this case. The parties dispute our standard of review. The county asserts that petitioners' arguments ask us to reweigh the evidence and substitute our judgment for that of the hearings officer. Response Brief 25-27. Petitioners respond, and we agree, that the relevant facts are undisputed. Thus, the dispute does not require us to make any factual findings or reweigh any evidence. Instead, we review the hearings officer's interpretation and application of the code to the undisputed facts. We review for errors of law, without deference to the hearings officer's interpretations. *Tonquin Holdings,*

LLC v. Clackamas County, 247 Or App 719, 722-23, 270 P3d 397, *rev den*, 352 Or 170, 285 P3d 720 (2012).

A. Size

At 1,200 to 1,500 square feet, the proposed clinic building would be substantially smaller than the dwelling, which is approximately 4,000 square feet. The hearings officer found that the smaller size of the clinic building relative to the dwelling "is indicative of both the subordinate nature of the proposed clinic building, and the clearly incidental nature of its use." Record 26-27 (emphases omitted). We do not understand petitioners to challenge that conclusion. However, they argue that it is not determinative.

B. Duration and Frequency of Use

The relative frequency and duration of use of the proposed clinic building will be during the business hours, generally ending around 2:00 p.m. By contrast, the residential dwelling may be used at any time for its primary residential purposes. The hearings officer found that the limited hours of operation of the home occupation in the clinic building is indicative of both the subordinate nature of the proposed clinic building and the clearly incidental nature of its use. We do not understand petitioners to challenge that conclusion. However, they argue that it is not determinative.

C. Location

The proposed clinic building site is removed from the dwelling by topography, vegetation, and 900 feet of distance. The dwelling is not visible from

the proposed clinic building site. The hearings officer reasoned that the ZDO does not require that an accessory building used for a home occupation be located within a certain distance or within sight of the dwelling. The hearings officer concluded that "the proposed clinic building's design as a house, its locational placement that is less convenient to the dwelling, and its other described physical characteristics are not such that the proposed building cannot reasonably function as an accessory building to a dwelling." Record 22.

Petitioners argue that the hearings officer thereby misconstrued the code. Petitioners emphasize that the definition of "accessory building" requires that the function of the clinic building be "clearly incidental" to the main building. Petitioners argue that the phrase "clearly incidental" means that the relationship between the two buildings must be obvious or apparent. Petitioners further argue that "clearly" means that an objective observer should be able to discern the functional relationship between an accessory building and main building.

We agree with petitioners. "Clearly" is not defined in the ZDO. "Clear" means "easily understood"; "easy to perceive or determine with certainty"; "readily recognized." *Webster's Third New Int'l Dictionary* 419 (unabridged ed 2002). When used as an adjective, "clear" means "without confusion or obscurity." *Id.* "Incidental" is also not defined in the ZDO. "Incidental" means "subordinate, nonessential, or attendant in position or significance" and "occurring as a minor concomitant." *Webster's* at 1142. "Concomitant" means "accompanying or attending, esp. in a subordinate or incidental way" and

"something that accompanies or is collaterally connected with another." *Webster's* at 471.

We agree with petitioners that an objective observer would not be able to discern any relationship between the clinic and dwelling, let alone a subordinate and clearly incidental relationship. The dwelling is up the hill and out of sight from the clinic building location. The clinic building location is closer to four other homes. The other four homes are 199 feet, 293 feet, 356 feet, and 373 feet from the clinic location. We agree with the petitioners that the locational characteristics, including the physical separation of 900 feet, the absence of a line-of-sight between the two buildings, and the presence of four other residences closer to the clinic, are circumstances that prevent an objective observer from discerning any functional relationship between the clinic building and the dwelling, let alone a "clearly incidental" functional relationship. We agree that the hearings officer misconstrued the phrase "clearly incidental" in concluding that the location of the clinic building does not weigh against a conclusion that the function of the clinic building is clearly incidental to the dwelling.

D. Exterior Design

The proposed clinic building will share exterior design characteristics with the dwelling, with a "modern farmhouse exterior with white board and batten siding, a red door, black shingled roof and either black framed windows or white framed windows with black trim." Record 56. The hearings officer found that the exterior design similarities between the clinic building and the dwelling "did not

carry much weight" because the dwelling is not visible from the clinic building site. Record 27. Instead, the hearings officer found that the fact that proposed clinic building will look like a house from the outside indicates the clearly incidental nature of the proposed clinic building's use. *Id.*

Petitioners argue, and we agree, that the fact that the clinic building is designed to look like a house does not indicate any relationship to the dwelling or indicate a functionally subordinate or incidental nature of the clinic building use relative to the dwelling. An objective observer might conclude that the clinic building is a house. A single-family dwelling is a primary use in the RRFF-5 zone. Even if a second house may be used as an accessory building, as the hearings officer found, in this case, the dwelling is far removed and not visible from the clinic building site. The exterior design does nothing to indicate that the clinic building is related to the dwelling, let alone subordinate and clearly incidental to the dwelling.

