

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

Regarding an Application for a Conditional Use	)	<b>Case File No.</b>
Permit to Host Events on Exclusive Farm Use	)	<b>Z0540-19-C</b>
Land.	)	<b>(Herkamp Barns)</b>

**A. SUMMARY**

1. The applicant and owner is Mark Herkamp.
2. The subject property is located at 14275 South Mueller Road, Oregon City, OR 97045. The legal description is T3S, R2E, Section 28, Tax Lots 600 and 690, W.M. The subject property is approximately 12.5 acres and is zoned EFU – Exclusive Farm Use.
4. On February 20, 2020, the Hearings Officer conducted a public hearing to receive testimony and evidence about the application. At the close of the public hearing, the record was left open two weeks for the submission of new evidence, testimony, and argument; one additional week for responses to the new evidence, testimony, and argument; and one additional week for the applicant’s final legal argument. In order to give the Oregon Department of Transportation enough time to respond to new evidence, the second open record period was extended until March 26, 2020. The date for the applicant’s final legal argument was extended until April 2, 2020.

**B. HEARING AND RECORD HIGHLIGHTS**

1. The Hearings Officer received testimony at the public hearing about this application on February 20, 2020. All exhibits and records of testimony are filed with the Planning Division, 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 Hearings Officer stated that the only relevant criteria were those identified in the staff report, that participants should direct their comments to those criteria, and failure to raise all arguments may result in waiver of arguments at subsequent appeal forums.

2. At the hearing, county planner Clay Glasgow discussed the staff report.
3. Mark Herkamp, Jessica Iselin, and Tyler Smith testified in support of the application.
4. A number of neighbors testified in opposition to the application.
5. At the conclusion of the public hearing, the Hearings Officer closed the public hearing and left the record open as discussed earlier.

### **C. FACTS**

The subject property is an approximately 12.5-acre parcel zoned EFU. The property is located at 14275 South Mueller Road, Oregon City, OR 97045. The subject property is located along South Mueller Road (Mueller Road) west of Highway 213, south of Oregon City. Mueller Road is an approximately one-mile dead end road. The property is in an area of EFU-zoned properties with predominantly agricultural uses and scattered rural homesites. The property is rectangular shaped with a creek and large pond on the northern portion. There is an existing residence close to Highway 213. There are two existing barns, an upper barn in the southwest corner and a lower barn in the northeast corner, which are proposed to hold events. The number of events and guests has changed during the process of the application, but the applicant now proposes no more than 44 events per year with varying numbers of guests allowed depending on the day of the event.

### **D. DISCUSSION**

The staff report explains that all of the applicable approval criteria are satisfied or can be satisfied with more information and possible conditions of approval. The majority of the findings in the staff report are not challenged. It would be a waste of the County's money and resources to review and repeat all of the unchallenged findings in the staff report. I have reviewed the unchallenged findings in the staff report, and I agree with those findings. Therefore, I adopt and incorporate the findings in the staff report in this decision, except as addressed further.

#### **1. Conditional Use Approval Criteria**

Clackamas Zoning and Development Ordinance (ZDO) 1203.03 provides the approval criteria for conditional uses. ZDO 1203.03(A) requires that, "[t]he use is listed as a conditional use in the zoning district in which the subject property is located." 1000 Friends of Oregon (1000 Friends) appear to argue that the proposed use cannot be approved

in an EFU zone. 1000 Friends' unfocused arguments make addressing the issues difficult, but I understand 1000 Friends to argue that the proposed use does not meet the requirements for home occupations.<sup>1</sup> Those arguments are addressed under the home occupation to host events standards of ZDO 806. Table 401-1 lists the potential allowed uses in County EFU zones. Table 401-1 specifically lists "Home occupation to host events, subject to Section 806" as a conditional use. While 1000 Friends argue that the proposed use does not satisfy the requirements for a home occupation to host events, that use is nonetheless listed as a conditional use in the EFU zone. Therefore, the proposed use is listed as a conditional use in the EFU zone.

ZDO 1203.03(A) is satisfied.

ZDO 1203.03(B) requires that the "characteristics of the subject property are suitable for the proposed use considering size, shape, location, topography, existence of improvements, and natural features." Opponents allege that the property is not suitable for the proposed use. Opponents' arguments are difficult to follow. Most of the arguments are more properly raised under other approval criteria, such as impacts from traffic, noise, pollution, etc. To the extent that opponents' arguments are directed towards ZDO 1203.03(B), I agree with the staff report that there is nothing about the characteristics of the subject property that would make the property unsuitable for the proposed use.

