



**NATURE OF THE DECISION**

Petitioner appeals a county decision approving a conditional use permit (CUP) for home-based occupation of a bed and breakfast.

**FACTS**

The subject property is approximately 13.5 acres and is zoned Timber Grazing (T/G). It can be accessed by two private roads, Ruby Peak Lane and Scotch Creek Road, and is surrounded by T/G zoned properties on all sides.

On February 7, 2022, the Parks (the applicants), submitted their application for a CUP authorizing a bed and breakfast home-based occupation on the subject property. On March 29, 2022, the planning commission held a public hearing on the application. On April 26, 2022, the planning commission’s decision to deny the application was issued. As we explain in more detail below, among the bases on which the planning commission denied the application was that it concluded that Wallowa County Land Development Ordinance (WCLDO) 35.025.07 and 9.020.02 were not met. Record 21.6.4, 21.6.6 to 6.7.

The applicants appealed the planning commission’s decision to the county board of commissioners. On June 15, 2022, the board of commissioners held a public hearing, that was then continued to June 22, 2022. The board of commissioners voted to reverse the planning commission and approve the CUP application, with conditions. The decision approving the application was issued on September 21, 2022. This appeal followed.

1 **FIRST ASSIGNMENT OF ERROR**

2 WCLDO Article 35 provides standards for the establishment of home-  
3 based occupations. Home-based occupations must comply with the criteria set  
4 out in WCLDO 35.025, including WCLDO 35.025.07, which states:

5 “HAZARDS: Within a residence[,] no equipment, process, or  
6 materials shall be used which will change the fire-rating or structure  
7 separation, fire wall, or ventilation requirements of the building  
8 shall be permitted. Attached garages shall not be considered part of  
9 the residence for the purpose of this ordinance. *Accessory buildings,*  
10 *attached garages, or new structures permitted with the use shall*  
11 *meet all structural and life safety requirements for the use and*  
12 *activity.* No hazardous materials shall be stored or used on the  
13 premise in quantities greater than customary for residential use  
14 unless specified and approved at the time of application. No Home-  
15 Based Occupation shall be permitted which presents a potential  
16 health or safety hazard to the area from discharges into the air, water,  
17 or ground; from surface run-off; or from increased need for vector  
18 control.” (Emphasis added.)

19 In their first assignment of error, petitioner asserts that the findings adopted by  
20 the board of commissioners addressing WCLDO 35.025.07 are inadequate and  
21 are not supported by substantial evidence in the record. Petition for Review 8-9.

22 Adequate findings are required to support quasi-judicial land use  
23 decisions. *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 20-21,  
24 596 P2d 1063 (1977); ORS 215.416(9). Generally, findings must (1) identify the  
25 relevant approval standards, (2) set out the facts which are believed and relied  
26 upon, and (3) explain how those facts lead to the decision on compliance with the  
27 approval standards. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992).

1 We will reverse or remand a decision that is “not supported by substantial  
2 evidence in the whole record.” ORS 197.835(9)(a)(C). Substantial evidence is  
3 evidence that a reasonable person would rely on in making a decision. *Dodd v.*  
4 *Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). In reviewing the  
5 evidence, LUBA may not substitute its judgment for that of the local decision-  
6 maker. Rather, LUBA must consider all the evidence to which it is directed and  
7 determine whether, based on that evidence, a reasonable local decision-maker  
8 could reach the decision that it did. *Younger v. City of Portland*, 305 Or 346, 358-  
9 60, 752 P2d 262 (1988).

10 Petitioner argues that the county’s findings do not adequately address the  
11 WCLDO 35.025.07 requirement that “[a]ccessory buildings \* \* \* permitted with  
12 the use shall meet all structural and life safety requirements for the use and  
13 activity.”

14 **A. Waiver**

15 ORS 197.797(1) requires that

16 “An issue which may be the basis for an appeal to [LUBA] shall be  
17 raised not later than the close of the record at or following the final  
18 evidentiary hearing on the proposal before the local government.  
19 Such issues shall be raised and accompanied by statements or  
20 evidence sufficient to afford the governing body, planning  
21 commission, hearings body or hearings officer, and the parties an  
22 adequate opportunity to respond to each issue.”

