

**BEFORE THE LAND USE HEARINGS OFFICER
OF CLACKAMAS COUNTY, OREGON**

Regarding a remanded application by Mark Herkamp)	<u>FINAL ORDER ON REMAND</u>
for approval of a CUP to establish and operate a)	Case No. Z0540-19-C
home occupation to host events at 14275 S Mueller)	(Herkamp
Road in unincorporated Clackamas County, Oregon)	Event Facility Remand)

A. FINDINGS

1. The applicant, Mark Herkamp, requests approval of a Conditional Use Permit (“CUP”) to operate a home occupation to host weddings and other events. The applicant proposes to operate the facility on a 12-acre site located at 14275 S Mueller Road; also known as tax lots 600 and 690, Section 28, Township 3 South, Range 2 East, WM, Clackamas County (the “site”). The site and all abutting properties are zoned EFU (Exclusive Farm Use).

a. The property is rectangular shaped with a creek and large pond on the northern portion. The site is currently developed with a residence near the south central portion of the site, two barns--an “upper barn” in the southwest corner and a “lower barn” in the northeast corner--a shop, and other outbuildings. The applicant proposed to construct a restroom building and proposed the following renovations to the two existing barns to accommodate proposed events:

The main (Lower) barn will be modified to allow use for gatherings and will be designed to accommodate tables, chairs, music and dancing and will include a catering prep area without cooking equipment. A small vestibule will be added to provide an improved entrance to the building.

The smaller, second barn (Upper) will be renovated to provide space for small meetings and will also accommodate ancillary space that may be used in conjunction with larger events. Two single user ADA bathrooms will be added to the Upper Barn.

2. The applicant proposed up to 44 events per year with varying numbers of guests allowed depending on the day of the event. The applicant proposed to conduct events outdoors and within the renovated barns. The applicant proposed to provide parking for up to 104 automobiles on the site.

3. By order dated April 20, 2020, former Clackamas County Hearings Officer Fred Wilson approved the CUP application subject to conditions of approval. 1000 Friends of Oregon (“1000 Friends”) appealed Hearings Officer Wilson’s decision to the Land Use Board of Appeals (“LUBA”).

4. LUBA remanded the decision to the County by order dated October 30, 2020. *1000 Friends of Oregon v. Clackamas County*, LUBA No. 2020-051. LUBA concluded that the proposed barn renovations and new restroom building violate ORS 215.448(3), as the proposed barn alterations would change the nature of the buildings to a type of building that would not otherwise be allowed in the EFU zone. LUBA further held that the free standing restroom building is a “building[]normally associated with uses permitted in the [EFU] zone...” (ORS 215.448(1)(c)(B)) or a “[s]tructure that would not otherwise be allowed in the [EFU] zone...” (ORS 215.448(3)). LUBA denied 1000 Friends’ other assignments of error.

5. Both parties appealed LUBA’s decision to the Court of Appeals, which reversed LUBA’s decision regarding renovations to the “Lower Barn,” affirmed those portions addressing the “upper barn” and restroom building, and remanded the case to LUBA. *1000 Friends of Or. v. Clackamas Cnty.*, 309 Or App 499, 483 P.3d 706 (2021). The Oregon Supreme Court denied review of the Court of Appeals’ decision. *1000 Friends of Or. v. Clackamas Cnty.*, 367 Or 347 (2021).

6. LUBA revised its decision consistent with the Court of Appeals decision and again remanded the decision to the county by order dated August 30, 2021.

7. The applicant has now requested that the County proceed with the remand of the CUP application pursuant to ORS 215.435(2)(a). Clackamas County Hearings Officer Joe Turner (the "hearings officer") held a public hearing about the remanded application. Representatives of the applicant testified in support of the remanded application. No one else testified orally or in writing in response to the remand. Contested issues on remand include:

a. Whether enclosure of the covered porch area of the upper barn building will change the nature of this existing building to one that is not otherwise be allowed in the EFU zone, ORS 215.448(3); and

b. Whether the proposed free-standing restroom building is a “building[]normally associated with uses permitted in the [EFU] zone...” (ZDO 806.02.C and ORS 215.448(1)(c)(B)) or a “[s]tructure that would...otherwise be allowed in the [EFU] zone...” (ORS 215.448(3)).

