

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

3
4 GREG KUPILLAS and MALIA KUPILLAS,
5 *Petitioners,*

6
7 vs.

8
9 CLACKAMAS COUNTY,
10 *Respondent,*

11
12 and

13
14 SAGE AND SOCIAL LLC,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2024-015

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Clackamas County.

23
24 Micheal M. Reeder filed the petition for review and reply brief and argued
25 on behalf of petitioners.

26
27 No appearance by Clackamas County.

28
29 Nikesh J. Patel filed the intervenor-respondent's brief and argued on behalf
30 of intervenor-respondent. Also on the brief were Damien R. Hall and Dunn
31 Carney LLP.

32
33 ZAMUDIO, Board Member; RYAN, Board Chair; RUDD, Board
34 Member, participated in the decision.

35
36
37 REMANDED

07/19/2024

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

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NATURE OF THE DECISION

Petitioners appeal a hearings officer decision approving a conditional use permit (CUP) for a home occupation event business on land zoned AG/Forest (AG/F), a mixed farm and forest use zone.

FACTS

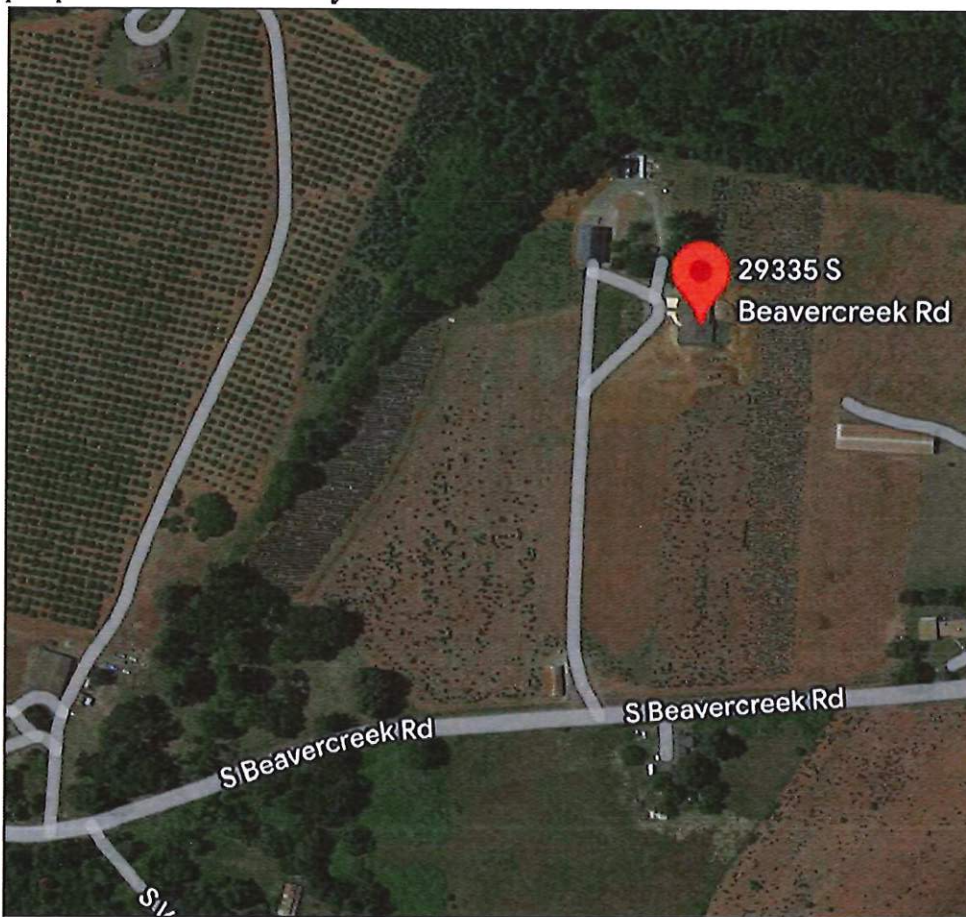
The subject property is approximately 20 acres. The property is developed with a single-family dwelling and a 3,000-square-foot barn. The barn was authorized in 2020 as an agricultural structure that is allowed outright in the AG/F zone under ORS 215.760 and ORS 455.315 and is exempt from the application of the Oregon Structural Specialty Code (OSSC). The dwelling and barn are located on the northern portion of the site. A portion of the property was used to grow Christmas trees in the past, and the application states that intervenor will continue to grow Christmas trees and add a flower farm.¹ Record 378, 387.²

Intervenor applied for approval for a home occupation event business to host events such as wedding receptions and ceremonies. The property abuts and

¹ Petitioners argue in their summary of facts and reply brief that intervenor’s assertions that the property is in agricultural use are not supported by evidence. Petition for Review 6-7; Reply Brief 1. However, petitioners do not assign error to any finding concerning agricultural use of the subject property or develop any argument in the petition for review related to whether the subject property is in agricultural use. Accordingly, that factual dispute is not before us for resolution in this appeal.

² All record citations in this opinion are to the Amended Record.

1 is accessed from South Beavercreek Road. The proposed event area is accessed
2 via a gravel driveway that is over 500 feet long from the road to the parking area.
3 At the southern tip of the property, near the intersection of South Beavercreek
4 Road and South Valley Vista Road, there are several large trees lining the road.
5 There are additional smaller trees along the remainder of the south boundary,
6 abutting South Beavercreek Road. To the north of the site is over 500 acres of
7 land owned by a lumber company and managed for timber harvest. The nearest
8 dwellings are approximately 800 feet away from the proposed event area on the
9 properties immediately to the east and west of the site.



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11 Record 388.

SITE PLAN

NOTE:

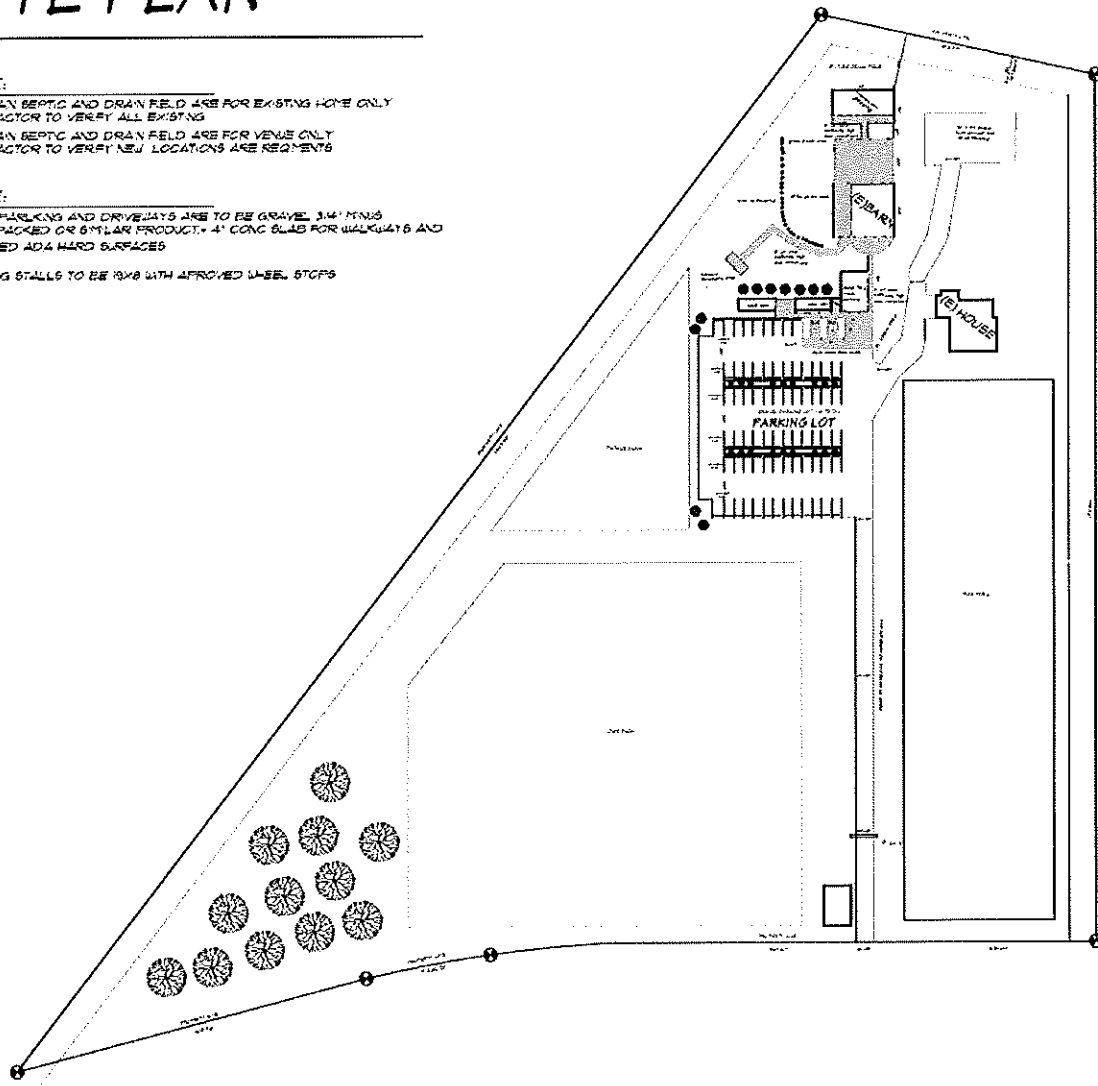
(E) DRAIN SEPTIC AND DRAIN FIELD ARE FOR EXISTING HOME ONLY
CONTRACTOR TO VERIFY ALL EXISTING

(N) DRAIN SEPTIC AND DRAIN FIELD ARE FOR VENUE ONLY
CONTRACTOR TO VERIFY NEW LOCATIONS ARE REQUIRED

NOTE:

VENUE PARKING AND DRIVEWAYS ARE TO BE GRAVEL 3/4" MINUS
HARD PACKED OR SIMILAR PRODUCT. 4" CONC SLAB FOR WALKWAYS AND
REQUIRED ADA HARD SURFACES

PARKING STALLS TO BE 9'x8' WITH APPROVED WHEEL STOPS



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2 Record 387.

3 Intervenor proposed to use the barn and to construct a 1,400-square-foot
4 “dressing building” north of the barn with four bathrooms, two showers, a
5 kitchen, and two changing rooms with a 40 by 60-foot concrete surfaced outdoor
6 gathering area between the barn and the dressing building. Record 398 (dressing
7 building floor plan). Intervenor also proposed an outdoor ceremony area

1 southwest of the barn, two storage containers, a temporary food truck parking
2 space, a 70-space parking lot, and roughly three acres of landscaping. Intervenor
3 requested approval to use temporary tents for the events and to host up to 36
4 events per year with an average of 100 guests per event, up to a maximum of 150
5 guests at any given event.³

6 County planning staff recommended denial based on a determination that
7 intervenor may not use the barn for event purposes. Intervenor appealed. After a
8 hearing, the hearings officer issued a decision concluding that intervenor may use
9 the barn, the dressing building, and temporary tents for event purposes. The
10 hearings officer approved the CUP, with conditions, including a maximum of 52
11 events per year, with a maximum of 100 people per event. Record 33 (Condition
12 of Approval 10). This appeal followed.

13 **FIRST ASSIGNMENT OF ERROR**

14 Petitioners argue that the hearings officer misconstrued ORS 215.760 in
15 concluding that the barn can be converted to be used as an event facility, if
16 intervenor obtains a building permit for that use. ORS 215.760 provides:

17 “(1) An agricultural building, as defined in ORS 455.315,
18 customarily provided in conjunction with farm use or forest
19 use is an authorized use on land zoned for forest use or for
20 mixed farm and forest use.

³ Intervenor initially requested approval for up to 36 events per year. Record 384. Intervenor later requested approval for up to 52 events per year. Record 86. The decision approves up to 52 events per year. Record 33.

1 “(2) A person may not convert an agricultural building authorized
2 by this section to another use.”

3 ORS 455.315, in turn, provides, in part:

4 “(2) As used in this section:

5 “(a)(A) ‘Agricultural building’ means a structure located on a
6 farm or forest operation and used for:

7 “(i) Storage, maintenance or repair of farm or
8 forestry machinery and equipment;

9 “(ii) The raising, harvesting and selling of crops or
10 forest products;

11 “(iii) The feeding, breeding, management and sale of,
12 or the produce of, livestock, poultry, fur-bearing
13 animals or honeybees;

14 “(iv) Dairying and the sale of dairy products; or

15 “(v) Any other agricultural, forestry or horticultural
16 use or animal husbandry, or any combination
17 thereof, including the preparation and storage of
18 the produce raised on the farm for human use
19 and animal use, the preparation and storage of
20 forest products and the disposal, by marketing or
21 otherwise, of farm produce or forest products.

22 “(B) ‘Agricultural building’ does not mean:

23 “(i) A dwelling;

24 “(ii) A structure used for a purpose other than
25 growing plants in which 10 or more persons are
26 present at any one time;

27 “(iii) A structure regulated by the State Fire Marshal
28 pursuant to ORS chapter 476; [or]

29 “(iv) A structure used by the public[.]

1 “* * * * *

2 “(4) An agricultural building may be used for uses in addition to
3 the uses listed in subsection (2)(a)(A) of this section if the
4 additional uses:

5 “(a) Are incidental and accessory to the uses listed in
6 subsection (2)(a)(A) of this section;

7 “(b) Are personal to the farm owner and the farm owner’s
8 immediate family or household; and

9 “(c) Do not pose a greater hazard to persons or property
10 than the uses listed in subsection (2)(a)(A) of this
11 section.”