ZDO 1203.03(B) is satisfied.

ZDO 1203.03(C) requires that "the proposed use comply with Subsection 1007.07, and safety of the transportation system is adequate to serve the proposed use." Generally, ZDO 1007.07(B) provides that development "shall be granted only if capacity of transportation facilities is adequate or will be made adequate in a timely manner." Certain developments, such as the proposed use however, are exempt from the facilities concurrency requirement. ZDO 1007.07(B)(5) exempts: "[h]ome occupations to host events, which are approved pursuant to Section 806[.]" Therefore, the applicant need not demonstrate compliance with concurrency requirements.

Under ZDO 1203.03(C), the application must also demonstrate that "the safety of the transportation system is adequate to serve the proposed use." The applicant originally

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<sup>1</sup> It would have been helpful if 1000 Friends had actually cited any of the ZDO provisions regarding home occupations rather than vague citations to state statutes and administrative rules.

proposed a range of events of between “1-3 events per week during summer with other times of year possibly once or twice per month” and up to 300 guests per event. As discussed earlier, Mueller Road is a dead end road with its only access from Highway 213. Opponents argue that Highway 213 is a busy highway and it is already difficult, and often delayed, to turn onto Highway 213 from Mueller Road. According to opponents, the proposed additional traffic would make the Highway 213 and Mueller Road intersection unsafe.

Although the County Department of Transportation and Development (DTD) originally recommended approval of the application, after receiving notification from the Oregon Department of Transportation (ODOT) that there could be problems with the Highway 213 and Mueller Road intersection, DTD recommended waiting to hear from ODOT on the issue of safety. The applicant agreed to conduct a traffic impact analysis (TIA), and the record was specifically left open to allow for a TIA to be prepared by the applicant and reviewed by ODOT. The applicant’s traffic engineer prepared the TIA and submitted it to ODOT. ODOT responded that it would approve the proposed development with two conditions of approval – that the applicant submit a traffic control plan (TCP) and widen Highway 213 to include a left turn lane onto Mueller Road. The construction of a left turn lane onto Mueller Road would be prohibitively expensive, so the applicant’s traffic engineer worked with ODOT to find an acceptable alternative. The applicant’s traffic engineer worked with ODOT and determined that the following conditions of approval would keep traffic and safety levels acceptable at the Mueller Road and Highway 213 intersection if guests were limited to 200 people per event:

- 1) Mid-Week Days – Events with more than 120 attendees should not end prior to 6:00 PM.
- 2) Fridays - Events with more than 105 attendees should not end prior to 6:00 PM.
- 3) Saturdays – Events with more than 180 attendees should not end prior to 5:00 PM.
- 4) Sundays – No restrictions on event sizes or times.<sup>2</sup>

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<sup>2</sup> Although the applicant specifically states that the proposed conditions restrict the number of guests to 200 Monday through Saturday, up to 300 would be permissible on Sundays.

With these restrictions on the number of event guests and times, the applicant argues that with the additional conditions of approval to coordinate TCP with ODOT that ZDO 1203.03(C) would be satisfied. The applicant's position is a bit confusing as the applicant's traffic engineer argued that in addition to the proposed TCP condition of approval that the conditions of approval could also contain requirements for future road widening for a left turn lane if ODOT decided road widening was required. In the applicant's final legal argument, the applicant's attorney would prefer not to have the TCP conditions of approval but agrees to it. The applicant's attorney, however, argues that any road widening requirements would be an unconstitutional taking. Thus, it is not entirely clear what the applicant is actually proposing.