8. Based on the above findings, and incorporating the findings from Hearings Officer Wilson’s April 20, 2020 order, the hearings officer:

a. Denies the proposed free-standing restroom building; and

b. Approves the remainder of the application, subject to the following conditions of approval.

B. HEARING AND RECORD HIGHLIGHTS

1. The hearings officer received testimony at a public hearing about this remanded application, on October 14, 2021. All exhibits and records of testimony are filed at the Clackamas County Department of Transportation and Development. At the beginning of the hearing, the hearings officer made the declaration required by ORS 197.763. The hearings officer disclaimed any *ex parte* contacts, bias or conflicts of interest. The following is a summary by the hearings officer of selected testimony at the public hearing.

2. County planner Clay Glasgow summarized the history of the application. He noted that the remand proceeding is limited to whether the proposed freestanding restroom building and renovations to the “upper barn” are “buildings normally associated with uses permitted in the EFU zone, as required by ZDO 806.02.C and ORS 215.448(1)(c)(B).

a. He noted that ZDO 806.02.L allows the use of portable restrooms for this type of event facility and accessory restrooms are not unusual in the EFU zone. He opined that it would be “unusual” for the county to require permanent restroom facilities for this type of facility. He requested the hearings officer modify the conditions of approval to allow either portable or permanent restrooms, subject to county approval.

3. Attorney Tyler Smith and architect Jessica Iselin appeared on behalf of the applicant, Mark Herkamp.

a. Mr. Smith summarized his memorandum dated October 14, 2021 (Exhibit 43).

i. He testified that, contrary to LUBA’s assumption, changes to the upper barn are limited to enclosing the previously approved restrooms for this building. The floor plans and elevations drawings in the record (Plan Sheet A6 of the application) reflect the existing condition of the upper barn, with the exception of the enclosed restrooms. The county approved the restrooms in 2018 and the applicant installed the rough plumbing within the existing roof overhang on the southeast corner of the building.. (Attachments 5-12 of Exhibit 43).¹ The applicant intends to wall off the area beneath the existing roof overhang to enclose the restrooms within the building. No other changes are proposed to the upper barn building.

ii. In regard to the free-standing restroom building, as Ms. Iselin testified at the original public hearing, the applicant originally proposed to place four portable restrooms on the site for use by event guests. However, the county building code department requested that the applicant install permanent restrooms facilities. (Exhibit 13). The applicant is willing to provide portable restrooms, plumbed restrooms inside the lower barn, or in the proposed freestanding restroom building, whichever the county

¹ Mr. Smith attached 16 “exhibits” to his memorandum, County Exhibit 43. To avoid confusion with the county’s exhibit numbering, the hearings officer refers to these “exhibits” as “attachments” to Exhibit 43.

prefers. The county has approved, and the applicant installed, a new septic system and drainfield with sufficient capacity to accommodate up to 300 people per day. (Exhibits 15 and 16).

Hearings Officer Wilson concluded that the code permits restrooms on EFU land as “uses and structures customarily accessory and incidental to a dwelling” pursuant to ZDO 401.04, table 401-1.

iii. He waived the applicant’s right to submit a final written argument.

b. Ms. Iselin testified that she met with county building department staff prior to submitting the application. Based on that meeting, she understood that the county allows portable restrooms for a limited period and the county would prefer that the applicant install permanent restroom facilities to serve the proposed use. She testified that all of the interior walls shown on the floor plan for the upper barn are existing.

4. At the conclusion of the hearing, the hearings officer closed the record and took the matter under advisement.

C. FINDINGS

1. LUBA remanded this CUP decision for the sole issues of determining:

a. Whether changes to the upper barn will convert the existing building to a “[s]tructure that would not otherwise be allowed in the zone in which the home occupation is to be established. ORS 215.448(3); and

b. Whether the proposed freestanding restroom building is:

i. A “building[] normally associated with uses permitted in the zone in which the property is located” (ZDO 806.02.C and ORS 215.448(1)(c)(B)); and

ii. A “[s]tructure that would...otherwise be allowed in the zone in which the home occupation is to be established” (ORS 215.448(3)).

