

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

3  
4 NORTH HIDEAWAY HILLS NEIGHBORS,  
5 *Petitioner,*

6  
7 vs.

8  
9 LANE COUNTY  
10 *Respondent,*

11  
12 and

13  
14 LINDSAY BURCH,  
15 *Intervenor-Respondent.*

16  
17 LUBA No. 2023-081

18  
19 LINDSAY BURCH,  
20 *Petitioner,*

21  
22 vs.

23  
24 LANE COUNTY,  
25 *Respondent,*

26  
27 and

28  
29 NORTH HIDEAWAY HILLS NEIGHBORS,  
30 *Intervenor-Respondent.*

31  
32 LUBA No. 2023-083

33  
34 FINAL OPINION  
35 AND ORDER

36  
37 Appeal from Lane County.  
38

1 William H. Sherlock filed a petition for review, reply briefs, and an  
2 intervenor-respondent's brief and Zack P. Mittge argued on behalf of North Hill  
3 Hideaway Neighbors. Also on the briefs was Zack P. Mittge.  
4

5 Michael M. Reeder filed a petition for review, reply brief, and an  
6 intervenor-respondent's brief and argued on behalf of Lindsay Burch.  
7

8 Rebekah Dohrman filed the respondent's brief and argued on behalf of  
9 respondent.  
10

11 RUDD, Board Member; RYAN, Board Chair; ZAMUDIO, Board  
12 Member, participated in the decision.  
13

14 AFFIRMED

05/20/2024

15  
16 You are entitled to judicial review of this Order. Judicial review is  
17 governed by the provisions of ORS 197.850.

**NATURE OF THE DECISION**

In LUBA No. 2023-081, North Hideaway Hills Neighbors (NHHN) appeals a county hearings official’s approval of a home occupation permit for dog boarding, training, and breeding (the home occupation). In LUBA No. 2023-083, Lindsay Burch (Burch), the applicant, appeals the hearings official’s imposition of a condition of approval limiting the size of a structure to be utilized as part of the home occupation.

**FACTS**

On January 19, 2022, Burch applied for a home occupation permit to operate a dog boarding, training, and breeding facility on the 40-acre subject property. Burch proposed operating the facility using outside areas as well as a dwelling and a second structure on the subject property, describing the second structure:

“as the ‘pole barn,’ [which] has a 49 [foot by] 84 [foot] footprint (or 4,032 square feet), and the side area of the structure, which is referred to throughout the record as the ‘east wing,’ ‘east shed roof,’ ‘east roof extension,’ ‘eave,’ or ‘added overed extension,’ [which] has a 22 [foot by] 100 [foot] footprint (or 2,200 square feet). The [a]pplication also includes a proposal for a ‘west wing’ addition to the building that would have the same footprint as the existing ‘east wing,’ 22 foot by 100 foot.” Burch Petition for Review 2-3 (citations omitted).

On March 30, 2023, the planning director approved Burch’s home occupation with conditions of approval. On April 11, 2023, NHHN appealed the planning director approval to the hearings official. On May 4, 2023, the hearings

1 official held a public hearing on the application. On July 19, 2023, the hearings  
2 official affirmed the planning director’s approval with revised and additional  
3 conditions of approval. On October 16, 2023, the hearings official reaffirmed the  
4 approval with conditions after considering Burch’s request for reconsideration.  
5 On November 3, 2023, the hearings official reaffirmed the approval with  
6 conditions after considering Burch’s second request for reconsideration. Record  
7 5. This appeal followed.

## 8 **OVERVIEW**

9 The subject property is zoned Marginal Lands (ML).<sup>1</sup> ORS 215.317(1)(f)  
10 provides that a county may allow on marginal land, nonresidential uses identified  
11 in ORS 215.213(1) and (2). ORS 215.213(2)(n) provides that a county may allow  
12 home occupations as provided in ORS 215.448, which states:

13 “(1) The governing body of a county or its designate may allow,  
14 subject to the approval of the governing body or its designate,  
15 the establishment of a home occupation and the parking of  
16 vehicles in any zone. However, in an exclusive farm use zone,  
17 forest zone or a mixed farm and forest zone that allows

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<sup>1</sup> Lane County Code (LC) 16.214(1) provides:

“The purpose of the [ML] is to provide an alternative to more restrictive farm and forest zoning; provide opportunities for persons to live in a rural environment and to conduct farm or forest operations. The ML Zone is applied to specific properties consistent with the requirements of ORS 197.247 (1991 Edition), ORS 215.317, ORS 215.327 (2017 Edition), and the policies of the Lane County Rural Comprehensive Plan.”