I agree with ODOT and the applicant's traffic engineer that in order to ensure that the safety of the transportation system is adequate to serve the proposed use that the number of guests must be limited to 200 or less Monday through Saturday (and 300 on Sunday).<sup>3</sup> I also agree with the time restrictions quoted earlier. As to the potential condition of approval regarding road widening, I do not think requiring a left turn road to accommodate the impacts of the original proposal would be a taking as there would be an essential nexus between the left turn lane and the safety problems generated by the proposal – and the solution to the problem would be roughly proportional to the impact causing the problem as the left turn lane would only be to solve the problem of the impacts from the proposal rather than an excuse to solve other problems as well. Because the cost of adding a left turn lane is prohibitively expensive, it makes more sense to find a different way to condition approval.<sup>4</sup> With the proposed restrictions on number of guests and event times along with conditions of approval requiring TCP coordinated with ODOT, I agree that the safety of the transportation system would be adequate for the proposed use. Therefore, in addition to the restrictions quoted earlier, the following conditions of approval are added:

- 1) The applicant shall submit a traffic control plan (TCP) to manage and mitigate impacts to OR 213 during events. The TCP shall be implemented during each scheduled event. The TCP shall be reviewed and approved by ODOT. A Permit

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<sup>3</sup> 300 guests is the maximum allowed under ZDO 806.02(H).

<sup>4</sup> Just because an exaction is expensive does not mean it is not roughly proportional.

from ODOT District 2B will be required for implementation. The analysis must be conducted by a Professional Engineer registered in the State of Oregon.

- 2) The applicant shall provide annual reports to ODOT for review to evaluate traffic performance and safety which may be used to modify TCP requirements.<sup>5</sup>

While these are somewhat complicated conditions of approval, I think it is feasible for the applicant to comply with them. With the described conditions of approval, ZDO 1203.03(C) is satisfied.

ZDO 1203.03(D) requires that ““proposed use will not alter the character of the surrounding area in a manner that substantially limits, impairs, or precludes the use of surrounding properties for the primary uses allowed in the zoning district(s) in which surrounding properties are located.”

There are a number of steps in the analysis under ZDO 1203.03(D). The first step is to determine what the “character of the surrounding area” is. Although all of the involved parties are near Highway 213, the character of the surrounding area is small to medium scale farm use with scattered residential homesites.

The next step involves determining what primary uses of the surrounding properties may be affected. As the surrounding properties are zoned EFU, the primary uses on the surrounding properties are farm and forest (in this case farm) uses. Although residential use is not a primary use in the EFU zone and would not generally be a consideration under ZDO 1203.03(D), under ZDO 806.02(E) effects on residential use must be considered in EFU zones when the proposed conditional use is a home occupation to host events. Thus, the pertinent uses to consider are impacts to farm use and residential use.

The remaining question is whether the proposed use would alter the character of the farm use area in a way that would substantially limit, impair, or preclude residential uses on surrounding RRFF-5 properties. In *York v. Clackamas County*, \_\_\_ Or LUBA \_\_\_,

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<sup>5</sup> The proposed conditions of approval in the applicant’s traffic engineer’s letter also included provisions stating that ODOT could require the addition of a left turn lane in the future. While I do not think that imposing a condition of approval requiring the left turn lane would be a taking right now if necessary to meet the requirements of ZDO 1203.03(C), I am not sure that allowing ODOT to impose such an exaction in the future would not be a taking. For instance, if the applicant is adequately satisfying traffic and safety requirements for years and then baseline traffic on Highway 213 increases, I am not sure it should be the applicant’s responsibility to remedy that problem merely to continue hosting the same level and type of events. Therefore, I will not impose a condition requiring future road widening for a left turn lane.

LUBA No. 2018-145, April 10, 2019 (*York*), the Land Use Board of Appeals (LUBA) explained that I must determine whether the proposed use would alter the character of the area in manner that substantially impairs or substantially limits the uses at issue.<sup>6</sup> Opponents raise three impacts they believe would substantially impact or impair their farm and/or residential uses: noise, impacts on farm use, and traffic.

Opponents argue that even with the landscaping buffering and restricting music to the barns that noise from the proposed events would ruin their peaceful enjoyment of residential enjoyment. ZDO 806.02(J) provides:

“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, when measured off the subject property, of noise created by the home occupation shall not exceed the greater of 60 dB(A) or the ambient noise level. During all other hours, the average peak sound pressure level, when measured off the subject property, of noise created by the home occupation shall not exceed the greater of 50 dB(A) or the ambient noise level.

“a. Noise generated by vehicles entering or exiting the subject property, but not by idling vehicles, shall be exempt from Subsection 806.02(J)(1).

“b. Subsection 806.02(J)(1) shall not apply to noise detectable on public rights-of-way and railroad rights-of-way.”