2. Based on the applicant’s un rebutted testimony, and contrary to the assumptions of LUBA and the Court of Appeals, no changes are proposed to the interior of the existing upper barn. There are no existing horse stalls. The building is currently partitioned as shown in Plan Sheet A6 of the application. The county approved restrooms in the southeast corner of this building in 2018, prior to submittal of this application. (Attachments 11 and 12 of Exhibit 43). The applicant proposed to enclose the restrooms by constructing walls beneath the existing roof overhand in the southeast corner of the upper barn building. The hearings officer finds that the existing upper barn is a “building[] normally associated with uses permitted in the zone in which the property is located” (ZDO 806.02.C and ORS 215.448(1)(c)(B)). Enclosure of this small area of the

existing upper barn building will not change the nature of this existing building to one that is “[n]ot otherwise be allowed in the [EFU] zone...” (ORS 215.448(3)).

3. The hearings officer cannot find that the proposed free-standing restroom building is a “building[] normally associated with uses permitted in the [EFU] zone...” (ZDO 806.02.C and ORS 215.448(1)(c)(B)) or a “[s]tructure that would...otherwise be allowed in the [EFU] zone...” (ORS 215.448(3)).

a. ZDO 806.02.L expressly allows the use of portable restrooms for home occupations to host events. Home occupations to host events are allowed as a conditional use in the EFU zone. ZDO Table 401-1. Therefore, the hearings officer finds that the use of portable restrooms is allowed on the site.

b. The hearings officer further finds that permanent restroom facilities are allowed within barns and accessory structures in the EFU zone. As noted above, the county previously approved a restroom within the upper barn on the site (Attachments 11 and 12 of Exhibit 43). In addition, the hearings officer is aware of other cases where the county has approved restrooms within accessory structures. The hearings officer finds that the installation of restroom facilities within an existing barn or accessory structure would not change the nature of the building to one that is not normally associated with uses permitted in the EFU zone or that would not otherwise be allowed in the EFU zone. Therefore, the hearings officer finds that the applicant should be allowed to construct restrooms within the existing lower barn, if desired.

c. However, as LUBA noted, there is no evidence in the record that separate, free-standing, restroom buildings are normally associated with uses permitted in the EFU zone or that the restroom building is accessory to the existing dwelling. (p. 21 of LUBA No. 2020-051). The applicant failed to provide any additional evidence on remand. Therefore, the hearings officer cannot approve the proposed free-standing restroom building.

D. CONCLUSION

1. Based on the findings and discussion provided or incorporated herein, the hearings officer:

a. Denies the proposed free-standing restroom building; and

b. Approves the remainder of the application, Case No. Z0540-19-C (Herkamp), subject to the following conditions of approval.

E. DECISION

Based on the findings, discussion and conclusions provided or incorporated herein and the public record in this case, the hearings officer hereby approves Case No. Z0540-19-C (Herkamp) subject to the following conditions:

I. General Conditions:

- A. Approval of this land use permit is based on the submitted written narrative and plan(s) dated December 12, 2019. Following submission of additional requested information, the application was deemed complete on January 2, 2020. No work shall occur under this permit other than that which is specified within these documents. It shall be the responsibility of the property owner(s) to comply with this document(s) and the limitation of approval described herein.
- B. The applicant is advised to take part in a Post Land Use Transition meeting. County staff would like to offer you an opportunity to meet and discuss this decision and the conditions of approval necessary to finalize the project. The purpose of the meeting is to ensure you understand all the conditions and to identify other permits necessary to complete the project. If you like to take advantage of this meeting please contact Wendi Coryell, at (503) 742-4657 or at wendicor@co.clackamas.or.us
- C. **Prior to the issuance of building permits**, the applicant shall submit a statement of use to Wendi Coryell in the Clackamas County Engineering Division. Wendi may be contacted at 503-742-4657, or wendicor@co.clackamas.or.us The statement of use is used to calculate the Transportation System Development charge. A Transportation System Development Charge (TSDC) is included in the final calculation of the building permit fees for new instructional projects; this includes additions and tenant improvements that increase the number of daily trips to the site.
- D. The conditional use approval is valid for four years from the date of the final written decision. During this four year period, the approval shall be implemented, or the approval will become void. “Implemented” means all major development permits shall be obtained and maintained for the approved conditional use, or if no major development permits are required to complete the development contemplated by the approved conditional use, “implemented” means all other necessary County development permits (e.g. grading permit, building permit for an accessory structure) shall be obtained and maintained. A “major development permit” is:
 - 1. A building permit for a new primary structure that was part of the conditional use approval; or
 - 2. A permit issued by the County Engineering Division for parking lot or road improvements required by the conditional use approval.