1 residential uses, the following standards apply to the home  
2 occupation:

3 “(a) It shall be operated by a resident or employee of a  
4 resident of the property on which the business is  
5 located;

6 “(b) It shall employ on the site no more than five full-time  
7 or part-time persons;

8 “(c) It shall be operated substantially in:

9 “(A) The dwelling; or

10 “(B) Other buildings normally associated with uses  
11 permitted in the zone in which the property is  
12 located; and

13 “(d) It shall not unreasonably interfere with other uses  
14 permitted in the zone in which the property is located.

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

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

23 “(4) The existence of home occupations shall not be used as  
24 justification for a zone change.”

25 Uses listed in ORS 215.213(2) are “conditional uses” which “may be subject to  
26 more stringent local criteria than those set forth in those statutory provisions.”  
27 *Brentmar v. Jackson County*, 321 Or 481, 497, 900 P2d 1030 (1995). The county  
28 may not, however, regulate the home occupation in a manner “inconsistent with

1 or less restrictive than the statutory standards.” *Kenagy v. Benton County*, 112 Or  
2 App 17, 20 n 2, 826 P2d 1047 (1992).

3 The county has incorporated the ORS 215.448 requirements in the Lane  
4 County Code (LC). LC 16.214 provides that home occupations are conditionally  
5 permitted uses in the ML zone and must comply with LC 16.214(3) which  
6 provides, in part:

7 “(d) Home occupation must:

8 “(i) Be operated by a resident or employee of a resident of  
9 the property on which the business is located;

10 “(ii) Employ on the site no more than five full-time or part-  
11 time persons at any given time;

12 “(iii) Be operated substantially in the dwelling or other  
13 buildings normally associated with uses permitted in  
14 the ML Zone;

15 “(iv) Not unreasonably interfere with other uses permitted in  
16 the zone in which the property is located;

17 “(v) Comply with sanitation and building code  
18 requirements prior to start of Home Occupations; and

19 “(vi) Not be used as justification for a zone change.”

20 As we have explained:

21 “Conditional use permits generally approve a particular type of use:  
22 a church, a school, a facility for the primary processing of forest  
23 products, etc. The scope of such use is based on the use category  
24 itself rather than the conditional use standards that apply. A home  
25 occupation permit, by contrast, is not as use specific; it authorizes  
26 any business use of residential property, if the business operation  
27 fits within the specific limits that constrain the scope of the home

1 occupation. As a practical matter, the limits that apply to a home  
2 occupation are what define the home occupation as a use category.”  
3 *Jacobs v. Clackamas County*, 73 Or LUBA 262, 272 (2016)  
4 (emphasis omitted).

5 Thus, the Burch operation may qualify for a home occupation permit if it meets  
6 the specific statutory and LC limits on home occupations. The assignments of  
7 error set forth by NHHN and Burch focus on the same provision, LC  
8 16.214(3)(d)(iii), which corresponds to ORS 215.448(1)(c).

9 **NHHN ASSIGNMENT OF ERROR<sup>2</sup>**

10 NHHN argues that the hearings official misconstrued LC  
11 16.214(3)(d)(iii)’s requirement that home occupations be “operated substantially  
12 in the dwelling or other buildings normally associated with uses permitted in the  
13 ML zone” and “made a decision not supported by adequate findings.” NHHN  
14 Petition for Review 5-6. NHHN argues that this is the case because the decision  
15 approves “a large-scale dog breeding facility on [m]arginal land that relies  
16 primarily on off-site dog breeding ‘Guardians’ to supply the business with  
17 puppies.” *Id.* at 5.

18 We will reverse or remand a local government decision that misconstrues  
19 the law. ORS 197.835(9)(a)(D). A local code provision implementing state law  
20 must be interpreted to be consistent with the implemented statute. *Wetherell v.*

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<sup>2</sup> We agree with Burch that it is not perfectly clear what NHHN is arguing at various points. Burch Intervenor-Respondent’s Brief 3, 3 n 3. NHHN’s assignment of error is jumbled and we understand and address its arguments as set forth in this opinion.

1 *Douglas County*, 51 Or LUBA 699, 707-708, *aff'd*, 209 Or App 1, 146 P3d 343  
2 (2006). Generally, findings must (1) address the applicable standards, (2) set out  
3 the facts relied upon, and (3) explain how those facts lead to the conclusion that  
4 the standards are met. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992).