23 The county, initially, responds that petitioner’s first assignment of error was not  
24 preserved because

1 “There is no reference in the record to any participant mentioning  
2 WCLDO § 35.025.07 (or any part of it), let alone that portion of  
3 WCLDO § 35.025.07 that states accessory buildings must ‘meet all  
4 structural and life safety requirements for the use and activity’. No  
5 participant used any of the operative words found in WCLDO §  
6 35.025.07 (including ‘structural or life safety requirements’).  
7 Neither did any participant question what those requirements might  
8 be; and, certainly, no one asserted what petitioner now asserts —  
9 that those standards ‘include those in Section 3102 of Oregon’s  
10 Structural Specialty Code’.” Respondent’s Brief 6 (citing Petition  
11 for Review 9).

12 According to the county, the issue identified in the first assignment of error was  
13 not sufficiently raised below, before the close of the record on March 29, 2022,  
14 and is therefore waived. ORS 197.797(1).

15 Petitioner responds, and we agree, that they could not have raised the issue  
16 of adequate findings before the close of the record because to do so would have  
17 required petitioner to anticipate the board of commissioners’ findings.

18 As noted by the county, the record in this matter was closed on March 29,  
19 2022. The decision by the planning commission, denying the CUP in part for  
20 failure to satisfy WCLDO 35.025.07 was issued April 26, 2022. The planning  
21 commission found that “[w]ithout further evidence or investigation, it is unclear  
22 that \* \* \* [the] requirements for the use and activity as required by [WCLDO]  
23 35.025.07” can be met. Record 21.6.6 to 6.7. The planning commission’s  
24 decision was then appealed to the county’s board of commissioners. Compliance  
25 with this section was identified by the applicants in their notice of appeal to the  
26 county board, which stated:

1 “The Commission erred in finding that ‘without further evidence or  
2 investigation, it is not clear that a yurt can meet current structural  
3 and life safety requirements for the use and activity as required in  
4 Section 35.025.07’. Decision, Finding 9. The Commission does not  
5 explain what structural and life safety requirements ‘are not met’,  
6 neither is there substantial evidence to support that finding.” Record  
7 18.1.

8 It is the decision by the board of commissioners, dated September 21, 2022, that  
9 contained the findings of satisfaction of WCLDO 35.025.07 that petitioner now  
10 challenges.

11 Petitioner was not required to anticipate the content of the board of  
12 commissioner’s ultimate findings regarding in the final decision. In *Lucier v. City*  
13 *of Medford*, 26 Or LUBA 213, 216 (1993), we explained that:

14 “The references in [*former*] ORS 197.763(1) [(2019), *renumbered*  
15 *as* ORS 197.797(1) (2021)] and [*former*] ORS 197.835(2) [(1991),  
16 *renumbered as* ORS 197.835(3) (1995)] to ‘issues’ are references to  
17 issues concerning the substantive and procedural requirements that  
18 must be satisfied in rendering the challenged decision. Therefore, if  
19 a petitioner wishes to argue that a particular approval criterion or  
20 procedural requirement is not satisfied by a proposed land use  
21 action, the petitioner must raise the ‘issue’ of compliance with that  
22 criterion below. However, contrary to respondent’s suggestion, a  
23 petitioner is not required to anticipate the actual findings a local  
24 government ultimately adopts in support of its final decision or  
25 question the adequacy of the evidence accepted into the record to  
26 support such findings.

27 “In order to preserve the right to challenge at LUBA the adequacy  
28 of the adopted findings to address a relevant criterion or the  
29 evidentiary support for such findings, a petitioner must challenge  
30 the proposal’s compliance with that criterion during the local  
31 proceedings. Once that is done, the petitioner may challenge the  
32 adequacy of the findings and the supporting evidence to demonstrate

1 the proposal complies with the criterion. The particular findings  
2 ultimately adopted or evidence ultimately relied on by the decision-  
3 maker need not be anticipated and specifically challenged during the  
4 local proceedings.”

