

1 governed by the provisions of ORS 197.850.

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NATURE OF THE DECISION

Petitioner appeals amendments to the Marion County Code (MCC) that allow and regulate event businesses as conditional use home occupations in the Exclusive Farm Use (EFU), Special Agriculture, and Farm/Timber zones.

BACKGROUND

This is the second time that MCC amendments allowing and regulating event businesses as home occupations on resource lands are before us for review. In 2023, we remanded code amendments because the county failed to demonstrate that that the code provision limiting events to 750 attendees was consistent with ORS 215.448, which limits home occupations in resource zones to five on-site employees. *1000 Friends of Oregon v. Marion County*, ___ Or LUBA ___ (LUBA Nos 2022-085/086, Feb 16, 2023) (*McNitt*). ORS 215.448 provides, in part:

“(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:

- 1 “(A) The dwelling; or
- 2 “(B) Other buildings normally associated with uses
- 3 permitted in the zone in which the property is located;
- 4 and
- 5 “(d) It shall not unreasonably interfere with other uses permitted
- 6 in the zone in which the property is located.
- 7 “(2) The governing body of the county or its designate may establish
- 8 additional reasonable conditions of approval for the establishment
- 9 of a home occupation under subsection (1) of this section.”

10 In *McNitt*, we concluded that an event venue business may be operated as

11 a home occupation on resource land. ___ Or LUBA at ___ (slip op at 16-17). We

12 explained that ORS 215.448 sets no express limit on the number of people who

13 may attend an event. However, we concluded that “the five-employee limit is an

14 indirect limit on the size and scope of the home occupation activities.” *Id.* at ___

15 (slip op at 20). We reasoned that we cannot say as a matter of law that five

16 employees cannot support and manage an event of up to 750 attendees.

17 Nevertheless, we agreed with the petitioners that the decision and record did not

18 demonstrate that the county considered the five-employee limit in ORS

19 215.448(1)(b) in adopting a 750-person maximum. We also agreed that the

20 county’s decision and the record did not demonstrate that five employees can

21 support up to 750 event attendees.

22 In the decision challenged in this appeal, the county has removed the 750-

23 person event attendee cap. The new regulations require an applicant to

1 demonstrate during the county application review process that the proposed
2 events can be conducted with no more than five employees. This appeal followed.

3 **FIRST ASSIGNMENT OF ERROR**

4 Petitioner argues that amendments misconstrue the five-employee limit in
5 ORS 215.448(l)(b). The parties dispute the standard of review. Petitioner argues
6 that LUBA reviews newly adopted land use regulations for consistency with state
7 law. Intervenor-respondent (intervenor) accepts petitioner’s statement of the
8 applicable standard of review. Differently, the county argues that we must defer
9 to the county’s interpretation of the new regulations that the county advocates in
10 its respondent’s brief, citing ORS 197.829.¹

¹ ORS 197.829(1) provides:

“[LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless [LUBA] determines that the local government’s interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
- “(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

1 We agree with petitioner and intervenor that we review the code
2 amendments for consistency with state law. The deferential standard of review in
3 ORS 197.829(1) cited by the county does not apply here. The board of
4 commissioners adopted the new regulations but did not apply them in the
5 challenged decision. This appeal does not concern “a local government’s
6 interpretation of its * * * land use regulations.” ORS 197.829(1). We are not
7 required to defer to proposed interpretations of local regulations set out for the
8 first time in a local government’s respondent’s brief. *Green v. Douglas County*,
9 245 Or App 430, 438-40, 263 P3d 355 (2011); *Tukwila Development, LLC v. City*
10 *of Woodburn*, ___ Or LUBA ___, ___ (LUBA No 2021-058, Nov 5, 2021) (slip
11 op at 6-7); *City of Albany v. Linn County*, 78 Or LUBA 1, 3-5 (2018); *Munkhoff*
12 *v. City of Cascade Locks*, 54 Or LUBA 660, 665-66 (2007). Moreover, the new
13 regulations implement ORS 215.448. Even if the challenged decision included
14 an interpretation of the new regulations, we do not defer to a local governing
15 body’s interpretation of a local regulation that implements state law. *Kenagy v.*
16 *Benton County*, 115 Or App 131, 134-36, 838 P2d 1076, *rev den*, 315 Or 271
17 (1992).²

² If a local code provision is subject to more than one reasonable interpretation, one of which is consistent with the statute implemented, the local government cannot choose an interpretation that is inconsistent with the statute. *Central Oregon Landwatch v. Deschutes County*, 52 Or LUBA 582, 599-600 (2006).