5 **A. Misconstruction of Law**

6 NHHN characterizes Burch's home occupation as "a commercial breeding,  
7 boarding and dog training kennel" relying

8 "on numerous off-site contractors who are provided dogs who have  
9 been, or will be, bred on the subject property. These contractors,  
10 referred to by [Burch] as 'Guardians,' are under contract with  
11 [Burch] and instructed how to care for the breeding animals in their  
12 homes off-site in anticipation of providing [Burch] with the  
13 puppies." NHHN Petition for Review 2.

14 NHHN explains that Guardians are required by contract to bring the dogs to  
15 Burch for breeding within a given time frame and return the dogs to Burch for  
16 labor and delivery. NHHN argues that Burch's

17 "proposed system of farming out dogs \* \* \* is clearly contrary to  
18 the home occupation standards, which require that the home  
19 occupation be operated substantially in the dwelling or other  
20 buildings in the ML zone, *while the proposed \* \* \* care and*  
21 *gestation of the breeding animals would occur offsite at a variety of*  
22 *satellite locations.*" NHHN Petition for Review 7-8 (emphasis  
23 added).

24 NHHN argues that the hearings official misconstrued LC 16.214(3)(d)(iii)  
25 because they did not consider offsite operations in concluding that the home  
26 occupation will be operated substantially in the dwelling or other buildings on



1 the subject property. Burch responds that the hearings official did not misconstrue  
2 the law and that the requirement that the home occupation occur in the dwelling  
3 or in buildings normally associated with a use in the zone is concerned solely  
4 with elements of the business *occurring on the subject property*. Burch  
5 Respondent’s Brief 18.

6 In interpreting the law, we will consider the text and context. *State v.*  
7 *Gaines*, 346 Or 160, 171-73, 206 P3d 1042 (2009). NHHN makes no text or  
8 context argument.

9 NHHN argues that the Burch and Burch’s Guardians have contracts that  
10 place requirements on the Guardians that will “drive a hole” through a condition  
11 of approval limiting the number of animals on the property, that the condition  
12 itself allows unlimited puppies on the property under 12 weeks of age, and that it  
13 has not been shown that compliance with the numeric limit is feasible given the  
14 Guardian contract provisions.<sup>3</sup> NHHN Petition for Review 7. Condition 2(g) is:

15 “The number of dogs on the site at any time, including personal dogs  
16 and juvenile dogs, must not exceed 30 dogs plus dogs under 12  
17 weeks of age that are part of a litter from dogs whelped on the  
18 property, with a maximum of four litters in a month during breeding

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<sup>3</sup> NHHN does not argue that there is not substantial evidence to support the decision and then argue for remand under ORS 197.835(9)(a)(C). *See* NHHN Petition for Review 4-5 (discussing standard of review). Note, however, that we agree with county “that it will be up to [Burch] to adhere to operating the business as proposed and as conditioned.” Respondent’s Brief 3. A contract between Burch and other parties is irrelevant to the obligation of Burch to comply with the county’s conditions of approval.

1 seasons.” Record 166 (underscoring omitted).  
2 NHHN does not explain how the number of dogs and the condition of approval  
3 relate to the interpretation of the criterion and thus does not establish a basis for  
4 remand or reversal.

5 Additionally, NHHN argues that Burch’s assertion that Guardians are not  
6 employees of the home occupation fails to recognize that the provision of the  
7 dogs to Guardians is compensation. NHHN Petition for Review 8. First, NHHN  
8 does not argue that the hearings official adopted Burch’s position on Guardians  
9 and employees. Second, NHHN’s petition does not provide any explanation of  
10 how this general assertion relates to interpretation of the criterion requiring  
11 operation of the home occupation in the dwelling or other buildings.<sup>4</sup>

12 We understand NHHN to argue, however, that the county misconstrued  
13 the law by failing to consider off-site activities in assessing whether the home  
14 occupation will be operated substantially within the dwelling and outbuildings  
15 on the subject property. We reject that argument because NHHN has not  
16 established that the home occupation criteria require the county to consider the  
17 overall business operation in determining whether the home occupation will be

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<sup>4</sup> In its reply brief, NHHN states that “[t]he Hearings Official’s decision \* \* \* does not address the [G]uardian families as persons employed on-site.” Reply to Respondent 1. This may be an attempt to raise an issue with respect to LC 16.214(3)(d)(ii)’s restriction that the home occupation “Employ on the site no more than five full-time or part-time persons at any given time[.]” We will not address arguments raised for the first time in the reply brief. *Porter v. Marion County*, 56 Or LUBA 635, 641 (2008).

1 operated substantially within the dwelling or other buildings normally associated  
2 with permitted uses in the zone.