The hearings officer misconstrued the phrase "clearly incidental" in concluding that the exterior design of the clinic building indicates the clearly incidental nature of the proposed clinic building.

E. Associated Improvements

In *Red Grapes I*, we agreed with petitioners that the county should consider improvements associated with the clinic building "in determining whether the clinic building qualifies as an 'accessory building' to the dwelling." ___ Or LUBA at ___ (slip op at 15). The identified improvements include separate

access, parking areas, septic system, and drain field. On remand, the hearings officer observed that the clinic building is also likely to be served by separate utility connections. None of those improvements would be shared with the dwelling. The hearings officer concluded that the separate improvements indicate the subordinate nature of the proposed clinic building. The hearings officer found:

> "Employees and patients associated with the proposed clinic building will not be allowed to use the shared access road to the applicant's dwelling, but are restricted to the site and its driveway access, a factor I find indicates the subordinate nature of the proposed clinic building, as well as a factor indicating the incidental nature of the proposed clinic building's use as invitees to the proposed clinic will not have access to the main dwelling or the majority of the property. I also agree with appellants that the separate access to the proposed clinic building, and its separate septic and utilities, is a factor making it more difficult for casual passersby to note the subordinate nature of the proposed clinic building. Rather, casual passersby may view the proposed clinic building itself as a residential dwelling on the property. I do not find that the separate access to the proposed clinic, or separate septic and utilities, is a factor affecting the clearly incidental nature of the home occupation use as it remains apparent this is an incidental use of a residential property[.]" Record 26 (emphases omitted).

The hearings officer concluded that the separate improvements do not affect other factors derived from the home occupation criteria in ZDO 822.04. For example, the hearings officer found:

> "Vibration, glare, fumes, and odors that are detectable to normal sensory perception off the property are also prohibited from the proposed clinic building. Again, by contrast, the residential use of the dwelling has no such special restrictions, another factor

> indicating the subordinate nature of the proposed clinic building that is required by ZDO Section 822.04.1 find this characteristic unaffected by the separate access to the proposed clinic, or separate septic and utilities, or the 900 foot locational separation." Record 25 (emphasis omitted).

"Subordinate" is not defined in the ZDO. "Subordinate," when used as an adjective, means "placed in a lower order, class, or rank: holding a lower or inferior position." *Webster's* at 2277. As explained above, "incidental" is also not defined in the ZDO. "Incidental" means "subordinate, nonessential, or attendant in position or significance" and "occurring as a minor concomitant." *Webster's* at 1142. "Concomitant" means "accompanying or attending, esp. in a subordinate or incidental way" and "something that accompanies or is collaterally connected with another." *Webster's* at 471.

Petitioners argue, and we agree, that the separate access and other separate improvements make the clinic building independent from the dwelling and not subordinate or incidental to the dwelling. We agree with the petitioners that the hearings officer misconstrued the terms "subordinate" and "incidental" by eliminating from the meaning of those terms the requisite connection between the dwelling and clinic building.

F. Multifactor Conclusion

As we acknowledged in *Jacobs v. Clackamas County*, 73 Or LUBA 262 (2016), and *Red Grapes I*, the analysis of whether a building is "subordinate" and "clearly incidental" involves multiple factors. Overemphasis on any single factor "would be reductive and incomplete." *Jacobs*, 73 Or LUBA at 283-84. Some of

the factors that the hearings officer considered, such as relative size and relative duration and frequency of use support a conclusion that the clinic building is "subordinate" and "incidental." However, those factors are not dispositive either independently or together. As explained above, we agree with petitioners that the hearings officer misconstrued the terms "subordinate" and "clearly incidental" with respect to location, exterior design, and associated improvements. On the whole, and based on undisputed facts before them, we conclude that the hearings officer misconstrued the terms "subordinate" and "clearly incidental" in concluding that the clinic building is an "accessory building."

The second assignments of error are sustained.