- E. This Conditional Use approval is granted subject to the above and below stated conditions. Failure to comply with any of the conditions of approval constitutes a violation of this permit and may be cause for revocation of this approval.
- F. The approval of the application granted by this decision concerns only the applicable criteria for this decision. The decision does not include any conclusions by the county concerning whether the activities allowed will or will not come in conflict with the provisions of the federal Endangered Species Act (ESA). This decision should not be construed to or represented to authorize any activity that will conflict with or violate the ESA. It is the applicant, in coordination if necessary with the federal agencies responsibility for the administration and enforcement of the ESA, who must ensure that the approved activities are designed, constructed, operated and maintained in a manner that complies with the ESA.

II. **Planning and Zoning Conditions:** Clay Glasgow, (503) 742-4520, clayg@clackamas.co

- A. Development of the subject property is subject to the provisions of ZDO Section 1203 and those other relevant codes and ordinances adopted by the Board of County Commissioners pursuant to subsection 1001.03 of the ZDO, including, but not limited to, the County Roadway Standards, County Excavation and Grading Ordinance, and Oregon Structural Specialty Code, etc.
- B. Any outdoor lighting [ZDO 1005.05(A) and (B) and 806.02(I)] shall be located and designed so that it does not shine onto adjacent properties, upwards or rights-of-way. If additional lighting will be installed, the applicant shall submit an outdoor lighting system design plan prior to installation of the outdoor lighting system for review and approval by Planning and Zoning Division.
- C. All signs shall be in compliance with ZDO Section 1010.06 and 1010.13. One temporary sign shall be allowed in addition to signs permitted pursuant to Section 1010. The temporary sign shall not exceed eight square feet in area; shall be placed on private property on the day of the event; shall be removed no more than 24 hours after the event; and shall be physically attached to the premises in a manner which both prevents the sign from being moved or blown from its location, and allows the prompt removal of the sign.
- D. Use of on-site sewage disposal facilities, if proposed, shall be subject to approval by Septic & Onsite Wastewater System Programs.
- E. **Prior to commencement of use:** the applicant shall submit a plan showing satisfaction of requirements from Section 1021 of the Zoning and Development Ordinance, regarding trash/recycling. Detailed information, including ZDO 1021, is available on the county web site www.co.clackamas.or.us under “Garbage & Recycling.”

- F. **Prior to use:** The applicant shall obtain any necessary County Health Department Licenses and comply with County Health Department regulations.
- G. **Prior to use:** The applicant shall obtain any applicable OLCC Licenses and comply with OLCC regulations.
- H. The operator of the home occupation shall be a resident of the property on which the home occupation is located.
- I. The home occupation shall have no more than five full-time or part-time employees on the site.
- J. During the months of November through March, no event shall take place outside the hours of 9:00 a.m. to 10:00 p.m. During the months of April through October, no event shall take place outside the hours of 8:00 a.m. to 10:00 p.m. These time restrictions do not apply to persons involved in the set-up or clean-up of the facilities.
- K. During the months of November through March, no more than five events shall be allowed per week. During the months of April through October, no more than seven events shall be allowed per week. No more than a total of 44 events shall be allowed per year.
- L. A maximum of two events shall be allowed per day, and no more than one event shall occur at any one time.
- M. Events shall be restricted to following times:
1. Mid-Week Days – Events with more than 120 attendees shall not end prior to 6:00 PM.
 2. Fridays - Events with more than 105 attendees shall not end prior to 6:00 PM.
 3. Saturdays – Events with more than 180 attendees shall not end prior to 5:00 PM.
 4. Sundays – No restrictions on event sizes or times.
- N. Tents as allowed per 806.02(D). In case of Exclusive Farm Use zone property such at the subject – temporary tents may be allowed though **the events shall be operated substantially in the operator’s dwelling or other buildings normally associated with uses permitted in the EFU Zone.**
- O. The maximum number of guests for any single event shall not exceed 200 except for Sundays when the number of guests for any single event shall not exceed 300.
- P. Noise shall be regulated as follows:

1. From 7:00 a.m. until 10:00 p.m. on Friday and Saturday and until 9:00 p.m. on all other days of the week, the average peak sound pressure level of the noise shall not exceed the greater of 60 dB(A) or the ambient noise level when measured off the subject property. During all other hours, the average peak sound pressure level of the noise shall not exceed the greater of 50 dB(A) or the ambient noise level when measured off the subject property.
 - i. Noise generated by vehicles entering or exiting the subject property, but not by idling vehicles, shall be exempt from Subsection 806.03(N)(1).
 - ii. Subsection 806.03(N)(1) shall not apply to noise detectable on public rights-of-way and railroad rights-of-way.
 2. The applicant or his designee shall monitor noise at all events.
- R. Restroom facilities shall be regulated as follows:
1. Portable restroom facilities shall include hand-sanitizing or hand-washing facilities.
 2. Portable restroom facilities shall be subject to the standards of the service provider and the County Septic & Onsite Wastewater System Programs.
 3. Portable restroom facilities shall be screened from adjacent properties and rights-of-way by sight-obscuring fences or plantings (existing can satisfy) and shall be located a minimum of 50 feet from all lot lines.
 4. Permanent restrooms may be located inside the upper and/or lower barn, subject to required county permits.
- S. Events shall be operated substantially in the operator's dwelling or other buildings associated with uses permitted in the applicable zoning district.

III. Building Code Division Conditions: Richard Carlson, (503) 742-4769,
richardcar@co.clackamas.or.us

- A. All construction activities, and all changes of use (occupancy type), shall comply with applicable Oregon Specialty Codes and local ordinances. All such codes and ordinances apply to all such activities, even when permits and inspections are not required.
- B. Compliance with the following conditions is required prior to the commencement of any new use or occupancy:
 1. All necessary development permits (septic, building, electrical, grading, driveways, etc.) for the property, facility, and associated buildings shall be obtained.

2. The plans must meet the minimum structural integrity and life safety requirements of the applicable Oregon Specialty Codes.
3. Any additional information required by the Building Codes Division, such as engineering, details, and specifications, must be provided to the Plans Examiner reviewing the project.
4. All necessary permits and approved plans must be issued and maintained onsite as required.
5. All required inspections, corrections, and final approval must be obtained.

IV. Engineering Division Conditions: Ken Kent, (503) 742-4673,
kenken@clackamas.or.us

- A. **Prior to site improvements:** a Development Permit is required from the Engineering Department for review and approval of frontage improvements, erosion control Best Management Practices implemented, sight distances and the driveway improvements. The permit shall be obtained prior to commencement of site work and Certificate of Occupancy. To obtain the permit, the applicant shall submit construction plans prepared and stamped by an Engineer registered in the State of Oregon, or plans acceptable to the Engineering Division, provide a performance guarantee equal to 125% of the estimated cost of the construction and pay a plan review and inspection fee. The fee will be calculated as a percentage of the construction costs if it exceeds the minimum permit fee. The minimum fee and the percentage will be determined by the current fee structure at the time of the Development Permit Application.
- B. All frontage improvements in, or adjacent to Clackamas County right-of-way, or on site, shall be in compliance with *Clackamas County Roadway Standards*.
- C. The applicant shall obtain a Development Permit from Clackamas County Department of Transportation and Development prior to the initiation of any construction activities associated with the project.
- D. The westerly driveway serving the upper barn shall be constructed with a 20-foot wide, paved approach on to S Mueller Road, per Standard Drawing D500.
- E. Minimum intersection sight distance of 405 feet shall be provided to the east and west at the proposed driveways serving the event site. The easterly driveway serving as the main entrance shall be widened to the west as necessary to provide the standard radius wing and minimum sight distance. Intersection sight distance can be measured 14.5 feet back from the edge of pavement at a height of 3.5 feet to an object height of 3.5 feet in the center of the oncoming travel lane.