3 LC 16.214(3)(d) must be interpreted in a manner consistent with the state  
4 law that it implements. Again, ORS 215.317(1)(f) and ORS 215.213(2)(n)  
5 provide that home occupations may be allowed pursuant to compliance with ORS  
6 215.448. ORS 215.448(1)(a) provides that the home occupation shall be operated  
7 by a resident of the property on which the business is located or by the resident's  
8 employee.

9 The statute does not define "home," "occupation," or "operations."  
10 "[W]ords of common usage typically should be given their plain, natural and  
11 ordinary meaning." *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611,  
12 859 P2d 1143, 1146 (1993). Definitions of "home" include "one's principal place  
13 of residence." *Webster's Third New Int'l Dictionary* 1082 (unabridged ed 2002).  
14 Definitions of "occupation" include "activity in which one engages." *Id.* at 1560.  
15 Definitions of "operations" include both "the whole process of planning for and  
16 operating a business or other organized unit" and "a phase of a business or  
17 business activity." *Id.* at 1581. We conclude that "home occupation"  
18 encompasses activity in which one engages from the property containing their  
19 residence, that constitutes a phase of a business. Given that a home occupation  
20 may include a phase of a business, we also conclude that ORS 215.448(1)(c)'s  
21 requirement that the home occupation be operated substantially in the dwelling  
22 or in "[o]ther buildings normally associated with uses permitted in the zone in

1 which the property is located” does not prohibit other, offsite activity supportive  
2 of or supported by the home occupation.<sup>5</sup> ORS 215.448(1)(c)(B).

3 We find no support in the home occupation criteria for NHHN’s  
4 proposition that a business that involves operation from a home site and includes  
5 other off-site activities could not obtain home occupation approval for the home-  
6 site activities. We also see no policy reason, nor are we pointed to one, why the  
7 legislature would have desired to limit off-site business activities when imposing  
8 the obligation that a home occupation be operated substantially within the  
9 dwelling or other appropriate buildings at the home site.<sup>6</sup> NHHN’s  
10 misconception of law subassignment of error is denied.

11 **B Adequacy of Findings**

12 NHHN argues that the findings are inadequate because the hearings  
13 official did not address its argument that the home occupation would operate  
14 primarily “outside of the home,” which we understand to mean off site instead of

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<sup>5</sup> We use the terms “site” and “property,” the terms used in the statute, and intentionally do not use the terms “lot” or “parcel.”

<sup>6</sup> In so concluding, we express no opinion on whether, in a different fact pattern, a county must consider how off-site activities create impacts on and around the home occupation property. For example, a county may need to consider the home occupation relationship with off-site activities when determining whether the home occupation will “unreasonably interfere with other uses permitted in the zone.” ORS 215.448(1)(d). A county may also need to consider the impact of employees normally based off-property, working on the property.

1 outdoors on the subject property, and “thus could not comply with the  
2 requirement under LC 16.214(3)(d)(iii), that a home occupation must “[b]e  
3 operated substantially in the dwelling or other buildings normally associated with  
4 uses permitted in the ML Zone.” NHHN Petition for Review 8-9. This findings  
5 challenge depends on us agreeing with NHHN that the hearings official was  
6 required to consider off-site activities. We conclude above that the home  
7 occupation criteria do not require consideration of off-site activities when  
8 determining whether the home occupation will be operated substantially within  
9 the dwelling or other buildings on the property. Accordingly, the hearings official  
10 was not required to make findings on that issue.

11 NHHN’s assignment of error is denied.

## 12 **BURCH ASSIGNMENTS OF ERROR**

### 13 **A. Introduction**

14 Burch was the recipient of the home occupation permit. The recipient of a  
15 land use permit may file a challenge to a condition of approval. ORS 197.796(1).<sup>7</sup>  
16 The approval includes the following Condition 2d:

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<sup>7</sup> ORS 197.796(1) provides:

“An applicant for a land use decision, limited land use decision or expedited land division or for a permit under ORS 215.427 or 227.178 may accept a condition of approval imposed under ORS 215.416 or 227.175 and file a challenge to the condition under this section. Acceptance by an applicant for a land use decision, limited land use decision, expedited land division or permit under ORS

1 “Home occupation use of buildings is approved only for the existing  
2 27 [foot by] 40-foot dwelling and the 48 [foot by] 84-foot pole  
3 building shown on the site plan, without roof extension. The 20 [foot  
4 by]100-foot shed roof wings and 14 [foot by] 28[-foot] portable  
5 structures are not approved for home occupation use and must be  
6 removed from the property if existing or relocated within the interior  
7 of walls of the 48 [foot by] 84-foot pole building.” Record 166.