1 Generally, we review the adoption of a new land use regulation for
2 compliance with the comprehensive plan or the statewide planning goals. ORS
3 197.835(7).³ Where, as here, the petitioner raises a facial challenge to a new land
4 use regulation, arguing that it is inconsistent with the statute that it implements,
5 petitioner must demonstrate that the new regulation is “categorically incapable
6 of being applied consistently” with the statute. *Okray v. City of Cottage Grove*,
7 47 Or LUBA 297 (2004) (citing *Rogue Valley Assoc. of Realtors v. City of*
8 *Ashland*, 158 Or App 1, 4, 970 P2d 685, *rev den*, 328 Or 594 (1999)).
9 Accordingly, we review petitioner’s challenges to the new regulations to
10 determine whether those regulations are categorically incapable of being applied
11 consistent with the five-employee limitation in ORS 215.448(1)(b). For the
12 reasons explained below, we conclude that the new regulations are capable of
13 being applied consistently with ORS 215.448(1)(b).

14 The amendments provide, in part:

³ ORS 197.835(7) provides:

“[LUBA] shall reverse or remand an amendment to a land use regulation or the adoption of a new land use regulation if:

“(a) The regulation is not in compliance with the comprehensive plan; or

“(b) The comprehensive plan does not contain specific policies or other provisions which provide the basis for the regulation, and the regulation is not in compliance with the statewide planning goals.”

1 “C. Employees: The property owner shall employ on the site no
2 more than five full-time or part-time persons per ORS
3 215.448(1)(b).

4 “* * * * *

5 “H. Guests: The property owner shall ensure that the maximum
6 occupancy approved by the Marion County Building Official and
7 local fire district is not exceeded in structures on the property at any
8 time. A lower limit may be imposed based on the number of
9 employees able to provide services to the guests. The applicant shall
10 demonstrate how the employees of the business are able to provide
11 services to all the guests at the event. All events shall be conducted
12 in such a way as to comply with the conditions of approval placed
13 on the event business operation.

14 “I. Structures: The event business shall be operated substantially in
15 the dwelling, or other buildings normally associated with uses
16 permitted in the zone in which the property is located. New
17 structures shall obtain a building permit for the use. Existing
18 structures shall obtain a change of use permit from Building
19 Inspection. In either case, System Development Charges applied for
20 the additional traffic impacts anticipated shall be paid prior to
21 building permit issuance. Any changes to a structure shall not render
22 the structure a building not normally associated with uses permitted
23 in the zone.” MCC 17.136.060(C)(2) (2023); Amended Record 11-
24 12.⁴

25 The county found:

26 “The maximum number of participants is dictated by the Marion
27 County Building Official and local fire district; larger events must
28 obtain a mass gathering permit from Marion County. The number of
29 participants may be lower based on the number of employees able

⁴ The challenged decision amends the conditional use review criteria for the EFU, Special Agriculture, and Farm/Timber zones. The amended criteria are identical in those zones. We cite only the EFU criteria in this decision.

1 to provide services to the guests.” Amended Record 49.

2 Home occupation event attendance may not exceed building and fire code
3 occupancy limits for the structures in which the events will be held. However,
4 the building and fire code do not dictate the event attendance cap. Instead, the
5 applicant must establish that the maximum number of event attendees can be
6 served by no more than five employees on site.