While I can certainly understand opponents’ concerns about noise, the applicant conducted a noise test that demonstrates that noise from the proposed events can meet the requirements of ZDO 806.02(J). The applicant is a Gladstone police officer who is trained in applying noise ordinances and operating a noise meter, so he would be more able than the average home occupation to host events operator to adhere to the noise requirements. The applicant has offered to personally monitor noise levels at all events. As long as the applicant complies with the noise requirements of ZDO 806.02(J), I do not see that the proposed use would substantially impair or substantially limit farm or residential uses on surrounding lands. Especially with the condition of approval that the applicant (or

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<sup>6</sup> LUBA agreed with my conclusion that the “substantially preclude” prong was unnecessary to reach as it set an even higher bar than the “substantially impair” and “substantially limit” prongs.

employee) monitor all events, it is more than feasible that the applicant can satisfy the noise requirements of ZDO 806.02(J).

Opponents argue that the proposed use would substantially impair or substantially limit farm uses on surrounding lands because there would be conflicts between the proposed events and farm uses. According to opponents, certain farm activities such as using power equipment and spraying would interfere with the events and the surrounding owners would be forced to modify their activities. While there might be conflicts between the proposed events and existing farm activities, the surrounding owners would be under no obligation to modify their activities on behalf of the applicant. As the staff report explains:

“Prior to operating the home occupation, the applicant shall record a written irrevocable statement in the deed records of the County binding upon the landowner, and the landowner's successors in interest, acknowledging the right of adjacent and nearby farm and forest operators to employ accepted farm and forest management practices and prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming or forest practices for which no action or claim is allowed under Oregon Revised Statutes (ORS) 30.936 or 30.937. Impacts from farming and forest practices may include, but are not limited to: noise, dust, spray, smoke, vibrations, and visual impacts.”  
Staff Report 27.

With the condition of approval, I do not see that there would be any impact on surrounding owners' ability to continue existing farm practices. Any conflicts would be the applicant's responsibility for conducting a home occupation to host events in an EFU zone.

Opponents argue that traffic from the proposed events would substantially impair and substantially limit both farm uses and residential uses. Initially, opponents argue that the increased traffic from the proposed events would interfere with farm vehicle traffic. I do not see that the traffic from proposed events would substantially impair or limit farm vehicle traffic on Highway 213. Highway 213 is already a very busy road. The additional traffic that would be generated by the proposed events would only be a small and limited duration amount of the traffic on Highway 213. I think the impact on the use of farm vehicles on Highway 213 would be negligible at the most. Opponents also argue that traffic from the proposed events would impact farm vehicle use of Mueller Road. While unlike the impact on Highway 213 the impact on farm vehicle traffic on Mueller Road would be

noticeable when events would have guests arriving or departing at the same time, those times would be few and far between. The applicant proposes to limit the number of events to a maximum of 44 per year. Even if all of those 44 events took place when farm vehicles were using Mueller Road (which would almost certainly not be the case) and had large numbers of guests arriving or leaving at the same time, that would only result in a minor aggravation of increased traffic for a short period of time less than once per week. Thus, even under a worst case scenario, farm vehicles (which do not generally travel particularly quickly to begin with) would experience a minor delay less than once per week on average. I do not see that this rises to the level of substantially impairing or limiting farm uses.

Opponents also argue that the increased traffic on Mueller Road from the proposed events would substantially impair or limit residential uses because residents would be stuck in traffic. As discussed earlier, with the proposed conditions of approval, I do not see that there would be any safety concerns regarding the intersection of Mueller Road and Highway 213. As discussed regarding the impact on farm vehicles, while there would be a small impact on traffic on Mueller Road during some events, again I do not see that minor delays even at most of less than once per week rise to the level of substantially impairing or limiting residential use.

ZDO 1203.03(D) is satisfied.

ZDO 1203.03(E) requires that the “proposed use is consistent with the applicable goals and policies of the Comprehensive Plan.” In *York*, LUBA explained that this standard requires a hearings officer to:

“(1) consider all applicable goals and policies, (2) as necessary balance or weigh any conflicting or competing policy directives, and (3) reach an ultimate conclusion regarding whether or not the proposed use, given its relative characteristics and circumstances is consistent with the greater weight of the applicable comprehensive plan goals and policies.” Slip Op 23-24.