8 Burch challenges imposition of Condition 2d and requests that we “affirm the  
9 [c]ounty approval of the [a]pplication with [the above condition] omitted as it  
10 relates to the ‘wings’ of the structure not being allowed.”<sup>8</sup> Burch Petition for  
11 Review 6.

12 Like NHHN’s assignment of error, Burch’s two assignments of error relate  
13 to LC 16.214(3)(d)(iii)’s requirement that the home occupation “[b]e operated  
14 substantially in the dwelling *or other buildings normally associated with uses*  
15 *permitted in the ML Zone.*” (Emphasis added.) Burch argues that the pole barn  
16 with two wing additions is a structure normally associated with uses in the ML  
17 zone and that the hearings official erred in considering size and use in their

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215.427 or 227.178 of a condition of approval imposed under ORS  
215.416 or 227.175 does not constitute a waiver of the right to  
challenge the condition of approval. Acceptance of a condition may  
include but is not limited to paying a fee, performing an act or  
providing satisfactory evidence of arrangements to pay the fee or to  
ensure compliance with the condition.”

<sup>8</sup> We understand that the referenced 14 foot by 32 foot portable structures have  
already been removed from the property.

1 evaluation and conditioning approval on restricting the home occupation use to  
2 the 48 foot by 84 foot pole barn.<sup>9</sup>

### 3 **B. Burch First Assignment of Error**

4 Burch argues that the hearings official “improperly construed LC  
5 16.214(3)(d)(iii) to include a building size ‘norm’ to determine if the structure is  
6 ‘normally associated with uses in the ML zone.’” Burch Petition for Review 19-  
7 20.

#### 8 **1. Preservation**

9 As we have previously explained:

10 “As the party seeking relief from LUBA, petitioner bears the burden  
11 of establishing error in the land use decision on review. See *Morse*  
12 *Bros., Inc. v. Clackamas County*, 18 Or LUBA 188, 215 n 25 (1989)  
13 (‘It is petitioner’s responsibility to explain the basis upon which we  
14 may grant relief.’). The requirement in OAR 661-010-0030(4)(d)  
15 that petitioner establish where an issue raised in an assignment of  
16 error was preserved furthers the purpose of ORS 197.835(3), which  
17 requires that issues before LUBA on review ‘shall be limited to  
18 those raised by any participant before the local hearings body as  
19 provided by ORS 197.195 or 197.797, whichever is applicable.”  
20 *Rosewood Neighborhood Association v. City of Lake Oswego*,  
21 \_\_\_ Or LUBA \_\_\_, \_\_\_ (LUBA No 2023-035, Nov 1, 2023) (slip op

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<sup>9</sup>“As the Hearings Official under[stood] the information in the record, [Burch] had already constructed the pole barn and one side of the shed roof wings, the east wing, without [c]ounty approval, before the subject application for home occupation approval was submitted.” Record 19. Burch states that the pole barn and east shed wing were built as a single structure. Burch Petition for Review 2, 2 n 2. The condition of approval, 2d, requires removal of the east shed wing and does not allow construction of the proposed west shed wing.

1 at 6).

2 NHHN argues that Burch did not preserve the issue raised in its first assignment  
3 of error. The county does not contest preservation.

4 In their petition for review, Burch cites the record at 60, 100, and 218 for  
5 preservation of the issue it asserts in its first assignment of error, that is that the  
6 hearings official improperly inserted a structure size criterion into LC  
7 16.214(3)(d)(iii). The “raise it or waive it” principle requires that the issue be  
8 raised below with sufficient specificity so as to prevent “unfair surprise” on  
9 appeal. *Boldt v. Clackamas County*, 21 Or LUBA 40, 46, *aff’d*, 107 Or App 619,  
10 813 P2d 1078 (1991); *Friends of Yamhill County v. Yamhill County*, \_\_\_ Or  
11 LUBA \_\_\_, \_\_\_ (LUBA No 2021-074, Apr 8, 2022) (slip op at 5-6), *aff’d*, 321  
12 Or App 505 (2022) (nonprecedential memorandum opinion). A particular issue  
13 must be identified in a manner detailed enough to give the governing body and  
14 the parties fair notice and an adequate opportunity to respond. *Boldt*, 21 Or  
15 LUBA at 46. Burch requested that the hearings official identify the criterion  
16 violated by the size of the building and argued that there was no basis for a size  
17 limitation in LC chapter 16 or the building code. We agree with Burch that they  
18 preserved the issue.