12 The hearings officer found that the meaning of the phrase “an agricultural
13 building authorized by this section” in ORS 215.760(2) is ambiguous. The
14 hearings officer reasoned that ORS 215.760(2) would prohibit converting the
15 barn to commercial event home occupation uses if the site did not contain and
16 was not eligible for a dwelling. Record 12. The hearing officer found:

17 “To construe ORS 215.760 to prohibit changing the use of the
18 existing barn solely because it was constructed without a building
19 permit after the effective date of ORS 215.760 is an absurd result as
20 it would force [intervenor] to cease all non-agricultural use of the
21 existing barn and construct a new building on the site. If [intervenor]
22 obtain[s] an after the fact building permit for the existing barn it will
23 no longer constitute ‘an agricultural building authorized by [ORS
24 215.760(1)] * * *’ and ORS 215.760(2) would not apply to prohibit
25 converting the building to another use.

26 “* * * * *

27 “* * * If [intervenor] obtain[s] an after the fact building permit for
28 the existing barn it would be subject to the state structural specialty
29 code and therefore, would no longer constitute an agricultural

1 building.

2 “The only interpretation that gives meaning to all the full text of
3 ORS 215.760 is to limit ORS 215.760(2) to buildings constructed
4 without a building permit and to allow such buildings to be
5 converted to a non-agricultural use by obtaining an after the fact
6 building permit, as such buildings would no longer constitute ‘an
7 agricultural building authorized by [ORS 215.760(1)] * * *.’
8 Therefore, the hearings officer finds that [intervenor] can use the
9 existing barn on the site for the proposed event facility, provided [it]
10 obtain an after the fact building permit for the structure and any
11 additional approvals necessary to allow weddings and other events
12 and public gatherings inside the building. * * *” Record 12-13.⁴

13 Petitioners argue that the hearings officer misconstrued ORS 215.760.

14 Intervenor responds that the hearings officer correctly construed that statute. We
15 agree with petitioners for the reasons explained below.

16 In interpreting a statute, we examine the statutory text, context, and
17 legislative history with the goal of discerning the enacting legislature’s intent.
18 *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009); *PGE v. Bureau of*
19 *Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993). We are
20 independently responsible for correctly construing statutes. *See* ORS 197.805
21 (providing the legislative directive that LUBA “decisions be made consistently

⁴ Condition of Approval 4 provides:

“Within six months from the effective date of this Final Order the applicants shall obtain a building permit to convert the existing ag-exempt barn to a facility that is subject to public use and access for the proposed events or cease use of the barn for events and prohibit public access to the existing barn.” Record 32.

1 with sound principles governing judicial review”); *Gunderson, LLC v. City of*
2 *Portland*, 352 Or 648, 662, 290 P3d 803 (2012) (“In construing statutes and
3 administrative rules, we are obliged to determine the correct interpretation,
4 regardless of the nature of the parties’ arguments or the quality of the information
5 that they supply to the court.” (Citing *Dept. of Human Services v. J. R. F.*, 351
6 Or 570, 579, 273 P3d 87 (2012); *Stull v. Hoke*, 326 Or 72, 77, 948 P2d 722
7 (1997).)).

8 **A. Text and Context**

9 When considering the text and context, we begin by analyzing the words
10 in dispute, then consider those words in the immediate context, and then expand
11 the analysis to consider the broader context of other statutes concerning the same
12 subject. Again, ORS 215.760(2) provides that “[a] person may not convert an
13 agricultural building authorized by this section to another use.” We agree with
14 petitioners that that phrase is unambiguous. An “agricultural building” is a
15 building as defined in ORS 455.315. “Authorized” is a past participle of the verb
16 “authorize” and is used as an adjective describing an agricultural building.
17 “Authorized” means “sanctioned by authority.” *Webster’s Third New Int’l*
18 *Dictionary* 147 (unabridged ed 2022). Thus, “[a]uthorized by this section” means
19 authorized by ORS 215.760(1). ORS 215.760(2) provides that such buildings
20 may not be converted to another use. “Convert” means “to change from one form
21 or function to another.” *Webster’s* at 499.

1 The hearings officer’s interpretation—that a building that is authorized by
2 ORS 215.760 and constructed pursuant to that authorization is no longer
3 “authorized by” that section if a person later obtains a building permit for another
4 use—impermissibly inserts a qualifier into the statute where the legislature did
5 not. *See* ORS 174.010 (providing that, in the construction of a statute, we shall
6 not “insert what has been omitted”). The hearings officer’s interpretation
7 construes the statute as “a person may not convert an agricultural building
8 authorized by ORS 215.760 to another use, *unless a person later obtains building*
9 *permit approval for another use.*” We cannot and do not construe the statute in
10 that manner.

11 **B. Legislative History**

12 The legislative history supports our conclusion from the text in context that
13 the legislature intended to prohibit conversion of an agricultural building
14 authorized by ORS 215.760 to any other nonresource uses. ORS 215.760 was
15 enacted in 2013 in House Bill (HB) 2441 and became effective in 2014. Or Laws
16 2013, ch 73, § 2.

17 Since at least 1969, counties have been required to allow on agricultural
18 land “buildings customarily provided in conjunction with farm use.” ORS
19 215.283(1)(e); *see Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030
20 (1995) (uses authorized in ORS 215.283(1) are allowed “as of right”); Or Laws

1 1969, ch 258, § 1 (adding “other buildings customarily provided in conjunction
2 with farm use” to the list of allowed nonfarm uses in ORS 215.213).⁵

3 In 1975, the legislature first exempted from OSSC regulation agricultural
4 buildings “located on a farm.” *Former* ORS 456.758 (1975), Or Laws 1975, ch
5 646, § 2, *renumbered as* ORS 455.315 (1987).

6 Prior to HB 2441, structures used for storage, maintenance or repair of
7 farm or forestry equipment and the preparation and storage of farm or forest
8 products were not authorized as of right in forest and mixed farm and forest
9 zones. Neither were such structures exempt from the OSSC. Prior to HB 2441,
10 structures such as pole barns located in forest zones were not considered exempt
11 “agricultural buildings.” This made siting pole barns on woodlots more difficult

⁵ A former statutory definition of “farm use,” included “the construction and use of dwellings and other buildings customarily provided in conjunction with the farm use.” *Former* ORS 215.203(2) (1963); Or Laws 1963, ch 577, § 2 and ch 619, § 3. Thus, at that time, construction and use of buildings customarily provided in conjunction with the farm use was permissible under the statute as a “farm use.” In 1967, ORS 215.203(2) was amended to provide that “farm use” “does not include * * * the construction and use of dwellings and other buildings customarily provided in conjunction with the farm use,” but there was no concurrent amendment to add such buildings to the list of other allowed uses in ORS chapter 215. Or Laws 1967, ch 386, § 1. In 1969, “other buildings customarily provided in conjunction with farm use” was added to the list of allowed nonfarm uses in *former* ORS 215.213(6) (1969), which was prior to the 1983 marginal lands bifurcation and enactment of ORS 215.283. Or Laws 1969, ch 258, § 1.

1 than siting pole barns on farms because siting such structures required land use
2 and building permit review and approval.