FIRST ASSIGNMENTS OF ERROR

Petitioners argue that the hearings officer misconstrued the applicable law by concluding that the clinic building is an "accessory building normally associated with primary uses allowed" in the RRFF-5 zone. ZDO 202. As noted, the RRFF-5 zone allows a "home occupation" subject to standards in ZDO chapter 822, which implement the standards at ORS 215.448. In a portion of their first assignment of error, petitioner Puskas argues that the hearings officer's decision violates ORS 215.448(3) because the decision permits construction of a new structure that would not otherwise be allowed in the RRFF-5 zone.[2]

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[2] ORS 215.448(3) provides: "Nothing in this section authorizes the governing body or its designate to permit construction of any structure that would not

The county responds that ORS 215.448(3) is implemented through ZDO section 316, which allows home occupations subject to ZDO section 822. Thus, the county argues, a violation of ORS 215.448(3) occurs where there is a violation of the underlying zoning regulations. We agree with the county that the arguments under the ZDO and ORS 215.448(3) are interrelated. The county may not interpret and apply the ZDO home occupation requirements in a way that authorizes construction of a new building that would not otherwise be allowed in the RRFF-5 zone. If the hearings officer correctly concluded that the clinic structure is an "accessory building normally associated with primary uses," then the clinic structure is allowed in the RRFF-5 zone as an accessory building.

We agree with petitioners that the hearings officer erred in concluding that the clinic building is an "accessory building" for the reasons explained above. In addition, for the reasons explained below, we agree we petitioners that the hearings officer erred in concluding that the clinic building is a type of building "normally associated with primary uses allowed" in the RRFF-5 zone. ZDO 202.

The hearings officer concluded that the clinic building is essentially a house, and that second residential structures are a type of building normally associated with primary uses allowed in the RRFF-5 zone. The hearings officer observed that when a property owner wishes to replace an existing dwelling with a new dwelling, the property owner must sign an agreement with the county that

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otherwise be allowed in the zone in which the home occupation is to be established."

the original dwelling will not be used for residential purposes once the new dwelling is occupied as a condition for county approval of the new dwelling. The hearings officer quoted a county replacement dwelling agreement, which provides: "'The dwelling being replaced will be removed, demolished or converted to an accessory structure allowed under the zoning code within 3 months of the occupancy of the new dwelling. (Allowed accessory structures vary by zone but may include a garage or storage building.)'" Record 16 (emphasis omitted).

The hearings officer further reasoned:

> "[A]n original residential structure may be converted to an accessory structure when it is replaced by a new dwelling. This can be accomplished by submitting to the County a Replacement Dwelling Agreement that includes a Statement of Use concerning the original structure. This is typically required by the County for a replacement dwelling on RRFF-5 zoned property because Table 316-1, describing permitted uses in the RRFF-5 zone, only allows one single-family dwelling on each lot of record. When a replacement dwelling is built it may not otherwise be obvious that a building that was the original residential house on a property becomes an accessory structure that is subordinate to the new dwelling, and its use only incidental to the primary residential use of the new dwelling. Therefore, in order to keep the original house[,] the property owner building a replacement dwelling is often required to submit to the County a Statement of Use identifying the original house as an accessory structure that becomes both clearly subordinate and its use clearly incidental to the replacement dwelling. The original residential building thus becomes clearly subordinate to the new replacement dwelling because the new replacement dwelling becomes the location of the primary residential use of the property. The original residential house becomes an accessory structure building that cannot be used as a

dwelling or habitable space without some form of land use approval. Such an accessory structure/house can be used for many of the described accessory uses within Table 316-1, and many other similar uses, that are clearly incidental to the primary residential use of the property. It cannot, however, be used as a dwelling or for other uses, including as the location for a home occupation, without approval for such use. These are part of the restrictions related to the accessory nature of the building that make it subordinate to the primary residential dwelling.

"[A] a house is both typical of primary residential structures found in the RRFF-5 zone, and is also among the type of accessory buildings normally associated with the primary residential uses of property within the RRFF-5 zone. Such a house/accessory structure may also be used as a guest house if it meets the requirements of ZDO 833.01, may be used as an accessory dwelling unit if it meets the requirements of ZDO 839.02, or even may be retained as an accessory historic dwelling if it meets the requirements of ZDO 839.02, among its potential uses. I am not suggesting here that the applicant's proposed building meets the requirements for any of these accessory uses. The point is that a house is a building that is normally associated with both primary and accessory uses permitted in the RRFF-5 zone." Record 18 (emphases omitted).

The hearings officer also found that the proposed building can reasonably function as an accessory building to the dwelling if the home occupation use ceases or is never established.