7 Petitioner argues that the county’s decision misconstrues and misapplies
8 ORS 215.448(1)(b), which again provides that “the *home occupation* * * * shall
9 employ on the site no more than five full-time or part-time persons.” (Emphasis
10 added.) Differently, the code amendments provide that “[t]he *property owner*
11 shall employ on the site no more than five full-time or part-time persons per ORS
12 215.448(1)(b).” MCC 17.136.060(C)(2)(C) (2023) (emphasis added); Amended
13 Record 11. Petitioner argues that because the code regulates the number of people
14 that the *property owner* may employ—as opposed to the number of people that
15 the *home occupation* may employ—the code fails to impose the limit required by
16 ORS 215.448(1)(b). Petitioner argues that the term “employee” in subsection
17 MCC 17.136.060(C)(2)(H) (2023) is broad enough to allow a home occupation
18 event to employ individuals as independent contractors who are not employed by
19 or employees of the property owner. According to petitioner, this could “include
20 people such as caterers, officiants, bands, DJs, speakers, decorators, and
21 potentially many other types of workers, who are typically hired by the person
22 renting the venue.” Petition for Review 7. Petitioner argues that the code

1 amendments “simply fail[] to limit the ability of the owner’s clients, guests,
2 employees, contractors, or subcontractors from employing or hiring additional
3 people as part of operating or running the events.” Petition for Review 8. Thus,
4 petitioner argues, the code misconstrues ORS 215.448(1)(b) because the code
5 language could allow the home occupation to employ more people on site than
6 the statute allows.

7 The county responds that the code structure treats the property owner and
8 the home occupation “as one in the same” and “in practice there is no difference
9 between the two.” Respondent’s Brief 2, 6-7. The MCC defines a “home
10 occupation,” generally, as “any business or professional activity engaged in the
11 production of income by a resident of a dwelling or dwelling unit as a subordinate
12 use of the building and its premises[.]” MCC 17.110.270. Differently, for event
13 business home occupations on resource land, the code requires that the home
14 occupation operator be the property owner, who must reside full-time in the
15 dwelling on the subject property. MCC 17.136.060(C)(2)(B) (2023); Amended
16 Record 11.⁵ The county argues that, under the MCC, there is no legal distinction
17 between employment by the property owner and employment by the home
18 occupation. Moreover, the county and intervenor (together, respondents)

⁵ MCC 17.136.060(C)(2)(B) (2023) provides: “The property owner of the property upon which the event business is located shall be the operator of the event business and shall reside full-time in the dwelling on the property.” Amended Record 11.

1 respond, and we agree, that controlling case law makes clear that, for purpose of
2 the limitation in ORS 215.448(1)(b), an employee includes any individual on site
3 who assists in conducting an event. *See Green v. Douglas County*, 63 Or LUBA
4 200, 224-25, *aff'd*, 245 Or App 430, 263 P3d 355 (2011) (reasoning that
5 individuals involved in producing an event are “employ[ed]” within the meaning
6 of ORS 215.448(1)(b) and count against the five-person limit).

7 In all events, we do not review the challenged regulations for whether they
8 *could be* applied inconsistently with applicable state law. Instead, we will affirm
9 the amendments if they possibly can be applied consistently with state law.
10 Petitioner has not demonstrated that the code amendments categorically cannot
11 be applied consistently with ORS 215.448(1)(b). In applying the new code
12 regulations to an application for approval of a home occupation event business,
13 the county must interpret its code consistently with the limitation in ORS
14 215.448(1)(b), including case law construing that limitation.

15 The first assignment of error is denied.

16 **SECOND ASSIGNMENT OF ERROR**

17 Petitioner argues that the county’s decision lacks an adequate factual base.
18 Statewide Planning Goal 2 (Land Use Planning) requires that a legislative land
19 use decision be supported by “an adequate factual base,” which is an evidentiary
20 standard that is equivalent to the requirement that a quasi-judicial decision be
21 supported by substantial evidence in the whole record. *1000 Friends of Oregon*
22 *v. City of North Plains*, 27 Or LUBA 372, 377-78, *aff'd*, 130 Or App 406, 882

1 P2d 1130 (1994). Substantial evidence exists to support a finding of fact when
2 the record, viewed as a whole, would permit a reasonable person to make that
3 finding. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993);
4 *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988). Petitioner
5 argues that there is not an adequate factual base to demonstrate that the
6 amendments are consistent with ORS 215.448(1)(b). Specifically, petitioner
7 argues that the county failed to demonstrate that home occupation events that can
8 be approved under the amendments will be sufficiently limited in size and scope
9 to comply with the home occupation statute.