3 Oregon Small Woodlands Association (OSWA) requested that the
4 legislature adopt HB 2441 to authorize structures in forest and mixed farm and
5 forest zones for resource uses. The legislature intended to exempt such structures
6 from land use authorization and building permit requirements, in parity with
7 agriculture buildings on agricultural land. HB 2441 Section 3 redefined
8 “agricultural building” under ORS 455.315(2)(a), in relevant part, to include
9 structures “located on a farm *or forest operation.*” (Emphasis added.) HB 2441
10 Section 2 enacted what is now ORS 215.760. ORS 215.760(1) requires counties
11 to allow “agricultural buildings * * * customarily provided in conjunction with
12 farm use or forest use” outright in forest and mixed farm and forest zones.
13 Accordingly, just as counties must allow pole barns in EFU zones under ORS
14 215.283(1)(e), so too must they allow pole barns in forest and mixed farm and
15 forest zones under ORS 215.760(1).

16 Roger Beyer represented OSWA and testified to the purposes of HB 2441:

17 “What we are asking for is parity with ag buildings. * * * [P]arity is
18 if you are going to put any sort of electrical or plumbing into these
19 buildings, these agricultural buildings, that gets you out of the
20 exempt status. If you are going to put electricity or plumbing in the
21 buildings, you have to go get permits for that. That’s for the public
22 safety issues and human health safety issues. So, this mirrors that
23 identically. So, what these buildings are for * * * it’s about forest
24 landowners who have pieces of equipment that they typically want
25 to leave on their woodlot. Many forest landowners don’t live on their
26 small woodlots. They live somewhere else, and they commute to

1 their woods when they do some stuff. And if they've got a CAT or
2 a, you know, excavator, or an ATV or something like that, they use
3 in their forest management activities, many times you have to truck
4 these back and forth with them because of vandalism problems and
5 things like that. Another common use for these buildings would be
6 fire trucks. Many forest landowners want to have a fire truck on the
7 property, but it just, it doesn't work many times with our neighbors
8 in the forest to leave pieces of equipment like fire trucks out in the
9 open where people can get to them. If you can lock them into a metal
10 building, it would, they would be secure, and you could, you leave
11 them there. So that's basically the bill." Audio Recording, House
12 Committee on Land Use, HB 2441, Feb 7, 2013, at 17:15.

13 The HB 2441-1 amendments added that the structure must be one that is
14 "customarily provided in conjunction with farm use or forest use." House
15 Committee on Land Use Chair Brian Clem explained that limitation was so "that
16 the buildings wouldn't be used for non-farm or forest related things." Audio
17 Recording, House Committee on Land Use, HB 2441, Feb 19, 2013, at 2:15.

18 Representative Mark Johnson, the bill sponsor, explained:

19 "[R]eally all we're asking for here in this bill is that those folks who
20 are owners of forest land, not farmland, who use their land for
21 production, if you will, it's about raising trees. Yes, it's about
22 harvesting timber and so forth, have the same ability to just construct
23 accessory buildings that can be helpful for them and their practice
24 of forestry. So again, they have to go through the same hoops if, in
25 fact, they're going to have electricity in there or any sort of other
26 mechanical needs, they'd have to have separate inspections for that
27 by the state to make sure that those things are installed successfully.
28 But this is certainly not about creating condos in isolated forest
29 settings." Audio Recording, Senate Committee on Rural
30 Communities and Economic Development, HB 2441, Apr 23, 2013,
31 at 38:10.

1 Senator Ginny Burdick expressed concern that such structures might be
2 converted to another, nonresource use: “I could see a situation where you start
3 out with one type of building, then end up with another use that is not
4 contemplated. What protections are there in there to keep it from coming
5 becoming a condo?” Representative Johnson responded:

6 “[T]he intent is strictly to have it for that need that’s specific to the
7 practice. I’m just referring from farm buildings that I’ve worked on
8 where, yes, there could be electricity in them. Some do have, you
9 know, water, because they’re mixing spray and that kind of thing.
10 So, it fits in with farm practices and so forth. I can’t speak to the
11 exact specifics of how the forest practices would dovetail with that.
12 But again, there’s no habitation at all. It’s not for occupation
13 whatsoever. It has to be expressly targeted towards that forest use.”
14 *Id.* at 39:30.

15 Ian Tolleson, Oregon Farm Bureau, testifying in support of the bill, stated:
16 “A lot of our own members have cross purposes that it would be helpful to use a
17 building like this for storage and I think that goes to really the heart of the bill.
18 We certainly don’t envision this to have any kind of habitation or any other use
19 beyond that.” *Id.* at 42:00.

20 Roger Beyer, OSWA, clarified:

21 “To Senator Burdick’s question, Senator, lines nine and 10 of the
22 printed bill, I think, answer that question. We added this on the
23 House side: ‘A person may not convert an agricultural building
24 authorized by this section to another use.’ So, if a building is built,
25 and my understanding, that means if a person wants to convert it to
26 another use, they can’t, but if they even want to apply, particularly,
27 they’d have to go back to the land use process. But I think this is
28 pretty clear that it wouldn’t be allowed.” *Id.* at 43:40.

1 Senator Burdick replied: “Thank you. And I just wanted to get that on the record.
2 That was certainly the tone of our conversation before, and I was just a little
3 thrown off by some of the comments. Thank you.” *Id.*

4 ORS 215.760(2) prohibits a person from converting an agricultural
5 building authorized by ORS 215.760(1) to another use—that is, a use that is not
6 described in ORS 455.315.⁶ ORS 455.315(2)(a)(B)(ii) and (iv) expressly provide
7 that “agricultural building” does not mean “[a] structure used for a purpose other
8 than growing plants in which 10 or more persons are present at any one time” or
9 “[a] structure used by the public.” That prohibits use of the building for use as a
10 commercial event venue.⁷ The legislative history reveals that the legislature
11 intended to limit the use of structures authorized by ORS 215.760(1) to uses that
12 support resource practices and to prohibit those structures from being converted
13 to another use.

14 The hearings officer reasoned that intervenor could avoid the conversion
15 prohibition by obtaining building permits for the event business use. That
16 reasoning is inconsistent with the legislature’s intent that is demonstrated in the
17 plain language of the statute and supported by the legislative history.

⁶ There is no equivalent prohibition for agricultural buildings authorized on farmland.

⁷ An agricultural building may be used for purposes that are “incidental and accessory” to the uses in ORS 455.315(2)(a)(A) and that “[a]re personal to the farm owner and the farm owner’s immediate family.” ORS 455.315(4).

1 **C. Conflicting Statutory Provisions**

2 The parties and the challenged decision do not address the apparent
3 statutory conflict at the heart of this appeal. However, because we are
4 independently obligated to correctly construe ORS 215.760(2), we address it.