"[T]he applicant here proposes to replace an old existing house with a new building that will look like a house, will be usable as a house for many of the accessory uses that a house can be used for, and would retain the residential appearance, identification, and 'character' of a house. Applicant suggests that her proposed clinic building could be re-purposed as a home office, or as a storage building, or as a place for out-of-town guests to stay, or as mother/father-in-law quarters. [Petitioners] correctly point out that the proposed clinic building does not meet the requirements for a

> guest house. ZDO 833.01.C. (pertaining to guest houses) provides that the maximum floor area for a guest house shall be 600 square feet, and ZDO 833.01.D. provides that a guest house shall be located within 100 feet of the primary dwelling to which it is accessory. [Petitioners] also correctly point out that the proposed clinic building does not meet the requirements for an accessory dwelling unit. ZDO 839.02(A) provides that the maximum floor area of an accessory dwelling unit within the RRFF-5 zone shall be 900 square feet. However, property owners do in fact convert such structures into accessory dwelling units as referenced earlier in the discussion concerning whether such houses are among the type of building normally associated with primary residential use within the RRFF-5 zone. As with other property owners seeking to convert such a structure to an accessory dwelling unit, the applicant can still meet this requirement by making the building smaller or by partitioning the proposed clinic building in a manner that meets this requirement, or may otherwise obtain such approval." Record 21-22.

The hearings officer found that, if the home occupation use is later removed or never established, then "the building may only be used for an accessory use such as storage or those accessory uses described in Table 316-1 unless prior land use approval for another use is obtained." Record 22.

The county and Puskas agree that the proposed clinic structure is essentially a house. Petitioner Red Grapes LLC (Red Grapes) disputes that the proposed clinic structure is a house because the internal improvements are not designed to accommodate residential use. For example, the clinic building does not include a full bath and kitchen. Red Grapes' Petition for Review 15-17. Puskas emphasizes that the ZDO allows only one single-family dwelling on each lot of record in the RRFF-5 zone. *See* ZDO Table 316-1, n 9 ("Except as allowed by Section 839, *Accessory Dwelling Units*, or Section 1204, *Temporary Permits*,

each lot of record may be developed with only one of the following: detached single-family dwelling, duplex (only if approved as a conditional use in the RA-1 District), or manufactured dwelling." (Emphases in original.)). Puskas argues that, under ORS 215.448(3), the county cannot use a home occupation permit to authorize the construction of a building that would not otherwise be allowed in the zone.

The county responds that the county may authorize any structure anywhere on the subject property for use as part of a home occupation, so long as that structure can be converted to serve an accessory use that is permitted in the RRFF-5 zone. As we understand it, the county argues that home occupations are *uses* that are "normally associated" with primary residential uses, so any *structure* that is used for a home occupation can be approved as an "accessory building," so long as that structure can be converted to serve another accessory use that is permitted in the RRFF-5 zone.

The county's argument ignores the requirement that a "home occupation" must, by ZDO definition, be "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." ZDO 202; *see Watts v. Clackamas County*, 51 Or LUBA 166, 170-71 (2006) (explaining that the definition of "home occupation" requires that the accessory building in which the business will be conducted is a building that is normally associated with the primary uses allowed in the zone, not that the use itself be normally associated with uses allowed in the

zone). The focus of the inquiry is on the building and whether the *building* is normally associated with primary uses in the zone. The county's reasoning focuses on the *use* of the clinic building and not on the building itself. We agree with Puskas that the proper inquiry is whether the clinic *building* can be approved as accessory building to the dwelling in the absence of the home occupation use.

1000 Friends of Oregon v. Clackamas County, ___ Or LUBA __ (LUBA No 2020-051, Oct 30, 2020), *rev'd and rem'd on other grounds*, 309 Or App 499, 483 P3d 706, *rev den*, 368 Or 347, 489 P3d 543 (2021) is instructive. In that appeal, the county approved a home occupation for event hosting on property zoned for exclusive farm use (EFU). The applicant proposed to renovate two existing barns and to construct a separate new restroom building. The hearings officer found that the restroom building was normally associated with uses permitted in the zone because restrooms are uses and structures customarily accessory and incidental to a dwelling. We agreed with petitioner that "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." *1000 Friends of Oregon*, ___ Or LUBA at ___ (slip op at 21). We concluded that the restroom building violated ORS 215.448(3) because the applicant did not demonstrate that it was a structure that "would otherwise be allowed in the zone." *Id.* The Court of Appeals affirmed that conclusion, observing that the hearings officer's decision did not cite any relevant code provision "that could plausibly be interpreted to mean that any restroom

building, of any size, shape, use, and location on the property, is permitted outright as an accessory to a dwelling." *1000 Friends of Oregon v. Clackamas County*, 309 Or App 499, 514, 483 P3d 706, *rev den*, 368 Or 347, 489 P3d 543 (2021) (emphases omitted).