5 Issues must “be raised and accompanied by statements or evidence sufficient to  
6 afford” the hearings body and parties “an adequate opportunity to respond to each  
7 issue.” ORS 197.797(1). A petitioner is not required to have personally raised an  
8 issue below, in order to preserve the right to raise the issue at LUBA, provided  
9 the issue was raised by someone else below. *Santiam Water Control District v.*  
10 *City of Stayton*, 54 Or LUBA 561, 563 (2007). Here, the planning commission  
11 denied the application for failure to satisfy WCLDO 35.025.07 and the applicants  
12 raised the issue of compliance with WCLDO 35.025.07 in their notice of appeal  
13 of the planning commission’s decision to the board of commissioners. Petitioner  
14 could not have objected to or found fault with the board’s findings of compliance  
15 with WCLDO 35.025.07, before March 29, 2022, that were not made until  
16 September 21, 2022. Petitioner’s findings challenge was, therefore, not waived.

17 **B. Adequacy of Findings**

18 In response to the requirements of WCLDO 35.025.07, the county found  
19 that

20 “The yurt that is proposed to be used in the business was constructed  
21 as a permitted use and in compliance with all applicable structural  
22 and life-saving regulations. *The evidence in the record* establishes  
23 that there is no risk of vibrations, glare, fumes, odors, or electrical  
24 interference on the property lines, nor is there any evidence of any  
25 risk of hazardous materials being stored, or of potential discharges  
26 into the air, water, or ground.” Record 4.6 (emphasis added).

1           Petitioner argues that above findings do not “set out the facts which are  
2 believed and relied upon” or “explain how those facts lead to the decision on  
3 compliance with the approval standards.” *Hellier*, 23 Or LUBA at 556; Petition  
4 for Review 9-10. Instead, “it simply states a legal conclusion: that the yurt was  
5 constructed as a permitted use and in compliance with all applicable structural  
6 and life-saving regulations.” Petition for Review 10.

7           In its response, the county points to evidence in the record, including  
8 statements made by the applicants at the March 29, 2022 hearing, and states that  
9 “[o]n *this* record, Wallowa County’s findings of fact was sufficient to identify,  
10 evaluate, and support Wallowa County’s decision[.]” Respondent’s Brief 7  
11 (emphasis added).

12           We agree with petitioner that the findings are inadequate. The findings do  
13 not cite statements made at the hearing or any other specific evidence in the  
14 record. Instead, the findings refer to “evidence in the record.” Record 4.6. That  
15 is not sufficient to show the facts relied upon, nor how those facts lead to the  
16 county’s conclusion that WCLDO 35.025.07 is satisfied.

17           We sustain the first assignment of error based on inadequate findings.  
18 Because the findings are inadequate and do not identify any evidence relied upon  
19 for the conclusion that WCLDO 35.025.07 is satisfied, we need not and do not  
20 decide whether the inadequate findings are supported by substantial evidence.  
21 However, we observe that the testimony and record citations identified by  
22 respondent do not directly address yurt construction “*for the use and activity*,”

1 that is a bed and breakfast, in compliance with “all applicable structural and life-  
2 saving regulations” and, without more, are not substantial evidence that the  
3 standard is met. WCLDO 35.025.07.

4 The first assignment of error is sustained.

## 5 **SECOND ASSIGNMENT OF ERROR**

6 WCLDO 9.010 sets out the purpose of WCLDO Article 9, explaining that

7 “A conditional use is an activity which is similar to uses permitted  
8 in a particular zone but may not be entirely compatible with  
9 permitted uses. The [CUP] provides a mechanism for review of  
10 compatibility with permitted uses in a zone and with the general and  
11 specific purposes of this ordinance.”

12 The review criteria for a CUP are found at WCLDO 9.020 and state, in relevant  
13 part, that “[t]he use will not create excessive traffic congestion, noise, dust, glare  
14 from lights, or other conditions that may be hazardous.” WCLDO 9.020.02.  
15 Petitioner’s second assignment error is that the findings that address WCLDO  
16 9.020.02 are not adequate and are not supported by substantial evidence.