5 The Home Occupation Statute, ORS 215.448, authorizes a county to allow
6 home occupations “in any zone,” including “an exclusive farm use zone, forest
7 zone or a mixed farm and forest zone that allows residential uses.” ORS
8 215.448(1). Statutory restrictions apply to home occupations in resource zones.
9 A home occupation located in a resource zone must “be operated substantially in
10 [t]he dwelling[] or [o]ther buildings normally associated with uses permitted in
11 the zone in which the property is located[.]” ORS 215.448(1)(c). “Nothing in
12 [ORS 215.448(1)] authorizes the governing body or its designate to permit
13 construction of any structure that would not otherwise be allowed in the zone in
14 which the home occupation is to be established.” ORS 215.448(3). There is no
15 dispute that the barn is a building normally associated with uses permitted in the
16 AG/F zone.

17 The Home Occupation Statute, and the language quoted above, was
18 enacted in 1983, 30 years prior to the 2013 enactment of HB 2441. We presume
19 that the 2013 legislature that enacted HB 2441 was aware that the Home
20 Occupation Statute permitted the use of other structures normally associated with
21 permitted uses in forest and mixed farm and forest zones for home occupations.
22 *See Coates v. Marion County*, 96 Or 334, 339, 189 P 903 (1920) (explaining

1 presumption that the legislature enacts statutes “with full knowledge of the
2 existing condition of the law and with reference to it”).

3 When confronted with multiple applicable statutes that appear to conflict,
4 we are obligated to engage in a two-part analysis. First, we must determine
5 whether there is any way to reconcile the apparent conflict without exceeding the
6 bounds of the reasonable construction of the wording of the statutes. *Powers v.*
7 *Quigley*, 345 Or 432, 438, 198 P3d 919 (2008). “[W]hen one statute deals with a
8 subject in general terms and another deals with the same subject in a more minute
9 and definite way, the two should be read together and harmonized, if possible,
10 while giving effect to a consistent legislative policy.” *State v. Guzek*, 322 Or 245,
11 268, 906 P2d 272 (1995). Whenever possible, we construe statutes to be
12 consistent with one another. *See* ORS 174.010 (“[W]here there are several
13 provisions or particulars such construction is, if possible, to be adopted as will
14 give effect to all.”); *see also Force v. Dept. of Rev.*, 350 Or 179, 190, 252 P3d
15 306 (2011) (“Statutory provisions, however, must be construed, if possible, in a
16 manner that ‘will give effect to all’ of them.”). Second, if such harmonizing is
17 not possible, then we must apply established rules of construction that give
18 precedence to one of the conflicting statutes over the other. “When a general
19 statute and a specific statute both purport to control an area of law, this court
20 considers the specific statute to take precedence over an inconsistent general
21 statute related to the same subject.” *State ex rel Juv. Dept. v. M. T.*, 321 Or 419,

1 426, 899 P2d 1192 (1995). *See Preble v. Centennial Sch. Dist. No. 287*, 298 Or
2 App 357, 364, 447 P3d 42 (2019) (setting out and applying two-step inquiry).

3 ORS 215.448 is a general statute that applies in all zones, including mixed
4 farm and forest zones, and would appear to allow the county to authorize in the
5 AG/F zone the use of an agricultural building for home occupation events. ORS
6 215.760 is a specific statute that applies to “land zoned for forest use or for mixed
7 farm and forest use.” Accordingly, the conversion prohibition in ORS 215.760(2)
8 must take precedence over the general allowance in ORS 215.448(1)(c)(B).

9 The text of ORS 215.760(2) does not permit any exception for conversion
10 of agricultural buildings to home occupations uses, even if those uses require
11 separate and after-the-fact land use and building permit approvals. The legislative
12 history of ORS 215.760 does not demonstrate that the legislature considered the
13 potential of converting an agricultural building authorized under ORS 215.760 to
14 a home occupation use. There is no indication that the legislature intended to
15 permit such conversion. Instead, the legislative history demonstrates that the
16 legislature intended to prohibit the conversion to any use other than those uses
17 listed in ORS 455.315. While we are required to attempt to harmonize conflicting
18 statutory provisions, the hearings officer’s construction of ORS 215.760(2)
19 exceeds the bounds of the reasonable construction of the wording of that
20 provision, especially as illuminated by the legislative history.

21 Intervenor argues that the hearings officer correctly found that a literal
22 application of the conversion prohibition in ORS 215.760(2) would lead to an

1 absurd result in this case because intervenor cannot convert the barn to be used
2 for home occupation event purposes, but could (perhaps) construct a new barn,
3 not authorized by ORS 215.760(1), to use for event purposes. Petitioner argues,
4 and we agree, that while that result is unfortunate for intervenor’s business plans,
5 ORS 215.760(2) reflects the legislature’s policy choice to require agricultural
6 buildings in forest and mixed farm and forest zones to be used only for the
7 purposes listed in ORS 455.315.

8 The first assignment of error is sustained.

9 **SECOND ASSIGNMENT OF ERROR**

10 As explained above, a home occupation located in a resource zone must
11 “be operated substantially in [t]he dwelling[] or [o]ther buildings normally
12 associated with uses permitted in the zone in which the property is located[.]”
13 ORS 215.448(1)(c). “Nothing in [ORS 215.448(1)] authorizes the governing
14 body or its designate to permit construction of any structure that would not
15 otherwise be allowed in the zone in which the home occupation is to be
16 established.” ORS 215.448(3). Clackamas County Zoning and Development
17 Ordinance (ZDO) Section 806 regulates home occupations to host events. ZDO
18 806.02(C) implements ORS 215.448(1)(c) and provides: “the home occupation
19 shall be operated substantially in the operator’s dwelling or other buildings
20 normally associated with uses permitted in the applicable zoning district.”
21 Petitioners argue that the hearings officer misconstrued the law and made
22 findings not based on substantial evidence in concluding that the dressing

1 building is a structure that is “normally associated with uses permitted in the
2 zone.”

3 The hearings officer found:

4 “The proposed dressing building will be used on non-event days to
5 support the existing agricultural uses on the site by providing space
6 for break rooms, storage rooms, bathrooms and a kitchen area for
7 lunch breaks. During event days, the building will be used to provide
8 changing areas for the wedding party and a food storage area.
9 Accessory buildings in the AG/F zoning district are typically
10 permitted to have bathrooms and changing rooms. The proposed
11 building will be designed to match the same aesthetic as the existing
12 barn, thereby keeping the same visual characteristics of the site.
13 Both the existing barn and the proposed dressing building are
14 designed to appear and function as agricultural buildings similar to
15 those existing on surrounding properties in the area.” Record 23.

16 Petitioners argue that there is no evidence in the record that other
17 agricultural buildings in the AG/F zone contain multiple bathrooms, showers, and
18 kitchens, and are connected to septic systems capable of serving up to 150 people.

19 Intervenor responds that the hearings officer’s findings correctly construe
20 the applicable law, are adequate, and are supported by substantial evidence.
21 Intervenor points to the following materials in the record: (1) application
22 materials explaining the operations and use of the dressing building, how it
23 supports the existing agricultural uses on the site, and providing site plans for the
24 dressing building; (2) Staff Report dated July 6, 2023; and (3) Second Addendum
25 to Staff Report.