1000 Friends argue that the proposed use is not consistent with Chapter Four – Land Use Agriculture – Agriculture Policy 4.00.3 that “land uses that conflict with agricultural uses shall not be allowed” and Agricultural Policy 4.00.5 that “roads shall be developed in a manner and to a level compatible with maintaining Agricultural areas.”. Those policies are vague and aspirational. While Policy 4.00.3 perhaps tends to weigh against the

proposed use, it would also weigh against almost any non-agricultural use of EFU property which the ZDO clearly allows under certain circumstances. Policy 4.00.5 pertains to developing roads to levels for agricultural use. The proposed use envisions very little change to the existing roadways. Highway 213 is already a very improved roadway, and most of the opponents' arguments regarding Mueller Road are that it is not improved enough – not that they are afraid it will become too improved and increase urban use as 1000 Friends argue. I do not see that the proposed use is inconsistent with Policy 4.00.5. The applicant and the staff report provide many comprehensive plan policies and goals that the proposed use complies with, which 1000 Friends do not challenge. Even if the goals and policies cited by 1000 Friends weigh against the proposed use, they are easily outweighed by the goals and policies cited by the applicant and the staff report. Given the relative characteristics and circumstances of the proposed use, it is consistent with the greater weight of the applicable comprehensive plan goals and policies.

ZDO 1203.03(E) is satisfied.

ZDO 1203.03(F) requires that the “proposed use complies with any applicable requirements of the zoning district and overlay zoning district(s) in which the subject property is located, Section 800, and Section 1000.” Although the arguments are difficult to follow, opponents appear to argue that there could be problems with pollution entering the pond or stream on the property. The staff report thoroughly explains how all of the applicable requirements are satisfied. I agree with the staff report.

ZDO 1203.03(F) is satisfied.

All of the conditional use approval criteria of ZDO 1203.03 are satisfied.

## **2. Home Occupation to Host Events Approval Criteria**

ZDO 806.02 provides the standards for home occupations to host events. 1000 Friends do not cite any of the provisions of ZDO 806.02, which are the applicable provisions. Instead, 1000 Friends' make numerous arguments involving state statutes, without any explanation of how or if they apply to the proposed use.<sup>7</sup> I will do my best to address 1000 Friends' arguments.

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<sup>7</sup> I realize 1000 Friends likely has limited resources and must address zoning and development codes from around the state, so I can understand why they would prefer to use boilerplate language addressing state statutes. Such a broad brush approach, however, makes it difficult to follow many of their arguments. Some arguments are easy enough to apply to the ZDO, but other arguments do not appear to be applicable and

1000 Friends argue that the proposed use would have more than five employees.<sup>8</sup> ZDO 806.02(B) provides that the “home occupation shall have no more than five employees.” According to 1000 Friends, the applicant cannot conduct the proposed events without more than five employees. The applicant acknowledges that it understands the prohibition on more than five employees at one time and explains how it can meet the requirement. In any event, the proposed conditions of approval require the applicant to comply with the five employee requirement, and based on the applicant’s representations it is feasible that can be accomplished.

ZDO 806.02(B) is satisfied.

1000 Friends argues that the use of the two existing barns is impermissible.<sup>9</sup> ZDO 806.02(C) provides that in EFU zones:

“\* \* \* the home occupation shall be operated substantially in the operator’s dwelling or other buildings normally associated with uses permitted in the [EFU] zoning district.”

The proposal involves using two existing barns and building a small new building for restrooms. According to 1000 Friends the two exiting barns would somehow no longer be barns if they were used to host events but rather would be transformed into dancing halls or event centers. Barns are undoubtedly “buildings normally associated with uses permitted in the [EFU] zoning district.” Just because the barns may be used for hosting events does not mean they would not still be barns. While the applicant proposes to improve the barns by adding a hard floors (rather than dirt) and sound/water proofing that would hardly change their identification as barns. 1000 Friends’ argument is without merit.

I tend to agree with the applicant that the proposed restrooms are “uses and structures customarily accessory and incidental to a dwelling” so they would be “other buildings which are normally associated with uses permitted” in the EFU zone. Even if they are not, however, ZDO 806.02(C) only requires that the home occupation be *substantially* operated in the dwelling or other buildings associated with uses permitted in

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furthermore appear to be clearly erroneous.

<sup>8</sup> 1000 Friends cite ORS 215.448(1)(b), which provides a home occupation “shall employ on the site no more than five full-time or part-time persons[.]”