17 The board of commissioners found that

18 “The proposed use, by its nature and under the conditions of  
19 approval set out below, will not create excessive traffic congestion,  
20 noise, dust, glare from lights, or other conditions that may be  
21 hazardous and will not overburden, the public services of water,  
22 sewer, storm drainage, electrical service, fire protection, and  
23 school.” Record 4.4.

24 Petitioner asserts that these findings are inadequate to explain how the proposed  
25 use “will not create \* \* \* other conditions that may be hazardous,” specifically a  
26 hazardous fire risk. WCLDO 9.020.02; Petition for Review 14-15. Petitioner

1 points to the planning commission’s findings as support for the fact that  
2 hazardous fire risk was an issue understood by all parties. The planning  
3 commission found that the structure

4 “is not considered a residential structure and is not built to  
5 residential building code, which would have required fire-resistive  
6 construction and materials. The location is in both the Communities  
7 at Risk, (CAR) and Wild Urban Interface (WUI) fire zone overlays,  
8 and Level 1 fire hazard in the T/G zone, all of which denote extreme  
9 fire hazard. The Planning Commission finds that because of these  
10 factors, and:

11 “• the site/s limited access by single-lane access road,

12 “• the lack of a backup water supply, and

13 “• guests unfamiliar with the area,

14 “the combined effect of this proposal would create a hazardous fire  
15 risk.” Record 21.6.4.

16 The county, again, initially responds that this issue was not preserved  
17 during the proceedings below and is therefore waived. As explained above, this  
18 is a challenge to the adequacy of findings adopted by the board of commissioners  
19 and is therefore not an issue that could have been raised prior to the board of  
20 commissioners’ final decision being issued. It is clear from the findings made by  
21 the planning commission that all participants were aware of concerns relating to

1 potential fire hazards associated with the proposed use on the subject property.  
2 The issue has not been waived.<sup>1</sup>

3 The county next responds that there is evidence in the record that supports  
4 the board of commissioners' decision that WCLDO 9.020.02 is met, in that

5 "the yurt is a properly permitted use (Rec. 17.3; 21.37-21,22), and  
6 that there are residential uses already existing on the property and in  
7 the immediately surrounding area that are obviously not (by their  
8 nature, history, and present use) creating any fire hazards (Rec. 21.4-  
9 6; 21.26-2; 21.37-34)." Respondent's Brief 9.

10 The county asserts that the evidence cited to at those Record pages "constitutes  
11 evidence a reasonable person could accept to support Wallowa County's  
12 conclusion that there is no fire hazard \* \* \*." Respondent's Brief 10. However,  
13 as above, none of that evidence is cited to or explained in the findings the county  
14 *actually* made in their decision. Simply stating because of "[t]he proposed use,  
15 by its nature and under the conditions of approval set out below," there will be  
16 no hazardous conditions created, is not enough to state the facts relied on. Record  
17 4.4.

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<sup>1</sup> In their notice of appeal, the applicants identified this provision, stating:

"The Commission erred in finding that 'the combined effect of this proposal would create a hazardous fire risk'. (Decision Finding 4). The Commission erred in relating that finding of fact to the [WCLDO] § 9.020(02) and (03). There was not substantial evidence in the record to support that finding of fact." Record 17.9.

1           Furthermore, the county fails to explain why existing residential uses  
2 provide substantial evidence of the anticipated fire hazard or lack thereof  
3 associated with a bed and breakfast use within a permitted structure. The county  
4 must evaluate whether the home occupation will create a hazardous fire risk and  
5 make findings, supported by substantial evidence, that show how they came to  
6 their decision.

7           The second assignment of error is sustained.

8       **THIRD ASSIGNMENT OF ERROR**

9           Petitioner's third assignment of error is that the county should have  
10 imposed conditions to address the fire hazards posed by the proposed use. We do  
11 not reach petitioner's third assignment of error, as the county will need to identify  
12 any appropriate conditions for the application, after evaluating the potential fire  
13 hazards.

14           The county's decision is remanded.