## 19 2. Interpretation of Statutory and Code Requirement

20 ORS 215.448(1)(c)(B) and LC 16.214(3)(d)(iii) require that the home  
21 occupation be operated substantially in the dwelling or “[o]ther buildings



1 normally associated with uses permitted in the zone in which the property is  
2 located[.]” ORS 174.010 provides:

3 “In the construction of a statute, the office of the judge is simply to  
4 ascertain and declare what is, in terms or in substance, contained  
5 therein, not to insert what has been omitted, or to omit what has been  
6 inserted; and where there are several provisions or particulars such  
7 construction is, if possible, to be adopted as will give effect to all.”

8 Burch maintains that “There is no stated Lane County size ‘norm’ or size limit  
9 associated with structures in the farm and forest zone. This insertion of a  
10 substantive criterion, building size, violates ORS 174.010.” Burch Petition for  
11 Review 20. Burch argues that the county could have, but did not, adopt a relevant  
12 size limitation in its code.

13 Burch cites *Green v. Douglas County* as support for their position that size  
14 may not be a limiting factor. 245 Or App 430, 263 P3d 355 (2011). In *Green*, the  
15 court determined that we erred in interpreting “building” to require that the  
16 structure at issue have walls. The Court of Appeals stated:

17 “[T]he limiting factor for the allowed types of buildings under ORS  
18 215.448(1)(c)(B) is expressly stated. That limitation is not a matter  
19 of the design of the structure, it is whether the structure is  
20 commonplace – whether it is ‘normally associated with uses  
21 permitted in the zone in which the property is located.’ If gazebos  
22 and pavilions are normally associated with farm dwellings or other  
23 agricultural uses permitted by the applicable zoning district, then  
24 they are the type of buildings or housing a home occupation.” *Id.* at  
25 445-46.

1 We do not read the court’s decision to preclude consideration of the size of a  
2 structure if it is so large that it is no longer “*normally* associated with uses  
3 permitted in the zone.” ORS 215.448(1)(c)(B) (emphasis added).

4 The statute does not define “normally.” The county argues that the decision  
5 includes a dictionary definition of “normally” to include “to a normal degree.”  
6 Record 157. As NHHN explains, the county considered the plain meaning  
7 definition of “normal” to include “commonly, usually[,] in normal  
8 circumstances[,] under normal conditions.” *Id.* The hearings official determined  
9 “that the use of the word ‘normally’ suggests that not every building or use that  
10 would be permitted in the ML zone would necessarily be eligible for home  
11 occupation use.” Record 186. The hearings official concluded:

12 “[T]he use standard requiring that the home occupation occur in  
13 buildings ‘normally’ associated with uses permitted in the zone is  
14 meant to authorize the decision maker to disallow home occupation  
15 uses in extreme or atypical buildings. The Hearings Official believes  
16 that ‘extreme or atypical buildings’ would include structures that are  
17 unusually large.” Record 20.

18 The reading of “normally” is a reasonable interpretation of the statute and code.

19 Burch’s first assignment of error is denied.

20 **C. Burch Second Assignment of Error**

21 Burch maintains that the record reflects that a structure consisting of the  
22 pole barn and two wings is a structure normally associated with uses in the ML  
23 zone as required by LC 16.214(3)(d)(iii). Burch argues that the hearings official  
24 conditioning approval on confining the use to the pole barn is therefore not

1 supported by substantial evidence. We will remand or reverse a decision that is  
2 not supported by substantial evidence in the record. ORS 197.835(9)(a)(C). We  
3 may not, however, substitute our judgment for that of the local decision-maker.  
4 Rather, we must consider all the evidence to which we are directed and determine  
5 whether, based on that evidence, a reasonable local decision-maker could reach  
6 the decision that it did. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d  
7 262 (1988).

8 **1. Size**

9 Burch argues that the hearings official erred in imposing Condition 2d  
10 because there is not substantial evidence in the whole record to support the  
11 hearings official's finding that the use of the 4,032 square-foot pole barn plus two  
12 2,200 square-foot wings was too large to satisfy the criterion that the home  
13 occupation operate in a structure that is "normally associated" with uses in the  
14 ML zone.

15 We start by summarizing the evidence. County staff explained:

16 "It is difficult to compare this to an average or typical size of an  
17 agricultural structure as agricultural structures tend to have large  
18 variations in size and often do not require a building permit or  
19 building review. In my experience, this building would be  
20 considered larger than the typical non-exempt pole building  
21 structures that we commonly see permitted through our  
22 department." Record 77.