<sup>9</sup> 1000 Friends cite ORS 215.448(1)(c)(B), which provides that the home occupation “shall be operated substantially” in the dwelling or “[o]ther buildings normally associated with uses permitted in the zone in which the property is located[.]”

the underlying zone. The proposed use would be more than substantially operated in the two existing barns – not the proposed restroom. While the restrooms would undoubtedly be used, they would be an incidental part of the proposed home occupation.

ZDO 806.02(C) is satisfied.<sup>10</sup>

Opponents do not allege any other failures to comply with ZDO 806.02.<sup>11</sup>

### **3. Statutory Arguments**

1000 Friends make various arguments based on state statutory provisions without any explanation as to how or why they are applicable to the application. I will do my best to address those arguments.

1000 Friends argue that the proposed use is an impermissible “commercial use” in an EFU zone. 1000 Friends’ argument is very difficult to follow. While 1000 Friends is correct that ORS 215.283 generally restricts uses in EFU zones to farm and forest uses, there are certainly a number of exceptions. One of those exceptions is home occupations, which are specifically discussed in ORS 215.448 – which 1000 Friends cites repeatedly. ZDO 806.02 clearly allows for home occupations to host events on EFU land. Whether or not there is a “commercial” aspect to such uses is irrelevant. They are allowed uses. 1000 Friends’ argument is without merit.

1000 Friends argue that the applicant “has not established that his business serves as his occupation” or that he would “operate” the business. This argument is also very difficult to follow. 1000 Friends cite ORS 215.448(1)(a), but that statute merely provides that the home occupation “shall be operated by a resident or employee of a resident of the property on which the business is located.” ZDO 806.02(A) provides that the “operator shall reside full-time in a lawfully established dwelling unit on the tract on which the home occupation is located.” There is no dispute that the applicant lives full time in the dwelling on the property. ZDO 806.01(C) defines “Operator” as:

“The person who conducts the home occupation, has majority ownership interest in the home occupation, and is responsible for strategic decisions

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<sup>10</sup> 1000 Friends also argue that the proposed parking lot would not be located in the dwelling or in buildings normally associated with EFU uses. This argument is without merit.

<sup>11</sup> As discussed earlier, opponents raise objections based on potential noise from the proposed use. As discussed earlier, with conditions of approval the applicant can comply with the noise requirements of ZDO 806.02(J).

and day-to-day operations of the home occupation.”

1000 Friends neither acknowledge nor address the ZDO, and I fail to see how it is even remotely possible that the applicant would not be the person who has a majority interest in the home occupation and would be responsible for strategic decisions and day to day operations. The mere fact that the applicant would make the space available for others to rent would hardly change this fact – despite 1000 Friends’ protestations to the contrary. 1000 Friends’ argument is without merit.

1000 Friends argue that the proposed use violates OAR 660-033-0130(2)(a), which provides:

“No enclosed structure with a design capacity greater than 100 people, or group of structures with a total design capacity of greater than 100 people, shall be approved in connection with the use within three miles of an urban growth boundary, unless an exception is approved pursuant to ORS 197.732 and OAR chapter 660, division 4, \* \* \*.”

According to 1000 Friends, because the proposed building has a capacity of more than 100 people and it is within three miles of the UGB, it cannot be approved. 1000 Friends misread the rule. OAR 660-033-0130(2) only applies when the table from OAR 660-033-0120 triggers the application of the rule. Under the OAR 660-033-0120 table, OAR 660-033-0130(2) obviously does not apply to a home occupation to host events.<sup>12</sup> 1000 Friends’ argument is without merit.<sup>13</sup>

1000 Friends argue that the proposed use would violate Goal 3 (Agricultural Lands). Again, 1000 Friends’ argument is difficult to follow. Initially, I do not see how the proposed use would violate Goal 3. The proposed use is a use that is specifically allowed under the EFU statutes. More importantly, 1000 Friends do not even attempt to explain – and I do not see – that the Goals have any applicability to the current application. There is

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<sup>12</sup> OAR 660-033-0130(2) generally is applied to parks, quasi-public, and public uses such as parks, churches, community centers, and golf courses.