10 Petitioner cites *Von Lubken v. Hood River County*, 22 Or LUBA 307, 314
11 (1991) for petitioner’s proposition that Goal 2 requires the county to adopt
12 finding explaining how the new regulations comply with ORS 215.448(1)(b).
13 *Von Lubken* is inapposite and applied a different statutory standard of review.
14 The petitioners in *Von Lubken* challenged amendments to the county
15 comprehensive plan. “[LUBA] shall reverse or remand an amendment to a
16 comprehensive plan if the amendment is not in compliance with the goals.” ORS
17 197.835(6). In *Von Lubken*, we explained:

18 “Goal 2 imposes an obligation that a local government explain why
19 the amendment complies with applicable statewide planning goals.
20 This explanation may be provided either in findings, or if not in
21 findings, somewhere in the record supporting the legislative plan
22 amendment. Where the local government does not adopt findings
23 explaining why the challenged legislative plan amendment complies
24 with applicable goal requirements, we rely on respondents to
25 provide argument and citations to the record to assist this Board in

1 resolving allegations by petitioners that the challenged decision does
2 not comply with applicable statewide planning goals.” 22 Or LUBA
3 at 314.

4 Thus, when legislatively amending a comprehensive plan, a local government
5 must consider which statewide planning goals are implicated and explain why
6 the amendments are consistent with the applicable goals. However, petitioner has
7 not cited and we are not aware of any applicable law that requires a county, when
8 adopting new regulations for discretionary uses on resource land, to explain
9 whether and how the new regulations comply with the statute that the regulations
10 implement.⁶ The county did not err in failing to adopt findings in the challenged
11 decision explaining how the amendments comply with ORS 215.448(1)(b).

12 Petitioner argues that the record lacks substantial evidence to demonstrate
13 that events with as few as one hundred attendees are capable of being operated
14 by no more than five full-time or part-time employees pursuant to ORS
15 215.448(1)(b). Respondents respond, and we agree, that the amendments do not
16 approve, impose, or presuppose any particular attendance size for events (except
17 for requiring compliance with building and fire codes). Instead, under the

⁶ A local government is required to amend its land use regulations “to comply with a new requirement in land use statutes, statewide land use planning goals or rules implementing the statutes or the goals.” ORS 197.646(1). If a local government fails to amend local regulations, then “the new requirements [in state law] apply directly to the local government’s land use decisions.” ORS 197.646(3). The county may, but is not required, to allow and regulate home occupations on resource land. ORS 215.448. Thus, the county was not required by state law to adopt the amendments.

1 amendments, an applicant for a home occupation event business will need to
2 request approval for the number of attendees and demonstrate that an event with
3 that number of attendees can be served by five employees on site. Given that the
4 amendments do not allow any particular size of event, whether the record
5 contains any evidence about what size and scope of events may be accomplished
6 within the five-employee limit provides no basis for us to remand or reverse the
7 amendments.

8 Finally, petitioner argues that by failing to define within the regulations
9 the number of event attendees allowed, the county misconstrued and misapplied
10 ORS 215.448(1)(b). Petitioner argues that, “[a]t minimum, Goal 2 and ORS
11 215.448(1)(b) require the county to propose and justify a feasible limit on the
12 number of guests allowed at an event permitted as a home occupation.” Petition
13 for Review 21. Petitioner argues that “the county erred by failing to determine
14 what number of guests or range of guests five people could handle at a particular
15 type of event[.]” Petition for Review 23.

16 Nothing in ORS 215.283(2)(i), which allows on EFU land “[h]ome
17 occupations as provided in ORS 215.448[,]” or ORS 215.448 sets a numerical
18 limit on the overall number of persons that may be present at a site that is operated
19 as a home occupation. Instead, as we explained in *McNitt*, “the five-employee
20 limit is an indirect limit on the size and scope of the home occupation activities.”
21 ___ Or LUBA at ___ (slip op at 20). Essentially, petitioner takes issue with the
22 county’s decision to decide an attendee limit on a case-by-case basis when

1 processing applications for home occupation event businesses. That decision is
2 not prohibited by any applicable law to which we have been directed.

3 The second assignment of error is denied.

4 The county's decision is affirmed.