26 The Second Addendum to Staff Report states simply that “[t]he design of

1 the building is similar to buildings that are normally associated with uses
2 permitted in the Ag/F zoning district.” Record 99. That conclusory statement is
3 not substantial evidence. Differently, in *North Hideaway Hills Neighbors v. Lane*
4 *County*, we concluded that county staff testimony describing the characteristics
5 of buildings normally associated with uses in the zone constituted substantial
6 evidence. ___ Or LUBA ___ (LUBA Nos 2023-081/083, May 20, 2024) (slip op
7 at 22). There, the county staff generated a table of comparable structures and
8 explained both their research methods and reasoning behind their conclusion that
9 the proposed structure exceeded the average size of similar structures normally
10 associated with uses permitted in the applicable zone. *Id.* (slip op at 19-20).

11 The Staff Report dated July 6, 2023, states:

12 “The proposed [dressing] building will be used on non-event days
13 to support the existing Christmas tree farm business on site by
14 providing space for break rooms, storage rooms, bathrooms and a
15 kitchen area for lunch breaks. During event days, the building will
16 be used to provide changing areas for the wedding party and a food
17 storage area. Accessory buildings in the AG/F zoning district are
18 typically permitted to have bathrooms and changing rooms. The
19 proposed building will be designed to match the same aesthetic of
20 the existing barn, thereby keeping the same visual characteristics of
21 the site.” Record 358.

22 That statement may support a finding that “accessory buildings in the
23 AG/F zoning district are typically permitted to have bathrooms and changing
24 rooms.” However, that statement does not provide evidence that the dressing
25 building is a “building[] normally associated with uses permitted in the zone.”

26 The application materials provide:

1 “In the near future, an additional structure will be built to
2 accompany both businesses, Windmill Ridge Farms (Tree Farm)
3 and Sage Social (Event Venue) and serve as a dual-purpose
4 building. The building will be a 20x70 office space with a break
5 room, storage rooms (dressing rooms) and bathrooms. The building
6 will be constructed to mirror the image of the barn, thus keeping the
7 characteristics of this area’s AG/F zoning. The office space will
8 provide a much-needed room for business meetings, staff meetings,
9 restrooms, a kitchen area for lunches and breaks, as well as a place
10 to refrigerate drinks and homemade lunches for the onsite Tree Farm
11 workers that work long shifts during tree harvesting and planting
12 seasons. Serving as a dual purpose, it will also be utilized on non-
13 tree farming days, for the event venue services. The kitchen area will
14 be used to store food (if needed) for the event, such as cake in the
15 fridge, especially on warm days. As well as a place to get dressed
16 for the event, which will also serve as storage rooms. In the event
17 that the venue is no longer an active business this building will
18 continue to serve as office space, break room and restroom for onsite
19 workers as well as storage unit instead of dressing rooms.

20 “*Local Example: Clackamas County, Redland Tree Farm and
21 Event Venue, currently have and are building additional structures
22 to be used as suites, kitchen, for indoor and outdoor events, similar
23 to our property. * * *” Record 379.

24 Generally, application materials and applicant testimony may be
25 considered substantial evidence to support a decision. *Devin Oil Co., Inc. v.*
26 *Morrow County*, 60 Or LUBA 336, 348-49, *aff’d*, 236 Or App 164, 235 P3d 705
27 (2010). However, the testimony that the dressing building will be used for
28 agricultural purposes is insufficient to establish that the building is normally
29 associated with uses permitted in the zone. The “local example” of other
30 accessory buildings that have been constructed for event purposes—without any
31 description of those structures and evidence that those structures are normally

1 associated with uses permitted in AG/F zone—is similarly insufficient to
2 demonstrate that the dressing building satisfies that requirement.

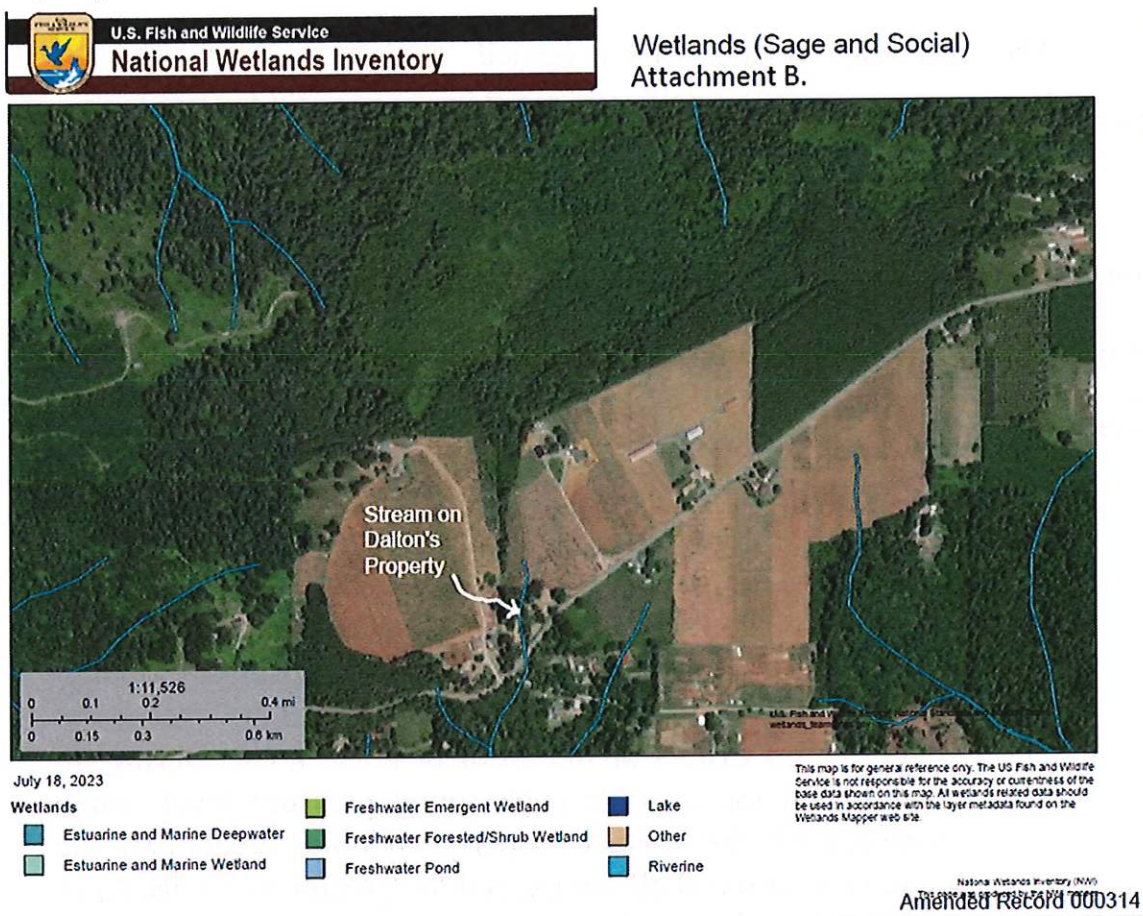
3 The second assignment of error is sustained.