<sup>13</sup> 1000 Friends made this exact argument in a recent case – Festive Hill Winery, Z0378-19-C, December 12, 2019. In that I case I explained that the cited provision did not apply to home occupations to host events because the table under OAR 660-033-0120 did not require such uses to comply with OAR 660-033-0130(2). 1000 Friends inexplicably neither acknowledge the earlier decision nor attempt to explain why it was wrongly decided. Perhaps I missed something in Festive Hill Winery, but to repeat the same argument without any explanation is curious at best.

nothing in the ZDO – or the ORSs for that matter – that remotely implicate the goals as applicable approval criteria. 1000 Friends’ argument is without merit.

1000 Friends argues that the proposed use does not comply with ORS 215.296(1), which provides:

“A use allowed under ORS 215.213 (2) or (11) or 215.283 (2) or (4) may be approved only where the local governing body or its designee finds that the use will not:

- “(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or
- “(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.”

Although ORS 215.296(1) is not listed in the ZDO as an applicable approval criterion, it is incorporated into to ZDO 401.05(A)(1) which is an approval criterion. While the staff report does not address ZDO 401.05(A)(1), the applicant provided a 20-page farm impacts test that exhaustively explains why the proposed use would not force a significant change in or increase the cost of farm practices on surrounding lands. Opponents do not acknowledge, let alone challenge, the applicant’s farm impacts test. Opponents’ arguments are based on the allegations that traffic will make it more difficult for farm vehicles to use the roads and that conflicts between farm activities such as spraying and noise will conflict with the proposed event hosting.

As discussed earlier, the applicant has agreed to reduce the amount of guests to comply with traffic and safety requirements. Initially, I do not see that any farm vehicle use of Highway 213 would be impacted by the proposed use. Highway 213 is a very busy highway with lots of existing traffic. Any farm vehicle use of Highway 213 already has to deal with significant amounts of traffic. Any traffic added to Highway 213 would have a negligible if any effect of farm vehicle use of Highway 213. While increased traffic from events might have some impact on Mueller Road, the maximum number of events would be capped at 44. Some of those events would be during the winter when farm activities are minimal. Even if there were some overlap between farm vehicle traffic and event traffic it would be for a very short period time on a small number of days. I do not see that this rises

to the level of forcing a significant change in or a significant increase in cost to farm practices on surrounding lands.

While opponents do raise the issue of conflicts between farm activities and event activities, they focus on farm activities having to be curtailed to accommodate the proposed use. As discussed earlier, the staff report explains that the applicant is required to record a deed acknowledging the right of adjacent and nearby farm and forest operators to employ accepted farm and forest management practices. Opponents would be under no obligation to adjust their farm practices to accommodate the proposed use. I do not see that the alleged potential conflicts between farm activities and proposed events would force a significant change in or increase the cost of farm practices on surrounding lands. The applicant's farm impacts test is much more persuasive than the speculative allegations raised by opponents.

ZDO 401.05(A)(1) is satisfied.

1000 Friends argues that the application does not satisfy ORS 215.448(1)(d), which provides that the home occupation "shall not unreasonably interfere with other uses permitted in the zone in which the property is located." ZDO 401.05(D)(1) provides:

"The home occupation shall not unreasonably interfere with other uses permitted in the EFU zoning district and shall not be used as justification for a zone change."<sup>14</sup>

The staff report does not address ZDO 401.05(D)(1), however, ZDO 1203.03(D) requires the applicant to demonstrate that the "proposed use will not alter the character of the surrounding area in a manner that substantially limits, impairs, or precludes the use of surrounding properties for the primary uses allowed in the zoning district(s) in which surrounding properties are located." As discussed earlier, the applicant has demonstrated that ZDO 1203.03(D) is satisfied. I think 1203.03(D) is a stricter requirement than ZDO 401.05(D)(1).<sup>15</sup> In other words, if ZDO 1203.03(D) is satisfied than ZDO 401.05(D)(1) is satisfied. Even if ZDO 401.05(D)(1) is not subsumed under ZDO 1203.03(D), ZDO 401.05(D)(1) is satisfied for the same reasons as discussed under ZDO 1203.03(D).

All of the approval criteria are satisfied.

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<sup>14</sup> ZDO 401.05(D)(1) codifies ORS 215.448(1)(d) and 215.448(4).

<sup>15</sup> ZDO 806.02(E) requires that impacts on dwellings also be considered in EFU zones even though those dwellings are not primary uses in the EFU zone. Therefore, the analysis under ZDO 1203.03(D) had to consider all of the opponents' alleged adverse impacts.