23 Another member of county staff stated:

24 "The building size is not typical for an accessory structure. I ran an  
25 inquiry on all finalized (completed) Residential Accessory Structures

1 for year [the] 2020. I chose this year as it is fairly recent, has already  
2 occurred, and has been provided with enough time that the majority  
3 of these permits for that year would have been completed giving us  
4 as much accuracy as possible. The average for this type of structure  
5 was 1,528 sq[ua]re f[ee]t. The largest accessory structure [permit]  
6 we issued that year was 4,000 sq[ua]re f[ee]t. \* \* \* *As far as*  
7 *Agricultural [(AG)] Buildings are concerned I could not run as*  
8 *accurate of an inquiry but it appears as though the average AG is*  
9 *2,238 [square feet]. It[']s hard to say what is typical for an AG*  
10 *building as AG buildings tend to one offs for an intended use and*  
11 *are generally designed to fit the need. As the structure in question*  
12 *was never permitted as an AG nor would the proposed use be*  
13 *considered an AG it's hard to make a point that this would be similar*  
14 *to a typical AG use.” Record 78-79 (emphasis added).*

15 The record includes a county staff generated table that identifies only one  
16 agricultural building larger than the proposed pole barn.

17 For their part, Burch submitted “an affidavit and email from [a] licensed  
18 contractor with over 20 years of experience, as well as photographic evidence of  
19 similar structures in the area as counter evidence.” Burch Petition for Review 35.  
20 Burch’s contractor characterized Burch’s pole-barn plus wings as a “medium-  
21 size” structure. Record 20-21. With respect to structure size, the hearings official  
22 found, in part:

23 “While it may be true that [Burch’s contractor] has constructed  
24 larger structures, the evidence submitted by the [c]ounty  
25 demonstrates that the average size of permitted residential accessory  
26 structures is only approximately 1[,]528 square feet. None of them  
27 exceeded 4,000 square feet. Permitted agricultural structures in 2020  
28 averaged 2[,]238 square feet, with one outlier measuring 15,120  
29 square feet. Other than the one outlier, none of the permitted  
30 agricultural buildings exceeded 4,000 square feet. Based on the  
31 evidence submitted by the [c]ounty, the Hearings Official concludes  
32 that the size of the structure on the subject property is not a building

1 size that is ‘normally’ associated with uses permitted in the ML  
2 zone.” Record 21 (footnotes omitted).

3 In footnotes, the hearings official stated that with removal of the largest and  
4 smallest structures, the average would be only 1,740 square feet and that there  
5 was no evidence submitted specifically addressing the size of pole barns or  
6 similar structures on ML lands but the hearings official believed it was “fair to  
7 extrapolate to include accessory residential structures and agricultural structures  
8 placed on other non-ML zoned lands in the [c]ounty to determine what structures  
9 are ‘normally’ associated with uses allowed in the ML zone.” Record 21 n 1-2.

10 Burch argues that a reasonable person would not rely on the county staff  
11 testimony to conclude what is normally associated with uses in the ML zone.  
12 Burch argues that the largest permitted structure identified by staff is 15,120  
13 square feet and substantially larger than their proposed structure. Burch argues  
14 that the 15,120 square foot building was not included in a county calculation of  
15 average building size. Burch speculates that if the buildings identified by county  
16 staff are multi-floor, square footage based on the building footprint would  
17 understate the size of the building. Burch argues, in effect, that within this  
18 context, the hearings official was required to rely on Burch’s evidence.

19 In *Friends of Metolious v. Jefferson County*, we concluded that a  
20 consultant letter stating that fireplaces associated with a use would be used  
21 infrequently and have an indistinguishably minimal impact on air quality did not  
22 explain the basis for those conclusions and that we were not directed to evidence  
23 in the record supporting those conclusions. 31 Or LUBA 160, 168 (1996). NHHN

1 argues that the contractor affidavit is similarly conclusory and unsubstantiated.  
2 NHHN Intervenor-Respondent's Brief 12. NHHN also argues Burch provides no  
3 evidence of the number or size of exempt agricultural structures. *Id.* at 13. NHHN  
4 also argues there is no evidence of multi-story structures in the county's evidence  
5 and that the 15,000 square foot building was in fact included in the average size  
6 calculation at Record 83. *Id.* at 14-15. The county responds that Burch has the  
7 burden to show by a preponderance of the evidence that the shed wings constitute  
8 a structure or structures normally associated with uses allowed in the ML zone.  
9 Respondent's Brief 7-8.