4 **THIRD ASSIGNMENT OF ERROR**

5 Conditional use approval criterion ZDO 1203.03(B) requires the county to
6 determine that “[t]he characteristics of the site are suitable for the proposed use
7 considering size, shape, location, topography, existence of improvements and
8 natural features.” Petitioners argue that the hearings officer erred in finding the
9 criterion was met based on a failure to review existing natural features, which
10 resulted in the hearings officer improperly failing to apply ZDO 1002.04, which
11 requires preservation of river and stream corridors. Petitioners argue that the
12 hearings officer’s conclusion that ZDO 1203.03(B) is satisfied is not supported
13 by adequate findings or substantial evidence.

14 Petitioners assert that there are springs and a small stream in the area where
15 the oak trees are located on their property, which we understand to mean the
16 southern tip of the property where trees are depicted on the site plan reproduced
17 above. The hearings officer found that “[t]here are no mapped protected natural
18 features on the property.” Record 10. Petitioners argue that finding fails to
19 address petitioners’ evidence and argument raised below that a stream exists on
20 the property. *See Norvell v. Portland Area LGBC*, 43 Or App 849, 853, 604 P2d
21 896 (1979) (findings must address and respond to specific issues relevant to
22 compliance with applicable approval standards that were raised in the

1 proceedings below). For example, petitioner submitted a US Fish and Wildlife
2 Service National Wetland Inventory map showing a stream located on the
3 property.



4
5 Record 314.

6 Intervenor responds, and we agree, that even if the hearings officer erred
7 in failing to address petitioner's argument and evidence regarding the disputed
8 stream, that error is harmless because the stream is located on the southwestern
9 corner of the property which is distant from the proposed event area and access
10 and there is no evidence that the stream would affect the proposed use or vice

1 versa. Likewise, there is no evidence that the stream would make the site
2 unsuitable for the proposed use or that the proposed use will impact the stream
3 corridor.

4 The third assignment of error is denied.

5 **FOURTH ASSIGNMENT OF ERROR**

6 Petitioners argue that the hearings officer’s findings related to noise
7 impacts are inadequate and not based on substantial evidence in the record. ZDO
8 806.02(J) regulates noise for home occupation event businesses and provides, in
9 part:

10 “Noise: Noise shall be regulated as follows:

11 “1. From 7:00 a.m. until 10:00 p.m. on Friday and Saturday and
12 until 9:00 p.m. on all other days of the week, the average peak
13 sound pressure level, when measured off the subject property,
14 of noise created by the home occupation shall not exceed the
15 greater of 60 dB(A) or the ambient noise level. During all
16 other hours, the average peak sound pressure level, when
17 measured off the subject property, of noise created by the
18 home occupation shall not exceed the greater of 50 dB(A) or
19 the ambient noise level.

20 “* * * * *

21 “2. A noise study may be required to demonstrate compliance
22 with Subsection 806.02(J)(1). If a noise study is required,
23 measurements shall be made with a sound level meter. The
24 sound level meter shall be an instrument in good operating
25 condition, meeting the requirements of a Type I or Type II
26 meter, as specified in ANSI Standard 1.4-1971. The sound
27 level meter shall contain at least an A-weighted scale, and
28 both fast and slow meter response capability. Personnel
29 making measurements shall have completed training in the

1 use of the sound level meter, and measurement procedures
2 consistent with that training shall be followed.”

3 The county did not require and intervenor did not submit a noise study.
4 Intervenor submitted evidence of decibel readings that ranged from 35.5 to 54.2
5 measured from the property boundary with amplified music inside the barn with
6 all doors open and amplified music on the patio north of the barn. Record 104,
7 106-112.

8 Petitioners submitted evidence of decibel readings measured from the
9 property boundary next to South Beaver creek Road that showed an average of
10 under 55 and maximum of 81. Record 126, 127, 149, 309.

11 The hearings officer found

12 “that it is feasible to comply with [ZDO 806.02(J)]. The proposed
13 events will take place predominantly indoors, within the existing
14 and proposed buildings, or in outdoor areas surrounding these
15 buildings. Based on [intervenor’s] sound level readings, the average
16 peak sound pressure level at the property lines of the site did not
17 exceed 60 dB with the sound system playing music at full volume
18 within the existing barn with the doors open and on the outdoor patio
19 north of the existing barn. (Attachments B through D of Exhibit 43,
20 Exhibits 43 through 43h, and Exhibit 48). This is consistent with
21 [petitioners’] noise measurements measured at the site’s
22 Beaver creek Road frontage. [Intervenor’s] and [petitioners’]
23 measurements both showed noise spikes in excess of 60 dB and
24 noise from events is audible on some surrounding properties, based
25 on neighbors’ testimony. However, the Code does not prohibit such
26 impacts. Noise limits are based on the average noise level, do not
27 include a maximum limit, and do not prohibit noise that is audible
28 from offsite. Future activities on the site must comply with these
29 noise limits and it is in [intervenor’s] best interest to do so, as
30 violations may result in enforcement action by the County, including
31 potential revocation of this approval.” Record 26.

1 The hearings officer relied on similar findings to reject petitioners’
2 arguments that noise generated by the event use will cause the use to “alter the
3 character of the surrounding area in a manner that substantially limits, impairs or
4 precludes the use of surrounding properties for the primary uses allowed in the
5 zoning district(s) in which surrounding properties are located,” in violation of
6 ZDO 1203.03(D). Record 16. With respect to that criterion and disputed noise
7 impacts, the hearings officer found

8 “that it is feasible to comply with the noise limits in ZDO 806.02.J,
9 based on the findings below. The proposed events will take place
10 primarily within two buildings onsite. The nearest dwellings are 800
11 feet or more away from the event area and screened by existing and
12 proposed vegetation (i.e. the proposed hedge on the north edge of
13 the parking lots, retained fir trees along the site’s S. Beaver creek
14 Road frontage, and natural growth trees on the west boundary of the
15 site). The hearings officer finds that the size of the site (nearly 20
16 acres), the location of proposed events (primarily inside buildings
17 located some distance from adjacent properties), combined with the
18 dense trees will inhibit sounds traveling to adjoining properties
19 making it feasible to comply with applicable noise standards.”
20 Record 16.

21 Petitioners argue that the hearings officer erred by not requiring a noise
22 study. Intervenors respond, and we agree, that ZDO 806.02(J) does not mandate
23 a noise study and, instead, provides the county discretion to require a noise study.
24 Petitioners have not demonstrated that the county’s discretionary decision to not
25 require a noise study provides a basis for remand.

26 Petitioners argue that the hearings officer’s findings are not supported by
27 substantial evidence because there is no evidence that the majority of the event

1 activities will occur indoors and there is no evidence quantifying how much noise
2 existing vegetation attenuates, especially because the prior tree farm Christmas
3 trees have been removed.