## **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** application Z0540-19-C with the following conditions of approval.

## **F. CONDITIONS OF APPROVAL**

### **I. General Conditions:**

- 1) Approval of this land use permit is based on the submitted written narrative and plan(s) dated 12/12/19. Following submission of additional requested information, the application was deemed complete on 1/02/20. 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.
- 2) 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](mailto:wendicor@co.clackamas.or.us)
- 3) **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](mailto: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.
- 4) 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:

- a) A building permit for a new primary structure that was part of the conditional use approval; or
  - b) A permit issued by the County Engineering Division for parking lot or road improvements required by the conditional use approval.
- 5) 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.
- 6) 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](mailto:clayg@clackamas.co)

- 1) Development of the subject property is subject to the provisions of ZDO Sec.1203 and those other relevant codes and ordinances adopted by the Board of County Commissioners pursuant to subsec. 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.
- 2) 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 right-of-ways. If additional lighting will be installed, the applicant will submit an outdoor lighting system design plan prior to installation of the outdoor lighting system for review and approval by Planning and Zoning Division.
- 3) 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 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.
- 4) Use of on-site sewage disposal facilities, if proposed, shall be subject to approval by Septic & Onsite Wastewater System Programs.

- 5) **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](http://www.co.clackamas.or.us) under “Garbage & Recycling.”
- 6) **Prior to use:** The applicant shall obtain any necessary County Health Department Licenses and comply with County Health Department regulations.
- 7) **Prior to use:** The applicant shall obtain any applicable OLCC Licenses and comply with OLCC regulations.
- 8) The operator of the home occupation shall be a resident of the property on which the home occupation is located.
- 11) The home occupation shall have no more than five full-time or part-time employees on the site.
- 12) 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.
- 14) 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.
- 15) A maximum of two events shall be allowed per day, and no more than one event shall occur at any one time.
- 16) Events shall be restricted to following times:
  - a) Mid-Week Days – Events with more than 120 attendees shall not end prior to 6:00 PM.
  - b) Fridays - Events with more than 105 attendees shall not end prior to 6:00 PM.
  - c) Saturdays – Events with more than 180 attendees shall not end prior to 5:00 PM.
  - d) Sundays – No restrictions on event sizes or times.
- 17) 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.**

18) 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.

19) Noise shall be regulated as follows:

A. 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.

B. The applicant or his designee shall monitor noise at all events.

20) Restroom facilities shall be regulated as follows:

A. Portable restroom facilities shall include hand-sanitizing or hand-washing facilities.

B. Portable restroom facilities shall be subject to the standards of the service provider and the County Septic & Onsite Wastewater System Programs.

C. 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.

21) 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](mailto:richardcar@co.clackamas.or.us)

1) 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.

- 2) Compliance with the following conditions is required prior to the commencement of any new use or occupancy:
  - a. All necessary development permits (septic, building, electrical, grading, driveways, etc.) for the property, facility, and associated buildings shall be obtained.
  - b. The plans must meet the minimum structural integrity and life safety requirements of the applicable Oregon Specialty Codes.
  - c. 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.
  - d. All necessary permits and approved plans must be issued and maintained onsite as required.
  - e. All required inspections, corrections, and final approval must be obtained.

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

1. **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.
2. All frontage improvements in, or adjacent to Clackamas County right-of-way, or on site, shall be in compliance with *Clackamas County Roadway Standards*.
3. 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.
4. 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.
5. 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.

6. The applicant shall provide adequate on site circulation for the parking and maneuvering of all vehicles anticipated to use site, as follows:
  - a. Parking spaces shall meet minimum *ZDO* section 1015 requirements.
  - b. 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.
  - c. Roads and parking areas shall be constructed per Standard Drawing R100.
  - d. 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.
  - e. 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.
  - f. 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.
  - g. 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.
7. Prior to the issuance of a building permit and/or site development, the applicant shall submit to Clackamas County Engineering Office:
  - a. 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.
  - b. Written approval from the Clackamas County Engineering for surface water management facilities and erosion control measures.
  - c. 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.

- i. The permit will be for driveway, drainage, parking and maneuvering areas, and other site improvements.
- ii. 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.
- iii. 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](mailto:adennis@clackamas.us)

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

DATED this 20<sup>th</sup> day of April, 2020.

  
Fred Wilson  
Clackamas County 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).