Similarly, here, the hearings officer's decision and the county on appeal do not cite any a relevant ZDO provision that could plausibly be interpreted to mean that any building, of any size, shape, and location on the property, is permitted outright as an accessory to a dwelling. The hearings officer relies heavily on a county practice of allowing dwelling structures to be used for accessory uses when a dwelling is replaced. However, the hearings officer and the county on appeal do not cite any code provision that governs that process. More importantly, the hearings officer and the county do not cite any code provision that that would permit a *new* structure designed to look like a house to be constructed as an accessory structure, except as a guest house or accessory dwelling unit (ADU), which we discuss below.

Under ZDO Table 316-1, a dwelling is a primary use, not an accessory use. As quoted above, the hearings officer acknowledged that "casual passersby may view the proposed clinic building itself as a residential dwelling on the property." Record 26. The hearings officer found that the chiropractic clinic could potentially be *converted* into an accessory structure to serve as a home office, storage, or ADU. The hearings officer agreed with petitioners that the proposed clinic building does not meet the requirements for a guest house because it is too

big and too far removed from the dwelling. The hearings officer also agreed with petitioners that the proposed clinic building is too large to meet the requirements for approval as an ADU.

However, the hearings officer reasoned, and the county argues on appeal, that the chiropractic clinic could be *converted* into an ADU by "making the building smaller or by partitioning the proposed clinic building." Record 21-22. According to the county, the applicant could obtain county approval of the clinic building as an ADU by partitioning 900 square feet for dwelling purposes and reserving the remainder of the building for other permitted accessory uses, such as storage. As we understand the county's position, the applicant could hypothetically build a second house of any size, so long as the second house structure could qualify as a "subordinate building" relative to the main building. The county's theory is inconsistent with the limitation in ORS 215.448(3) that a home occupation authorization cannot be used to "permit construction of any structure that would not otherwise be allowed in the zone." In other words, the county's interpretation would permit the construction of a new structure that would not otherwise be allowed in the zone.

The hearings officer also found that the chiropractic clinic could be converted to storage. The hearings officer's decision and the county on appeal did not cite any ZDO provision that would allow construction of the proposed clinic building as a storage building and the applicant has not proposed to construct a storage building. Instead, the proposed building is designed to

resemble a house and function as a clinic. In addition, the county has not established that the improvements associated with the clinic building are consistent with a storage building. For example, the county has not established that a storage building would require customer-oriented parking areas or separate septic system and utility connections.

We agree with petitioners that the hearings officer misconstrued the applicable law by finding that the clinic building is a building "normally associated with the primary uses allowed in the" RRFF-5 zone. ZDO 202. We also agree with Puskas that the hearings officer's decision violates ORS 215.448(3) because it permits construction of a new structure that would not otherwise be allowed in the RRFF-5 zone.

The first assignments of error are sustained.

DISPOSITION

We will reverse a decision that violates a provision of applicable law and is prohibited as a matter of law. ORS 197.835(1); OAR 661-010-0073(1)(c). As explained above, a home occupation in a structure that is separate from the dwelling may only be approved in an "accessory building normally associated with the primary uses allowed in the" RRFF-5 zone and a home occupation authorization cannot be used to "permit construction of any structure that would not otherwise be allowed in the zone." ZDO 202; ORS 215.448(3). For the reasons explained above, we conclude that the hearings officer erred in concluding that the clinic building, as proposed, is an "accessory building

normally associated with the primary uses allowed in the" RRFF-5 zone. ZDO 202.

Wihksne may be able to obtain approval of a clinic building and home occupation use if they alter the proposed clinic building design or location. Those modifications would require more than insignificant changes to the application, if not a new application. "When compliance with an applicable approval criterion would require more than insignificant changes to the application, if not a new application, reversal is the appropriate remedy." *Rogue Advocates v. City of Ashland*, ___ Or LUBA ___, ___ (LUBA No 2021-009, May 12, 2021) (citing *Richmond Neighbors v. City of Portland*, 67 Or LUBA 115, 129 (2013)) (slip op at 20). As we explained in *Richmond Neighbors*,

> "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.' * * * [W]hether 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, * * * then remand is appropriate. If the identified errors require a new or amended development application, then reversal is appropriate." 67 Or LUBA at 129 (citing *Angius v. Washington County*, 35 Or LUBA 462, 465-66 (1999); *Seitz v. City of Ashland*, 24 Or LUBA 311, 314 (1992)).

We agree with petitioners that reversal is the proper disposition.

The county's decision is reversed.