4 Intervenor responds, and we agree, that intervenor's decibel readings are
5 evidence that a reasonable person would rely upon to find that the noise criterion
6 is satisfied. That evidence includes a map of the location of the decibel readings
7 that shows some vegetation between the barn and patio area and the reading
8 location. Record 122. Moreover, petitioners' decibel readings do not
9 conclusively demonstrate that the proposed home occupation use causes an
10 "average peak sound pressure level, when measured off the subject property,"
11 exceeding 60 dB(A).

12 The decision does not rely on Christmas trees to attenuate the noise.
13 Instead, the decision acknowledges that "[t]he majority of the Christmas trees
14 have been removed from the site." Record 2, n 1. The decision relies on "the
15 proposed hedge on the north edge of the parking lots, retained fir trees along the
16 site's S. Beaver creek Road frontage, and natural growth trees on the west
17 boundary of the site." Record 16. Accordingly, petitioner's argument that there
18 is no evidence that Christmas trees will attenuate the noise provides no basis for
19 remand.

20 The fourth assignment of error is denied.

1 **FIFTH ASSIGNMENT OF ERROR**

2 Petitioners argue that the hearings officer’s findings related to traffic
3 impacts are inadequate and not based on substantial evidence in the record.
4 Intervenor was required to establish that the “safety of the transportation system
5 is adequate to serve the proposed use.” ZDO 1203.03(C). With respect to that
6 CUP criterion, the hearings officer found that that the safety of the transportation
7 system is adequate to serve the proposed use, based on the expert testimony of
8 county transportation staff, and reasoned that neighbors’ concerns were
9 insufficient to overcome that expert testimony. Record 13.

10 The hearings officer observed that several crashes have been reported on
11 the curved sections of South Beavercreek Road southwest of the site and that the
12 event business “will increase the volume of traffic on that section of road, which
13 will increase the risk of accidents.” *Id.* The hearings officer reasoned that while
14 “any increase in traffic volume will increase the risk of accidents and roads with
15 higher traffic volumes will generate more accidents within a given period of
16 time,” the existing transportation system can safely accommodate the additional
17 traffic from the event use because additional traffic generated by the use “will
18 not exceed the capacity of area roads or create, or exacerbate existing hazards.”
19 Record 14-16.

20 Petitioners argue that the county transportation staff analysis upon which
21 the hearings officer relied assumed only up to 36 events per year, while the
22 hearings officer approved up to 52 events per year. Thus, petitioners argue, a

1 reasonable person would not rely on the county transportation staff’s opinions to
2 find that that the “safety of the transportation system is adequate to serve the
3 proposed use.” ZDO 1203.03(C). Petitioners contend that the record does not
4 include any traffic analysis for up to 52 events per year.⁸

5 Intervenor points to county transportation and engineering comments after
6 the proposal was changed to host up to 52 events per year. A January 4, 2024,
7 staff response to new evidence following the open record period acknowledges
8 that the initial application requested up to 36 events per year and that the updated
9 proposal requested up to 52 events per year. Record 97. That same staff report
10 quoted the following analysis from the county transportation engineering
11 division:

12 “Despite the elevated crash risk, the addition of a small number of
13 trips from the proposed development would not trigger the
14 requirement that [intervenor] provide mitigation, based on the
15 principle of rough proportionality of traffic impacts to required
16 improvements. Beaver creek Rd carries [Average Daily Trips] of
17 about 2,400 vehicles per day. The proposed development would not
18 add appreciable vehicle trips commensurate with the improvements
19 suggested by the crash data.” Record 98.

20 Similarly, a February 2, 2024, joint memorandum from a senior planner
21 and a senior traffic engineer stated:

22 “The County estimates that the trip distribution to and from the

⁸ Intervenor submitted a traffic report that analyzed 52 events. However, the hearings officer rejected it because it violated the open record period restrictions. Record 9.

1 event site will be 50 percent from the north and 50 percent from the
2 south. Based on the limited number of vehicle trips added to the
3 curves southwest of the site, relative to the average daily vehicle
4 trips on S Beaver Creek Road, the vehicle trips would not create or
5 exacerbate a safety hazard. In addition, as discussed above, signage
6 in the curves meet current nominal safety standards. Therefore, the
7 County finds that the safety of the transportation system is adequate
8 to support the event hosting use.” Record 61.

9 We agree with intervenor that this evidence is evidence upon which a
10 reasonable person could rely to find that the traffic safety criterion was met,
11 particularly because there is no contrary expert traffic evidence in the record that
12 contradicts the county staffs’ expert opinions.

13 In response to concerns that the events will increase the number of
14 intoxicated drivers on the road, the hearings officer found:

15 “[Intervenor] can regulate alcohol use on the site. Some attendees
16 may bring their own alcohol or otherwise consume excessive
17 amounts, which could create a hazard, especially if those attendees
18 attempt to drive home. However, [intervenor] will have a strong
19 interest in monitoring and enforcing limits on alcohol consumption
20 and stopping intoxicated patrons from driving, in order to avoid
21 legal liability. There is no evidence that this use will generate a
22 significantly higher risk of drunk drivers than any other business that
23 serves alcohol.” Record 15.

24 Petitioners argue that there is no evidence that there are other businesses
25 in the area that serve alcohol, so this finding is not supported by substantial
26 evidence. Intervenor responds, and we agree, that the disputed finding
27 demonstrates that the hearings officer considered alcohol risk as it relates to the
28 proposed use and reasonably determined that it does not pose a significant safety

1 issue. The finding and the hearings officer's reasoning is not dependent on the
2 existence of other businesses in the area that serve alcohol.

3 The fifth assignment of error is denied.

4 **SIXTH ASSIGNMENT OF ERROR**

5 Petitioners argue that the hearings officer's findings with respect to
6 intervenor's alternative proposal to construct a new "reception building" and use
7 an 800-square foot temporary tent to host receptions are internally inconsistent
8 and not supported by adequate findings. Intervenor responds that the challenged
9 decision only approves the primary proposal and the hearings officer did not rely
10 upon the alternative proposal when reaching the decision. Thus, the sixth
11 assignment of error provides no basis for remand.

12 We tend to agree with petitioners that the hearings officer's decision is
13 unclear with respect to the alternative proposal. The hearings officer found "there
14 is no need to address the revised proposal, as the hearings officer approved use
15 of the existing barn, based on the discussion above." Record 24. The hearings
16 officer also found that "the site is large enough to accommodate [intervenor's]
17 alternative proposal to construct a new 2,400 square foot reception building north
18 of the proposed parking lot and southwest of the existing barn." Record 13.
19 However, as petitioners point out, the decision does not analyze the applicable
20 criteria with respect to a new reception building. Ultimately, we agree with
21 intervenor that the decision does not approve construction or use of a new

1 reception building for home occupation event business purposes. Accordingly,
2 the sixth assignment of error provides no basis for remand.⁹

3 The sixth assignment of error is denied.

4 The county's decision is remanded.

⁹ We sustain the first assignment of error and conclude that ORS 215.760(2) prohibits use of the barn for the home occupation event business. Accordingly, the hearings officer will likely consider the alternative proposal on remand and adopt new findings regarding that proposal.