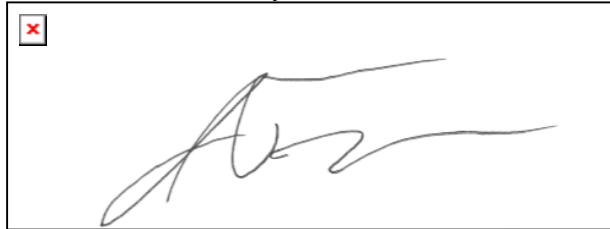
- F. The applicant shall provide adequate on site circulation for the parking and maneuvering of all vehicles anticipated to use site, as follows:
1. Parking spaces shall meet minimum ZDO section 1015 requirements.
 2. All roads used to access the event facility site shall be surfaced with screened gravel or better and no less than 20 feet in width.
 3. Roads and parking areas shall be constructed per Standard Drawing R100.
 4. Parking spaces shall be adequately delineated. For paved surfaces, parking spaces shall be striped. For a gravel surface, tire stops or a similar physical feature shall be provided to delineate each gravel parking space.
 5. The applicant shall provide a dimensioned site plan indicating each parking space and drive aisles. Gravel parking spaces shall be provided for smaller events and for use during inclement weather. The remainder of the parking may be on a grass field and shall include temporary delineation of drive aisles and parking spaces during events.
 6. Handicapped (ADA) parking spaces and adjacent accessible areas shall be paved with asphalt concrete or an equivalent approved by Clackamas County Engineering staff, as required by the Building Department.
 7. Drainage facilities shall be designed and constructed in conformance with *Clackamas County Roadway Standards* Chapter 4, providing water quality treatment and conveyance to a suitable outfall.
- G. Prior to the issuance of a building permit and/or site development, the applicant shall submit to Clackamas County Engineering Office:
1. Written approval from the Clackamas Fire District #1 for the planned access, circulation, fire lanes and water source supply. The approval shall be in the form of site and utility plans stamped and signed by the Fire Marshal.
 2. Written approval from the Clackamas County Engineering for surface water management facilities and erosion control measures.
 3. A set of street and site improvement construction plans, in conformance with *Clackamas County Roadway Standards* Section 140, to Clackamas County's Engineering Office and obtain written approval, in the form of a Development Permit.
 - a. The permit will be for driveway, drainage, parking and maneuvering areas, and other site improvements.

- b. The minimum fee deposit is required upon submission of plans for the Development Permit. The fee will be calculated based on 8.83% of the public improvements and 5% of the onsite transportation improvements, according to the current fee schedule.
- c. The applicant shall have an Engineer, registered in the state of Oregon, design and stamp construction plans for all required improvements, or provide alternative plans acceptable to the Engineering Division.

V. Septic & Onsite Wastewater Systems Programs Conditions: Aaron Dennis, (503) 742-4614, adennis@clackamas.us

- 1. Applicants will need Authorization Notice to change the use of restroom facilities on site to events/weddings.

DATED this 25th day of October 2021.



Joe Turner, Esq., AICP
Clackamas County Land Use Hearings Officer

APPEAL RIGHTS

ZDO 1307.10(F) provides that, with the exception of an application for an Interpretation, the Land Use Hearings Officer's decision constitutes the County's final decision for purposes of any appeal to the Land Use Board of Appeals (LUBA). State law and associated administrative rules promulgated by LUBA prescribe the period within which any appeal must be filed and the manner in which such an appeal must be commenced. Presently, ORS 197.830(9) requires that any appeal to LUBA "shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final." This decision will be "final" for purposes of a LUBA appeal as of the date of mailing (which date appears on the last page herein).