10 We agree with NHHN that the hearings official's decision is supported by  
11 substantial evidence. We agree that Burch's contractor's representations that  
12 "The size of the existing structure is not out of character for an agricultural or  
13 accessory structure. In fact, it is about average in size, even with both  
14 wings/eaves. I have obtained approvals for much larger structures for accessory  
15 and farm uses" and that "The building style is typical for an agricultural structure  
16 or a residential accessory structure" are not conclusive evidence of what is normal  
17 in the ML zone. Record 21. Although county staff acknowledged that they could  
18 not generate as complete evidence of size range for buildings associated with  
19 agriculture as they could for buildings associated with residential uses, the  
20 evidence provided was evidence a reasonable person could rely upon to make a  
21 decision, despite Burch's contractor submittal. Substantial evidence supported  
22 the hearings official's imposition of the condition.

1                   **2. Use of Other Building**

2           Burch argues that in evaluating whether the pole barn with wings was  
3 allowed, the planning staff repeatedly erroneously referred to uses accessory to  
4 residential uses, when the applicable standard is uses permitted in the ML zone,  
5 which includes farm and forest uses and structures normally associated with those  
6 uses. Burch Petition for Review 28. The hearings official did not, however, agree  
7 with staff, concluding:

8           “The Planning Director found, ‘Based on the available information,  
9 staff find no basis to conclude that the proposed 8,432 square foot  
10 building as designed would be customarily incidental, appropriate,  
11 and subordinate to the primary residential use and dwelling.’ [The  
12 hearings official concluded that the relevant issue concerned uses  
13 permitted outright and conditionally and that] the appropriate  
14 question is whether the wings, either with or separate from the pole  
15 barn, constitute a building ‘normally associated with uses that are  
16 allowed in the ML zone,’ which includes farm use and  
17 ‘nonresidential buildings customarily provided in conjunction with  
18 farm use buildings.’” Record 159 (footnote omitted).

19   The hearings official considered relevant uses allowed in the ML zone and our  
20 review is directed at the hearings official’s decision.

21           Burch also asserts that “[t]here is no evidence in the record related to use  
22 contrary to the use of the wings as stated by [Burch].” Burch Petition for Review  
23 23. Burch argues that “the [c]ounty’s imposition of Condition 2d” nonetheless  
24 “found that the wings were specialized structures for canine use. Rec[ord] 85-  
25 87.” Burch Petition for Review 26. Burch does not identify where in the record  
26 the hearings official found that the wings were specialized structures for canine

1 use and, for that reason, imposed Condition 2d. Record 85-87 is a letter from  
2 Burch’s counsel and not a county finding.<sup>10</sup>

3 The hearings official found:

4 “[Burch] carries the burden to establish compliance with this use  
5 standard. As such, the applicant must establish, by a preponderance  
6 of the evidence that the shed wings constitute a structure or  
7 structures that are normally associated with uses allowed in the ML  
8 zone. [Burch] has failed to demonstrate that the wings satisfy that  
9 standard.” Record 159.

10 The hearings official concluded that the square footage added by the wings  
11 resulted in a building that was excessive in size under the home occupation

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<sup>10</sup> With respect to the use of the structure, Burch’s contractor testified:

“This structure is a normal barn/accessory structure. There are thousands of these types of building[s] in Lane County. It is typical of the type of structure normally associated with residential and/or agricultural uses. Even if the home occupation is limited to the central area, the wing continues to have function and utility for farm uses and accessory dwelling uses.

“Further, this is a simple barn/accessory structure. There are no structural alterations proposed for [Burch’s] use that would preclude use of the structure for farm uses or residential storage or any other kind of use in the future. In fact, the home occupation impacts to the structure are so minimal that if the home occupation ended on a Friday, by Saturday you could have a fully functioning barn or garage or storage area. All that would be needed is to remove (or consolidate into a corner) the personal items associated with the home occupation, none of which are structural to attached to the structure.” Record 88.



1 criterion.<sup>11</sup> Burch does not challenge this finding and we see no reason that the  
2 hearings official is required to approve retention of the wing constructed prior to  
3 Burch obtaining land use approval.

4 Burch's second assignment of error is denied.

5 The decision is affirmed.

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<sup>11</sup> The county remarks that "While the building type, a pole barn, is normally associated with uses permitted in the ML Zone, the large size and specialized design are not." Respondent's Brief 8. The county argues that the structure is designed to house and care for dogs and because dog kennels are not a use permitted outright in the ML zone, approval of the structure would improperly allow construction of a building not otherwise allowed in the zone. The county does not assert that the hearings official imposed the condition for this reason and we do not address this argument further. *Id.* at 10-11.